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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Brian Leslie Finkel,

Petitioner,

vs.

Sandra Walker, et. al.,

Respondents.

No. CV 10-00536-PHX-FJM

ORDER

The court has before it petitioner's petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 (doc. 1), respondents' answer (doc. 13), and petitioner's reply (doc. 14). We also have before us the Report and Recommendation of the United States Magistrate Judge (doc. 15) and petitioner's objections (doc. 18). After *de novo* consideration, we accept the recommended decision of the Magistrate Judge, pursuant to Rule 8(b), Rules Governing § 2254 Cases, and deny the petition.

Petitioner raises four grounds for relief: (1) denial of his Fourteenth Amendment right to equal protection, his Fifth and Sixth Amendment rights to a fair trial, and his Sixth Amendment right to confrontation by the trial court's refusal to sever counts and joinder of the indictments for trial; (2) denial of his Fourteenth Amendment right to equal protection and his Sixth Amendment right to a fair trial because the court admitted testimony of Dr. Ann Burgess; (3) denial of his Fifth, Sixth, and Fourteenth Amendment rights to due process

1 when the court refused to permit defense expert Elizabeth Loftus to testify; and (4) denial of
2 his Sixth Amendment right to confrontation when the court permitted one of his accusers to
3 testify by way of videotape. We address each in turn.

4 **Ground One**

5 In ground one, petitioner alleges that he was denied his Fourteenth Amendment right
6 to Equal Protection, his Fifth and Sixth Amendment rights to a fair trial, and his Sixth
7 Amendment right to confrontation. The Magistrate Judge found that the only federal claim
8 fairly presented to the state courts is the alleged denial of his Sixth Amendment right to
9 confrontation. The record reflects that petitioner did not present the due process or other
10 claims under ground one to the state courts. Accordingly, those claims are procedurally
11 defaulted. See Baldwin v. Reese, 541 U.S. 27, 29, 124 S.Ct. 1347,1349 (2004); see also
12 Ariz. R. Crim. P. 32.2.

13 In his initial filings, petitioner did not assert any basis to overcome the procedural bar,
14 such as "cause and prejudice" or a "fundamental miscarriage of justice." In his objections,
15 however, petitioner asserts a basis for "cause and prejudice." Petitioner argues that trial,
16 appellate, and former appointed counsel provided ineffective assistance of counsel and
17 prejudiced petitioner by causing him to fail to comply with the state's procedural rules.
18 Ineffective assistance of counsel may be an objective factor constituting cause. See Murray
19 v. Carrier, 477 U.S. 478, 488, 106 S.Ct. 2639, 2645 (1986). However, a claim of ineffective
20 assistance of counsel "must be presented to the state courts as an independent claim before
21 it may be used to establish cause for a procedural default." Edwards v. Carpenter, 539 U.S.
22 446, 451, 120 S.Ct. 1587, 1591 (2000). Petitioner did not raise an ineffective assistance of
23 counsel claim in state court. Thus, we reject petitioner's argument now that ineffective
24 assistance of counsel was an objective factor causing procedural default in ground one.¹

25 Petitioner did raise a violation of his right to confrontation in state court. Petitioner
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27 ¹ We similarly reject ineffective assistance of counsel as a cause for procedural default
28 in grounds two and three.

1 alleges that the trial court refused to sever counts and, on a theory of cross-admissible "other
2 acts," joined counts involving multiple accusers without first evaluating the accusers'
3 credibility. The Magistrate Judge refused to consider this claim to the extent that it asserts
4 a violation of Arizona law, based on Ariz. R. Evid. 404(c) and State v. Aguilar, 209 Ariz. 40,
5 97 P.2d 856 (2004). We agree that such a claim is not cognizable on federal habeas corpus
6 review because it is made pursuant to state law. 28 U.S.C. § 2254(a).

7 The Magistrate Judge did however, consider petitioner's federal claim. The
8 Magistrate Judge rejected this claim on the merits because he found the Confrontation Clause
9 inapplicable to the joinder hearing since it was conducted pretrial. Petitioner objects, arguing
10 that there is nothing in Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354 (2004) that
11 limits the confrontation right to the context of a jury trial. Because the purpose of the joinder
12 hearing was to assess the truthfulness of the witnesses, petitioner asserts that he should have
13 had the right to cross-examine them.

14 In order to be entitled to habeas corpus relief, petitioner must show that the state
15 court's decision was an unreasonable application of, or contrary to, clearly established federal
16 law. 28 U.S.C. § 2254(d)(1). Petitioner has not pointed to a "clearly established" United
17 States Supreme Court precedent supporting his claim that he had a right to cross-examine
18 witnesses during a pre-trial joinder hearing. Rather, the Supreme Court has determined that
19 a criminal defendant has no pre-trial right to interview the witnesses against him; confronting
20 adverse witnesses is a trial right. Pennsylvania v. Ritchie, 480 U.S. 39, 53, 107 S.Ct. 989,
21 999 (1987); Barber v. Page, 390 U.S. 719, 725, 88 S.Ct. 1318, 1322 (1968). While petitioner
22 may not have been afforded the opportunity to cross examine the witnesses at the joinder
23 hearing, he did at trial. See Kentucky v. Stincer, 482 U.S. 730, 740, 107 S.Ct. 2658, 2664
24 (1987) (holding that there was no confrontation clause violation even though defendant was
25 excluded from a pretrial hearing when defendant had the opportunity to cross-examine at
26 trial). The state court's rejection of petitioner's Confrontation Clause claim was not contrary
27 to, or an unreasonable application of, clearly established federal law. Accordingly, petitioner
28 is not entitled to relief on ground one.

1 **Ground Two**

2 Petitioner argues that the testimony of Dr. Ann Burgess "was inadmissible under
3 Arizona law, usurped the function of the jury, lowered the prosecution's burden of proof and
4 deprived Petitioner of his Fourteenth Amendment right to Equal Protection of the law and
5 Sixth Amendment right to a fair trial" (docs. 1 at 9, 5 at 10). The Magistrate Judge found that
6 petitioner never presented a federal challenge to the trial court's ruling, only a state challenge.
7 Therefore this ground is technically exhausted and procedurally barred. Petitioner concedes
8 that he "did not specifically address a [violation of a] constitutional provision" (doc. 18 at 4).
9 Nevertheless, petitioner contends that because the state court admitted Dr. Burgess's
10 testimony, it "necessarily found that Petitioner was not arbitrarily deprived of any state law
11 entitlement" (doc. 18 at 4).

12 To exhaust state remedies, petitioner must afford the state courts the opportunity to
13 rule upon the merits of his federal claims by "fairly presenting" them to the state's highest
14 court in a procedurally appropriate manner. Reese, 541 U.S. at 29, 124 S.Ct. at 1349. A
15 claim is "fairly presented" only if petitioner has described the operative facts and the *federal*
16 legal theory upon which the claim is based. Castillo v. McFadden, 399 F.3d 993, 999 (9th
17 Cir. 2005). Here, petitioner never raised a federal challenge to the admission of Dr. Burgess'
18 challenge. He even admits this. Petitioner did not "fairly present" a federal claim. Nor do
19 we accept petitioner's argument that there was an arbitrary deprivation of a state statutory
20 entitlement. Petitioner never raised this claim before his objections and we refuse to imply
21 a state court ruling when one was never actually made. Petitioner is not entitled to relief on
22 ground two.

23 **Ground Three**

24 In ground three, petitioner alleges that the trial court's refusal to permit defense expert
25 Elizabeth Loftus to testify about the risk of implanted memories deprived him of his Fifth,
26 Sixth, and Fourteenth Amendment rights to due process and to present a defense. The
27 Magistrate Judge found that although petitioner cited the Fifth and Fourteenth Amendments
28 on direct appeal, his argument was limited to state law, only cited state law cases, and never

1 articulated a federal claim. Concluding that this was insufficient to fairly present a federal
2 due process claim to the Arizona Court of Appeals, the Magistrate Judge denied relief.
3 Petitioner objects, arguing that mere reference to a specific provision of the Constitution is
4 enough to fairly present a federal claim.

5 Petitioner relies primarily on Castillo to argue that mere reference to the Constitution
6 is enough to fairly present a federal claim. 399 F.3d 993. However, in that case the Ninth
7 Circuit stated that "[e]xhaustion demands more than drive-by citation, detached from any
8 articulation of an underlying federal legal theory." Id. at 1003. "Exclusive citation to
9 Arizona state court cases in a counseled petition for review is not sufficient to give a 'fair
10 opportunity' to the Arizona Supreme Court to decide a federal claim." Cook v. Schriro, 538
11 F.3d 1000, 1029 (9th Cir. 2008) (internal citations omitted). Here, in a "counseled petition,"
12 petitioner merely cited to the Constitution in the heading and concluding sentence of his
13 argument. His entire argument centered on Arizona law and the Arizona Court of Appeals
14 limited its review to state law and rejected petitioner's claim. "A conclusory, scattershot
15 citation of federal constitutional provisions, divorced from any articulated federal legal
16 theory" is insufficient. Castillo, 399 F.3d at 1002. We agree with the Magistrate Judge's
17 finding that petitioner did not fairly present a federal claim and therefore it is procedurally
18 defaulted. Having already objected petitioner's stated reason for "cause and prejudice," we
19 deny relief on ground three.

20 **Ground Four**

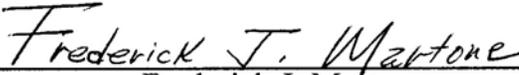
21 Petitioner's final ground for relief asserts that his Sixth Amendment right to
22 confrontation was violated when the trial court permitted one of his accusers to testify by
23 way of videotape without any showing that she was legally unavailable. The Magistrate
24 Judge considered this claim on the merits and found that petitioner did not show that the state
25 court's decision was contrary to, or an unreasonable application of, clearly established federal
26 law. Specifically, the Magistrate Judge noted that the trial court made particularized findings
27 which were sufficient to justify the special protection afforded to the witness. See Maryland
28 v. Craig, 497 U.S. 836, 852-53, 110 S.Ct. 3157, 3167 (1990). Petitioner objects arguing that

1 there was an unreasonable application of federal law because there was no evidence
2 justifying special protection.

3 Petitioner's objections do not persuade us that the Magistrate Judge's findings are
4 incorrect. After reviewing the court proceedings and Report and Recommendation, we agree
5 that this was not an unreasonable application of federal law. We deny relief on ground four.

6 Based on our *de novo* review of petitioner's claims, **IT IS ORDERED DENYING**
7 petitioner's petition for writ of habeas corpus (doc. 1). Because petitioner has not made a
8 substantial showing of the denial of a constitutional right, **IT IS FURTHER ORDERED**
9 **DENYING** a Certificate of Appealability and leave to proceed *in forma pauperis* on appeal.

10 DATED this 15th day of July, 2011.

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14 Frederick J. Martone
15 United States District Judge
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