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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Robert D. Lemke,

No. CV-09-1059-PHX-DGC

10 Petitioner,

ORDER

11 vs.

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13 Charles L. Ryan, Director of the Arizona
14 Department of Corrections; and the Attorney
15 General of the State of Arizona,

16 Respondents.
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18 The victim in this case was robbed and shot to death at a hotel in Tempe, Arizona.
19 Petitioner Robert Lemke was indicted on charges of first degree felony murder, armed
20 robbery, and conspiracy to commit armed robbery. A state court jury convicted on the
21 lesser included offenses of theft and conspiracy to commit theft, but was unable to reach
22 a verdict on the murder charge. Petitioner received concurrent 25 and 27-year sentences.
23 The Arizona Court of Appeals denied Petitioner's double jeopardy challenge to a retrial
24 on the murder charge, *Lemke v. Rayes*, 141 P.3d 407 (Ariz. Ct. App. 2007), and the
25 Arizona Supreme Court denied review. Plaintiff thereafter pled guilty to the murder
26 charge in exchange for a concurrent life sentence with the possibility of parole after 25
27 years.
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1 On May 18, 2009, Petitioner filed a federal petition for a writ of habeas corpus
2 pursuant to 28 U.S.C. § 2254. Doc. 1. Magistrate Judge Jay R. Irwin has filed a report
3 and recommendation (“R&R”) that the petition be denied. Doc. 20. Petitioner has filed
4 objections (Doc. 23), to which a response has been filed (Doc. 28). For reasons stated
5 below, the Court will accept the R&R and deny the petition.

6 **I. Legal Standard.**

7 A party may file specific, written objections to an R&R within ten days after being
8 served with a copy the R&R. Fed. R. Civ. P. 72(b); 28 U.S.C. § 636(b)(1)(C). The Court
9 must undertake a de novo review of those portions of the R&R to which specific
10 objections are made. *See id.*; *Thomas v. Arn*, 474 U.S. 140, 149 (1985); *United States v.*
11 *Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003). The Court may accept, reject, or
12 modify, in whole or in part, the findings or recommendations made by the magistrate
13 judge. 28 U.S.C. § 636(b)(1).

14 **II. Discussion.**

15 The Double Jeopardy Clause of the Fifth Amendment provides that no person
16 shall “be twice put in jeopardy of life or limb” for the same offense. This constitutional
17 protection against double jeopardy encompasses principles of res judicata and collateral
18 estoppel, commonly referred to, respectively, as claim preclusion and issue preclusion.
19 *See Blockburger v. United States*, 284 U.S. 299 (1932) (claim preclusion); *Ashe v.*
20 *Swenson*, 397 U.S. 436 (1970) (issue preclusion). Where separate prosecutions are for
21 the “same offense,” that is, neither offense requires proof of a fact which the other does
22 not, the claim preclusion component of the Double Jeopardy Clause bars the successive
23 prosecution. *Blockburger*, 284 U.S. at 304. Where a jury by its verdict has finally
24 determined an issue of ultimate fact, the issue preclusion component of the Double
25 Jeopardy Clause bars the State from haling the defendant “before a new jury to litigate
26 that issue again.” *Ashe*, 397 U.S. at 446.

27 The instant habeas petition asserts four grounds for relief. Doc. 1. The first three
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1 combine to assert a claim based on the claim preclusion component of double jeopardy.
2 Petitioner argues that his conviction on the lesser included offense of theft constitutes an
3 implicit acquittal of armed robbery, that armed robbery is the same offense as felony
4 murder predicated on armed robbery, and that his conviction for theft therefore
5 terminated jeopardy on the felony murder charge. Doc. 1 at 6-8. The fourth ground for
6 relief raises the issue preclusion component of double jeopardy, that is, Petitioner argues
7 that the jury's silence as to felony murder while convicting on the lesser included offense
8 of theft constitutes a valid and final judgment in his favor on the felony murder charge.
9 *Id.* at 9.

10 By pleading guilty to the charge of felony murder, the Magistrate Judge
11 concluded, Petitioner has waived his double jeopardy claims. Doc. 20 at 6-16. The
12 Court agrees.

13 “[A] guilty plea represents a break in the chain of events which has preceded it in
14 the criminal process. When a criminal defendant has solemnly admitted in open court
15 that he is in fact guilty of the offense with which he is charged, he may not thereafter
16 raise independent claims relating to the deprivation of constitutional rights that occurred
17 prior to the entry of the guilty plea.” *Tollet v. Henderson*, 411 U.S. 258, 267 (1973). It is
18 “well settled that a voluntary and intelligent plea of guilty made by an accused person,
19 who has been advised by competent counsel, may not be collaterally attacked.” *United*
20 *States v. Broce*, 488 U.S. 563, 574 (1989) (citation omitted).

21 Petitioner entered a counseled, knowing, and voluntary plea of guilty on the
22 charge of felony murder. The right to collaterally attack that charge on double jeopardy
23 grounds was not explicitly reserved in the plea agreement. Nor is conscious waiver
24 necessary with respect to each potential defense relinquished by a guilty plea. This is so
25 because waiver “derives not from any inquiry into a defendant’s subjective understanding
26 of the range of potential defenses, but from the admissions necessarily made upon entry
27 of a voluntary plea of guilty.” *Broce*, 488 U.S. at 573-74. Petitioner has therefore
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1 waived his double jeopardy claims absent some valid exception to the waiver doctrine.

2 Petitioner asserts that this case fits within the exception set forth in *Menna v. New*
3 *York*, 423 U.S. 61 (1975). Docs. 19 at 2, 23 at 2. He is incorrect.

4 The double jeopardy claim in *Menna* was a “strong one on the merits” given that
5 the defendant had served jail time on a contempt charge for refusing to give testimony
6 before a grand jury and later was indicted for the same refusal to answer grand jury
7 questions. 432 U.S. at 61-62 & n.2. *Menna* explicitly did *not* hold that a double jeopardy
8 claim may never be waived. *Id.* at 63 n.2. Instead, the case stands only for the
9 proposition that “a plea of guilty to a charge does not waive a claim that *judged on its*
10 *face* the charge is one which the State may not constitutionally prosecute.” *Id.* (emphasis
11 added). The double jeopardy claim in *Menna* was deemed not waived because the
12 indictment to which the defendant pled guilty “was facially duplicative of the earlier
13 offense of which the defendant had been convicted and sentenced so that the admissions
14 made by [the] guilty plea could not conceivably be construed to extend beyond a
15 redundant confession to the earlier offense.” *Broce*, 488 U.S. at 575-76. Petitioner, by
16 contrast, was not convicted and sentenced for felony murder before pleading guilty to that
17 charge. His double jeopardy claim, therefore, does not fall within the narrow *Menna*
18 exception. *See id.* at 576 (exception inapplicable where the defendants “pleaded guilty to
19 indictments that on their face described separate conspiracies”).

20 In deciding whether the *Menna* exception applies, the Magistrate Judge essentially
21 resolved the merits of Petitioner’s double jeopardy claims. The Court finds that analysis
22 unnecessary to the waiver issue. The jury did not convict Petitioner on the charge of
23 felony murder, nor did it explicitly acquit him of that charge. On its face, the felony
24 murder charge is not clearly “one which the State may not constitutionally prosecute.”
25 *Menna*, 423 U.S. at 63.

26 Even if the Court were to find that Petitioner has not waived his double jeopardy
27 claims, habeas relief would still be denied as the claims are without merit. Jeopardy
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1 does not terminate, but rather continues, following a mistrial justified by a hung jury. *See*
2 *United States v. Bates*, 917 F.2d 388, 392-93 (9th Cir. 1990) (citing *United States v.*
3 *Perez*, 22 U.S. (Wheat. 9) 579, 580, 6 L. Ed. 165 (1824)). Indeed, “a jury’s inability to
4 reach a decision is the kind of ‘manifest necessity’ that permits the declaration of a
5 mistrial and the continuation of the initial jeopardy that commenced when the jury was
6 first impaneled.” *Yeager v. United States*, 129 S. Ct. 2360, 2366 (2009) (citations
7 omitted). This Circuit has specifically held that where a defendant is tried on greater and
8 lesser included offenses under the same indictment, and jeopardy terminates on the lesser
9 offense by acquittal or conviction but continues as to the greater offense pursuant to a
10 mistrial, “the government is not barred from retrying the defendant, notwithstanding that
11 jeopardy has terminated on the [lesser] offense.” *United States v. Jose*, 425 F.3d 1237,
12 1243 (9th Cir. 2005). “And this is true even though the greater and lesser offenses are the
13 ‘same offense’ for purposes of double jeopardy.” *Id.* at 1243-44. Petitioner’s first three
14 grounds for relief based on the claim preclusion component of double jeopardy must fail.

15 With respect to the issue preclusion component of double jeopardy, neither a
16 conviction on a lesser included offense, nor the jury’s silence on a greater charge has
17 collateral estoppel effect “unless the record establishes that the issue was actually and
18 necessarily decided in the defendant’s favor.” *Schiro v. Farley*, 510 U.S. 222, 236
19 (1994). “The burden is ‘on the defendant to demonstrate that the issue whose relitigation
20 he seeks to foreclose was actually decided in the first proceeding.’” *Id.* at 233 (citation
21 omitted). The Magistrate Judge concludes, correctly, that Petitioner has not met his
22 burden.

23 Petitioner presents no evidence that the jury actually decided that he did not
24 commit armed robbery. The trial court’s instructions explicitly permitted a conviction on
25 the lesser included offense of theft if the jury could not agree on the armed robbery
26 charge. *See Lemke v. Rayes*, 141 P.3d 407, 410 (Ariz. Ct. App. 2007) (discussing the so-
27 called “*LeBlanc* instruction”). In light of that instruction, and absent some evidence to
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1 the contrary, the Court is bound to conclude that “the jury could have ‘grounded its
2 verdict upon an issue other than that which [Petitioner] seeks to foreclose from
3 consideration.”” *Schiro*, 510 U.S. at 236 (quoting *Ashe*, 397 U.S. at 444). Petitioner’s
4 fourth ground for relief based on the claim preclusion component of double jeopardy is
5 without merit.


6 Nothing in Petitioner’s objections (Doc. 23) undermines the reasoning of the
7 Magistrate Judge or the conclusions reached in this order, that is, that Petitioner has
8 waived his double jeopardy claims and those claims otherwise are without merit. The
9 petition for habeas relief will be denied.

10 The Court has considered whether a certificate of appealability should issue under
11 28 U.S.C. § 2253(c), and concludes that it should not. Petitioner has not shown that
12 “jurists of reason” would find it debatable whether the Court is correct in its procedural
13 (waiver) ruling. Nor has Petitioner made a substantial showing of the denial of a
14 constitutional right. *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

15 **IT IS ORDERED:**

- 16 1. The Magistrate Judge’s report and recommendation (Doc. 20) is **accepted**
17 as set forth in this order.
18 2. Petitioner Robert Lemke’s petition for a writ of habeas corpus (Doc. 1) is
19 **denied**.
20 3. A certificate of appealability is **denied**.
21 4. The Clerk is directed to enter judgment accordingly.

22 Dated this 15th day of March, 2011.

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26 _____
27 David G. Campbell
28 United States District Judge