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NOT FOR PUBLICATION

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

Jeremy Dean Garcia,  
Petitioner,  
v.  
Charles L. Ryan, et al.  
Respondents.

No. CV-12-01310-PHX-SRB  
**ORDER**

Petitioner Jeremy Dean Garcia filed his Petition for Writ of Habeas Corpus on June 12, 2012 raising six grounds for relief. Petitioner claims: 1) there was insufficient evidence to support his conviction on several counts; 2) trial counsel was ineffective because she pressured him not to testify at trial; 3) trial counsel was ineffective because she failed to call character witnesses on Petitioner’s behalf; 4) trial counsel was ineffective because she failed to request a *Willits* instruction; 5) the trial court erred in sentencing defendant pursuant to A.R.S. § 13-604.01; and 6) trial and appellate counsel were both ineffective because they failed to challenge his sentences and appellate counsel was also ineffective by failing to raise Petitioner’s claim regarding his desire to testify at trial. Respondents filed a limited answer asserting that Petitioner’s claims were procedurally defaulted and barred from federal habeas corpus review or were not cognizable on federal habeas corpus review. Petitioner’s reply argued that if there were a procedural fault there was cause to excuse it.

1 On July 16, 2013, the Magistrate Judge filed her Report and Recommendation  
2 recommending that the Petition be denied and further recommending that a certificate of  
3 appealability and leave to proceed in forma pauperis on appeal be denied. Petitioner filed  
4 timely written objections on August 2, 2013.

5 **Ground I – Sufficiency of the Evidence**

6 The Magistrate Judge concluded that Petitioner’s request for federal habeas  
7 corpus review based on sufficiency of the evidence should be denied because Petitioner’s  
8 sufficiency of the evidence claim was based only on state law grounds and federal habeas  
9 corpus relief is not available for alleged violations of state law or for alleged error in the  
10 interpretation of state law. Petitioner’s objection to the Magistrate Judge’s  
11 recommendation on Ground I is that it is his position that his conviction and detention  
12 were “based upon acts not legislatively delineated as to give notice of their prohibition is  
13 violative of due process under both federal and state analysis, must be subject to review  
14 by the federal courts.” (Doc. 20, Pet’r’s Objections to the Proposed Findings and  
15 Recommendations (“Pet’r’s Objection”) at 2).

16 Petitioner’s objection will be overruled. Petitioner presented this state law claim  
17 on appeal and based his claim only on state law grounds. His habeas petition also based  
18 his sufficiency of the evidence claim only on state law grounds. For the first time in his  
19 objections Petitioner states his position that Arizona state law did not give him sufficient  
20 notice that the acts for which he was convicted were prohibited and his opinion that that  
21 is a federal due process violation. In addition to stating no authority for his opinion, the  
22 basis for the denial of habeas relief on Ground I, as noted by the Magistrate Judge, was  
23 that Petitioner presented this as a state law claim on appeal and in his habeas petition.  
24 Even if his opinion were supported by any authority, Petitioner cannot raise a federal  
25 claim for the first time in his objections.

26 **Ground II - Ineffective Assistance of Counsel**

27 Petitioner raised this claim in state court on post-conviction review. The trial court  
28 found that his claim that his lawyer applied overbearing pressure to prevent him from

1 testifying at trial was not supported by the trial transcript. Instead, the trial transcript  
2 showed that the trial judge had reviewed with Petitioner his right to testify and advised  
3 Petitioner that it was Petitioner's decision whether to testify and not his counsel's.  
4 Petitioner advised the court that he did not wish to testify. On this basis the state court  
5 rejected this claim of ineffective assistance of counsel. The Magistrate Judge also noted  
6 that the appellate court in affirming the trial court found that Petitioner failed to explain  
7 how his counsel prevented him from testifying and Petitioner provided no information  
8 about how he would have testified at trial. The appellate court concluded that Petitioner  
9 had not established that but for counsel's deficient performance there was a reasonable  
10 probability that the outcome of his trial would have been different.

11 The Magistrate Judge observed that Petitioner did not challenge the state court's  
12 conclusion about the trial transcript reflecting that he waived his right to testify after a  
13 discussion with the trial judge. Petitioner also failed to provide any specific information  
14 in his Petition regarding the substance of the testimony he would have given at trial. The  
15 Magistrate Judge concluded that Petitioner failed to show that the state court's decision  
16 on post-conviction relief was contrary to clearly established law, based on an  
17 unreasonable application of clearly established federal law, or based on an unreasonable  
18 determination of the facts considering the evidence presented in the state court  
19 proceeding.

20 In his Objection to the recommendation for denial of relief on Ground II,  
21 Petitioner states only that his testimony was vital to his defense and without such  
22 testimony "to contravene the state's version of events was fatal to said defense thereby  
23 rendering his assistance of counsel ineffective." (*Id.* at 2). He argues that the Court  
24 should infer that his testimony at trial would have been that the accusations against him  
25 were fabricated. While this Court may conclude that generally Petitioner would have  
26 denied the allegations against him, Petitioner still fails to show that he was prejudiced as  
27 a result of counsel's allegedly deficient performance or fails to show that the findings of  
28 the state court were based on an unreasonable determination of the facts considering the

1 evidence presented. Petitioner's objection to the recommendations with respect to  
2 Ground II is overruled.

### 3 **Ground III – Ineffective Assistance of Counsel**

4 The ineffective assistance of counsel claim in Ground III is that trial counsel was  
5 ineffective because she failed to present several unidentified character witnesses on  
6 Petitioner's behalf. This was noted on post-conviction review when the state court found  
7 that by failing to specify how the character witnesses would have testified Petitioner  
8 failed to show that but for counsel's alleged deficient performance there was a reasonable  
9 likelihood that the outcome of the trial would have been different.

10 The Magistrate Judge concluded that Petitioner had not shown that the state  
11 court's resolution of this claim was contrary to or an unreasonable application of  
12 *Strickland v. Washington*, 466 U.S. 668 (1984). *Strickland* requires that Petitioner show  
13 that counsel's performance was objectively deficient and that counsel's deficient  
14 performance prejudiced the Petitioner. In his Objections to the Magistrate Judge's  
15 recommendation for denial of relief on Ground III, Petitioner states that the character  
16 witnesses were to send sworn statements to the court under separate cover. He also states  
17 that Petitioner's understanding was that all these witnesses were willing and able to  
18 testify as to his good character. But Petitioner knew, based on the state court's resolution  
19 this claim, that there were no sworn statements sent to the court under separate cover in  
20 support of his claim of ineffective assistance of counsel.

21 This Court's review on a federal habeas petition requires Petitioner to show that  
22 the state court's rejection of his claim of ineffective assistance of counsel was contrary to  
23 clearly established federal law, was based on an unreasonable application of clearly  
24 established federal law, or was based on an unreasonable determination of the facts  
25 considering the evidence presented in state court. Petitioner has not met that standard  
26 here. His objections to the Magistrate Judge's recommendation for denial of federal  
27 habeas relief on Ground III are overruled.

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1 not ineffective for failing to challenge his sentence.

2 The habeas petition contained only a single sentence with respect to this claim.  
3 Petitioner said, “both trial and appellate counsel should have briefed and argued the  
4 unconstitutionality of the matter in which defendant was sentenced.” (Doc. 1, Pet’r’s Pet  
5 for Writ of Habeas Corpus at 12) The Magistrate Judge correctly concluded that this  
6 conclusory assertion is not sufficient to show that the state court’s decision was contrary  
7 to clearly established federal law, was based on an unreasonable application of clearly  
8 established federal law, or was based on an unreasonable determination of the facts  
9 considering the evidence presented in the state court.

10 The other claim of ineffective assistance of counsel in Ground VI is that appellate  
11 counsel failed to raise the claim about Petitioner being pressured not to testify. The  
12 Magistrate Judge found that Petitioner did not exhaust available state remedies with  
13 respect to this claim, that any return to state court on this claim would be futile, and  
14 therefore, the claim is barred from federal habeas review unless Petitioner could show  
15 cause and prejudice or a fundamental miscarriage of justice to overcome the procedural  
16 bar. The Magistrate Judge concluded that Petitioner has failed to do this.

17 Petitioner’s Objection to the Magistrate Judge Report and Recommendation on  
18 Ground VI is again only a single sentence. Petitioner says, “As to ground six, it is a  
19 federal claim that both trial and appellate counsel were ineffective and worthy of the  
20 court’s review and relief.” (Pet’r’s Objection at 3) This objection fails to show that the  
21 Magistrate Judge erred in her recommendation concerning the procedural bar of the claim  
22 of ineffective assistance of appellate counsel with respect to Petitioner wanting to testify  
23 and her recommendation on the merits of the ineffective assistance of trial and appellate  
24 counsel claim regarding his sentencing under Arizona law. Petitioner’s Objection to the  
25 Report and Recommendation as to Ground VI is overruled.

26 IT IS ORDERD overruling Petitioner’s Objections to the Report and  
27 Recommendation of the Magistrate Judge.

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IT IS FURTHER ORDERED adopting the Report and Recommendation of the Magistrate Judge as the Order of this Court.

IT IS FURTHER ORDERED that the Petition for Writ of Habeas Corpus is denied.

IT IS FURTHER ORDERED that a Certificate of Appealability and leave to proceed in *forma pauperis* on appeal is denied because denial of the petition is justified by a plain procedural bar and reasonable jurists would not find the procedural ruling debatable and because Petitioner has not made a substantial showing of the denial of a constitutional right.

Dated this 29th day of August, 2013.

  
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Susan R. Bolton  
United States District Judge