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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Anthony James Merrick,	}	No. CV-16-00124-PHX-SPL
	}	
Petitioner,	}	ORDER
v.	}	
	}	
Charles L. Ryan, et al.,	}	
	}	
Respondents.	}	

The Court has before it Petitioner’s Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 and a supporting memorandum (Docs. 1, 3), Respondents’ Response (Doc. 12), and Petitioner’s reply (Doc. 19). We also have before us the Report and Recommendation of the United States Magistrate Judge (Doc. 20), recommending denial of the Petition, and Petitioner’s timely Objections (Doc. 23).

Petitioner was found guilty by a jury of two counts of conspiracy to commit tampering with a witness, conspiracy to commit perjury, and obstructing criminal investigations or prosecutions. He was sentenced to a 4.5 year prison term for each conviction for conspiracy to tamper with witnesses, a 12 year prison term for conspiracy to commit perjury, and a 6 year prison term for obstructing an investigation or prosecution. The court ordered concurrent sentencing, but consecutive as to his sentences in another case (Doc. 12, Ex. A, Ex. Q at 3).

The Petitioner raises nineteen grounds for relief in his Petition for Writ of Habeas Corpus. In *Ground One*, the Petitioner argues the trial court erred by denying his motion

1 to dismiss the case for lack of jurisdiction based on the State’s presentation of privileged
2 religious communications to the grand jury, which he believed violated clearly
3 established federal law as determined by the United States Supreme Court. In *Ground*
4 *Two*, the Petitioner argues the trial court violated clearly established federal law by
5 denying his motion to preclude evidence of his communications with Reverend
6 McFarland, including letters and telephone calls, which Petitioner claimed were
7 privileged religious communications. In *Ground Three*, the Petitioner argues the trial
8 court erred by denying his motion for appointment of an expert
9 witness/neuropsychologist to assist his defense. In *Ground Four*, the Petitioner argues
10 the trial court erred by denying his motion for constitutional seating in the courtroom as
11 required by clearly established federal law. In *Ground Five*, the Petitioner argues the trial
12 court violated clearly established federal law by precluding him from presenting evidence
13 of his religion and a defense under Ariz. Rev. Stat. § 41-1493.01.

14 The Petitioner argues in *Ground Six*, the trial court erred by denying his motion in
15 limine to preclude the introduction into evidence of phone calls. In *Ground Seven*, the
16 Petitioner argues the trial court violated clearly established federal law by denying his
17 motion for a new trial based on his assertion that insufficient evidence supported his
18 convictions. In *Ground Eight*, the Petitioner argues the trial court violated clearly
19 established federal law by precluding a defense witness. In *Ground Nine*, the Petitioner
20 argues the trial court violated clearly established federal law by denying him the right to
21 confront a witness. In *Ground Ten*, the Petitioner argues the trial court violated his state
22 and federal rights to due process and a fair trial by denying his motion for a new trial and
23 by denying him “the opportunity to include evidence.” In *Ground Eleven*, the Petitioner
24 argues the trial court erred by denying his motion for a new trial on the ground that the
25 state presented privileged legal communications at trial in violation of his state and
26 federal constitutional rights.

27 In *Ground Twelve*, the Petitioner argues the trial court erred by denying his motion
28 for a new trial on the grounds that the trial court had failed to give a *Willits* instruction.

1 In *Ground Thirteen*, the Petitioner argues the trial court erred by denying his motion for a
2 new trial based on his assertion that the State introduced evidence at trial that it did not
3 disclose to the defense. In *Ground Fourteen*, the Petitioner argues the trial court erred by
4 denying his motion for a new trial based on his assertion that the prosecution misled the
5 jury and committed misconduct in violation of his state and federal constitutional rights
6 to due process and a fair trial. In *Ground Fifteen*, the Petitioner argues that the State’s
7 use of privileged material prevented him from exercising his state and federal
8 constitutional rights to testify and present evidence in his defense. In *Ground Sixteen*, the
9 Petitioner argues the trial court erred by denying his motion for a mistrial based on the
10 prosecution informing the jury that he had been convicted of eleven felonies. In *Ground*
11 *Seventeen*, the Petitioner argues he was denied effective assistance of counsel on appeal.
12 In *Ground Eighteen*, the Petitioner argues the State committed prosecutorial misconduct
13 and deprived him of his state and federal constitutional rights to due process and a fair
14 trial. In *Ground Nineteen*, the Petitioner argues the trial court violated his state and
15 federal rights to due process by not allowing him to include an illegal sentencing claim in
16 his petition for post-conviction relief (Doc. 1 at 7-38).

17 The Magistrate Judge concluded that Ground Eighteen is procedurally barred from
18 federal habeas corpus review and further concluded that the Petitioner has not established
19 a basis to overcome that bar. The Magistrate Judge further stated in the R&R that
20 Grounds Two, Four, Five, Six, Ten, Twelve, Thirteen, Sixteen, and Nineteen are not
21 cognizable on federal habeas corpus review or lack merit. Additionally, the Magistrate
22 Judge held the Petitioner has not shown that he is entitled to habeas corpus relief on his
23 remaining claims.

24 A district judge “may accept, reject, or modify, in whole or in part, the findings or
25 recommendations made by the magistrate judge.” 28 U.S.C. § 636(b). When a party files
26 a timely objection to an R&R, the district judge reviews *de novo* those portions of the
27 R&R that have been “properly objected to.” Fed. R. Civ. P. 72(b). A proper objection
28 requires specific written objections to the findings and recommendations in the R&R. *See*

1 *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003); 28 U.S.C. §
2 636(b)(1). It follows that the Court need not conduct any review of portions to which no
3 specific objection has been made. *See Reyna-Tapia*, 328 F.3d at 1121; *see also Thomas v.*
4 *Arn*, 474 U.S. 140, 149 (1985) (discussing the inherent purpose of limited review is
5 judicial economy). Further, a party is not entitled as of right to *de novo* review of
6 evidence or arguments which are raised for the first time in an objection to the R&R, and
7 the Court's decision to consider them is discretionary. *United States v. Howell*, 231 F.3d
8 615, 621-622 (9th Cir. 2000).

9 In his Objections to the Report and Recommendation, Petitioner challenges the
10 Magistrate Judge's following conclusions:

11 (1) the Magistrate Judge incorrectly concluded that *Ground One* is not
12 cognizable on Federal Habeas Corpus, because it is a matter of state law;

13 (2) the Magistrate Judge incorrectly concluded that *Ground Two* is not
14 cognizable on Federal Habeas Corpus, because Respondents prevented Petitioner from
15 citing proper law, and did not allow the Petitioner to have it or receive it;

16 (3) the Magistrate Judge recognized *Ground Four* is a cognizable claim but
17 erred in stating that there is no Supreme Court precedence on the issue;

18 (4) the Magistrate Judge incorrectly concluded in *Ground Five* that the
19 resolution of his claim turns on the application of state law and that the Arizona Court of
20 Appeals decision is the correct interpretation of state law;

21 (5) the Magistrate Judge incorrectly concluded in *Ground Six* that Habeas
22 Corpus review is not available for claims under 42 U.S.C. § 2000 CC-1;

23 (6) the Magistrate Judge incorrectly concluded in *Ground Ten* that Petitioner's
24 conclusory allegations failed to explain how the ruling of the trial court violated his due
25 process rights;

26 (7) without providing any specific objections, Petitioner objects to the R&R
27 conclusion in *Ground Twelve*;

28 (8) the Petitioner argues the Magistrate Judge misconstrued the claim in

1 *Ground Thirteen;*

2 (9) the Petitioner objects in *Ground Sixteen* and believes that the Due Process
3 Clause of the 14th Amendment to the United States Constitution prohibits the state from
4 violating a court order where the Petitioner has a liberty interest;

5 (10) the Magistrate Judge misconstrued the claim in *Ground Nineteen*;

6 (11) the Magistrate Judge erred by stating Petitioner failed to make a
7 preliminary showing under *Ground Three*;

8 (12) the Magistrate Judge incorrectly concluded in *Ground Seven* that there was
9 sufficient evidence to support the conspiracy to commit the perjury offense;

10 (13) the Magistrate Judge incorrectly concluded in *Ground Eight* that denying
11 petitioner a right to call a witness favorable to his defense did not violate the AEDPA;

12 (14) the Magistrate Judge incorrectly concluded in *Ground Nine* failing to
13 distinguish *Bruton v. United States, 391 U.S. 123, 126 (1968)* from *Crawford v.*
14 *Washington, 541 U.S. 36 (2004)*;

15 (15) the Magistrate Judge misconstrued the facts in *Ground Eleven*;

16 (16) the Magistrate Judge erred in concluding *Ground Fourteen* that his claim
17 was strictly a *Darden v. Wainwright, 477 U.S. 168 (1986)* due process claim;

18 (17) the Magistrate Judge incorrectly concluded in *Ground Fifteen* that the
19 Petitioner could have testified to his religious practices and called McFarland to testify;
20 and

21 (18) the Magistrate Judge was confusing and wrong in *Ground Seventeen* by
22 finding the Petitioner did not establish ineffective assistance of appellate counsel (Doc.
23 23 at 2-15).

24 The Court also reviewed Petitioner's motion for judicial notice (Doc. 25).
25 Petitioner asserts that the error of law in the Arizona Court of Appeals'
26 memorandum decision, dated October 20, 2012, demonstrates that his claims in his
27 habeas petition were meritorious. In particular, he asserts that this error affects
28 *Grounds Five, Fifteen, and Seventeen* of his habeas petition. Petitioner attached

1 the court of appeals' April 25, 2017 order denying his motion for reconsideration to
2 substantiate his assertion that the earlier decision contained a legal error with
3 respect to ARS 41-1493.01. Petitioner is correct that the April 2017 order does
4 indicate that the 2012 memorandum decision contained a legal error. The order
5 also states that the error was immaterial.

6 In *Ground Five* of the habeas petition, Petitioner argues that the state court
7 violated his due process rights by preventing him from presenting a freedom of
8 religion defense, based on ARS 41-1493.01. The Magistrate Judge correctly
9 rejected that claim because federal courts are bound by the state court's
10 interpretations of state law. Furthermore, even if the state court was incorrect (as it
11 seems to acknowledge in the April 2017 order), a challenge to the state court's
12 interpretation of state law is not cognizable on federal habeas review.

13 In *Ground Fifteen*, Petitioner argues that the state court used privileged
14 material (recorded calls and calls between Petitioner and his pastor) and that
15 prevented him from exercising his right to testify. The Magistrate Judge correctly
16 rejected this claim, but not on the basis of any interpretation of ARS 41-1493.01 or
17 the state court's application of that statute. Instead, the Magistrate Judge correctly
18 concluded that the court of appeals' decision that the trial court did not prevent
19 Petitioner from testifying was not an unreasonable determination of the facts or an
20 unreasonable application of clearly established federal law.

21 In *Ground Seventeen*, Petitioner argues ineffective assistance of appellate
22 counsel because counsel filed an *Anders* brief and did not file a motion for
23 reconsideration. This argument is soundly rejected because Petitioner had not
24 established prejudice under *Strickland*. The Magistrate Judge decision does not
25 turn on, or even mention, the state court's interpretation of ARS 41-1493.01.

26 The Court has undertaken an extensive review of the sufficiently developed record
27 and the specific written objections to the findings and recommendations in the R&R,
28 without the need for an evidentiary hearing. After conducting a *de novo* review of the

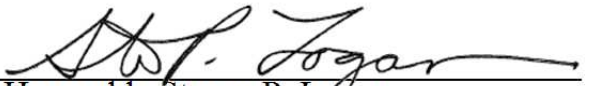
1 issues and objections, the Court concludes the Magistrate Judge was correct in the
2 conclusions that Ground Eighteen is procedurally barred from federal habeas corpus
3 review and that the Petitioner has not established a basis to overcome that bar.
4 Additionally, the Magistrate Judge correctly found that Grounds Two, Four, Five, Six,
5 Ten, Twelve, Thirteen, Sixteen, and Nineteen are not cognizable on federal habeas corpus
6 review or lack merit. Additionally, the Magistrate Judge correctly held the Petitioner has
7 not shown that he is entitled to habeas corpus relief on his remaining claims.

8 Having carefully reviewed the record, the Petitioner has not shown that he is
9 entitled to habeas relief. Finding none of Petitioner's objections have merit, the R&R
10 will be adopted in full. Accordingly,

11 **IT IS ORDERED:**

- 12 1. That the Magistrate Judge's Report and Recommendation (Doc. 20) is
13 **accepted** and **adopted** by the Court;
- 14 2. That the Petitioner's Objections (Doc. 23) are **overruled**;
- 15 3. That the Petition for Writ of Habeas Corpus (Doc. 1) is **denied** and this
16 action is **dismissed with prejudice**;
- 17 4. That a Certificate of Appealability and leave to proceed *in forma pauperis*
18 on appeal are **denied** because the dismissal of the Petition is justified by a plain
19 procedural bar and reasonable jurists would not find the ruling debatable; and
- 20 5. That the Clerk of Court shall **terminate** this action.

21 Dated this 14th day of July, 2017.

22
23 
24 Honorable Steven P. Logan
25 United States District Judge
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