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

Jimmy Kelly Contreras,
Petitioner,
v.
Charles L. Ryan, et al.,
Respondents.

No. CV-13-01590-PHX-ROS
ORDER

Magistrate Judge Michelle H. Burns issued a Report and Recommendation (“R&R”) recommending the petition for writ of habeas corpus be denied and dismissed with prejudice. Petitioner filed timely objections. The Court called for supplemental briefing, which Respondents submitted but Petitioner did not. For the following reasons, the R&R will be adopted in full.

I. Standard of Review for R&R

A district judge “may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge.” 28 U.S.C. § 636(b). A district judge must review de novo the portions to which an objection is made but a judge need not review the portions to which no objection is made. *See Schmidt v. Johnstone*, 263 F. Supp. 2d 1219, 1226 (D. Ariz. 2003) (“[D]e novo review of factual and legal issues is required if objections are made, but not otherwise.”) (quotation marks and citation omitted).

1 **II. Factual Background**

2 Petitioner does not object to the factual and procedural background recited by the
3 Magistrate Judge. Therefore, it will be adopted. In brief, Petitioner was convicted of
4 sexually abusing his 14-year old stepdaughter as well as physically abusing and confining
5 three other stepdaughters. He was sentenced to consecutive sentences totaling more than
6 250 years. Petitioner pursued a direct appeal where all his convictions were affirmed.
7 He then pursued state post-conviction relief. Petitioner was appointed counsel in
8 connection with his post-conviction proceedings but that counsel was unable to find any
9 grounds for relief. Petitioner filed a pro se petition for post-conviction relief but the
10 superior court concluded all claims raised in the petition were either “precluded, waived,
11 or baseless.”

12 Petitioner appealed the denial of post-conviction relief. The Arizona Court of
13 Appeals interpreted the appeal as asserting a variety of theories involving ineffective
14 assistance of counsel (“IAC”) that Petitioner had not raised below. The Arizona Court of
15 Appeals rejected all of Petitioner’s claims, finding them procedurally precluded. (Doc. 8-
16 4 at 108). The Arizona Supreme Court denied review and Petitioner then filed the
17 present federal petition.

18 **III. Federal Petition and Objections**

19 The federal petition raises five grounds for relief involving IAC of trial counsel
20 and IAC of appellate counsel. (Doc. 4 at 2). The petition asserts all these claims were
21 exhausted during state court proceedings. In their response, Respondents argue all the
22 claims are procedurally defaulted. Petitioner’s reply reiterates he exhausted all of his
23 claims during state-court proceedings. (Doc. 9 at 4) (“Petitioner has left none of his
24 claims unexhausted in state court . . .”). The reply also contains the following passage:

25 Petitioner brings forth his federal habeas corpus claims to this court
26 because of the violation of his secured constitutional rights. Petitioner[’s]
27 claims of IAC are the legitimate reason as to why his claims were dropped
28 and not waived by the Petitioner throughout the post-conviction relief
efforts. Petitioner’s counsel failed to follow the state[’s] procedural rule
and thus was ineffective, cause for a claim of not being reasonably

1 available to Petitioner is implied by the IAC claims brought before the
2 court.

3 (Doc. 9 at 9).

4 It is not clear what this passage means. It may be an attempt by Petitioner to argue his
5 post-conviction relief counsel was ineffective such that the default of his claims involving
6 IAC of trial and appellate counsel should be excused. The Magistrate Judge,
7 understandably, did not interpret this passage or any other aspect of Petitioner's filings as
8 making such an argument. Instead, the Magistrate Judge looked to the underlying record
9 and determined Petitioner failed to exhaust his claims and the claims were all
10 procedurally defaulted.

11 Petitioner filed objections to the R&R but those objections do not point out
12 *specific* flaws in the Magistrate Judge's analysis. Instead, Petitioner made only general
13 objections. Such objections have "the same effect as would a failure to object." *Warling*
14 *v. Ryan*, 2013 WL 5276367, at *2 (D. Ariz. Sept. 19, 2013). That is, general
15 objections—just like a failure to object—mean the Court need not conduct *any* review of
16 the R&R. Despite the lack of appropriate objections, the Court called for supplemental
17 briefing regarding Petitioner's alleged default of all of his claims. (Doc. 14). In their
18 supplemental brief, Respondents claim Petitioner failed "to plead and prove" a basis for
19 excusing the procedural default of his claims. (Doc. 16 at 1). Thus, Respondents request
20 the Court enforce the procedural default of all of the claims. Petitioner did not file a
21 supplemental brief.

22 **IV. Analysis of Claims**

23 The R&R concluded Petitioner did not properly exhaust his claims and, therefore,
24 all his claims are procedurally defaulted. The R&R is correct but the Court differs
25 slightly in the path it takes to reach this conclusion.

26 Petitioner did not present to the state courts the IAC theories he has set forth in his
27 federal petition. Thus, the crucial issue is whether there are grounds for excusing
28 Petitioner's default of his current claims. The Supreme Court and Ninth Circuit have

1 created a special rule excusing the default of IAC claims. That rule states “[i]nadequate
2 assistance of counsel at initial-review collateral proceedings may establish cause for a
3 prisoner’s procedural default of a claim of ineffective assistance at trial” or on direct
4 appeal. *Martinez v. Ryan*, 132 S. Ct. 1309, 1315 (2012); *Nguyen v. Curry*, 736 F.3d
5 1287, 1296 (extending *Martinez* to “appellate-counsel IAC”). To take advantage of this
6 rule, a petitioner must “demonstrate that the underlying ineffective-assistance-of-trial [or
7 appellate]-counsel claim is a substantial one, which is to say that the [petitioner] must
8 demonstrate that the claim has some merit.” *Martinez*, 132 S. Ct. at 1318. Thus, in a
9 situation of alleged default, the Court must look to the merits of the claim to determine
10 whether the default should be enforced. *See Sexton v. Cozner*, 679 F.3d 1150, 1157-58
11 (9th Cir. 2012) (explaining court must look to trial counsel’s performance to determine
12 whether post-conviction counsel’s failure to raise IAC-of-trial-counsel constituted IAC-
13 of-post-conviction-counsel such that procedural default should be excused). If an
14 examination of the merits shows the claim is “substantial,” the Court cannot enforce the
15 procedural default.

16 Because the petition *might* have attempted to raise the rule outlined above, the
17 Court will look to the merits of the underlying claims. The merits of Petitioner’s various
18 IAC claims are subject to the same standard: “To establish an ineffective assistance of
19 counsel claim, [Petitioner] must show: (1) that counsel’s performance was deficient; and
20 (2) that the deficient performance prejudiced his defense.” *Sexton*, 679 F.3d. at 1159. On
21 the first prong, there is a strong presumption that counsel’s performance was not
22 deficient. *Id.* And on the second prong, there must be “a reasonable probability that, but
23 for counsel’s unprofessional errors, the result of the proceeding would have been
24 different.” *Id.* In other words, counsel’s failures “undermine confidence in the
25 outcome.” *Id.*

26 **A. IAC Regarding Trial Counsel**

27 Petitioner presents four different theories of IAC of trial counsel. First, trial
28 counsel was ineffective by not pursuing evidence that Petitioner’s “medical history [and]

1 extensive surgical procedures . . . prevented any sexual activity.” (Doc. 1 at 7). Second,
2 trial counsel was ineffective in failing “to adequately impeach the victim’s testimony.”
3 That impeachment should have included counsel calling “expert medical examiners” to
4 testify about the lack of “tissue damage” to the sexual assault victim. Third, trial counsel
5 was ineffective based on the failure to “prepare, find or otherwise procure an expert
6 witness” to rebut the state’s expert witness. Petitioner believes an expert could have
7 testified about his medical conditions that made it impossible for him to “tie up the
8 children” or to sexually abuse one child. (Doc. 1 at 10). And fourth, trial counsel was
9 ineffective in failing to obtain an acquittal “in the face of false and perjured testimony
10 and a complete lack of vaginal (hymen) injury or DNA evidence.” (Doc. 1 at 11).

11 The first prong of the IAC inquiry requires determining whether Petitioner has
12 shown his counsel’s performance was deficient. Petitioner has not. In fact, the record
13 contradicts most of Petitioner’s claims. During trial, Petitioner’s counsel *did* pursue a
14 theory that Petitioner was unable to engage in sexual activity. Counsel called Petitioner’s
15 physician who testified Petitioner had surgery around the time of certain alleged
16 activities. According to the physician, the surgery would have prevented sexual activity
17 for “two to three weeks.” (Doc. 16-3 at 182). But the evidence at trial was that some of
18 the sexual activity occurred “four to five weeks” after Petitioner’s surgery. (Doc. 16-3 at
19 205). Thus, according to the evidence, Petitioner was not incapacitated at the relevant
20 time.

21 The record also establishes counsel did not perform deficiently in cross-examining
22 a prosecution witness regarding the lack of tissue damage to the sexual assault victim.
23 That witness testified that the lack of tissue damage did not prove Petitioner’s innocence.
24 Petitioner has not explained what more counsel should have done in light of this
25 testimony. Petitioner has not adequately explained or proffered the alleged “expert
26 witness” testimony he believes his counsel should have used to rebut the prosecution’s
27 witness.

28 Finally, the record establishes counsel did not perform deficiently in cross-

1 examining the victims. That cross-examination was quite minimal. However, the limited
2 cross-examination did highlight inconsistencies in the testimony. And it could have been
3 a reasonable trial strategy not to aggressively attack children testifying regarding sexual
4 and physical abuse. *See Murray v. Schriro*, 745 F.3d 984, 1011 (9th Cir. 2014) (“We
5 must therefore begin any ineffective assistance of counsel inquiry with the premise that
6 under the circumstances, the challenged action[s] might be considered sound trial
7 strategy.”) (quotation marks and citations omitted).

8 Petitioner has not established his trial counsel was deficient, meaning he cannot
9 satisfy the first prong of the IAC standard. But even if the Court were to assume
10 Petitioner *had* shown deficient performance, he has not shown he suffered prejudice as a
11 result. When assessing prejudice, the Court must keep in mind that “a verdict or
12 conclusion only weakly supported by the record is more likely to have been affected by
13 errors than one with overwhelming record support.” *Strickland v. Washington*, 466 U.S.
14 668, 696 (1984). This case involved overwhelming evidence of Petitioner’s guilt. As
15 explained by the state trial court when denying Petitioner’s request to conduct post-trial
16 DNA testing:

17 [T]he jury was presented with evidence of [Petitioner’s] guilt that was
18 overwhelming, compelling and credible regardless of [the lack of] any
19 DNA results. The several young victims all testified convincingly, in detail
and at length about [Petitioner’s] violent crimes against them.

20 (Doc. 8-4 at 55). In addition to the children’s testimony, the children’s mother also
21 testified about injuries she observed on the children after Petitioner “‘took over’
22 disciplining them.” (Doc. 8-1 at 99). The mother testified Petitioner hit the children with
23 fly swatters, whipped them with electrical cords, and “beat them in the closet until they
24 bled.” (Doc. 8-1 at 100). The mother also recounted witnessing Petitioner hit one child
25 in the face “many times” and that Petitioner broke the child’s nose. Another non-victim
26 child provided corroborating testimony that Petitioner was responsible for various
27 injuries inflicted on the children. (Doc. 8-1 at 100). In light of this overwhelming
28 evidence, the alleged deficiencies outlined by Petitioner do not provide any reasonable

1 basis to conclude the result of the proceeding might have been different if only counsel
2 had done what Petitioner now believes counsel should have done.

3 Because neither prong of the *Strickland* inquiry has been met, Petitioner has not
4 made a “substantial” showing that trial counsel was ineffective. *Martinez v. Ryan*, 132 S.
5 Ct. 1309, 1318 (2012). Therefore, there is no basis for excusing the procedural default of
6 the trial counsel IAC claims.

7 **B. IAC Regarding Appellate Counsel**

8 Petitioner argues counsel on direct appeal was ineffective by failing to raise an
9 argument regarding “prosecutorial misconduct.”¹ That misconduct allegedly occurred
10 when the prosecutor allowed a police detective to testify about the children’s health and
11 injuries despite that testimony being in conflict with medical reports. (Doc. 1 at 9).
12 There is no plausible reason to conclude appellate counsel should have raised this
13 argument as it has no legal basis. That is, the record does not establish that calling the
14 detective to testify qualified as misconduct. Therefore, the failure to raise the issue could
15 not have been deficient performance. Moreover, Petitioner could not have been
16 prejudiced by counsel’s alleged failure; if the issue had been raised, the outcome of the
17 proceeding would have been the same. Therefore, Petitioner has not made a “substantial”
18 showing that appellate counsel was ineffective. *Martinez v. Ryan*, 132 S. Ct. 1309, 1318
19 (2012).

20 **C. All Claims Are Procedurally Defaulted**

21 Petitioner has not made a “substantial” showing that he was denied effective
22 assistance of trial or appellate counsel. Therefore, there is no reason to excuse the
23 procedural default of his claims. The conclusion by the Magistrate Judge that all the
24 claims were procedurally defaulted will be adopted.

25 Accordingly,

26 **IT IS ORDERED** the Report and Recommendation (Doc. 10) is **ADOPTED IN**

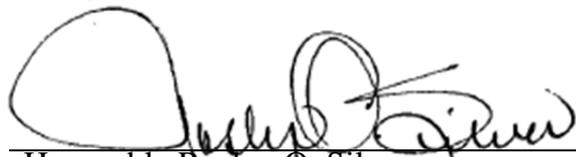
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28 ¹ It is only in the reply in support of his petition that Petitioner makes clear he is attempting to assert this as an IAC claim. (Doc. 9 at 8) (“Petitioner’s appellate counsel was ineffective . . .”).

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FULL and the Petition for Writ of Habeas Corpus (Doc. 1) is **DENIED**.

IT IS FURTHER ORDERED a Certificate of Appealability and leave to proceed in forma pauperis on appeal are **DENIED** because Petitioner has not made a substantial showing of the denial of a constitutional right.

Dated this 25th day of November, 2014.



Honorable Roslyn O. Silver
Senior United States District Judge