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**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA**

Eric Brian Pearce,	)	No. CV-06-2841-PHX-SMM (JR)
Petitioner,	)	
v.	)	<b>ORDER</b>
Charles L. Ryan, et al.,	)	
Defendants.	)	

Pending before the Court is Petitioner’s First Amended Petition for Habeas Corpus. (Doc. 15.) The matter was referred to Magistrate Judge Jacqueline M. Rateau for a Report and Recommendation, who filed a Report and Recommendation with this Court recommending that Petitioner’s First Amended Petition be denied on its merits. (Doc. 120.) Petitioner then filed his objections to the Report and Recommendation, Respondents responded, and Petitioner submitted a reply. (Docs. 130-132.) After considering the Report and Recommendation, the arguments raised in Petitioner’s Objections and his reply, the Court will deny Petitioner’s First Amended Petition for Habeas Corpus.

**STANDARD OF REVIEW**

When reviewing a Magistrate Judge’s Report and Recommendation, this Court “shall make a *de novo* determination of those portions of the report . . . to which objection is made,” and “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)(C); see also Baxter v. Sullivan, 923 F.2d 1391, 1394 (9th Cir. 1991) (citing Britt v. Simi Valley Unified Sch. Dist., 708 F.2d 452,

1 454 (9th Cir. 1983)).

2 **DISCUSSION<sup>1</sup>**

3 Magistrate Judge Rateau filed a thorough fifty page Report and Recommendation  
4 (“R&R”) recommending denial of habeas relief for Petitioner’s First Amended Petition for  
5 Habeas Corpus. (Doc. 120.) Petitioner filed eleven objections to the R&R. (Doc. 130.)  
6 Respondents responded to each objection and Petitioner replied in support. (Docs. 131, 132.)

7 First, Petitioner raises several arguments regarding the R&R’s statement of the  
8 standard of review under the AEDPA, the standard of review regarding application of  
9 Arizona’s procedural default rules, the standard of review regarding cause and prejudice, and  
10 the standard of review regarding fundamental miscarriage of justice. The Court has reviewed  
11 the R&R’s statements of the standards of review objected to by Petitioner. The Court finds  
12 that the R&R’s statements of the standards of review is correct and overrules Petitioner’s  
13 objection number one.

14 Moreover, to the extent that Petitioner’s objection is but a general objection, the Court  
15 is relieved of any obligation to review a general objection to the R & R. See Thomas v. Arn,  
16 474 U.S. 140, 149 (1985) (stating that no review at all is required for “any issue that is not  
17 the subject of an objection.”); United States v. Reyna–Tapia, 328 F.3d 1114, 1121 (9th Cir.  
18 2003) (same).

19 Petitioner’s second objection to the R&R’s Blakely v. Washington, 542 U.S. 296  
20 (2004), analysis stating that “retroactivity is irrelevant,” is overruled because, as the R&R  
21 correctly determines, Blakely was decided over one year after Petitioner’s conviction had  
22 become final, and was determined under Teague v. Lane, 489 U.S. 288 (1989), not to apply  
23 retroactively.

24 Petitioner’s third objection that none of his ineffective assistance of counsel (“IAC”)  
25 claims were waived or defaulted is overruled because the R&R properly found that Petitioner

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27 <sup>1</sup>The factual and procedural history of this case is set forth in the Magistrate Judge’s  
28 Report and Recommendation. (Doc. 120.)

1 failed to exhaust all of his IAC claims in state court by failing to present them to the Arizona  
2 Court of Appeals.

3 Petitioner's fourth objection that proper exhaustion is shown on the record and  
4 therefore the R&R mistakenly conducted a cause and prejudice analysis and a fundamental  
5 miscarriage of justice analysis is overruled. The R&R properly found that Petitioner did not  
6 exhaust all of his claims in state court and properly considered cause and prejudice and  
7 fundamental miscarriage of justice arguments.

8 Petitioner's fifth objection regarding the R&R's fundamental miscarriage of justice  
9 analysis is overruled. Under Schlup v. Delo, 513 U.S. 298, 321 (1995), an exception to  
10 procedural default is limited to habeas petitioners who can establish that new evidence shows  
11 that "a constitutional violation has probably resulted in the conviction of one who is actually  
12 innocent." Here, Petitioner merely relitigates the evidence presented at trial. The R&R  
13 properly found that such arguments do not establish that a fundamental miscarriage of justice  
14 occurred.

15 Petitioner's sixth objection argues that the R&R improperly found that the  
16 requirements of Alcala v. Woodford, 334 F.3d 862 (9th Cir. 2003) (applying pre-AEDPA  
17 standards) were not met regarding his IAC claim that counsel failed to call beneficial  
18 witnesses at trial. This objection is overruled because the testimony identified by Petitioner  
19 of the two witnesses not called at trial, Michael Perrin and Steven Anchondo, would have  
20 supported the prosecution's claim that Petitioner was the shooter by providing identification  
21 evidence, physical evidence of the handgun, and a motive. The R&R properly recommended  
22 that the state court's ruling was not an unreasonable application of Strickland v. Washington,  
23 466 U.S. 668 (1984). (See R&R, Doc. 120 at 32-34.)

24 Petitioner's seventh objection argues that the R&R improperly analyzed Missouri v.  
25 Frye, 132 S.Ct. 1399 (2012), alleging that his counsel improperly failed to advise him of a  
26 plea offer. In Frye, the Court undertook the question of whether defense counsel had a duty  
27 to communicate the terms of a formal plea offer to his client on terms and conditions that  
28 may result in a lesser sentence, a conviction on lesser charges, or both. Id. The Court held

1 that defense counsel has the duty to communicate formal offers from the prosecution to  
2 accept a plea on terms and conditions that may be favorable to the accused. Id. The Court  
3 overrules Petitioner’s objection because here there was no formal plea offer from the  
4 prosecution and the R&R properly found no Frye violation.

5 Petitioner’s eighth objection argues that the R&R improperly found that counsel did  
6 not infringe his right to testify by failing to allow him to testify. The Court overrules this  
7 objection. The R&R considered the record, Petitioner’s proposed testimony, and determined  
8 that “the trial judge reasonably found that any error by trial counsel in advising [Petitioner]  
9 about his right to testify did not prejudice [Petitioner].” (Doc. 120 at 38.) The trial court  
10 noted that Petitioner’s testimony would not have affected the jury verdict because the  
11 evidence of guilt was so strong. (See id. at 36-38.)

12 Petitioner’s ninth objection argues that the R&R improperly failed to consider the  
13 merits of his State v. Willits, 96 Ariz. 184, 393 P.2d 274 (1964), claim. The Court overrules  
14 this objection because the R&R properly found this claim procedurally defaulted due to  
15 Petitioner’s failure to exhaust this claim during state court proceedings.

16 Petitioner’s tenth objection argues that the trial court gave an unconstitutionally vague  
17 jury instruction on premeditation, yet the R&R concluded that he had failed to satisfy the  
18 standard for habeas relief. Under the AEDPA, the standard for habeas relief is a state court’s  
19 unreasonable application of controlling U.S. Supreme Court precedent. Williams v. Taylor,  
20 529 U.S. 362, 399-400 (2001). The R&R properly determined that “[g]iven the lack of any  
21 clearly established federal authority to the contrary, the Court cannot conclude that the  
22 premeditation instruction given in [Petitioner’s] case was unconstitutional.” (Doc. 120 at 46.)  
23 The tenth objection is overruled.

24 Petitioner’s final objection is also overruled. The R&R properly found that  
25 Petitioner’s supplemental new evidence claim was untimely and procedurally defaulted.  
26 (Doc. 120 at 46-48.)

27 **CONCLUSION**

28 Accordingly, on the basis of the foregoing,

