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NOT FOR PUBLICATION

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

Zachary M. White,  
  
                                Petitioner,  
  
v.  
  
Charles L. Ryan, et al.,  
  
                                Respondents.

No. CV-16-00288-PHX-DJH  
**ORDER**

Pending before the Court is *pro se* Petitioner's Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 (Doc.1) to which Respondents filed an Answer (Doc. 11). Following a sound analysis, Magistrate Judge John Z. Boyle recommended denial of and dismissal with prejudice of the Petition. (Doc. 27). Petitioner filed timely objections. (Doc. 28). Respondents filed none.

**I. R&R**

The R & R accurately identifies Petitioner’s three grounds for relief: “(1) a violation of the Fifth Amendment right against Double Jeopardy; (2) a violation of the Sixth Amendment right to effective assistance of counsel; and (3) a violation of the Fifth Amendment right to due process of law based on alleged prosecutorial misconduct.” (Doc. 27 at 3:19-21) (citation omitted). Two different legal theories comprise the first ground for relief. First, Petitioner “claims that the indictment was multiplicitous in violation of the Double Jeopardy Clause because it charged a single act in two different counts.” (*Id.* at 8:20-21) (citation omitted). Second, Petitioner claims that his second

1 trial violated the Fifth Amendment’s Double Jeopardy Clause.

2 In their answer, Respondents took the position that the first part of ground one,  
3 and the second and third grounds were procedurally barred. As to the only claim they  
4 deemed to be properly exhausted, Petitioner’s claim that his second trial violated the Fifth  
5 Amendment’s Double Jeopardy Clause, Respondents argued that that claim failed on the  
6 merits.

7 The Magistrate Judge carefully and accurately set forth the factual background and  
8 trial proceedings, as well as the governing legal principles with respect to procedural  
9 default and merits review. (*See* Doc. 27 at 1:20 - 8:17). Applying these principles, the  
10 Magistrate Judge concluded as follows. Petitioner’s Double Jeopardy claim based upon  
11 the “multiplicitous” nature of his indictment was unexhausted and procedurally defaulted  
12 because such claim was never “‘fairly presented’ to the state courts[.]” (*Id.* at 8:20; 8:26-  
13 27) (citation omitted)). It is well settled, as the Magistrate Judge correctly wrote, that  
14 “[t]he Supreme Court has held that in all cases except those reversed on grounds of  
15 insufficient evidence, the Double Jeopardy Clause does not prevent a retrial. (*Id.* at 10:1-  
16 3) (*See, e.g., Bullington v. Missouri*, 451 U.S. 430, 442 (1981) (when a case is reversed  
17 for any reason, but insufficient evidence, “the original conviction has been nullified” and  
18 “‘the slate wiped clean’”) (other citation omitted)). Based upon the foregoing, the  
19 Magistrate Judge further found no merit to Petitioner’s ineffective assistance of counsel  
20 (“IAC”) claim predicated upon his trial counsel’s “fail[ure] to prevent violations against  
21 ‘double jeopardy’ in violation of the Fifth Amendment.” (*Id.* at 10:20-21).

22 As to Petitioner’s third ground, alleged prosecutorial misconduct, the Magistrate  
23 Judge first found that this claim, too, was “unexhausted and procedurally defaulted  
24 because Petitioner raise[d] the claim for the first time” therein. (Doc. 27 at 11:13-14).  
25 The Magistrate Judge found this claim to be without merit as well, reasoning that  
26 “Petitioner did not demonstrate that any of the statements were improper. Prosecutors and  
27 defense lawyers are given ‘wide latitude’ in closing arguments.” (*Id.* at 12:6-9) (citing  
28 *United States v. Sayetsitty*, 107 F.3d 1405, 1409 (9th Cir. 1997)).

1           Lastly, the Magistrate Judge found that “[t]he record is sufficiently developed”  
2 such that “an evidentiary hearing [wa]s [not] necessary[.]” (*Id.* at 12:21-22) (citing  
3 *Rhoades v. Henry*, 638 F.3d 1027, 1041 (9th Cir. 2011)) (other citation omitted).

4           For all of these reasons, the Magistrate Judge found that Petitioner was not entitled  
5 to habeas corpus relief, and recommended denial of the Petition and dismissal with  
6 prejudice. The Magistrate Judge further recommended denial of a “Certificate of  
7 Appealability and leave to proceed *in forma pauperis* on appeal. . . because dismissal of  
8 the Petition is justified by a plain procedural bar and jurists of reason would not find the  
9 procedural ruling debatable, and because Petitioner has not made a substantial showing of  
10 the denial of a constitutional right.” (Doc. 27 at 13:7-11).

## 11   **II.    Petitioner's Objections**

12           Petitioner’s objections are scant, to say the least. In part one, which Plaintiff  
13 evidently believes is directed to his IAC claim, Plaintiff states that “[a]ll” four of the  
14 attorneys identified therein “informed [him] that ‘indictment was fine.’” (Doc. 28 at 1).  
15 Based upon this unsupported statement, Petitioner contends that “[t]he burden to prove  
16 [IAC] has been established.” (*Id.*) (citations omitted). As will be seen, part two of  
17 Petitioner’s objections, entitled “Procedural Bar[,] is confusing. *Id.* (emphasis omitted).  
18 Suffice it to say for now that Petitioner vaguely states that “failure to review the claim  
19 will result in the fundamental miscarriage of justice.” *Id.* Continuing, Plaintiff contends  
20 that “procedural default w[ill] be excused even in the absence of cause when a  
21 constitutional violation has probably resulted in the conviction.” *Id.* In conclusion,  
22 Petitioner baldly asserts that he should be granted an evidentiary hearing “given the epic  
23 constitution[al] violations” to which allegedly he has been subjected. *Id.*

## 24   **III.   Standard of Review**

25           This Court must “make a de novo determination of those portions of the report or  
26 specified proposed findings or recommendations to which” a Petitioner objects. 28  
27 U.S.C. § 636(b)(1)(C); see also Fed.R.Civ.P. 72(b)(3) (“The district judge must  
28 determine de novo any part of the magistrate judge's disposition that has been properly  
objected to.”); *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003) (same).

1 Further, this Court “may accept, reject, or modify, in whole or in part, the findings or  
2 recommendations made by the magistrate judge.” 28 U.S.C. § 636(b)(1)(C); Fed.R.Civ.P.  
3 72(b)(3). At the same time, however, the relevant provision of the Federal Magistrates  
4 Act, 28 U.S.C. § 636(b)(1)(C), “does not on its face require any review at all. . . of any  
5 issue that is not the subject of an objection.” *Thomas v. Arn*, 474 U.S. 140, 149 (1989)  
6 (emphasis added); *see also Wang v. Masaitis*, 416 F.3d 992, 1000 n. 13 (9th Cir. 2005)  
7 (“Of course, de novo review of a R & R is only required when an objection is made to the  
8 R & R, [*Reyna–Tapia*,] 328 F.3d [at] 1121. . . (“Neither the Constitution nor the [Federal  
9 Magistrates Act] requires a district judge to review, de novo, findings and  
10 recommendations that the parties themselves accept as correct”)[.]”). Likewise, it is  
11 well-settled that “failure to object to a magistrate judge's factual findings waives the  
12 right to challenge those findings [.]” *Bastidas v. Chappell*, 791 F.3d 1155, 1159 (9th Cir.  
13 2015) (quoting *Miranda v. Anchondo*, 684 F.3d 844, 848 (9th Cir. 2012) (internal  
14 quotation marks omitted) (footnote omitted)), as Magistrate Judge Boyle advised the  
15 parties herein. (Doc. 27 at 13:22-14:1) (citation omitted).

#### 16 **IV. Discussion**

17 Petitioner did not object at all to the R&R's background section or its recitation of  
18 the governing legal principles. Thus, consistent with 28 U.S.C. § 636(b)(1)(C), and the  
19 case law construing it, the Court will not review that section.

20 Apparently Petitioner is asserting IACs against four of his attorneys due to the  
21 purportedly multiplicitous indictment. However, as the Magistrate Judge accurately  
22 stated and went on to analyze, the only IAC claim which Petitioner asserted was a  
23 violation of the Sixth Amendment based upon “trial counsel[’s] fail[ure] to prevent  
24 violations against ‘double jeopardy’ in violation of the Fifth Amendment.” (*See Doc. 27*  
25 *at 10: 19-21*). This is a separate and distinct issue from the IAC which Petitioner now is  
26 asserting for the first time in his objections to the R & R. Given that this particular IAC,  
27 based upon an allegedly multiplicitous indictment is not one of the grounds which the  
28 Petition raises, understandably the Magistrate Judge did not address it. Obviously then  
this issue is not subject to review by this Court.

1           Petitioner’s “procedural bar” objection is, likewise, without merit. Petitioner  
2 objects to “Ground III,” at page 10, line 13 of the R & R. Doc. 28 at 2. This objection is  
3 perplexing because the R & R did not begin to address ground three (alleged  
4 prosecutorial misconduct) until page 10, line 27. Page 10, line 13, corresponds to the  
5 highlighted language in the following sentence. “[T]he Arizona Court of Court of  
6 Appeals correctly applied established federal law by rejecting Petitioner’s reliance on  
7 *State v. Aguilar*, 217 Ariz. 235 (App. 2007)[,] for the unsupported assertion that the trial  
8 court committed a structural error that bars retrial.” (Doc. 27 at 10:12-15) (citation  
9 omitted) (emphasis added). However, this sentence is in the section of the R & R  
10 addressing ground one(b), that is, the second trial was barred by the Fifth Amendment’s  
11 Double Jeopardy Clause. The Court does not read Petitioner’s objections as objection to  
12 the Magistrate Judge’s findings as to ground one(b). To the extent that Petitioner’s  
13 objections could conceivably be read in that way, which is a stretch, there is no merit to  
14 such objections. The Magistrate Judge thoroughly addressed and soundly recommended  
15 denial of this ground on the merits. (*See* Doc. 27 at 9:8-10-17).

16           Insofar as Petitioner is objecting to the findings as to ground three (prosecutorial  
17 misconduct), he fares no better. Petitioner seems to be suggesting that the Magistrate  
18 Judge did not consider that claim on the merits, but he did. (*See* Doc. 27 at 12:1-19).  
19 Moreover, Petitioner simply recites that “failure to review the claim will result in a  
20 fundamental miscarriage of justice.” (Doc. 28 at 2). Petitioner did not and has not come  
21 forth with the type of evidence which is required to satisfy “[t]o qualify for the  
22 ‘fundamental miscarriage of justice’ exception to the procedural default rule[.]” (Doc. 27  
23 at 7:3-4) (quoting *Cook v. Schriro*, 538 F.3d 1000, 1028 (9<sup>th</sup> Cir. 2008) (quoting *Murray*  
24 *v. Carrier*, 477 U.S. 478, 496 (1986) (other citation omitted)), as the R & R details. (*See*  
25 *id.* at 7:4-13). Thus, there is no basis for Petitioner’s objections to the R & R as it  
26 pertains to his third ground for relief.

27           Lastly, Petitioner’s unsubstantiated “belie[f]” of “epic constitution[al]  
28 violations[.]” particularly in the face of the Magistrate Judge’s complete and even-handed  
consideration of each of Petitioner’s grounds for relief, does not warrant an evidentiary

1 hearing, as Petitioner urges. (*See* Doc. 28 at 2).

2 **V. Conclusion**

3 Having found no merit to Petitioner's objections to the R & R,

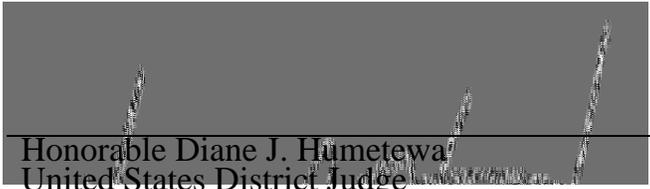
4 **IT IS ORDERED** that Magistrate Judge Boyle's Report and Recommendation  
5 (Doc. 27) is **ACCEPTED** and **ADOPTED** as the Order of this Court.

6 **IT IS FURTHER ORDERED** that the Petition for Writ of Habeas Corpus  
7 pursuant to 28 U.S.C. § 2254 (Doc. 1) is **DENIED** and **DISMISSED WITH**  
8 **PREJUDICE**.

9 **IT IS FURTHER ORDERED** that pursuant to Rule 11(a) of the Rules Governing  
10 Section 2254 Cases, a Certificate of Appealability and leave to proceed in forma pauperis  
11 on appeal are **DENIED** because dismissal of the Petitioner is justified by a plain  
12 procedural bar and reasonable jurists would not find the ruling debatable, and because  
13 Petitioner has not made a substantial showing of the denial of a constitutional right.

14 **IT IS FINALLY ORDERED** that the Clerk of the Court shall terminate this  
15 action and enter judgment accordingly.

16 **Dated** this 23rd day of May, 2017.

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Honorable Diane J. Humetewa  
United States District Judge