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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

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Robert D. Bixler,

No. CV10-0734-PHX-DGC

10

Plaintiff,

ORDER

11

vs.

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Charles L. Ryan, et al.,

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Defendants.

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Robert Dennis Bixler corresponded online with an Arizona undercover officer who he thought was a 13 year old girl. Doc. 23 at 14. He emailed the girl links to visual media of a minor engaging in sex acts, along with other pictures. *Id.* at 10-11, 14. He also talked with the girl over the phone, and traveled to Phoenix for the purpose of having sex with her at a Mesa hotel. *Id.* at 14. Bixler was indicted on several counts, pled guilty to one count of sexual exploitation of a minor and one count of luring a minor for sexual exploitation, and was sentenced to 17 years' incarceration on the first count and lifetime probation on the second. *Id.* at 1.

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Petitioner filed a motion for post-conviction relief, but his post-conviction counsel found that no error had occurred in the conviction process. Petitioner subsequently filed his own post-conviction brief, the arguments of which were rejected summarily by the trial court. The Arizona Court of Appeals and Arizona Supreme Court denied review. On April 1, 2010, Petitioner Bixler filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254. Doc. 1. On April 7, 2011, Magistrate Judge Edward C. Voss filed a Report & Recommendation

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1 (“R&R”) that the petition, a Certificate of Appealability (“COA”), and leave to appeal *in*
2 *forma pauperis* be denied. Doc. 23. Petitioner filed objections to the R&R on June 16 and
3 also requested appointment of counsel and an evidentiary hearing. Doc. 26. The matter has
4 been fully briefed.

5 The Court may accept, reject, or modify, in whole or in part, the findings or
6 recommendations made by a magistrate judge in a habeas case. *See* 28 U.S.C. § 636(b)(1).
7 The Court must undertake *de novo* review of those portions of the R&R to which specific
8 objections are made. *See* § 636(b)(1)(c); Fed. R. Civ. P. 72(b); *United States v. Reyna-Tapia*,
9 328 F.3d 1114, 1121 (9th Cir. 2003). The Court has reviewed *de novo* Petitioner’s specific
10 objections in this case and will accept the R&R for the reasons discussed below.

11 **I. Discussion of Claims for Habeas Relief.**

12 Petitioner seeks relief on three grounds: ineffective assistance of counsel, individual
13 errors as well as cumulative effects; involuntary plea; and jurisdictional defects.

14 **A. Ineffective Assistance of Counsel.**

15 The R&R concluded that the individual ineffective assistance (“IA”) claims fail
16 because (1) the pre-plea IA claims not related to voluntariness of the plea are barred by
17 Petitioner’s unconditional guilty plea and also fail for other reasons (Doc. 23 at 9, 11, 13,
18 15); (2) IA claims regarding prejudicial statements by counsel at the sentencing hearing have
19 no merit (*id.* at 12); and (3) the state court’s summary denial of the IA claims was not an
20 unreasonable application of federal law or an unreasonable determination of facts (*id.* at 10,
21 12, 13, 14, 15, 16). The R&R also concluded that the claim for violation of due process
22 based on the cumulative effects of 11 mistakes by trial counsel (1) was not fairly presented
23 to the state courts, has not been exhausted, and is now procedurally defaulted; (2) cannot be
24 excused by “inadequate access to legal resources”; and (3) does not show a miscarriage of
25 justice so as to overcome procedural default. *Id.* at 5-6. Petitioner objects to the R&R’s
26 conclusions as incorrect. Doc. 26 at 2-11.

27 **1. Pre-plea Mistakes.**

28 The Supreme Court has held that while pre-plea constitutional violations cannot be

1 challenged on appeal or habeas, the “voluntary and intelligent character of [a] guilty plea”
2 may be collaterally attacked. *Tollett v. Henderson*, 411 U.S. 258, 267 (1973). When
3 challenging the intelligent character of the guilty plea with regard to ineffective assistance,
4 however, a petitioner “must demonstrate that the advice [of his attorney] was not ‘within the
5 range of competence demanded of attorneys in criminal cases.’” *Id.* at 266. It is not
6 sufficient for a petitioner to show “that if counsel had pursued a certain factual inquiry such
7 a pursuit would have uncovered a possible constitutional infirmity in the proceedings.” *Id.*
8 at 267.

9 While the R&R has found in part that Petitioner’s challenges do not amount to an
10 attack on the voluntariness of the plea, Petitioner argues that the pre-plea mistakes by counsel
11 go to the “intelligent” aspect of his guilty plea. Doc. 26 at 7-9. Petitioner argues that he was
12 not given sufficient information regarding the strength of the case against him before making
13 the plea, that trial counsel would have found constitutional errors had the grand jury
14 transcripts been reviewed, and that counsel failed to conduct a pre-trial investigation into the
15 charges, opting instead to scare Petitioner into accepting a plea by impressing upon him the
16 prospect of a heavy sentence should Petitioner invoke his right to trial. *Id.*

17 In reviewing ineffective-assistance claims in this circuit, “[c]ourts must be ‘highly
18 deferential’ to counsel’s performance . . . [and] ‘the defendant must overcome the
19 presumption that, under the circumstances, the challenged action might be considered sound
20 trial strategy.’” *Hein v. Sullivan*, 601 F.3d 897, 918 (9th Cir. 2010) (citation omitted). Even
21 if attorney error is shown, a petitioner must further show with “reasonable plausibility” that
22 but for counsel’s unprofessional errors the result of the proceeding would have been
23 different. *Leavitt v. Arave*, ___ F.3d ___, 2011 WL 1844064, *7 (9th Cir. May 17, 2011). In
24 light of the record, the Court concludes that even if attorney error is assumed, Petitioner has
25 failed to meet the second prong above.

26 First, Petitioner fails to state what his maximum sentence would have been had he
27 been convicted at trial of all indicted counts. Petitioner does, however, note that it would
28 have been a “draconian sentence.” Doc. 26 at 8. By admitting his guilt – and Petitioner is

1 not arguing actual innocence on habeas – Petitioner received only 17 years’ imprisonment
2 and lifetime probation. On the basis of this record, the Court cannot find that Petitioner has
3 shown he would have made a different choice but for his counsel’s alleged errors.

4 Second, Petitioner urges that had he known the prosecutor had the burden of proving
5 beyond a reasonable doubt the images he sent were of real minors, he would not have
6 accepted the plea deal. *Id.* at 18. But Petitioner does not show how this prosecutorial burden
7 would have impaired the case against him or otherwise resulted in his acquittal. It also bears
8 mention that this assertion is at odds with Petitioner’s parallel contention that he lacked the
9 capacity to make a voluntary choice due to psychotropic medications. Assuming Petitioner
10 was capable of rational decision-making, the Court cannot conclude that Petitioner, knowing
11 he engaged in the conduct the prosecution alleged, would have decided to take his chances
12 at trial when he was admittedly staring at a “draconian sentence” if his gamble on a trial did
13 not pan out.

14 Third, the R&R observed that “Petitioner’s vague and conclusory claim . . . contains
15 nothing to show that a review of the grand jury transcript would have had any impact on the
16 charges.” Doc. 23 at 8. On this basis the R&R concluded the state court’s summary denial
17 of this IA claim was not an unreasonable application of law or determination of facts.
18 Doc. 23 at 8. Petitioner fails to show how reviewing the prosecutor’s grand jury presentation
19 would have changed the indicted counts that proceeded to trial. Moreover, Petitioner has
20 failed to persuade the Court that a review of the transcript would have led him to make a
21 different choice regarding the plea agreement, for the same reasons as discussed above.

22 In short, Petitioner has not plausibly shown that, but for counsel’s alleged errors, the
23 result of the state-court proceeding would have been different.

24 **2. Statements Made by Counsel.**

25 Petitioner frames the R&R’s conclusions on this issue as incorrect, but fails to show
26 how the R&R erred – other than to argue that trial counsel should have made a different
27 argument before the trial court. Doc. 26 at 11. The R&R found trial counsel’s statements
28 were not prejudicial, and Petitioner’s objections have failed to show that “there is a

1 reasonable probability that, but for counsel’s unprofessional errors, the result of the
2 proceeding would have been different,” *Leavitt*, 2011 WL 1844064, *16.

3 **3. Counsel’s Failure to Ascertain Mental Competency.**

4 Petitioner asserts the R&R erred when it concluded that the record clearly refutes
5 Petitioner’s lack of competency. Doc. 26 at 9-10. The dispositive issue, however, is whether
6 trial counsel’s performance “fell below an objective standard of reasonableness” when
7 viewed at the time of performance. *Strickland v. Washington*, 466 U.S. 668, 688-89 (1984).

8 The transcript of the change of plea hearing reflects that Petitioner understood the
9 questions posed to him by the judge and responded appropriately. Doc. 16-1. Petitioner
10 specifically confirmed that his medications did not affect his ability to understand the nature
11 of the proceedings in any way. *Id.* at 58. A defendant’s contemporaneous statements
12 regarding his understanding of the plea agreement carry substantial weight in determining
13 the voluntariness of a guilty plea. *United States v. Mims*, 928 F.2d 310, 313 (9th Cir. 1991).
14 The Court may properly credit a defendant’s testimony at a hearing regarding entry of a
15 guilty plea over any subsequent declarations to the contrary. *See United States v. Castello*,
16 724 F.2d 813, 815 (9th Cir. 1984). Given the fact that Petitioner appeared competent and
17 responded appropriately at the plea hearing, the Court cannot determine that counsel’s
18 performance in ascertaining his competency fell below an objective standard of
19 reasonableness.

20 **4. Remaining IA Claims.**

21 Petitioner’s objection to the individual IA claims not discussed above is not
22 sufficiently specific, and therefore the Court will adopt the R&R as to those claims.

23 **5. Cumulative Error.**

24 Petitioner argues he has shown cause excusing procedural default because he was
25 intentionally deprived of access to Supreme Court case law and did not reasonably know he
26 had to argue “cumulative effect.” Doc. 26 at 3. Petitioner asserts that Supreme Court
27 reporters were removed by corrections officials after *Lewis v. Casey*, 518 U.S. 346 (1996).
28 Doc. 26 at 3. As the Court recognized in *Lewis*, however, “an inmate cannot establish

1 relevant actual injury simply by establishing that his prison’s law library or legal assistance
2 program is subpar in some theoretical sense.” *Id.* at 351. Even if Petitioner had argued
3 “cumulative effect,” the record here does not show the alleged cumulative error “so infected
4 the trial with unfairness as to make the resulting conviction a denial of due process,” *Hein*,
5 601 F.3d at 917 (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)). Petitioner
6 pled guilty pursuant to a plea agreement, received a prison sentence in the middle of the
7 range, and avoided the alternative of a “draconian sentence” had he lost at trial (Doc. 26 at
8 8). As discussed in more detail above, the Court is not persuaded that counsel’s cumulative
9 conduct resulted in denial of due process.

10 The Court will accept the R&R and deny habeas relief as to this ground.

11 **B. Voluntariness of Guilty Plea.**

12 The claim that the guilty plea was not voluntary due to Petitioner’s use of
13 psychotropic medications was denied by the state court, and the R&R concluded that
14 Petitioner has not shown an unreasonable application of law or an unreasonable
15 determination of facts. Doc. 23 at 17. Petitioner asserts this finding is erroneous. Doc. 26
16 at 12-13.

17 Petitioner fails to cite to medical evidence from a competent specialist that the
18 medication he took in fact altered his mental capacity.¹ Moreover, elsewhere in the objection
19 Petitioner argues that he would have made a decision to proceed to trial had he been
20 informed of the prosecution’s burden. Assuming that Petitioner was on the same medication
21 throughout the pre-plea proceedings, the Court fails to see how – in the absence of medical
22 evidence to the contrary – Petitioner’s choice to plead guilty was not voluntary but his choice
23 to proceed to trial would have been. Moreover, as noted above, the transcript of the change
24 of plea hearing shows that Petitioner understood the plea colloquy and responded
25 appropriately throughout. Doc. 16-1.

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27 ¹ Petitioner does not rely on the psychophysiological evaluation performed by the
28 public defender’s expert (Doc. 16-1 at 18-39), nor is this evaluation availing on this issue.

1 On habeas review a petitioner has the burden of substantiating his claim to relief with
2 competent evidence. Petitioner has failed to do so here, and the Court therefore adopts the
3 R&R and will deny relief on this ground.

4 **C. Arizona’s Criminal Jurisdiction.**

5 Petitioner argues that Arizona lacked criminal jurisdiction over him because he was
6 at home in New Mexico when the electronic exchange took place, any media he transmitted
7 was sent to Yahoo’s California servers, and the undercover officer who posed as a minor
8 downloaded the media from the California servers. Doc. 27 at 17. The R&R found that this
9 argument was an issue of state law not cognizable in a habeas petition. Doc. 23 at 17:27-28.
10 Because Petitioner has not objected specifically to this ground (Doc. 26 at 13), the Court will
11 deny relief on this ground. The also Court notes, however, that the target of Petitioner’s acts
12 was in Arizona throughout the time when the crimes were committed (*see id.* at 10:24-27;
13 Doc. 1 at 8).

14 **II. Evidentiary Hearing, COA, and Appeal *In Forma Pauperis*.**

15 The R&R concluded that Petitioner is “not entitled to an evidentiary hearing because
16 his petition fails to raise any colorable claims for relief.” Doc. 26 at 18. Having reviewed
17 the merits of Petitioner’s claims as discussed above, the Court agrees. The R&R also
18 recommended denying a COA and leave to appeal *in forma pauperis* because “Petitioner has
19 not made a substantial showing of the denial of a constitutional right.” *Id.* Petitioner has
20 failed to establish that a COA and leave to appeal *in forma pauperis* are warranted, and the
21 Court therefore adopts these recommendations. The Court also concludes that Petitioner has
22 been sufficiently able to set forth his arguments, and that appointment of counsel is not
23 warranted.

24 **IT IS ORDERED:**

- 25 1. The R&R (Doc. 23) is **accepted** and the petition for writ of habeas corpus is
26 **denied.**
- 27 2. The Court declines to issue a Certificate of Appealability as stated above.
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3. The Court denies leave to appeal *in forma pauperis* as stated above.

DATED this 12th day of August, 2011.



David G. Campbell
United States District Judge