UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

APR 24 2023

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

GERALD VAUGHN GWEN, Petitioner-Appellant, v. ATTORNEY GENERAL FOR THE STATE OF ARIZONA; et al., Respondents-Appellees.	No. 22-15944 D.C. No. 3:20-cv-08327-JAT District of Arizona, Prescott ORDER

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

Appellant's motion for reconsideration (Docket Entry No. 4) is denied. *See* 9th Cir. R. 27-10.

No further filings will be entertained in this closed case.

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Before: NGUYEN and BADE, Circuit Judges.

The request for a certificate of appealability (Docket Entry No. 2) 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).

Any pending motions are denied as moot.

DENIED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Gerald Vaughn Gwen,

Petitioner,

v.

Scott Mascher, et al.,

Respondents.

NO. CV-20-08327-PCT-JAT

JUDGMENT IN A CIVIL CASE

Decision by Court. This action came for consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED adopting the Report and Recommendation of the Magistrate Judge as the order of this Court. Grounds 1B, 5A(4) and 9 of the Petition are dismissed with prejudice; the remaining Grounds of the Petition are denied with prejudice. This action is hereby terminated.

Debra D. Lucas
District Court Executive/Clerk of Court

June 16, 2022

By s/ W. Poth
Deputy Clerk

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Gerald Vaughn Gwen,

Petitioner,

v.

Attorney General of the State of Arizona, et al.,

Respondents.

No. CV-20-08327-PCT-JAT

ORDER

Pending before this Court is Petitioner's Petition for Writ of Habeas Corpus filed pursuant to 28 U.S.C. § 2254 ("Petition"). The Magistrate Judge to whom this case was assigned issue a Report and Recommendation ("R&R") recommending that the Petition be denied. (Doc. 56). Petitioner filed objections to the R&R. (Doc. 57). Respondent replied to the objections. (Doc. 58).

I. Review of R&R

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). It is "clear that the district judge 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*) (emphasis in original); *Schmidt v. Johnstone*, 263 F.Supp.2d 1219, 1226 (D. Ariz. 2003) ("Following *Reyna-Tapia*, this Court concludes that *de novo* review of factual and legal issues is required if objections are made, 'but not otherwise.'"); *Klamath-Siskiyou Wildlands Ctr. v. U.S. Bureau of Land Mgmt.*, 589 F.3d

1027, 1032 (9th Cir. 2009) (the district court "must review de novo the portions of the [Magistrate Judge's] recommendations to which the parties object."). District courts are 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) (emphasis added); *see also* 28 U.S.C. § 636(b)(1) ("the court shall make a *de novo* determination of those portions of the [report and recommendation] to which objection is made.").[1]

Accordingly, the Court will review the portions of the R&R to which there is a specific objection de novo. The Court notes that at page 2 of his objections Petitioner states that he objects to the entirety of the R&R. The Court is not obligated to review every word of the 53-page R&R de novo based on this global objection. *Accord Martin v. Ryan*, 2014 WL 5432133, *2 (D. Ariz. October 24, 2014) ("...when a petitioner raises a general objection to an R&R, rather than specific objections, the Court is relieved of any obligation to review it.") (collecting cases); *Warling v. Ryan*, 2013 WL 5276367, *2 (D. Ariz. September 19, 2013) ("A general objection has the same effect as would a failure to object") (internal quotations and citation omitted). Thus, Petitioner's general objection cannot overcome this Circuit's *en banc* case law that this Court need only review de novo factual and legal issues to which there is a specific objection. *See Reyna-Tapia*, 328 F.3d at 1121. As a result, this general objection is overruled and the Court will turn to Petitioner's specific objections where the Court can discern them.

II. Default

The R&R concludes that Respondents have not failed to defend this action; therefore, Petitioner is not entitled to default or default judgment. (Doc. 56 at 9-10).

[1] The Court notes that the Notes of the Advisory Committee on Rules appear to suggest a clear error standard of review under Federal Rule of Civil Procedure 72(b), citing *Campbell*. Fed. R. Civ. P. 72(b), NOTES OF ADVISORY COMMITTEE ON RULES—1983 citing *Campbell v. United States Dist. Court*, 501 F.2d 196, 206 (9th Cir. 1974), *cert. denied*, 419 U.S. 879 (The court "need only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation."). The court in *Campbell*, however, appears to delineate a standard of review specific to magistrate judge findings in the motion to suppress context. *See Campbell*, 501 F.2d at 206–207. Because this case is not within this limited context, this Court follows the Ninth Circuit's *en banc* decision in *Reyna-Tapia* on the standard of review for an R&R.

Petitioner objects to this recommendation. (Doc. 57 at 9). The Court has reviewed the relevant filings in this case and agrees with the R&R that Petitioner is not entitled to default. This objection is overruled.

III. Factual Background

The R&R summarized the history of this case in state court. (Doc. 56 at 1-5). While Petitioner objects to the accuracy of the state court's recounting of its own proceedings and findings, Petitioner does not specifically object to the R&R's summary of what transpired in state court. (*See* Doc. 57). This Court accepts and adopts the R&R's recounting of the state court proceedings.

In short summary, Petitioner proceeded to a jury trial, pro se with advisory counsel, and was convicted of identity theft, credit card theft, theft, fraud and forgery. (Doc. 56 at 2-3). Petitioner was sentenced to 5 years incarceration. (*Id.*). It appears Petitioner has completed his sentence, but no one argues the Petition is moot.

IV. Habeas Petition

The R&R quoted the claims raised in the habeas petition. (Doc. 56 at 5-7). The R&R then endeavored to summarize that narrative into grounds for relief. (Doc. 56 at 7-8). The R&R summarized Petitioner's claims/ground as follows:

> - Ground 1A – use of perjured testimony at grand jury
> - Ground 1B – insufficient evidence at grand jury2
> - Ground 2A – improper vacating of preliminary hearing
> - Ground 2B – inadequate notice and right to counsel at grand jury
> - Ground 3 – search and seizure upon arrest
> - Ground 4 – search and seizure of car, residence and truck
> - Ground 5A – procedural defects of (1) insufficient indictment, (2) prosecutorial misconduct in arguments, (3) variance from the indictment, (4) verdict not unanimous, and (5) denial of access to exculpatory evidence
> - Ground 5B – insufficient evidence of (1) theft and negotiation of checks, and (2) certified proof of loss from credit card
> - Ground 6A – admission of false evidence, unauthenticated records, incorrect legal decisions and denial of evidentiary hearing
> - Ground 7A – evidence tampering
> - Ground 7B – *Brady* violations
> - Ground 8 – denial of substitute counsel
> - Ground 9A – judicial bias on relationship
> - Ground 9B – judicial bias based on rulings on: (1) March 19, 2018 order on motion to dismiss/suppress; (2) unauthenticated computer records; (3) filing of motions for a change of judge; (4) failure to disclose; (5) check records; (6) prosecution's improper arguments; and (7) Petitioner's motion for acquittal.

(*Id.*).

Petitioner objected to some of this summary, which will be discussed more fully below. Otherwise, the Court accepts the R&R's characterization of the claims in this case.

V. Unexhausted and Procedurally Defaulted Claims

The R&R concludes that Grounds 1B, 5A(4), and 9 are unexhausted and defaulted, without excuse, and must be dismissed with prejudice. (Doc. 56 at 16, 19, 21-22, 24). Petitioner generally objects and states that he exhausted all his claims. (Doc. 57 at 9). However, Petitioner does not offer any specifics as to when in state court he presented these claims in a procedurally correct manner. (Doc. 57 at 9-11). The Court agrees with the R&R that these claims are unexhausted and this Court cannot consider their merits unless Petitioner shows cause and prejudice or a fundamental miscarriage of justice/actual innocence to overcome his failure to exhaust. The Court finds the R&R correctly stated the law governing these exceptions to the exhaustion requirement (Doc. 56 at 22-24) and Petitioner's objection (Doc. 57 at 14) that the R&R incorrectly stated the governing law is overruled.

The R&R concludes that Petitioner has not shown cause and prejudice or a fundamental miscarriage of justice. (Doc. 56 at 24). Petitioner objects to the R&R's reliance on the state court record/decisions. (Doc. 57 at 9). Petitioner argues that the state court's decisions do not reflect what actually transpired in state court. (*Id.*). Under 28 U.S.C. § 2254, this Court cannot review the state court's record or decisions de novo, nor could the Magistrate Judge in preparing the R&R. Thus, the R&R's reliance on and citation to the state court's decisions was appropriate and this objection is overruled.

The Court accepts the R&R's determination that Grounds 1B, 5A(4), and 9 are unexhausted and defaulted, without excuse, and must be dismissed with prejudice.[2]

[2] Petitioner objects to the R&R's characterization of Ground 9 as judicial bias; Petitioner indicates he intended to argue an inappropriate exercise of judicial power. (Doc. 57 at 13-14). First, the Court agrees with the R&R that the closest legal theory to the words Petitioner is using (notably Petitioner offers no citation to any law discussing judicial use of power as a cognizable theory) is judicial bias. But regardless of how Petitioner intended to cast this claim, this Court's conclusion that the claim is unexhausted without excuse is unchanged. Thus, this objection is overruled as irrelevant to the decision.

VI. Remaining Claims

With respect to any claims that Petitioner exhausted before the state courts, under 28 U.S.C. §§ 2254(d)(1) and (2) this Court must deny the Petition on those claims unless "a state court decision is contrary to, or involved an unreasonable application of, clearly established Federal law"[3] or was based on an unreasonable determination of the facts. *See Lockyer v. Andrade*, 538 U.S. 63, 71 (2003). Additionally, "[a]n application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State." 28 U.S.C. § 2254(b)(2).

At this point, Petitioner makes two additional global objections. (Doc. 57 at 13). First, Petitioner argues that the R&R subcategorizing his claims violates his due process rights. (*Id.*). As discussed in footnote 2, the Magistrate Judge in preparing the R&R attempted to analyze Petitioner's words as legal claims. The claims in Petitioner's Petition span 10 pages, but only ground six contains a legal citation, and it is to a state case not a federal one. (Doc. 1 at 6-15). By Petitioner failing to offer any legal support for his arguments, the Court must either deny relief with no analysis, or determine whether there is any legal support for the factual theories presented. There is no due process violation in the Court researching the claims to the best of its ability. Moreover, in his objections, Petitioner offers no alternative legal theory to support his factual allegations. For all of these reasons, this objection is overruled.

Next, Petitioner argues that it is inconsistent for the R&R to determine that some claims were exhausted and some claims remain unexhausted, but procedurally defaulted, in state court. (Doc. 57 at 15-16). The R&R is legally correct that some claims may have been exhausted in state court while other claims have not been exhausted in state court. *See, e.g., Bradford v. Davis*, 923 F.3d 599 (9th Cir. 2019) (finding some claims exhausted and some claims unexhausted). Accordingly, this objection is overruled.

At pages 24–51, the R&R discusses the merits of the remaining grounds in the

[3] Further, in applying "Federal law" the state courts only need to act in accordance with Supreme Court case law. *See Carey v. Musladin*, 549 U.S. 70, 74 (2006).

Petition. (Doc. 56 at 24–51). The R&R reviews certain grounds de novo. (*See e.g.*, Doc. 56 at 27). Ultimately as to all remaining grounds, the R&R determines that they are either without merit or that the state court decision was not contrary to or an unreasonable application of clearly established federal law or an unreasonable determination of the facts. Petitioner makes no specific objections to this portion of the R&R and the Court accepts pages 24–51 and the conclusions therein.

VII. Conclusion

Based on the foregoing,

IT IS ORDERED that the Report and Recommendation (Doc. 56) is accepted and adopted. The objections (Doc. 57) are overruled. Grounds 1B, 5A(4) and 9 of the Petition are dismissed with prejudice; the remaining Grounds of the Petition are denied with prejudice; the Clerk of the Court shall enter judgment accordingly.

IT IS FURTHER ORDERED that pursuant to Rule 11 of the Rules Governing Section 2254 Cases, in the event Petitioner files an appeal, the Court denies issuance of a certificate of appealability because dismissal of portions of the Petition is based on a plain procedural bar and jurists of reason would not find this Court's procedural ruling debatable, *see Slack v. McDaniel*, 529 U.S. 473, 484 (2000), and Petitioner has not made a substantial showing of the denial of a constitutional right, *see* 28 U.S.C. § 2253(c)(2).

Dated this 15th day of June, 2022.

James A. Teilborg
Senior United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

Gerald Vaughn Gwen, Petitioner -vs- Scott Mascher, et al., Respondents.	CV-20-8327-PCT-JAT (JFM) **Report & Recommendation on Petition for Writ of Habeas Corpus**

I. MATTER UNDER CONSIDERATION

Petitioner has filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 (Doc. 1), which is now ripe for consideration. Accordingly, the undersigned makes the following proposed findings of fact, report, and recommendation pursuant to Rule 8(b), Rules Governing Section 2254 Cases, Rule 72(b), Federal Rules of Civil Procedure, 28 U.S.C. § 636(b) and Rule 72.2(a)(2), Local Rules of Civil Procedure.

II. RELEVANT FACTUAL & PROCEDURAL BACKGROUND

A. FACTUAL BACKGROUND

The following summary of the facts is drawn from the decision of the Arizona Court of Appeals in disposing of Petitioner's direct appeal.

> ¶2 Gwen was employed by Dahl Jones Food Company ("Dahl") until Gwen alleged verbal and physical abuse, at which point the parties mutually agreed to terminate Gwen's employment. Gwen and Dahl agreed that Gwen would receive three months' salary as severance, paid in two computer-generated checks of $5,313.06 each.
> ¶3 Two months later, Dahl's chief financial officer ("CFO") discovered unauthorized activity on Dahl's business accounts including the purchase of a $4,000 mountain bike to be shipped to Gwen's home address and two handwritten checks with a signature stamp (rather than a computer-generated signature) in the same amounts as Gwen's severance checks ($5,313.06). Dahl's CFO contacted law enforcement and the bank to report these unauthorized transactions.
> ¶4 Police investigation revealed that Gwen had used the

> fraudulent checks to obtain a $5,000 money order to buy a vehicle. Dahl's CFO also discovered Gwen had used a third unauthorized check to buy multiple electronic devices from a retail store. Police then obtained warrants to search Gwen's home, the purchased vehicle, and a rented trailer. Those searches revealed $3,600 in cash, a receipt from the retail store and the electronic devices purchased there, a receipt for the cashier's check, and a piece of paper with the CFO's debit-card number.

(Exh. GG, Mem. Dec. 1/14/20.) (Exhibits herein are referenced as follows: to the Petition (Doc. 1) as "Exh. P-__"; to the Answer (Doc. 23), as "Exh. ___"; and to the Reply (Doc. 43) as Exh. R-___.")

B. PROCEEDINGS AT TRIAL

A felony Complaint against Petitioner was filed on September 22, 2015. (Exh. R-P.) Following his arrest, Petitioner requested a preliminary hearing, which was scheduled for September 25, 2015. (Exh. B, M.E. 9/24/15.) On September 25, 2015, the Yavapai County Grand Jury issued an Indictment (Exh. D), indicting Petitioner on charges of identity theft, credit card theft, fraud, theft, and two counts of forgery. A Notice of Supervening Indictment (Exh. C.) issued the same date.

On October 2, 2015, counsel appeared and requested a copy of the grand jury transcript. (Exh. E., Not. Appear.) On October 5, 2015, Petitioner appeared with counsel and waived reading of the indictment and plead not guilty. (Exh. F, M.E. 10/5/15.)

Petitioner then appeared on October 30, 2017, and following questioning by the trial court, waived his right to counsel, executing a written Waiver (Exh. H). The public defender's office was directed to appoint advisory counsel. (Exh. G, M.E. 10/30/17.)

Petitioner moved *pro se* to dismiss (Exh. I) on various grounds, e.g. insufficient indictment, lack of preliminary hearing, illegal arrest, illegal search & seizure, and evidence tampering. He also moved *pro se* (Exh. J) to suppress the results of the search warrants.

On March 13, 2018, Petitioner waived his right of self-representation and requested appointment of counsel. The request was granted, and the public defender's office was again appointed to represent Petitioner. (Exh. K, M.E. 3/13/18.) The court denied the

motion to dismiss. (Exh. L, Order 3/19/18.)

On June 18, 2018, Petitioner again executed a waiver of his right to counsel (Exh. M), which was accepted. Petitioner then filed *pro se* a Petition for Change of Judge (Exh. N), which was rejected as untimely and unsupported (Exh. P, Order 7/9/18). Petitioner then filed *pro se* a new petition for change of judge (Exh. Q), and an extension ("Waiver of Requirements") (Exh. R) to file such petition. This request was again rejected as untimely. (Exh. S, Order 8/29/18.)

Petitioner also filed a Motion to Compel (Exh. O) production of seized evidence, which was granted. He then sought sanctions (Exh. S). The Court granted sanctions, finding a failure to preserve evidence, and directing a curative ("*Willits*") lost-evidence instruction, citing *State v. Willits*, 96 Ariz. 184, 187 (1964). (Exh. T, Order 9/5/18.)

The matter proceeded to a pretrial conference and trial on September 11, 2018, in which Petitioner appeared *pro se* with advisory counsel. The prosecution successfully moved to dismiss Count 6 (forgery) of the indictment. In addition, the trial court denied a number of motions, including a motion to compel and a motion to suppress, and conducted a voluntariness hearing finding Petitioner's statement voluntary. A five-day trial was conducted, and Petitioner was found guilty by the jury of the remaining five counts. (Exh. U, M.E. 9/11/18; Exh. W, M.E. 9/19/18; Exhs. X, Y, Z, AA, BB, Verdict Forms.)

On November 19, 2018, Petitioner was sentenced to concurrent terms of imprisonment, the longest of which was 5 years, with 625 days of presentence incarceration credit.[1] (Exh. GG, Mem. Dec. 1/14/20 at ¶ 5.)

Petitioner filed a Motion to Vacate Judgement, which was denied on May 9, 2019. (Exh. R-C, Order 5/9/19.)

C. COLLATERAL PROCEEDINGS

In the midst of the trial proceedings, Petitioner filed with the Arizona Supreme

[1] It appears Petitioner may have fully served his prison sentence in this case, but he remains incarcerated on sentences imposed in a separate prosecution.

Court a Motion for Speedy Decision, Petition for Grant Writ Time, and Petition for Writ of Habeas Corpus. All three were denied on May 30, 2018. (Exh. R-E, Order 5/20/18.)

In addition, on June 29, 2018, Petitioner filed with the Arizona Court of Appeals a Petition for Special Action. The Arizona Court of Appeals declined jurisdiction on July 5, 2018. (Exh. R-E, Docket for 1 CA-SA 18-0163.)

Between sentencing and his opening brief on direct appeal, Petitioner filed a Second Petition for Special Action. (*See* Exh. R-G, Scheduling Order 3/29/19.) That proceeding was summarily dismissed when the Arizona Court of Appeals declined jurisdiction. (*Id.* at Order 3/29/219.)

D. PROCEEDINGS ON DIRECT APPEAL

Petitioner filed a direct appeal. On or about August 5, 2019, appointed counsel was unable to find a non-frivolous issue for review and filed an Opening Brief (Exh. EE) pursuant to *Anders v. California*, 386, U.S. 738 (1967) and related state authorities. Petitioner then filed *pro per* a "Supplemental Brief," arguing: (a) a defective indictment based on insufficient and false evidence and denial of procedural rights; (b) denial of a preliminary hearing; (c) illegal stop and arrest; (d) illegal search and seizure; (e) insufficient evidence to convict; (f) evidentiary errors; (g) evidence tampering; (h) denial of a fair trial based on lack of access to paralegal and investigator services, access to a law library, and access to resources, evidence, subpoenas, and inability to repeatedly attack the search warrant; (i) ineffective assistance of counsel; (j) improper denial of various pretrial motions, some resulting in constitutional violations; (k) erroneous denial of motion for judgment of acquittal; (l) erroneous denial of motion to vacate judgment; (m) insufficient *Willits* instruction on destroyed evidence; (n) prosecutorial misconduct including bad faith, improper inferences, improper comments, and extrinsic fraud; and (o) witness perjury and improper expert testimony.

In a Memorandum Decision issued January 14, 2020 (Exh. GG) the Arizona Court of Appeals found no merit to the asserted claims, reviewed the record for "reversible error"

and found none, and affirmed Petitioner's convictions and sentences.

Petitioner filed a Petition for Review (Exh. R-A) by the Arizona Supreme Court, which was denied on July 28, 2020. (Exh. GG, Mandate.) Petitioner filed a motion for reconsideration which was dismissed as improperly filed. (Exh. P-7, Order 8/13/20.) The Arizona Court of Appeals issued its Mandate (Exh. GG) on September 3, 2020.

E. PROCEEDINGS ON POST-CONVICTION RELIEF

Petitioner did not file any petitions for post-conviction relief pursuant to Arizona Rule of Criminal Procedure 32. (Petition, Doc. 1 at 4; Answer, Doc. 23 at 3.)

F. PRESENT FEDERAL HABEAS PROCEEDINGS

Petition – Petitioner commenced the current case by filing his Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 on December 7, 2020 (Doc. 1). Because Petitioner remained incarcerated at the time at the Yavapai County Jail, he named Sheriff Scott Mascher as respondent. Upon his transfer to the custody of the Arizona State Prison system, Arizona Department of Corrections, Rehabilitation and Reentry Director Shinn was substituted in as respondent. (Order 5/17/21, Doc. 36.)

Upon issuing the service order, the Court found Petitioner's Petition asserted the following grounds for relief:

> In **Ground One**, Petitioner contends his Fifth and Fourteenth Amendment rights were violated because of "malicious prosecution" and a "defective indictment." He claims the prosecutor brought a "fraudulent case before the grand jury," "prematur[e]ly presented a[n] information to a grand jury before he determined probable cause," "suborned testimony" when presenting the case to the grand jury, and "inserted false facts to unfairly influence the deliberation to indict." Petitioner also alleges that the grand jury proceeding was "plagued with large assignments of perjury" and that the indictment lacked probable cause, was "unconstitutional in violation of [Petitioner's] grand jury guarantee," and was "insufficient for the grand jury to return an indictment" because "there was no evidence in support of the allegations."
>
> In **Ground Two**, Petitioner alleges his Fifth, Sixth, and Fourteenth Amendment rights to due process and counsel were violated due to a "deprivation of preliminary hearing, improperly vacated by a form not authorized by law, and the court and State[']s misuse of a grand jury indictment to deny a privilege when the[y]

failed to provide sufficient notice of grand jury proceeding." He contends this prevented him from requesting representation before the grand jury.

In **Ground Three**, Petitioner claims he was denied his Fourth and Fourteenth Amendment rights because he was arrested without a warrant or probable cause and "without [the police officer] stating the grounds for effectuating an arrest."

In **Ground Four**, Petitioner asserts his Fourth Amendment and due process rights were violated because his property and papers were "illegally search[ed] and seized prior to law enforcement obtaining a valid search warrant." He also contends the police, aided by the prosecutor "unlawfully participated in a coverup of the illegal searches."

In **Ground Five**, Petitioner contends his due process rights were violated and his conviction was unconstitutional because there was insufficient evidence of guilt adduced at trial. He claims that the "indictment was insufficient as a matter of law and lacked probable cause" and that the trial court allowed the prosecutor's "ambiguous remarks" made during opening and closing arguments to "proceed unchallenged" and without "correcting or disapproving instructions." Petitioner also claims the State "failed to prove a single element," "the trial proof does not correspond to the alleged conduct of the indictment," and the evidence was insufficient to establish guilt beyond a reasonable doubt.

Petitioner asserts that the offenses of fraudulent schemes and artifices, credit card theft, and forgery were "never tried at trial" and that the prosecutor, during closing arguments, "abrogate[d] the charge of 'theft.'" Petitioner claims that "the ad[]mission of not being able to prove the most important element of the entire indictment cast[s] reasonable doubt as to the conduct alleged in all other counts" because "[w]ithout this central offense or element proven, there are no other rational bas[e]s for support of the other offenses."

Petitioner also contends the "jury verdict was not unanimous as a fact of law" and the trial court did not "admonish or issue a disapproving instruction that would have diminished the risk of a non-unanimous jury verdict" after the prosecutor's "admission." In addition, Petitioner claims the trial court "impeded, hindered, obstructed, and defeated the Petitioner[']s access to exculpatory evidence" and the trial court failed to "exercise its judic[i]al authority to require the State to produce l[e]g[i]timate proof of loss." He contends that the lack of "l[e]g[i]timate certified records showing that a crime had been committed leaves the record void of evidence necessary to sustain a conviction" and that his conviction "was the result of deception of court and jury, p[re]sumption and unreasonable inference from facts not in evidence."

In **Ground Six**, Petitioner claims his Fourteenth Amendment due process rights were violated because the trial court admitted "forged or fabricated evidence," made "incorrect legal conclusions," and "deprived Petitioner of his right to hold an evidentiary hearing pursuant to ARS 13-4238."

In **Ground Seven**, Petitioner alleges his Fourteenth Amendment rights were violated due to "tampering, concealment, [and] suppression of evidence." He claims the trial was unfair because the trial court "allowed allegations of misconduct and tampering to proceed excused, challenged, and without an investigation."

> In **Ground Eight**, Petitioner contends he was denied his right to counsel when the "trial court failed to hold a hearing on two separate incidents when [Petitioner] requested substitute counsel."
>
> In **Ground Nine**, Petitioner claims there were "judicial improprieties" that violated his Fourteenth Amendment rights and prevented him from receiving a fair trial.

(Order 1/21/21, Doc. 5 at 2-4.)

Upon evaluation of the Petition, Answer and Reply, the undersigned denominates the various claims and subclaims as follows:

- Ground 1A – use of perjured testimony at grand jury
- Ground 1B – insufficient evidence at grand jury[2]
- Ground 2A – improper vacating of preliminary hearing
- Ground 2B – inadequate notice and right to counsel at grand jury
- Ground 3 – search and seizure upon arrest
- Ground 4 – search and seizure of car, residence and truck
- Ground 5A – procedural defects of (1) insufficient indictment, (2) prosecutorial misconduct in arguments, (3) variance from the indictment, (4) verdict not unanimous, and (5) denial of access to exculpatory evidence
- Ground 5B – insufficient evidence of (1) theft and negotiation of checks, and (2) certified proof of loss from credit card
- Ground 6A – admission of false evidence, unauthenticated records, incorrect legal decisions and denial of evidentiary hearing
- Ground 7A – evidence tampering
- Ground 7B – *Brady* violations
- Ground 8 – denial of substitute counsel
- Ground 9A – judicial bias on relationship

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[2] Petitioner argues in his Reply that there were other procedural errors in the grand jury proceedings such as a lack of adequate notice, etc. (Reply, Doc. 43 at 17-18.) No claim on this basis was raised in the Petition, and it will not be addressed herein. "The district court need not consider arguments raised for the first time in a reply brief." *Zamani v. Carnes*, 491 F.3d 990, 997 (9th Cir. 2007). Moreover, for the reasons discussed hereinafter regarding Ground 1A, claims related to grand jury proceedings and not remediable in this habeas proceeding.

- Ground 9B – judicial bias based on rulings on: (1) March 19, 2018 order on motion to dismiss/suppress; (2) unauthenticated computer records; (3) filing of motions for a change of judge; (4) failure to disclose; (5) check records; (6) prosecution's improper arguments; and (7) Petitioner's motion for acquittal.

Response - On April 16, 2021, Respondents filed their Answer (Doc. 23). Respondents argue defenses of procedural default, non-cognitive state law claims, *Stone v. Powell* bar on exclusionary rule claims, harmless error, and lack of merit.

Reply - Because Respondents relied in part upon a failure to properly exhaust state remedies, the Court set a date certain for a reply and directed:

> Any assertions in the reply that Petitioner's claims were fairly presented to the state appellate courts shall be supported by specific references to the location of the presentation of the claim, i.e. by exhibit number/letter in the record of this proceeding, document name, date of filing with the state court, page(s)/ line number(s) (e.g. "Exh. A, Petition for Review, filed 1/1/15, at 1/17 – 2/23").

(Order 4/21/21, Doc. 25.)

On May 24, 2021, Petitioner filed a Reply (Doc. 43). Petitioner argues the Answer is deficient and results in a procedural default entitling him to default judgment, and is based on factual inaccuracies. He argues he was denied a full and fair proceeding, and his claims are free of defense and meritorious.[3]

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[3] Plaintiff argues for the first time in his reply that the prosecution engaged in various forms of misconduct, including: (1) suppressing evidence, (2) misrepresentations at trial, (3) improper comments, (4) subpoenaing expert testimony from a lay witness, and (5) tampering with a witness. The undersigned does not consider these arguments raised for the first time in a reply brief. *Zamani v. Carnes*, 491 F.3d 990, 997 (9th Cir. 2007). "A Traverse is not the proper pleading to raise additional grounds for relief. In order for the State to be properly advised of additional claims, they should be presented in an amended petition…[t]hen the State can answer and the action can proceed." *Cacoperdo v. Demosthenes*, 37 F.3d 504, 507 (9th Cir. 1994). Moreover, the Court's scheduling Order, filed January 27, 2021 (Doc. 9) advised the parties that any motion to amend the petition was due within 28 days of the filing of the answer. No such motion was timely filed. Further, the arguments on these claims are largely conclusory in nature.

III. APPLICATION OF LAW TO FACTS ON PETITION

A. REQUEST FOR DEFAULT JUDGMENT

Petitioner argues in his Reply that the Answer (Doc. 23) "fails to respond to the Petition allegations with any specificity or not at all, misrepresents material fact, and its conclusion drawn from the record are in contravention to clearly establish[ed] state law and federal code." (Reply, Doc. 43 at 1.) Thus, he argues, Respondents have procedurally defaulted and he is entitled to a default judgment on the merits. (*Id.* at 1-3.) Petitioner's Reply repeats the same argument with respect to various individual claims.

Petitioner has repeatedly sought entry of default or default judgment in this case (*see* Motion 3/15/21, Doc. 14; Motion 4/9/21, Doc. 21), and filed an interlocutory appeal seeking review of the denial of entry of default (Doc. 39). The motions were denied (Docs. 15, 31), and the interlocutory appeal dismissed (Doc. 51).

Default judgment and entry of default are governed by Federal Rule of Civil Procedure 55. Default has not yet been entered in this matter, which is a prerequisite to entry of a default judgment. *See Eitel v. McCool,* 782 F.2d 1470, 1471 (9th Cir.1986) (Rule 55 is a "two-step process" consisting of "entry of default" followed by "entry of judgment"). Accordingly, Petitioner's request can only be treated as an application for entry of default pursuant to Fed.R.Civ.P. 55(a).

Petitioner is not entitled to entry of default because Respondents have not "failed to plead or otherwise defend" so as to permit entry of default, but have instead filed a timely Answer addressing Petitioner's claims. Fed. R. Civ. P. 55(a). That Petitioner (or even the court) may find the defenses asserted insufficient or incomplete does not mean Respondents have failed to plead or defend.

Moreover, "[t]he failure to respond to claims raised in a petition for habeas corpus does not entitle the petitioner to a default judgment." *Gordon v. Duran*, 895 F.2d 610, 612 (9th Cir. 1990). *See Blietner vs. Wellborne*, 15 F.3d 652 (7th Cir. 1994) ("the district court, rather than entering a default judgment, ordinarily should proceed to the merits of the petition").

Neither entry of default nor default judgment should be granted.

B. PROCEDURAL DEFAULT

Respondents argue that Petitioner's federal claims in Grounds 1B, 5A(2), 5A(4) and 9 were not fairly presented to the state courts and are now procedurally defaulted, or were procedurally barred.[4]

In his Petition, Petitioner addresses exhaustion only as to Grounds 1 through 4, having failed to address it in the remaining grounds asserted in additional pages not using the approved form. In each, he asserts exhaustion on direct appeal.

Petitioner was directed to support claims of proper exhaustion in his reply with references to specific pages of the state court record (Order 4/21/21, Doc. 25.) With one exception Petitioner has responded only generically, and making conclusory references to exceptions to the exhaustion requirement. (Reply, Doc. 43 at 10-13.)

1. Exhaustion Requirement

Generally, a federal court has authority to review a state prisoner's claims only if available state remedies have been exhausted. *Duckworth v. Serrano*, 454 U.S. 1, 3 (1981) (*per curiam*); 28 U.S.C. § 2254(b) and (c). When seeking habeas relief, the burden is on the petitioner to show that he has properly exhausted each claim. *Cartwright v. Cupp*, 650 F.2d 1103, 1104 (9th Cir. 1981).

In his Reply, Petitioner argues his Petition should nonetheless be granted because he was not afforded a "full and fair" hearing or opportunity to be heard on the merits of

[4] Respondents summarily argue that all of Petitioner's claims are procedurally defaulted. (Answer, Doc. 23 at 10.) Nonetheless, they subsequently concede that at least portions were properly exhausted. (*See e.g.* Answer, Doc, 23 at 12-13 (conceding only a portion of Ground 1 was procedurally defaulted.) Further, Respondents' sweeping allegation is belied by their reliance (for many of the claims) upon deferential review for a merits decision by the Arizona Court of Appeals. The undersigned addresses procedural default only for those claims where the defense is specifically argued.

his claims.[5] (Reply, Doc. 43 at 5-9.) It is true that it is only "available" and "effective" remedies that must be exhausted. 28 U.S.C. § 2254(b)(1)(B). Thus, for example, exhaustion is not required where "the highest state court has recently addressed the issue raised in the petition and resolved it adversely to the petitioner, in the absence of intervening United States Supreme Court decisions on point or any other indication that the state court intends to depart from its prior decisions." *Sweet v. Cupp*, 640 F.2d 233, 236 (9th Cir. 1981). *But see Alfaro v. Johnson*, 862 F.3d 1176, 1180 (9th Cir. 2017) (declining to resolve whether *Sweet* was effectively overruled by *Engle v. Isaac*, 456 U.S. 107 (1982)). But these principles do not allow a Petitioner to rely on defects in his own proceedings to excuse a failure to *present* his federal claims to the state courts.

Petitioner properly observes that the state appellate court need not have taken up the federal claim for exhaustion to attach. (Reply, Doc. 43 at 10.) "All exhaustion requires is that the state courts have the opportunity to remedy an error, not that they actually took advantage of the opportunity." *Scott v. Schriro*, 567 F.3d 573, 583 (9th Cir. 2009). The key, however, is that the federal claim must have been fairly presented to the state courts for them to have the opportunity to remedy it.[6]

Accordingly, to have exhausted his state remedies, Petitioner must have fairly presented his federal claims to the state courts. "A petitioner fairly and fully presents a claim to the state court for purposes of satisfying the exhaustion requirement if he presents the claim: (1) to the proper forum, (2) through the proper vehicle, and (3) by providing the

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[5] To the extent that Petitioner might rely upon the lack of a full and fair hearing to challenge factual findings in the state courts on his previously raised claims, those issues are addressed hereinafter with respect to the claims raised in the Petition. To the extent that Petitioner intends to assert this as a new ground for relief, it is considered, having been first raised in the reply. *Zamani*, 491 F.3d at 997; *Cacoperdo*, 37 F.3d at 507. To the extent that Petitioner might rely upon the lack of a full and fair hearing to challenge factual findings in the state courts on his previously raised claims, those issues are addressed hereinafter with respect to the claims raised in the Petition.

[6] It is true that state remedies can be exhausted if the state appellate court actually decides a federal claim, even if not fairly presented to it. *Castille v. Peoples*, 489 U.S. 346, 351 (1989). But Petitioner points to no instance where that occurred.

proper factual and legal basis for the claim." *Insyxiengmay v. Morgan*, 403 F.3d 657, 668 (9th Cir. 2005).

2. Procedural Default

Ordinarily, unexhausted claims are dismissed without prejudice. *Johnson v. Lewis*, 929 F.2d 460, 463 (9th Cir. 1991). However, where a petitioner has failed to properly exhaust his available administrative or judicial remedies, and those remedies are now no longer available because of some procedural bar, the petitioner has "procedurally defaulted" and is generally barred from seeking habeas relief. Dismissal with prejudice of a procedurally defaulted habeas claim is generally proper absent a "miscarriage of justice" which would excuse the default. *Reed v. Ross*, 468 U.S. 1, 11 (1984).

Respondents argue that Petitioner may no longer present his unexhausted claims to the state courts. Respondents rely upon Arizona's preclusion bar, set out in Ariz. R. Crim. Proc. 32.2 and time limit bar, set out in Ariz. R. Crim. P. 32.4. (Answer, Doc. 23 at 6.)

Remedies by Direct Appeal - Under Ariz.R.Crim.P. 31.3, the time for filing a direct appeal expires twenty days after entry of the judgment and sentence. Moreover, no provision is made for a successive direct appeal. Accordingly, direct appeal is no longer available for review of Petitioner's unexhausted claims.

Remedies by Post-Conviction Relief – Under Arizona's waiver and timeliness bars, Petitioner can no longer seek review by a subsequent PCR Petition.

Waiver Bar - Under the rules applicable to Arizona's post-conviction process, a claim may not ordinarily be brought in a petition for post-conviction relief that "has been waived at trial, on appeal, or in any previous collateral proceeding." Ariz.R.Crim.P. 32.2(a)(3). Under this rule, some claims may be deemed waived if the State simply shows "that the defendant did not raise the error at trial, on appeal, or in a previous collateral proceeding." *Stewart v. Smith*, 202 Ariz. 446, 449, 46 P.3d 1067, 1070 (2002) (quoting Ariz.R.Crim.P. 32.2, Comments). *But see State v. Diaz*, 236 Ariz. 361, 340 P.3d 1069 (2014) (failure of PCR counsel, without fault by petitioner, to file timely petition in prior

PCR proceedings did not amount to waiver of claims of ineffective assistance of trial counsel).

For others of "sufficient constitutional magnitude," the State "must show that the defendant personally, "knowingly, voluntarily and intelligently' [did] not raise' the ground or denial of a right." *Id.* That requirement is limited to those constitutional rights "that can only be waived by a defendant personally." *State v. Swoopes*, 216 Ariz. 390, 399, 166 P.3d 945, 954 (App.Div. 2, 2007). Indeed, in coming to its prescription in *Stewart v. Smith*, the Arizona Supreme Court identified: (1) waiver of the right to counsel, (2) waiver of the right to a jury trial, and (3) waiver of the right to a twelve-person jury under the Arizona Constitution, as among those rights which require a personal waiver. 202 Ariz. at 450, 46 P.3d at 1071. Here, none of Petitioner's claims are of the sort requiring a personal waiver.

Timeliness Bar - Even if not barred by preclusion, Petitioner would now be barred from raising his claims by Arizona's time bars. Ariz.R.Crim.P. 32.4 requires that petitions for post-conviction relief (other than those which are "of-right") be filed "within ninety days after the entry of judgment and sentence or within thirty days after the issuance of the order and mandate in the direct appeal, whichever is the later." *See State v. Pruett*, 185 Ariz. 128, 912 P.2d 1357 (App. 1995) (applying 32.4 to successive petition, and noting that first petition of pleading defendant deemed direct appeal for purposes of the rule). That time has long since passed.

Exceptions - Rules 32.2 and 32.4(a) do not bar dilatory claims if they fall within the category of claims specified in Ariz.R.Crim.P. 32.1(d) through (h). See Ariz. R. Crim. P. 32.2(b) (exceptions to preclusion bar); Ariz. R. Crim. P. 32.4(a) (exceptions to timeliness bar). Petitioner has not asserted that any of these exceptions are applicable to his claims. Nor does it appears that such exceptions would apply.

Paragraph 32.1 (d) (expired sentence) generally has no application to an Arizona prisoner who is simply attacking the validity of his conviction or sentence. Where a claim is based on "newly discovered evidence" that has previously been presented to the state

courts, the evidence is no longer "newly discovered" and paragraph (e) has no application. Here, Petitioner makes no assertions of newly discovered evidence has long ago asserted the vast majority of the facts underlying his claims. Paragraph (f) has no application because Petitioner timely appealed and had no right to an of-right PCR proceeding which is limited to pleading or capital offense defendants. Paragraph (g) has no application because Petitioner has not asserted a change in the law since his last PCR proceeding. Finally, paragraph (h), concerning claims of actual innocence, has no application to the procedural claims Petitioner asserts in this proceeding.

Therefore, none of the exceptions apply, and Arizona's time and waiver bars would prevent Petitioner from returning to state court. Thus, Petitioner's claims that were not fairly presented are all now procedurally defaulted.

3. Procedural Bar

Related to the concept of procedural default is the principle of barring claims actually disposed of by the state courts on state grounds. "[A]bsent showings of 'cause' and 'prejudice,' federal habeas relief will be unavailable when (1) 'a state court [has] declined to address a prisoner's federal claims because the prisoner had failed to meet a state procedural requirement,' and (2) 'the state judgment rests on independent and adequate state procedural grounds.' " *Walker v. Martin,* 562 U.S. 307, 316 (2011).

In *Bennett v. Mueller*, 322 F.3d 573 (9th Cir.2003), the Ninth Circuit addressed the burden of proving the independence and adequacy of a state procedural bar.

> Once the state has adequately pled the existence of an independent and adequate state procedural ground as an affirmative defense, the burden to place that defense in issue shifts to the petitioner. The petitioner may satisfy this burden by asserting specific factual allegations that demonstrate the inadequacy of the state procedure, including citation to authority demonstrating inconsistent application of the rule. Once having done so, however, the ultimate burden is the state's.

Id. at 584-585.

4. Application to Petitioner's Claims

a. Ground 1B

In Ground 1B, Petitioner argues there was insufficient evidence before the grand jury to find probable cause.

Procedural Bar - Respondents argue this claim was procedurally barred by the trial court for failure to timely raise it at trial, Petitioner failed to properly challenge that ruling through a petition for special action, is barred from now doing so, and the claim was procedurally barred on direct appeal on that basis. (Answer, Doc. 23 at 12-13.)

The Arizona Court of Appeals opined:

> Generally, any challenge to the sufficiency of a grand jury indictment must be made by way of special action prior to trial. *State v. Moody*, 208 Ariz. 424, 439-40, ¶ 31 (2004). The only exception to this rule, and thus the only such issue reviewable on direct appeal, is a claim that the State knew the indictment was partially based on perjured, material testimony. *State v. Murray*, 184 Ariz. 9, 32 (1995). Because Gwen did not seek relief by special action, we review only to determine whether the indictment was based on perjured, material testimony.

(Exh. GG, Mem. Dec. 1/14/20 at ¶ 8.)

Petitioner argues that he did seek the required review by a special action to the Arizona Court of Appeals. (Reply, Doc. 43 at 10.) Petitioner attaches copies of the Arizona Court of Appeals docket in the special action case 1 CA-SA 18-0163. That docket reflects a petition for special action being filed on June 29, 2018 (during the pretrial proceedings in the criminal prosecution), and an order declining jurisdiction on July 5, 2018.[7] (Exh. R-F.) But Petitioner proffers nothing to show that this petition for special action was directed to challenging the grand jury proceedings.

To the contrary, the Arizona Court of Appeals found that "Gwen did not seek relief by special action." In a footnote to the discussion on this claim, the Arizona Court of

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[7] Petitioner also provides a copy of an order of the Arizona Court of Appeals dated March 29, 2019 declining jurisdiction of a petition for special action in case 1 CA-SA 19-0076. (Exh. R-G.) No evidence of the nature of this petition is provided. Petitioner was sentenced on October 2, 2018. Accordingly, this could not have been a *pretrial* petition challenging the grand jury proceedings, as required by Arizona law.

Appeals observed:

> Gwen asserts that he was unable to timely challenge the grand jury determination of probable cause because he was not provided a transcript of the grand jury proceeding until May 2017. But Gwen admits that the transcript was provided to his original public defender- and ultimately provided to him-and he fails to explain why he did not seek relief by special action once he received the transcript.

(Exh. GG, Mem. Dec. 1/14/20 at ¶ 8, n. 1.) Petitioner proffers nothing beyond his bare assertions to overcome the presumption of correctness that attaches to the conclusion that the required special action was not filed. *See* 28 U.S.C. § 2254(e). Consequently, the undersigned finds it was not.

Moreover, Petitioner makes no assertion that the applied procedural bar was not independent and adequate, let alone offering "specific factual allegations" and "citation to authority" to support such assertions. *See Bennett*, 322 F.3d 584-585.

Accordingly, the undersigned concludes Ground 1B was procedurally barred on an independent and adequate ground.

b. Ground 5A(2) – Prosecutor Misconduct re Arguments

Claims Adequately Raised - Petitioner claims in Ground 5A(2) that the prosecutor engaged in misconduct during opening and closing arguments. In the Petition, Petitioner identifies one incident of misconduct. He complains that the prosecutor made "ambiguous remarks" and asserts that in closing arguments the prosecutor argued "'the state cannot prove charge of theft...we are not charging that the defendant stole check.'" (Petition, Doc. 1 at 9(A), 9(B).) This references the following portions of closing argument:

> One of the things I want to clarify is the defendant is not charged with stealing the checks. That is not a charge. He wasn't charged because there was just no proof. You heard Mr. Dimler indicate he didn't know when the checks were stolen.
>
> It's a reasonable inference that -- that he stole the checks, the defendant stole those checks, 'cause he had access to those checks by his own testimony. It came out in the testimony that he was there and had access to the corporate office, to the restaurant's offices both night and day. He shared those offices.
>
> But don't be misled or find that confusing. He's not charged with the theft of those checks. He's charged with using those stolen checks.

(Exh. QQ, R.T. 9/19/18 (Day 5) at 29-30.) Petitioner's argument fairly raises a claim of prosecutorial misconduct based on these comments.

Petitioner's bare assertions of other misconduct in arguments is not sufficient to state a claim on such bases. Conclusory allegations that are not supported by specific facts do not merit habeas relief. *James v. Borg*, 24 F.3d 20, 26 (9th Cir.), *cert. denied, sub. nom James v. White*, 513 U.S.935 (1994).

In his Reply, Petitioner makes reference to his Appendix A to his Supplemental Brief (Exh. FF) on direct appeal when arguing the prosecutor's "comments were improper," which (Reply, Doc. 43 at 51) In that Appendix, Petitioner listed a variety of comments in opening statements and closing arguments. But Petitioner cannot use his Reply to amend his Petition. *Cacoperdo*, 37 F.3d at 507.

Accordingly, the undersigned addresses only the one supported claim of prosecutorial misconduct.

Procedural Default - Respondents argue Petitioner did not properly exhaust his claim in Ground 5A(2). Respondents provide no argument on the nature of the deficiency in Petitioner's presentation of this claim. (Answer, Doc. 23 at 25.) Petitioner proffers nothing to show his fair presentation. Nonetheless, the undersigned concludes the claim was fairly presented.

In his Supplemental Brief on direct appeal, Petitioner raised claims of prosecutorial misconduct. (*See* Exh. FF, Supp. Brief, Doc. 23-1 at 296 *et seq.*) And he argued prosecutorial misconduct occurs when the prosecution "improperly argues inferences in its opening statement," "implies or present[s] conflicting or false facts in his comments," and "unprofessionally makes ad hominem arguments[sic] directed towards Defendant in the presence of jurors." (*Id.* at 296-297.) He argued that the prosecution "failed to include legal grounds in his arguments," "made unfounded insinuations, fraudulent and misleading comments, comments not supported by trial proof, and hides behind insufficient legal theory," "unfairly planted cancerous material." (*Id.* at 297-301.) In Appendix A ("Prosecutor Comments") to his Supplemental Brief, Petitioner provided a litany of

purportedly prejudicial statements by the prosecution during opening and closing arguments. (*Id.* at Doc. 23-1 at 313-318.) Included was the following:

> (m) Prosecutor misrepresents count four of the indictment, when he told the jury that theft was not an offense on which Defendant had been charged (TR Day 5 p 28 at 15) "He is not charged with the theft of those checks" (TR Day 5 P 20 at 8) (See objection at 11). See opposing testimony (TR Day 5 P 26 at 14-17); (Day 5 P 30 at 2-4); (Day 2 P 67 at 3; P 68 at 1)

(Exh. FF, Supp. Brief, Append. A, Doc. 23-1 at 317, ¶ (m).) Thus, Petitioner fairly presented the facts of his claim in Ground 5A(2).

In support of this claim, Petitioner cited, *inter alia*: *Mooney v. Holohan*, 294 U.S. 103 (1935) (*see id.*, Doc. 23-1 at 299) which addressed a claim of prosecutorial misconduct but only on the basis of the presentation of perjured testimony (not the prosecutor's argument), and was cited by Petitioner solely on that basis; *DeChristoforo v. Donnelly*, 473 F.2d 1236 (1st Cir. 1973) (*see id.*, Doc. 23-1 at 300), albeit only by references to "DeChirstoforo" and "the Court of Appeals for the First Circuit") a case on prosecutorial misconduct based on comments in closing argument, which was reversed in the leading Supreme Court case on such claims, *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974), on the basis of a lack of prejudice as a result of a curative instruction; and *State v. Hughes*, 193 Ariz. 72, 969 P.2d 1184 (1998) (*see id.*, Doc. 23-1 at 297), a case which relied principally, *Hughes* at ¶ 26, on *DeChristoforo*, 416 U.S. 637, to address claims of prosecutorial misconduct on, *inter alia*, misconduct in rebuttal argument, *id.* at ¶¶ 48-74. These were sufficient to put the Arizona Court of Appeals on notice that he was asserting a federal, constitutional claim based on prosecutorial misconduct.

Thus, Petitioner fairly presented to the Arizona Court of Appeals his single, adequately stated federal claim in Ground 5A(2), and it is neither unexhausted nor procedurally defaulted.

c. Ground 5A(4) – Non-Unanimous Jury

In Ground 5A(4) Petitioner complains that there was not a unanimous jury verdict,

and insufficient instructions to require one. Respondents argue this claim is procedurally defaulted. (Answer, Doc. 23 at 25.) Petitioner does not respond on this claim and points to no fair presentation of it. The undersigned finds none, and concludes that Petitioner has procedurally defaulted his state remedies on this claim.

d. Ground 9

In Ground 9, Petitioner argues that the trial court was biased, based on: (A) a purported relationship with the owner of the corporate victim; and (B) as demonstrated by various erroneous or abusive decisions by the judge, including: (1) issuing the ruling on March 19, 2020 without an evidentiary hearing or due process; (2) admitting computer generated copies without a certificate of authenticity; (3) interfering with Petitioner's right to file motions for a change of judge; (4) failing to find the prosecution had failed to make disclosures; (5) failure to require "legitimate" banking records; (6) failure to address the prosecution's improper arguments; (7) improperly rejecting Petitioner's motion for acquittal, thereby allowing him to be convicted without direct evidence and based on inferences. (Petition, Doc. 1 at 9(E)-9(F).)

The Supreme Court held long ago that a "fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U.S. 133, 136 (1955). "In the absence of any evidence of some extrajudicial source of bias or partiality, neither adverse rulings nor impatient remarks are generally sufficient to overcome the presumption of judicial integrity, even if those remarks are 'critical or disapproving of, or even hostile to, counsel, the parties, or their cases.'" *Larson v. Palmateer*, 515 F.3d 1057, 1067 (9th Cir. 2008) (quoting *Liteky v. United States*, 510 U.S. 540, 555 (1994) (emphasis added)).

Respondents argue that Ground 9 is procedurally defaulted. (Answer, Doc. 23 at 34.)[8]

[8] Respondents also argue Grounds 9B(1), 9B(2), 9B(4), 9B(5), 9B(6) and 9B(7) are based on the claims in Grounds 1 through 6 and are without merit for the reasons raised in response to those claims. (Answer, Doc. 23 at 34-35.) Respondents further argue more particularly that Grounds 9A and 9B(3) are procedurally defaulted (the former because

In his Reply, Petitioner argues the merits of Ground 9A, and argues he submitted six different motions for change of judge with the trial court, that any untimeliness of his motions was caused by the trial judge's requiring Petitioner to submit his filings to advisory counsel for filing with the court, and that the trial judges decisions were contrary to clearly established state law.[9] (Reply, Doc. 43 at 61-63.)

Petitioner fails to show that he properly exhausted his state remedies on a federal claim of judicial bias. Petitioner points to his arguments to the trial court. But presentation to the trial court is insufficient to exhaust state remedies. "In cases not carrying a life sentence or the death penalty, 'claims of Arizona state prisoners are exhausted for purposes of federal habeas once the Arizona Court of Appeals has ruled on them.'" *Castillo v. McFadden*, 399 F.3d 993, 998 (9th Cir. 2005) (quoting *Swoopes v. Sublett*, 196 F.3d 1008, 1010 (9th Cir. 1999)).

Petitioner did raise a claim on direct appeal that he was denied a fair trial when the trial court abused its discretion in denying motions to continue, precluding counsel from relitigating issues raised during Petitioner's self-representation, granting a motion to continue while outside the presence of Petitioner, failing to provide means to conduct his defense. (Exh. FF, Supp. Brief, Doc. 23-1 at 280-283.) He further argued that the trial judge ruled improperly on his motions for change of judge required to be decided by the presiding judge, and in retaliation ordered Petitioner to submit his motions through advisory counsel. (*Id.* at 283-285.) He argued that the trial judge erred in denying his motion for acquittal and motion to vacate judgment (*id.* at 287-293), motion to impeach

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never factually raised and the latter because the underlying substantive claims on the motions for change of judge were rejected by the trial court as untimely, which ruling was not challenged on appeal. (*Id.* at 35-36.) Because the undersigned concludes no federal claim of judicial bias was fairly presented to the Arizona Court of Appeals, these additional arguments are not reached.

[9] In his Reply, Petitioner adds an argument that the trial judge's bias is shown by allowing the prosecution to "create evidence throughout the proceedings." (Reply, Doc. 43 at 63.) The undersigned does not address this new claim raised for the first time in the Reply. *Zamani*, 491 F.3d at 997.

witness (*id.* at 294), and request for a different *Willits* jury instruction (*id.* at 295-296).[10] Petitioner did not, however, argue that any of this flowed from judicial bias, let alone that it amounted to a federal claim of judicial bias.

At best he: argued a denial of his right to "due process of law" (Exh. FF, Supp. Brief, Doc. 23-1 at 281); cited to *U.S. v. Jackson*, 390 U.S. 570, 583 (1968) in relation to a claim of retaliation and argued that granting a continuance without Defendant being present amounted to a denial of a fair trial in violation of the Fifth Amendment (*id.* at 282); argued a violation of 18 U.S.C. § 1691-1738 and cited *Olmstead v. United States*, 217 U.S 438 (1928) in support of his claim that the trial judge had interfered with a right of court access in violation of federal law (*id.* at 284-285); cited to *Virginia v. Rives*, 100 U.S 313 (1879) for the proposition that there was a denial of equal protection (*id.* at 285-286); cited various court decisions about the sufficiency of the evidence standard (*id.* at 289-290); cited to federal cases regarding impeachment of a witness and alleged a violation of "due process" (*id.* at 294-295); cited *Brady v. Maryland*, 373 U.S. 83 (1963) to support his claim to a different *Willits* instruction (*id.* at 295-296).

None of the cited cases addressed a federal constitutional claim of judicial bias. And a bare reference to broad constitutional principles such as "due process" or a "fair trial" is not sufficient to fairly raise the constitutional basis of a claim. *Casey v. Moore*, 386 F.3d 896, 913 (9th Cir. 2004). Moreover, Petitioner's bare reference to a denial of a fair trial in violation of the Fifth Amendment as a result of the denial of a continuance (*id.* at 282) was not sufficient to fairly present a federal due process claim based on judicial bias. In sum, Petitioner asserted a variety of discrete rulings with constitutional dimensions, and vaguely referenced a denial of due process, but never fairly presented a federal claim of judicial bias.

Accordingly, Petitioner's claims of judicial bias in Ground 9 were not fairly presented on direct appeal, and for the reasons discussed hereinabove are now procedurally

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[10] These sections of the Supplemental Brief constitute Petitioner's Issues for review 8, 9, 10, and 11. (*See* Exh. FF, Supp. Brief, Doc. 23-1 at 225.)

defaulted.

e. Summary Re Exhaustion

Based upon the foregoing, the undersigned concludes that Petitioner has procedurally defaulted his state remedies, or been procedurally barred, on his claims in Grounds 1B, 5A(4) and 9.

5. Cause and Prejudice

If the habeas petitioner has procedurally defaulted on a claim, or it has been procedurally barred on independent and adequate state grounds, he may not obtain federal habeas review of that claim absent a showing of "cause and prejudice" sufficient to excuse the default. *Reed v. Ross*, 468 U.S. 1, 11 (1984).

"Cause" is the legitimate excuse for the default. *Thomas v. Lewis*, 945 F.2d 1119, 1123 (1991). "Because of the wide variety of contexts in which a procedural default can occur, the Supreme Court 'has not given the term "cause" precise content.'" *Harmon v. Barton*, 894 F.2d 1268, 1274 (11th Cir. 1990) (quoting *Reed*, 468 U.S. at 13). The Supreme Court has suggested, however, that cause should ordinarily turn on some objective factor external to petitioner, for instance:

> ... a showing that the factual or legal basis for a claim was not reasonably available to counsel, or that "some interference by officials", made compliance impracticable, would constitute cause under this standard.

Murray v. Carrier, 477 U.S. 478, 488 (1986) (citations omitted).

Petitioner argues no basis for cause to excuse his procedural default. The undersigned finds none.

In replying on Ground 9, Petitioner argues that the trial court rejected his motions for change of judge (which purportedly raised Petitioner's claims of judicial bias) as untimely, and that the untimeliness resulted from the trial court interfering with the mail and Petitioner's right of access, *i.e.* by requiring him to have advisory counsel file his

documents. (Reply, Doc. 43 at 61-63.) While that might explain a procedural default of a federal claim at trial, it does nothing to explain Petitioner's failure to raise his *federal* claim of judicial bias before the Arizona Court of Appeals.

Summary re Cause and Prejudice – Based upon the foregoing, the undersigned concludes that Petitioner has failed to establish cause to excuse his procedural defaults.

Both "cause" and "prejudice" must be shown to excuse a procedural default, although a court need not examine the existence of prejudice if the petitioner fails to establish cause. *Engle v. Isaac*, 456 U.S. 107, 134 n. 43 (1982); *Thomas v. Lewis*, 945 F.2d 1119, 1123 n. 10 (9th Cir.1991). Petitioner has filed to establish cause for his procedural default. Accordingly, this Court need not examine the merits of Petitioner's claims or the purported "prejudice" to find an absence of cause and prejudice.

6. Actual Innocence

The standard for "cause and prejudice" is one of discretion intended to be flexible and yielding to exceptional circumstances, to avoid a "miscarriage of justice." *Hughes v. Idaho State Board of Corrections*, 800 F.2d 905, 909 (9th Cir. 1986). Accordingly, failure to establish cause may be excused "in an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent." *Murray v. Carrier*, 477 U.S. 478, 496 (1986) (emphasis added). A petitioner asserting his actual innocence of the underlying crime must show "it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence" presented in his habeas petition. *Schlup v. Delo*, 513 U.S. 298, 327 (1995). A showing that a reasonable doubt exists in the light of the new evidence is not sufficient. Rather, the petitioner must show that no reasonable juror would have found the defendant guilty. *Id.* at 329. Moreover, not just any evidence of innocence will do; the petitioner must present "new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial." *Schlup*, 513 U.S. at 324.

Petitioner fails to offer any new, credible evidence, or to show that such evidence

would establish that no reasonable juror could have found him guilty. Accordingly his procedurally defaulted and procedurally barred claims must be dismissed with prejudice.

C. GROUND 1A – GRAND JURY / PERJURY

In Ground 1A, Petitioner asserts his Fifth and Fourteenth Amendment rights were violated during the grand jury proceedings because the prosecutor presented perjured testimony. Respondents argue this claim must be rejected because Petitioner fails to meet the standard for relief on claims decided on the merits by the state courts. (Answer, Doc. 23 at 13-15.)

1. Deferential Review of Merits Decisions

While the purpose of a federal habeas proceeding is to search for violations of federal law, in the context of a prisoner "in custody pursuant to the judgment a State court," 28 U.S.C. § 2254(d) and (e), not every error justifies relief. Where the state court has rejected a claim on the merits, "a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the state-court decision applied [the law] incorrectly." *Woodford v. Visciotti*, 537 U. S. 19, 24– 25 (2002) (per curiam). *See Johnson v. Williams*, 133 S.Ct. 1088, 1091-92 (2013) (adopting a rebuttable presumption that a federal claim rejected by a state court without being expressly addressed was adjudicated on the merits).

Rather, in such cases, 28 U.S.C. § 2254(d) provides restrictions on the habeas court's ability to grant habeas relief based on legal or factual error. This statute "reflects the view that habeas corpus is a 'guard against extreme malfunctions in the state criminal justice systems,' not a substitute for ordinary error correction through appeal." *Harrington v. Richter*, 562 U.S. 86, 102–03 (2011).

Errors of Law – To justify habeas relief based on legal error, a state court's merits-based decision must be "contrary to, or an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" before relief may

be granted. 28 U.S.C. §2254(d)(1).

The Supreme Court has instructed that a state court decision is "contrary to" clearly established federal law "if the state court applies a rule that contradicts the governing law set forth in [Supreme Court] cases or if the state court confronts a set of facts that are materially indistinguishable from a decision of [the Supreme] Court and nevertheless arrives at a result different from [its] precedent." *Lockyer v. Andrade*, 538 U.S. 63, 73 (2003) (internal quotation marks omitted).

To show an unreasonable application, "a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington*, 562 U.S. at 103.

Errors of Fact – Similarly, the habeas courts may grant habeas relief based on factual error only if a state-court merits decision "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)(2). "Or, to put it conversely, a federal court may not second-guess a state court's fact-finding process unless, after review of the state-court record, it determines that the state court was not merely wrong, but actually unreasonable." *Taylor v. Maddox*, 366 F.3d 992, 999 (9th Cir. 2004).

2. State Court Decision

In evaluating state court decisions, the federal habeas court looks through summary opinions to the last reasoned decision. *Robinson v. Ignacio*, 360 F.3d 1044, 1055 (9th Cir. 2004). Here, the last reasoned decision on Ground 1A was that of the Arizona Court of Appeals in Petitioner's direct appeal. That court opined:

> ¶9 "To constitute perjury, the false sworn statement must relate to a material issue and the witness must know of its falsity." *Moody*, 208 Ariz. at 440, ¶ 34 (citing A.RS. § 13-2702(A)(l)). A material statement is one that could have affected the proceeding. *Id.* at ¶ 35 (citing A.RS. § 13- 2701(1)). "Contradictions and changes in a witness's testimony alone do not constitute perjury and do not create an inference, let alone prove, that the prosecution knowingly presented perjured testimony." *Tapia v. Tansy*, 926 F.2d 1554, 1563

> (10th Cir. 1991); *see also State v. Morrow*, 111 Ariz. 268, 271 (1974).
> ¶10 Gwen asserts that the grand jury witness "made false statements and a misrepresentation of material fact" when he testified that "Clinton Arnett" was the party responsible for ordering the mountain bike online, that the transaction was flagged by the online vendor, that Gwen called the online vendor, that all the events occurred within Yavapai County, and that the fraudulent checks came from a desk drawer.
> ¶11 But Gwen has failed to show that these statements were material or that the testifying witness knew they were false. And because other substantial evidence apart from the allegedly false statements supported the finding of probable cause, the statements could not reasonably have unfairly influenced the grand jury's determination of probable cause. *See Moody*, 208 Ariz. at 440, ¶ 36. Gwen thus is not entitled to relief.

(Exh. GG, Mem. Dec. 1/14/20 at ¶¶ 9-11.)

3. Evaluation of State Court Decision

Factual Error - Petitioner points to no remediable error or fact in the state court's determination. The Petition offers only vague and conclusory assertions of factual error. Petitioner simply asserts that "[i]t is fact" that false "facts" were used at the grand jury. (Petition, Doc. 1 at 6.)

In his Reply he argues "the Grand Jury proceeding was plagued with large (number) assignments of perjury" and "the prosecution suborned testimony, injected false facts that he knew not to be true." (Reply Doc. 43 at 14.) He repeats allegations of misrepresentations by the prosecution that "the officer has called the online vender," and "the stolen checks had come from a desk drawer." (Reply, Doc. 43 at 15.) He adds allegations that the prosecutor suborned perjury about Petitioner having been given a credit card number (*id.* at 18-19), the existence of photos of cashing a check, deposits at Chase Bank, and the ordering of the bike under the name of Clinton Arnett" (*id.* at 19).

But Petitioner proffers nothing to show an unreasonable determination of the facts on which the state court relied, *i.e.* materiality, knowledge the statements were false, or availability of other evidence to provide probable cause. At best, he makes conclusory allegations of falseness.

Legal Error - Nor does Petitioner proffer anything to show legal error.

The governing Supreme Court law is *Napue v. Illinois*, 360 U.S. 264 (1959), which

requires a showing that "(1) the testimony (or evidence) was actually false; (2) the prosecution knew or should have known that the testimony was actually false; and (3) the false testimony was material." *Reis-Campos v. Biter*, 832 F.3d 968, 976 (9th Cir. 2016).

Here, the state properly relied on the lack of materiality.

The state court also relied, however, on the lack of a showing that the *witness* knew the testimony was false. Under *Napue*, the relevant inquiry is not whether the witness knew the testimony was false (which would render prosecutors guarantors that their witness would never commit perjury). Rather, the relevant inquiry is whether the *prosecution* knew the testimony was false.[11] Indeed, the case cited by the state court, *State v. Moody*, 208 Ariz. 424, 94 P.3d 1119 (2004), focused on whether the false testimony constituted perjury under state law (*i.e.* because the *witness* knew it was false). The witness's knowledge or ignorance that he is testifying falsely is irrelevant. *See Napue v. People of State of Ill.*, 360 U.S. 264, 269 (1959) ("use of false evidence, known to be such by representatives of the State"). *See also Phillips v. Ornoski,* 673 F.3d 1168, 1183–84 (9th Cir. 2012), *as amended on denial of reh'g and reh'g en banc* (May 25, 2012) (*Napue* violated where witness did not know his attorney had negotiated deal with prosecutor for testimony, and prosecutor did not correct testimony by witness he had no deals).

Thus, the state court's reliance on the witness for knowledge of falsity was contrary to controlling Supreme Court law, and the Court must review the claim *de novo*.

4. Merits of Claim

Even so, this claim is without merit for each of two reasons. First, Petitioner proffers nothing to show that the *prosecution* was aware the testimony was false. His conclusory assertion to the contrary is not sufficient.

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[11] It could be that the state court concluded that the witness should have been deemed a part of the prosecution. *See Napue*, 360 U.S. at 269 ("use of false evidence, known to be such by representatives of the State"). *But see Reis-Campos v. Biter*, 832 F.3d 968, 977 (9th Cir. 2016) (no Supreme Court law on imputing knowledge of police to prosecutors). But the undersigned has discerned no basis to reach such a conclusion. The state court's reliance on *Moody* suggests to the contrary.

Second, as Respondents argue, even in federal cases, where a grand jury indictment is constitutionally required, the trial jury's "guilty verdict renders error in the presentation to the grand jury harmless beyond a reasonable doubt." *United States v. Navarro*, 608 F.3d 529, 539 (9th Cir. 2010). (*See* Answer, Doc. 23 at 13.)

Ground 1A is without merit and must be denied.

D. GROUND 1B – GRAND JURY / INSUFFICIENT EVIDENCE

In Ground 1B, Petitioner argues there was insufficient evidence before the grand jury. The undersigned has concluded that this claim was procedurally barred on an independent and adequate state ground.

Even if the Court could reach a contrary conclusion, any deficiency in the grand jury proceedings is not cognizable on habeas review and was rendered harmless by Petitioner's conviction at trial. *Navarro*, 608 F.3d at 539. Accordingly, if not dismissed as procedurally barred, Ground 1B must be denied as without merit.

E. GROUND 2A – PRELIMINARY HEARING

In Ground 2A, Petitioner asserts his scheduled preliminary hearing was vacated without issuance of an order or minute entry, resulting in a denial of due process. (Petition, Doc. 1 at 7.) Respondents argue that any error was a matter of state law and not cognizable on habeas review, Petitioner's bare reference to due process is insufficient to state a federal claim, and any error was harmless given the trial jury verdict. (Answer, Doc. 23 at 15-18.) Petitioner replies that the state court "unreasonably applied state law," resulting in his constitutional violation, and disputes whether he would have reasonably agreed to vacating of the preliminary hearing as required by state law. (Reply, Doc. 43 at 22-23.)

The Arizona Court of Appeals rejected Petitioner's claim regarding the lack of preliminary hearing, holding:

> ¶12 Gwen argues that he was wrongfully denied a preliminary hearing. *See* Ariz. R. Crim. P. 5.1(a). But because the State charged him by a grand jury indictment, not a complaint, Gwen was not entitled to a preliminary hearing. *See* Ariz. Const. art. 2, §

> 30; Ariz. R. Crim. P. 2.2, 5.1(a) (providing for a preliminary hearing "if charged in a complaint"); *State v. Meeker*, 143 Ariz. 256, 265 (1984) ("Either indictment by a grand jury or information after a preliminary hearing is a constitutionally proper method of bringing an accused felon to trial.").
>
> ¶13 Gwen also contends that he was not provided notice of a supervening indictment as contemplated by Rule 12.6. The record shows, however, that the superior court sent notice of a supervening indictment to both Gwen and defense counsel, so Gwen has not established error.

(Exh. GG, Mem. Dec. 1/14/20 at ¶¶ 12-13.)

The Arizona Court of Appeals found no error of state law. A state court determination of state law is not subject to review in a federal habeas court. *Bains v. Cambra*, 204 F.3d 964, 971 (9th Cir. 2000) ("federal court is bound by the state court's interpretations of state law").

Even if the undersigned could assume *arguendo* (in Petitioner's favor) that some state law error occurred in the process, Petitioner fails to show that it rose to the level of being a violation of due process. An error of state law must be "sufficiently egregious to amount to a denial of equal protection or of due process of law guaranteed by the Fourteenth Amendment." *Pully v. Harris*, 465 U.S. 37, 41 (1984). To sustain such a due process claim founded on state law error, a habeas petitioner must show that the state court "error" was "so arbitrary and fundamentally unfair that it violated federal due process." *Jammal v. Van de Kamp*, 926 F.2d 918, 920 (9th Cir. 1991) (quoting *Reiger v. Christensen*, 789 F.2d 1425, 1430 (9th Cir.1986)). To receive review of what otherwise amounts to nothing more than an error of state law, a petitioner must argue "not that it is wrong, but that it is so wrong, so surprising, that the error violates principles of due process"; that a state court's decision was "such a gross abuse of discretion" that it was unconstitutional. *Brooks v. Zimmerman*, 712 F.Supp. 496, 498 (W.D.Pa.1989).

Here, Petitioner fails to show such an egregious violation. Rather, Petitioner appears to simply misunderstand that (given the state's ability under Arizona law to proceed by either: (a) information (or complaint) and preliminary hearing; or (b) grand jury indictment) the issuance of the indictment renders the information (or complaint) and preliminary hearing moot, making obvious that the preliminary hearing will not be held.

Indeed, such an indictment is called a "supervening indictment" because it supervenes the previous information or complaint. *Cf.* Daniels v. Frigo, No. CV-15-1867-PHX-PGR-DKD, 2016 WL 6089828, at *3 (D. Ariz. Aug. 3, 2016), *report and recommendation adopted*, No. 2016 WL 6070957 (D. Ariz. Oct. 17, 2016) (noting propriety of supervening indictment prior to preliminary hearing).

Even if there were a constitutional violation, Petitioner is not entitled to habeas relief based on trial error unless he can establish that it had substantial and injurious effect or influence in determining the trial jury's verdict. *Davis v. Ayala*, 576 U.S. 257, 267–68 (2015). Petitioner offers nothing to show any influence on the trial jury's verdict. At best, he speculates that a preliminary hearing might not have resulted in a finding probable cause. (Reply, Doc. 53 at 24.) But merely being required to proceed to trial is not sufficient to show sufficiently harmful error. *See Navarro*, 608 F.3d at 539 (error at grand jury rendered harmless by conviction at trial); *Mechanik*, 475 U.S. at 70 ("the petit jury's verdict rendered harmless any conceivable error in the charging decision"); and *Thues v. Ryan*, No. CV-13-00644-PHX-NVW-JFM, 2014 WL 3571687, at *8 (D. Ariz. July 21, 2014) (accepting conclusion of Report & Recommendation that "any error in not having a preliminary hearing was rendered harmless when the trial jury's verdict established that there was not only probable cause to believe Petitioner had committed the offenses, but proof beyond a reasonable doubt").

Ground 2A is without merit and must be denied.

F. GROUND 2B – GRAND JURY NOTICE AND COUNSEL

In Ground 2B Petitioner argues he did not receive advance notice of the grand jury proceedings, and thus was denied his right to counsel at the grand jury. (Petition, Doc. 1 at 7.) Respondents argue there is no state right to appear at the grand jury, no Sixth Amendment right to counsel by the target of a grand jury investigation, and any error was harmless. (Answer, Doc. 23 at 15-18.)

Notice Not Required - Petitioner proffers no authority for a constitutional right to

advance notice of a grand jury proceeding. Indeed, the Supreme Court has long recognized the propriety of grand jury proceedings being conducted in secret with no notice whatsoever, even to the prosecuting attorney or the judge. *See In re Oliver*, 333 U.S. 257, 265 (1948); *United States v. Williams*, 504 U.S. 36, 49 (1992). (Indeed, Federal Rule of Criminal Procedure 6 mandates secrecy in federal grand jury proceedings.) Petitioner points to no state law affording a right to prior notice of a grand jury proceeding. At most, Arizona law provides that where a target of an investigation is aware of the investigation and requests to be heard, the grand jury must be informed of the request, but need not grant it. *See* Ariz. R. Crim. Proc. 12.5(a); *Trebus v. Davis In & For Cty. of Pima*, 189 Ariz. 621, 623, 944 P.2d 1235, 1237 (1997).

It is true that Arizona Rule of Criminal Procedure 12.6(c) requires notice to a defendant who has already had an initial appearance that a supervening indictment has issued. But that does not require advance notice of the grand jury proceedings.[12]

Counsel Not Required - Of course, had Petitioner been called to testify at the grand jury, he may have had a right under Arizona law to counsel to advise him, but not to argue for him or represent him. *See* Ariz. R. Crim. Proc. 12.5(b) (precluding counsel at grand jury from communicating with anyone other than his client). *Cf. United States v. Y. Hata & Co.*, 535 F.2d 508, 512 (9th Cir. 1976) ("During a grand jury proceeding there is no right of cross-examination, or of introducing evidence to rebut the prosecutor's presentation."). Similarly, there is a right under the Sixth and Fourteenth Amendments to advice of counsel when testifying before a grand jury where criminal proceedings have already been initiated on the same charges "whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." *United States v. Hayes*, 231 F.3d 663, 670 (9th Cir. 2000) (quoting *United States v. Gouveia*, 467 U.S. 180, 187-188 (1984)).

But Petitioner was not called to testify.

Ground 2B is without merit and must be denied.

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[12] For the same reasons, it is irrelevant if Petitioner did not receive the Notice of Supervening Indictment because it was returned to the court in the mail. (*See* Exh. R-M.)

G. GROUNDS 3 & 4 – SEARCH & SEIZURE

In Ground 3 Petitioner argues his Fourth Amendment rights were violated when he was detained and arrested without probable cause, resulting in a search of his body. (Petition, Doc. 1 at 8.) In Ground 4, Petitioner argues his Fourth Amendment rights were violated when a search was conducted of his vehicle, residence and rental truck without a valid search warrant. (*Id.* at 9.) Relying on *Stone v. Powell*, 428 U.S. 465, 481–82, 494 (1976), Respondents argue these claims are not cognizable on habeas review because Petitioner had a full and fair opportunity to litigate these issues before the state courts, and did so before the trial court and on direct appeal. (Answer, Doc. 23 at 18-19.) Petitioner replies that *Stone* only governs exclusionary rule claims. (Reply, Doc. 43 at 25-27.)

If Petitioner's claim is merely that he suffered illegal searches, he is not entitled to habeas relief. Assuming the searches were illegal and unconstitutional, Petitioner must show that they had substantial and injurious effect or influence in determining the trial jury's verdict. *Davis v. Ayala*, 576 U.S. 257, 267–68 (2015). But that would only be the case if the evidence from the results of the searches was presented to the jury. But the presentation of such evidence was, itself, not considered a constitutional violation until the Supreme Court's adoption of the "exclusionary rule" in *Mapp v. Ohio*, 367 U.S. 643 (1961).[13] Indeed, the Supreme Court had long held that "that in a prosecution in a State court for a State crime the Fourteenth Amendment does not forbid the admission of evidence obtained by an unreasonable search and seizure." *Wolf v. People of the State of Colo.*, 338 U.S. 25, 33 (1949). Thus, to state a remediable error on habeas review, Petitioner must rely on the exclusionary rule.

However, in *Stone* the Court concluded that because of the high cost of freeing guilty defendants and low likelihood of additional deterrence on police, an exclusionary rule claim may only be relied on to obtain relief on habeas if the defendant was not provided by the state courts with "an opportunity for full and fair litigation of a Fourth

[13] Prior to *Mapp*, the only remedy for the unlawful seizure was a petition for return of the seized property. *Stone*, 428 U.S. at 482.

Amendment claim." 428 U.S. at 494. Here Petitioner proffers nothing to show that he was not afforded such a full and fair opportunity to litigate his exclusionary rule claims. At most, he conclusorily argues it was not afforded (Reply, Doc. 43 at 5-6), and points to the denial without an evidentiary hearing of his January 8, 2018 motion to dismiss, his April 9, 2018 petition for writ of habeas corpus to the Arizona Supreme Court, his June 29, 2018 Petition for Special Action, his April 24, 2019 Petition for Special Action, his direct appeal, his Petition for Review in his direct appeal, and his motion to vacate judgment. (Reply Doc. 432 at 7-8.) Petitioner proffers nothing to show that an evidentiary hearing was necessary to a full and fair litigation in these proceedings.

For example, the Motion to Dismiss was denied based on an assumption that Petitioner's rights were violated by the seizures, but found that the remedy was excluding evidence, not dismissing charges. (Exh. R-B, Order 3/19/18 at ¶¶ 3-4.) Petitioner proffers nothing to show that the rejection of his other purported attempts to raise his claims (*e.g.* pretrial state habeas petition, pretrial petition for special action, post-trial petition for special action, or motion to vacate judgment) even raised his exclusionary claims, nor that their denial precluded him from fully and fairly litigating his Fourth Amendment claims before the trial court and on direct appeal. The state is not required to make a full and fair litigation available in whatever forum or process a defendant choses, only to do so somewhere and somehow.

Nor is it sufficient to simply complain that an evidentiary hearing was not allowed. *Stone* does not mandate an evidentiary hearing unless one is necessary to a full and fair hearing on the claim. Thus, for example, the Ninth Circuit has held that *Stone* was satisfied where the trial court rejected the claims without holding an evidentiary hearing because it concluded the defendant's version of the facts did not differ from the officers, or that the allegations were too conclusory. *Mack v. Cupp*, 564 F.2d 898, 901 (9th Cir. 1977).

The Arizona Court of Appeals addressed the lack of an evidentiary hearing before the trial court on Petitioner's claim that the seizures were not supported by probable cause:

> In *Franks*, the Supreme Court held that a defendant is entitled to a

> hearing to challenge a search warrant affidavit when he makes a substantial preliminary showing that (1) the affiant knowingly, intentionally, or with reckless disregard for the truth included a false statement in the affidavit, and (2) the false statement was necessary to the finding of probable cause. 438 U.S. at 154, 155-56.
> ¶ 20 Here, the superior court found that Gwen's motion to suppress did not make the requisite preliminary showing to trigger a *Franks* hearing, and the record supports this finding. The court properly analyzed the issue and did not err when it determined that Gwen's "brief, generalized motion" did not reach the threshold level required by *Franks*.

(Exh. GG, Mem. Dec. 1/14/20 at ¶¶ 19-20.) Petitioner proffers nothing to show any error in this conclusion, nor how it denied him an *opportunity* for full and fair litigation. That Petitioner lost that opportunity by failing to adequately pursue it does not satisfy *Stone*.

In short, Petitioner's claims in Grounds 3 and 4 fail either because they do not assert exclusionary rule claims (and thus raise no basis from relief from conviction) or because they do assert exclusionary rule claims and Petitioner fails to show he did not have an opportunity for full and fair litigation of them in the state courts. Accordingly, both Grounds must be denied.

H. GROUND 5A – PROCEDURAL DEFECTS

In Ground 5A, Petitioner asserts a series of procedural defects at trial, *i.e.* (1) insufficient indictment, (2) prosecutorial misconduct in arguments, (3) variance from the indictment, (4) verdict not unanimous, and (5) denial of access to exculpatory evidence. (Petition, Doc. 1 at 9(a) to 9(c).)

Respondents argue: Ground 5A(2) is procedurally defaulted and fails to show prejudice; Ground 5A(4) is procedurally defaulted and without merit; and Ground 5A(5) is an evidentiary claim, not a *Brady* claim, and is without merit. Respondents do not address the grounds related to the indictment (Grounds 5A(1) and 5A(3)). (Answer, Doc. 23 at 19-26.)

Petitioner's Reply on Ground 5 mainly addresses his insufficient evidence claims in Ground 5B. (Rely, Doc. 43 at 28-43.) With regard to Ground 5A(1) he argues the indictment failed to state an offense because it listed alternative means of commission and failed to identify sufficient specifics (e.g. location, time, etc.). (*Id.* at 33-34, 35-36.) With

regard to Ground 5A(5) (exculpatory evidence), Petitioner argues the prosecution withheld subpoenaed information regarding the IP address from which the mountain bike was ordered. (*Id.* at 33.) Petitioner does not reply on Grounds 5A(2), 5A(3), or 5A(4).

To the extent that Respondents rely in part on procedural default of these claims, this exhaustion defense is not reached (except as to Grounds 5A(2) and 5A(4)) because the undersigned finds the claims plainly without merit. *Franklin v. Johnson*, 290 F.3d 1223 (9th Cir. 2002).

1. Ground 5A(1) – Insufficient Indictment

Petitioner's claim in Ground 5A(1) is that the indictment is insufficient because it listed alternative means of commission, and failed to provide specifics on locations, dates and times. This claim is without merit on both bases.

The Sixth Amendment provides that "In all criminal prosecutions, the accused shall enjoy the right ... to be informed of the nature and cause of the accusation...." This guarantee is applicable to the states through the due process clause of the Fourteenth Amendment. *In re Oliver*, 333 U.S. 257, 273-74 (1948).

With regard to alternative means of commission, there is "a long-established rule of the criminal law that an indictment need not specify which overt act, among several named, was the means by which a crime was committed." *Schad v. Arizona*, 501 U.S. 624, 631 (1991).

With regard to dates and locations, "a defendant is not entitled to know all the evidence the government intends to produce, but only the theory of the government's case." *United States v. Giese*, 597 F.2d 1170, 1181 (9th Cir. 1979). The Supreme Court has outlined the two standards by which the adequacy of an indictment is to be evaluated:

> These criteria are, first, whether the indictment "contains the elements of the offense intended to be charged, and 'sufficiently apprises the defendant of what he must be prepared to meet,'" and secondly, "in case any other proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction."

Russell v. United States, 369 U.S. 749, 763-64 (1962).

Here, the Indictment identified dates or date ranges for the commission of the various offenses, and placed the location in Verde Valley Precinct of Yavapai County. Moreover, it included substantial details about the means of commission. (Exh. D, Indictment.) Petitioner proffers nothing to suggest he was surprised at trial about the elements of the alleged offenses, *i.e.* that the different dates or locations were required to form an element of the offense (as opposed to the evidence of it), or that the allegations were insufficient to avoid future prosecutions on the facts alleged in the indictment.

Ground 5A(1) is without merit and must be denied.

2. Ground 5A(2) – Prosecutorial Misconduct

In Ground 5A(2), Petitioner argues prosecutorial misconduct with regard to closing argument statements on theft of the checks.

With regard to this incident, the undersigned finds the prosecution was clarifying to the jury that because Plaintiff was not charged with the theft of the checks (just the use of them), they should not be distracted by the lack of evidence on the theft. Petitioner fails to identify any ambiguity, let alone any misconduct, in such arguments.

Moreover, to the extent that the statement may have been inartful, Petitioner objected, and on direction from the court, the prosecutor clarified:

> MR. RODRIGUEZ: I'd like to clarify; I just may have said he was not charged with theft. Don't be confused by the theft of the checks. The State is not alleging that he burglarized the Dahl Group restaurant and physically stole those checks.
>
> The State's charge of theft is that the defendant possessed the stolen checks and used those stolen checks which caused a financial loss to the Dahl Restaurant Group.

(*Id.* at 31.) Petitioner proffers nothing to show that this clarification was insufficient to avoid any prejudice.

Ground 5A(2) is without merit and must be denied.

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3. Ground 5A(3) – Variance from Indictment

Petitioner claims in Ground 5A(3) that "the trial proof does not correspond to the alleged conduct of the Indictment." (Petition, Doc. 1 at 9(A).) Again, however, Petitioner fails to identify what variances occurred. To the extent that Petitioner relies upon the Indictment's listing of various alternative means of commission and proof of less than all, this claim is without merit. *Schad v. Arizona*, 501 U.S. 624, 631 (1991). To the extent that Petitioner simply replies upon purported deficiencies in proof at trial, the claim is addressed hereinafter under Ground 5B.

Ground 5A(3) is without merit and must be denied.

4. Ground 5A(4) – Non-Unanimous Verdict

In Ground 5A(4), Petitioner complains that there was not a unanimous jury verdict, and insufficient instructions to require one. The undersigned has concluded the claim is procedurally defaulted. Even if not procedurally defaulted, the claim is without merit.

Contrary to Respondents' contentions (Answer, Doc. 23 at 25), Petitioner's claim asserts a cognizable federal claim. A federal constitutional right to a unanimous jury in a state criminal case was recognized on April 20, 2020 in *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020). Although this new rule in *Ramos* does not apply retroactively to cases on federal habeas review, *Edwards v. Vannoy*, 141 S. Ct. 1547 (2021), Petitioner's direct appeal was not concluded until July 28, 2020, when the Arizona Supreme Court denied review. (Exh. GG, Mandate.) Accordingly, the right applied to this case.

Nonetheless, the claim is without merit. As correctly reported by Respondents:

> The court told the jury during final instructions that "all eight of you must agree on a verdict and whether the verdict is guilty or not guilty … [y]our verdict must be unanimous." Exh. QQ, at 78. The jury verdict forms all stated that they reflected the unanimous verdicts of the jurors. See Exhs. X–BB. Later, when the jury returned its verdicts, the court asked if the verdicts were the jury's "true and correct verdicts." Exh. QQ, at 88. No juror expressed that they were not. *Id.* And Gwen declined the chance to poll the jurors individually on the verdicts. *Id.*

(Answer, Doc. 23 at 25.) Accordingly, Ground 5A(4) must be denied.

5. Ground 5A(5) – Access to Exculpatory Evidence

Petitioner's Ground 5A(5) argues: "the state and the trial court impeded, hindered, obstructed, and defeated the Petitioner's access to exculpatory evidence." (Petition, Doc. 1 at 9B.) Respondents argue Ground 5A(5) is an evidentiary claim, not a *Brady* claim, and is without merit. (Answer, Doc. 23 at 26.) Petitioner does not reply.

In *Brady v. Maryland*, 373 U.S. 83, 87 (1963), the Supreme Court held that a defendant's due process rights are violated when the state fails to disclose to the defendant prior to trial "evidence favorable to an accused . . . where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87.

Here, Petitioner points to no failure to provide *exculpatory* evidence, but rather failure to provide *inculpatory* evidence, *i.e.* "legitimate proof of loss, proof of existence of the stolen business checks, use of a credit card unauthorized or that a particular business check was negotiated at a Chase banking center." (Petition, Doc. 1 at 9(B).) Evidence is subject to the disclosure requirement only if it is exculpatory, *i.e.* "favorable to an accused." *Brady*, 373 U.S. at 87.

Ground 5A(5) is without merit and must be denied.

I. GROUND 5B – INSUFFICIENT EVIDENCE

In Ground 5B, Petitioner asserts there was insufficient evidence to support the elements of the charges of: (1) theft, (2) loss, (3) stolen checks, (4) credit card, and (5) negotiation of check. (Petition, Doc. 1 at 9(a)-9(c).) Respondents argue that Petitioner fails to show that the Arizona Court of Appeals' rejection of these claims on the merits was sufficiently deficient to warrant relief under 28 U.S.C. § 2254(d). (Answer, Doc. 23 at 19-24.) Petitioner replies arguing the merits of these claims. (Reply, Doc. 43 at 28-42.)

1. Applicable Law

As discussed hereinafter, the Arizona Court of Appeals rejected on the merits

Petitioner's claims of insufficient evidence on direct appeal. That decision is entitled to deferential review under 28 U.S.C. § 2254(d).

Under long established Supreme Court law, the Due Process Clause of the Fourteenth Amendment protects a defendant against conviction "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970). "The Due Process Clause of the Fourteenth Amendment denies States the power to deprive the accused of liberty unless the prosecution proves beyond a reasonable doubt every element of the charged offense." *Carella v. California*, 491 U.S. 263, 265 (1989) (citation omitted). In evaluating a claim of insufficient evidence, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

2. State Court Decision

Here, the Arizona Court of Appeals rejected Petitioner's claims of insufficient evidence on direct appeal. In doing so, the court summarized the applicable law:

> ¶23 We will not disturb a jury's verdict if "substantial evidence" supports the verdict. *State v. Atwood*, 171 Ariz. 576, 597 (1992), *disapproved on other grounds by State v. Nordstrom*, 200 Ariz. 229, 241, ¶ 25 (2001). "Substantial evidence" is evidence from which a rational jury could have found the essential elements of the charged crimes beyond a reasonable doubt. *Id.*

(Exh. GG, Mem. Dec. 1/14/20, ¶ 23.)

The state court then summarized the evidence supporting each of the convictions:

> ¶24 Here, there was substantial evidence to support the verdicts. As to taking the identity of another entity, Gwen possessed and used the CFO's company debit-card information without his permission. *See* A.R.S. § 13-2008(A). And when Gwen used that debit-card information to buy a $4,000 mountain bike, he committed theft of a credit card. See A.R.S. § 13- 2102(A). The record also supports the jury's finding that Gwen committed fraudulent schemes and artifices when he knowingly went to a bank and cashed a check he knew to be fraudulent. *See* A.R.S. § 13-2310(A). And the CFO's testimony that "there was no valid reason for [Dahl] to be giving Mr. Gwen two more payments equal to the payments which [Dahl] had

> made for his severance" and that Dahl would never issue handwritten payroll or severance checks supports the finding of theft. *See* A.R.S. 13-1802(A). The record also supports the jury's verdict that Gwen committed forgery when he presented the forged checks to the bank teller. See A.R.S. 13-2002(A)(3). Accordingly, the jury had adequate evidence from which to find Gwen guilty as charged.

(*Id.* at ¶ 24.) The state court had previously in its decision summarized the evidence as restated hereinabove in Section II(A) (Factual Background).

3. Evaluation of State Court Decision

The Arizona Court of Appeals rejected on the merits Petitioner's claims of insufficient evidence on direct appeal. That decision is entitled to deferential review under 28 U.S.C. § 2254(d). (*See supra* Section III(C)(1), Deferential Review of Merits Decisions.)

Legal Error - In evaluating a claim of insufficient evidence, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

Petitioner does not suggest how the state court's decision was contrary to or an unreasonable application of the *Jackson* standard. Although couching the standard in terms of "substantial evidence," the state appellate court applied a standard that did not differ meaningfully from *Jackson*. Under § 2254(d) "the state court's decision must be *substantially* different from the relevant precedent of this Court." *Williams v. Taylor*, 529 U.S. 362, 405 (2000) (emphasis added). Meeting the standard "does not require citation of our cases-indeed, it does not even require awareness of our cases, so long as neither the reasoning nor the result of the state-court decision contradicts them." *Early v. Packer*, 537 U.S. 3, 8 (2002).

Factual Error – Petitioner's Petition fails to assert any unreasonable determination of the facts, or even to identify specific elements Petitioner contends were not supported by sufficient evidence. In his Reply (other than the procedural objections discussed under Ground 5A), Petitioner simply argues various failures of proof without any discussion of

the evidence actually presented.

Even if considered *de novo,* Petitioner fails to show (for the reasons discussed hereinafter) insufficient evidence of any element of the offenses on which he was convicted.

4. Ground 5B(1) –Theft of Checks

In Ground 5(B)(1), Petitioner argues that there was insufficient evidence to prove theft and negotiation of the checks ("the existence of stolen business checks…that a particular business check was negotiated at a chase banking center"). (Petition, Doc. 1 at 9(B).) But as discussed hereinabove with regard to Ground 5A(2), Petitioner was not charged with nor convicted of stealing checks. Petitioner points to no conviction which required proof of his having stolen the checks, *e.g.* by burglarizing the checks out of the company offices. Rather, his conviction for theft under Count 4 of the indictment was based upon "control[ing]" the "stolen…checks" and the resulting "U.S. Currency" when negotiating them. (Exh. D, Indictment at 1.) Petitioner proffers nothing to explain why the evidence on those elements was insufficient.

In his Reply, he argues for the first time that there was insufficient "continuity of evidence," or "definitive evidence of the existence of any alleged stolen checks." (Reply, Doc. 43 at 41.) Petitioner fails to explain how "continuity of evidence" was an element. To the extent he intends to argue that the state was required to prove how he gained possession of the checks, his argument is flawed. All that the state was required to prove was Petitioner's knowledge that the checks did not belong to him and his control of them. So, for example, Petitioner could be guilty of the "theft" of the checks if he had simply found them lying on a street corner, he obtained them from a third party, etc. Petitioner proffers no reason why the evidence was insufficient for the jury to conclude he knew he was not entitled to the checks or their proceeds.

In his Reply, Petitioner suggests there was an insufficient chain of custody. (Reply, Doc. 43 at 37.) But Petitioner fails to explain how, given the testimony proffered in the

case, a chain of custody was necessary to prove the elements of Count 4, including his negotiation of the checks. Here, there was testimony that Petitioner had been captured by Chase bank cameras cashing the company's checks, (Exh. NN, R.T. 9/13/18 at 134-140) and that the resulting funds were used to purchase a cashier's check used by Petitioner to purchase an automobile, and that he had a receipt (and at least some of the purchased items) from purchasing items at Walmart which matched another check presented to Walmart (Exh. OO, R.T. 9/14/18 at 125-127). Petitioner fails to explain how this was not sufficient evidence (especially in light of all the other evidence in the case), for a reasonable juror to find him guilty on the check charges. Moreover, to the extent that Petitioner might have had available to him objections to such testimony, he failed to interpose them, and the evidence was before the jury. Petitioner complains that the state failed to prove which particular check was used at which location. But Petitioner fails to show that such proof was an element of the offense.

To the extent that Petitioner relies on violations of state evidentiary law by admission of copies of checks, his claims are without merit for the reasons discussed hereinafter in Ground 6 (admission of evidence).

This claim is without merit.

5. Ground 5B(2) –Certified Proof of Loss from Credit Cards

The Petition argues the "state [failed] to produce legitimate proof of loss." (Petition, Doc. 1 at 9(B).) In his Reply, Petitioner argues: "The state produce[sic] no record demonstrating an economic loss by certifying documents such as credit card statements or credit card receipts." Petitioner fails to explain how "loss" from the credit card use was an element of an offense for which he was convicted. Count 2 alleged only that Petitioner "controlled" the credit card without consent. (Exh. D, Indictment at 1.) Moreover the appellate court found that charge was established when Plaintiff "used that debit-card information to buy a $4,000 mountain bike." (Exh. GG, Mem. Dec. 1/14/20 at ¶ 24.)

Nor does Petitioner explain why "certified" records were required,[14] nor why the company representative's testimony that the company card had been charged $4,000 because "somebody had ordered a very expensive mountain bike to be delivered to Mr. Gwen's address." (Exh. NN, R.T. 9/13/18 at 54-55.) To the extent that Petitioner relies on violations of state evidentiary law, his claims are without merit for the reasons discussed hereinafter in Ground 6 (admission of evidence).

Petitioner attempts to raise credibility questions by asking why the representative would have been checking card transactions on a weekend. (Reply Doc. 43 at 32.) But he offers no reason why a reasonable juror could not have found the representative credible about the evidence of the offense, despite the admission he was "not quite sure why [he] was on the accounts on the weekend." (Exh. NN, R.T. 9/138/18 at 54.)

Petitioner complains for the first time in his Reply of various additional questions which he contends were not answered by the state's case, *e.g.* (1) the location of the original checks; (2) their continued existence; (3) the location of the negotiation of various checks; (4) the sequence of checks; (5) injection of false facts by police; (6) the sufficiency of time for Petitioner to travel to each location of negotiation; (7) the lack of investigation at the company offices, or of the source of the checks; (8) Petitioner's property upon arrest did not include stolen checks; (9) Petitioner's lack of access to the checks; (10) the access of other persons to the checks; (11) Petitioner's statements regarding the checks he legitimately received; (12) the bank teller's limited memory; (13) and the prosecution's badgering of his witness. (Reply, Doc. 43 at 37-41.) But Petitioner fails to establish how these unanswered questions precluded a reasonable juror from relying on the evidence presented to find guilt beyond a reasonable doubt.

To the extent the jury had evidence on these matters before them, the presence of such evidence is not controlling. Rather, under *Jackson*, the court must view "the evidence in the light most favorable to the prosecution." *Maquiz v. Hedgpeth*, 907 F.3d 1212, 1217

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[14] "Certification" is, at best, hearsay evidence by the certifying person that the records are genuine.

(9th Cir. 2018). This includes making reasonable inferences from circumstantial evidence, and electing to reject some evidence and accept other evidence based on credibility. The reviewing court must leave with the jury the responsibility to "resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Jackson*, 443 U.S. at 319.

6. Rejection of Claim Not Unreasonable

Even if this Court might conclude on *de novo* review that Petitioner's claims of insufficient evidence have merit, that does not justify relief.

> [The petitioner] "faces a heavy burden when challenging the sufficiency of the evidence used to obtain a state conviction on federal due process grounds." First, he must meet the burden under *Jackson v. Virginia* of showing that "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Second, after the passage of the [AEDPA] the standards of *Jackson* are applied "with an additional layer of deference," requiring the federal court to determine "whether the decision of the [state court] reflected an 'unreasonable application of' *Jackson* ... to the facts of this case."

Maquiz v. Hedgpeth, 907 F.3d 1212, 1217–18 (9th Cir. 2018) (citations omitted) (citing *Jackson*, 443 U.S. at 319). Petitioner fails to offer anything to show that the state court's decisions were not just wrong, but an unreasonable application of the *Jackson* standard.

Accordingly, this Ground 5B is without merit and must be denied.

J. GROUND 6 – EVIDENTIARY ERRORS

Ground 6 alleges denials of due process from various evidentiary rulings. Petitioner argues that that the trial court erred in admitting "forged or fabricated evidence." He argues the trial court erred in admitting computer generated copies without a certificate of authenticity. Petitioner cites to Ariz. Rev. Stat. § 13-110(F), Ariz. R. Evid. 901 and 902(b), and *State v. Johnson*, 184 Ariz. 521, 911 P.2d 527 (1994). Finally, Petitioner argues the trial court made incorrect legal conclusions and denied him an evidentiary hearing required by Ariz. Rev. Stat. § 13-4238. (Petition, Doc. 1 at 9(c).)

Respondents construe Ground 6 as relating to the admission of copies of the checks, and argue that evidentiary errors based on state law are generally not cognizable on habeas, review. Respondents further argue that Arizona Rule of Evidence 901(b)(1) authorizes admission of non-self-authenticating records when supported by other evidence, and Petitioner failed to object. Respondents argue than any error was harmless. (Answer, Doc. 23 at 26-27.)

Petitioner replies that the relevant Arizona and federal rules of evidence are the same, and that Rule 901(b)(1) required an evidentiary hearing. He argues he raised the issue in his Motion to Suppress (Exh. R-O) and in a petition for special action. He argues his trial was rendered fundamentally unfair.

The Arizona Court of Appeals addressed the underlying state evidentiary law claim:

> ¶26 Gwen argues that the superior court erred by admitting into evidence computer generated copies of checks because the checks were not self-authenticating documents under Arizona Rule of Evidence 902(4). But here, the checks were properly authenticated under Rule 901.
> ¶27 To properly authenticate an item of evidence, "the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is." Ariz. R. Evid. 901(a). The superior court" does not determine whether the evidence is authentic, but only whether evidence exists from which the jury could reasonably conclude that it is authentic." *State v. Lavers*, 168 Ariz. 376, 386 (1991). Once that standard is met, any uncertainty goes to the weight rather than the admissibility of the evidence. *State v. George*, 206 Ariz. 436, 446, ¶¶ 30-31 (App. 2003).
> ¶28 Dahl's CFO' s testimony that he logged into his bank account online and printed the fraudulent checks for law enforcement provided the superior court with a reasonable basis for admitting the checks into evidence, and the court thus did not abuse its discretion by doing so.

(Exh. GG, Mem. Dec. 1/14/20 at ¶¶ 26-28.) This state court determination of state law is not subject to review in a federal habeas court. *Bains v. Cambra*, 204 F.3d 964, 971 (9th Cir. 2000) ("federal court is bound by the state court's interpretations of state law").

Nor can Petitioner shoehorn this into a question of federal law by simply pointing to the similarity between the state and federal rules of evidence. Indeed, Federal Rule of Evidence 101(a) provides: "These rules apply to proceedings in United States courts."

Even if this habeas court had authority to second guess the state court's state law

ruling, Petitioner fails to show how that ruling was erroneous. He offers nothing to show error in the state court's recitation of the CFO's testimony. Arizona's Rule 901(a) *requires* only some evidence of authenticity. Arizona's Rule 901(b)(1) permits authentication by "Testimony that an item is what it is claimed to be." Arizona's Rule 902 does not mandate self-authenticating records but simply identifies records which are *permitted* to be deemed self-authenticating, "requir[ing] no extrinsic evidence of authenticity to be admitted."

Finally, Petitioner makes only a conclusory allegation that he was denied a required evidentiary hearing. The statute he cites, Ariz. Rev. Stat. § 13-4238, pertains only to evidentiary hearings in a post-conviction relief proceeding. Petitioner never filed a petition for post-conviction relief. Moreover, he fails to show how an evidentiary hearing would have led to a different outcome.

Ground 6 is without merit and must be denied.

K. GROUND 7A – TAMPERING

In Ground 7A, Petitioner argues that: (1) the police planted evidence in his vehicle and amongst his personal property; and (2) the prosecution altered police body-cam videos. (Petition, Doc. 1 at 9(D).)

Respondents reply that Petitioner fails to show the state court's rejection of this claim merits relief under the deferential standards of 28 U.S.C. § 2254(d). Respondents argue the claims were speculative and unsupported. Respondents recite evidence addressing custody of Petitioner's jeep, and Petitioner's failure to support his claim regarding body-cam footage. Respondents argue Petitioner has failed to show any error was not harmless. (Answer, Doc. 23 at 27-30.)

Petitioner does not reply on this portion of Ground 7. (*See* Reply, Doc. 43 at 46-47.)

The Arizona Court of Appeals rejected this claim.

> ¶32 Gwen next asserts that one of the electronic devices and the retail-store receipt used as evidence against him were placed in his vehicle after his arrest. Gwen also asserts that significant portions of body camera footage were deleted and not provided to him. But

> Gwen offers no evidence of tampering, and the record does not support his contention, so the superior court did not err by admitting the now-challenged evidence. *See State v. Ritchey*, 107 Ariz. 552,557 (1971).

(Exh. GG, Mem. Dec. 1/14/20 at ¶ 32.)

Petitioner fails to show how this was contrary to or an unreasonable application of Supreme Court law. He also fails to show why it was an unreasonable determination of the facts. Indeed, Petitioner offers this Court only conclusory allegations or speculation. This claim is without merit and must be denied.

L. GROUND 7B - BRADY

In Ground 7B, Petitioner argues the prosecution withheld evidence, including photographs, flash drives, subpoenaed information from Suddenlink Communications, tapes of witness interviews, and logs and recordings of police radio communications. (Petition Doc. 1 at 9(D).)

Respondents argue that Petitioner fails to show the state court's rejection of this claim merits relief under the deferential standards of 28 U.S.C. § 2254(d). Respondents argue that either Petitioner fails to prove withholding, the complained of materials that existed were produced, and Petitioner declined an extension of trial to avoid any prejudice from delay in production and the trial court issued a lost evidence instruction.

In his Reply, Petitioner references a laundry list of purportedly withheld items, including a significant number not referenced in the Petition. (Reply, Doc. 43 at 46-47, 53-59.) The latter constitute new claims raised for the first time in a reply, and need not be considered. *Zamani*, 491 F.3d at 997; *Cacoperdo*, 37 F.3d at 507.

The Arizona Court of Appeals rejected at least the portion of this claim related to dispatch logs, reasoning:

> ¶33 Gwen also contends that the State purposefully concealed evidence by disclosing dispatch logs only two days before trial, even though they were generated over a year earlier. But the superior court repeatedly asked Gwen what sanction he would suggest for the delayed disclosure. Although Gwen asked the court to dismiss his charges with prejudice, he also deferred to the court regarding the appropriate sanction. Given that Gwen was ultimately provided with the dispatch logs and declined the court's offer to delay

> the trial, the court did not abuse its discretion by determining that a *Willits* instruction was the appropriate sanction.

(Exh. GG, Mem. Dec. 1/14/20 at ¶ 33.) Petitioner proffers nothing to show this was contrary to or an unreasonable application of Supreme Court law, or an unreasonable determination of the facts.

Moreover, Petitioner proffers nothing to show that the withheld evidence was favorable to Petitioner. Without a showing of favorability, no *Brady* violation occurred and Petitioner fails to show that any error was not harmless. *See Brady*, 373 U.S. at 87.

Ground 7B is without merit and must be denied.

M. GROUND 8 – RIGHT TO COUNSEL

In Ground 8, Petitioner argues that his right to counsel was denied when the trial court twice failed to hold a hearing on his requests for substitute counsel. (Petition, Doc. 1 at 9(D).)

Respondents argue that at the hearing on October 30, 2017, when presented with the option to either pursue substitution of counsel or to pursue self-representation, that Petitioner proceeded to move for self-representation. That request was granted. Respondents argue that later, after counsel had again been appointed, Petitioner again waived counsel. Respondents argue Petitioner claims he was misled by the trial court into waiving counsel the first time, but the trial court carefully and correctly explained Petitioner's rights and options. Respondents argue the state court's rejection of this claim on the merits is entitled to deferential review under 28 U.S.C. § 2254, and Petitioner fails to meet the standard. Finally Respondents argue that any error from the October 30, 2017 hearing was rendered harmless when counsel was again appointed. (Answer, Doc. 23 at -31-34.)

In his Reply, Petitioner argues for the first time that on April 5, 2018 he filed a motion for substitute counsel ("Notice of Ineffective Assistance of Counsel").[15] He argues

[15] Petitioner identifies this filing as "Exh. S". (Reply, Doc. 43 at 48.) Exhibit S to the Answer is an Order on Petitioner's motion for change of judge. Exhibit R-S to the Reply is a label with no document attached.

that after accelerating the hearing on the motion, the trial court "refused to entertain it" at the hearing on April 23, 2018, and directed the clerk to not accept *pro se* documents by Petitioner.

The Arizona Court of Appeals disposed of this claim as premature:

> ¶38 Gwen argues that the superior court violated his Sixth Amendment right to counsel when it denied his request for substitute counsel and failed to hold a hearing after he advanced a claim of ineffective assistance of counsel. Ineffective assistance of counsel claims can only be brought in post-conviction proceedings, not on direct appeal. *State ex rel. Thomas v. Rayes*, 214 Ariz. 411, 415, ¶ 20 (2007). Consequently, we do not address these arguments.

(Exh. GG, Mem. Dec. 1/14/20 at ¶ 38.) Thus, Respondents' reliance on a merits decision on this claim is misplaced.

The appellate court did, however, consider Petitioner's claims of denial of his rights of self- representation:

> ¶34 Gwen next contends that he was ill-prepared for trial after the superior court denied his requests for paralegal services, an investigator, and access to a law library. Because Gwen was provided with advisory counsel, his constitutional right to court access was met, regardless whether he had personal access to legal materials. *See State v. Henry*, 176 Ariz. 569, 584 (1993) ("Library access is only one permissible means of affording the right of meaningful self-representation. Legal help is another."); *see also Bounds v. Smith*, 430 U.S. 817, 828 (1977) (requiring the state to provide either adequate law libraries or adequate assistance from persons trained in the law"), *abrogated in part by Lewis v. Casey*, 518 U.S. 343, 354 (1996).
>
> ¶35 Gwen also alleges that he faced unfair challenges compared to the prosecuting attorney because of his lack of resources and inability to access evidence. This, however, was a consequence of his decision to represent himself. The superior court warned Gwen of the dangers of representing himself, informing him that he was solely responsible for "asserting legal defenses, interviewing witnesses, doing investigations, doing legal research, filing and arguing motions, examining and cross-examining witnesses, giving opening statements and final arguments to the jury." *See Faretta v. California*, 422 U.S. 806, 835 (1975) (noting that a defendant "should be made aware of the dangers and disadvantages of self-representation"). And here, the record reveals that Gwen made a voluntary, knowing, and intelligent waiver of his right to counsel. Having knowingly waived his right to counsel, Gwen cannot now challenge the consequences of which the court warned him.

(Exh. GG, Mem. Dec. 1/14/20 at ¶ 34-35.) To the extent that the factual findings in that discussion are relevant, they are entitled to a presumption of correctness. 28 U.S.C. §

2254(e).

Citing *State v. Moody*, 192 Ariz. 505, 968 P.2d 578 (1998), Petitioner argues that his decision to proceed with self-representation was involuntary. In *Moody*, the state trial court was faced with trial counsel with whom the defendant had an irreconcilable conflict. "By refusing to appoint new counsel, the trial court effectively left him no alternative. Forcing Moody to choose in this situation [between deficient representation or self-representation] was constitutionally impermissible because both alternatives resulted in a violation of his right to representation." 192 Ariz. at 509, 968 P.2d at 582.

The critical factor in *Moody* was the existence of an irreconcilable conflict with counsel. "An indigent defendant is entitled to appointed counsel, but not necessarily to appointed counsel of his choice." *United States v. Torres-Rodriguez*, 930 F.2d 1375, 1380 n. 2 (9th Cir. 1991). "[T]he right to counsel of choice does not extend to defendants who require counsel to be appointed for them." *United States v. Gonzalez-Lopez*, 548 U.S. 140, 151 (2006). And, "there is no automatic right to a substitution of counsel simply because the defendant informs the trial court that he is dissatisfied with appointed counsel's performance." *Jackson v. Ylst*, 921 F.2d 882, 888 (9th Cir. 1990). Consequently, the Sixth Amendment is offended only where substitution of appointed counsel is denied despite the existence of an actual conflict of interest or an irreconcilable conflict with appointed counsel. *Id.*

Here, Petitioner alleged no actual conflict of interest or irreconcilable conflict which would have entitled him to substitute counsel.

Petitioner references denials in October 2017 and April 2018. However, Petitioner did not finally waive his right of representation until June 18, 2018. At the hearing on his waiver, he explained his reasons for being dissatisfied with appointed counsel, and wanting to self-represent:

> THE COURT: All right. An attorney can be of great assistance and value to you in a criminal case. There are serious dangers and disadvantages to representing yourself. So please tell me why you want to represent yourself again.
>
> THE DEFENDANT: Well, I just feel that the public defender's

> office, not that they do a terrible job. I just don't think they would be an adversarial challenge to prosecution. I mean, there are just - - there are certain things. I mean, we've continued - - we did not pursue ineffective assistance of counsel.
>
> And the previous counsel, we extended the trial, the first trial date, because we were going to do interviews, which didn't happen. Not one single interview was done leading up to the three month. And I just feel that if I'm going to be found guilty that I'll just be found guilty on my own accord.

(Exh. KK, R.T. 6/18/18 at 7.) Petitioner's generalized disappointment with appointed counsel's representation, or with delays in conducting interviews, did not create a constitutional obligation to appoint him new counsel. Consequently, there was no constitutional error in accepting his waiver of representation.

Ground 8 is without merit and must be denied.

IV. CERTIFICATE OF APPEALABILITY

Ruling Required - Rule 11(a), Rules Governing Section 2254 Cases, requires that in habeas cases the "district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant." Such certificates are required in cases concerning detention arising "out of process issued by a State court", or in a proceeding under 28 U.S.C. § 2255 attacking a federal criminal judgment or sentence. 28 U.S.C. § 2253(c)(1).

Here, the Petition is brought pursuant to 28 U.S.C. § 2254, and challenges detention pursuant to a State court judgment. The recommendations if accepted will result in Petitioner's Petition being resolved adversely to Petitioner. Accordingly, a decision on a certificate of appealability is required.

Applicable Standards - The standard for issuing a certificate of appealability ("COA") is whether the applicant has "made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). "Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v.*

McDaniel, 529 U.S. 473, 484 (2000). "When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue when the prisoner shows, at least, 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." *Id.* "If the court issues a certificate, the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. § 2253(c)(2)." 28 U.S.C. § 2253(c)(3). *See also* Rules Governing § 2254 Cases, Rule 11(a).

Standard Not Met - Assuming the recommendations herein are followed in the district court's judgment, that decision will be in part on procedural grounds, and in part on the merits. Under the reasoning set forth herein, jurists of reason would not find it debatable whether the district court was correct in its procedural ruling, and jurists of reason would not find the district court's assessment of the constitutional claims debatable or wrong.

Accordingly, to the extent that the Court adopts this Report & Recommendation as to the Petition, a certificate of appealability should be denied.

V. RECOMMENDATION

IT IS THEREFORE RECOMMENDED:

(A) Grounds 1B, 5A(4) and 9 of Petitioner's Petition for Writ of Habeas Corpus (Doc. 1) be **DISMISSED WITH PREJUDICE**.

(B) The balance of Petitioner's Petition for Writ of Habeas Corpus (Doc. 1) be **DENIED**.

(C) To the extent the foregoing findings and recommendations are adopted in the District Court's order, a Certificate of Appealability be **DENIED**.

VI. EFFECT OF RECOMMENDATION

This recommendation is not an order that is immediately appealable to the Ninth Circuit Court of Appeals. Any notice of appeal pursuant to Rule 4(a)(1), Federal Rules of

Appellate Procedure, should not be filed until entry of the district court's judgment.

However, pursuant to Rule 72(b), Federal Rules of Civil Procedure, the parties shall have fourteen (14) days from the date of service of a copy of this recommendation within which to file specific written objections with the Court. *See also* Rule 8(b), Rules Governing Section 2254 Proceedings. Thereafter, the parties have fourteen (14) days within which to file a response to the objections. Failure to timely file objections to any findings or recommendations of the Magistrate Judge will be considered a waiver of a party's right to *de novo* consideration of the issues, *see United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003)(*en banc*), and will constitute a waiver of a party's right to appellate review of the findings of fact in an order or judgment entered pursuant to the recommendation of the Magistrate Judge, *Robbins v. Carey*, 481 F.3d 1143, 1146-47 (9th Cir. 2007).

In addition, the parties are cautioned Local Civil Rule 7.2(e)(3) provides that "[u]nless otherwise permitted by the Court, an objection to a Report and Recommendation issued by a Magistrate Judge shall not exceed ten (10) pages."

Dated: February 3, 2022

James F. Metcalf
United States Magistrate Judge

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