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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Curtis Montgomery,

10 Petitioner,

11 v.

12 S. Morris, et al.,

13 Respondents.
14

No. CV-17-03579-PHX-DWL

ORDER

15 On November 27, 2017, Petitioner filed an amended petition for writ of habeas
16 corpus under 28 U.S.C. § 2254 (“the Petition”). (Doc. 6.) On November 30, 2018,
17 Magistrate Judge Boyle issued a Report and Recommendation (“R&R”) concluding the
18 Petition should be denied and dismissed with prejudice. (Doc. 23.) Afterward, Petitioner
19 filed written objections to the R&R. (Doc. 24). As explained below, the Court will deny
20 Petitioner’s objections.

21 I. Background

22 Petitioner was sentenced to life in prison after being convicted at trial of sexual
23 abuse, child molestation, and sexual conduct with a minor. (Doc. 23 at 2.) The evidence
24 at trial included (1) a confrontation call in which Petitioner made incriminating statements
25 and (2) Petitioner’s “full-blown confession” to the police. (*Id.*)

26 In his direct appeal, Petitioner raised only one issue: whether the trial court abused
27 its discretion by admitting expert testimony concerning general characteristics of child
28 sexual abuse victims. (*Id.* at 12; *see also State v. Montgomery*, 2016 WL 3660255 (Ariz.

1 Ct. App. 2016)). On July 5, 2016, the Arizona Court of Appeals affirmed Petitioner’s
2 conviction. (Doc. 23 at 2.)

3 On September 8, 2016, Petitioner filed a notice of post-conviction relief. (*Id.*) On
4 November 28, 2016, Petitioner’s counsel filed a notice stating there were no colorable
5 claims. (*Id.*) On February 27, 2017, Petitioner—acting *pro se*—filed a petition raising
6 three claims: (1) prosecutorial misconduct/perjury, (2) ineffective assistance, and (3) juror
7 bias. (*Id.*) On June 2, 2017, the trial court denied the petition. (*Id.*) Petitioner didn’t seek
8 review in the Arizona Court of Appeals. (*Id.* at 3.)

9 On October 5, 2017, Petitioner filed a habeas petition, which he later amended. (*Id.*)
10 The Petition raises four claims: (1) ineffective assistance, (2) erroneous evidentiary rulings
11 by the trial court, (3) prosecutorial misconduct, and (4) actual innocence. (*Id.*)

12 The R&R was issued in November 2018. (Doc. 23.) As for the first claim in the
13 Petition (ineffective assistance), the R&R begins by noting that this claim is procedurally
14 defaulted because Petitioner didn’t appeal the denial of his PCR petition to the Arizona
15 Court of Appeals. (*Id.* at 5-7.) Next, the R&R addresses whether, under *Martinez v. Ryan*,
16 566 U.S. 1 (2012), Petitioner can establish cause and prejudice to excuse the default (based
17 on his claim that PCR counsel was ineffective). (*Id.* at 7-11 & n.4.) Specifically:

18 (1) As for Petitioner’s claim that trial counsel was ineffective by failing to
19 present a CAT scan showing that Petitioner had cognitive disabilities, the R&R concludes
20 this claim is insubstantial because (1) the proffered evidence only shows “some minimal
21 irregularity” in Petitioner’s brain, not Alzheimer’s or dementia, (2) Petitioner “fails to
22 explain how dementia would have caused him to commit [sex] offenses on a child,” and
23 (3) Petitioner’s filings in this case are “inconsistent with his claim of diminished capacity.”
24 (*Id.* at 7-8.)

25 (2) As for Petitioner’s claim that trial counsel was ineffective by failing to
26 impeach the victim with the first hospital report, which didn’t show the victim had bruises,
27 the R&R concludes this claim is insubstantial because (1) “Petitioner did not attach the
28 reports to the Petition, so Petitioner fails to substantiate his claim,” (2) Petitioner was

1 accused of sexual conduct, not physical assault, so the absence of bruises wouldn't negate
2 the charge, and (3) Petitioner can't establish prejudice as to this issue "in light of his pretrial
3 admissions that he committed numerous sexual acts on the victim." (*Id.* at 8.)

4 (3) As for Petitioner's claim that trial counsel was ineffective by failing to
5 investigate whether a particular witness had a motive to coach the victim to lie (and to
6 impeach the witness on that basis), the R&R concludes this claim is insubstantial because
7 (1) Petitioner offered only a cursory allegation of the witness's motivation and (2) the
8 witness's testimony was, in any event, "brief and far less significant than the victim's
9 testimony and Petitioner's numerous incriminating statements." (*Id.* at 8-9.)

10 (4) As for Petitioner's claim that trial counsel was ineffective by failing to object
11 to the prosecutor's closing argument, the R&R concludes this claim is insubstantial because
12 counsel made a tactical choice to address the prosecutor's statement on the merits, rather
13 than object to it. (*Id.* at 9-10.)

14 (5) As for Petitioner's claim that trial counsel was ineffective by failing to ask
15 certain questions during the redirect exam of the defense witness on false confessions, the
16 R&R concludes this claim is insubstantial because (1) it is speculative whether the expert
17 would have provided favorable answers to the line of questions proposed by Petitioner and
18 (2) trial counsel's decision to avoid potentially damaging testimony was a tactical decision.
19 (*Id.*)

20 (6) As for Petitioner's claim that trial counsel was ineffective by failing to
21 "timely" seek the removal of a juror who was crying during opening statements, the R&R
22 concludes this claim is insubstantial because counsel did seek the removal of the juror
23 (albeit unsuccessfully) once opening statements were complete and "[n]othing in the record
24 suggests the outcome would have been different if counsel had raised the issue in the
25 middle of opening statements rather than waiting until opening statements concluded." (*Id.*
26 at 11.)

27 For all of these reasons, the R&R concludes that "Petitioner fails to establish a
28 substantial claim of ineffective assistance of counsel. Consequently, he fails under

1 *Martinez* to provide cause for the procedural default of the claim.” (*Id.* at 11.)

2 Next, as for the second and third claims in the Petition (trial errors and prosecutorial
3 misconduct), the R&R concludes these claims are “unexhausted and procedurally defaulted
4 without excuse” because Petitioner didn’t raise them in his direct appeal to the Arizona
5 Court of Appeals and didn’t appeal the denial of his PCR petition to the Arizona Court of
6 Appeals. (*Id.* at 11-12.) Finally, as for the fourth claim in the Petition (actual innocence),
7 the R&R concludes this claim fails because Petitioner didn’t present any new evidence and
8 simply seeks to reargue the evidence based on information that was available to him at the
9 time of trial. (*Id.* at 12-14.)

10 II. Legal Standard

11 A party may file specific, written objections to an R&R within fourteen days of
12 being served with a copy of it. Rules Governing Section 2254 Cases 8(b) (“Section 2254
13 Rules”); *see also* Fed. R. Civ. P. 72(b)(2); 28 U.S.C. § 636(b)(1)(C). The Court must
14 undertake a *de novo* review of those portions of the R&R to which specific objections are
15 made. *See, e.g., Thomas v. Arn*, 474 U.S. 140, 149-50 (1985) (“It does not appear that
16 Congress intended to require district court review of a magistrate’s factual or legal
17 conclusions, under a *de novo* or any other standard, when neither party objects to those
18 findings.”); *United States v. Reyna-Tapia*, 328 F.3d 1114, 1221 (9th Cir. 2003) (“[T]he
19 district judge must review the magistrate judge’s findings and recommendations *de novo*
20 if objection is made, but not otherwise.”). The Court may accept, reject, or modify, in
21 whole or in part, the findings or recommendations made by the magistrate judge. Section
22 2254 Rules 8(b); *see also* Fed. R. Civ. P. 72(b)(3); 28 U.S.C. § 636(b)(1)(C).

23 III. The Parties’ Arguments

24 In his objections to the R&R, Petitioner focuses primarily on his first ineffective
25 assistance theory (trial counsel’s failure to present cognitive-disability evidence). On this
26 issue, he argues that (1) he didn’t receive the actual medical records “until after the time of
27 state appeals” and “had to have family members to retrieve this information,” (2) the
28 medical records show “decreased blood to the brain” and “minimal brain damage,” and (3)

1 cognitive-disability evidence would have been useful in challenging “the voluntariness of
2 statements” he made during the confrontation call and during his confession to the police.
3 (Doc. 24 at 1-3.) Next, with respect to his second ineffective assistance theory (trial
4 counsel’s failure to impeach the victim with the first hospital report), Petitioner contends
5 the report would have been valuable for impeachment purposes. (*Id.* at 4.) Finally, with
6 respect to his fourth ineffective assistance theory (trial counsel’s failure to object to the
7 prosecutor’s closing argument), Petitioner argues the prosecutor’s statements were
8 improper and prejudicial. (*Id.* at 4-5.)

9 Respondents did not file a response to the objections.

10 IV. Analysis

11 The Court agrees with the R&R’s conclusion that Petitioner has failed to present a
12 “substantial” claim of ineffective assistance of trial counsel and, thus, has procedurally
13 defaulted that claim. *See generally Contreras v. Ryan*, 2014 WL 6668468, *2 (D. Ariz.
14 2014) (citations omitted) (“The Supreme Court and Ninth Circuit have created a special
15 rule excusing the default of IAC claims. . . . To take advantage of this rule, a petitioner
16 must ‘demonstrate that the underlying ineffective-assistance-of-trial [or appellate]-counsel
17 claim is a substantial one, which is to say that the [petitioner] must demonstrate that the
18 claim has some merit.’ Thus, in a situation of alleged default, the Court must look to the
19 merits of the claim to determine whether the default should be enforced. If an examination
20 of the merits shows the claim is ‘substantial,’ the Court cannot enforce the procedural
21 default.”).

22 Petitioner’s primary theory is that trial counsel should have attempted to challenge
23 the voluntariness of his confession (and his incriminating statements during the
24 confrontation call) by presenting evidence of his alleged cognitive deficits. This is not a
25 substantial IAC claim. The medical records (which Petitioner describes but doesn’t attach)
26 suggest he suffers from only “minimal” impairments, and Petitioner’s conduct while
27 litigating this case is inconsistent with the existence of a significant cognitive impairment.
28 It is pure speculation (and certainly not reasonably probable) that trial counsel could have

1 somehow secured the suppression of Petitioner’s incriminating statements (or blunted the
2 impact of those statements at trial) by obtaining more medical evidence or presenting
3 different evidence at trial. Moreover, although Petitioner contends that he was
4 “emotionally [and] psychologically [sic] overborn by circumstances,” he admits he
5 thought he “was having a private call with [his] daughter.” (Doc. 24 at 3.) These
6 circumstances were not coercive and trial counsel wouldn’t have been able to suppress the
7 confrontation call based upon them. *See, e.g., Reel v. Ryan*, 2013 WL 2284988, *18 (D.
8 Ariz. 2013) (rejecting habeas claim, where petitioner argued his trial counsel “should have
9 sought to suppress the confrontation call between himself and the victim,” because “[t]hat
10 Petitioner’s statements were obtained by some deceit (*e.g.* the victim failing to alert
11 Petitioner that he had been found out and was being recorded) does not result in the
12 statements being ‘compelled’ . . . [and] any effort by counsel to suppress the statements,
13 on the grounds suggested by Petitioner, would have been futile.”). *See also Illinois v.*
14 *Perkins*, 496 U.S. 292, 297 (1990) (“[T]he danger of coercion results from the interaction
15 of custody and official interrogation.”).

16 Petitioner’s other objections fare no better. Petitioner still hasn’t substantiated his
17 claim that the first hospital report was favorable to him and the R&R correctly concludes
18 that Plaintiff can’t, in any event, establish prejudice under *Strickland* in light of the strong
19 evidence of his guilt. Finally, as for trial counsel’s failure to object to the prosecutor’s
20 closing argument, Petitioner simply repeats his earlier argument that the prosecutor’s
21 argument was improper and doesn’t attempt address the R&R’s conclusion that counsel’s
22 decision to address this argument on the merits (as opposed to objecting to it) was a tactical
23 choice that is immune from second-guessing under *Strickland*.

24 Accordingly, **IT IS ORDERED** that:

- 25 (1) The R&R’s recommended disposition (Doc. 24) is accepted;
- 26 (2) The amended petition (Doc. 6) is denied and dismissed with prejudice;
- 27 (3) A Certificate of Appealability and leave to proceed in forma pauperis on
28 appeal are denied because the dismissal of the Petition is justified by a plain procedural bar

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and jurists of reason would not find the procedural ruling debatable; and

(4) The Clerk shall enter judgment accordingly and terminate this action.

Dated this 5th day of March, 2019.



Dominic W. Lanza
United States District Judge