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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

James Bryan Gordon,
Petitioner,

vs.

Dora B. Schriro, et al.,
Respondents.

No. CV-07-02279-PHX-ROS

ORDER

Pending before the Court is Magistrate Judge Jennifer C. Guerin’s Report and Recommendation. (Doc. 27). Judge Guerin recommends the Petition for a Writ of Habeas Corpus be denied. For the reasons discussed below, the Report and Recommendation will be adopted. Pursuant to 28 U.S.C. foll. § 2254, R. 11, the Court must “issue or deny a certificate of appealability when it enters a final order adverse to the applicant.” A certificate of appealability will be denied because the applicant has not made a substantial showing of the denial of a constitutional right as required by 28 U.S.C.A § 2253(c)(2).

BACKGROUND

On November 21, 2007, Petitioner filed a Petition for Writ of Habeas Corpus (Doc. 1). Magistrate Judge Guerin identified sixteen grounds for relief set forth in the Petition (including several with subparts):

Ground 1: Petitioner’s 6th Amendment right to a jury trial was violated when 21 members of the jury panel stated that they were victims of abuse or knew someone who was a victim

1 of abuse and the trial court denied defense counsel's motion to strike the entire jury panel on
2 the grounds that it could not fairly hear the case;

3 **Ground 2:** Petitioner's 6th Amendment right to compel witnesses to attend was violated
4 when the trial court ruled that Petitioner's reputation for truthfulness was not at issue and
5 therefore Petitioner could not call witnesses prepared to testify to Petitioner's good character
6 and truthfulness;

7 **Ground 3:** Petitioner's 6th and 14th Amendment rights were violated when the trial court
8 allowed the jury to receive an instruction related to Petitioner's flight from the state;

9 **Ground 4:** Petitioner's 6th and 14th Amendment rights were violated when (a) the
10 prosecutor, in her opening statements, told jurors that Petitioner was arrested out-of-state
11 after being featured on "America's Most Wanted," and (b) members of the jury were
12 overheard discussing local radio coverage of Petitioner's trial;

13 **Ground 5:** Petitioner's due process rights were violated when the trial court admitted into
14 evidence (a) a photo of the victims, and (b) police photographs depicting Petitioner's
15 abundance of body hair and a small abnormality on Petitioner's genitals;

16 **Ground 6:** Petitioner's due process rights were violated because Counts 9 and 13 of
17 Petitioner's indictment did not set forth specific evidence to support a conviction;

18 **Ground 7:** Petitioner's due process rights were violated when the trial court sentenced
19 Petitioner as a dangerous offender on counts 2-9, 14, 15, 17 and 18 of the indictment, when
20 those counts were alleged as non-dangerous felonies;

21 **Ground 8:** Petitioner's federal and state due process rights were violated when he was
22 charged and convicted for crimes allegedly committed more than seven years before the
23 indictment;

24 **Ground 9:** Petitioner's federal and state due process rights were violated when the
25 indictment was amended twice, once before the jury, over Petitioner's objection;

26 **Ground 10:** Petitioner's 4th, 5th and 14th Amendment rights were violated when the trial
27 court admitted Petitioner's private telephone conversations into evidence;

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1 **Ground 11:** Petitioner's due process rights were violated when the court instructed the jury
2 that it could consider evidence of other sexual offenses to the extent such offenses showed
3 Petitioner's propensity for sexual misconduct;

4 **Ground 12:** (a) Petitioner's right to a speedy trial was violated with respect to his failure to
5 appear (CR 98-90662), and (b) Petitioner's guilty plea in CR 98-90662 was not entered into
6 knowingly, intelligently, and voluntarily because he was unaware that his speedy trial
7 deadline had expired;

8 **Ground 13:** Petitioner's 5th, 6th, 8th and 14th Amendment rights were violated when the
9 prosecutor engaged in prosecutorial misconduct by (a) amending the grand jury indictment
10 twice, (b) telling jurors that Petitioner had been featured on America's Most Wanted, (c)
11 showing the jury a black suitcase with yellow FBI tape around it but not admitting the
12 suitcase into evidence, (d) telling the jury that Petitioner posted and forfeited a \$20,000 bond,
13 (e) misstating facts to the jury regarding Petitioner's purchase of a Blazer SUV, (f) belatedly
14 disclosing a State witness's criminal background, (g) admitting Petitioner's private telephone
15 conversations into evidence, (h) misrepresenting dates relevant to Petitioner's speedy trial
16 deadline in his failure to appear case, and (i) engaging in all of the above misconduct, which
17 amounted to cumulative error;

18 **Ground 14:** Petitioner's 5th, 6th and 14th Amendment rights were violated when (a) the jury
19 panel selected did not represent a fair cross section of the community, (b) the trial court failed
20 to strike jury member Jane Hancock for cause, (c) the trial court failed to sever the trial, (d)
21 the trial counsel failed to move for severance, and (e) the trial court erred in sentencing by
22 not applying the correct dates on which the crimes were committed;

23 **Ground 15:** (a) Petitioner's 6th Amendment right to effective assistance of counsel was
24 violated because appellate counsel failed to raise on appeal each of the issues presented in
25 Petitioner's Rule 32 Petition; (b) trial counsel admitted to ineffectiveness after the indictment
26 was amended during trial; (c) the trial court failed to conduct an evidentiary hearing
27 regarding the claims of ineffective assistance of counsel raised in Petitioner's Rule 32
28 Petition;

1 **Ground 16:** Petitioner’s federal due process rights were violated by the preclusion of certain
2 claims by the state court on collateral review.
3 (Doc. 27).

4 On March 24, 2009, Magistrate Judge Guerin recommended the petition be denied
5 (Doc. 27). On May 1, 2009, Petitioner filed an objection to Magistrate Judge Guerin’s
6 Report and Recommendation, and requested an evidentiary hearing (Docs. 30; 31).
7 Petitioner’s objections and request for an evidentiary hearing are considered below.

8 **STANDARD**

9 A district judge “may accept, reject, or modify, in whole or in part, the findings or
10 recommendations made by the magistrate judge.” 28 U.S.C. § 636(b). Where any party has
11 filed timely objections to the magistrate judge’s report and recommendations, the district
12 court’s review of the part objected to is to be *de novo*. *Id.*; *see also United States v. Reyna-*
13 *Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003); *Schmidt v. Johnstone*, 263 F. Supp. 2d 1219,
14 1226 (D. Ariz. 2003) (“Following *Reyna-Tapia*, this Court concludes that *de novo* review of
15 factual and legal issues is required if objections are made, but not otherwise.”) (internal
16 quotations and citations omitted).

17 **DISCUSSION**

18 **I. Need for Evidentiary Hearing**

19 Petitioner generally objects to the Report and Recommendation on the ground that it
20 was based on state court factual determinations or the Magistrate Judge’s factual
21 determinations rather than on an evidentiary hearing. Petitioner claims he is entitled to an
22 evidentiary hearing because the state court made evidentiary findings without holding a
23 hearing or giving Petitioner an opportunity to present evidence. The granting of a hearing
24 is within the discretion of the District Court. *Tilcock v. Budge*, 538 F.3d 1138, 1143 (9th Cir.
25 2008). A district court abuses its discretion in denying a request for an evidentiary hearing
26 if petitioner “has alleged facts that, if proven, would entitle him to habeas relief, and . . . he
27 did not receive a full and fair opportunity to develop those facts.” *Id.* (internal quotation
28 marks and citation omitted). Petitioner does not identify a single factual determination on

1 which Magistrate Judge Guerin wrongly relied, or a single factual dispute which would
2 necessitate an evidentiary hearing. As discussed below, Petitioner has not alleged facts that
3 if proven would entitle him to relief; his claims fail as a matter of law. An evidentiary
4 hearing is therefore not necessary and Petitioner's request for one will be denied.

5 **II. Grounds 3, 4(b), 12(b), 15(b) and 15(c)**

6 Judge Guerin recommends grounds 3, 4(b), 12(b), 15(b), and 15(c) of the petition be
7 denied because Petitioner did not exhaust these claims by presenting them in state court in
8 either his direct appeal or his Rule 32 petition. Petitioner objects that he did present each of
9 these claims in state court. Petitioner is partially correct. Petitioner raised ground 3 in his
10 direct appeal to the Arizona State Court of Appeals. (Doc. 1, Ex. F at 23). He also raised
11 ground 15(c) in his appeal of the Arizona Superior Court's denial of his Rule 32 petition in
12 the Arizona State Court of Appeals (Doc. 15, Ex. CCC1 at 2). He did not, however, raise the
13 claims identified by Judge Guerin as grounds 4(b), 12(b), and 15(b) in state court. Judge
14 Guerin's recommendation that these claims be denied will be adopted. Grounds 3 and 15(c)
15 will be considered on the merits.

16 **(1) Ground 3**

17 Judge Guerin identified ground 3 as: "Petitioner's 6th and 14th Amendment rights
18 were violated when the trial court allowed the jury to receive an instruction related to
19 Petitioner's flight from the state." This paraphrase of Petitioner's claim is inaccurate. An
20 accurate paraphrase of Ground 3 in the Petition is: Petitioner's 6th and 14th Amendment
21 rights were violated when the trial court told jurors not to consider evidence of the
22 punishment Petitioner might receive to rebut an inference that Petitioner fled because he had
23 a guilty conscience. (Doc. 1 at 7). Petitioner raised this ground in his direct appeal. The
24 claim nevertheless fails on its merits. The Arizona Court of Appeals correctly denied the
25 claim on the correct ground that "a careful review of the record reveals that the trial court
26 never precluded such evidence because none was ever offered." (Doc. 1, Ex. 1, part 1 at 12).
27 Petitioner does not cite any evidence to the contrary from the record.

28 **(2) Ground 15(c)**

1 Ground 15(c) is: the trial court failed to conduct an evidentiary hearing regarding the
2 claims of ineffective assistance of counsel raised in Petitioner’s Rule 32 Petition. Petitioner
3 does not identify a single factual determination made by the trial court when denying his
4 ineffective assistance of counsel claim. Because Petitioner does not do so, ground 15(c) fails.
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6 **III. Grounds 4(a), 9-11, 12(a), 13, 14(a), 14(b) and 14(e)**

7 Judge Guerin recommends grounds 4(a), 9-11, 12(a), 13, 14(a), 14(b) and 14(e) be
8 denied because they are procedurally barred on an independent state law ground. Petitioner’s
9 only objection is that Respondents waived this defense. Petitioner argues, “In the
10 Respondents’ Answer the state relied on 2 mutually exclusive reasons for rejecting each of
11 the above claims, including procedural default (preclusion based on a state law ground) and
12 denial on the merits. Because the state chose to address and argue the claim on the merits
13 they have relinquished the preclusion defense.” (Doc. 30 at 5). Procedural default and failure
14 on the merits are not mutually exclusive defenses to Petitioner’s claims. Petitioner cites no
15 authority for his position that the State waives procedural defenses when it accompanies them
16 with defenses that reach the merits. Petitioner offers additional argument in support of
17 grounds 9, 10, and 13 on the merits, but does not otherwise respond to Judge Guerin’s
18 recommendation that these claims are procedurally barred.

19 Judge Guerin’s conclusion that the claims are procedurally barred is correct.
20 Petitioner presented these grounds in his Rule 32 Petition, but the trial court denied them
21 pursuant to Ariz. R. Crim. P. Rule 32.3(a)(3), which precludes from post-conviction relief
22 claims that could have been raised on appeal. Rule 32.2(a)(3) is an independent state law
23 ground, which bars federal habeas review. *See Stewart v. Smith*, 536 U.S. 856, 860 (2002).
24 Petitioner claims he failed to raise some of these grounds because he relied on the advice of
25 his counsel. Petitioner’s attempt to show cause for the procedural default by alleging
26 ineffective assistance of appellate counsel is an independent constitutional claim, which
27 Petitioner raised as ground 15(a) and is considered below and denied on its merits. Since
28 Petitioner has not shown cause for the procedural default or shown a fundamental

1 miscarriage of justice, Magistrate Judge Guerin’s recommendation that grounds 4(a), 9-11,
2 12(a), 13, 14(a), 14(b) and 14(e) be denied because they are procedurally barred will be
3 adopted.

4 **IV. Grounds 1, 2, 6, 8, 14(d), 15(a)**

5 Judge Guerin recommends grounds 1, 2, 6, 8, 14(d), and 15(a) be denied on their
6 merits. Petitioner’s only objection is that the Magistrate Judge reached this ruling without
7 an evidentiary hearing, wrongly relying on facts still in dispute. Petitioner does not name any
8 disputed facts upon which the Magistrate Judge relied when denying these claims, or offer
9 any other explanation for why an evidentiary hearing is necessary to resolve his claims.
10 Judge Guerin’s recommendation does not rely on any disputed facts that would necessitate
11 an evidentiary hearing. Judge’s Guerin’s recommendation that these grounds be denied on
12 their merits will accordingly be adopted.

13 **V. Grounds 5, 7, 14(c), 16**

14 Judge Guerin recommends grounds 5, 7, and 14(c) be denied because they were not
15 fairly presented as federal claims in state court, and recommends ground 16 be denied
16 because it states a non-cognizable claim. Petitioner presents no objection. The
17 recommendation that these grounds be denied will therefore be adopted.

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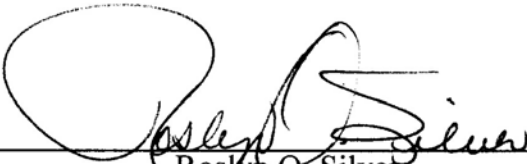
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Accordingly,

IT IS ORDERED the Report and Recommendation (Doc. 27) is **ADOPTED** and the
Petition (Doc. 1) is **DENIED**.

FURTHER ORDERED a certificate of appealability **IS DENIED**.

DATED this 30th day of December, 2009.



Roslyn O. Silver
United States District Judge