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NOT FOR PUBLICATION

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Duane Martin Shepherd,
Petitioner,
vs.
Charles L. Ryan, et al.,
Respondents.

) No. CV09-8137-PCT-SRB

) **ORDER**

_____)

On August 24, 2009, Petitioner Duane Martin Shepherd filed his Petition for Writ of Habeas Corpus raising two claims. Petitioner alleges that the trial court violated his Fourteenth Amendment right to due process when it refused to permit him to withdraw from his plea agreement and that he was denied a meaningful right of appellate review in violation of his constitutional rights. Respondents filed their answer to the Petition on April 22, 2010. Thereafter, Petitioner filed his reply on June 14, 2010.

On August 5, 2010 the Magistrate Judge issued his Report and Recommendation recommending that the Petition for Writ of Habeas Corpus be denied. The Report and Recommendation concluded that Petitioner had failed to raise either claim before the state court as a federal or constitutional claim and was therefore procedurally barred from federal habeas corpus review. As to Petitioner's first claim, the Magistrate Judge also concluded that Petitioner failed to demonstrate that a refusal to consider his claim would result in a

1 fundamental miscarriage of justice. A fundamental miscarriage of justice occurs when a
2 constitutional violation has probably resulted in the conviction of one who is actually
3 innocent. The Magistrate Judge alternatively considered the merits of this claim and
4 concluded that even if Plaintiff's claim were considered he was not denied any right to due
5 process in connection with the entry of his guilty plea. As to Plaintiff's second claim, the
6 Magistrate Judge concluded that if its merits were reached there was no evidence that the
7 state court did not consider the merits of his claim and there is no federal constitutional right
8 to direct appeal or collateral review of convictions and sentencings.

9 Petitioner timely filed written objections to the Report and Recommendation. In his
10 written objections he does not contest his procedural default but argues that he has
11 demonstrated actual innocence because the record establishes that he did not commit an
12 aggravated assault against a police officer. Petitioner's guilty plea to the amended charge of
13 Aggravated Assault with a Deadly Weapon or Dangerous Instrument was a guilty plea with
14 respect to the victim Lucia Cardella not the police officer. He has made no claim of actual
15 innocence of aggravated assault with a deadly weapon as to Lucia Cardella or of burglary of
16 Lucia Cardella's residence. Petitioner has failed to object to the Report and Recommendation
17 with respect to the denial of his second claim.

18 With respect to the claim of actual innocence, the Court finds that it is without merit.
19 There is no question that the Petitioner has procedurally defaulted on this claim by failing
20 to raise any federal constitutional claim before the state court. A claim that he may have
21 been innocent of aggravated assault against a police officer is irrelevant to his conviction for
22 aggravated assault of Lucia Cardella. The Court agrees with the Magistrate Judge that if this
23 claim could be considered on the merits it is without merit for the reasons expressed by the
24 Magistrate Judge in the Report and Recommendation.

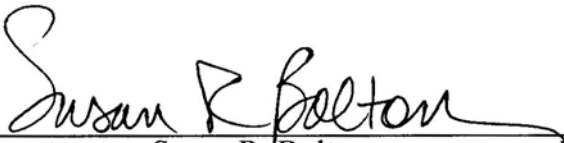
25 IT IS ORDERED overruling Petitioner's objections to the Magistrate Judge's Report
26 and Recommendation.

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IT IS FURTHER ORDERED adopting the Report and Recommendation of the Magistrate Judge as the order of this Court.

IT IS FURTHER ORDERED denying Petitioner's Petition for Writ of Habeas Corpus.

DATED this 23rd day of September, 2010.



Susan R. Bolton
United States District Judge