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7 **IN THE UNITED STATES DISTRICT COURT**
8 **FOR THE DISTRICT OF ARIZONA**
9

10 Rafael Martinez,

11 Petitioner,

12 v.

13 State of Arizona, et al.,

14 Respondents.
15

No. CV-14-01753-PHX-JAT

ORDER

16 Pending before the Court is Petitioner's Amended Petition for Writ of Habeas
17 Corpus (Doc. 7) ("Petition"). The Magistrate Judge to whom this case was assigned
18 issued a Report and Recommendation (Doc. 26) ("R&R"), recommending that this Court
19 deny the Petition. Petitioner has filed objections to the R&R. (Doc. 27). Respondent has
20 filed a Response to Petitioner's objections to the R&R, requesting this Court to overrule
21 Petitioner's objections and adopt the R&R. (Doc. 31).

22 **I. Review**

23 **A. Review of R&R**

24 This Court "may accept, reject, or modify, in whole or in part, the findings or
25 recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1). It is "clear that
26 the district judge must review the magistrate judge's findings and recommendations *de*
27 *novo if objection is made*, but not otherwise." *United States v. Reyna-Tapia*, 328 F.3d
28 1114, 1121 (9th Cir. 2003) (*en banc*) (emphasis in original); *Schmidt v. Johnstone*, 263

1 F.Supp.2d 1219, 1226 (D. Ariz. 2003) (“Following *Reyna-Tapia*, this Court concludes
2 that *de novo* review of factual and legal issues is required if objections are made, ‘but not
3 otherwise.’”); *Klamath Siskiyou Wildlands Ctr. v. U.S. Bureau of Land Mgmt.*, 589 F.3d
4 1027, 1032 (9th Cir. 2009) (the district court “must review *de novo* the portions of the
5 [Magistrate Judge’s] recommendations to which the parties object.”). District courts are
6 not required to conduct “any review at all . . . of *any issue* that is not the subject of an
7 objection.” *Thomas v. Arn*, 474 U.S. 140, 149 (1985) (emphasis added); *see also* 28
8 U.S.C. § 636(b)(1) (“the court shall make a *de novo* determination of those portions of
9 the [report and recommendation] to which objection is made.”). Thus, the Court will
10 review the portions of the R&R to which Petitioner objected *de novo*.

11 **B. Review of State Court Decisions**

12 The Petition in this case was filed under 28 U.S.C. § 2254 because Petitioner is
13 incarcerated based on a state conviction. With respect to any claims that Petitioner
14 exhausted before the state courts, under 28 U.S.C. §§ 2254(d)(1) and (2) this Court must
15 deny the Petition on those claims unless “a state court decision is contrary to, or involved
16 an unreasonable application of, clearly established Federal law”¹ or was based on an
17 unreasonable determination of the facts. *See Lockyer v. Andrade*, 538 U.S. 63, 71 (2003).
18 Further, this Court must presume the correctness of the state court’s factual findings
19 regarding a petitioner’s claims. 28 U.S.C. § 2254(e)(1); *Ortiz v. Stewart*, 149 F.3d 923,
20 936 (9th Cir. 1998). Additionally, “[a]n application for a writ of habeas corpus may be
21 denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies
22 available in the courts of the State.” 28 U.S.C. § 2254(b)(2).

23 **II. Factual Background**

24 At pages 1-4, the R&R recounts the factual and procedural background of this
25 case. Other than in the context of specific legal arguments discussed below, neither party
26 objects generally to this recounting; accordingly, the Court accepts and adopts it, with the

27 ¹ Further, in applying “Federal law” the state courts only need to act in
28 accordance with Supreme Court case law. *See Carey v. Musladin*, 549 U.S. 70, 74
(2006).

1 exception of the error in the R&R as to the date on which the Arizona Court of Appeals
2 affirmed Petitioner’s convictions and sentences on Petitioner’s direct appeal. (*See* R&R at
3 3). The R&R incorrectly states April 26, 2010. (*Id.*) The Court notes that the Arizona
4 Court of Appeals affirmed Petitioner’s convictions and sentences on August 26, 2010.
5 (Doc. 19-2, Ex. P, at 148).

6 **III. Petition**

7 The Petition in this case raises 12 claims (Doc. 7). The Court will address each
8 claim in turn, and will follow the numbering system used by the R&R.

9 **Claim 1**

10 In his first claim, Petitioner argues that “the trial court abused its discretion by
11 allowing [the] state to present evidence of Petitioner and co-defendant [communicating]
12 while in court”, thereby violating his due process rights. (Doc. 7 at 6). The R&R
13 concludes that because Petitioner has not “assert[ed] a federal claim,” and, accordingly,
14 has not exhausted state remedies, this first claim is procedurally defaulted. (Doc. 26 at 11,
15 31). Further, the R&R states that “Petitioner fails to establish that error, if any, had a
16 ‘substantial and injurious effect or influence in determining the jury’s verdict.’” (*Id.* at
17 12) (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993)). As a result, the R&R
18 concludes that habeas relief is precluded as to this first claim because “Petitioner cannot
19 demonstrate cause, let alone prejudice, for his default.” (Doc. 26 at 12).

20 Though Petitioner asks the Court, in his objection, “to reconsider this claim not
21 procedurally defaulted and consider this claim for what it is,” this does not dissuade this
22 Court from agreeing with the findings and conclusions in the R&R. (Doc. 27 at 3). The
23 Court agrees with the R&R’s conclusion that Petitioner “did not fairly present a federal
24 claim,” to the state courts, nor demonstrate cause and prejudice to excuse his default.
25 (Doc. 26 at 11–12). Further, the Court accepts and adopts the R&R’s merits finding that
26 the admission of the evidence of Petitioner and his co-defendant communicating was not
27 error. (*Id.* at 12). Accordingly, the Petitioner’s objections are overruled, the R&R is
28 accepted and adopted on Claim 1, and relief is denied on this claim.

1 **Claim 2**

2 The Petitioner’s second claim encompasses five separate sub-claims of ineffective
3 assistance of counsel. (Doc. 7 at 7). Petitioner contends that ineffective assistance of
4 counsel has resulted in the violation of his Sixth and Fourteenth amendment rights. (*Id.*)
5 Petitioner also alleges that, should these grounds be procedurally defaulted, this
6 ineffective assistance of counsel should excuse the default. (Doc. 24 at 17–18).

7 At pages 13–14, the R&R states the governing legal standard for evaluating
8 ineffective assistance of counsel claims established by the Supreme Court in *Strickland v.*
9 *Washington*, 466 U.S. 668 (1984). Neither party objects to the R&R’s statement of the
10 legal standard. Accordingly, the Court accepts and adopts it as the governing legal
11 standard for evaluating the Petitioner’s ineffective assistance of counsel claims. Further,
12 the Magistrate Judge considered each of the Petitioner’s ineffective assistance of counsel
13 claims on the merits in the R&R. (Doc. 26 at 13). Accordingly, this Court will also
14 examine the ineffective assistance of counsel claims on the merits.

15 **Failure to Examine Clothing for DNA Evidence**

16 In his first sub-claim, Petitioner argues that his trial counsel was ineffective for
17 failing to examine his clothing for DNA evidence. (Doc. 7 at 7). The R&R concludes
18 that Petitioner’s claim fails, as “Petitioner presents no evidence to establish this claim is
19 true,” nor has Petitioner set forth any “evidence to establish that DNA testing, if
20 conclusive, would have been more or less likely to inculcate or exculpate the Petitioner.”
21 (R&R at 14). Further, the R&R concludes that “Petitioner’s speculation regarding the
22 potential results of further DNA testing is insufficient to establish [that Petitioner
23 suffered] prejudice” as a result of his trial counsel’s deficient performance. (*Id.* at 14–
24 15). Accordingly, the R&R ascertains that Petitioner is not entitled to habeas relief on
25 this claim. (*Id.*)

26 In his objection, Petitioner argues that though “he cannot show which way the
27 DNA test will lead,” if the Court would “order a DNA test on the clothing . . . all can be
28 put to rest.” (Doc. 27 at 3). Notwithstanding his objection, Petitioner still fails to support

1 his claim, as he has not produced any evidence indicating his claim is true or that trial
2 counsel's failure to examine his clothing for DNA evidence "prejudiced [his] defense."
3 *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Further, the Court accepts and
4 adopts the R&R's findings on the merits as to this sub-claim. As a result, this objection
5 is overruled. Accordingly, the R&R is accepted as set forth above, and relief is denied on
6 this claim.

7 **Failure to Object to Reference of a Prior Trial**

8 In his second sub-claim, Petitioner argues that his trial counsel failed to "provide
9 [him] with the presumption of innocence when [a] witness testified Petitioner had [a]
10 previous trial" and counsel thereafter did not request a mistrial. (Doc. 7 at 7). The R&R
11 concludes that "Petitioner cannot demonstrate any due process violation as a result of
12 counsel's failure to request a mistrial, which would almost certainly have been denied
13 based upon a sole reference to a prior trial." (Doc. 26 at 16). Accordingly, Petitioner is
14 not entitled to habeas relief on this claim, as "Petitioner's claim fails because he cannot
15 establish there was prejudice." (*Id.* at 15–16).

16 Petitioner objects and argues that the "reference of . . . a previous trial can [a]ffect
17 the integrity of a trial." (Doc. 27 at 4). However, Petitioner fails to support this
18 speculative claim with evidence. Accordingly, for the reasons stated in the R&R (at 15–
19 16), this objection is overruled. The R&R is accepted and adopted as to this second sub-
20 claim, and habeas relief is denied on this claim.

21 **Improper Comments During Closing Argument**

22 In his third sub-claim, Petitioner alleges that his trial counsel was ineffective for
23 failing "to object to the prosecution's improper comments that some of the loci do match
24 that of the defendant" during closing argument. (Doc. 24 at 16). The R&R concludes that
25 counsel's failure to object to this statement was not ineffective. (Doc. 26 at 16). The
26 R&R further concludes that this statement by the Prosecutor was not improper as it was a
27 response to an argument by Petitioner, and because "counsel reminded the jurors that the
28 results were inconclusive." (*Id.*). Accordingly, the R&R ascertains that Petitioner is not

1 entitled to habeas relief on this claim. (*Id.*).

2 Petitioner maintains the allegations in this third sub-claim in his objection, again
3 arguing that the Prosecutor’s comments are improper. (Doc. 27 at 4). Petitioner further
4 objects on the grounds that the jury members are not experts in examining DNA. (*Id.*).
5 This objection is overruled, as fact-finding is the essential function of the jury. *See*
6 *Apprendi v. New Jersey*, 530 U.S. 466, 476–490 (2000). Further, the Court accepts and
7 adopts the R&R’s findings on the merits as to this sub-claim. Thus, the R&R is accepted
8 as specified above, and relief is denied on this claim.

9 **Failure to Interview Witnesses**

10 In his fourth sub-claim, Petitioner argues that trial counsel’s failure to interview
11 additional potential witnesses violated his “Sixth Amendment right to effective assistance
12 of counsel,” as these witnesses may have information about “what the suspects were
13 wearing, . . . what race they were,” and whether more than one person was running from
14 the scene of the crime. (Doc. 24 at 16–17). The R&R concludes that Petitioner’s claim
15 fails as he has not proven that counsel’s “failure to identify and interview additional
16 witnesses” establishes deficient performance under the standard established in *Strickland*
17 *v. Washington*, 466 U.S. 668 at 687. (R&R at 17). This Court agrees.

18 Objecting, Petitioner argues that counsel should have further investigated two
19 witnesses’ whose descriptions of the event (Doc. 27 at Ex. B) do not describe Petitioner.
20 (Doc. 27 at 5). The Court has reviewed the R&R’s conclusions on this theory and agrees
21 that Petitioner has failed to prove deficient performance by counsel, or prejudice, as to
22 this sub-claim. The Court further agrees with Respondent’s argument that “Petitioner
23 cannot show deficient performance because his counsel could have reasonably decided
24 not to interview or call these two witnesses as a matter of trial strategy.” (Doc. 31 at 5).
25 Accordingly, this objection is overruled, the R&R is accepted and adopted, and relief is
26 denied on this claim.

27 **Ineffective Assistance of Appellate and PCR Counsel**

28 In his fifth and final sub-claim, Petitioner asserts that, by failing to raise the

1 arguments included in his Petition, both appellate and post-conviction counsel were
2 ineffective. (Doc. 7 at 7). As the arguments included in his Petition were without merit,
3 the R&R concludes that “appellate and post-conviction counsel were not ineffective for
4 failing to raise them.” (R&R at 17). This Court agrees. In his objection, Petitioner fails
5 to produce any evidence supporting this allegation. (See Doc. 27 at 6). As a result, the
6 Court overrules this objection. The R&R is accepted and adopted as to this fifth sub-
7 claim, and relief is denied on this claim.

8 **Claim 3**

9 In his Third Claim, Petitioner alleges that by “knowingly presenting false
10 testimony” and by contradicting the State’s DNA expert, the Prosecutor committed
11 misconduct. (Doc. 7 at 8). As a result, Petitioner argues that the Prosecutor’s conduct
12 violated Petitioner’s Fourteenth Amendment right to due process of law. (*Id.*) This Third
13 Claim encompasses three separate sub-claims.

14 **False Testimony Claim regarding Petitioner’s Residence**

15 In the first sub-claim, Petitioner asserts that the Prosecutor knowingly elicited
16 false testimony from Officer Gutierrez that Petitioner lived in South Phoenix instead of
17 “Maryvale.” (Doc. 24 at 20–21). The R&R concludes that “Petitioner does not dispute
18 that the jurors knew Petitioner’s actual address, nor does he dispute that the officer [later]
19 agreed the address was north of ‘South Phoenix.’” (R&R at 18–19). Accordingly, the
20 R&R further concludes that Petitioner’s claim fails, as Petitioner has failed to show that
21 this testimony “had an injurious effect on the jury.” (R&R at 19). This Court agrees.
22 Petitioner has not objected to the R&R as to this specific sub-claim of his Third Claim.
23 As a result, the R&R is accepted and adopted as specified above, and habeas corpus relief
24 is denied as to this sub-claim.

25 **False Testimony Claim regarding the Possession of \$8.95**

26 In the second sub-claim, Petitioner asserts that the Prosecutor knowingly elicited
27 false testimony from Detective Ybarra that Petitioner did not “have any money at the
28 time of his arrest.” (Doc. 24 at 23). Petitioner alleges that this evidence would have

1 corroborated his defense that he had money for a bus ticket. (Doc. 24 at 26). The R&R
2 concludes that Detective Ybarra’s statement was, at most, inconsistent, as she agreed that
3 the booking records indicate Petitioner had this money when accepted at the country jail,
4 but “also stated that she did not believe the \$8.95 was Petitioner’s and instead testified
5 that \$8.95 was the amount on Perez’s person.” (R&R at 20). The R&R further concludes
6 that “Petitioner has not established that this testimony was false,” or that the testimony
7 had a substantial and injurious effect on the jury’s decision. (*Id.*)

8 In his objection to this claim, Petitioner requests an evidentiary hearing to examine
9 the “Good Year arrest report to show cause that the arrest and booking sheet is not Perez
10 and Martinez’s as Ms. Ybarra stated.” (Doc. 27 at 6). This objection is overruled because
11 the arrest report that Detective Ybarra examined during trial at the behest of the
12 Prosecutor does indicate Petitioner had \$8.95 when accepted at the jail. (R&R at 19) (*See*
13 *also* Doc. 24-1, Ex. B, at 23). Further, Detective Ybarra’s testimony was not false, as she
14 agreed that the arrest report indicates Petitioner had \$8.95 when booked at the county jail.
15 (*Id.*). Accordingly, the R&R is accepted and adopted, and habeas relief is denied as to
16 this sub-claim.

17 **Contradicting the State’s DNA Witness**

18 In the third sub-claim, Petitioner argues that the Prosecutor contradicted the DNA
19 expert when the Prosecutor stated that “some of the exhibits from the lab do match up
20 with the defendant.” (Doc. 24 at 29). The R&R concludes that this is the same argument
21 rejected above (in Claim 2, sub-claim 3). (R&R at 20). Petitioner concedes that this issue
22 was raised in Claim 2. (Doc. 27 at 7). Accordingly, the R&R is accepted and adopted,
23 and habeas relief is denied as to this sub-claim.

24 **Claim 4**

25 In his fourth claim, Petitioner asserts that the State violated his Fifth Amendment
26 guarantee against double jeopardy by convicting him of both Armed Robbery and Theft
27 of Means of Transportation. (Doc. 24 at 32). Though Petitioner alleges he presented this
28 issue in a direct appeal, the R&R notes that his claim in the Arizona Court of Appeals

1 was instead based upon a violation of A.R.S. § 13-116. (R&R at 21). The R&R
2 concludes that “to the extent Petitioner argues the sentence violated Arizona law, that
3 argument is not cognizable on habeas review.” (*Id.*). Further, Petitioner has failed to
4 show any cause to excuse the procedural default of any potential federal claim on this
5 issue. (*Id.*). Finally, the R&R concludes that this fourth claim is meritless, as the Arizona
6 Court of Appeals found that no double jeopardy violation occurred; the State may punish
7 separate offenses included within the same transaction, and here “the theft of cash from
8 the victim was separate from the theft of the vehicle.” (*Id.* at 22).

9 Petitioner objects that “[d]ouble jeopardy bars subsequent prosecutions of a single
10 act.” (Doc. 27 at 7). However, the R&R assumed a federal claim was exhausted for
11 purposes of determining whether this claim had merit, as indicated by its analysis of
12 Petitioner’s argument that a Theft of Means of Transportation is a “lesser-included
13 offense” of an Armed Robbery. (Doc. 26 at 20) (quoting Doc. 24 at 32). As a result, this
14 objection does not change the outcome of this case and is overruled. Accordingly, the
15 R&R is accepted and adopted as to Claim 4, and relief is denied on this claim.

16 **Claim 5**

17 Next, Petitioner claims that the trial court’s failure to apply a clear and convincing
18 evidence standard when determining whether Petitioner’s pretrial identification was
19 unduly prejudicial violated his rights to due process of law. (Doc. 24 at 32-33). The
20 R&R concludes that the “Arizona state court’s fact finding was not unreasonable” as the
21 pretrial identification by D.M. was neither unreliable nor impermissibly suggestive.
22 (R&R at 23-24). The R&R further concludes that this claim fails because the Arizona
23 Court of Appeals’ finding that no prejudice appears affirmatively in the record “was not
24 based on an unreasonable application of clearly established federal law or an
25 unreasonable determination of the facts.” (*Id.* at 25).

26 Petitioner objects and alleges that he has extensively argued each of the five
27 factors of *Biggers*.² (Doc. 27 at 9). However, this objection is overruled, as the R&R

28 ² *Neil v. Biggers*, 409 U.S. 188, 197 (1972).

1 extensively reviewed the Arizona state court’s *Biggers* finding under a totality of the
2 circumstances test, determining it was not unreasonable. (R&R at 22–25). Accordingly,
3 the R&R is accepted and adopted as to this claim, and relief is denied.

4 **Claim 6**

5 In his sixth claim, Petitioner argues that the trial court erred in denying Petitioner a
6 *Batson*³ challenge after the State struck a Hispanic juror, resulting in the violation of his
7 Fourteenth Amendment right to due process. (Doc. 24 at 38–39). Though “Petitioner
8 made a prima facie showing that the strike was based upon [the juror’s] race,” the
9 Prosecutor indicated that the juror was dismissed based upon his lack of a high school
10 degree (R&R at 26–27). The R&R concludes that a “lack of education is a non-
11 discriminatory reason for striking a juror.” (*Id.* at 27). The R&R further concludes that
12 Petitioner’s failure to demonstrate that the Prosecutor was purposefully discriminatory
13 towards this Hispanic juror indicates that “the [Arizona] court of appeal’s rejection of
14 Petitioner’s *Batson* claim was neither contrary to, nor an unreasonable application of,
15 clearly established federal law.” (*Id.*). Accordingly, this claim fails. (*Id.*).

16 In his objection, Petitioner repeats his contention that the Prosecutor’s strike was
17 discriminatory, contending that the juror may have had a GED instead of a high school
18 degree by drawing a parallel to his own lack of a high school degree. (Doc. 27 at 10).
19 The Court overrules this objection, as the R&R considered this counter-argument in its
20 determination that striking a juror because of a lack of education is race-neutral. (R&R at
21 27); *see also United States v. Martin*, 7 F.3d 679, 686–87 (7th Cir. 1993). Accordingly,
22 the R&R is accepted and adopted on this sixth claim, and habeas relief is denied on this
23 claim.

24 **Claim 7**

25 Petitioner next argues that he was unconstitutionally detained as the “investigatory
26 stop was not based on reasonable suspicion.” (Doc. 7 at 12). As a result, Petitioner
27 claims his Fourth Amendment rights were violated (Doc. 24 at 43). The R&R concludes

28 ³ *Batson v. Kentucky*, 476 U.S. 79 (1986).

1 that this claim is not cognizable, as Petitioner had the opportunity to litigate this Fourth
2 Amendment issue in both the Arizona trial court and Arizona Court of Appeals. (R&R at
3 27–28). Accordingly, this claim fails, as “federal habeas corpus relief may not lie for a
4 claim that evidence recovered through an illegal search or seizure was introduced at trial”
5 where that claim has been fully and fairly litigated, as here. (*Id.*).

6 The Petitioner has not raised any objection regarding this seventh claim (*See* Doc.
7 27). As a result, the R&R is accepted and adopted on Claim 7, and habeas relief is
8 denied as to this claim.

9 **Claim 8**

10 In his eighth claim in his Petition, Petitioner alleges that the imposition of the
11 consecutive sentence for the Theft of Means of Transportation conviction violates his due
12 process rights. (Doc. 7 at 13). Petitioner then asserts a violation of the Sixth Amendment
13 Confrontation Clause in his Reply, arguing that because the theft victim did not testify at
14 trial and because “the jury never decided” the theft charge beyond a reasonable doubt,
15 Petitioner did not have an opportunity to confront this witness. (Doc. 24 at 45–46) (*See*
16 U.S. CONST. amend. VI). First, the R&R concludes that the consecutive sentences
17 claim raised in the Petition is the same as Petitioner’s fourth claim, and is procedurally
18 defaulted. (R&R at 29). The Court accepts and adopts the R&R as to this theory.
19 Second, the R&R concludes that because the confrontation claim was not raised in his
20 Petition, this claim is waived, as “a reply ‘is not the proper pleading to raise additional
21 grounds for relief’ in a habeas proceeding.” (*Id.*) (quoting *Cacoperdo v. Demosthenes*, 37
22 F.3d 504, 507 (1994)). Alternatively, on the merits, the R&R concludes that Petitioner’s
23 Confrontation Clause claim also fails as “the testimony of the victim was sufficient” to
24 prove the Theft of Means of Transportation violation and “the victim was subject to
25 cross-examination during trial.” (R&R at 29). This Court agrees.

26 Petitioner’s objection asserts, as in his Reply (Doc. 24 at 45–48), that his Sixth and
27 Fourteenth Amendment rights were violated because the Theft of Means of
28 Transportation conviction was based on the state trial court’s finding that there was “a

1 separate victim in this case, [] a separate owner of the vehicle” whom Petitioner claims he
2 did not have the opportunity to confront. (Doc. 27 at 10–11). However, the R&R found,
3 on the merits, that the victim, Deane Maki, testified in the state trial court that the co-
4 defendant pointed a handgun at him and told him to “[g]et out of the cab.” (Doc. 26 at 29)
5 (quoting Doc. 19-5, Ex. MMM, at 178–79). This same victim also testified that he saw
6 the Petitioner “slide into the driver’s seat” after the co-defendant told the victim to get out
7 of the taxicab. (*Id.* at 180). The Court accepts and adopts the R&R’s findings on the
8 merits as to this sub-claim.

9 Petitioner’s claim is also meritless, as the transcript of the state trial court
10 proceedings indicates that Petitioner’s counsel, Mr. Winchell, did, in fact, have the
11 opportunity to cross-examine this victim. (*See* Doc. 19-5, Ex. MMM, at 36, 201–229).
12 Further, the transcript of the state trial court proceedings illustrates that Petitioner’s
13 counsel had the opportunity to cross-examine each additional witness called by the
14 Prosecutor. (*See* Doc. 19-6, Ex. NNN, at 20, 46, 67, 102, 124; Ex. OOO, at 152, 177,
15 195, 215, 227) (Doc. 19-7, Ex. PPP at 5; Ex. QQQ at 137). Accordingly, Petitioner’s
16 objection that he did not have the opportunity to confront the victim is without merit.
17 This Court also notes that the witnesses called by the Prosecutor, with the exception of
18 the victim, Deane Maki, are not civilians, but, rather, are testifying in their capacity as
19 law enforcement and corrections personnel.

20 Additionally, this Court examined the jury instructions and notes that the trial
21 court instructed the jury that the State has the burden of proving the Petitioner guilty
22 beyond a reasonable doubt. (Doc. 19-7 at 49–50). As the Petitioner has not presented any
23 evidence that the jury never decided the theft charge beyond a reasonable doubt,
24 Petitioner’s objection is overruled. After examining the state trial court record
25 thoroughly, this Court also finds that Petitioner’s objection that the Theft of Means of
26 Transportation conviction was based on a separate victim or separate owner of the
27 vehicle has no merit as Petitioner has presented no evidence supporting these allegations
28 nor does the record indicate these allegations are true. Accordingly, Petitioner’s

1 objections are overruled. The R&R is accepted and adopted on Claim 8, and habeas
2 relief is denied as to this claim.

3 **Claim 9**

4 In his Ninth Claim, Petitioner argues that “improper consideration in determining
5 sentencing” resulted in the violation of his Fourteenth Amendment right to due process.
6 (Doc. 7 at 14). Petitioner expands in his Reply that the presentence report “was
7 inaccurate in its criminal history as “it double[d] the Defendant’s guilty plea as though he
8 pleaded guilty to two armed robberies back in ’02,” and because Petitioner “was never
9 convicted for two separate victims” in the present case. (Doc. 24 at 48). The R&R
10 concludes that the imposition of the aggravated sentence neither violates Petitioner’s due
11 process rights nor is unwarranted as it was imposed based upon the findings that
12 “Petitioner was on parole at the time of the offense, . . . Petitioner had ‘a prior felony
13 conviction’, [there was] threat of serious physical injury, the presence of an accomplice,
14 and the commission of the offense for pecuniary gain.” (R&R at 29–30). The R&R
15 further concludes that the “record does not support” Petitioner’s conclusory allegation
16 “that the court double counted his prior felony conviction.” (*Id.* at 30). Accordingly, this
17 Ninth Claim fails. (*Id.*)

18 The Petitioner has not raised any objection regarding this Ninth claim (*See* Doc.
19 27). As this Court agrees with the R&R, the R&R is accepted and adopted on Claim 9.
20 Habeas relief is denied as to this claim.

21 **Claim 10**

22 In his Tenth Claim, Petitioner alleges that the state of Arizona “retaliated against
23 Petitioner for exercising [his] right to trial” in violation of his Fourteenth Amendment
24 due process rights. (Doc. 7 at 15). Petitioner elaborates in his Reply, stating that “the fact
25 that the Petitioner went through two separate trials which resulted in hung jury mistrials
26 created the inference that the prosecution wanted to punish the Petitioner by increasing
27 the Petitioner’s sentence. . . .” (Doc. 24 at 50). The R&R concludes that Petitioner’s
28 allegation of “an inference of vindictiveness based upon errors and multiple trials” is

1 meritless as it is not supported by the record. (R&R at 30). Accordingly, the R&R
2 concludes that habeas corpus relief cannot be granted as to this disparity in sentencing
3 claim as Petitioner does not present any grounds implicating the federal Constitution.
4 (*Id.*). This Court agrees.

5 Though Petitioner’s objection again asserts that his continuous trials were
6 retaliatory (Doc. 27 at 11–12), this objection is overruled, as Petitioner fails to provide
7 any evidence to support this allegation of vindictiveness. Accordingly, this Court accepts
8 and adopts the R&R as to this Tenth Claim, and habeas relief is denied as to this claim.

9 **Claim 11**

10 Petitioner next claims a due process violation as a result of the trial court’s refusal
11 to permit “Petitioner to present to the jury the newly discovered evidence” that he
12 possessed \$8.95 at the time of the offense; Petitioner alleges that this evidence would
13 have corroborated his defense that the money was for a bus ticket. (Doc. 24 at 51–52).
14 The R&R concludes that this new evidence, the receipt from the jail, is “at best
15 cumulative”, and “the jurors were aware of at least one jail record.” (R&R at 31). The
16 R&R further concludes that Petitioner’s claim is meritless as he cannot prove that the trial
17 court’s error had a ‘substantial and injurious effect or influence in determining the jury’s
18 verdict.’” (*Id.*) (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993)). Accordingly,
19 the R&R recommends that habeas relief be denied as to this claim. (*Id.* at 31).

20 Petitioner’s objection again asserts that the witness’s testimony regarding the
21 \$8.95 was “false.” (Doc. 27 at 12). This objection is overruled, as Petitioner fails to
22 establish that this testimony was injurious or prejudicial. Accordingly, the R&R is
23 accepted and adopted on Claim 11, and habeas relief is denied as to this claim.

24 **Claim 12**

25 In his Twelfth and final claim, Petitioner alleges that he was denied the
26 presumption of innocence “after the State’s leading witness stated that [he] had a
27 previous trial. . . .” (Doc. 24 at 54). The R&R concludes that this claim is identical to the
28 claim rejected above (here, at Ground 2, sub-claim 2 regarding failure to object to

1 reference to a prior trial). (R&R at 31). Petitioner concedes in his Objections that this
2 Claim is discussed in Claim 2. (Doc. 27 at 12). This Court agrees with the R&R.
3 Accordingly, the R&R is accepted and adopted on Claim 12 and habeas corpus relief is
4 denied as to this claim.

5 **IV. Motion for Evidentiary Hearing**

6 Though Petitioner has not filed a formal Motion for Evidentiary Hearing, he
7 requests in his Petition that the Court “grant a new trial or re-sentencing.” (Doc. 7 at 19).
8 The R&R concludes that no evidentiary hearing is needed as “[t]he record is sufficiently
9 developed.” (R&R at 31). This Court agrees.

10 In his objection, Petitioner asserts that “an evidentiary hearing should be granted.”
11 (Doc. 27 at 13). This Court overrules this objection, as Petitioner’s Petition (Doc. 7) and
12 Objections (Doc. 27) have failed to provide any indication that the record is insufficient.
13 (R&R at 31). In his objection, Petitioner also asks the Court to reevaluate the evidence,
14 and has attached Exhibits. (Doc. 27 at 13). Notably, in regard to the potential witnesses
15 identified by Petitioner in Exhibit B to his Objections (discussed above in Claim 2, sub-
16 claim 4), the Court notes that Petitioner may not use an evidentiary hearing merely to
17 determine if these two witnesses have potentially favorable testimony. *See United States*
18 *v. Fuentes*, 2009 WL 4730733, *5 (D. Ariz. Dec. 7, 2009) *aff’d United States v. Fuentes*,
19 457 Fed.Appx 687 (9th Cir. 2011) (“Petitioner is not entitled to an evidentiary hearing as
20 a fishing expedition to see if any of these individuals might have helpful testimony.”).
21 Accordingly, the Petitioner’s request for an evidentiary hearing is denied.

22 **V. Conclusion**

23 Based on the foregoing,

24 **IT IS ORDERED** that the Motion for Evidentiary Hearing (Doc. 27 at 13) is
25 denied.

26 **IT IS FURTHER ORDERED** that the Report and Recommendation (Doc. 26) is
27 accepted as specified above; the objections of Petitioner (Doc. 27) are overruled as
28 specified above; the Petition is denied, with prejudice, and the Clerk of the Court shall

1 enter judgment accordingly.

2 **IT IS FINALLY ORDERED** that, in the event Petitioner files a notice of appeal,
3 a Certificate of Appealability is denied because the Petition is barred by a plain
4 procedural bar and jurists of reason would not find this Court's procedural decision
5 debatable or wrong; further, Petitioner has failed to make a substantial showing of the
6 denial of a constitutional right.

7 Dated this 16th day of June, 2016.

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