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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Everardo Lopez, Jr.,
Petitioner,
vs.
Charles L. Ryan¹, et al.,
Respondents.

NO. CV-08-1469-PHX-PGR (MHB)

ORDER

Having reviewed *de novo* the Report and Recommendation of Magistrate Judge Burns in light of the petitioner’s Objection to Report and Recommendation (doc. #17), the Court finds that the objections should be overruled and that the petitioner’s habeas petition, filed pursuant to 28 U.S.C. § 2254, should be denied.

First, the Court agrees with the Magistrate Judge that the merits of Grounds Two, Three, Four, and Five of the § 2254 petition cannot be reached because the petitioner procedurally defaulted as to those grounds and has not established either cause for his failure to properly raise those claims in state court

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Charles L. Ryan, the current director of the Arizona Department of Corrections, is substituted as a respondent pursuant to Fed.R.Civ.P. 25(d) in place of former director Dora B. Schriro.

1 or actual prejudice stemming from his failure to do so, nor has he demonstrated
2 that a miscarriage of justice would result if those issues are not addressed on
3 their merits.

4 Second, the Court also agrees with the Magistrate Judge that Ground One
5 must be denied on its merits because the prosecution witnesses' sporadic
6 references to a drug organization did not render the petitioner's trial
7 fundamentally unfair given the trial judge's curative instruction to the jury.

8 Third, the Court also agrees with the Magistrate Judge that Ground Six
9 must be denied on its merits because the Portillo reasonable doubt instruction
10 given by the trial court does not violate any clearly established Supreme Court
11 authority.

12 Fourth, the Court further agrees with the Magistrate Judge that Ground
13 Seven must be denied on its merits in its entirety because the state courts'
14 rejection of the petitioner's various ineffective assistance of counsel claims
15 included in Ground Seven did not amount to an unreasonable application of
16 Strickland v. Washington, 466 U.S. 668 (1984).² Therefore,

17 IT IS ORDERED that the Magistrate Judge's Report and Recommendation
18 (doc. #16) is accepted and adopted by the Court.

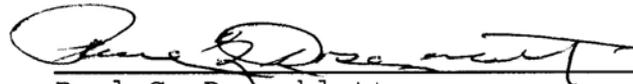
19 IT IS FURTHER ORDERED that the petitioner's Petition Under 28 U.S.C.
20 § 2254 for a Writ of Habeas Corpus by a Person in State Custody is denied and

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22 The fact that the petitioner included for the first time in his Objection to
23 Report and Recommendation a copy of the search warrant at issue in Ground
24 Seven (c) does not change the Court's acceptance of the Magistrate Judge's
25 conclusion regarding that ground. The petitioner still has not established any
26 prejudice stemming from his trial counsel's failure to move to suppress the
evidence seized under the allegedly invalid warrant because he has not
established that any such motion would have been successful.

1 that this action is dismissed with prejudice. The Clerk of the Court shall enter
2 judgment accordingly.

3 DATED this 10th day of October, 2009.

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7 Paul G. Rosenblatt
8 United States District Judge
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