

1 **WO**

2  
3  
4  
5  
6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**  
8

9 Freddie Lee Ford,

10 Petitioner,

11 v.

12 Charles L. Ryan, et al.,

13 Respondents.  
14

No. CV-13-02474-PHX-DGC

**ORDER**

15  
16 Petitioner objects to the Report and Recommendation (R&R) of Magistrate Judge  
17 Burns. Doc. 16. The R&R suggests that the Court deny the pro se petition for writ of  
18 habeas corpus brought under 28 U.S.C. § 2254. Doc. 15. Specifically, Judge Burns  
19 found that Petitioner procedurally defaulted grounds one and three of his petition by  
20 failing to present them to the state court, and that he failed to show cause and prejudice to  
21 excuse the default. Doc. 15 at 12. Judge Burns found that ground two of the petition is  
22 not a cognizable federal claim. *Id.* at 14. For the reasons that follow, the Court will  
23 accept the R&R and deny the habeas petition.

24 **I. Background.**

25 The petition concerns two Arizona state cases: CR 2010-106247, in which  
26 Petitioner was charged with threatening two police officers and others with a pellet gun,  
27 and CR 2010-117471, in which he was charged with assaulting a detention officer in the  
28 Maricopa County Jail. Doc. 15. In CR 2010-106247, Petitioner pled guilty to two counts

1 of class 2 felony aggravated assault and one count of class 3 felony aggravated assault.  
2 Doc. 15 at 2. The plea agreement required that Petitioner be sentenced to prison for the  
3 class 2 felony assaults and did not state whether these sentences would be served  
4 consecutively or concurrently. *Id.* Petitioner agreed to be placed on supervised probation  
5 for the class 3 assault. *Id.* In CR 2010-117471, Petitioner pled guilty to a class 5 felony  
6 aggravated assault. The plea agreement provided that Petitioner would be placed on  
7 supervised probation upon his release. *Id.* at 9.

8 At sentencing, the trial court heard from officers present at the scene of the class 2  
9 assaults. They described Petitioner’s brandishing of what appeared to be a firearm in the  
10 middle of a public street, pointing it at drivers who fled in fear, pointing it at officers who  
11 were trying to get the scene under control, and refusing to comply with officers’  
12 commands until he was forcibly subdued. Doc. 13-1 at 47-79. The trial court considered  
13 Petitioner’s criminal history and past gang affiliation, heard arguments about his mental  
14 health, and sentenced Petitioner to two terms of 18.5 years on the class 2 felonies, to be  
15 served consecutively, and to a probationary period following his imprisonment. *Id.* This  
16 was less than the 46.5-year sentence requested by the State. *Id.* at 65.

17 Petitioner filed a timely notice of post-conviction relief (“PCR”). His PCR  
18 counsel found “no claims for relief to raise in post conviction proceedings.” Doc. 15 at 3  
19 “Petitioner filed a timely pro per PCR petition, raising the following issues: 1) ineffective  
20 assistance of counsel (“IAC”) for failure to ‘explain contents of plea agreements to  
21 defendant;’ and 2) the trial court improperly aggravated his sentences and also  
22 improperly ordered them to be served consecutively.” *Id.* at 3-4 (quoting Ex. N at 6-8).  
23 The trial court denied the PCR petition. *Id.* at 4.

24 Petitioner filed a petition for review with the Arizona Court of Appeals raising  
25 four issues: “1) whether his plea was legal because he was on ‘psychotropic narcotic  
26 drugs while pleading guilty before the judge;’ 2) whether his sentence was properly  
27 aggravated with a prior conviction; 3) whether the imposition of consecutive sentences  
28 was proper; and 4) IAC (generally and relating to his plea).” *Id.* (quoting Doc. 6 at 31-

1 46). The Court of Appeals denied the petition, finding that nothing in the record  
2 indicated that the trial court or Petitioner’s trial counsel should have doubted his  
3 competency at the plea hearing, that the sentence was properly aggravated, that  
4 consecutive sentences were lawful because the sentences were imposed for a single act  
5 that harmed multiple victims, and that most of Petitioner’s IAC claims were too vague or  
6 unsupported to permit meaningful review. *Id.* at 4-6. The Court of Appeals found that  
7 Petitioner’s IAC claim regarding his acceptance of the plea agreement was sufficiently  
8 specific, but determined that the record contradicted his claim and that Petitioner had  
9 failed to establish prejudice arising from trial counsel’s actions. *Id.* at 5. The Arizona  
10 Supreme Court denied review. *Id.*

11 Petitioner’s federal habeas petition raises three grounds for relief: (1) ineffective  
12 assistance of counsel in violation of the Fifth and Sixth Amendments because trial  
13 counsel failed to investigate Petitioner’s mental history and his alleged prior conviction  
14 and failed to “group plea’s at sentencing;” (2) the sentence violated the Fifth and Sixth  
15 Amendments because the trial court improperly used a prior conviction, “transfer[red]  
16 intent in violation of the law,” relied on insufficient testimony, and engaged in judicial  
17 fact finding; and (3) the sentence was excessive and violated the Fifth Amendment  
18 because it was based on brandishing a pellet gun which had no CO2 cartridge. *See*  
19 *Doc. 6 at 6-8.*

20 Judge Burns found that Petitioner failed to exhaust his remedies in state court on  
21 grounds one and three, resulting in procedural default. *Id.* at 12. On ground one, she  
22 found that “[w]hile Petitioner raised differing IAC claims [in] his PCR petition and  
23 petition for review, both pleadings failed to mention any failure to investigate or [group  
24 the plea agreements], but instead argued IAC generally and relating to the acceptance of  
25 his plea and failure to explain the contents of his plea.” *Id.* On ground three, Judge  
26 Burns found that Petitioner failed to raise a “claim in his PCR petition or petition for  
27 review arguing that his sentence was constitutionally excessive or ‘absurd’ as set forth in  
28 his habeas petition.” *Id.* Judge Burns also found on grounds one and three that Petitioner

1 failed to establish any basis “to excuse the procedural default by showing of cause and  
2 prejudice [and did not argue] a fundamental miscarriage of justice.” *Id.* Finally, Judge  
3 Burns found that ground two failed to state a cognizable federal claim because it  
4 concerned “[s]entence calculation and application of state sentencing statutes [that] are  
5 matters of state law,” and Petitioner failed to establish that his sentence was “arbitrary  
6 and capricious, or fundamentally unfair.” *Id.* at 14-15

7 Petitioner’s objection to the R&R focuses entirely on exhaustion and procedural  
8 default. Petitioner argues that his counsel at the sentencing hearing failed to state that the  
9 pellet gun was inoperable, that he was under the influence of both drugs and alcohol, and  
10 that he lacked the intent to place anyone in imminent physical danger. *Id.* He argues that  
11 this is a substantial claim and that he was left unrepresented during PCR proceedings  
12 when his appointed PCR counsel filed a notice stating that he could find no errors in the  
13 conviction or sentencing. *Id.* at 2. Petitioner also argues that his PCR counsel should  
14 have addressed “judicial fact finding” and the imposition of consecutive sentences. *Id.* at  
15 2. Petitioner closes by claiming that his counsel acted in violation of the State Bar of  
16 Arizona Rules of Professional Conduct and that he has been denied due process. *Id.* at 3.

## 17 **II. Analysis.**

### 18 **A. Ground Two.**

19 As noted, Judge Burns found that ground two failed to state a cognizable federal  
20 claim. Petitioner raises no objection to this conclusion. Doc. 6. The Court must  
21 undertake a de novo review only of those portions of the R&R to which specific  
22 objections are made. Fed. R. Civ. P. 72(b)(3); *United States v. Reyna-Tapia*, 328 F.3d  
23 1114, 1121 (9th Cir. 2003). The Court therefore will not address ground two.

### 24 **B. Ground One.**

25 As noted, ground one asserts that Petitioner’s trial counsel provided ineffective  
26 assistance by failing to investigate his mental history and his prior conviction and by  
27 failing to “group plea’s.” Doc. 6 at 6. Judge Burns found that Petitioner did not raise this  
28 claim in state court and that it is now procedurally defaulted because Petitioner cannot

1 return to state court to raise it. Doc. 15 at 12. Petitioner does not object to this finding,  
2 but appears to argue that his procedural default of ground one should be excused for  
3 cause and prejudice. Doc. 16 at 2.

4 When a petitioner has procedurally defaulted a claim, a federal district court may  
5 consider the merits of that claim if the petitioner can establish cause for the procedural  
6 default and resulting prejudice. *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). In  
7 *Martinez v. Ryan*, \_\_\_ U.S. \_\_\_, 132 S. Ct. 1309 (2012), the Supreme Court held that  
8 cause and prejudice can be satisfied when PCR counsel “was ineffective under the  
9 standards of *Strickland v. Washington*, 466 U.S. 668 (1984)” and a petitioner shows “that  
10 the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is  
11 to say that the prisoner must demonstrate that the claim has some merit.” *Id.* at 1318.

12 Petitioner did not argue before Judge Burns that his procedural default of ground  
13 one should be excused for cause and prejudice. Doc. 15 at 12-13. Even considering the  
14 cause and prejudice arguments that appear to be raised for the first time in Petitioner’s  
15 objection, they are unavailing. To establish ineffective assistance of counsel under  
16 *Strickland*, a petitioner “must show that counsel’s representation fell below an objective  
17 standard of reasonableness” and that the “deficiencies in counsel’s performance [were]  
18 prejudicial to the defense.” *Strickland*, 466 U.S. at 688, 692. Prejudice means “a  
19 reasonable probability” that, “but for counsel’s deficient performance, ‘the result of the  
20 proceeding would have been different.’” *Franklin v. Johnson*, 290 F.3d 1223, 1237, (9th  
21 Cir. 2002) (quoting *Strickland*, 466 U.S. at 694).

22 In his objection, Petitioner mixes arguments regarding his trial counsel and his  
23 PCR counsel. He asserts that trial counsel should have mentioned at the sentencing  
24 hearing that he “brandish[ed] an inoperable air pellet gun” that had no CO2 cartridge.  
25 Doc. 16 at 2, 3. He argues that this fact indicates that he lacked the intent to place anyone  
26 in imminent physical danger. *Id.* at 3. Additionally, Petitioner argues that trial counsel  
27 should have mentioned that he was under the influence of “not only drugs, but alcohol” at  
28 the time of the incident, and should have objected to judicial fact finding and consecutive

1 sentences. *Id.* at 2. Finally, Petitioner complains that his PCR counsel raised no issues  
2 with the conviction and sentencing, leaving Petitioner “unrepresented.” *Id.*

3 None of these arguments relate to ground one. As noted above, ground one asserts  
4 ineffective assistance of counsel based on a failure to investigate Petitioner’s mental  
5 health history and prior convictions, and on a failure to “group plea’s.” Doc. 6 at 6.  
6 Because the arguments made in the objection do not relate to ground one, Petitioner has  
7 failed to establish cause for the procedural default of ground one.<sup>1</sup> Nor do the arguments  
8 show that ground one was a substantial claim.<sup>2</sup> *Martinez*, 132 S.Ct. at 1318.

9 **C. Ground Three.**

10 Ground three asserts that Petitioner’s sentence was excessive and violated the  
11 Fifth Amendment because it was based on brandishing a pellet gun which had no pellets  
12 or CO2 cartridge. *See* Doc. 6 at 6-8. Judge Burns found that Petitioner did not raise this  
13 claim in state court and that it is now procedurally defaulted. Doc. 15 at 12. Petitioner  
14 does not object to this finding, but appears to argue that his procedural default should be  
15 excused for cause and prejudice. Doc. 16 at 2.

16 Again, Petitioner did not argue before Judge Burns that his procedural default of  
17 ground three should be excused for cause and prejudice. Doc. 15 at 12-13. When this  
18 Court considers the new cause and prejudice arguments, it finds them unpersuasive. As  
19 noted above, Petitioner’s objection argues that trial counsel should have mentioned that  
20 he brandished an inoperable pellet gun, that he lacked the intent to place anyone in  
21 imminent physical danger, and that he was under the influence of “not only drugs, but

---

22  
23 <sup>1</sup> Procedural default can also be excused when “failure to consider the claims will  
24 result in a fundamental miscarriage of justice.” *Coleman*, 501 U.S. at 750. Petitioner  
does not raise this issue in his objection.

25 <sup>2</sup> On the merits of ground one, Petitioner does not explain what he means by the  
26 failure to “group” pleas (this may simply be an objection to the consecutive sentences) or  
27 how further investigation of his criminal history would have made a difference. With  
28 respect to trial counsel’s alleged failure to investigate Petitioner’s mental health issues,  
those issues were the primary focus of trial counsel’s argument at the sentencing. *See*  
Doc. 13-1 at 65-70. (The Court notes that the sentencing transcript attributes many of the  
mental health arguments to the trial judge, but this appears to be a clear error as the  
speaker – defense counsel – is addressing the judge. *See id.* at 68, lines 16-17 (“in your  
court”), and 69, line 19 (“Your Honor”)).

1 alcohol.” Doc. 16 at 2-3. Because ground three is not an ineffective assistance of  
2 counsel claim, these arguments are not directly relevant, but Petitioner may be asserting  
3 them to show that PCR counsel should have made the ground three arguments, that his  
4 failure to do so was ineffective, and that this ineffectiveness constitutes cause and  
5 prejudice sufficient to excuse the procedure default. Even so construed, they are  
6 unavailing.

7 The fact that Petitioner used a pellet gun and not a real firearm was abundantly  
8 clear at the sentencing hearing. Witnesses referred to the weapon as a “BB gun” or  
9 “pellet gun.” *See, e.g.*, Doc. 13-1 at 58. The presentence report referred to it as an “air  
10 gun.” *Id.* at 93. The Court clearly understood that it was not a firearm in the traditional  
11 sense. And the fact that it was also inoperable would have made little difference as it was  
12 the appearance of the weapon, not the fact that it was a pellet gun, that made Petitioner’s  
13 crime so serious. *Id.* at 47-79. Petitioner’s alleged lack of intent to place anyone in  
14 physical danger is inapposite because the charge was that Petitioner placed law  
15 enforcement and others “in reasonable apprehension of physical injury.” *Id.* at 3.  
16 Witnesses testified at the sentencing hearing that they thought Petitioner’s gun was an  
17 actual firearm and felt fear when he pointed it at them in the middle of a city street and  
18 refused to put it down when ordered to do so by law enforcement. *See, e.g., id.* at 57-59.  
19 Finally, Petitioner argues that counsel should have made clear that Petitioner was “under  
20 the influence not only of drugs, but alcohol.” Doc. 16 at 2. This fact was also clear at the  
21 sentencing. The presentence report noted that, at the time of the offense, Petitioner was  
22 holding a gun in his right hand and a beer in his left hand. Doc. 13-1 at 93. Given that  
23 these facts were known to the trial court at sentencing, and given the nature of the  
24 charges for which Petitioner was sentenced, Petitioner’s arguments do not provide a basis  
25 for concluding that PCR counsel was ineffective when he failed to assert that the sentence  
26 was excessive. Nor do they provide a basis for concluding that PCR counsel overlooked  
27 a substantial argument.<sup>3</sup>

---

28 <sup>3</sup> Petitioner’s citation to *State v. Fell*, 115 P.3d 594 (Ariz. 2005), where the

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**D. Conclusion.**

Petitioner does not object to Judge Burns’ recommendation on ground two and has procedurally defaulted his claims in grounds one and three. Petitioner has not shown cause and prejudice to excuse his procedural default. The Court will accept Judge Burns’ recommendation.

**IT IS ORDERED:**

1. Petitioner’s petition for writ of habeas corpus is **denied**.
2. A certificate of appealability and leave to proceed in forma pauperis on appeal are denied because Petitioner has not made a substantial showing of the denial of a constitutional right as required by 28 U.S.C. § 2253(c)(2).
3. The Clerk shall terminate this action.

Dated this 30th day of June, 2015.



---

David G. Campbell  
United States District Judge

---

Arizona Supreme Court reviewed Arizona’s non-capital, first degree murder sentencing scheme, appears to be inapposite. Petitioner does not explain this citation beyond stating that “Arizona statute[ ]s were clear at the time.” Doc. 16 at 2.