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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Frank John Arnold,
Petitioner,
vs.
Charles L. Ryan, et al.,
Respondents.

No. CV-15-00828-PHX-PGR (MHB)

ORDER

Having reviewed *de novo* the Report and Recommendation of Magistrate Judge Burns in light of the petitioner’s Motion to Objection [sic] to Report and Recommendation Filed by Magistrate Judge Michelle H. Burns to Petitioner[’]s Writ of Habeas Corpus and Travers Motion (Doc. 39), the Court finds that the petitioner’s objections should be overruled because the Magistrate Judge correctly concluded that the petitioner’s amended habeas petition, filed pursuant to 28 U.S.C. § 2254, should be denied.

The petitioner was convicted by a jury of conspiracy to commit first-degree murder, which arose from his hiring of an undercover police officer to kill his wife. In Ground One of his amended petition, he alleges that he was denied due process because the police used entrapment to create the crime he was charged with, and

1 in Ground Four, he relatedly alleges that he was denied due process because the
2 county sheriff's office and prosecutor's office manufactured, edited, altered, and
3 destroyed audio and video evidence that was used at trial. The Court agrees with
4 the Magistrate Judge's conclusion, which the petitioner does not discuss in his
5 objections, that these two claims fail because the Arizona Court of Appeals' rejection
6 of them was neither contrary to, or an unreasonable application of, clearly
7 established Supreme Court precedent, nor did it involve an unreasonable
8 determination of the relevant facts in light of the state court record.

9 In Ground Two, the petitioner alleges that he was denied effective assistance
10 of appellate counsel because his counsel failed to provide any arguments in his
11 Anders brief, and in Ground Three, he alleges that he was denied due process when
12 the prosecutor provided false information to the jury during opening statements and
13 closing arguments. The Court also agrees with the Magistrate Judge's conclusion,
14 which the petitioner does not discuss in his objections, that the record establishes
15 that the petitioner procedurally defaulted on these two claims because he failed to
16 present them to the state courts on direct appeal or in his PCR proceedings, and that
17 he has not demonstrated either a cause for the defaults and prejudice resulting from
18 them or the existence of a fundamental miscarriage of justice.

19 In Ground Five, the petitioner alleges that he was denied effective assistance
20 of counsel during his post-conviction proceedings when his counsel failed to submit
21 and argue issues that the petitioner provided to him. The Court further agrees with
22 the Magistrate Judge's conclusions, which the petitioner does not discuss in his
23 objections, (1) that this claim, to the extent that it is meant to be an independent
24 ground for habeas relief, is not cognizable in a federal habeas proceeding as
25 expressly stated in 28 U.S.C. § 2254(i), and (2) that this claim, to the extent that it
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1 is meant to establish cause and prejudice for the petitioner's procedural default in
2 his Ground Two pursuant to Martinez v. Ryan, 132 S.Ct. 1309 (2012), is unavailing
3 because that ineffective assistance claim is not a substantial one as required by
4 Martinez. Therefore,

5 IT IS ORDERED that the petitioner's Pro-Se Request for Appointment of
6 Counsel with Meritorious or Complex Appeal (Doc. 40) is denied.

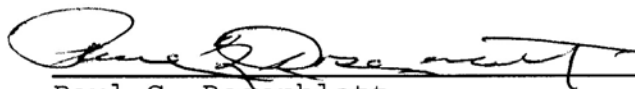
7 IT IS FURTHER ORDERED that the Magistrate Judge's Report and
8 Recommendation (Doc. 38) is accepted and adopted by the Court.

9 IT IS FURTHER ORDERED that the petitioner's First Amended Petition Under
10 28 U.S.C. § 2254 for a Writ of Habeas Corpus by a Person in State Custody (Doc.
11 8) is denied and that this action is dismissed with prejudice.

12 IT IS FURTHER ORDERED that a Certificate of Appealability shall not issue
13 and leave to proceed *in forma pauperis* on appeal is denied because the petitioner
14 has not made a substantial showing of the denial of a constitutional right and
15 because dismissal of the petition is justified by a plain procedural bar and jurists of
16 reason would not find the procedural ruling debatable.

17 IT IS FURTHER ORDERED that the Clerk of the Court shall enter judgment
18 accordingly.

19 DATED this 5th day of April, 2017.

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22 Paul G. Rosenblatt
23 United States District Judge
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