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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Michael Martin Sanders,

Petitioner,

vs.

Dora Schriro, et al.,

Respondents.

) No. CV 05-0572-PHX-EHC (MEA)

) **ORDER**

On January 25, 2006, Petitioner proceeding pro se filed an Amended Petition for Writ of Habeas Corpus under 28 U.S.C. § 2254 (Dkt. 5), regarding his criminal convictions in the Superior Court in and for Maricopa County, Arizona. The matter was referred to Magistrate Judge Mark E. Aspey who issued an Amended Report and Recommendation dated November 1, 2007 recommending that the Amended Petition be denied and dismissed with prejudice. After being granted extensions of time, Petitioner filed an Objection (Dkt. 56) to the Report and Recommendation on October 3, 2008.

Standard of Review

The district court reviews de novo the portions of the Magistrate Judge's Report and Recommendation to which there is a filed objection. 28 U.S.C. § 636(b)(1)(C) ("a judge of the court shall make a de novo determination of those portions of the report, ..., to which objection is made."); see also United States v. Reyna-Tapia, 328 F.3d 1114, 1121 (9th Cir.

1 2003). The district court is not required to review any issue that is not the subject of an
2 objection. Schmidt v. Johnstone, 263 F. Supp. 2d 1219 (D. Ariz. 2003), citing Thomas v.
3 Arn, 474 U.S. 140, 149 (1985).

4 Discussion

5 Petitioner and co-defendants were charged in September 1997 with crimes, including
6 first-degree felony murder, “or, in the alternative” second degree murder, as a result of an
7 incident in which Petitioner and the others entered a Phoenix home allegedly to arrest a
8 California bail absconder, Victor Alcantar. Petitioner and his “team” were dressed in dark
9 battle dress uniforms, body armor, and balaclavas. Petitioner was armed with a .45 caliber
10 handgun and an AR-15 rifle (Dkt. 24 - Answer - Exhibit H [State’s appellate brief] at 4-5;
11 Dkt. 56 at 144). Forced entry was made into the residence using a sledgehammer (id.).
12 Petitioner and the others used flex-cuffs to restrain two adult occupants and move them to
13 a central location, made a security sweep of rooms with weapons at the ready, and kicked
14 open locked doors (id.). An exchange of gunfire occurred, and two persons inside the home
15 were killed.

16 Petitioner was tried separately from his co-defendants in September and October
17 1998. Petitioner asserted at his criminal trial that he and his co-defendants were legitimate
18 bounty hunters, that is, bail enforcement agents. Petitioner argued at trial that his actions
19 were justified and the victims had been killed in self-defense. The State argued that Petitioner
20 and his co-defendants had used the bail bond as a cover story for an intended burglary (the
21 bail bond on Alcantar had been exonerated) and that their actions constituted first-degree
22 felony murder. Petitioner was found guilty on each of the two first-degree felony murder
23 counts, four counts of aggravated assault, four counts of unlawful imprisonment, and one
24 count of burglary in the first degree. On August 25, 1999, the trial court imposed sentence,
25 including consecutive natural life sentences on each of the first-degree felony murder
26 convictions. Petitioner filed a motion to vacate the Judgment which was denied by the trial
27 court.

1 appellate counsel, fundamental unfairness in his criminal trial, or substantial prejudice in
2 violation of constitutional standards.

3 In Ground Twelve, Petitioner has asserted violation of his right to present a defense
4 based on the trial court's preclusion of expert testimony regarding "fight or flight syndrome."
5 The Arizona Court of Appeals considered the issue on direct appeal and held that as a matter
6 of state law Petitioner's rights were not violated. It was determined not an abuse of discretion
7 to exclude the proffered testimony because the manner in which a person responds to
8 stressful circumstances invoking the fight or flight syndrome is a matter within the common
9 experience of all persons, and that under Arizona law, the use of physical or deadly force in
10 self-defense is governed by a reasonableness standard which was properly left for the jury's
11 consideration. The Magistrate Judge has recommended denial of the claim on the basis that
12 federal habeas relief does not lie for alleged errors of a state court's interpretation of a state
13 rule of evidence.

14 Petitioner objects to the recommended finding, arguing that he presented the issue as
15 one of constitutional magnitude. The Magistrate Judge did not reject the claim, however,
16 on the ground that it was not properly presented as a constitutional claim. Petitioner also
17 objects that it was necessary for him to defend against the State's charge that he acted
18 recklessly. Therefore, the proposed expert testimony was relevant to assist the jury in
19 understanding the "physiological" and "psychological" state of mind and body that occurs
20 when people are confronted with extraordinary circumstances or lethal threat (that is,
21 "psycho-dynamics" commonly known as "fight or flight syndrome"). Petitioner argues that
22 the proffered testimony would have shown that Petitioner, having been shot multiple times
23 by victim Chris Foote, returned fire at victim Spring Wright as a result of the irrepressible
24 effects of the syndrome, not because of recklessness or criminal mind-set. The "fight or
25 flight" evidence was admitted at Petitioner's sentencing.

26 The State's case consisted of the testimony of Ronald Timms, Petitioner's associate
27 who participated with Petitioner in entering the residence, that Petitioner intended to
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1 burglarize the residence, and that the bail enforcement venture was a ruse. Petitioner was
2 armed, and an exchange of gunfire developed between him and Foote resulting in the death
3 of victims Foote and Wright. Given the circumstances, exclusion of proffered expert
4 testimony regarding Petitioner's alleged "mind-set" at the time he fired on victim Wright
5 does not amount to error that rendered Petitioner's trial fundamentally unfair.

6 In Ground Fourteen, Petitioner asserts another claim that his right to present a defense
7 was precluded, contending that it was constitutional error for the trial court to rule
8 inadmissible the grand jury testimony of David Brackney, a participant with Petitioner in the
9 charged activity, under the "unavailable witness" exception. Petitioner sought Brackney's
10 testimony in support of his defense that the activity was a legitimate bail enforcement action.
11 Brackney testified before the grand jury that the activity was an attempt to legitimately
12 execute a bail warrant. Petitioner anticipated that Brackney would invoke the Fifth
13 Amendment privilege if called as a defense witness. Petitioner raised this issue on direct
14 appeal and the Arizona Court of Appeals held that Brackney's grand jury testimony was not
15 admissible because the State had not had an interest in a complete examination of Brackney
16 at the time he testified before the grand jury. It was not until the subsequent appearance of
17 Timms before the grand jury and the change in Timms' testimony that the State had evidence
18 to pursue the case on the basis that the home invasion was a robbery rather than a bail
19 recovery. The Magistrate Judge has recommended a finding that because Brackney's
20 testimony was not Petitioner's only defense, its preclusion did not violate Petitioner's federal
21 right to due process of law.

22 Petitioner objects that while the Magistrate Judge correctly described Brackney's
23 grand jury testimony, the recommended finding fails to do justice to the exculpatory scope
24 of Brackney's testimony. Brackney's testimony was not limited to the question of
25 Petitioner's intent for making entry but also encompassed Petitioner's defense against the
26 charges of recklessness and contradicted Timms' testimony of Petitioner's other drug
27 robberies. According to Petitioner Brackney testified that he and Petitioner began wearing
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1 body armor in response to high-threat groups, that the residence in question was a known
2 drug house, that he told victim Foote to show his hands and drop his gun before opening fire,
3 and that he and Petitioner returned gunfire only after they had been hit by Foote's gunfire.
4 Brackney was tried and convicted following Petitioner's trial and conviction (Dkt. 41 -
5 Amended Report and Recommendation at n.1).

6 The Court notes the recent decision in United States v. McFall, 558 F.3d 951 (9th Cir.
7 2009), in which the exclusion of alleged exculpatory grand jury testimony was held to be
8 prejudicial error on direct appeal. In McFall, the defendant had already been indicted at the
9 time the proposed witness testified before the grand jury but a superseding indictment had
10 not yet been returned. The witness subsequently pleaded guilty to a certain charge but "stuck
11 to" a version of events as testified to before the grand jury in his post-plea debriefing. And,
12 the witness was unavailable to the defendant but not to the government under the terms of
13 his plea agreement. McFall, 558 F.3d at 962-964.

14 The Ninth Circuit's decision in McFall is not binding on the Arizona state courts.
15 Moreover, when David Brackney testified before the grand jury the State had not yet heard
16 Ronald Timms' testimony and was not sure if Timms' testimony would be consistent with
17 his prior statements that the incident involved a "bail pickup" (Dkt. 24 - Answer - Exhibit
18 H [State's appellate brief] at 34)]. Petitioner has not shown a violation of his constitutional
19 rights in the exclusion of David Brackney's grand jury testimony at trial.

20 Petitioner's Objection (Dkt. 56) is overruled.

21 On March 16, 2009, Petitioner filed a Motion for Court Order Directing the State's
22 Custodian of Evidence to Preserve Certain Evidence for Discovery (Dkt. 57). On March 24,
23 2009, Respondents filed a Response arguing that the Court should decline to issue a
24 preservation order and stating that the State of Arizona retains all papers, documents, records
25 and evidence admitted in criminal and civil cases and in the possession of law enforcement
26 agencies pursuant to the Arizona Rules of Criminal Procedure and the Rules of the Arizona
27 Supreme Court. Petitioner filed a Reply on April 1, 2009 (Dkt. 59). The Court will deny the
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1 Motion to Preserve Evidence. Respondents are reminded of their obligation to preserve the
2 records and evidence in this case.

3 Accordingly,

4 **IT IS ORDERED** that Petitioner's Motion for Court Order Directing the State's
5 Custodian of Evidence to Preserve Certain Evidence for Discovery (Dkt. 57) is denied.

6 **IT IS FURTHER ORDERED** that Petitioner's Objection (Dkt. 56) is overruled.

7 **IT IS FURTHER ORDERED** that the Amended Report and Recommendation of the
8 Magistrate Judge (Dkt. 41) is adopted as the Order of the Court.

9 **IT IS FURTHER ORDERED** that the Amended Petition for Writ of Habeas Corpus
10 (Dkt. 5) is denied and dismissed with prejudice.

11 DATED this 31st day of August, 2009.

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Earl H. Carroll
United States District Judge

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