UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

JUN 28 2019

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

JESUS OSCAR MERAZ LEON, named as: Jesus Meraz Leon,

Petitioner-Appellant,

v.

CHARLES L. RYAN; ATTORNEY GENERAL FOR THE STATE OF ARIZONA,

Respondents-Appellees.

No. 19-15242

D.C. No. 2:17-cv-04227-DWL
District of Arizona,
Phoenix

ORDER

Before: SILVERMAN and WATFORD, Circuit Judges.

The request for a certificate of appealability (Docket Entry No. 2) is denied because appellant has not shown that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also* 28 U.S.C. § 2253(c)(2); *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012).

Any pending motions are denied as moot.

DENIED.

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District of Arizona,
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ORDER

Before: SCHROEDER and PAEZ, Circuit Judges.

Appellant's notice of appeal (Docket Entry No. 4) is construed as a motion for reconsideration and is denied. *See* 9th Cir. R. 27-10.

If appellant wishes to seek review of this court's decision, he is directed to file a petition for writ of certiorari directly with the United States Supreme Court.

No further filings will be entertained in this closed case.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Jesus Oscar Meraz Leon,

Petitioner,

v.

Charles L Ryan, et al.,

Respondents.

No. CV-17-04227-PHX-DWL

ORDER

On November 16, 2017, Petitioner filed a petition for writ of habeas corpus under 28 U.S.C. § 2254 ("the Petition"). (Doc. 1.) On August 27, 2018, Magistrate Judge Fine issued a Report and Recommendation ("R&R") concluding the Petition should be denied and dismissed with prejudice. (Doc. 19.) Afterward, Petitioner filed written objections to the R&R (Doc. 20) and Respondents filed a response (Doc. 21).

As explained below, the Court will deny Petitioner's objections.

I. Background

In 1985, following a jury trial, Petitioner was convicted of armed burglary, sexual assault, and attempted sexual assault and sentenced to life in prison. (Doc. 19 at 1-2.) He unsuccessfully appealed his conviction and sentence through the Arizona court system on grounds not relevant here. (*Id.*)

In 2000, the state of Arizona enacted a post-conviction DNA testing procedure, which is codified at A.R.S. § 13-4240(A). (Doc. 19 at 3-4.)

Four years later—in 2004—Petitioner filed a notice of post-conviction relief in

which he requested "medical testing" of DNA. (Doc. 19 at 2.) The superior court never ruled on this notice. (*Id.*) Instead of requesting a ruling or petitioning to the Arizona Court of Appeals, Petitioner continued to file additional motions for post-conviction relief. (*Id.*)

In March 2015, Petitioner filed another motion in the superior court for post-conviction DNA testing under A.R.S. § 13-4240(A). (Doc. 19 at 2.) In April 2015, the motion was denied. (*Id.*)

In July 2015, Petitioner filed a petition for review with the Arizona Court of Appeals. (*Id.*) In April 2017, the Court of Appeals issued a memorandum decision in which it denied relief on the grounds that (1) "Leon offers no proof the evidence still exists more than thirty years after investigators first collected it, or, if it does exist, that it remains in a condition that allows DNA testing," and (2) "Leon previously petitioned for DNA testing in 2004. . . . [I]f Leon wished to challenge the failure to grant that earlier petition for testing, he had an obligation to file a timely petition for review" and failed to do so. (Doc. 17-1 at 61.)

In May 2017, Petitioner filed a petition for review with the Arizona Supreme Court. (Doc. 17-1 at 63-76.) This petition framed the issue as whether the trial court had abused its discretion under Arizona law. (*Id.* at 64.) The only two references to a possible federal constitutional claim were (1) an assertion that Arizona's abuse-of-discretion standard "is too liberal and has resulted in an arbitrary and capricious enforcement of this substantive right for all but the wealthiest of defendants and is a complete violation of the 14th Amendment due process and equal protection clause" and (2) and assertion that the Court of Appeals had "resorted to using incorrect rhetoric so that they may sweep this complete denial of due process under the rug." (*Id.* at 68-70.) The Supreme Court denied the petition in September 2017. (Doc. 17-1 at 85.)

In November 2017, Petitioner filed the Petition. (Doc. 1.) It raises only one ground for relief: that Arizona's refusal to grant his request for DNA testing violated his Fourteenth Amendment rights to due process and equal protection because he is actually innocent of sexual assault. (*Id.* at 6.)

The R&R was issued in August 2018. (Doc. 19.) It concludes the Petition should be denied for three independent reasons: (1) the petition is untimely and not subject to the "actual innocence" exception because Petitioner failed to present any new evidence of his innocence (Doc. 19 at 3-5); (2) Petitioner didn't "fairly present[]" any federal claims in his petition to the Arizona Supreme Court and thus failed to meet AEDPA's exhaustion requirement (Doc. 19 at 5-6); and (3) the Supreme Court specifically held, in *Dist. Atty's Office for Third Judicial Dist. v. McGuire*, 557 U.S. 52 (2009), that there's no federal constitutional right to post-conviction DNA testing (Doc. 19 at 6.)

II. Legal Standard

A party may file specific, written objections to an R&R within fourteen days of being served with a copy of it. Rules Governing Section 2254 Cases 8(b) ("Section 2254 Rules"); *see also* Fed. R. Civ. P. 72(b)(2); 28 U.S.C. § 636(b)(1)(C). The Court must undertake a *de novo* review of those portions of the R&R to which specific objections are made. *See, e.g., Thomas v. Arn*, 474 U.S. 140, 149-50 (1985) ("It does not appear that Congress intended to require district court review of a magistrate's factual or legal conclusions, under a *de novo* or any other standard, when neither party objects to those findings."); *United States v. Reyna-Tapia*, 328 F.3d 1114, 1221 (9th Cir. 2003) ("[T]he district judge must review the magistrate judge's findings and recommendations de novo if objection is made, but not otherwise."). The Court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. Section 2254 Rules 8(b); *see also* Fed. R. Civ. P. 72(b)(3); 28 U.S.C. § 636(b)(1)(C).

III. The Parties' Arguments

In his objections to the R&R, Petitioner doesn't meaningfully address the analysis contained in the R&R. (Doc. 20.) Instead, he argues (1) he's entitled to DNA testing under *Brady v. Maryland*, 373 U.S. 83 (1963), (2) the evidence against him at trial was weak (there was no DNA evidence and the victim couldn't identify him), and (3) the prosecution never proved "at least some penetration" as required under Arizona's rape laws. (*Id.*)

In their response, Respondents argue that Petitioner's new arguments, "even if true,

do[] not excuse the untimeliness of his claim nor [do they] turn his state claim into a federal one." (Doc. 21 at 1-2.)

IV. Analysis

The R&R identified three independent reasons why habeas relief is unavailable: (1) the Petition is untimely; (2) Petitioner failed to exhaust his federal claims in state court; and (3) on the merits, there is no federal constitutional right to DNA testing. In his objections, Petitioner seemingly ignored these issues. Even if his invocation of *Brady* could be liberally construed as an attempt to shoehorn his complaint into a cognizable federal theory of relief—and thus address the third ground for dismissal identified in the R&R—he still hasn't addressed the issues of timeliness and exhaustion.

These omissions mean Petitioner is not entitled to relief. The Supreme Court has explained that "[i]t does not appear that Congress intended to require district court review of a magistrate's factual or legal conclusions, under a *de novo* or any other standard, when neither party objects to those findings." *Thomas v. Arn*, 474 U.S. 140, 149-50 (1985). *See also United States v. Reyna-Tapia*, 328 F.3d 1114, 1221 (9th Cir. 2003) ("[T]he district judge must review the magistrate judge's findings and recommendations de novo if objection is made, but not otherwise."). Here, Petitioner has effectively conceded that the R&R's analysis of the timeliness and exhaustion issues is correct.

Accordingly, **IT IS ORDERED** that:

(1) The Court accepts the recommended disposition of the R&R (Doc. 19);

(2) The Petition (Doc. 1) is denied and dismissed with prejudice;

(3) A Certificate of Appealability and leave to proceed in forma pauperis on appeal are denied because the dismissal of the Petition is justified by a plain procedural bar and reasonable jurists would not find the ruling debatable; and

...

...

(4) The Clerk shall enter judgment accordingly and terminate this action.

Dated this 5th day of February, 2019.

Dominic W. Lanza
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Jesus Meraz Leon,

Petitioner,

v.

Charles Ryan, et al.,

Respondent.

No. CV-17-04227-PHX-DJH (DMF)

REPORT AND RECOMMENDATION

TO THE HONORABLE DIANE J. HUMETEWA, UNITED STATES DISTRICT JUDGE:

This matter is on referral to the undersigned pursuant to Rules 72.1 and 72.2 of the Local Rules of Civil Procedure for further proceedings and a report and recommendation. Pending is the Petition Under 28 U.S.C. § 2254 for a Writ of Habeas Corpus ("Petition") filed by Jesus Meraz Leon ("Petitioner" or "Leon") (Doc. 1). Respondents filed their Answer (Doc. 17). Petitioner filed a Reply (Doc. 18). For the reasons set forth herein, the undersigned Magistrate Judge recommends that this Court deny and dismiss the Petition with prejudice and also deny a certificate of appealability.

I. Procedural History

After a jury trial, Petitioner was convicted in Maricopa County Superior Court, case #CR-2000-149150, of armed burglary, sexual assault, and attempted sexual assault (Doc. 17-1 at 3-8). On December 19, 1985, Petitioner was sentenced to two consecutive life sentences for the armed burglary and sexual assault convictions and a concurrent 20-

year term of imprisonment for the attempted sexual assault conviction (Doc. 17-1 at 9-16). After direct appeal and petition to the Arizona Supreme Court, Petitioner's conviction and sentence were affirmed (Doc. 1 at 2-4; Doc. 17 at 3; Doc. 17-1 at 17-26). According to both parties, post-conviction relief was not granted (Doc. 1 at 2-4; Doc. 17 at 3), and the initial post-conviction proceedings concluded at some point between 1987 and 1999 (Doc. 17-1 at 17-26; Doc. 17 at 3). Yet, Petitioner continued to file post-conviction notices; by April 25, 2017, the Arizona Court of Appeals noted that Petitioner had initiated over fourteen post-conviction proceedings (Doc. 17-1 at 60).

On September 29, 2004, Petitioner filed a notice of post-conviction relief, requesting "a medical testing" of the "D.N.A." (Doc. 17-1 at 17-31). It appears that the superior court never ruled on that notice, and instead of requesting a ruling or petitioning to the court of appeals, according to Respondents, Petitioner continued to file PCRs (Doc. 17 at 3).

On March 2, 2015, Petitioner filed a motion in the state superior court for post-conviction DNA testing under A.R.S. § 13–4240 (Doc. 17-1 at 32-40). The motion was denied on April 17, 2015 (Doc. 17-1 at 41-42). On July 10, 2015, Petitioner filed a petition for review to the Arizona Court of Appeals, asserting that he met the criteria for DNA testing under A.R.S. § 13– 4240 (Doc. 17- 1 at 43-57). The court of appeals denied relief, finding that Petitioner had not established the elements under A.R.S. § 13–4240 (Doc. 17-1 at 58-61).

Petitioner then petitioned for review to the Arizona Supreme Court, arguing that the lower court denial of his request for DNA testing was an abuse of discretion (Doc. 17-1 at 62-83). Petitioner framed the issue as, "Did the superior court abuse it's [sic] discretion when summarily denying [Petitioner's] request for DNA testing pursuant to A.R.S. 13-4240 and Arizona Rule of Criminal Procedure 32.12 without comment or explanation?" (Doc. 17-1 at 64). In Petitioner's dozen pages of his argument, Petitioner only references to any constitutional claim are as follows: "[T]he current 'abuse of discretion' standard is too liberal and has resulted in an arbitrary and capricious

enforcement of this substantive right for all but the wealthiest of defendants and is a complete violation of the 14th Amendment due process and equal protection clause" (Doc. 17-1 at 68); and "[T]he court of appeals, in order to obtain the desired result and affirm the superior court's ruling, resorted to using incorrect rhetoric so that they may sweep this complete denial of due process under the rug" (Doc. 17-1 at 70). The Arizona Supreme Court denied the petition on September 15, 2017 (Doc. 17-1 at 85).

Petitioner asserts one ground in his Petition, which was filed with this Court on November 15, 2017 (Doc. 1).[1] In his Petition, Petitioner names Charles Ryan as Respondent and the Arizona Attorney General as an Additional Respondent. In the Petition, Petitioner claims that the state court's refusal to grant his request for DNA testing violates his Fourteenth Amendment rights to due process and equal protection because he is actually innocent of sexual assault (Doc. 1 at 6).

II. Analysis

A. Untimely Petition.

Respondents argue that the Petition is untimely under the one year statute of limitations set forth in the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") beginning on "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence." 28 U.S.C. § 2244(d)(1)(D). As relevant here, in 2000, the Arizona Legislature enacted a post-conviction DNA testing procedure that provides, *inter alia*, as follows:

> At any time, a person who was convicted of and sentenced for a felony offense and who meets the requirements of this section may request the forensic deoxyribonucleic acid testing of any evidence that is in the possession or control of the court or the state, that is related to the investigation or prosecution that resulted in the judgment of conviction, and that may contain biological evidence.

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[1] The Petition was docketed by the Clerk of Court on November 16, 2017. The Petition contains a certificate of service indicating that Petitioner placed the Petition in the prison mailing system on November 15, 2017 (Doc. 1 at 11). Pursuant to the prison mailbox rule, the undersigned has used November 15, 2017, as the filing date. *Porter v. Ollison*, 620 F.3d 952, 958 (9th Cir.2010) ("A petition is considered to be filed on the date a prisoner hands the petition to prison officials for mailing.").

A.R.S. § 13–4240(A) (2000) (added by Laws 2000, Ch. 373, § 1.). This statute became effective July 18, 2000. *See* S.B. 1353, 44th Leg., 2nd Reg. Sess. (AZ 2000).

Petitioner did not request DNA testing until September 29, 2004, more than four years after the statute became effective. Petitioner did not further try to exhaust his remedies in state court until March 2, 2015. Petitioner did not diligently pursue DNA testing after the enactment of the state DNA testing statute in 2000. *Cf. Johnson v. United States*, 544 U.S. 295, 311, 125 S. Ct. 1571(2005) (stating that in order for a prisoner to be entitled to the alternative start for a claim based on a previously unknown factual predicate under 28 U.S.C. § 2255, ¶ 6(4), a prisoner must act with "reasonable promptness"); *see also Diaz v. Conway*, 498 F. Supp. 2d 654, 658 (S.D.N.Y. 2007) (claim based on DNA tests was not timely pursuant to § 2244(d)(1)(D) where petitioner filed DNA-testing motion 8 years after DNA statute was enacted). Thus, the Petition is untimely.

Petitioner acknowledges that his Petition is untimely (Doc. 1 at 17). Petitioner requests relief under the "*Schlup* actual innocence gateway" claiming that the state is impeding his ability to conduct DNA testing to prove his innocence (*Id.*). To pass through the actual innocence/*Schlup* gateway to excuse untimeliness of a petition[2], a petitioner must establish his or her factual innocence of the crime and not mere legal insufficiency. *See Bousley v. U.S.*, 523 U.S. 614, 623 (1998); *Jaramillo v. Stewart,* 340 F.3d 877, 882–83 (9th Cir.2003). "To be credible, such a claim requires petitioner to support his allegations of constitutional error with new reliable evidence–whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence." *Schlup,* 513 U.S. at 324. *See also Lee v. Lampert,* 653 F.3d 929, 945 (9th Cir.2011). A petitioner "must show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." *569* U.S. 383, 399 (2013) (quoting *Schlup,* 513 U.S. at 327). Because of "the rarity of such evidence, in virtually

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[2] *Schlup v. Delo,* 513 U.S. 298, 327 (1995); *House v. Bell,* 547 U.S. 518 (2006); *McQuiggin v. Perkins,* 569 U.S. 383, 391-396 (2013).

every case, the allegation of actual innocence has been summarily rejected." *Shumway v. Payne,* 223 F.3d 982, 990 (9th Cir.2000) (citing *Calderon v. Thomas,* 523 U.S. 538, 559 (1998)). Here, Petitioner presents no new evidence. Thus, the *Schlup* actual innocence gateway cannot apply to render the Petition timely.

B. Denial of DNA Testing.

Petitioner argues that the Arizona state courts violated his Fourteenth Amendment rights to due process and equal protection when his post-conviction request for DNA testing was denied (Doc. 1 at 6). Respondents argue that this claim is not cognizable in habeas review because it is a question of state law and, despite Petitioner's argument here, is not a federal question (Doc. 17 at 7).

The Court notes that Petitioner did not raise the DNA testing issue as a question of federal law in the state courts (Doc. 17-1 at 32-40, 43-57, 62-83). A state prisoner must properly exhaust all state court remedies before this Court can grant an application for a writ of habeas corpus. 28 U.S.C. § 2254(b)(1), (c); *Duncan v. Henry,* 513 U.S. 364, 365 (1995); *Coleman v. Thompson,* 501 U.S. 722, 731 (1991). Arizona prisoners properly exhaust state remedies by fairly presenting claims to the Arizona Court of Appeals in a procedurally appropriate manner. *O'Sullivan v. Boerckel,* 526 U.S. 838, 843–45 (1999); *Swoopes v. Sublett,* 196 F.3d 1008, 1010 (9th Cir.1999); *Roettgen v. Copeland,* 33 F.3d 36, 38 (9th Cir.1994). To be fairly presented, a claim must include a statement of the operative facts and the specific federal legal theory. *Baldwin v. Reese,* 541 U.S. 27, 32–33 (2004); *Gray v. Netherland,* 518 U.S. 152, 162–63 (1996); *Duncan,* 513 U.S. at 365–66; *Scott v. Schriro,* 567 F.3d 573, 582 (9th Cir. 2009).

A defendant cannot "transform a state-law issue into a federal one merely by asserting a violation of due process." *Langford v. Day,* 110 F.3d 1380, 1389 (9th Cir.1996). Isolated citations to federal provisions or cases do not create a federal claim; instead, Petitioner must have articulated a federal theory for his federal habeas claim. *See Castillo v. McFadden,* 399 F.3d 993, 1002 (9th Cir. 2005). Further, mere "general appeals to broad constitutional principles, such as due process, equal protection,

and the right to a fair trial," do not establish exhaustion. *Hiivala v. Wood,* 195 F.3d 1098, 1106 (9th Cir.1999) (citation omitted). Nor is it enough to raise a state claim that is analogous or closely similar to a federal claim. *Castillo,* 399 F.3d at 999. Accordingly, because Petitioner's arguments to the Arizona state courts did not raise a question of federal law for purposes of habeas review, this issue was not properly exhausted.

Moreover, the Court notes that Petitioner requested post-conviction DNA testing under an Arizona statute and the Arizona courts reviewed his request under Arizona law (Doc. 17-1 at 41-42, 58-61). On habeas review, this Court cannot "reexamine state-court determinations on state-law questions." *Estelle v. McGuire,* 502 U.S. 62, 67–68 (1991).

Finally, even if Petitioner had raised this as a federal question earlier in his legal proceedings, it would be unavailing because there is no "freestanding [Constitutional] right" to post-conviction DNA testing. *Dist. Atty's Office for Third Judicial Dist. v. Osborne,* 557 U.S. 52, 72–73 (2009).

For all of the reasons above, undersigned concludes that Petitioner is not entitled to habeas relief. Accordingly,

IT IS THEREFORE RECOMMENDED that the Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 (Doc. 1) be denied and dismissed with prejudice.

IT IS FURTHER RECOMMENDED that a Certificate of Appealability be denied because dismissal of the Petition is justified by a plain procedural bar and reasonable jurists would not find the procedural ruling debatable.

This recommendation is not an order that is immediately appealable to the Ninth Circuit Court of Appeals. Any notice of appeal pursuant to Rule 4(a)(1) of the Federal Rules of Appellate Procedure should not be filed until entry of the District Court's judgment. The parties shall have fourteen days from the date of service of a copy of this recommendation within which to file specific written objections with the Court. *See* 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 6, 72. The parties shall have fourteen days within which to file responses to any objections. Failure to file timely objections to the

Magistrate Judge's Report and Recommendation may result in the acceptance of the Report and Recommendation by the District Court without further review. *See United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003). Failure to file timely objections to any factual determination of the Magistrate Judge may be considered a waiver of a party's right to appellate review of the findings of fact in an order or judgment entered pursuant to the Magistrate Judge's recommendation. *See* Fed. R. Civ. P. 72.

Dated this 27th day of August, 2018.

Honorable Deborah M. Fine
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Jesus Oscar Meraz Leon,

Petitioner,

v.

Charles L Ryan, et al.,

Respondents.

NO. CV-17-04227-PHX-DWL

JUDGMENT IN A CIVIL CASE

Decision by Court. This action came for consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED adopting the Report and Recommendation of the Magistrate Judge as the order of this Court. Petitioner's Petition for Writ of Habeas Corpus pursuant to 28 U. S. C. § 2254 is denied and this action is hereby dismissed with prejudice.

Brian D. Karth
District Court Executive/Clerk of Court

February 5, 2019

s/ Rebecca Kobza
By Deputy Clerk

Additional material from this filing is available in the Clerk's Office.