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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Brandon Scott Terry,
Petitioner,

vs.

Charles L. Ryan, et al.,
Respondents.

No. CV-12-0888-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’ response (doc. 13), first supplemental response (doc. 20), and second supplemental response (doc. 28), petitioner’s reply to first supplemental response (doc. 24), and reply to second supplemental response (doc. 31). We also have before us the Report and Recommendation of the United States Magistrate Judge recommending that the petition for writ of habeas corpus be denied (doc. 32), and petitioner’s objections (doc. 33).

I

On November 4, 2008, petitioner was indicted in state court on one count of aggravated assault, a class 3 dangerous felony. The evidence indicated that following an argument, petitioner approached the victim while she was sitting in a parked car. Carrying two knives, petitioner is alleged to have repeatedly stabbed the victim’s car, slashed a tire and

1 threatened to kill her. After a two-day trial, petitioner was convicted by a jury as charged.
2 Petitioner, having had two prior felony convictions, was sentenced to a minimum term of
3 11.25 years imprisonment.

4 On April 27, 2012, petitioner filed the instant habeas petition, asserting six grounds
5 for relief: (1) violation of his constitutional right to a fair trial when the victim was
6 “coaching” witnesses; (2) violation of his constitutional right to a fair trial when the
7 prosecutor impeached a defense witness with her prior statement to a 911 operator, although
8 the operator was not available for cross-examination; (3) violation of federal due process
9 when the trial court failed to inform petitioner of his rights under Boykin v. Alabama, 395
10 U.S. 238 (1969); (4) ineffective assistance of counsel at trial, on direct appeal, and during
11 post-conviction proceedings in violation of Sixth Amendment rights; (5) violation of federal
12 due process when his mental competency was not evaluated; and (6) violation of federal due
13 process because no black jurors served on his jury.

14 II

15 We first agree with the Magistrate Judge’s conclusion that petitioner failed to properly
16 exhaust grounds 1 and 3 through 6. In each case, petitioner failed to fairly present his federal
17 claims to the Arizona Court of Appeals. These unexhausted claims are now procedurally
18 defaulted. Therefore, petitioner may not obtain federal habeas relief on these claims absent
19 a showing of cause and prejudice sufficient to excuse the default. Reed v. Ross, 468 U.S. 1,
20 11, 104 S. Ct. 2901, 2908 (1984).

21 Petitioner has raised ineffective assistance of counsel as cause to excuse his
22 procedural default. After a thorough evaluation, the Magistrate Judge concluded that none
23 of petitioner’s claims of ineffectiveness of counsel constitute cause. After *de novo* review
24 of each of these claims, we also conclude that petitioner’s claims of ineffective assistance of
25 counsel do not constitute cause to excuse his procedurally defaulted claims.

26 Petitioner also asserts broad claims of actual innocence, but he makes no showing that
27 “it is more likely than not that no reasonable juror would have convicted him in light of the
28 new evidence” presented in his habeas petition. Schlup v. Delo, 513 U.S. 298, 327, 115 S.

1 Ct. 851, 867 (1995).

2 We conclude that petitioner has failed to properly exhaust his state remedies on the
3 claims presented in grounds 1 and 3 through 6, and these claims are now procedurally
4 defaulted. We also conclude that petitioner has failed to demonstrate cause and prejudice or
5 actual innocence to excuse the defaults. Therefore, we agree with the Magistrate Judge that
6 these claims must be dismissed with prejudice.

7 **III**

8 The Magistrate Judge concluded that the only claim that was properly exhausted is
9 the Confrontation Clause claim presented in ground 2. Petitioner argues that he was denied
10 his right to a fair trial in violation of the Confrontation Clause when the trial court allowed
11 a defense witness, petitioner's girlfriend, to be impeached with her own prior statements to
12 the 911 operator, although the 911 operator was not made available for cross-examination.

13
14 Neither the 911 recording nor the statements by the 911 operator were offered at trial,
15 and therefore are not at issue here. The witness was only asked about her own statements to
16 the 911 operator. This is not hearsay. The witness was fully competent to testify as to her
17 own statements without the admission of the 911 transcript or the availability of the 911
18 operator. We agree with the Magistrate Judge that these statements were not hearsay subject
19 to the Confrontation Clause. Therefore, ground 2 is without merit and is denied.

20 **IV**

21 After *de novo* consideration of each of the claims presented in the habeas petition, we
22 accept the recommended decision of the United States Magistrate Judge pursuant to Rule
23 8(b), Rules Governing § 2254 Cases. Therefore, **IT IS ORDERED DENYING** and
24 **DISMISSING WITH PREJUDICE** the petition for writ of habeas corpus (doc. 1).

25 Because petitioner has not made a substantial showing of the denial of a constitutional
26 right and because the dismissal of the petition is justified by a plain procedural bar and jurists
27 of reason would not find the procedural ruling debatable, **IT IS FURTHER ORDERED**
28 **DENYING** a certificate of appealability and leave to proceed *in forma pauperis* on appeal.

1 DATED this 12th day of August, 2013.

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3 *Frederick J. Martone*

4 Frederick J. Martone
5 Senior United States District Judge
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