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

Travis Donovan Hiland,
Petitioner,
v.
Charles L. Ryan, et al.,
Respondents.

No. CV-13-08110-PCT-PGR
ORDER

Hiland is an Arizona state prisoner who was convicted pursuant to a guilty plea of theft, in violation of A.R.S. § 13-1802, and fraud schemes, in violation of A.R.S. § 13-2310. The state trial court imposed a sentence of nine years of imprisonment for the theft conviction, and a consecutive sentence of seven years of probation for the fraud schemes conviction. Hiland filed a Petition under 28 U.S.C. § 2254 for a Writ of Habeas Corpus by a Person in State Custody in which he challenges his conviction and sentence. The Magistrate Judge issued a Report and Recommendation (“R&R”) (Doc. 29) recommending that the Petition be denied. Hiland has filed objections to the R&R (Doc. 32). For the reasons set forth below, the Court will over rule Hiland’s objections, will adopt in part the R&R, and will deny the Petition.

A. Ground Two

In Ground Two of his Petition, Hiland argues that “he was convicted on the basis of a guilty plea that was the product of ineffective assistance of counsel.” (Doc. 1 at 7,

28

1 15-16.) Hiland does not deny that he has procedurally defaulted Ground Two because he
2 failed to raise it in his PCR proceeding, but objects to the R&R’s conclusions that he has
3 failed to show cause and prejudice to overcome his procedural default. (Doc. 32 at 2-6.)

4 Under *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), “a procedural default by state
5 PCR counsel in failing to raise trial-counsel IAC is excused if there is ‘cause’ for the
6 default.” *Dietrich v. Ryan*, 740 F.3d 1237, 1244 (9th Cir. 2013). To demonstrate such
7 “cause,” a petitioner must show, among other things, that the trial counsel IAC claim is a
8 “substantial” claim. *Martinez*, 132 S. Ct. at 1318-19. Hiland contends that he met this
9 requirement. He contends that his trial counsel IAC claim is “substantial” because his
10 trial counsel advised him to enter a guilty plea to both theft and fraud schemes even
11 though a conviction and sentence on both of these offenses violates the Double Jeopardy
12 Clause. (Doc. 32 at 3.)

13 The Double Jeopardy Clause protects “an individual from being subjected to the
14 hazards of trial and possible conviction more than once for an alleged offense.” *Missouri*
15 *v. Hunter*, 459 U.S. 359, 365 (1983) (quotation marks and citations omitted). Because
16 Hiland was convicted of both of the offenses in a single proceeding, his “right to be free
17 from multiple trials for the same offense” is not implicated. *Id.* Rather, at issue is the
18 imposition of cumulative sentences in a single proceeding.

19 “With respect to cumulative sentences imposed in a single trial, the Double
20 Jeopardy Clause does no more than prevent the sentencing court from prescribing greater
21 punishment than the legislature intended.” *Id.* at 366. Thus, “where the offenses are the
22 same . . . cumulative sentences are not permitted unless elsewhere specially authorized
23 by” the legislature. *Whalen v. United States*, 445 U.S. 684, 693 (1980). Where the
24 legislature intended “to impose multiple punishments, imposition of such sentences does
25 not violate the Constitution.” *Albernaz v. United States*, 450 U.S. 333, 344 (1981).

26 The Arizona legislature has provided notice of its intent to allow multiple
27 punishments for the same act. *See* A.R.S. § 13-116 (“An act or omission which is made
28 punishable in different ways by different sections of the laws may be punished under
both, but in no event may sentences be other than concurrent.”) Assuming that theft and

1 fraud schemes are the “same” for double jeopardy purposes,¹ imposition of cumulative
2 sentences in the same trial is authorized by the legislature and does not, therefore, violate
3 the Double Jeopardy Clause. Accordingly, Hiland’s claim – that his trial counsel was
4 ineffective because he advised Hiland to enter guilty pleas that violated Hiland’s rights
5 under the Double Jeopardy Clause – is not a “substantial” claim, and Hiland has failed to
6 meet his burden of demonstrating cause for his procedural default of Ground Two.
7 Ground Two is therefore dismissed.

8 B. Ground Five

9 In Ground Five of his Petition, Hiland contends that the trial court’s imposition of
10 consecutive sentences for his convictions for theft and fraud schemes violates the Double
11 Jeopardy Clause. (Doc. 1 at 19-20.) He objects to the R&R’s recommendation to
12 dismiss Ground Five as unreviewable in habeas. He contends that Ground Five is
13 reviewable in habeas because the state court’s decision to impose consecutive sentences
14 involves “an unreasonable determination of the facts and an unreasonable application of
15 clearly established federal law.” (Doc. 32 at 13.)

16 In determining that the sentences for theft and fraud schemes could be run
17 consecutively rather than concurrently under state law, the sentencing judge determined:

18 The misrepresentations of the information [for the fraud] is different than
19 the theft of the items that are taken, . . . the crux of a fraud case is the
20 misrepresentation. The crux of the theft case is actually the taking. . . .

21 I looked at the *State versus Gordon* analysis . . . [and an unpublished
22 case from toward the end of 2008]. . . . [T]he theory of it is equally applicable
23 here as it was in that particular case, distinguishing between the offense of
24 fraudulent schemes and artifices and a theft count. And it is true that the shared
25 characteristic of that is victims of the theft count may also be victims of the fraud
26 count. But that case law supports consecutive sentencing.

27 (Doc. 16-5 at 140-141.) Thus, the sentencing judge determined that “these are not the
28 same elements and that consecutive sentencing is available to the Court.” (*Id.* at 159.)

¹ The Court disagrees with and thus does not adopt the portion of the R&R that
analyzes whether theft and fraud schemes are the “same” offenses for double jeopardy
purposes in relation to Ground Two. (*See* Doc. 29 at 23-24.)

1 The state PCR court interpreted the sentencing judge as finding that “each of the
2 Defendants knowingly obtained a benefit by misrepresenting that they had actual
3 investments for the victims to invest in and that those investments would result in a
4 benefit to the victims. The Defendants *then* received money from the victims and kept
5 that money for their own gain.” (Doc. 15-3 at 10 (citing Doc. 16-5 at 140-141.) The
6 PCR court thus rejected Hiland’s challenge to the consecutive sentences, finding that the
7 fraud schemes and theft were separate acts, and that, accordingly, consecutive sentences
8 were authorized under A.R.S. § 13-116 and *State v. Gordon*, 778 P.2d 1204 (Ariz. 1989).
9 (See Doc. 15-3 at 10.)

10 A review of the indictment, which is the basis of the convictions for theft and
11 fraud schemes, indicates that this decision by the state court may be based on an
12 unreasonable determination of the facts in light of the evidence presented in the state
13 court proceeding.² However, the mere fact that a state court made an unreasonable
14 determination of facts does not provide a basis for this Court to grant habeas relief.
15 Rather, “it is only noncompliance with *federal* law that renders a State’s criminal
16 judgment susceptible to collateral attack in the federal courts.” *Wilson v. Corcoran*, 562
17 U.S. 1, 5 (2010). Thus, a state court’s unreasonable determination of facts applied to
18 *state* law, and that may result in a violation of *state* law, does not provide an avenue for
19 relief in habeas. *Id.* at 5-6; see *Estelle v. McGuire*, 502 U.S. 62, 67 (1991) (“federal
20 habeas corpus relief does not lie for errors of state law”) (citation omitted)).

21 Hiland contends that federal law was violated here, citing the Double Jeopardy
22 Clause. However, as discussed previously in relation to Ground Two, the imposition of

23
24 ² The indictment, which is the basis for Hiland’s guilty plea, charges Hiland with
25 committing a violation of the fraud schemes statute by engaging in the following
26 conduct: “[P]ursuant to a scheme or artifice to defraud, [he] knowingly obtained a
27 benefit of approximately \$1,658,849.71 by means of false or fraudulent pretenses,
28 in funds, *not* the “benefit” of having the victims believe or trust in the value of the
investments, as found by the state court.

1 sentences in the same proceeding for both theft and fraud schemes does not violate the
2 Double Jeopardy Clause because state law allows imposition of cumulative sentences.³
3 Further, the determination of whether consecutive cumulative sentences, as opposed to
4 concurrent cumulative sentences, can be imposed is a question of state law, not federal
5 law. *See* A.R.S. § 13-116; *State v. Gordon*, 778 P.2d 1204, 1211 (Ariz. 1989). Thus, in
6 Ground Five, Hiland is actually challenging the state court’s application of what may be
7 an unreasonable determination of facts to state law, and in particular to A.R.S. § 13-116
8 and *Gordon*. This challenge is not cognizable in habeas. *See Wilson*, 562 U.S. at 5-6.
9 Ground Five is therefore dismissed.

10 C. Ground One

11 In Ground One of his petition, Hiland contends that his guilty plea was not
12 knowing, intelligent, and voluntary. (Doc. 1 at 14-15.) The R&R concludes that
13 Hiland’s challenge to his guilty plea lacks merit because Hiland cannot show that the
14 state court’s rejection of his claim was based on an unreasonable determination of the
15 facts or that it was contrary to, or an unreasonable application of, established federal law.
16 (Doc. 29 at 38-42.) Hiland raises a general objection to the R&R’s conclusion and
17 recommendation that Ground One be dismissed, but does not raise any specific objection,
18 relying instead on the argument he “set forth in his Traverse in relation to this ground.”
19 (Doc. 32 at 7-8.)

20 The Court has reviewed the entire record and Hiland’s objection, and overrules the
21 objection. The Court agrees with the R&R that Hiland has not demonstrated that his
22 guilty plea was involuntary or that there was a Due Process violation. The Court further
23 finds that the record refutes Hiland’s factual allegations and demonstrates that those
24 allegations are not credible. The Court adopts the R&R’s findings, analysis, and
25 conclusion on this issue. (*See* Doc. 29 at 38-42.) Ground One is therefore dismissed.

26
27 ³ The Court disagrees with and thus does not adopt the portion of the R&R that
28 analyzes whether theft and fraud schemes are the “same” offenses for double jeopardy
purposes in relation to Ground Five. (*See* Doc. 29 at 55-56.)

1 D. Ground Four

2 In Ground Four of his petition, Hiland contends that he did not receive a fair
3 hearing or a fair sentence due to the bias and prejudice of the trial court judge, and that
4 this violated his rights under the Sixth and Fourteenth Amendments. (Doc. 1 at 17-19.)
5 The R&R concludes that Hiland’s claim that the trial judge was biased and prejudiced
6 lacks merit because Hiland cannot show that the state court’s rejection of this claim was
7 based on an unreasonable determination of the facts or that it was contrary to, or an
8 unreasonable application of, established federal law. (Doc. 29 at 42-46.) Hiland raises a
9 general objection to the R&R’s conclusion and recommendation that Ground Four be
10 dismissed, but does not raise any specific objection, relying instead on the argument he
11 “set forth in his Traverse in relation to this ground.” (Doc. 32 at 8-9.)

12 The Court has reviewed the entire record and Hiland’s objection, and overrules the
13 objection. The Court agrees with the R&R that Hiland has not demonstrated that the state
14 court’s resolution of this claim was based on an unreasonable determination of facts, or
15 that it was contrary to, or an unreasonable application of, clearly established federal law.
16 The Court adopts the R&R’s findings, analysis, and conclusion on this issue. (*See* Doc.
17 29 at 42-46.) Ground Four is therefore dismissed.

18 E. Ground Three

19 In Ground Three of his petition, Hiland contends that he did not receive fair
20 hearings and a fair sentence due to prosecutorial misconduct, and that this violated his
21 rights under the Fifth, Sixth, and Fourteenth Amendments. (Doc. 1 at 16-17.) The R&R
22 concludes that Hiland did not establish a due process violation based on the alleged
23 instances of prosecutorial misconduct, and that the prosecutorial misconduct claim lacks
24 merit because Hiland cannot show that the state court’s rejection of his claims of
25 prosecutorial misconduct, individually or cumulatively, was based on an unreasonable
26 determination of the facts or that it was contrary to, or an unreasonable application of,
27 established federal law. (Doc. 29 at 46-52.) Hiland raises a general objection to the
28 R&R’s conclusion and recommendation that Ground Three be dismissed, but does not
raise any specific objection, relying instead on the argument he “set forth in his Traverse

1 in relation to this ground.” (Doc. 32 at 9-11.)

2 The Court has reviewed the entire record and Hiland’s objection, and overrules the
3 objection. The Court agrees with the R&R that Hiland has not established a due process
4 violation based on the alleged instances of prosecutorial misconduct, and that the
5 prosecutorial misconduct claim lacks merit because Hiland cannot show that the state
6 court’s rejection of his claims of prosecutorial misconduct, individually or cumulatively,
7 was based on an unreasonable determination of the facts or that it was contrary to, or an
8 unreasonable application of, established federal law. The Court adopts the R&R’s
9 findings, analysis, and conclusion on this issue. (See Doc. 29 at 46-61.) Ground Three is
10 therefore dismissed.

11 F. Ground Six

12 In Ground Six of his petition, Hiland contends that the trial court improperly
13 considered aggravating and mitigating factors and thereby violated the protections
14 provided by the Fifth, Sixth, and Fourteenth Amendments. (Doc. 1 at 20-21.) The R&R
15 concludes that the sentencing court considered Hiland’s role in the offenses and his
16 argument that the money that he did receive was only a salary and did not constitute a
17 pecuniary gain; that the record did not support Hiland’s contention that the imposition of
18 the sentences violated his due process rights; and that Hiland had not demonstrated that
19 the state court’s rejection of his sentencing claims was based on an unreasonable
20 determination of the facts or that it was contrary to, or an unreasonable application of,
21 clearly established federal law. (Doc. 29 at 57-59.) Hiland raises a general objection to
22 the R&R’s conclusion and recommendation that Ground Six be dismissed, but does not
23 raise any specific objection, relying instead on the argument he “set forth in his Traverse
24 in relation to this ground.” (Doc. 32 at 14.)

25 The Court has reviewed the entire record and Hiland’s objection, and overrules the
26 objection. The Court agrees with the R&R that Hiland has not established a due process
27 violation based on the imposition of the sentences; that the record reflects that the
28 sentencing court considered Hiland’s role in the offenses and his argument that the
money that he did receive was only a salary and did not constitute a pecuniary gain; and

1 that Hiland did not demonstrate that the state court’s rejection of his sentencing claims
2 was based on an unreasonable determination of the facts or that it was contrary to, or an
3 unreasonable application of, clearly established federal law. The Court adopts the R&R’s
4 findings, analysis, and conclusion on this issue. (*See* Doc. 29 at 57-61.) Ground Six is
5 therefore dismissed.

6 G. Request for Evidentiary Hearing

7 In his petition, Hiland requests an evidentiary hearing. (Doc. 1 at 13.) The R&R
8 recommends denying an evidentiary hearing. (Doc. 29 at 59-60.) Hiland objects to the
9 recommendation, contending that he is entitled to an evidentiary hearing because he has
10 presented “meritorious claims” and exercised reasonable diligence in developing a factual
11 record in state court. (Doc. 32 at 14-15.)

12 “In deciding whether to grant an evidentiary hearing, a federal court must consider
13 whether such a hearing could enable an applicant to prove the petition’s factual
14 allegations, which, if true, would entitle the applicant to federal habeas relief.” *Schriro v.*
15 *Landrigan*, 550 U.S. 465, 474 (2007) (citation omitted). “Because the deferential
16 standards prescribed by § 2254 control whether to grant habeas relief, a federal court
17 must take into account those standards in deciding whether an evidentiary hearing is
18 appropriate.” *Id.* (citations omitted). Moreover, “if the record refutes the applicant’s
19 factual allegations or otherwise precludes habeas relief, a district court is not required to
20 hold an evidentiary hearing.” *Id.*

21 Here, the record precludes habeas relief on Grounds Two and Five, for the reasons
22 discussed above. As to Ground One, challenging the voluntariness of Hiland’s guilty
23 plea, the record refutes Hiland’s factual allegations and demonstrates that those
24 allegations are not credible. (*See* Doc. 20 at 38-42.) Further, the Court finds that Hiland
25 has not made a colorable claim and that his factual allegations are refuted by the record as
26 to Ground Four, claiming that the trial court judge was biased and prejudiced; Ground
27 Three, claiming prosecutorial misconduct; and Ground Six, claiming the trial court
28 improperly considered aggravating and mitigating factors. (*See* Doc. 29 at 42-52, 57-59.)
Accordingly, Hiland is not entitled to an evidentiary hearing. *See Landrigan*, 550 U.S. at

1 474.

2 **Conclusion**

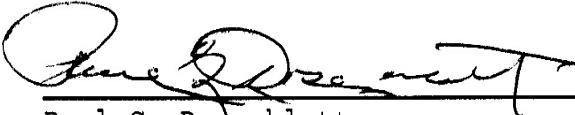
3 The Court will deny Hiland's petition because the claims in his petition either lack
4 merit or are procedurally defaulted and barred from review and are therefore dismissed.
5 Further, because the record precludes habeas relief as to Grounds Two and Five; and the
6 record refutes Hiland's factual allegations and/or Hiland has not made a colorable claim
7 as to Grounds One, Three, Four, and Six, he is not entitled to an evidentiary hearing.
8 Accordingly,

9 IT IS ORDERED that the Magistrate Judge's Report and Recommendation (Doc.
10 29) is accepted and adopted to the extent set forth herein.

11 IT IS FURTHER ORDERED that the Petition Under 28 U.S.C. § 2254 for a Writ
12 of Habeas Corpus by a Person in State Custody (Doc. 1) is DENIED and that this action
13 is DISMISSED. The Clerk of the Court shall enter judgment accordingly.

14 IT IS FURTHER ORDERED that no certificate of appealability shall be issued
15 and that the petitioner is not entitled to appeal *in forma pauperis* because dismissal is
16 justified by a plain procedural bar, and reasonable jurists would not find the ruling
17 debatable; or the petitioner has not made a substantial showing of the denial of a
18 constitutional right in that he has failed to demonstrate that reasonable jurists would find
19 the Court's assessment of his constitutional claims to be debatable or wrong.

20 Dated this 28th day of June, 2015.

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24 Paul G. Rosenblatt
25 United States District Judge
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