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

Jason Earl Tibbetts,

Petitioner,

v.

Charles Ryan, et al.,

Respondents.

No. CV-17-02499-PHX-ROS

ORDER

In 2015, Petitioner Jason Tibbetts (“Tibbetts”) was convicted in state court of one count of luring a minor for sexual exploitation and one count of sexual exploitation of a minor. After extensive proceedings in state court, Tibbetts filed a petition for writ of habeas corpus in this Court. (Doc. 1.) Magistrate Judge David Duncan issued a Report and Recommendation (“R & R”), concluding Tibbetts is not entitled to relief. (Doc. 14.) Tibbetts filed an objection, (Doc. 15), but having reviewed each ground for relief, the Court agrees with the R & R that he is not entitled to relief.

FACTUAL BACKGROUND

On May 23, 2014, Petitioner Jason Tibbetts was arrested in connection with his relationship with a 17-year-old girl. (Doc. 21 at 8.) On May 29, 2014, a search warrant was issued to search Tibbetts’ cell phone. (Doc. 21 at 11–14.) In June 2014, a grand jury indicted Tibbetts on one count of luring a minor for sexual exploitation and one count of sexual exploitation of a minor. (Doc. 7-1 at 2.) On November 13, 2014, a second search warrant was issued to search Tibbetts’ cell phone using new technology that can obtain

1 deleted content. (Doc. 9-2 at 2–4.) Subsequently, a jury convicted Tibbetts of both counts
2 of the indictment and Tibbetts was sentenced to concurrent terms, the longest of which was
3 12 years. (Doc. 7-2 at 2–6.) Tibbetts initiated an appeal and the Arizona Court of Appeals
4 affirmed his convictions and sentences. (Doc. 7-6.)

5 Tibbetts then filed a Notice of Post-Conviction Relief (“PCR”) and a pro per
6 petition alleging ineffective assistance of counsel and trial court errors. (Docs. 7-7.) The
7 Superior Court of Arizona ruled that the arguments in the petition were “precluded as
8 having been previously ruled upon or untimely filed or the Petition lack[ed] sufficient basis
9 in law and fact to warrant further proceedings herein and no useful purpose would be served
10 by further proceedings.” (Doc. 8-2 at 2.) Tibbetts appealed and the Arizona Court of
11 Appeals granted review and denied relief. (Doc. 8-6.)

12 On July 26, 2017, Tibbetts filed a petition for writ of habeas corpus in this Court.
13 (Doc. 1.) Magistrate Judge Duncan issued an R & R, recommending the petition be denied.
14 (Doc. 14.) Tibbetts filed an objection to the R & R. (Doc. 15.)

15 STANDARD OF REVIEW

16 The Court “must review the magistrate judge’s findings and recommendations de
17 novo if objection is made, but not otherwise.” *United States v. Reyna-Tapia*, 328 F.3d
18 1114, 1121 (9th Cir. 2003); 28 U.S.C. § 636(b)(1)(C). A proper objection requires
19 “specific written objections to the proposed findings and recommendations.” Fed. R. Civ.
20 P. 72(b); see *Warling v. Ryan*, No. CV 12-01396, 2013 WL 5276367, at *2 (9th Cir. 2013).
21 A general objection, on the other hand, “has the same effect as would a failure to object.”
22 *Warling*, 2013 WL 5276367, at *2.

23 ANALYSIS

24 I. Ineffective Assistance of Counsel Claims

25 A. Claims in the Petition that were not presented to the Court of Appeals

26 Judge Duncan found the following claims of ineffective assistance of trial counsel
27 were raised for the first time in the Petition: failure to object to irrelevant witnesses, failure
28 to provide discovery documents to Tibbetts, waiving time without Tibbetts’ presence or

1 permission, and failure to object to prosecutorial misconduct. (Doc. 14 at 4.) In addition,
2 Judge Duncan found that Tibbetts raised for the first time in the Petition that appellate
3 counsel was ineffective for failing to make the following arguments: trial counsel should
4 have interviewed witnesses before trial, the trial court should not have allowed certain
5 witnesses to testify, the trial court should have conducted an evidentiary hearing, trial
6 counsel failed to communicate with Tibbetts, trial counsel failed to provide discovery
7 documents to Tibbetts, trial counsel waived time without Tibbetts' presence or permission,
8 trial counsel failed to present all available defenses, and the cumulative effect of trial
9 counsel's errors prejudiced Tibbetts. (Doc. 14 at 4.) Judge Duncan concluded that because
10 Tibbetts did not present these claims to the Arizona Court of Appeals, they were
11 procedurally defaulted. (Doc. 14 at 4.)

12 A federal court may not grant habeas relief unless the petitioner "has exhausted
13 available state remedies as to any of his federal claims." *Coleman v. Thompson*, 501 U.S.
14 722, 731 (1991). To exhaust state remedies in Arizona, the petitioner must "fairly present"
15 his claims to the Arizona Court of Appeals. *Castillo v. McFadden*, 399 F.3d 993, 998–
16 1000 (9th Cir. 2004). This requires a description of "both the operative facts and the federal
17 legal theory on which his claim is based so that the state courts [could] have a 'fair
18 opportunity' to apply controlling legal principles to the facts bearing upon his
19 constitutional claim." *Id.* at 999 (quoting *Kelly v. Small*, 315 F.3d 1063, 1066 (9th Cir.
20 2003)). If the petitioner fails to "fairly present" his claims to the state court, they are
21 procedurally defaulted and generally barred from federal habeas review. *Id.* at 998.
22 Exceptions arise where the petitioner can "demonstrate cause for the default and actual
23 prejudice as a result of the alleged violation of federal law, or demonstrate that failure to
24 consider the claims will result in a fundamental miscarriage of justice." *Coleman*, 501 U.S.
25 at 750.

26 With regard to ineffective assistance of counsel ("IAC") claims, "each 'unrelated
27 alleged instance . . . of counsel's ineffectiveness' is a separate claim for purposes of
28 exhaustion." *Gulbrandson v. Ryan*, 738 F.3d 976, 992 (9th Cir. 2013) (citation omitted).

1 To show cause for procedural default in Arizona, a petitioner must demonstrate: (1)
2 “counsel in the initial-review collateral proceeding, where the claim should have been
3 raised, was ineffective under the standards of *Strickland v. Washington*, 466 U.S. 668
4 (1984)”; and (2) “the underlying [IAC] claim is a substantial one, which is to say that the
5 prisoner must demonstrate that the claim has some merit.” *Cook v. Ryan*, 688 F.3d 598,
6 607 (9th Cir. 2012) (quoting *Martinez v. Ryan*, 566 U.S. 1, 14 (2012)).

7 Tibbetts does not specifically object to Judge Duncan’s finding that each of the
8 above claims was procedurally defaulted. He cites no evidence in the record that any of
9 these claims were actually presented to the Arizona Court of Appeals. Rather, Tibbetts
10 argues: “By appellate counsel failing to appeal all of the claims, the petitioner is now unable
11 to raise them at all due to a procedural bar.” (Doc. 15 at 5.) Counsel’s failure, according
12 to Tibbetts, was a miscarriage of justice that excuses the procedural default. (Doc. 15 at
13 4.) Tibbetts’ procedural default cannot be excused under the fundamental miscarriage of
14 justice exception. “[T]he miscarriage of justice exception is limited to those extraordinary
15 cases where the petitioner asserts his innocence and establishes that the court cannot have
16 confidence in the contrary finding of guilt.” *Johnson v. Knowles*, 541 F.3d 933, 937 (9th
17 Cir. 2008). To invoke the exception, Tibbetts must show that “it is more likely than not
18 that no reasonable juror would have found [him] guilty beyond a reasonable doubt.” *Id.* at
19 936. Tibbetts has not met this high burden. Nor has Tibbetts shown cause for his
20 procedural default. Tibbetts has not shown that any of the underlying IAC claims are
21 substantial claims and PCR counsel’s failure to raise those claims prejudiced him.
22 Accordingly, the Court adopts Judge Duncan’s conclusion that the IAC claims raised for
23 the first time in the Petition are not reviewable. (Doc. 14 at 5.)

24 **B. Claims dismissed by the Arizona Court of Appeals**

25 Judge Duncan concluded that of Tibbetts’ remaining IAC claims, all but one is
26 barred from federal review because the Arizona Court of Appeals rejected the claims based
27 on adequate and independent state procedural grounds. (Doc. 14 at 5.) “[A]n adequate
28 and independent finding of procedural default will bar federal habeas review of the federal

1 claim, unless the habeas petitioner can show ‘cause’ for the default and ‘prejudice
2 attributable thereto,’ or demonstrate that failure to consider the federal claim will result in
3 a ‘fundamental miscarriage of justice.’” *Harris v. Reed*, 489 U.S. 255, 262 (1989).
4 Tibbetts does not specifically object to Judge Duncan’s conclusion and does not challenge
5 that there were independent and adequate state procedural grounds for the dismissal of his
6 claims. Further, Tibbetts has neither shown cause and prejudice nor demonstrated that
7 failure to consider his claims would result in a fundamental miscarriage of justice. As such,
8 the Court adopts Judge Duncan’s conclusion with regard to these claims.

9 Tibbetts’ sole remaining IAC claim is that his counsel was ineffective for failing to
10 challenge venue or jurisdiction. Judge Duncan concluded Tibbetts is not entitled to relief
11 pursuant to this claim because he failed to show prejudice. Because Tibbetts does not
12 specifically object, the Court adopts Judge Duncan’s conclusion.

13 **II. Claims of prosecutorial misconduct and trial court error**

14 Tibbetts’ claims of prosecutorial misconduct include assertions that the prosecution
15 presented inconsistent witness testimony, made false statements about Tibbetts’ possession
16 of a photograph of the victim, used his confession inappropriately, used a large screen
17 television to show a photograph of the victim, and called several irrelevant witnesses.
18 Tibbetts also claims the trial court erred for a number of reasons, including by allowing
19 prosecutorial misconduct, allowing a Rule 8 violation, and failing to conduct an evidentiary
20 hearing. Judge Duncan concluded that Tibbetts’ claims of prosecutorial misconduct and
21 trial court error are barred from federal review because the Arizona Court of Appeals
22 rejected the claims based on adequate and independent state procedural grounds: that
23 Tibbett had not raised these claims on direct appeal pursuant to the Arizona Rules of
24 Criminal Procedure. (Doc. 14 at 7.) Tibbetts does not specifically object and the Court
25 accordingly adopts Judge Duncan’s conclusion.

26 Tibbetts appears to argue that his procedural default should be excused because his
27 counsel failed to raise his claims on appeal. However, aside from making conclusory
28 statements that his verdict would have been overturned if appellate counsel had raised these

1 claims, Tibbetts has not demonstrated prejudice. (Doc. 15 at 5.) As such, the Court adopts
2 Judge Duncan’s conclusion that federal review is inappropriate here.

3 **III. Warrantless search claim**

4 Finally, Judge Duncan concluded that Tibbetts’ warrantless search claim was “based
5 on a misunderstanding of the facts.” (Doc. 14 at 7.) It is undisputed that law enforcement
6 conducted two searches of Tibbetts’ phone: the first using technology that obtained the
7 phone’s current content and the second using newer technology that obtained the phone’s
8 deleted content. (Doc. 9-2 at 9.) Tibbetts believes that both searches were conducted with
9 only one warrant. (Doc. 13 at 10–11.) The Court ordered Respondents to submit a copy
10 of the second warrant, which Respondents provided on June 20, 2019. (Doc. 21.) The
11 record indicates there were two warrants for the two searches: one dated May 29, 2014,
12 and the second dated November 13, 2014. (Docs. 9 at 7; 21 at 14.) Therefore, the Court
13 adopts Judge Duncan’s conclusion that both searches were proper and neither trial counsel
14 nor appellate counsel was ineffective in failing to raise the argument.

15 Accordingly,

16 **IT IS ORDERED** the Report and Recommendation (Doc. 14) is **ADOPTED** to the
17 extent it is consistent with the analysis above and **REJECTED** to the extent it is
18 inconsistent.

19 **IT IS FURTHER ORDERED** Tibbetts’ Petition for Writ of Habeas Corpus (Doc.
20 1) is **DENIED** and **DISMISSED WITH PREJUDICE**.

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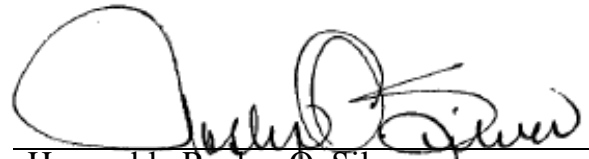
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IT IS FURTHER ORDERED the Clerk of Court shall enter judgment in favor of Respondents.

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

Dated this 5th day of September, 2019.


Honorable Roslyn O. Silver
Senior United States District Judge