

1 **WO**

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

9
10 David W. Curtis, Jr.,

11 Petitioner,

12 v.

13 David Shinn, Director of the Arizona
14 Department of Corrections; and Attorney
General of the State of Arizona,

15 Respondents.
16

No. CV-19-04374-PHX-DGC (JZB)

ORDER

17
18 Petitioner David Curtis is serving time in Arizona state prison for sexually
19 exploiting and molesting children. He commenced this federal action by filing a habeas
20 corpus petition under 28 U.S.C. § 2254. Doc. 1. He also filed a motion to compel the State
21 to provide the Court with additional exhibits related to the state proceedings. Doc. 52.

22 Magistrate Judge John Boyle issued a report recommending that the Court deny the
23 habeas petition and the motion to compel (“R&R”). Doc. 56. Curtis filed an objection.
24 Doc. 62. In separate orders, the Court accepted the R&R and denied the motion to compel
25 (Doc. 64) and the habeas petition (Doc. 65).

26 Curtis moves the Court to reconsider its order denying the motion to compel.
27 Doc. 67. The motion is fully briefed. Docs. 69-71. For reasons stated below, the Court
28 will deny the motion.

1 **I. Background.**

2 In May 2009, Dwayne Benallie found a computer flash drive in the parking lot at
3 Tempe Marketplace. Benallie discovered photos of nude children on the flash drive and
4 promptly turned it over to the Tempe Police Department. A forensic exam of the flash
5 drive suggested that Curtis was its owner.

6 Curtis was arrested at Tempe Marketplace when he went there to retrieve the flash
7 drive during an undercover operation by Tempe police. During searches of Curtis’s
8 residence and vehicles, police seized additional flash drives, external hard drives, compact
9 discs, a digital camera, and other electronic media containing child pornography. *See Docs.*
10 25 at 6-23, 56 at 2-5.

11 In February 2010, the State charged Curtis with fifteen counts of sexual exploitation
12 of a minor in violation of A.R.S. § 13-3553 (Counts 1-10, 12, 14, 16, 18, and 20) and five
13 counts of molestation of a child in violation of A.R.S. § 13-1410 (Counts 11, 13, 15, 17,
14 and 19). The indictment identified Curtis’s infant granddaughter, “Jessica,” as the victim
15 of the molestation charges and the child depicted in the last five charged visual depictions
16 of child pornography. The State dismissed the molestation charge in Count 13 because the
17 image supporting the charge may not have fit the legal definition for molestation. *See*
18 *Docs.* 25 at 4, 56 at 2-8.

19 The remaining charges were tried to a jury in December 2010. Jason and Caroline
20 Curtis, Jessica’s parents and Curtis’s son and daughter-in-law, testified that Jason and his
21 father were the only men who ever had unsupervised access to Jessica, and that Curtis had
22 babysat Jessica when certain charged photos were taken. Curtis admitted that he had taken
23 photos of himself and Jessica in the nude, including the charged photo of Jessica exposing
24 her genitals. Curtis further admitted that one of the charged photos depicted Jessica holding
25 Curtis’s penis in her hands. Curtis denied having any sexual intent in taking and possessing
26 such photos. *See Docs.* 25 at 17-26, 56 at 8-9.

27 The jury convicted Curtis on each of the nineteen counts. He was sentenced to
28 consecutive terms of ten years in prison for a total of 190 years. The Arizona Court of

1 Appeals affirmed the convictions and sentences, and the Arizona Supreme Court denied
2 review. Curtis’s petitions for post-conviction relief under Arizona Rule of Criminal
3 Procedure 32 were denied. *See* Docs. 25 at 27-28, 56 at 10-11.

4 **II. Curtis’s Habeas Petition and Motion to Compel.**

5 Curtis brought this federal habeas action in June 2019. Doc. 1. He asserts fourteen
6 grounds for relief, with subclaims alleged in some of the grounds. *Id.* at 6-69. As
7 summarized in the Court’s service order:

8 In **Ground One**, Petitioner alleges that his statutes of conviction are
9 unconstitutional. In **Ground Two**, he alleges the indictment was duplicative
10 and failed to set forth the acts alleged to have violated the state statutes. In
11 **Ground Three**, he alleges violation of his Sixth Amendment rights. In
12 **Ground Four**, he alleges that exclusion of his computer expert at trial
13 violated his Sixth and Fourteenth Amendment right to represent himself and
14 to due process. In **Ground Five**, Petitioner alleges violations of his First,
15 Sixth, and Fourteenth Amendment rights. In **Ground Six**, he appears to
16 allege the State failed to offer separate admissible evidence to support each
17 of the molestation charges. In **Ground Seven**, he alleges that the trial court
18 issued jury instructions that required Petitioner to prove that he was in
19 possession of images in an active case of one of his clients in violation of the
20 First Amendment. In **Ground Eight**, he alleges that he had to testify in order
21 to present an affirmative defense under the state statute, since repealed, in
22 violation of his Eighth Amendment rights. In **Ground Nine**, Petitioner
alleges prosecutorial misconduct. In **Ground Ten**, Petitioner alleges “false
reporting” by a Tempe detective on the search warrant. In **Ground Eleven**,
Plaintiff appears to allege that bank records were illicitly obtained or
disclosed to police. In **Ground Twelve**, Petitioner alleges insufficient
evidence to sustain his convictions. In **Ground Thirteen**, Petitioner seeks
relief concerning jury instructions given regarding his affirmative defense.
In **Ground Fourteen**, he challenges the denial of his suppression motions.

23 Doc. 13 at 2-3 (emphasis added); *see also* Doc. 21 (Curtis’s list of claims and issues).

24 In his motion to compel, Curtis requests disclosure of the actual pornographic
25 photographs and all state court documents related to the search of his home, law office, and
26 vehicles. Doc 52 at 1-2, 5. Curtis contends that his claims of fraud and perjury in Ground
27 Two “cannot be competently weighed without viewing the actual named images.” *Id.* at 2.
28 He further contends the actual images will assist him with his claims regarding duplicity

1 (Ground Six), prosecutorial misconduct (Ground Nine), false reporting (Ground Ten), and
2 insufficiency of the evidence (Ground Twelve). *Id.* at 4-5. Curtis also argues that the
3 disclosure is necessary for the Court to evaluate his argument that “the search of the
4 [portable hard drive] and Fujitsu CD were done without the authority of the warrant.” *Id.*
5 at 8.

6 **III. Judge Boyle’s R&R and Curtis’s Objection.**

7 In his R&R, Judge Boyle found that some of Curtis’s claims are procedurally
8 defaulted under 28 U.S.C. § 2254 because (1) he failed to present them to the Arizona
9 Court of Appeals, (2) the state courts invoked an independent and adequate state procedural
10 rule in denying the claims – Curtis could have raised the claims on direct review but failed
11 to do so, *see* Ariz. R. Crim. P. 32(a), or (3) he failed to fairly present the federal bases for
12 the claims to the state courts.¹ Judge Boyle further found that Curtis has established no
13 exception to the procedural default because he has not shown cause and prejudice or a
14 miscarriage of justice. With respect to Curtis’s other claims (and a few defaulted claims),
15 Judge Boyle found that they are not cognizable under federal habeas law or otherwise lack
16 merit. *See* Doc. 56. at 1-2, 17-53.

17 Judge Boyle recommended that Curtis’s motion to compel be denied for the
18 following reasons (*id.* at 54-55):

19 Regarding Ground Two, Petitioner’s challenges to the grand jury
20 proceedings are not cognizable. Regarding Count Six, Petitioner’s duplicity
21 allegation would not be aided by a review of the photographs. The question
22 regarding duplicity is whether Petitioner had clear notice of the charges
23 connecting the photographs in Counts 12, 16, 18, and 20 to the molestation
24 charges in Counts 11, 15, 17, and 19. The Court finds that Petitioner had
25 clear notice for each charge. Also, Petitioner argues that the “trial court
26 convictions were based upon evidence of criminal acts other than those for
27 which he was charged in the Indictment.” (Doc. 52 at 2.) As explained in
28 Ground Six, the Court finds that the Arizona Court of Appeals decision

¹ These include grounds one (a) and (b)(2), two, three, five (Sixth and Fourteenth Amendment claims), eight, nine (c)-(e) and (h), ten, eleven (prosecutorial misconduct), twelve, and thirteen.

1 denying this claim was not an unreasonable application of clearly established
2 federal law, or an unreasonable interpretation of the facts before it.

3 Regarding Grounds Nine (prosecutorial misconduct) and Ten (search
4 warrant fraud), the Court finds that the additional documents requested by
5 Petitioner would not aid the Court's ruling. Finally, Regarding Count
6 Twelve, Petitioner's sufficiency of the evidence claim is unexhausted and
7 procedurally defaulted without excuse so additional exhibits are [not]
8 necessary for a resolution of this claim.

9 Curtis filed an objection to the R&R, but did not specifically object to Judge Boyle's
10 findings and recommendation on the motion to compel. *See* Doc. 62. The Court
11 accordingly accepted the R&R in this regard and denied the motion to compel. Doc. 64
12 at 1-2 (citations omitted). Curtis moves the Court to reconsider that ruling. Doc. 67.²

13 **IV. Curtis's Motion for Reconsideration.**

14 **A. Reconsideration Standard.**

15 Motions for reconsideration are disfavored and rarely granted. *See Nw. Acceptance*
16 *Corp. v. Lynnwood Equip., Inc.*, 841 F.2d 918, 925-26 (9th Cir. 1988); *Resolution Tr. Corp.*
17 *v. Aetna Cas. & Sur. Co.*, 873 F. Supp. 1386, 1393 (D. Ariz. 1994). A motion for
18 reconsideration will be denied absent a showing of manifest error or of new facts or legal
19 authority that could not have been brought to the Court's attention earlier with reasonable
20 diligence. LRCiv 7.2(g)(1); *see United Nat'l Ins. Co. v. Spectrum Worldwide, Inc.*, 555
21 F.3d 772, 780 (9th Cir. 2009). Mere disagreement with an order is an insufficient basis for
22 reconsideration. *Ross v. Arpaio*, No. CV 05-4177-PHX-MHM, 2008 WL 1776502, at *2
(D. Ariz. 2008).

23 **B. Discussion.**

24 Rule 72 requires that objections be "specific" to the findings and recommendations
25 of the magistrate judge. Fed. R. Civ. P. 72(b)(2). Because an obvious purpose of this

26
27 ² In a separate order, the Court accepted the remainder of the R&R and denied
28 Curtis's habeas petition. *See* Doc. 65 at 6-14. Curtis has not sought reconsideration of that
order. *See* Docs. 67 at 1-2 (seeking reconsideration on the "partial ruling" on the R&R and
motion to compel), 70 at 4 (noting that he filed the motion for reconsideration before he
had received a copy of the order denying the habeas petition).

1 requirement is judicial economy – to permit magistrate judges to resolve matters not
2 objectionable to the parties – the Court was required to review de novo only “those portions
3 of [Judge Boyle’s R&R] to which objection is made.” 28 U.S.C. § 636(b)(1)(C); *see*
4 *Thomas v. Arn*, 474 U.S. 140, 149 (1985) (explaining that § 636(b)(1) “does not . . . require
5 any review at all, by either the district court or the court of appeals, of any issue that is not
6 the subject of an objection”); *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir.
7 2003) (§ 636(b)(1) “makes it clear that the district judge must review the magistrate judge’s
8 findings and recommendations de novo *if objection is made*, but not otherwise”) (emphasis
9 in original); Fed. R. Civ. P. 72(b)(3) (“The district judge must determine de novo any part
10 of the magistrate judge’s disposition that has been properly objected to.”).

11 Judge Boyle advised Curtis that he had 14 days to file specific objections to the
12 R&R and that the failure to timely file such objections “may result in the acceptance of the
13 [R&R] by the District Court without further review.” Doc. 56 at 55-56 (citing § 636(b)(1);
14 Fed. R. Civ. P. 72; *Reyna-Tapia*, 328 F.3d at 1121). Because Curtis did not object to Judge
15 Boyle’s recommendation that the motion to compel be denied (*see* Doc. 62), the Court
16 accepted the R&R in this regard and denied the motion (Doc. 64).

17 Curtis asserts in his motion for reconsideration that his objection to the R&R
18 “include[d] the argument for granting the motion to compel.” Doc. 67 at 5 (citing Doc. 62
19 at 17, lines 2-12). But the cited portion of the objection does not even mention the motion
20 to compel or Judge Boyle’s recommendation that the motion be denied. Instead, it contains
21 Curtis’s argument that the trial judge violated state procedural rules:

22 Judge McMurdie was faced with Curtis’s Motion in Limine that requested
23 the Judge to Order that evidence that must be disclosed pursuant to Ariz. R.
24 Crim. P. 15.1(b) that had not been disclosed, to be inadmissible at trial.
25 Curtis had been trying to see the sole evidence against him for the 5
26 molestations counts, since the case began. How can any attorney defend
27 against molestation charges where he is denied any viewing of the five
28 photos that allegedly are the evidence of the five acts of molestations? How
can any attorney cross-examine the images themselves about what is going
on in each image? There was no live witness. The child was not a witness
and remained in Glendale. One has to see the images in context

1 Doc. 62 at 17, lines 2-12.

2 Curtis has not shown that the Court erred in finding that he failed to object to Judge
3 Boyle's recommendation that the motion to compel be denied. *See* Docs. 56 at 54-55, 64
4 at 1-2. The motion for reconsideration will be denied in this regard.

5 Curtis argues that the procedures set forth in Rule 72 have been violated because
6 Judge Boyle issued a consolidated R&R and the Court accepted the R&R in separate
7 orders:

8 Curtis's fully briefed motion to compel was not a dispositive motion, and
9 thus its procedures were those set forth in Rule 72(a). Curtis's Habeas
10 Petition, and State's Response, and Curtis's Reply, however, were ripe for a
11 dispositive ruling, and thus were governed by 72(b)'s procedures. Where a
12 U.S. District Court judge deviates from these procedures, assuming the Court
is exercising its sound discretion in doing so, this situation is governed by
Rule 83

13 The reason that this change of proceedings for the motion to compel should
14 not be lumped with the habeas Petition is that the less formal procedures had
15 already been followed, but the Court's ruling deprived Curtis of the granting
16 of his motion which was denied without reference to Curtis's argument of
record.

17 Doc. 67 at 4-5.

18 This argument fails for a number of reasons. Curtis's concern that the motion to
19 compel and the habeas petition were "lumped" into one R&R is of no importance. Nothing
20 in § 636, Rule 72, or this District's local rules requires that non-dispositive and dispositive
21 matters be addressed in separate documents. Because the Court "has the authority and
22 obligation to apply the appropriate standard of review to whatever decision is issued by the
23 Magistrate Judge," it would be "counterproductive [to require] the Magistrate Judge, in
24 every instance, to put form over substance and issue a document captioned in a particular
25 manner[.]" *Florence v. Stanback*, 607 F. Supp. 2d 1119, 1122 (C.D. Cal. 2009); *see In the*
26 *Matter of United States v. 5.62 Acres of Land*, No. 4:13-CV-00198-TUC-DCB, 2016 WL
27 1714310, at *2 (D. Ariz. Apr. 29, 2016) (finding it immaterial that "[t]he Magistrate Judge
28 treated the motions in limine as dispositive and issued [an] R&R, instead of an Order");

1 *Cassidy v. Union Sec. Ins. Co.*, No. CV 16-4087 (JRT/FLN), 2017 WL 6061620, at *1 (D.
2 Minn. Dec. 6, 2017) (finding no harmful error where, “without deciding whether the
3 underlying motion is dispositive, the Magistrate Judge issued an R&R stating that the
4 district court would conduct a de novo review of any objections”); *see also United States*
5 *v. Raddatz*, 447 U.S. 667, 676 n.3 (1980) (eschewing a construction of the Federal
6 Magistrates Act that would tend to “frustrate the plain objective of Congress to alleviate
7 the increasing congestion of litigation in the district courts”). Similarly, Curtis cites no
8 legal authority suggesting that the Court must resolve pending matters in one consolidated
9 order.³

10 What is more, Curtis was required to file timely objections regarding the motion to
11 compel whether Judge Boyle had issued an order denying the motion under Rule 72(a) or
12 a recommendation that the motion be denied pursuant to Rule 72(b). *See Fed. R. Civ. P.*
13 *72(a)* (“A party may serve and file objections to the order within 14 days after being served
14 with a copy.”); *Fed. R. Civ. P. 72(b)(2)* (“Within 14 days after being served with a copy of
15 the recommended disposition, a party may serve and file specific written objections[.]”).
16 Thus, “regardless of whether the motion [to compel] should have been considered a
17 dispositive or non-dispositive matter, under either Rule 72(a) or (b)(2), [Curtis’s] time to
18 file objections expired long ago.” *LCS Grp., LLC v. Shire LLC*, No. 18 Civ. 2688 (AT)
19 (SDA), 2020 WL 3412927, at *3 (S.D.N.Y. June 22, 2020); *see Terrell v. Davis*, No. 5:17-
20 CV-441(MTT), 2019 WL 3285951, at *2 (M.D. Ga. July 22, 2019) (“Rule 72 . . . allows
21 parties to object to a Magistrate Judge’s orders on non-dispositive motions (Rule 72(a)) or
22 recommendations on dispositive motions (Rule 72(b)(2)) within 14 days Whether the

23
24 ³ Curtis’s reliance on Federal Rule of Civil Procedure 83 is misplaced. *See Doc. 67*
25 *at 3-4.* Rule 83 allows district courts to promulgate local rules that are not inconsistent
26 with the federal rules, and permits judges to regulate practice in any manner consistent with
27 federal law, rules, and the district’s local rules. *Fed. R. Civ. P. 83(a)-(b)*; *see Peterson v.*
28 *Time Ins. Co.*, No. CV 11-81-M-DWM-JCL, 2012 WL 1755166, at *2 (D. Mont. May 16,
2012) (explaining that Rule 83 “authorizes district courts to adopt local rules to govern
their practice” and the local rules “have the ‘force of law’ and are binding upon the parties
and upon the court”) (citation omitted). The Court properly reviewed the R&R and Curtis’s
objections pursuant to § 636 and Rule 72, and Curtis identifies no violation of a local rule
in his motion for reconsideration. *See Doc. 69 at 9-10* (noting that Rule 83 has no
application to Curtis’s case).

1 Plaintiff is objecting to the Magistrate Judge’s Order regarding the motion to compel or to
2 the Recommendation to grant summary judgment, the objection is more than a month
3 late.”); *Solis v. Malkani*, 638 F.3d 269, 274 (4th Cir. 2011) (“We note that a party’s failure
4 to object to a magistrate judge’s recommendations within [14] days in either a
5 nondispositive, Fed.R.Civ.P. 72(a), or a dispositive matter, Fed.R.Civ.P. 72(b), waives
6 further review.”); Doc. 69 at 7-8 (noting that Curtis’s motion for reconsideration should be
7 denied because it essentially is an untimely-filed objection).

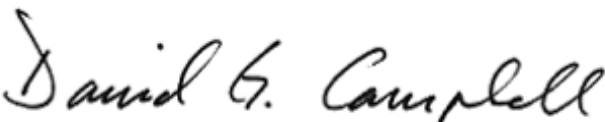
8 Curtis spends much of his motion for reconsideration rearguing the merits of his
9 case. *See* Doc. 67 at 6 (claiming that he was not the man in some of the pornographic
10 images and other images do not reflect “true and accurate depictions of real events”); at 7
11 (the state statute required him to testify and prove that “he did not touch the child because
12 of a sexual motive”); at 8 (one image “only shows a nude J.C. on her back, and no one
13 else”); at 9 (a detective “committed several instances of perjury” and this “false testimony
14 allowed the jury . . . to believe that at least some of the first ten images were [his] photos”).
15 But a motion for reconsideration may not repeat previously made arguments. LRCiv
16 7.2(g)(1); *see Motorola, Inc. v. J.B. Rodgers Mech. Contractors*, 215 F.R.D. 581, 582 (D.
17 Ariz. 2003) (reconsideration cannot “be used to ask the Court to rethink what it has already
18 thought through”). Nor has Curtis shown that any new facts or arguments could not have
19 been raised previously with reasonable diligence. *See* LRCiv 7.2(g)(1). Curtis’s arguments
20 regarding the merits of his case do not warrant reconsideration of the Court’s prior orders.
21 *See* Doc. 69 at 10-11.

22 **IT IS ORDERED:**

23 1. Curtis’s motion for reconsideration of the order denying his motion to
24 compel (Doc. 67) is **denied**.

25 2. Curtis’s motion to permit the refile of his reply to include omitted pages
26 (Doc. 71) is **granted**.

27 Dated this 7th day of January, 2022.

28 

David G. Campbell
Senior United States District Judge