

1 **WO**

2
3
4
5
6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
8

9 Robert Michael Piotrowski,

10 Petitioner,

11 v.

12 Charles L Ryan, et al.,

13 Respondents.
14

No. CV-18-01134-PHX-DWL

ORDER

15 On April 13, 2018, Petitioner filed a petition for writ of habeas corpus under 28
16 U.S.C. § 2254. (Doc. 1.) On June 24, 2019, Magistrate Judge Burns issued a Report and
17 Recommendation (“R&R”) concluding the petition should be denied and dismissed with
18 prejudice. (Doc. 16.) Afterward, Petitioner filed written objections to the R&R (Docs. 22,
19 23) and Respondents filed a response (Doc. 27). For the following reasons, the Court will
20 overrule Petitioner’s objections and deny his petition.

21 I. Background

22 A. **The Underlying Incident**

23 On May 18, 2011, Detective Zygmunt of the Glendale Police Department was
24 conducting surveillance of Petitioner. (Doc. 10-4 at 22-23, 27.) When Petitioner left in a
25 pickup truck with two people, Detective Zygmunt followed him with a team of officers.
26 (*Id.* at 29.) After the truck pulled into the parking lot of a store, Detective Zygmunt stopped
27 the truck. (*Id.* at 29-31.) Petitioner was seated in the middle of the front seat, with the
28 driver and another passenger on either side of him. (*Id.* at 32-33, 96.)

1 When Detective Zygmunt ordered the truck's occupants to put their hands up,
2 everybody but Petitioner complied. (*Id.* at 33-34.) The driver had his hands up and his
3 foot on the brake. (*Id.* at 35-37.) Petitioner, however, leaned over toward the gearshift and
4 the truck lunged forward. (*Id.* at 35, 77.) Officers opened the door on the driver's side and
5 the driver turned off the truck. (*Id.* at 37.) As officers were trying to pull the driver out of
6 the truck, Petitioner "reached over and started the vehicle, turned the ignition back on and
7 began to reach over with his left foot and slam on the gas." (*Id.* at 38.) Detective Zygmunt
8 "[a]bsolutely" believed he was "in danger at that point in time." (*Id.*) Petitioner succeeded
9 in putting the truck into drive, and it lunged forward several feet while one of the officers
10 was halfway into the driver's compartment. (*Id.* at 39, 82-83.) Each time the truck lunged
11 forward, Detective Zygmunt feared he would be pulled under it. (*Id.* at 39-40.) Detective
12 Zygmunt testified that, at one point, he was struck on the arm by the truck's door. (*Id.* at
13 117-18 ["It is my belief that I was struck in the arm by the door."].)

14 After the truck's third and final lunge, Petitioner reached under the seat as he
15 continued thrashing about. (*Id.* at 40.) Believing that Petitioner was attempting to grab a
16 weapon, Detective Zygmunt used a Taser to subdue him. (*Id.* at 40-42.) A different officer
17 later searched Petitioner's sock and found "[a] white rocky substance" (methamphetamine)
18 and "a glass pipe." (*Id.* at 126-28.)

19 **B. The State Proceedings**

20 On May 26, 2011, Petitioner was indicted by a state grand jury on various charges.
21 (Doc. 10-1 at 4-7.)

22 On February 23, 2012, following a four-day jury trial, Petitioner was convicted of
23 one count of aggravated assault on a police officer (Detective Zygmunt) and one count of
24 possession or use of dangerous drugs. (Doc. 10-1 at 40-50.)

25 On March 9, 2012, Petitioner's trial counsel filed a motion for new trial. (Doc. 10-
26 1 at 51-55.) In a nutshell, Petitioner's trial counsel argued that the aggravated assault
27 conviction was contrary to the weight of the evidence. (*Id.* at 52-53.)

28 On April 20, 2012, the trial judge denied Petitioner's motion for new trial and then

1 sentenced Petitioner to 15.75 years' imprisonment on the aggravated assault count and 10
2 years' imprisonment on the drug count, to run concurrently. (Doc. 10-1 at 62-66.)
3 Petitioner was later sentenced to additional time for violating his terms of probation arising
4 from earlier convictions. (Doc. 16 at 3-4.)

5 On March 18, 2013, Petitioner filed (through appointed counsel) his opening brief
6 in his direct appeal to the Arizona Court of Appeals. (Doc. 10-1 at 85-102.) This brief
7 only challenged the sentences arising from the probation violations (*id.* at 86)—it did not
8 assert any claims concerning the propriety of the aggravated assault conviction.

9 On January 14, 2014, the Arizona Court of Appeals affirmed Petitioner's
10 convictions and sentence. (Doc. 10-1 at 152-59.)

11 On June 23, 2014, Petitioner filed a *pro se* notice of post-conviction relief ("PCR").
12 (Doc. 10-2 at 4-7.)¹

13 On June 27, 2014, the trial court issued an order appointing counsel to represent
14 Petitioner in the PCR proceeding. (Doc. 10-2 at 9-10.)

15 On November 24, 2014, Petitioner's court-appointed counsel filed a notice
16 certifying that, "having corresponded with petitioner, reviewed the trial and appellate
17 record and all relevant transcripts, [counsel] is unable to find a colorable issue to submit to
18 the court" (Doc. 20-2 at 15.)

19 On August 4, 2016, a different attorney filed a supplemental PCR petition and brief
20 on Petitioner's behalf. (Doc. 10-2 at 39-58.) The first ground for relief was that the
21 aggravated assault conviction violated Petitioner's rights under the Fifth, Sixth, and
22 Fourteenth Amendments because "the State failed to prove two fundamental elements of
23 aggravated assault upon Detective Zygmunt. First, it failed to prove that Defendant acted
24 with the intent to cause anyone to be placed in reasonable apprehension or fear of harm.
25 Second, it failed to prove the fear to which Detective Zygmunt testified was reasonable."
26 (*Id.* at 45-50.) The second ground for relief was that Petitioner's sentence was
27 disproportionate and excessive in light of the fact that Detective Zygmunt merely

28 ¹ Petitioner filed a different PCR notice in September 2012 (Doc. 10-1 at 161-64) but
was later allowed to withdraw it as premature (Doc. 10-2 at 2).

1 “complained of some wrist pain” following the incident. (*Id.* at 50-53.) The third ground
2 for relief was that Petitioner wasn’t fully advised by trial counsel of the consequences of
3 rejecting the plea offer. (*Id.* at 53-55.)

4 On February 26, 2017, the trial court issued an order denying the PCR petition.
5 (Doc. 10-2 at 80-83.)

6 On May 2, 2017, Petitioner filed (through counsel) a petition for review with the
7 Arizona Court of Appeals. (Doc. 10-2 at 85-100.)

8 On January 25, 2018, the Arizona Court of Appeals issued a memorandum decision
9 in which it granted Petitioners’ request for review but denied relief. (Doc. 10-2 at 114-15.)

10 C. Federal Proceedings

11 On April 13, 2018, Petitioner filed his habeas petition. (Doc. 1.) It asserts three
12 grounds for relief.

13 ▪ In Ground One, Petitioner asserts a claim of ineffective assistance against his trial
14 and appellate counsel for failing to challenge his assault conviction. (*Id.* at 6-7.)
15 Specifically, Petitioner argues that, although his trial counsel filed a motion for new trial
16 premised on the argument that the assault conviction was against the weight of the
17 evidence, his counsel should have also raised sufficiency-of-the-evidence and
18 constitutional challenges to that conviction. (*Id.*)

19 ▪ In Ground Two, Petitioner asserts a claim of ineffective assistance against his trial
20 and appellate counsel “for failure to raise violation of ‘due process and fair trial’ when the
21 state elicited ‘prior bad acts’ testimony about Petitioner from the detective during direct
22 examination and the court[’]s failure to find ‘cause’ for a mistrial violated Petitioner[’]s
23 Fifth, Sixth and Fourteenth Amendment[rights].” (*Id.* at 9-10.)

24 ▪ In Ground Three, Petitioner asserts a claim of ineffective assistance against his
25 trial and appellate counsel “for failure to raise violation of ‘due process and fair trial’ at
26 sentencing which violated Petitioner[’]s Fifth, Sixth and Fourteenth Amendment[rights].”
27 (*Id.* at 11-12.) Specifically, Petitioner contends that his trial and appellate counsel should
28 have argued “that the sentencing court committed ‘plain error’ when it found it was

1 ‘mandated’ to sentence Petitioner to consecutive terms for the 2007 and 2008 cases to the
2 2011 case.” (*Id.*)

3 On June 24, 2019, the R&R was issued. (Doc. 16.)

4 II. Summary Of R&R

5 The R&R concludes the petition should be denied and dismissed with prejudice
6 because all three of Petitioner’s claims are procedurally defaulted without excuse. (Doc.
7 16 at 16.)

8 As a threshold matter, the R&R observes that, in general, a state prisoner must
9 exhaust his remedies in state court before seeking habeas relief in federal court. (*Id.* at 5-
10 8.) The R&R further observes that, because Petitioner didn’t assert any of the claims
11 identified in his petition during the state-court proceedings, those claims must be deemed
12 procedurally defaulted unless Petitioner can establish, under *Martinez v. Ryan*, 566 U.S. 1
13 (2012), that the ineffective assistance of his PCR counsel qualifies as “cause” for the
14 procedural default. (*Id.* at 9-10.) Finally, the R&R observes that, to establish “cause”
15 under *Martinez*, a habeas petitioner must show both that (1) PCR counsel’s failure to raise
16 the claim was itself ineffective, and (2) the underlying ineffective-assistance claim is
17 “substantial,” meaning it “has some merit.” (*Id.*)

18 With respect to Ground One (ineffective assistance—failure to raise a sufficiency
19 of the evidence/constitutional challenge to the aggravated assault conviction), the R&R
20 concludes that Petitioner cannot meet the *Martinez* standard because his trial counsel
21 actually moved for a new trial based on the inadequacy of the evidence yet the trial court
22 denied that motion. (*Id.* at 10-11.) Given this outcome, the R&R concludes that “Petitioner
23 can not meet the prejudice prong, as he can not demonstrate that the trial court would have
24 granted the motion had he asserted a constitutional violation.” (*Id.*) The R&R further notes
25 that, to the extent Petitioner is seeking to assert an ineffective assistance claim against the
26 attorney who represented him during his direct appeal in state court, that claim fails for the
27 additional reason that “the *Martinez* exception does not apply to claims of ineffective
28 assistance of appellate counsel.” (*Id.*, citation omitted.)

1 With respect to Ground Two (ineffective assistance—failure to challenge the “prior
2 bad acts” testimony), the R&R concludes that Petitioner cannot meet the *Martinez* standard
3 because (1) his trial counsel repeatedly objected when a witness referred to his prior bad
4 acts and even moved for a mistrial based on that testimony,² (2) the trial court “gave the
5 jury a curative instruction” based on the improper testimony, and (3) there was ample
6 evidence to support the assault conviction, including testimony that Detective Zygmunt
7 was struck on the arm by the vehicle. (*Id.* at 11-15.) The R&R thus summarizes:
8 “Petitioner’s claim of ineffective assistance of counsel is not a substantial one. He does
9 not demonstrate that his trial counsel was ineffective, or that, even if counsel was
10 ineffective, that he was prejudiced; thus, Petitioner does not demonstrate cause under
11 *Martinez* to excuse his procedural default of the claim.” (*Id.* at 15.)

12 With respect to Ground Three (ineffective assistance—failure to raise a sentencing
13 challenge), the R&R concludes that Petitioner cannot meet the *Martinez* standard because
14 (1) he did not develop, or cite any authority in support of, his argument that the trial court
15 would have declined to impose consecutive sentences if his trial counsel had raised a “plain
16 error” objection, (2) the Arizona Court of Appeals specifically held, when affirming his
17 sentence on direct appeal, that the imposition of consecutive sentences was correct and
18 mandated by Arizona law, and (3) in any event, “errors in the application of state law are
19 not cognizable in habeas corpus proceedings.” (*Id.* at 16.)

20 III. Legal Standard

21 A party may file specific, written objections to an R&R within fourteen days of
22 being served with a copy of it. Rules Governing Section 2254 Cases 8(b) (“Section 2254
23 Rules”); *see also* Fed. R. Civ. P. 72(b)(2); 28 U.S.C. § 636(b)(1)(C). The Court must
24 undertake a *de novo* review of those portions of the R&R to which specific objections are
25 made. *See, e.g., Thomas v. Arn*, 474 U.S. 140, 149-50 (1985) (“It does not appear that

26
27 ² On this point, the R&R elaborates that although “the witness’s comments were non-
28 responsive, unprofessional, and appeared to be meant to prejudice Petitioner, Petitioner’s
claim of ineffective assistance of counsel lacks analysis and is factually inaccurate, in that
Petitioner’s counsel did repeat his request for a mistrial after the third objectionable
comment.” (*Id.* at 14.)

1 Congress intended to require district court review of a magistrate’s factual or legal
2 conclusions, under a *de novo* or any other standard, when neither party objects to those
3 findings.”); *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003) (“[T]he
4 district judge must review the magistrate judge’s findings and recommendations de novo
5 if objection is made, but not otherwise.”). The Court may accept, reject, or modify, in
6 whole or in part, the findings or recommendations made by the magistrate judge. Section
7 2254 Rules 8(b); *see also* Fed. R. Civ. P. 72(b)(3); 28 U.S.C. § 636(b)(1)(C).

8 IV. Analysis

9 Petitioner asserts, at the outset of his objections, that the R&R’s discussion of
10 procedural-default principles is erroneous because “they do not apply when Petitioner has
11 raised all his/her grounds under *Martinez v. Ryan*” (Doc. 22 at 2.)

12 This argument lacks merit. Petitioner seems to misinterpret *Martinez* as holding
13 that a habeas petitioner can automatically avoid a finding of procedural default by simply
14 asserting that PCR counsel was ineffective in failing to raise a particular argument. As the
15 R&R correctly notes, this interpretation is inaccurate—a habeas petitioner seeking to
16 invoke *Martinez* to avoid a finding of procedural default needs to make certain additional
17 showings.

18 Petitioner argues his first claim for relief is “substantial” because Detective
19 Zygmunt admitted, during cross-examination, that he was never in the direct path of the
20 truck and never saw Petitioner point the steering wheel toward him. (*Id.* at 2-3.) Thus,
21 Petitioner argues that “the state did not meet its burden of proof to establish guilt of
22 aggravated assault” and “Petitioner ‘objects’ strenuously to R&R as to default and
23 insubstantial.” (*Id.* at 3.)

24 These arguments are unavailing. Petitioner fails to acknowledge that his trial
25 counsel moved for a new trial based on the inadequacy of the evidence concerning the
26 assault, yet the trial court denied that motion. Petitioner has not attempted to explain why
27 the trial court would have ruled in his favor had his counsel sought a different form of relief
28 (*i.e.*, a directed verdict rather than a new trial) based on the same general argument and/or

1 repackaged the argument as a constitutional challenge. Moreover, the evidence was legally
2 sufficient to support the jury's verdict—as noted, Detective Zygmunt testified he was
3 struck on the arm by the truck, and feared for his safety, due to Petitioner's wild attempts
4 to escape.

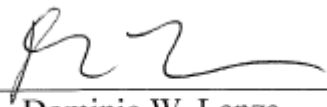
5 Petitioner argues his second claim for relief is substantial because the R&R “is in
6 direct contradiction to the evidence Petitioner has shown from the record.” (*Id.* at 4.)
7 Petitioner does not, however, purport to identify any specific portions of the record that
8 contradict the R&R's analysis. Also, Petitioner fails to address—much less demonstrate
9 the inaccuracy of—the R&R's conclusion that he can't show prejudice concerning his
10 second claim because his trial counsel repeatedly objected to the other-acts testimony,
11 moved for a mistrial based on that testimony, and obtained a curative objection from the
12 judge.

13 Petitioner does not address his third claim for relief (sentencing error) and has thus
14 forfeited any objection to the R&R's rejection of it. *See, e.g., Thomas*, 474 U.S. 140 at
15 149-50; *Reyna-Tapia*, 328 F.3d at 1121.

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

- 17 (1) The R&R's recommended disposition (Doc. 16) is **accepted**;
18 (2) The petition (Doc. 1) is **denied**;
19 (3) A Certificate of Appealability and leave to proceed in forma pauperis on
20 appeal are **denied** because the dismissal of the petition is justified by a plain procedural
21 bar and jurists of reason would not find the procedural ruling debatable; and
22 (4) The Clerk shall enter judgment accordingly and terminate this action.

23 Dated this 30th day of September, 2019.

24
25
26 
27 _____
28 Dominic W. Lanza
United States District Judge