

APPENDIX A

DENIAL OF REQUEST FOR A
CERTIFICATE OF APPEALABILITY
FROM NINTH CIRCUIT

UNITED STATES COURT OF APPEALS

FILED

FOR THE NINTH CIRCUIT

MAR 12 2018

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

STEPHEN FRANK KARBAN,

Petitioner-Appellant,

v.

ATTORNEY GENERAL FOR THE STATE
OF ARIZONA and CHARLES L. RYAN,
Warden,

Respondents-Appellees.

No. 17-16688

D.C. No. 2:14-cv-02763-SRB
District of Arizona,
Phoenix

ORDER

Before: CANBY and SILVERMAN, Circuit Judges.

This appeal is from the denial of appellant's 28 U.S.C. § 2254 petition and subsequent post-judgment motions for relief. The request for a certificate of appealability (Docket Entry No. 5) is denied because appellant has not shown that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also* 28 U.S.C. § 2253(c)(2); *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012); *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003); *United States v. Winkles*, 795 F.3d 1134, 1143 (9th Cir. 2015), *cert. denied*, 136 S. Ct. 2462 (2016); *Lynch v. Blodgett*, 999 F.2d 401, 403 (9th Cir. 1993) (order).

Any pending motions are denied as moot.

DENIED.

APPENDIX B

UNITED STATES DISTRICT COURT OF

ARIZONA

DENYING FEDERAL HABEAS RELIEF

NOT FOR PUBLICATION

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Stephen Frank Karban,
Petitioner,

v.

Charles L Ryan, et al.,
Respondents.

No. CV-14-02763-PHX-SRB

ORDER

Petitioner Stephen Karban was convicted in Maricopa County Superior Court of 11 felonies after representing himself with advisory counsel in a jury trial. He was sentenced to 138.5 years in prison. Petitioner was represented by counsel on appeal and his counsel raised four issues before the Arizona Court of Appeals. The Arizona Court of Appeals affirmed his convictions and sentence and the Arizona Supreme Court denied review. Thereafter, Petitioner filed a timely Petition for Post-Conviction Relief raising 12 grounds for relief. The Petition for Post-Conviction Relief was denied. Petitioner appealed the denial and the Court of Appeals denied relief.

Petitioner then filed this Petition for Writ of Habeas Corpus raising 29 claims of violation of his federal constitutional rights. After full briefing the Magistrate Judge issued her Report and Recommendation recommending that the Petition be denied and dismissed with prejudice. Petitioner filed timely written objections to the Magistrate Judge's Report and Recommendations.

After a *de novo* review the Court agrees with the Magistrate Judge's categorization

1 of Petitioner's claims as follows: Grounds 1, 2 and 3 correspond to three of the four
2 issues raised on direct appeal. Grounds 4 through 29 correspond to the 12 grounds for
3 relief raised in Petitioner's state Petition for Post-Conviction Relief raised as ineffective
4 assistance of appellate counsel. Those 12 grounds also included sub-issues. Grounds 7-
5 26, 28 and 29 are presented by Petitioner in this Petition for Writ of Habeas Corpus as
6 grounds for relief independent of any ineffective assistance of appellate counsel claim.
7 The Court agrees with the Magistrate Judge that because Petitioner raised these claims
8 only as ineffective assistance of appellate counsel claims in state court these claims can
9 be evaluated here only under the standards of ineffective of assistance of appellate
10 counsel and not as independent claims. They are unexhausted and procedurally defaulted
11 and absent showing actual innocence these claims cannot be reviewed independently.

12 In Petitioner's objections he objects to the finding that there was procedural
13 default without excuse on Grounds 7-26, 28 and 29. The excuse that he offers with
14 respect to all of these independent claims previously raised only as ineffective assistance
15 of appellate counsel is the ineffective assistance of his appellate counsel. With respect to
16 each of these claims his objections state that counsel's ineffectiveness is the excuse for
17 why the claim was not raised on direct appeal and the reason why the default should be
18 excused. This is not a sufficient basis to excuse the procedural default and the Court
19 agrees with the Magistrate Judge that these claims can only be evaluated as claims of
20 ineffective assistance of appellate counsel and not on independent grounds.

21 **Ground 1**

22 On direct appeal Petitioner raised the claim that the trial court erred in admitting
23 certain pornographic computer images at trial. Petitioner does not dispute that this claim
24 was not federalized by his appellate lawyer and was argued only under state law.
25 Petitioner objects to the finding that he has failed to overcome this procedural default by
26 demonstrating cause and prejudice or by showing actual innocence. Petitioner points to a
27 letter sent to his attorney prior to the filing of the appellate brief requesting that she
28 federalize all claims raised. While Petitioner may have demanded that his appellate

1 lawyer federalize all his claims, even if she had done so he has failed to show the merit of
2 the claim. The Court agrees with the Magistrate Judge that the trial court's ruling on the
3 admission of the images under the Arizona Rules of Evidence was reasonable as was the
4 appellate court's affirmance of the ruling. Moreover, Petitioner has not shown that if it
5 were error the admission infected his trial with error of constitutional dimensions denying
6 him due process.

7 **Ground 2**

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9 Petitioner's appellate counsel raised Ground 2 on appeal arguing that it was error
10 to preclude evidence of one of the victim's viewing of pornographic material. As with
11 Ground 1, his attorney did not federalize the claim but only argued it under state law.
12 Even if Petitioner's present claim of due process violations were exhausted, he has not
13 demonstrated that the preclusion of this evidence pursuant to a state rule of evidence
14 would rise to the level of a violation of his rights to Due Process under the United States
15 Constitution. The Court's review of the record discloses what the Magistrate Judge also
16 saw. Much of the evidence Petitioner sought to admit was admitted despite the granting
17 of the prosecution's motion in limine concerning the viewing of pornographic images by
18 the victim. Therefore even if not procedurally barred this claim fails on the merits.
19 Because it fails on the merits, the claim that his appellate lawyer was ineffective for
20 failing to provide a federal basis for the claim also fails.

21 **Ground 3**

22
23 Ground 3 was raised on direct appeal. In his appellate brief Petitioner argued that
24 he was entitled to present evidence of good character to rebut the state's allegations
25 against him and specifically evidence of his acquittal in a Michigan case involving the
26 same victims. His appellate lawyer did not federalize the claim and argued it solely
27 under state law. In rejecting this argument for reversing Petitioner's conviction the
28 Arizona Court of Appeals related that the trial record did not identify the specific acts of

1 which Petitioner had been acquitted in Michigan and absent this information could not
2 conclude that the trial erred by precluding evidence of the acquittal. The Magistrate
3 Judge correctly noted that the state court evidentiary rulings, even if erroneous, are not
4 grounds for federal habeas relief unless the ruling renders the state proceedings so
5 fundamentally unfair as to violate due process. Federal courts have consistently held that
6 evidence of an acquittal in a prior proceeding is generally inadmissible. The rationale is
7 that an acquittal does not support a finding of innocence but only a finding that the
8 prosecution did not establish an essential element of the charge beyond a reasonable
9 doubt. Because the weight of federal authority would not have permitted the admission in
10 evidence of Petitioner's acquittal, the Court cannot conclude that the state court's ruling
11 on this claim violated Petitioner's constitutional rights to fundamental fairness at trial.
12 Petitioner has failed to establish that the state court's adjudication of this claim was
13 contrary to or involved in unreasonable application of clearly-established federal law.

14 **Ground 4**

15 In Ground 4 Petitioner claims that his rights to due process, compulsory process
16 and a fair trial were violated because a government witness threatened a defense witness
17 to prevent him from testifying at trial. The witness who did not testify at trial was
18 Petitioner's son, Frank, who submitted an affidavit in support of Petitioner's Petition for
19 Post-Conviction Relief claiming he had been threatened by Petitioner's wife if he were to
20 appear and testify at trial. In rejecting this claim the state court found that there was no
21 showing of state action and, therefore, no violation of compulsory process rights because
22 the unavailability of the witness was not the result of state action. The Arizona Court of
23 Appeals commented in its affirmance that Petitioner provided no evidentiary support that
24 a state agent was involved in the alleged intimidation of his son Frank. Petitioner argues
25 that the trial court erred in failing to allow an evidentiary hearing where he could
26 ascertain whether his wife acted alone or at the suggestion of a state actor.

27 In order to prevail on this claim Petitioner must show that the state court's
28 adjudication was either contrary to or involved an unreasonable application of clearly-

1 established federal law. He has not. The affidavit provides no basis for any court to
2 conclude that Petitioner's wife was acting as an agent of the state when she allegedly
3 threatened Frank to keep him from testifying. The Court agrees with the Magistrate
4 Judge that this claim fails on the merits.

5 **Ground 5**

6 Ground 5 presents a closely-related claim to Ground Four. In his Petition for Post-
7 Conviction Relief Petitioner raised as a claim of alleged newly- discovered evidence the
8 information contained in Frank's affidavit. Petitioner argued had this evidence been
9 presented at trial he would not have been convicted. In his objections Petitioner takes
10 issue with the Magistrate Judge's finding that the trial court denied this claim as frivolous
11 and also argues that he federalized the claim by referencing a United States Supreme
12 Court case. Petitioner argues, as he did for Ground Four, that if only an evidentiary
13 hearing had been ordered by the state court he would have been able to prove his claim.

14 Issue number one in Petitioner's Petition for Post-Conviction Relief involved these
15 two issues related to his son's testimony. The heading cites the Fifth, Sixth and
16 Fourteenth Amendments to the United States Constitution but the three paragraphs
17 devoted to the argument concerning the alleged newly- discovered evidence refers only to
18 state court standards for a new trial. The mere citation of a federal case is insufficient to
19 federalize a claim. The Court agrees with the Magistrate Judge that Ground Five is
20 procedurally barred because it was not fairly presented to the state court as a federal
21 claim nor has Petitioner argued cause and prejudice or actual innocence to overcome this
22 procedural bar.

23 **Grounds 6, 7-26, 28 and 29**

24 Ground 6 and Grounds 7-26, 28 and 29 are all claims of ineffective assistance of
25 appellate counsel. Ground 6 is denominated a claim of ineffective assistance of appellate
26 counsel. As the Court previously noted Grounds 7-26, 28 and 29 can only be considered
27 by this Court as ineffective assistance of appellate counsel claims because they were
28 never raised as independent grounds for post-conviction relief in state court.

1 In addition to his single claim of ineffective assistance of appellate counsel these
2 additional 22 claims of ineffective assistance of appellate counsel are described similarly
3 in Petitioner's objections as "dead bang" winner arguments that should have been raised
4 by his appellate counsel in his state appeal of his conviction and sentence. While
5 Petitioner concedes in his briefs that appellate counsel is not required to raise every single
6 issue a defendant wishes to raise, he argues that these issues should have been raised at
7 his insistence by his appellate counsel. The state court denied Petitioner's claim of
8 ineffective assistance of counsel finding that as to some of the claims Petitioner's counsel
9 could not have raised them on appeal because Petitioner had failed to preserve the issues
10 at trial and as to others the issues lacked legal merit. The Court agrees with the extensive
11 discussion by the Magistrate Judge as to all of the claims of ineffective assistance of
12 appellate counsel. Petitioner has failed to demonstrate that counsel's decision to argue the
13 claims she presented on direct appeal was objectively unreasonable. Petitioner has also
14 failed to show that had his appellate counsel raised any or all of these additional claims
15 that the result of his appeal would have been different.

16 **Ground 27**

17 Ground 27 was raised for the first time in Petitioner's Petition for Post-Conviction
18 Relief. It is a claim of lack of subject matter jurisdiction based on an allegedly flawed
19 Indictment. The trial court denied the claim as precluded under Arizona Rule of Criminal
20 Procedure, 32.2(a) and the Court of Appeals denied the constitutional claim as precluded
21 for failure to raise it on direct appeal. The state court also found that Petitioner's
22 appellate counsel was not ineffective for failing to raise this claim. As the Magistrate
23 Judge explained defects in an Indictment are required to be raised in a motion filed in
24 accordance with Rule 16, Arizona Rules of Criminal Procedure. Ariz. R. Crim. P.
25 13.5(e). Petitioner counters that because his Indictment was flawed this impacted state
26 court subject matter jurisdiction and subject matter jurisdiction cannot be waived and can
27 be raised at any time. The Court agrees with the Magistrate Judge that if the Indictment
28 were defective that defect did not create a lack of subject matter jurisdiction in the state

1 court. The claim lacks merit and, therefore, the failure to raise the claim on direct appeal
2 could not be considered ineffective assistance of appellate counsel.

3 IT IS ORDERED overruling Petitioner's Objections to the Report and
4 Recommendation of Magistrate Judge.

5 IT IS ORDERED adopting the Report and Recommendation of the Magistrate
6 Judge as the Order of this Court. (Doc. 47)

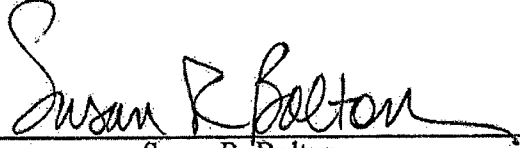
7 IT IS FURTHER ORDERED that Petitioner's Petition for Writ of Habeas Corpus
8 is denied and dismissed with prejudice.

9 IT IS FURTHER ORDERED that Petitioner's Request to Supplement the Record
10 of his Writ of Habeas Corpus is denied. (Doc. 44)

11 IT IS FURTHER ORDERED denying a Certificate of Appealability because
12 denial of the Petition is justified by a plain procedural bar and jurist of reason would not
13 find the ruling debatable and because Petitioner has failed to show the denial of a federal
14 constitutional right.

15 Dated this 11th day of August, 2017.

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Susan R. Bolton
United States District Judge

**Additional material
from this filing is
available in the
Clerk's Office.**