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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

FRANK NATHAN ESCALANTE,)	Case No. CV 19-5563-RSWL (JPR)
)	
Petitioner,)	
)	ORDER ACCEPTING FINDINGS AND
v.)	RECOMMENDATIONS OF U.S.
)	MAGISTRATE JUDGE
JIM ROBERTSON, Warden,)	
)	
Respondent.)	
_____)	

The Court has reviewed the Petition, records on file, and Report and Recommendation of U.S. Magistrate Judge. On October 15, 2021, Petitioner filed Objections to the R. & R.; Respondent didn't respond. Although the Objections are largely unintelligible, the Court attempts to address them nonetheless.

Petitioner continues to insist that the state court admitted codefendant Akuna's statements without deciding the "factual existence of a conspiracy to commit murder." (Objs. at 2; see id. at 4-5.) He is apparently arguing that it didn't properly admit them under the federal or state coconspirator exception to the hearsay rule. (See R. & R. at 27 & n.14; see also Objs. at 3-5 (citing state and federal evidence rules and Carbo v. United States, 314 F.2d 718, 735 n.21 (9th Cir. 1963) (discussing coconspirator exception), and United States v. Ellsworth, 481

1 F.2d 864, 871 (9th Cir. 1973) (same).) But as the Magistrate
2 Judge correctly noted, claims that a state court violated federal
3 or state evidence rules aren't cognizable on federal habeas
4 review. (See R. & R. at 27; see also id. at 16-17.) In any
5 event, as the Magistrate Judge also observed, the state court
6 didn't admit the statements under the coconspirator exception.
7 (See id. at 27 (citing 1 Rep.'s Tr. at 36-54).) For that reason
8 and others, Dutton v. Evans, 400 U.S. 74, 88-89 (1970) (plurality
9 opinion), on which Petitioner relies (see Objs. at 3-4), doesn't
10 apply.

11 Further, the Supreme Court has since held that the
12 constitutional right of confrontation extends only to testimonial
13 statements. (See R. & R. at 29 (citing Crawford v. Washington,
14 541 U.S. 36, 68 (2004); Davis v. Washington, 547 U.S. 813, 821
15 (2006)).) As the Magistrate Judge correctly found, the court of
16 appeal was not objectively unreasonable in concluding that
17 Akuna's statements weren't testimonial and thus that their
18 admission didn't violate the Confrontation Clause. (See id. at
19 37-38.)

20 Petitioner's next argument fares even worse: the Magistrate
21 Judge should have reviewed grounds one through three under
22 Federal Rule of Criminal Procedure 52(b)'s plain-error standard,
23 not de novo. (See Objs. at 5-6, 11; R. & R. at 14-16.) But
24 plain error applies only on direct appeal and is "out of place"
25 on habeas review. United States v. Frady, 456 U.S. 152, 164
26 (1982). In any event, it's a more deferential standard than the
27 de novo review the Magistrate Judge engaged in and Petitioner
28 thus couldn't possibly have been prejudiced. See, e.g., United

1 States v. Lindsey, 680 F. App'x 563, 565-66 (9th Cir. 2017).

2 Petitioner states that the Magistrate Judge "ma[de] an
3 astounding effort to not mention . . . [the] jury inquiry about
4 whether finding him not guilty of murder." (Objs. at 7 (citing 2
5 Clerk's Tr. at 263-64); see also id. at 10.) During
6 deliberations, the jury asked if "someone [can] be found not
7 guilty of murder [and] gui[l]ty of conspiracy or does it have to
8 be all or none." (2 Clerk's Tr. at 263.) The judge responded,
9 "[A] defendant may be found not guilty of murder and guilty of
10 conspiracy." (Id. at 264.) Petitioner does not explain how the
11 jury's question or the judge's answer bears on any of his claims,
12 however, and the Magistrate Judge therefore made no mistake in
13 not discussing the issue.¹


14 Finally, Petitioner maintains that he didn't "freely" waive
15 his right to testify. (Objs. at 9.) That claim appears nowhere
16 in the Petition. Even if the Court could consider habeas claims,
17 as opposed to arguments, raised for the first time in objections
18 to an R. & R., see Akhtar v. Mesa, 698 F.3d 1202, 1208 (9th Cir.
19 2012); but see Cacoperdo v. Demosthenes, 37 F.3d 504, 507 (9th
20 Cir. 1994) (court need not consider habeas claims raised for
21 first time in traverse), his new claim has not been exhausted in
22 state court and is likely time barred and therefore not
23 appropriate for review, see Marquez-Ortiz v. Sullivan, No. SACV
24 08-552 ABC (FFM), 2012 WL 294741, at *1 (C.D. Cal. Feb. 1, 2012)

26 ¹ Petitioner asserts that the jury inquiry required the
27 state court to give CALJIC 6.24 (see Objs. at 19), contrary to
28 the Magistrate Judge's finding that the court had no reason to
give it (see R. & R. at 23-28). But he doesn't explain why the
jury question required the court to do so.

1 (declining to consider habeas petitioner's additional claims
2 raised for first time in objections to report and recommendation
3 in part because they were not exhausted in state court). The
4 Court therefore declines to consider it.

5 Having reviewed de novo those portions of the R. & R. to
6 which Petitioner objects, the Court agrees with and accepts the
7 findings and recommendations of the Magistrate Judge. IT
8 THEREFORE IS ORDERED that the Petition is denied and Judgment be
9 entered dismissing this action.

10
11
12 DATED: November 5, 2021



RONALD S.W. LEW
U.S. DISTRICT JUDGE