APPENDIX-A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

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

MARTICE DESHAWN WALLACE, Petitioner-Appellant, v. DAVID SHINN, Director; ATTORNEY GENERAL FOR THE STATE OF ARIZONA, Respondents-Appellees.	No. 22-16451 D.C. No. 2:21-cv-01180-DJH District of Arizona, Phoenix ORDER

Before: NGUYEN and BADE, Circuit Judges.

The request for a certificate of appealability (Docket Entry No. 3) 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).

All pending motions are denied as moot.

DENIED.

APPENDIX- B

UNITED STATES COURT OF APPEALS

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U.S. COURT OF APPEALS

MARTICE DESHAWN WALLACE, Petitioner-Appellant, v. DAVID SHINN, Director; ATTORNEY GENERAL FOR THE STATE OF ARIZONA, Respondents-Appellees.	No. 22-16451 D.C. No. 2:21-cv-01180-DJH District of Arizona, Phoenix ORDER

Before: SILVERMAN and H.A. THOMAS, Circuit Judges.

Appellant has filed a combined motion for reconsideration and motion for reconsideration en banc (Docket Entry No. 12).

The motion for reconsideration is denied and the motion for reconsideration en banc is denied on behalf of the court. *See* 9th Cir. R. 27-10; 9th Cir. Gen. Ord. 6.11.

Appellant's request for a stay and for appointment of counsel (Docket Entry Nos. 13 & 14) are denied.

No further filings will be entertained in this closed case.

APPENDIX-C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Martice Deshawn Wallace,

Petitioner,

v.

David Shinn, et al.,

Respondents.

No. CV-21-01180-PHX-DJH (JZB)

REPORT & RECOMMENDATION

TO THE HONORABLE DIANE J. HUMETEWA, UNITED STATES DISTRICT JUDGE:

Petitioner Martice Deshawn Wallace has filed a Petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. (Doc. 1.)

I. Summary of Conclusion.

Petitioner was convicted at trial and sentenced on two counts of aggravated assault. Petitioner unsuccessfully sought relief in state court. Petitioner then filed a habeas petition in this Court asserting four grounds for relief. (Doc. 1.) Petitioner has since filed an Amended Petition asserting seven grounds for relief. (Doc. 35.) Because each ground and subpart is either non-cognizable, procedurally defaulted, or without merit, the Court recommends the petition be dismissed with prejudice.

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II. Background.

A. Conviction & Sentencing.

The Arizona Court of Appeals summarized the facts of the case as follows:[1]

> While patrolling a light rail stop, a security officer saw Wallace bleeding from an apparent "gash" to his head. After approaching Wallace, the security officer radioed for assistance. A responding fireman examined Wallace's head wound and, given the amount of blood, called for an ambulance.
>
> Once the ambulance arrived, Wallace voluntarily got inside and sat on a bench next to a gurney. Although he was instructed to lie down on the gurney, Wallace refused.
>
> When a paramedic told Wallace that he needed to lie down for his own safety, Wallace became verbally abusive, grabbed trauma shears–a particularly sharp scissor used for cutting clothing, belts, and boots off injured patients in emergencies–and swung them at the paramedics. Overhearing the commotion, a fireman opened the ambulance's side door, and Wallace jumped out. He was quickly disarmed, however, and detained.
>
> The State charged Wallace with two counts of aggravated assault, both class three felonies. In his own defense, Wallace testified that a paramedic struck him in the face while he was in the back of the ambulance. He explained that he only grabbed the trauma shears to protect himself because he was blind in one eye and his "biggest fear" was sustaining an injury to his good eye.
>
> After trial, a jury found Wallace guilty on both counts. The jury also found two aggravating factors: (1) the offenses were dangerous, and (2) Wallace was on felony probation at the time of the offenses. After Wallace admitted two prior felony convictions, the superior court sentenced him as a category 3 non-dangerous offender and imposed two 20-year maximum terms of imprisonment, each to run concurrently, with no presentence incarceration credit.

State v. Wallace, 2020 WL 772995, at *1 (Ariz. Ct. App. 2020).

B. Direct Appeal.

On appeal, appointed counsel filed a brief pursuant to *Anders v. State of California*, 386 U.S. 738 (1967) finding no colorable claim. (Doc. 16-1, Ex. E, at 22.) Petitioner proceeded pro se and filed a supplemental brief. (Doc. 16-1, Ex. F, at 34.)

On February 18, 2020, the court of appeals affirmed the convictions. *Wallace*, 2020 WL 772995, at *1 (Ariz. Ct. App. 2020). Petitioner did not file for review in the Arizona Supreme Court. (Doc. 16-1, Ex. G, at 42.)

[1] The Court presumes the Arizona Court of Appeals' summary of the facts is correct. 28 U.S.C. § 2254(e)(1).

C. Post-Conviction Relief.

On January 9, 2019, Petitioner filed a pro se Petition for Post-Conviction Relief. (Doc. 16-1, Ex. I, at 49.) On March 27, 2019, the court appointed counsel for Petitioner at his request. (Doc. 16-1, Ex. J, at 66.) On April 29, 2020, counsel filed an amended petition. (Doc. 16-1, Ex. K, at 69.) On May 20, 2021, Petitioner filed a second PCR petition. (Doc. 16-1, Ex. M, at 84.) On November 5, 2020, the court denied Petitioner's claims and dismissed the Petition. (Doc. 16-2, Ex. P, at 36.)

On November 30, 2020, Petitioner filed a petition for review in the Arizona Court of Appeals. (Doc. 16-3, Ex. Q, at 2.) On May 11, 2021, the court granted review but denied relief on February 27, 2020. (Doc. 16-5, Ex. R, at 3.)

III. Petition for Writ of Habeas Corpus.

On July 2, 2021, Petitioner timely mailed the instant habeas petition. (Doc. 1.) As summarized by the Court:

> Petitioner raises three grounds for relief. In Ground One, Petitioner asserts that his conviction was obtained in violation of the Fourth and Fourteenth Amendments. In Ground Two, Petitioner contends he received ineffective assistance of trial, appellate, and post-conviction counsel, in violation of the Sixth Amendment. In Ground Three, Petitioner claims his conviction was obtained in violation of his Fourteenth Amendment rights to due process, fundamental fairness, and equal protection.

(Doc. 6 at 1-2.) On April 29, 2021, Respondents filed a Response. (Doc. 16.) On October 19, 2021, Petitioner filed a Reply. (Doc. 17.)

On October 26, 2021, Petitioner filed a Motion for Summary Judgment. (Doc. 18.) On November 8, 2021, Respondents filed a Response. (Doc. 22.) On November 18, 2021, Petitioner filed a Reply. (Doc. 23.)

On March 17, 2022, Petitioner filed a Motion to Amend. (Doc. 28.) On March 22, 2022, Respondents filed a Response. (Doc. 29.) On March 31, 2022, the Court granted Petitioner's Motion (doc. 34), and directed the Clerk to file Petitioner's Amended Petition (doc. 35).

IV. Legal Standards.

A. Requisites for Federal Habeas Review.

1. Federal Claim.

"In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States." *Estelle v. McGuire*, 502 U.S. 62, 68 (1991); *see* 28 U.S.C. § 2254(a). "[F]ederal habeas corpus relief does not lie for errors of state law." *Swarthout v. Cooke*, 562 U.S. 216, 219 (2011) (citations omitted); *see Estelle*, 502 U.S. at 63 ("[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions."). "[T]he availability of a claim under state law does not of itself establish that a claim was available under the United States Constitution." *Dugger v. Adams*, 489 U.S. 401, 409 (1989). A petitioner "may not . . . transform a state-law issue into a federal one merely by asserting a violation of due process." *Langford v. Day*, 110 F.3d 1380, 1389 (9th Cir. 1996).

2. Exhaustion of State Remedies.

"Before seeking a federal writ of habeas corpus, a state prisoner must exhaust available state remedies, thereby giving the State the opportunity to pass upon and correct alleged violations of its prisoners' federal rights." *Baldwin v. Reese*, 541 U.S. 27, 29 (2004) (cleaned up); *see* 28 U.S.C. § 2254(b)(1). "To provide the State with the necessary 'opportunity,' the prisoner must 'fairly present' his claim in each appropriate state court." *Baldwin*, 541 U.S. at 29 (citations omitted). Fair presentation requires a prisoner to "clearly state the federal basis and federal nature of the claim, along with relevant facts." *Cooper v. Neven*, 641 F.3d 322, 326 (9th Cir. 2011).

"To exhaust one's state court remedies in Arizona, a petitioner must first raise the claim in a direct appeal or collaterally attack his conviction in a petition for post-conviction relief." *Roettgen v. Copeland*, 33 F.3d 36, 38 (9th Cir. 1994). In non-capital cases, "claims of Arizona state prisoners are exhausted for purposes of federal habeas once the Arizona Court of Appeals has ruled on them." *Swoopes v. Sublett*, 196 F.3d 1008, 1010 (9th Cir. 1999); *see Crowell v. Knowles*, 483 F. Supp. 2d 925, 933 (D. Ariz. 2007).

3. Absence of State Procedural Bar.

"A federal court may not hear a habeas claim if it runs afoul of the procedural bar

doctrine." *Cooper*, 641 F.3d at 327. Under this doctrine, a claim is procedurally defaulted and consequently barred from federal review "if the state court denied the claim on state procedural grounds" or "if [the] claim is unexhausted but state procedural rules would now bar consideration of the claim." *Id.*; *see Martinez v. Ryan*, 566 U.S. 1, 9 (2012) ("[A] federal court will not review the merits of claims, including constitutional claims, that a state court declined to hear because the prisoner failed to abide by a state procedural rule."); *Beaty v. Stewart*, 303 F.3d 975, 987 (9th Cir. 2002) ("A claim is procedurally defaulted 'if the petitioner failed to exhaust state remedies and the court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred.'" (quoting *Coleman v. Thompson*, 501 U.S. 722, 735 n.1 (1991))).

To preclude federal review, the state procedural rule must be a "nonfederal ground adequate to support the judgment" and "firmly established and consistently followed." *Martinez*, 566 U.S. at 9. "Arizona's waiver rules are independent and adequate bases for denying relief." *Hurles v. Ryan*, 752 F.3d 768, 780 (9th Cir. 2014). Under these rules, a defendant is precluded from relief on any constitutional claim "waived in any previous post-conviction proceeding, except when the claim raises a violation of a constitutional right that can only be waived knowingly, voluntarily, and personally by the defendant." Ariz. R. Crim. P. 32.2(a)(3). A defendant waives a claim by failing to assert it during the appropriate proceeding unless the claim implicates a "right . . . of sufficient constitutional magnitude to require personal waiver by the defendant," *e.g.*, the right to a jury and the right to counsel. *Stewart v. Smith*, 202 Ariz. 446, 449–50 (2002).

To obtain review of a procedurally defaulted claim, the prisoner must show "cause for the default and resulting prejudice, or that failure to review the claims would result in a fundamental miscarriage of justice." *Moormann v. Schriro*, 426 F.3d 1044, 1058 (9th Cir. 2005). The latter requires a showing of actual innocence. *Poland v. Stewart*, 117 F.3d 1094, 1106 (9th Cir. 1997).

B. Standard for Merits Review.

> To obtain relief, a petitioner must show the state courts' adjudication of a claim:
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). "This 'standard is difficult to meet.'" *Mays v. Hines*, 141 S. Ct. 1145, 1149 (2021) (quoting *Harrington v. Richter*, 562 U.S. 86, 102 (2011)). As explained by the Supreme Court:

> The term "unreasonable" [in § 2254(d)] refers not to "ordinary error" or even to circumstances where the petitioner offers "a strong case for relief," but rather to "'extreme malfunctions in the state criminal justice system.'" In other words, a federal court may intrude on a State's "'sovereign power to punish offenders'" only when a decision "was so lacking in justification . . . beyond any possibility for fairminded disagreement."

Id. (brackets omitted) (quoting *Richter*, 562 U.S. at 102–03). "Factual determinations by state courts are presumed correct absent clear and convincing evidence to the contrary." *Miller-El v. Cockrell*, 537 U.S. 322, 324 (2003) (citing 28 U.S.C. § 2254(e)(1)). "[A] decision adjudicated on the merits in a state court and based on a factual determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state-court proceeding." *Id.* (citing 28 U.S.C. § 2254(d)(2)). *Cf. Andrews v. Davis*, 944 F.3d 1092, 1107 (9th Cir. 2019) ("Unreasonable determinations of material facts can occur where the state court plainly misapprehends or misstates the record in making its findings or where the state court has before it, yet apparently ignores, evidence that supports petitioner's claim." (internal quotations and citations omitted)).

The subject of federal review is "the last reasoned state-court decision." *Murray v. Schriro*, 745 F.3d 984, 996 (9th Cir. 2014). "When at least one state court has rendered a reasoned decision, but the last state court to reject a prisoner's claim issues an order 'whose text or accompanying opinion does not disclose the reason for the judgment,' [a federal court] 'look[s] through' the mute decision and presume[s] the higher court agreed with and adopted the reasons given by the lower court." *Curiel v. Miller*, 830 F.3d 864, 870 (9th Cir.

2016) (quoting *Ylst v. Nunnemaker*, 501 U.S. 797, 802–06 (1991)).

In this case, the Court reviews the decisions of the Arizona Court of Appeals on direct and collateral review (doc. 1-4, Ex. A, at 3–20; doc. 1-5, Ex. K, at 5–8.) as they are the last reasoned state-court decisions adjudicating Petitioner's claims in state court. *See Murray*, 745 F.3d at 996. The Arizona Supreme Court did not set forth its reasons for denying Petitioner's petition for review on direct review. (Doc. 1-4, Ex. B, at 22.) The Arizona Court of Appeals' decision on collateral review is the last decision of record.

V. Analysis.

A. Ground One.

In Ground One, Petitioner asserts his "conviction was obtained in violation of the 4th and 14th Amendments . . . to be free from unreasonable seizures and excessive force." (Doc. 35 at 6.) Petitioner argues that firefighters and paramedics improperly seized him when they demanded he lay on a gurney, forced him to stay in the ambulance, and grabbed his wrist. (*Id.* at 7-12.) He asserts that firemen "unlawfully seizing the Petitioner inside their confined ambulance was a direct result and only cause of Petitioner being charged, tried, and convicted." (*Id.* at 12.)

Petitioner's appellate counsel filed an *Anders* brief and did not raise this claim. In his pro se brief, Petitioner alleged that the "Phoenix Police Department conspired against Mr. Wallace to conceal the role each of them played in unlawfully seizing and assaulting Mr. Wallace." (Doc. 16-1, Ex. F, at 35.) Petitioner did not cite to federal law in support of his claim.[2]

The Arizona Court of Appeals denied relief on his claim.

> First, Wallace's claims of perjury and conspiracy are issues of witness credibility. Put differently, Wallace is questioning the honesty of the first responders' testimony at trial. "No rule is better established than that the credibility of the witnesses and the weight and value to be given to their testimony are questions exclusively for the jury." *State v. Clemons*, 110 Ariz. 555, 556–67 (1974). "In this case, the jury heard each witness testify and was able to evaluate his or her veracity." *See State v. Piatt*, 132 Ariz. 145, 150–

[2] Petitioner did raise a Fourth Amendment claim prior to trial when he filed a "Motion to Suppress Statements and Evidence." (Doc. 16-5, Ex. U, at 12.) Petitioner asserted the fireman illegally seized him and the police fabricated evidence. (*Id.* at 13.) He alleged firefighters punched him multiple times causing injuries to his head. (*Id.*)

> 51 (1981). To the extent there was contradictory evidence, on review, we resolve any conflicts against Wallace. *State v. Girdler*, 138 Ariz. 482, 488 (1983).

Wallace, 2020 WL 772995, at *1.

Here, Petitioner's claim is unexhausted because he did not raise this as a federal claim in the Arizona Court of Appeals. *See, e.g.*, *Picard v. Connor*, 404 U.S. 270, 275-78 (1971) ("[W]e have required a state prisoner to present the state courts with the same claim he urges upon the federal courts."). A claim is only "fairly presented" to the state courts when a petitioner has "alert[ed] the state courts to the fact that [he] was asserting a claim under the United States Constitution." *Shumway v. Payne*, 223 F.3d 982, 987 (9th Cir. 2000) (quotations omitted); *see Johnson v. Zenon*, 88 F.3d 828, 830 (9th Cir. 1996) ("If a petitioner fails to alert the state court to the fact that he is raising a federal constitutional claim, his federal claim is unexhausted regardless of its similarity to the issues raised in state court."). Petitioner raised his claim as a federal claim in the trial court but does not explain why he failed to raise a federal claim on direct appeal. Petitioner's claim is unexhausted and procedurally defaulted without excuse.

Notwithstanding, Petitioner's Fourth Amendment claim is also not cognizable. A Fourth Amendment claim is not cognizable in federal habeas proceedings if a petitioner has had a full and fair opportunity to litigate the claim in state court. Under *Stone v. Powell*, 428 U.S. 465 (1976), "where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim," federal habeas corpus relief will not lie for a claim that evidence recovered through an illegal search or seizure was introduced at trial. Petitioner filed a motion in the trial court and referenced this issue on direct appeal, so he had the ability to bring this claim in the state courts. Petitioner's Fourth Amendment claim is not cognizable. Petitioner may not circumvent this result by raising a Fourteenth Amendment claim. "Even though due process violations, unlike some Fourth Amendment violations, are cognizable in a habeas proceeding in federal court, petitioner may not cloak his or her Fourth Amendment claim in due process clothing to circumvent *Stone v. Powell.*" *Gilmore v. Marks*, 799 F.2d 51, 57 (3d Cir. 1986) (citations omitted).

Further, Petitioner's Fourteenth Amendment claim appears to rest on his right "to be free from excessive force." (Doc. 35 at 6.) Petitioner's jury trial instructions included a "Justification for Self-Defense" jury instruction, which stated that a person is "justified in using or threatening physical force or deadly physical force" under certain conditions. (Doc. 16-5, Ex. W, at 32-33.) Petitioner provides no authority for the proposition that he was entitled to a dismissal of his case based upon this claim.

Accordingly, Petitioner is not entitled to habeas relief for Ground One.

B. Ground Two.

In Ground Two, Petitioner asserts "trial counsel, appellate counsel, and PCR counsel provided ineffective assistance" in his case. (Doc. 1[3] at 13.)[4] The Sixth Amendment to the United States Constitution provides that a criminal defendant has a right to the effective assistance of counsel in his defense. To demonstrate ineffective assistance under Strickland, the defendant must show that (1) his attorney's representation "fell below an objective standard of reasonableness," and that (2) the defendant suffered "prejudice" due to this ineffective representation. *Strickland v. Washington*, 466 U.S. 668, 688, 692 (1984). The court's evaluation of counsel's performance must be "highly deferential" and must avoid "the distorting effects of hindsight" by analyzing the challenged decision from counsel's perspective at the time. *Strickland*, 466 U.S. at 689. There is a strong presumption that counsel's conduct falls within the wide range of reasonable assistance. *Id.* To establish prejudice, Martin must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Lafler v. Cooper*, 566 U.S. 156, 163 (2012) (citing *Strickland*, 466 U.S. at 694).

1. Grand Jury Proceedings.

Petitioner asserts that counsel failed to file challenges to "multiple defects in regards to the grand jury proceedings." (Doc. 1 at 14.) Petitioner asserts counsel should have

[3] The Court notes that Petitioner failed to include Ground Two in his Amended Petition. (*Compare* Doc. 1 *with* Doc. 35.) In an abundance of caution, the Court will address Petitioner's omitted claim in Ground Two as detailed in the original Petition (doc. 1 at 13-32).

[4] Petitioner had two separate trial counsel in his case, and he alleges both provided the same ineffective assistance in his case.

challenged the qualifications of two grand jurors, and affirmed Petitioner's right "to be present at the grand jury proceedings" and to present exculpatory evidence under Rule 12 of the Arizona Rules of Criminal Procedure. (*Id.*) Petitioner alleges that "had counsel filed a timely motion to challenge those proceedings, the indictment would have been dismissed or at the very least remanded for a new determine of probable cause." (Doc. 1 at 15.) Petitioner raised this claim in the Arizona Court of Appeals in PCR proceedings. (Doc. 16-3, Ex. Q, at 17.) On May 11, 2021, the court granted review but denied relief after finding "petitioner has not established an abuse of discretion" by the trial court. (Doc. 16-5, Ex. R, at 4.)

Petitioner is not entitled to relief on this claim because any error occurring at the grand jury proceeding was rendered harmless when Petitioner was found guilty as charged by a petit jury. *See United States v. Mechanik*, 475 U.S. 66, 70 (1986) (holding that where a defendant was convicted at trial "any error in the grand jury proceeding connected with the charging decision [is] harmless beyond a reasonable doubt" because a subsequent guilty verdict by a petit jury "means not only that there was probable cause to believe that the defendants were guilty as charged, but also that they are in fact guilty as charged beyond a reasonable doubt"); *Williams v. Stewart*, 441 F.3d 1030, 1042 (9th Cir. 2006) ("[A]ny constitutional error in the grand jury proceedings is harmless because Williams was ultimately convicted of the offenses charged.").

Petitioner is therefore unable to establish prejudice from any ineffective assistance by his counsel. *See United States v. Anderson*, 61 F.3d 1290, 1297 n.5 (7th Cir. 1995) (petitioner could not show counsel acted deficiently for failing to challenge the indictment because petitioner's "subsequent conviction establishes that there was no 'reasonable probability' that the result of the proceeding would have been different but for his trial counsel's alleged error"); *Murray v. Schriro*, 2006 WL 988133, at *7 (D. Ariz. Apr. 13, 2006) ("Because a jury found Petitioner guilty of the charged offenses beyond a reasonable doubt, the alleged absence of probable cause before the grand jury, even if true, would be harmless error."). Accordingly, the Court recommends that this claim be dismissed.

2. Counsel Withholding Exculpatory Materials.

Petitioner alleges counsel withheld "exculpatory materials from the Petitioner include the grand jury transcripts." (Doc. 1 at 16.) Petitioner asserts that if counsel had given him "all the evidence that supports his claims" Petitioner could have fought his Fourth Amendment unlawful seizure claim (as alleged in Ground One). (Doc. 1 at 15.) Petitioner does not describe what evidence was withheld other than grand jury transcripts.

Petitioner did not raise this ineffective assistance of counsel claim in the Arizona Court of Appeals in his Petition for Review of PCR proceedings.[5] Petitioner did allege counsel "ignored defendant's request to be present at the grand jury proceedings and defendant['s] desire to present exculpatory evidence []." (Doc. 16-3, Ex. Q, at 17.) But Petitioner did not allege counsel withheld exculpatory materials from him. Petitioner fails to provide cause and prejudice to excuse the procedural default of this claim.

To the extent Petitioner alleges PCR counsel provided ineffective assistance of counsel to excuse the procedural default of this claim (*see* sub-claim 6 *infra*), Petitioner must establish cause and prejudice under *Martinez v. Ryan*, 566 U.S. 1 (2012). He must show that PCR counsel failed to raise a substantial claim of ineffective assistance of trial counsel in his PCR proceeding. He must also demonstrate that his underlying ineffective assistance of trial counsel claim is "substantial." *Id.* In *Martinez*, the Supreme Court defined substantial to be a "claim that has some merit," and explained the procedural default of a claim will not be excused if the ineffective assistance of counsel claim "is insubstantial, i.e., it does not have any merit or [ ] it is wholly without factual support." *Martinez*, 566 U.S. at 14–16.

Petitioner fails to demonstrate counsel's conduct resulted in prejudice. Petitioner does not describe what materials were withheld and how the outcome of the proceedings would have been different if they had been produced. Petitioner's "conclusory suggestion [] that his trial . . . counsel provided ineffective assistance fall[s] far short of stating a valid

[5] Petitioner was aware of the claim. On direct appeal, Petitioner argued that he "sought to obtain video footage from inside the ambulance. . . because it would have proved his innocence." (Doc. 16-1 at 35.)

claim of constitutional violation." *Jones v. Gomez*, 66 F.3d 199, 205 (9th Cir. 1995) (denying habeas *Brady* claim that was "argued in a single page, without reference to the record or any document.") (citation and quotation omitted). Because Petitioner's claim is not substantial, he fails to demonstrate prejudice to excuse the procedural default of this claim.

3. Failure to Interview Witnesses

Petitioner asserts counsel provided ineffective assistance by failing to interview "each witness listed in the police reports." (Doc. 1 at 16.) Petitioner argues that these "witnesses potentially had exculpatory information but counsel failed to secure statements from these individuals." (*Id.*) On April 29, 2020, Petitioner's PCR counsel filed a notice of review advising "counsel is unable to find any claims for relief to raise in post-conviction review proceedings." (Doc. 16-1, Ex. K, at 78.) On May 21, 2021, Petitioner filed a pro se PCR petition. (Doc. 16-1, Ex. M, at 83.) Petitioner did not raise this ineffective assistance of counsel claim in the PCR petition.[6] Petitioner raised a bare allegation in the Arizona Court of Appeals claiming counsel "failed to interview all witnesses" in the case. (Doc. 16-3, Ex. Q, at 17.)

Petitioner's claim is unexhausted because he failed to raise this claim in his PCR petition. Petitioner may excuse the procedural default of his claim if he can demonstrate this was a substantial claim that PCR counsel failed to raise. But PCR counsel would have been required to raise a claim that Petitioner (who was representing himself) failed to interview witnesses prior to trial. "[A] defendant who elects to represent himself cannot thereafter complain that the quality of his own defense amounted to a denial of effective assistance of counsel." *Faretta v. California*, 422 U.S. 806, 834-35 n.46 (1975). Under these facts, Petitioner cannot establish that his PCR counsel could have raised a viable IAC claim concerning Petitioner's self-representation. *See Cook v. Ryan*, 688 F.3d 598, 609 (9th Cir. 2012) (noting that "Cook could have corrected [counsel's] errors once he decided to

[6] Petitioner did raise a claim that he was prevented from calling "favorable witnesses" at trial because the witnesses failed to comply with his subpoenas. (Doc. 16-1, Ex. M, at 104.) But he did raise this as a claim of ineffective assistance of counsel.

represent himself. *Faretta* therefore precludes Cook from complaining about the quality of his own defense."); *Ochoa v. United States*, 2010 WL 11643617, at *2 (C.D. Cal., 2010) ("Because an IAC claim premised on Petitioner's substandard self-representation lacks merit, appellate counsel could not have acted unreasonably in declining to raise the issue on direct appeal."). Petitioner does not explain what efforts he undertook to interview witnesses, to include Fire Captain Timothy Jones. (*See infra* §V(B)(3)(i)-(iii).) The Court concludes that Petitioner does not establish that PCR counsel failed to raise a substantial claim regarding the quality of Petitioner's own conduct.

Assuming arguendo that Petitioner could bring this claim[7], the Court reviews Petitioner's Motion to Amend and whether this Court can consider new evidence presented by Petitioner. For the reasons detailed *infra*, the Court finds that Petitioner could establish the claim is substantial, but he fails to demonstrate *Strickland* prejudice on the merits.

i. Motion to Amend.

On March 17, 2022, Petitioner filed a Motion to Amend based on the testimony of Fire Captain Timothy Jones in civil trial CV-17-4126-PHX-DJH. (Doc. 28-4 at 10.) Petitioner asserts that Captain Jones testified that he saw the entire incident and that Petitioner "never swung the shears at the two EMTs" or "posed any threat" them. (Doc. 28-4 at 10.) The Court will assume as true that Captain Jones testified that 1) he saw the entire incident, 2) Petitioner picked up the trauma shears, and 3) Petitioner never swung them at anyone. The Court does not agree that Captain Jones testified that Petitioner posed "no threat" to anyone.

Petitioner agrees that he "picked up a pair of trauma shears and held them in his hand in hopes of warding off [firefighters] Riggs and Warren." (Doc. 28-1 at 10.) Petitioner attached an affidavit to his PCR petition, and avowed that "I was forced to defend myself because I was injured and was in fear of my life at the time I was also suffering from multiple head wounds including a wound I sustained from the fireman's attack." (Doc. 16-1, Ex. I, at 62.) Witnesses Todd Riggs and Daniel Warren testified in Petitioner's criminal

[7] The Court in *Cook* specifically added that "[w]e do not hold that a *Martinez* claim can never be available to a defendant who represents himself." *Cook*, 688 F.3d at 609 n.12.

trial that Petitioner held and swung the shears them. (Doc. 28-2 at 6.)[8]

ii. New Evidence.

This Court is generally precluded from considering new evidence in habeas matters. "Although state prisoners may sometimes submit new evidence in federal court, AEDPA's statutory scheme is designed to strongly discourage them from doing so....Section 2254(d) applies even where there has been a summary denial." *Cullen v. Pinholster*, 131 S. Ct. 1388, 1401, 563 U.S. 170, 186 (2011). But the "Ninth Circuit has held that in the context of a *Martinez* claim, *Pinholster* does not bar a petitioner from introducing new evidence to the district court. . . . A petitioner may present evidence to demonstrate both cause and prejudice under *Martinez*." *Smith v. Ryan*, 2019 WL 3412587, at *3 (D. Ariz., 2019) (cleaned up) citing *Dickens v. Ryan*, 740 F.3d 1302 (9th Cir. 2014).

Phoenix Fire Captain Tim Jones was called as a witness in Petitioner's federal civil trial. He testified that he was at the scene of the incident and saw the altercation. He stated at page 32:

> Q. Did you witness what transpired that caused Mr. Wallace to pick up the trauma shears?
>
> A. I witnessed everything. I don't know what caused him to pick up the trauma shears.
>
> Q. Did you see Mr. Wallace do anything other than hold the shears in his hand when he was being held captive inside the ambulance?
>
> A. He was not being held captive, but I didn't see him do anything else other than hold the shears.

Wallace v. Jones, CV-17-04126-PHX-DJH, Doc. 288 at 32 (D. Ariz. Apr. 1, 2022) (Transcript of February 22, 2022 Jury Trial Proceedings). Then at page 66:

> Q. All right. And then what happened next, what did you see?
>
> A. There was some back and forth between Todd Riggs. Mr. Wallace stood there quietly not doing anything. Todd Riggs was becoming from what I would describe it agitated, scared, whatever you want to call it, and then eventually Mr. Riggs

[8] See testimony of Todd Riggs "He grabbed the scissors. He stood up, and he took a swing with the scissors in hand, at me." (Doc. 17 at 210.) Testimony of Daniel Warren "He jumped up and starting swing the shears." (Doc. 17 at 218.)

was pulled out the side door.

Q. Mr. Wallace --

A. Sorry, I apologize, Mr. Wallace was pulled out the side door.

Wallace, CV-17-04126-PHX-DJH, Doc. 288 at 66.

iii. Discussion.

Again, assuming arguendo Petitioner can raise an IAC claim against his own representation, and assuming this new evidence is reviewable under *Martinez*, Petitioner fails to establish that PCR counsel's ineffective assistance excuses his procedural default. "*Martinez* requires that a petitioner's claim of cause for a procedural default be rooted in 'a potentially legitimate claim of ineffective assistance of trial counsel.'" *Lopez v. Ryan*, 678 F.3d 1131, 1137-38 (9th Cir. 2012) (quoting *Martinez*, 566 U.S. at 9). Petitioner must establish that his ineffective assistance of trial counsel claim is "a substantial one" and "has some merit." *Martinez*, 556 U.S. at 14.[9] A claim has "some merit" if "reasonable jurists" would find the claim "debatable." *Miller-El v. Cockrell*, 537 U.S. 322, 336, 338 (2003). Petitioner's claim that trial counsel provided ineffective assistance by failing to interview Captain Jones lacks merit.

In the context of Petitioner's trial testimony, Petitioner's claim of ineffective assistance of counsel fails beyond debate. The crime of Aggravated Assault required proof that Petitioner "intentionally put another person in reasonable apprehension of imminent physical injury" and that he used a deadly weapon. (Doc. 16-5, Ex. W, at 30.) The offense did not require proof that Petitioner swung the shears. Petitioner testified that when he refused to get on the gurney in the ambulance, the firefighters began punching him. He testified that "I seen the scissors laying there after – I was hit a few times, I stepped back, and I was in the back of the ambulance. I was trapped. . . I looked down and I seen scissors there, so I grabbed them." (Doc. 17 at 202.) Petitioner agrees that he grabbed the shears to

[9] *See Martinez*, 132 S. Ct. at 1319 ("When faced with the question whether there is cause for an apparent default, a State may answer that the ineffective-assistance-of-trial-counsel claim is insubstantial, i.e., it does not have any merit or that it is wholly without factual support. . . .").

"ward off" the firefighters who were allegedly assaulting him. (Doc. 28-1 at 10.)[10] At trial, Petitioner testified that "even when I grabbed the scissors, they was still attempting to attack me, and I never swung the scissors at them. I just held them up. Every time they advanced toward me, I held them up like this, and that –even me having the scissors in my hand they was still trying to attack me." (Doc. 17 at 202.) Petitioner admits he "held up" the scissors. He does not dispute that he used them to defend himself.

Four firefighters (Warren, Riggs, Alfred, Wagner) and Petitioner all agreed Petitioner pointed the shears at victims Warren and Riggs. Petitioner alleged the firefighters were assaulting him and he used the shears to stop the assault. Captain Jones's testimony that Petitioner did not swing the shears does not diminish that Petitioner held the shears in a manner to stop an alleged assault and protect himself. The jury considered the question and found "beyond a reasonable doubt that the defendant did not act with" the justification of self defense. (Doc. 16-5 at 32.) Petitioner does not have a substantial claim there was a reasonable probability the outcome of his trial would have been different with the testimony of Captain Jones. *See Porter v. McCollum*, 558 U.S. 30, 38-39 (2009) ("To establish prejudice, [a petitioner] 'must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different'") (quoting *Strickland*, 466 U.S. at 694).

4. Failure to Evaluate Competency at the Time of the Assault.

Petitioner asserts counsel "failed to file any motions to initiate (competency) proceedings in his case. (Doc. 1 at 18.) Petitioner asserts that he had "ten medical staples and seven sutures" from his head injury, and a history of "bipolar disorder" and "delusional schizophrenia." (*Id.* at 17.) He argues "there's a real possibility that a mental health expert would have determined that the Petitioner was mentally incapacitated due to him having

[10] Petitioner' testimony that he held up the shears is consistent with two other firefighters. Also, a fourth firefighter testified at the criminal trial. Firefighter Scott Alfred testified at the criminal trial that he was at the scene and observed the incident. He testified that "[Petitioner] had trauma shears with him, and he was by the side door, and he was pointing them at both of these two individuals, in the back of the room; they were in the ambulance with him." (Doc. 17 at 223.) A fifth firefighter, Keith Wagner, submitted a declaration in the civil trial that Petitioner was "pointing" the shears at the two victims. (Doc. 17 at 230.)

multiple illnesses at the time of his arrest." (*Id.*at 18.) Petitioner argues this would have defeated the "mens rea" in his case and may have resulted in a dismissal of the case. (*Id.*)

Petitioner's claim is unexhausted because he did not bring this claim in the trial court. In his PCR petition, Petitioner alleged "counsel was aware of defendant's mental illness and failed to file a Rule 11 motion or take any other action" in violation of his Sixth Amendment rights. (Doc. 16-1, Ex. M at 89-90.) Petitioner argued that "I informed this attorney about my mental illness. He took no action nor did he file a Rule 11 motion." (Doc. 16-1, Ex. M, at 116.) He stated he advised a second attorney "of my struggle with schizophrenia." (*Id.* at 117.) Petitioner argued that counsel provided ineffective assistance by failing to have him evaluated under Rule 11 of the Arizona Rules of Criminal Procedure for his competence to stand trial. He did not argue the claim presented here (counsel should have had him evaluated to determine if he lacked the capacity to commit the charged offenses).[11] Petitioner's claim is unexhausted and procedurally defaulted without excuse.

Assuming arguendo that Petitioner properly exhausted this claim, he fails to show deficient performance or prejudice. Petitioner alleges that he suffered from schizophrenia and bipolar disorder, but he provides nothing more than his summary assertion. It is well-settled that "[c]onclusory allegations which are not supported by a statement of specific facts do not warrant habeas relief." *James v. Borg*, 24 F.3d 20, 26 (9th Cir. 1994). Petitioner filed a 272-page Reply with numerous exhibits (doc. 17), but he does not provide evidence that he was incompetent at the time of the offense.

Petitioner also fails to show counsel's performance was deficient. Petitioner testified

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[11] Petitioner did bring this claim in the Arizona Court of Appeals. In his petition for review, Petitioner argued trial counsel "was also aware of, or should have been aware of defendant's prior Rule 11 history, mental illnesses, and that defendant was diagnosed with 'delusional schizophrenia' and 'bi-polar disorder, this attorney was also on notice that defendant was suffering from these disorders along with severe head injuries at the time of the offense by failed to file any motions or have defendant examined." (Doc. 16-3, Ex. Q, at 9.) Petitioner argued that "at the time of the offense and waiver of counsel, defendant was suffering from 'delusional schizophrenia' and 'bi-polar disorder.'" (*Id.* at 13.) But proper exhaustion required that he present the same claim in PCR petition and petition for review. *Casey v. Moore*, 386 F.3d 896, 916 (9th Cir. 2004) ("Generally, a petitioner satisfies the exhaustion requirement if he properly pursues a claim (1) throughout the entire direct appellate process of the state, or (2) throughout one entire judicial post-conviction process available in the state.").

at trial that he acted intentionally. Petitioner testified that when a firefighter was treating his head wound, the firefighter applied "too much pressure and he started to cause me pain and dizziness, so I requested that he stop." (Doc. 17 at 193-94.) Petitioner testified that the firefighters tried to restrain him and repeatedly punched him. (*Id.* at 196.) Petitioner resisted because he was "scared, confused." (*Id.*) Petitioner testified that he picked up the scissors to "simply protect myself." (*Id.*) Petitioner testified his biggest fear "was being punched in my only good eye and becoming blind." (*Id.*) During cross-examination, Petitioner reasserted that he grabbed the scissors because the firefighters were "attempting to attack" him and he held the scissors to defendant himself. (*Id.* at 202.)[12] Petitioner testified that he intentionally acted in self-defense, and he presents no evidence that he was incompetent. In light of Petitioner's testimony, Petitioner's counsel may have decided before trial that Petitioner did not believe he was incompetent at the time of the offense or that it was sound trial strategy to solely pursue a justification defense. *See Hensley v. Crist*, 67 F.3d 181, 185 (9th Cir. 1995) ("Tactical decisions that are not objectively unreasonable do not constitute ineffective assistance of counsel.").

Petitioner must also demonstrate that he was prejudiced by any fault of counsel; he must show that because of counsel's errors the results of the proceedings would have been different. But Petitioner never testified he was acting irrationally at the time of the offense. He did not argue that his actions were unjustified. Petitioner also filed an "affidavit" with his PCR petition, which was consistent with his trial testimony. (Doc. 16-1, Ex. M, at 84-11.) Petitioner detailed the entire incident and justified his actions because he was "scared," "trapped," and "struck" by the firemen. (*Id.* at 115.) He stated that because "of them trapping me and being extremely combative with me, and me having really bad head wounds, and a serious disorder of schizophrenia, all of these factors overwhelmed me and led me to attempt to protect myself." (*Id.* at 115-116.) In his "Motion for Summary

[12] The Court notes that Petitioner chose to represent himself at trial. On May 15, 2018, Petitioner proceeded pro se, and trial commenced on September 13, 2018. (Doc. 17, Ex. K, at 152-153; id. at 169-170.) He does not argue that his schizophrenia prevented him from being sufficiently competent to represent himself. Even though Petitioner represented himself and also testified at trial, he did not claim he was incompetent at the time of the offense.

Judgment" (doc. 18), Petitioner asserts "Petitioner's condition was stable, he was fully oriented and aware, and he explicitly refused treatment, transport, and a gurney" from firefighters (*id.* at 10). Petitioner has consistently argued that he acted in self-defense, which was the defense he presented to the jury. Petitioner fails to demonstrate that his schizophrenia at the time of offense played a role in this case. Petitioner therefore fails to show "there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Strickland*, 466 U.S. at 695. *See Sully v. Ayers*, 725 F.3d 1057, 1070 (9th Cir. 2013) (finding petitioner's "proffered evidence showing that he was generally consuming large quantities of cocaine and suffering various psychotic symptoms around the time of the murders" was insufficient to establish *Strickland* prejudice on whether he intended to commit the offenses).

Petitioner is not entitled to relief on this claim.

5. Appellate Counsel's Failure to Assert Seizure Claim.

Petitioner asserts that appellate counsel provided ineffective assistance by failing to "raise all meritorious issues on appeal" and failing to pursue his Fourth Amendment seizure claim. (Doc. 1 at 21-22.) He argues that "every single shred of evidence offered against Petitioner was derived from a Fourth Amendment violation and ultimately was 'fruit of the poisonous tree.'" (*Id.* at 24.) Petitioner fails to establish this claim has merit, as explained in Ground One.

6. PCR counsel's Failure to Pursue Incompetence Claim.

Petitioner asserts post-conviction counsel "ignored all the errors of this case" and failed to pursue a medical report "as to Petitioner's competence at the time of his arrest." (Doc. 1 at 26.) Petitioner argues that if PCR counsel "would have conducted a proper investigation she would have found that there was plenty of evidence to support" his claim of incompetence. (*Id.* at 27.)

The Court has determined that Petitioner fails to establish trial counsel provided ineffective assistance regarding this claim (see subclaim 4 *supra*), so Petitioner fails to establish that PCR counsel provided ineffective assistance by failing to bring this claim.

C. Ground Three.

In Ground Three, Petitioner argues his "conviction was obtained in violation" of his right "to due process, fundamental fairness, and equal protection" under the Fourteenth Amendment. (Doc. 35-3 at 1.) He asserts that the trial court improperly denied his motion to suppress brought under the Fourth Amendment "without holding the state to it's (sic) burden as required by rule and law." (*Id.* at 2.) He asserts the trial court "denied Petitioner's motions and refused to afford Petitioner full and fair litigation of his claims by and through and evidentiary hearing to resolve and redress his constitutional violations." (*Id.*)

Petitioner's claim that he was denied an evidentiary hearing was not raised on direct appeal in his pro se supplemental brief. (Doc. 16-1, Ex. F, at 35.) Petitioner's claim is unexhausted and procedurally defaulted without excuse.

Also, Petitioner acknowledges the trial court ruled on his motion. (Doc. 35-3 at 2.) On July 10, 2018, the court held status conference, addressed a "Motion to Suppress Statements and Evidence and Motion to Dismiss," and denied the motions. (Doc. 16-1, Ex. at 141.) The court was not required to hold an evidentiary hearing. An evidentiary hearing on a suppression motion is necessary "only when the moving papers allege facts with sufficient definiteness, clarity and specificity to enable the trial court to conclude that contested issues of fact exist." *United States v. Howell*, 231 F.3d 615, 620 (9th Cir. 2000). Petitioner's claim that he was "seized" by firefighters does not merit exclusion of evidence or dismissal of a case. *See United States v. Payner*, 447 U.S. 727, 735 (1980) (holding that supervisory powers do "not authorize a federal court to suppress otherwise admissible evidence on the ground that it was seized unlawfully from a third party not before the court.").

Petitioner's remaining claims mirror those brought in Ground One. He is not entitled to relief for the reasons explained *supra*. Petitioner is not entitled to relief in Ground Three.

D. Ground Four.

Petitioner asserts that "newly discovered evidence has surfaced that would have changed the verdict and would have resulted in an acquittal" or dismissal of his case. (Doc.

28 at 1; 35-3 at 9-14.) As detailed in Ground Two, Petitioner reasserts that the testimony of Captain Jones "raised insurmountable doubt as to Mr. Wallace's guilt in the criminal trial." (Doc. 35-3 at 11.) The Court has concluded in Ground Two there was no reasonable probability the testimony of Captain Jones would have affected the outcome of the criminal trial. Petitioner is not entitled to relief on this claim.

E. Grounds Five and Six.

Petitioner asserts that his conviction was obtained in violation of the Fourth and Fourteenth Amendments because he "was arrested and charged without probable cause (Ground Five) and the "indictment against Mr. Wallace was obtained by perjured testimony" (Ground Six). (Docs. 28 at 2; 35-3 at 15-17; 35-4 at 1-12.) Petitioner is not entitled to relief for alleged errors in grand jury proceedings as explained in Ground Two above. *See Mechanik*, 475 U.S. at 70 (1986).

Regarding Ground Six, Petitioner alleges Officer Calandra committed perjury in the grand jury when he testified that Petitioner swung the shears at the victims. (Doc. 35-4 at 5-6.) He asserts that Officer Calandra fabricated a police report regarding Petitioner's use of the shears. (*Id.*) He argues that "an indictment or conviction secured by the state by the use of perjured testimony" is a denial of due process. (*Id.* at 7.) The Ninth Circuit has held in the habeas context that "any constitutional error in the grand jury proceedings is harmless because [defendant] was ultimately convicted of the offenses charged." *Williams v. Stewart*, 441 F.3d 1030, 1042 (9th Cir. 2006). After considering the testimony firefighters Warren, Riggs, and Alfred, even if Officer Calandra was incorrect, the grand jury was also not substantially misled regarding the event. The Court does not find the Petitioner is entitled to relief on this claim. *See United States v. Trass*, 644 F.2d 791, 796 (9th Cir. 1981) ("(d)ismissal of an indictment is required only in flagrant cases in which the grand jury has been overreached or deceived in some significant way") (citations omitted).

F. Ground Seven.

Petitioner asserts his "conviction was obtained in violation of his right to a fair trial,

equal protection of the law, and fundamental fairness under the U.S. Constitution's Fourteenth Amendment" based upon the State suppressing exculpatory evidence. (Doc. 28 at 2.) Petitioner argues that the prosecution knew Captain Jones had "favorable testimony for the defense and knowingly failed to disclose it to Mr. Wallace. This was a *Brady*[13] violation." (Doc. 35-4 at 13.)[14]

A meritorious *Brady* claim contains three essential components: (1) the evidence must be favorable to the accused, either because it is exculpatory or because it is impeaching; (2) the government must have withheld the evidence, either intentionally or inadvertently; and (3) the evidence must be material to guilt or punishment, i.e., "prejudice must have ensued." *Strickler v. Greene*, 527 U.S. 263, 281–82 (1999). Undisclosed evidence is material under *Brady*, and its non-disclosure is prejudicial, if a reasonable probability exists that, had the evidence been disclosed, the result of the proceeding would have been different. "A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *United States v. Bagley*, 473 U.S. 667, 682 (1985).

The Court has determined under Ground Two there was no reasonable probability the outcome of the trial would have been different if Captain Jones had testified in the criminal trial. As stated previously, four firefighters (Warren, Riggs, Alfred, Wagner) and Petitioner all agreed Petitioner pointed the shears at victims Warren and Riggs. Petitioner alleged the firefighters were assaulting him and he used the shears to stop the assault. The jury rejected Petitioner's self-defense claim beyond a reasonable doubt. Even if the prosecution withheld the testimony of Captain Jones, Petitioner fails to prove the evidence was material. Petitioner's claim in Ground Seven fails.

VI. Motion for Summary Judgment.

On October 26, 2021, Petitioner filed a Motion for Summary Judgment. (Doc. 18.) Petitioner advances the same claims brought in the Petition and asserts there "is no genuine

[13] *Brady v. Maryland*, 373 U.S. 83 (1963).

[14] The Court elects to bypass a procedural default analysis on Grounds Four through Seven. *See* 28 U.S.C. § 2254(b)(2) (allowing denial of unexhausted claims on the merits); *Lambrix v. Singletary*, 520 U.S. 518, 524-25 (1997) (explaining that the court may bypass the procedural default question in the interest of judicial economy when the merits are clear but the procedural default issues are not).

issue of material fact in regards to Petitioner's Fourth Amendment claim." (Doc. 18 at 8.) Petitioner argues it is undisputed that firefighters seized him in violation of his Fourth Amendment rights. He asserts that because there is no "genuine issue of material fact" he is entitled to a judgment as a matter of law. (*Id.* at 5.)

Here, Respondents have filed a Response (doc. 16) to the Petition and a Response (doc. 22) to the Motion. The Court's analysis of the merits of the Petition will be dispositive of petitioner's summary judgment motion. Because Movant's motion is procedurally defaulted or meritless, Movant's request for summary judgment should be denied. *See Kornfeld v. Puentes*, No. 1:19-cv-00263-JLT-HC, 2019 WL 1004578, at *1 (E.D. Cal. Mar. 1, 2019) ("For all practical purposes, summary judgment is equivalent to the Court's making a determination on the merits of a habeas petition. Thus, motions for summary judgment are inappropriate in federal habeas proceedings."); *Fahr v. Shinn*, 2021 WL 3666244, at *6 (D. Ariz. 2021) ("Summary judgment procedures generally are ill suited to habeas cases.").

VII. Certificate of Appealability.

"The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant." Hab. R. 11(a). The Court may issue a certificate of appealability "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). "A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller–El v. Cockrell*, 537 U.S. 322, 327 (2003). As to all of Petitioner's claims, Petitioner has failed to make the requisite showing and the Court will recommend that a certificate of appealability be denied.

The record is sufficiently developed that an evidentiary hearing is unnecessary to resolve factual disputes alleged by Petitioner. *See Schriro v. Landrigan*, 550 U.S. 465, 474 (2007) ("[I]f the record refutes the applicant's factual allegations or otherwise precludes habeas relief, a district court is not required to hold an evidentiary hearing.").

Accordingly,

IT IS RECOMMENDED that the Amended Petition for a Writ of Habeas Corpus (docs. 1, 35)) be **dismissed with prejudice**.

IT IS FURTHER RECOMMENDED that the Motion for Summary Judgment (doc. 18) be denied.

IT IS FURTHER RECOMMENDED that a certificate of appealability be **denied** as to all of Petitioner's claims.

This recommendation is not an order that is immediately appealable to the Ninth Circuit Court of Appeals. Any notice of appeal pursuant to Fed. R. App. P. 4(a)(1) should not be filed until entry of the District Court's judgment. The parties shall have 14 days from the date of service of a copy of this recommendation within which to file specific written objections with the Court. *See* 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 6, 72. Thereafter, the parties have 14 days within which to file a response to the objections.

Failure to file timely objections to the Magistrate Judge's Report and Recommendation may result in the acceptance of the Report and Recommendation by the District Court without further review. *See United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003). Failure to file timely objections to any factual determinations of the Magistrate Judge may be considered a waiver of a party's right to appellate review of the findings of fact in an order or judgment entered pursuant to the Magistrate Judge's recommendation. *See* Fed. R. Civ. P. 72.

Dated this 8th day of April, 2022.

Honorable John Z. Boyle
United States Magistrate Judge

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Martice Deshawn Wallace,

Petitioner,

v.

David Shinn, et al.,

Respondents.

No. CV-21-01180-PHX-DJH (JZB)

ORDER

On July 7, 2021, Petitioner Martice Deshawn Wallace ("Petitioner") filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 (the "Petition") (Doc. 1). On September 22, 2021, Respondents filed a Response (Doc. 16), and on October 19, 2021, Petitioner filed his Reply (Doc. 17). Following his Reply, Petitioner filed a Motion for Summary Judgment (Doc. 18) and a Separate Statement of Facts (Doc. 19). Respondents responded (Doc. 22) and Petitioner filed his reply (Doc. 23). With permission of the Court, Petitioner then filed an Amended Petition (Doc. 35).

On April 8, 2022, Magistrate Judge John Z. Boyle issued a Report and Recommendation ("R&R") recommending denial and dismissal of the Amended Petition and the Motion for Summary Judgment (Doc. 36). Petitioner has filed objections (Docs. 41, 44), and Respondents have filed their response (Doc. 42).

I. Standard of Review

This Court "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1). The Court "must

review the magistrate judge's findings and recommendations *de novo* if objection is made, but not otherwise." *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003) (en banc). The Court is not required to conduct "any review at all. . . of any issue that is not the subject of an objection." *Thomas v. Arn*, 474 U.S. 140, 149 (1985); *see also* 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b)(3).

II. Factual Background

The Arizona Court of Appeals provided the following background facts from Petitioner's case[1]:

> While patrolling a light rail stop, a security officer saw Wallace bleeding from an apparent "gash" to his head. After approaching Wallace, the security officer radioed for assistance. A responding fireman examined Wallace's head wound and, given the amount of blood, called for an ambulance.
>
> Once the ambulance arrived, Wallace voluntarily got inside and sat on a bench next to a gurney. Although he was instructed to lie down on the gurney, Wallace refused.
>
> When a paramedic told Wallace that he needed to lie down for his own safety, Wallace became verbally abusive, grabbed trauma shears—a particularly sharp scissor used for cutting clothing, belts, and boots off injured patients in emergencies—and swung them at the paramedics.[2] Overhearing the commotion, a fireman opened the ambulance's side door, and Wallace jumped out. He was quickly disarmed, however, and detained.
>
> The State charged Wallace with two counts of aggravated assault, both class three felonies. In his own defense, Wallace testified that a paramedic struck him in the face while he was in the back of the ambulance. He explained that he only grabbed the trauma shears to protect himself because he was blind in one eye and his "biggest fear" was sustaining an injury to his good eye.
>
> After trial, a jury found Wallace guilty on both counts. The jury also found two aggravating factors: (1) the offenses were dangerous, and (2) Wallace was on felony probation at the time of the offenses. After Wallace admitted two prior felony convictions, the superior court sentenced him as a

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[1] The appellate court's stated facts are entitled to the presumption of correctness. *See* 28 U.S.C. § 2254(e)(1); *Runningeagle v. Ryan*, 686 F.3d 758, 763 n.1 (9th Cir. 2012). This presumption can be rebutted by clear and convincing evidence. *Id.*

[2] Petitioner disputes that he swung the shears at the paramedics and says he only held them up. As discussed more herein, Petitioner cannot meet his burden of rebutting the presumption of correctness by clear and convincing evidence; nor does the distinction matter for purposes of his aggravated assault convictions.

> category 3 non-dangerous offender and imposed two 20-year maximum terms of imprisonment, each to run concurrently, with no presentence incarceration credit.

(Doc. 16-1 at 3).

III. Petitioner's Objections

1. Ground One Objections

In Ground One, Petitioner asserts his "conviction was obtained in violation of the 4th and 14th Amendments . . . to be free from unreasonable seizures and excessive force." (Doc. 35 at 6). He says that after refusing transport to the hospital, he was unlawfully seized when firefighters and paramedics coerced him in an ambulance, tried to force him to lay on a gurney, and blocked his attempts to leave the ambulance. (*Id.* at 8–10). In his Reply in support of his Objection, Petitioner says he "was entitled to exclusion of Riggs and Warren's testimony in regards to his alleged conduct because their testimony was 'fruit of the poisonous tree' directly derived from their unlawful seizure of Wallace's person inside their ambulance." (Doc. 44 at 5). He says his unlawful seizure in the ambulance was the "only cause of Petitioner being charged, tried, and convicted." (Doc. 35 at 8–10).

The Magistrate Judge found Ground One was unexhausted for failure to alert the state appeals court of his federal claim, procedurally defaulted without excuse, and not cognizable under *Stone v. Powell*, 428 U.S. 465 (1976). (Doc. 36 at 8). In his Objection, Petitioner says his claim should not be barred under *Stone* because he did not get a full and fair opportunity to litigate it in state court. (Doc. 41 at 2). He says his motions to suppress and dismiss were denied without an evidentiary hearing and without addressing the merits of the claim. (*Id.*) He also says any procedural default should be excused by his appellate counsel's failure to raise the claim on appeal. (*Id.*)

A. Petitioner's claim is barred by *Stone*

Where a state has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a petitioner is not entitled to federal habeas relief on the grounds that evidence obtained in an unconstitutional seizure was introduced at trial. *Stone*, 428 U.S. at 494. "The relevant inquiry is whether petitioner had the opportunity to litigate his claim,

not whether he did in fact do so or even whether the claim was correctly decided." *Ortiz-Sandoval v. Gomez*, 81 F.3d 891, 899 (9th Cir. 1996). Petitioner raised his unlawful seizure claim prior to trial in a motion to suppress. (Doc. 36 n. 2; Doc. 16-5 at 12, Ex. U). The trial judge set a Status Conference on the motion and several other pre-trial motions. (Doc. 16-5 at 20, Ex. V). The minute entry from the Status Conference says that discussion was held on the motions, and they were denied. (*Id.* at 21). The judge also found the discussion and rulings at the Status Conference mooted Petitioner's request for oral argument on his motions. (*Id.*) (noting "Defendant's *pro per* Motion Requesting Oral Argument on All Motions is satisfied by today's hearing"). Contrary to his protestations, Petitioner clearly had the ability and opportunity to raise his Fourth Amendment allegations to the trial judge. Petitioner nonetheless says the trial court's denial of his motion to suppress was in error; that the state court judge should have set an evidentiary hearing under Arizona Rule of Criminal Procedure 16.2(c)(1–4), and thus there was "an unconscionable breakdown" in the state court's corrective process. (Doc. 44 at 7). The Court does not agree, and to the extent that Petitioner disagreed with the trial judge's rulings, he was also provided the opportunity to raise the issues on appeal. He did not. *Mack v. Cupp*, 564 F.2d 898, 901 (9th Cir. 1977) (noting that the opportunity to litigate "extends to appellate review and other matters unrelated to the need for a state court hearing"). Any breakdown was a result of Petitioner's failure, not the state's failure to supply a process to correct a perceived error. Because he had the opportunity to raise his Fourth Amendment claim in state court and did not, Petitioner's claim is barred from being heard by a federal habeas court under *Stone*.

B. Claim One is defaulted without excuse

Moreover, even if cognizable under *Stone*, the Court also agrees with the Magistrate Judge's conclusion that the claim is unexhausted and procedurally defaulted without excuse. As noted above, Petitioner did not raise this claim on direct appeal in his *pro per* brief. In his Reply, Petitioner seeks to excuse his procedural default by arguing that his "opportunity to raise his claim on direct appeal was stripped from him as result of ineffective assistance of appellate counsel" who failed to "raise all meritorious issues on

appeal." (Doc. 44 at 2; Doc. 1 at 21–22).[3]

"[A] petitioner may overcome procedural default by making an adequate showing of cause and prejudice for his failure to exhaust his state court remedies." *Smith v. Baldwin*, 510 F.3d 1127, 1139 (9th Cir. 2007) (internal quotations omitted). Ineffective assistance of appellate counsel can establish cause to excuse a procedural default, but the error must rise to the level of a constitutional violation of the right to counsel under *Strickland v. Washington*, 466 U.S. 668 (1984). *Murray v. Carrier*, 477 U.S. 478, 488 (1986). The objective reasonableness of counsel's failure to pursue claims on appeal depends upon the merits of the claims; appellate counsel does not have a constitutional duty to raise every nonfrivolous issue on appeal. *See Jones v. Barnes*, 463 U.S. 745, 751–54 (1983). *See also Rupe v. Wood*, 93 F.3d 1434, 1444–45 (9th Cir. 1996) ("[T]he failure to take a futile action can never be deficient performance.").

Upon this Court's review of the record, Petitioner's claim that he was unconstitutionally seized lacks merit and thus the procedural bar is not excused by counsel's failure to raise the claim on appeal. The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures[.]" U.S. Const. amend. IV. A seizure "in the constitutional sense . . . occurs when there is a restraint on liberty to the degree that a reasonable person would not feel free to leave." *Doe ex rel. Doe v. Hawaii Dep't of Educ.*, 334 F.3d 906, 909 (9th Cir. 2003). The Amendment prohibits only unreasonable seizures. Whether a seizure is reasonable or unreasonable is an objective query requiring the Court to balance "the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing government interests at stake." *United States v. Enslin*, 327 F.3d 788, 796

[3] Petitioner asserted an ineffective assistance of appellate counsel claim on the same bases in his PCR Petition. (Doc. 16-1 at 92). The PCR court found his claim was without merit, and that in light of the "overwhelming evidence of Defendant's guilt," Petitioner could not establish that the alleged failure to raise the claim on appeal prejudiced him under *Strickland*. (Doc. 16-2 at 37). Notwithstanding the state court's merit determination of this claim, the Ninth Circuit has held that AEDPA deference to the state court determination is not appropriate on federal habeas review, and that instead, a federal habeas court should review an IAC claim raised to excuse a procedural default *de novo*. *Visciotti v. Martel*, 862 F.3d 749, 769 (9th Cir. 2016). This Court thus applies a *de novo* standard of review to the claim.

(9th Cir. 2003) (quotation omitted).

The Supreme Court has "never limited the [Fourth] Amendment's prohibition on unreasonable searches and seizures to operations conducted by the police." *New Jersey v. T.L.O.*, 469 U.S. 325, 335 (1985) (discussing Supreme Court precedent applying the Fourth Amendment to other government actors such as firefighters and building inspectors). But there are few cases applying the Fourth Amendment to paramedics like the parties involved here. Some district courts in the Ninth Circuit have used a "purpose and nature of conduct" test from the Sixth Circuit to determine whether paramedics have violated an individual's Fourth Amendment right against unreasonable seizures. *See e.g.*, *Perez v. City of Fresno*, 2022 WL 826990, *31 (E.D. Cal. March 18, 2022) (finding no unconstitutional seizure took place where "[t]here [w]as nothing before the Court to suggest that [the paramedic] was attempting to do anything other than effectuate the medical transport and care of [defendant] . . . so that [defendant] could receive further and appropriate medical help at a hospital"); *Martinez v. City of Los Angeles*, 2021 WL 4497506, *7 (C.D. Cal. 2021) (dismissing Fourth Amendment seizure claim alleging seizure by paramedics occurred during "the typical emergency response to a semi-conscious woman"). *See also Peete v. Metro. Gov't of Nashville and Davidson Cty.*, 486 F.3d 217, 220 (6th Cir. 2007) (finding no Fourth Amendment violation where paramedics merely responded to a medical emergency and "were not acting to enforce the law, deter or incarcerate").

Applying this test to the evidence in the record shows that Petitioner was not unconstitutionally seized by paramedic firemen Todd Riggs and Daniel Warren. The evidence relevant to the reasonableness of Petitioner's alleged seizure was the trial testimony of Petitioner, Riggs, Warren, other paramedic and fire personnel, and a Valley Metro security guard. Beyond Petitioner's own testimony, there was no evidence showing that Petitioner was improperly coerced into getting into the ambulance or that he was prevented from leaving the ambulance. The other witnesses testified that Petitioner got into the ambulance voluntarily so he could be transported to the hospital for further medical attention. Testimony from both sides showed that the argument in the ambulance between

Petitioner and Riggs and Warren started when Petitioner refused to comply with their request that Petitioner move from the jump seat to the gurney during his transport to the hospital, per safety protocol. Petitioner's testimony regarding what occurred in the ambulance differs from the two paramedics' testimony, however. Petitioner testified that he tried to exit the ambulance at that time, but the victims blocked him, grabbed his wrist, and started punching him. He says he grabbed trauma shears to protect himself. The victims testified that Petitioner became verbally abusive when they asked him to move to the gurney and began swinging trauma shears at them. Another paramedic ultimately pulled Petitioner out of the ambulance from a side door.

The jury was able to assess the credibility of each witness at trial. Prior to receiving the case, the jury was instructed on justifications for self-defense and non-justifications for threat or use of force. Because the jury ultimately found Petitioner guilty of two counts of aggravated assault, it necessarily resolved any conflicting testimonial evidence against Petitioner and rejected Petitioner's asserted justifications for wielding the trauma scissors against Riggs and Warren. The circumstances show that Petitioner was in the ambulance so that Riggs and Warren could "effectuate the medical transport and care of" Petitioner, not for the purpose of interfering with his liberty. *Perezi,* 2022 WL 826990, at *31. Nor were they "acting to enforce the law, deter or incarcerate" Petitioner. *Peete*, 486 F.3d at 220. Ultimately, the interest in providing the care Petitioner needed outweighed any intrusion on his liberty rights.

In sum, Petitioner's detainment in the ambulance was not unreasonable under the Fourth Amendment and therefore appellate counsel was not deficient in failing to raise the claim on appeal. Petitioner's claim is defaulted without excuse and his objection as to Ground One is overruled. For the same reasons, Petitioner's objections that the R&R did not address his claim in Ground Two that his appellate counsel was ineffective for failing to raise his unlawful seizure claim on appeal (Doc. 41 at 3) is also overruled.

2. Ground Two Objections

In Ground Two, which was not included in Petitioner's Amended Petition, but was

resolved by the Magistrate Judge out of an abundance of caution, Petitioner argues grounds on which his trial, PCR, and appellate counsel were ineffective. The R&R recommends denying each claim.

Petitioner first says the R&R erred when it found his IAC claim that his trial counsel "failed to pursue competency at the time of offense defense" was unexhausted. (Doc. 41 at 3). Petitioner says he only "added a few additional words to his habeas claim" and that it did not "fundamentally alter" the claim he made to the PCR court that his counsel was ineffective in failing to have his competency to stand trial evaluated. (Doc. 41 at 3). The Court disagrees. As the Respondents point out, "there is very little relationship between a defendant's competency to stand trial and his criminal responsibility for the crime." *Bishop v. Superior Ct.*, 724 P.2d 23, 26 n.3 (Ariz. 1986). The R&R did not err in finding that Petitioner failed to exhaust his IAC claim based on his "competency at the time of offense defense." Moreover, the Court agrees with the R&R that even if exhausted, Petitioner failed to substantiate his claims that he was incompetent at the time of the offense and thus cannot show deficient performance or prejudice. (*See* Doc. 36 at 18–19). Petitioner does not address the evidentiary deficiency in his Objection or Reply. Because this claim is insubstantial, Petitioner's objection to the R&R's conclusion that PCR counsel was not deficient in failing to raise trial counsel's ineffectiveness is also overruled.

Petitioner next objects that the R&R did not address his argument that his PCR counsel's conflict of interest as a part-time City of Phoenix attorney should excuse the default of this claim. This is not error. As noted above, the R&R determined that Petitioner's underlying IAC claim was insubstantial, thus, Petitioner could not show he was prejudiced by his trial counsel's failure to pursue the competency at the time of offense defense. PCR counsel's conflict of interest would not have changed the substantiality of the underlying claim. Notwithstanding, the Court also rejects Petitioner's conflict of interest argument on the merits. An ineffective assistance of counsel claim based on a conflict of interest requires a petitioner to show "that an actual conflict of interest adversely affected his lawyer's performance." *Cuyler v. Sullivan*, 446 U.S. 335, 350 (1980). An

"actual conflict of interest" means "a conflict that affected counsel's performance—as opposed to a mere theoretical division of loyalties." *Mickens v. Taylor*, 535 U.S. 162, 171 (2002) (emphasis in original). In *Mickens* "the Supreme Court explicitly limited this presumption of prejudice for an actual conflict of interest. . . to cases involving 'concurrent representation'"—that is, simultaneous representation of two or more defendants. *Rowland v. Chappell*, 876 F.3d 1174, 1192 (9th Cir. 2017) (citing *Mickens*, 535 U.S. at 175). Petitioner cannot establish prejudice here because this is not a matter involving concurrent representation. Petitioner does not argue that Ms. Bain concurrently represented him and the City of Phoenix. Although Ms. Bain may have represented Petitioner and a defendant being prosecuted by the City of Phoenix (which Petitioner does not substantiate), this would not be an actual conflict of interest of the kind identified in *Mickens*. This objection too, is overruled.

Petitioner next contends that the R&R erred by finding his trial counsel's failure to interview all witnesses listed in the police report was not a viable IAC claim. As he did in his Amended Petition, Petitioner argues that the testimony he elicited during his civil trial from Phoenix Fire Captain Tim Jones ("Captain Jones") would have probably changed the verdict and thus should have been considered by the Magistrate Judge to establish cause and prejudice for his PCR counsel's failure to argue that his trial counsel failed to interview the witnesses in the police report. He says that Captain Jones corroborated his testimony that he only *held* the trauma shears in front of him and did not swing them at Riggs and Warren while in the ambulance. But the Magistrate Judge explained in his R&R that the State was never required to show Petitioner swung the shears to prove its aggravated assault charge. (Doc. 36 at 15). In his Objection, Petitioner states that his indictment "alleged that he 'swung trauma shears' at Riggs and Warren" and that he was convicted on that charge. (Doc. 41 at 4). He is mistaken. Count 1 of his Indictment states that Petitioner, "using a scissors, a deadly weapon or dangerous instrument, intentionally did place Todd Riggs in reasonable apprehension of imminent physical injury. . .The State further alleges that the offense charged in this count is a dangerous felony because the offense involved the

discharge, use, *or threatening exhibition* of a scissors, a deadly weapon or dangerous instrument, in violation of A.R.S. § 13-105 and 13-704." (Doc. 35-13 at 18) (emphasis added). The same acts were alleged with regard to Daniel Warren in Count 2. (*Id.*)

As the Magistrate Judge found, "Captain Jones's testimony that Petitioner did not swing the shears does not diminish that Petitioner held the shears in a manner to stop an alleged assault and protect himself." (Doc. 36 at 16). Petitioner testified that he grabbed the shears and "held them up" to defend himself. The jury was charged with resolving whether Petitioner was justified in acting in self-defense and they found he was not. Captain Jones's testimony would not have affected that resolution. The Court agrees with the R&R. Petitioner does not have a substantial claim that there was a reasonable probability the outcome of his trial would have been different had trial counsel interviewed and had Captain Jones testify. This objection is also overruled.

3. Ground Three

In Ground Three of the Amended Petition Petitioner states that his "conviction was obtained in violation" of his right "to due process, fundamental fairness, and equal protection" under the Fourteenth Amendment when the trial court denied his motion to suppress without holding the state to its burden of proof and without providing him an evidentiary hearing. (Doc. 35-5 at 1). The R&R found that by failing to raise this claim on direct appeal, the claim is unexhausted and procedurally defaulted without excuse. (Doc. 36 at 20). It also rejected the substance of the claim, and clarified for Petitioner that the trial court was not required to hold an evidentiary hearing on his motion. The R&R states:

> An evidentiary hearing on a suppression motion is necessary "only when the moving papers allege facts with sufficient definiteness, clarity and specificity to enable the trial court to conclude that contested issues of fact exist." *United States v. Howell*, 231 F.3d 615, 620 (9th Cir. 2000). Petitioner's claim that he was "seized" by firefighters does not merit exclusion of evidence or dismissal of a case. *See United States v. Payner*, 447 U.S. 727, 735 (1980) (holding that supervisory powers do "not authorize a federal court to suppress otherwise admissible evidence on the ground that it was seized unlawfully from a third party not before the court.").

(Doc. 36 at 20).

Petitioner does not object to this finding, but instead states the "claim was technically exhausted throughout a full round of PCR Proceedings" and that any default should be excused because appellate counsel was ineffective for failing to raise it on direct appeal. (Doc. 41 at 5). Even assuming exhaustion of the claim, however, the Court agrees with the R&R's merit determination, to which Petitioner does not object. The state court did not violate Petitioner's due process rights by failing to provide him an evidentiary hearing on his motion to suppress for the reasons stated in the R&R. This objection is overruled.

4. Ground Five and Six Objections

In Ground Five, Petitioner contends his conviction was obtained in violation of the Fourth and Fourteenth Amendments when he was arrested without probable cause. He says Officer Calandra, the arresting officer, misrepresented what Captain Jones told him about the incident in his police report, and used the falsified police report in grand jury proceedings. In Ground Six, Petitioner makes the related contention that his indictment was obtained by the perjured testimony Officer Calandra gave during grand jury proceedings, and thus he was denied due process.

The Magistrate Judge correctly found that "any error occurring at the grand jury proceeding was rendered harmless when Petitioner was found guilty as charged by a petit jury." (Doc. 36 at 10 *citing United States. v. Mechanik*, 475 U.S. 66, 70 (1986) and *Williams v. Stewart*, 441 F.3d 1030, 1042 (9th Cir. 2006)). The Magistrate Judge also said that considering the firemen's testimony at Petitioner's criminal trial, even if Officer Calandra misstated Captain Jones's representation of certain facts in his police report, e.g., that Petitioner was swinging the shears at Riggs and Warren as opposed to holding them in front of him, and that Petitioner "chased" Riggs and Warren out of the ambulance instead of being pulled out of the side door, the grand jury was not substantially misled. (Doc. 36 at 21 *citing United States v. Trass*, 644 F.2d 791, 796 (9th Cir. 1982) ("[d]ismissal of an indictment is required only in flagrant cases in which the grand jury has been overreached or deceived in some significant way")). Petitioner does not distinguish the cases cited by

the Magistrate Judge or explain why this legal principle does not preclude his claims. Instead, he says the R&R ignores "all the evidence and corresponding exhibits" supporting these claims, and reiterates the arguments made in his Amended Petition. The Court has reviewed this claim *de novo* and disagrees with Petitioner. The R&R reconciles the purported inconsistencies between the police report and the testimony Captain Jones provided in Petitioner's civil rights trial in accordance with the applicable habeas standards. His objections to the recommendations on Grounds Five and Six are overruled.

5. Ground Seven Objections

In Ground Seven, Petitioner asserts his "conviction was obtained in violation of his right to a fair trial, equal protection of the law, and fundamental fairness under the U.S. Constitution's Fourteenth Amendment" when the state suppressed the "exculpatory" testimony of Captain Jones, and in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), failed to disclose it to him. (Doc. 35-4 at 13). The Magistrate Judge found that the claim failed on the merits: that because there was no reasonable probability that the outcome of the trial would have been different if Captain Jones would have testified in Petitioner's criminal trial (as determined in its analysis of Ground Two), Petitioner could not establish his testimony was material for *Brady* purposes. (Doc. 36 at 22). Notwithstanding this analysis, Petitioner says the "R&R did not fully address the merits of the impeachment aspect of the *Brady* claim." He then again reiterates the arguments in his Amended Petition. The Court finds that the R&R thoroughly explained how any allegedly impeachment testimony by Captain Jones at his criminal trial would probably not have changed the guilty verdict, and thus was not material under *Brady*. (*See* Doc. 36 at 13–16). This objection is overruled.

IV. Motion for Summary Judgment

After filing his Petition, Petitioner filed a Motion for Summary Judgment (Doc. 18). Therein, he argues the merits of his Petition and specifically argues that "there is no issue of material fact" that Riggs and Warren seized him in violation of his Fourth Amendment rights. (Doc. 18 at 8). Because the Court, in conducting its *de novo* review of the objected-

to claims in his habeas Petitions, concludes otherwise, the Court will also accept Judge Boyle's recommendation that the Motion for Summary Judgment be denied.

V. Conclusion

After conducting its *de novo* review, the Court accepts the recommended decision within the meaning of Federal Rule of Civil Procedure 72(b) and overrules Petitioner's objections. *See* 28 U.S.C. § 636(b)(1).

Accordingly,

IT IS ORDERED that Petitioner's Objections (Doc. 41) to the Report and Recommendation of Judge Boyle are **OVERRULED**, and the Report and Recommendation (Doc. 36) **ACCEPTED AND ADOPTED.** Petitioner's Amended Petition for Writ of Habeas Corpus (Docs. 1, 35) is **DISMISSED, WITH PREJUDICE**.

IT IS FURTHER ORDERED that Petitioner's Motion for Summary Judgment (Doc. 18) is **DENIED**.

IT IS FURTHERED ORDERED that a Certification of Appealability and leave to proceed in forma pauperis is **DENIED** because the dismissal of the Petition is justified by a plain procedural bar, reasonable jurists would not find the ruling debatable, and Petitioner has not made a substantial showing of the denial of a constitutional right.

IT IS FINALLY ORDERED that the Clerk of Court shall enter judgment denying and dismissing Petitioner's Petition for Writ of Habeas Corpus filed pursuant to 28 U.S.C. § 2254 (Docs. 1, 35) and terminate this action.

Dated this 16th day of September, 2022.

Honorable Diane J. Humetewa
United States District Judge

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