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

John Francis Ree,

Petitioner,

v.

Charles L. Ryan, et al.,

Respondents.

No. CV-13-00746-TUC-RM

ORDER

Pending before the Court is Petitioner's § 2254 Petition for Writ of Habeas Corpus ("Petition") (Doc. 1). The magistrate judge to whom this case was assigned issued a Report and Recommendation (Doc. 17) that recommends denying the Petition.

A party may file objections to a magistrate judge's report and recommendation within 14 days after being served with a copy of it. 28 U.S.C. § 636(b)(1)(C); *see also* Rule 8(b) of the Rules Governing § 2254 Cases. The district judge must "make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1)(C); *see also* Rule 8(b) of the Rules Governing 2254 Cases in the United States District Courts. A review of the record reflects that the parties have not filed any objections to the Report and Recommendation and that the time to file objections has expired. Therefore, the Court is not required to review the magistrate judge's findings and recommendations *de novo*. *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 ("the district judge must review the magistrate judge's findings and recommendations *de novo if objection is made*, but not otherwise." (emphasis in original)).

1 While 28 U.S.C. § 636 “does not require the judge to review an issue *de novo* if no
2 objections are filed, it does not preclude further review by the district judge, *sua sponte*
3 or at the request of a party, under a *de novo* or any other standard.” *Thomas v. Arn*, 474
4 U.S. 140, 154 (1985). The Court “may accept, reject, or modify, in whole or in part, the
5 findings or recommendations made by the magistrate judge.” 28 U.S.C. § 636(b)(1).
6 The advisory committee notes to Rule 72(b) of the Federal Rules of Civil Procedure state
7 that, “[w]hen no timely objection is filed, the court need only satisfy itself that there is no
8 clear error on the face of the record in order to accept the recommendation” of a
9 magistrate judge. The Court will follow this approach and review the magistrate judge’s
10 Report and Recommendation for clear error. *See Prior v. Ryan*, 2012 WL 1344286, *1
11 (D. Ariz. Apr. 18, 2012) (reviewing for clear error unobjected-to portions of Report and
12 Recommendation on § 2254 petition); *Johnson v. Zema Sys. Corp.*, 170 F.3d 734, 739
13 (7th Cir. 1999) (“If no objection or only partial objection is made, the district judge
14 reviews those unobjected portions for clear error.”).

15 After reviewing the record, the Court finds that the magistrate judge’s report
16 correctly concludes that Petitioner’s guilty plea precludes him from raising “independent
17 claims relating to the deprivation of constitutional rights that occurred prior to the entry
18 of the guilty plea.” *Tollett v. Henderson*, 411 U.S. 258, 267 (1973). Petitioner “may only
19 attack the voluntary and intelligent character of the guilty plea by showing that the advice
20 he received from counsel was not within the standards set forth in *McMann* [*v.*
21 *Richardson*, 397 U.S. 759 (1970)].” *Tollett*, 411 U.S. at 267. “Counsel’s failure to
22 evaluate properly facts giving rise to a constitutional claim, or his failure properly to
23 inform himself of facts that would have shown the existence of a constitutional claim,
24 might in particular fact situations meet this standard of proof.” *Id.* at 265-67. “Thus,
25 while claims of prior constitutional deprivation may play a part in evaluating the advice
26 rendered by counsel, they are not themselves independent grounds for federal collateral
27 relief.” *Id.* at 267. Accordingly, the Court adopts the portion of the magistrate judge’s
28 report recommending dismissal of the first three counts of the Petition and will dismiss

1 those counts to the extent that they raise independent claims of constitutional deprivations
2 that occurred prior to the entry of Petitioner’s guilty plea. For the reasons discussed
3 below, however, the Court will not, at this point in time, dismiss the portions of those
4 counts that allege ineffective assistance of counsel.

5 The magistrate judge’s report recommends dismissing the fourth count of the
6 Petition as procedurally defaulted. In this count, Petitioner alleges that he lost the
7 opportunity to accept a more favorable plea agreement because his trial attorney failed to
8 answer a telephone call from him on the last day given by the state for accepting the
9 plea.¹ The Court agrees with the magistrate judge that Petitioner failed to present this
10 claim to the state court and that it is now procedurally defaulted. The Court finds,
11 however, that the magistrate judge erred in concluding that Petitioner had to present an
12 independent claim for ineffective assistance of postconviction counsel to the state court in
13 order to assert the ineffectiveness of postconviction counsel as cause for the procedural
14 default of his claim of ineffective assistance of trial counsel.

15 In *Edwards v. Carpenter*, 529 U.S. 446 (2000), the Supreme Court held that an
16 ineffective assistance of *trial counsel* claim asserted as cause for the procedural default of
17 another claim of constitutional error may itself be procedurally defaulted if not presented
18 to the state courts as an independent claim. Unlike a claim of ineffective assistance of
19 trial counsel, however, a claim of ineffective assistance of *postconviction relief counsel*
20 cannot be raised as a freestanding constitutional claim, as “[t]here is no constitutional
21 right to an attorney in state post-conviction proceedings.” *Coleman v. Thompson*, 501
22 U.S. 722, 752 (1991); *see also Martinez v. Ryan*, 132 S. Ct. 1309, 1318-19 (2012)
23 (holding that the ineffectiveness of postconviction relief counsel may, under certain
24 circumstances, establish cause for the procedural default of a claim of ineffectiveness of
25 trial counsel, but that the ineffectiveness of postconviction relief counsel cannot be raised
26 as “a freestanding constitutional claim”). Because ineffective assistance of

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28 ¹ As discussed below, Count Four of the Petition also alleges ineffective assistance
of trial counsel on other grounds.

1 postconviction counsel cannot be raised as a freestanding constitutional claim, it was
2 erroneous for the magistrate judge to conclude that Petitioner had to raise the
3 ineffectiveness of postconviction counsel as an independent claim in state court in order
4 to assert, in federal habeas proceedings, the ineffectiveness of that counsel as cause for
5 the procedural default of his ineffective assistance of trial counsel claim.

6 Typically, an “attorney’s negligence in a postconviction proceeding does not
7 establish cause” for a procedural default. *Martinez*, 132 S. Ct. at 1319. In states such as
8 Arizona, however, where claims of ineffective assistance of trial counsel can be raised for
9 the first time in postconviction proceedings (rather than on direct appeal), a procedural
10 default “will not bar a federal habeas court from hearing a substantial claim of ineffective
11 assistance at trial if, in the initial-review collateral proceeding, there was no counsel or
12 counsel in that proceeding was ineffective.” *Id.* at 1320. Here, as in *Martinez*,
13 Petitioner’s appointed postconviction relief counsel was unable to find any meritorious
14 claims, and thus Petitioner filed his petition for postconviction relief *pro se*. If *Martinez*
15 applies, and if Petitioner can establish (1) that his postconviction counsel was ineffective
16 under the standards of *Strickland v. Washington*, 466 U.S. 668 (1984), and (2) that his
17 underlying ineffective assistance of trial counsel claim is a substantial one, then he may
18 be able to overcome the procedural default of his ineffective assistance of trial counsel
19 claim. *See Martinez*, 132 S. Ct. at 1318. Petitioner’s Reply to Respondents’ Limited
20 Answer, while inartful, might be construed as raising a *Martinez*-type argument. (*See*
21 *Doc. 11* at 6 (“Ineffective assistance of appellate counsel may constitute cause for state
22 procedural default for purposes of habeas corpus review.”)). Therefore, the Court will
23 not dismiss the fourth count of the Petition at this point in time.

24 Both Respondents and the magistrate judge treated the Petition as asserting only
25 one claim of ineffective assistance of trial counsel. “Prisoner *pro se* pleadings are given
26 the benefit of liberal construction.” *Porter v. Ollison*, 620 F.3d 952, 958 (9th Cir. 2010)
27 (citing *Erickson v. Pardus*, 551 U.S. 89, 94 (2007)). Construed liberally, the Petition
28 alleges multiple bases for ineffective assistance of counsel claims. Though only a single

1 count of the Petition is characterized as an ineffective assistance claim, the first two
2 counts of the Petition might be construed as including allegations of ineffective assistance
3 of counsel. In the first count, Petitioner appears to allege that his trial counsel was
4 ineffective in pressuring Petitioner to accept a guilty plea instead of pursuing an
5 entrapment defense. In the second count, Petitioner appears to allege that his trial
6 counsel was ineffective in advising Petitioner to accept a guilty plea instead of going to
7 trial and challenging evidence obtained pursuant to an allegedly unconstitutional search
8 warrant and challenging testimony obtained during an interrogation allegedly infected by
9 a *Miranda* violation. Furthermore, the fourth count of the Petition does not allege
10 ineffectiveness solely on the grounds that counsel allegedly caused Petitioner to lose the
11 opportunity to accept a more favorable plea agreement. Petitioner also alleges in count
12 four that his trial counsel falsely promised him he would obtain clemency and thus only
13 serve half of his sentence if he pleaded guilty. Additionally, Petitioner complains that his
14 trial counsel assured him not to worry about a second criminal case filed against him but
15 then allowed the state to use the case to persuade Petitioner to plead guilty in the case at
16 hand.

17 Respondents' Limited Answer to Petition for Writ of Habeas Corpus does not
18 address the impact of *Martinez* on the procedural default of Petitioner's claim that trial
19 counsel was ineffective in allegedly preventing Petitioner from accepting a more
20 favorable plea agreement. The Court will therefore order supplemental briefing on the
21 issue of how *Martinez* affects the procedural default of that claim. The supplemental
22 briefing shall also address the procedural status of the other allegations of ineffective
23 assistance of trial counsel contained in the Petition.

24 Accordingly,

25 **IT IS HEREBY ORDERED** as follows:

- 26 1. The portion of the magistrate judge's Report and Recommendation (Doc. 17) that
27 recommends dismissing the first three counts of the Petition is accepted and
28 adopted, and the first three counts of the Petition (Doc. 1) are dismissed with

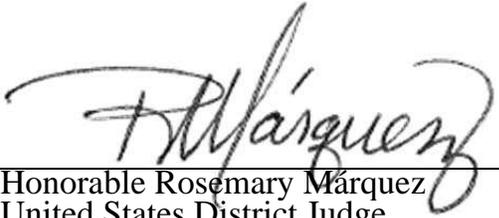
1 prejudice to the extent that they allege independent claims of constitutional errors
2 that occurred prior to Petitioner's guilty plea. The portions of the first two counts
3 of the Petition that might be construed as alleging ineffective assistance of trial
4 counsel will not be dismissed at this time.

5 2. The Court declines to adopt the portion of the magistrate judge's report that
6 recommends dismissing the fourth count of the Petition. The fourth count of the
7 Petition will not be dismissed at this time.

8 3. On or before **November 20, 2014**, Respondents shall file a supplemental brief
9 addressing the impact of *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), on the
10 procedural default of Petitioner's claim that trial counsel was ineffective in
11 allegedly preventing Petitioner from accepting a more favorable guilty plea.
12 Respondents shall include with their supplemental brief all portions of the record
13 necessary to determine whether this claim is "substantial." Respondents'
14 supplemental brief shall also address the procedural status of the other allegations
15 of ineffective assistance of trial counsel contained in the Petition.

16 4. Petitioner shall file a response to Respondents' supplemental brief no later than
17 **December 4, 2014**. No reply will be permitted absent leave of Court.

18 Dated this 5th day of November, 2014.

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23 Honorable Rosemary Márquez
24 United States District Judge
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