UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DOUGLAS WAYNE SOKELL, Petitioner-Appellant, v. BRIGITTE AMSBERRY, Respondent-Appellee.	No. 22-35776 D.C. No. 2:18-cv-02118-SB District of Oregon, Pendleton ORDER

Before: TALLMAN and IKUTA, Circuit Judges.

The request for a certificate of appealability 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.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

DOUGLAS WAYNE SOKELL,

Petitioner,

v.

BRIGITTE AMSBERRY,

Respondent.

Case No. 2:18-cv-02118-SB

FINDINGS AND RECOMMENDATION

BECKERMAN, U.S. Magistrate Judge.

Petitioner Douglas Wayne Sokell ("Petitioner") filed this habeas corpus proceeding pursuant to 28 U.S.C. § 2254. The parties declined to consent to proceed before a magistrate judge under 28 U.S.C. § 636(c). For the reasons explained below, the district judge should deny the Petition for Writ of Habeas Corpus (ECF No. 1) and decline to issue a certificate of appealability.

BACKGROUND

In November 2011, Petitioner approached an eight-year-old girl in the children's section of the Hillsboro Public Library, asked her about her book selection, and rubbed her buttocks and hips for several minutes as they talked. (Resp't Exs. (ECF No. 17), Ex. 102 at 257-58, 321-24.)

The child's mother, who had briefly gone to a different section of library, returned to find Petitioner on his knees with his arm around the child and his hand on the child's buttocks. (*Id.* at 258, 264.) When Petitioner saw the child's mother approaching, he fled. (*Id.* at 271.)

A Washington County grand jury later returned an indictment charging Petitioner with several crimes in connection with the incident at the library, and noting Petitioner's designation as a predatory sex offender under Oregon Revised Statute ("ORS") § 181.585.[1] (Resp't Ex. 116 at 85-88.) Petitioner pleaded not guilty on all counts and proceeded to a bench trial in September 2013.

At trial, the State presented evidence that Petitioner had touched the victim in the library and had done so for sexual gratification. The State also presented evidence that Petitioner had been convicted of similar sex crimes on at least two occasions before trial: once in 1996 for first-degree sexual abuse in Washington County and again in 2012 for attempted first-degree sexual abuse in Lincoln County. (*Id.* at 234-35; 406.)

The trial court ultimately found Petitioner guilty of one count of Sexual Abuse in the First Degree; one count of Unlawful Contact with a Child; and two counts of Unlawfully Being in a Location Where Children Regularly Congregate. (*Id.* at 374; Resp't Ex. 101.) In a separate proceeding, the trial court imposed a sentence of life imprisonment without the possibility of

[1] ORS § 181.585 provides that a person is a predatory sex offender if he or she is "required to report as a sex offender under ORS § 181.609 as the result of a finding that the person committed an act that if committed by an adult in this state would constitute a predatory sex offense" and "[e]xhibits characteristics showing a tendency to victimize or injure others." The Oregon Board of Parole and Post-Prison Supervision designated Petitioner as a predatory sex offender in 2003. *See State v. Sokell*, 360 Or. 392, 394 (2016).

parole pursuant to ORS § 137.719, a "three strikes" law which provides for a life sentence for certain recidivist sex offenders.[2]

Petitioner filed a direct appeal, assigning as error the trial court's imposition of a life sentence. (Resp't Ex. 103 at 5.) Among other things, Petitioner argued that given ORS § 137.719's "extremely broad scope of application"—wherein Petitioner's nonviolent conduct was subject to "the exact same presumptive sentence . . . as the violent, serial rapist"—his life sentence violated Article I, section 16, of the Oregon Constitution.[3] (*Id.* at 9-10.) In a written opinion, the Oregon Court of Appeals rejected Petitioner's arguments, explaining that the circumstances underlying Petitioner's case confirmed that it was not "a 'rare' one in which Article I, section 16, prohibits the imposition of the life sentence prescribed by the legislature to protect the public from [Petitioner's] recidivism." *State v. Sokell*, 273 Or. App. 654, 658 (2015).

The Oregon Supreme Court granted review. (Resp't Ex. 107.) In his brief on the merits, Petitioner renewed his argument that his life sentence was disproportionate under Article I, section 16, but also argued, for the first time, that his sentence constituted cruel and unusual punishment under the Eighth Amendment to the United States Constitution. (Resp't Ex. 108 at 11-13.) The Oregon Supreme Court rejected Petitioner's claim under the state constitution in a written opinion, explaining that "in light of the circumstances of [Petitioner's] current offense and his history of committing similar offenses against other young children, . . . the sentence of life imprisonment without the possibility of parole that the trial court imposed pursuant to ORS §

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[2] ORS § 137.719(1) provides for a presumptive life sentence for a felony sex crime if the defendant "has been sentenced for sex crimes that are felonies at least two times prior to the current sentence."

[3] Article I, section 16, of the Oregon Constitution provides that "all penalties shall be proportioned to the offense."

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137.719(1) is not disproportionate under Article I, section 16." *Sokell*, 360 Or. at 399. The Oregon Supreme Court declined to consider Petitioner's Eighth Amendment claim, explaining:

> [Petitioner] did not raise those arguments in the Court of Appeals; we therefore do not consider them. *See* [OR. R. APP. P.] 9.20(2) (questions before the Supreme Court include all questions that were properly before the Court of Appeals that the petition or response claim were incorrectly decided).

Id. at 393 n.1.

Petitioner next sought postconviction relief. (Resp't Ex. 113.) Through counsel, Petitioner asserted that his trial attorney was ineffective when he (1) failed to file a motion *in limine* to prevent the introduction of Petitioner's previous convictions at trial; (2) failed to "attack the inclusion of purported statements made by Petitioner to a therapist assigned as part of Petitioner's post-prison supervision[;]" and (3) failed "to seek the unshackling of Petitioner during all of his appearances before the trial judge." (Resp't Ex. 114 at 5-6.) The defendant moved for summary judgment. (Resp't Ex. 121.) After further briefing by both parties, the postconviction court granted Defendant's motion and dismissed the petition. (Resp't Exs. 124, 125.) Petitioner did not appeal.

Petitioner then filed a *pro se* Petition for Writ of Habeas Corpus in this Court, raising two grounds for relief:

> **Ground One:** The sentence of life in prison without the possibility of parole constitutes cruel and unusual punishment under the Eighth Amendment to the United States Constitution.
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> **Supporting Facts:** The Court when it sentenced Petitioner to a life sentence when the penalty's severity was disproportionate to the particular conduct that constituted the offense. The [Eighth] Amendment forbids extreme sentences that are grossly disproportionate to the crime. The offense did not involve violent conduct, yet Petitioner received the same sentence as a violent serial rapist. Given Petitioner's age of 71 at sentencing, the standard sentence of 75 months for this crime would have been sufficient punishment. Petitioner's sentence is essentially a death sentence. Relief requested: Vacate life sentence.

> **Ground Two:** Denial of effective assistance of counsel at trial and appeal, under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution.
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> **Supporting Facts:** Trial counsel failed to object to references made to Petitioner's prior convictions and to inclusion of statements Petitioner allegedly made to a therapist but presented by a third party, as hearsay testimony. Declarant did not testify because she had been terminated due to sexual misconduct. Thus, these statements originated from an unreliable person. Petitioner was thereby deprived of his constitutional rights to a jury trial, confrontation, effective assistance of counsel, and right against self-incrimination. Failure to raise an issue is a violation of due process.

(Pet. (ECF No. 1), at 5.) Respondent urges the Court to deny habeas relief, arguing that Petitioner's claims are procedurally defaulted; that Ground One otherwise fails on the merits; and that Petitioner has failed to sustain his burden of proving that he is entitled to habeas relief as to Ground Two. (Resp't Resp. to Pet. (ECF No. 24), at 6-7; Resp't Reply (ECF No. 76), at 2-12.)

DISCUSSION

I. GROUND ONE

1. Legal Standards

A habeas petitioner generally must exhaust all remedies available in state court, either on direct appeal or through collateral proceedings, before a federal court may consider granting habeas relief. *See* 28 U.S.C. § 2254(b)(1)(A) (instructing that a court may not issue a writ of habeas corpus on an individual in state custody's behalf unless "the applicant has exhausted the remedies available in the courts of the State"); *see also Smith v. Baldwin*, 510 F.3d 1127, 1137 (9th Cir. 2007) (noting that an individual in custody must first exhaust available remedies before a federal court may consider a habeas petition on the merits). Generally, a petitioner satisfies the exhaustion requirement "by fairly presenting the federal claim to the appropriate state courts . . . in the manner required by the state courts, thereby 'afford[ing] the state courts a meaningful opportunity to consider allegations of legal error.'" *Casey v. Moore*, 386 F.3d 896, 915-16 (9th Cir. 2004) (quoting *Vasquez v. Hillery*, 474 U.S. 254, 257 (1986)) (alteration in original); *see*

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also O'Sullivan v. Boerckel, 526 U.S. 838, 845 (1999) (holding that "[b]ecause the exhaustion doctrine is designed to give the state courts a full and fair opportunity to resolve federal constitutional claims before those claims are presented to the federal courts, . . . state prisoners must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the state's established appellate review process").

A fair presentation requires that the petitioner made "reference to a specific federal constitutional guarantee, [and included] a statement of the facts that entitle [him or her] to relief." *Dickens v. Ryan*, 740 F.3d 1302, 1317 (9th Cir. 2014) (quoting *Gray v. Netherland*, 518 U.S. 152, 162-63 (1996)). The presentation of a federal claim "for the first and only time in a procedural context in which its merits will not be considered" does not satisfy the exhaustion requirement. *Castille v. Peoples*, 489 U.S. 346, 351 (1989); *see also Roettgen v. Copeland*, 33 F.3d 36, 38 (9th Cir. 1994) (noting that the submission of "a new claim to the state's highest court in a procedural context in which its merits will not be considered absent special circumstances does not constitute fair presentation"). Thus, if a petitioner failed to present his claims to the state courts in a procedural context in which the merits of those claims were considered, the claims have not fairly been presented to the state courts and are not eligible for federal habeas corpus review. *See Edwards v. Carpenter*, 529 U.S. 446, 453 (2000) (explaining that the reasons for the exhaustion requirement would be frustrated if a habeas court "allow[ed] federal review to a[n] [individual in state custody] who had *presented* his claim to the state court, but in such a manner that the state court could not, consistent with its own procedural rules, have entertained it").

A petitioner is considered to have "procedurally defaulted" his claim if he failed to meet a state procedural rule or failed to raise the claim at the state level at all. *See Carpenter*, 529 U.S.

at 451 (explaining that a "petitioner who has failed to meet the State's procedural requirements for presenting his federal claims has deprived the state courts of an opportunity to address those claims in the first instance[,]" and that the procedural default doctrine applies "whether the default in question occurred at trial, on appeal, or on state collateral attack") (simplified). If a petitioner has procedurally defaulted a claim in state court, a federal court will not review it unless the petitioner "can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." *Coleman v. Thompson*, 501 U.S. 722, 750 (1991).

2. Analysis

Petitioner asserts in Ground One that his life sentence constitutes cruel and unusual punishment under the Eighth Amendment. (Pet. at 5.) More specifically, Petitioner argues that "[t]his extreme sentence, with not even the *possibility* of release or parole, for a single act of improper sexual touching, based on recidivism, is so grossly disproportionate that it violates the Eighth Amendment[.]" (Pet'r's Corrected Br. at 1.)

As summarized above, Petitioner challenged in his direct appeal proceedings the trial court's imposition of a life sentence, arguing that because of the relatively minor nature of the touching at issue, a life sentence without the possibility of parole violated the proportionality principle articulated in Article I, section 16, of the Oregon Constitution. (Resp't Ex. 103 at 9-10.) The Oregon Court of Appeals rejected Petitioner's arguments and affirmed his life sentence. *Sokell*, 273 Or. App. at 658. Petitioner then sought review in the Oregon Supreme Court, challenging his life sentence under both the Oregon Constitution and the Eighth Amendment. (Resp't Ex. 108 at 12-14.) The Oregon Supreme Court rejected on the merits Petitioner's claim

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under the state constitution, and expressly declined to consider Petitioner's Eighth Amendment claim because it was not appropriately before the court. *Sokell*, 360 Or. at 393 n.1, 399.

Although Petitioner properly exhausted a claim challenging the trial court's imposition of a life sentence during his direct appeal proceedings, he presented that claim to the Oregon Court of Appeals as a matter of state rather than federal law. It is firmly established that a petitioner must expressly identify the federal nature of his claim at every level of his state court proceedings to fairly present the claim. *See Baldwin v. Reese*, 541 U.S. 27, 29 (2004) (explaining that a petitioner "must 'fairly present' his claim in each appropriate state court (including a state supreme court with powers of discretionary review), thereby alerting that court to the federal nature of the claim"); *see also Hiivala v. Wood*, 195 F.3d 1098, 1106 (9th Cir. 1999) (explaining that fair presentation requires a petitioner "to alert the state courts to the fact that he was asserting a claim under the United States Constitution" (citing *Duncan v. Henry*, 513 U.S. 364, 365-66 (1995)). Petitioner thus failed fairly to present Ground One, and because he may no longer do so, Ground One is procedurally defaulted. *See* ORS § 19.255(1) (requiring that "a notice of appeal must be served and filed within [thirty] days after the judgment appealed from is entered in the register").

Petitioner concedes that he failed fairly to present Ground One to the Oregon courts, but argues that this Court should reach the merits of the claim because "significant and material components of the exhaustion requirement were satisfied in this case[.]" (Pet'r's Corrected Br. (ECF No. 69), at 5-6.) Petitioner emphasizes that he challenged his sentence as disproportionate under Article I, section 16 of the Oregon Constitution—"the state constitutional analogue to the Eighth Amendment"—at every level of state-court review, and that the "profound similarity" of

the proportionality analysis under the two standards "diminishes any comity interest and augurs in favor of federal habeas review[.]" (*Id.* at 6-8.)

The Court disagrees. "The mere similarity between a claim of state and federal error is insufficient to establish exhaustion." *Hiivala*, 195 F.3d at 1106; *see also Johnson v. Zenon*, 88 F.3d 828, 830 (9th Cir. 1996) (explaining that "[i]f a petitioner fails to alert the state court to the fact that he is raising a federal constitutional claim, his federal claim is unexhausted regardless of its similarity to the issues raised in state court"). Even "general appeals to broad constitutional principles, such as due process, equal protection, . . . the right to a fair trial" or, as in this case, the right to be free of cruel and unusual punishment, cannot achieve fair presentation. *Hiivala*, 195 F.3d at 1106. Rather, as explained above, fair presentation required Petitioner to identify the federal nature of his claim at every level of state-court review. *See Lyons v. Crawford*, 232 F.3d 666, 668 (9th Cir. 2000), *amended by* 247 F.3d 904 (9th Cir. 2001) (explaining that an individual in state custody "must make the federal basis of [his] claim explicit either by citing federal law or the decisions of the federal courts, even if the federal basis is 'self-evident' or the underlying claim would be decided under state law on the same considerations that would control resolution of the claim on federal grounds") (simplified). Although Petitioner raised his Eighth Amendment claim to the Oregon Supreme Court, doing so did not cure the default. *See Casey*, 386 F.3d at 918 (holding that because the petitioner "raised his federal constitutional claims for the first and only time to the state's highest court on discretionary review, he did not fairly present them").

Indeed, the Oregon Supreme Court explicitly declined review of the Eighth Amendment claim because it was not properly before the court pursuant to Oregon Rule of Appellate Procedure 9.20. *See Coleman*, 501 U.S. at 750 (noting that federal review is barred "[i]n all cases in which a[n] [individual in state custody] has defaulted his federal claims in state court pursuant

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to an independent and adequate state procedural rule"); *see also Ylst v. Nunnemaker*, 501 U.S.797, 801 (1991) (explaining that "[w]hen a state-law default prevents the state court from reaching the merits of a federal claim, that claim can ordinarily not be reviewed in federal court") (simplified).

For these reasons, Ground One is procedurally defaulted. Petitioner does not argue that cause and prejudice or the miscarriage of justice exception apply to excuse the default, nor does he point to any authority that could persuade the Court to disregard well-established habeas principles in favor of review. Accordingly, the district judge should deny habeas relief as to Ground One.[4]

II. GROUND TWO

Petitioner does not argue the merits of the claim alleged in Ground Two, nor does Petitioner challenge Respondent's argument that Ground Two is procedurally defaulted. Accordingly, habeas relief is precluded as to Ground Two because it is procedurally defaulted, and because Petitioner has failed to sustain his burden of demonstrating entitlement to habeas relief on that claim. *See* 28 U.S.C. § 2248 (instructing that "[t]he allegations of a return to the writ of habeas corpus or of an answer to an order to show cause in a habeas proceeding, if not traversed, shall be accepted as true except to the extent that the judge finds from the evidence that they are not true"); *see also Silva v. Woodford*, 279 F.3d 825, 835 (9th Cir. 2002) (recognizing that a habeas petitioner carries the burden of proving his case).

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[4] Because Ground One is procedurally defaulted, the district judge need not consider Respondent's arguments on the merits.

CONCLUSION

For the reasons stated, the district judge should DISMISS the Petition for Writ of Habeas Corpus (ECF No. 1), with prejudice, and decline to issue a Certificate of Appealability because Petitioner has not made a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2).

SCHEDULING ORDER

The Court will refer its Findings and Recommendations to a district judge. Objections, if any, are due within fourteen (14) days. If no objections are filed, the Findings and Recommendation will go under advisement on that date. If objections are filed, a response is due fourteen (14) days after being served with a copy of the objections. When the response is due or filed, whichever date is earlier, the Findings and Recommendation will go under advisement.

IT IS SO ORDERED.

DATED this 30th day of August, 2022.

Stacie F. Beckerman

HON. STACIE F. BECKERMAN
United States Magistrate Judge

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

PORTLAND DIVISION

DOUGLAS WAYNE SOKELL,

Petitioner,

v.

BRIGITTE AMSBERRY,

Respondent.

No. 2:18-cv-02118-SB

OPINION AND ORDER

MOSMAN, J.,

On August 30, 2022, Magistrate Judge Stacie F. Beckerman issued her Findings and Recommendation ("F&R") [ECF 82], recommending that Petitioner's Petition for Writ of Habeas Corpus [ECF 1] be dismissed with prejudice. Petitioner filed objections, and Respondent responded. Pet'r's Objs. to F&R [ECF 84]; Resp't's Resp. to Objs. to F&R [ECF 85].

DISCUSSION

The magistrate judge makes only recommendations to the court, to which any party may file written objections. The court is not bound by the recommendations of the magistrate judge, but retains responsibility for making the final determination. The court is generally required to make a de novo determination regarding those portions of the report or specified findings or recommendation as to which an objection is made. 28 U.S.C. § 636(b)(1)(C). However, the court is not required to review, de novo or under any other standard, the factual or legal conclusions of

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JUDGMENT

MOSMAN, J.,

Based on my Opinion and Order [ECF 86] adopting Magistrate Judge Beckerman's Findings and Recommendation [ECF 82], it is hereby ORDERED AND ADJUDGED that the above captioned matter is DISMISSED WITH PREJUDICE. Pending motions, if any, are DENIED AS MOOT.

DATED this 27th day of September, 2022.

MICHAEL W. MOSMAN
Senior United States District Judge

the magistrate judge as to those portions of the F&R to which no objections are addressed. *See Thomas v. Arn*, 474 U.S. 140, 149 (1985); *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003). While the level of scrutiny under which I am required to review the F&R depends on whether or not objections have been filed, in either case, I am free to accept, reject, or modify any part of the F&R. 28 U.S.C. § 636(b)(1)(C).

CONCLUSION

Upon review, I agree with Judge Beckerman's recommendation, and I ADOPT the F&R [ECF 82] as my own opinion. Petitioner's Petition for Writ of Habeas Corpus [ECF 1], is DISMISSED WITH PREJUDICE, and I DECLINE to issue a Certificate of Appealability because Petitioner has not made a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2).

IT IS SO ORDERED.

DATED this 27 day of September, 2022.

MICHAEL W. MOSMAN
Senior United States District Judge

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