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

9 Thintinus Noseth Taylor,

10 Petitioner,

11 v.

12 United States of America,

13 Respondent.
14

No. CV-21-00681-PHX-ROS (JZB)

REPORT & RECOMMENDATION

15
16 TO THE HONORABLE ROSLYN O. SILVER, SENIOR UNITED STATES
17 DISTRICT JUDGE:

18 Petitioner Thintinus Noseth Taylor (“Movant”) has filed a Motion to Vacate, Set
19 Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255. (Doc. 1, “Motion.”)¹

20 **I. Summary of Conclusion.**

21 Movant was convicted at trial for unlawful possession of firearms and ammunition.
22 The Ninth Circuit affirmed his conviction on direct appeal, and the Supreme Court denied
23 certiorari. Movant timely filed the instant Motion, which asserts eight grounds for relief.
24 Movant is not entitled to relief on any of these grounds because they are procedurally
25 defaulted without excuse or without merit. Accordingly, the Court recommends the Motion
26 be denied and dismissed with prejudice for the reasons detailed in this Report &
27 Recommendation.

28 ¹ In this Report, “Doc.” refers to the docket in the present civil case; “CR Doc.” refers to the docket in the underlying criminal case, CR-16-01377-ROS-2.

II. Background.

On June 6, 2017, Movant was charged with unlawful possession of firearms and ammunition in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2).² (CR Doc. 66 at 2–3.) The predicate offenses consisted of Movant’s convictions for transporting marijuana for sale, carrying a handgun without a license, and possession of cocaine and a firearm. (*Id.* at 2.) On November 3, 2017 and April 9, 2018, respectively, Movant was convicted at trial and sentenced to 83 months in prison followed by 36 months of supervised release. (CR Docs. 294, 332.)

On April 9, 2018, Movant filed a notice of appeal. (CR Doc. 333.) On appeal, Movant challenged his conviction on three grounds: (1) insufficient evidence that he knowingly possessed the firearms and ammunition; (2) abuse of discretion by the Court in allowing presentation of certain text messages and photographs at trial; and (3) prosecutorial misconduct due to the prosecution’s reference to him as a “felon” at trial. (9th Cir. No. 18-10129, Appellant’s Opening Br., Doc. 16; CR Doc. 333.) On December 29, 2019, the Ninth Circuit affirmed. *United States v. Taylor*, 789 F. App’x. 52 (9th Cir. 2019).

On June 29, 2020, the Supreme Court denied certiorari. *Taylor v. United States*, 141 S. Ct. 177 (2020).

III. Movant’s Motion to Vacate, Set Aside, or Correct Sentence.

On April 19, 2021, Movant timely filed his Motion.³ (Doc. 1.) As summarized by the Court in its May 6, 2021 Service Order and as stated in the Motion and supplements thereto,⁴ Movant asserts eight grounds for relief:

² Movant was also charged with possessing an unregistered firearm, which was dismissed prior to trial. (CR Doc. 66 at 2; CR Doc. 166.) The indictment also charged Movant’s wife, whose case was severed prior to trial, with aiding and abetting Movant’s unlawful possession and making false statements. (CR Doc. 66 at 2–4; CR Doc. 257.)

³ In general, a § 2255 motion must be filed within one year of the date the conviction became final. 28 U.S.C. § 2255(f)(1). The instant Motion, filed April 19, 2021, is timely because it was filed within one year of the Supreme Court’s denial of certiorari on June 29, 2020. *See Clay v. United States*, 537 U.S. 522, 527 (2003) (a conviction is “final” for purposes of § 2255 when the Supreme Court has denied a petition for a writ of certiorari).

⁴ Initially, the Motion raised six grounds for relief. (Doc. 1.) On April 26, 2021, Movant filed a supplement adding Ground Seven. (Doc. 3.) Shortly after the issuance of the Service Order, Movant filed a second supplement amending Ground Seven and adding Ground Eight. (Docs. 5-1, 5-2.) The Court will consider all eight grounds and the government’s response to each. (*See* Doc. 10 at 4–5, 23 n.16.)

1 In Ground One, Movant asserts a claim for ineffective assistance of counsel
2 based on counsel's failure to file a suppression motion.

3 In Ground Two, Movant alleges the government lacked jurisdiction.

4 In Ground Three, Movant alleges there was insufficient evidence to sustain
5 the conviction in violation of the Fifth and Sixth Amendments.

6 In Ground Four, Movant asserts counsel was ineffective for failing to
7 challenge the allegedly defective indictment and lack of jurisdiction in
8 violation of the Fifth and Sixth Amendments.

9 Movant also includes as Grounds Five and Six, "Truth Affidavits."

10 [In Ground Seven,] Movant asserts violations . . . of the Fifth and Sixth
11 Amendments alleging the indictment was defective and that he received
12 ineffective assistance of counsel.

13 [In Ground Eight, Movant asserts actual innocence.]

14 (Doc. 4 at 1–2; *see* Docs. 1, 3, 5-1, 5-2.) On July 7, 2021, the government filed a response
15 arguing that the Motion should be denied because all eight grounds are either procedurally
16 defaulted or without merit. (Doc. 10.) On August 9, 2021, Movant filed a reply. (Doc. 24.)

17 **IV. Legal Standard.**

18 A federal prisoner may seek release on the ground that his sentence was "imposed
19 in violation of the Constitution or laws of the United States" or "in excess of the maximum
20 authorized by law" or that "the court was without jurisdiction to impose such sentence."
21 28 U.S.C. § 2255(a). To obtain review of a claim in a § 2255 motion, the movant must
22 have raised the claim on appeal, otherwise the claim is procedurally defaulted unless the
23 movant can show either cause and prejudice or actual innocence. *Bousley v. United States*,
24 523 U.S. 614, 622 (1998); *United States v. Braswell*, 501 F.3d 1147, 1149 (9th Cir. 2007).

25 **V. Analysis.**

26 **A. Ground One.**

27 In Ground One, Movant claims his counsel was ineffective for failing to move for
28 suppression of evidence discovered in his home after execution of a search warrant on the
basis that law enforcement unlawfully detained him during the search.⁵ (Doc. 1 at 6–7.)

⁵ Movant had moved for suppression of this evidence on the basis that the warrant authorizing the search was invalid. (CR Docs. 85, 87.) The Court denied this motion and determined the warrant was valid and supported by probable cause. (CR Doc. 194.)

1 “When the Sixth Amendment ineffective assistance of counsel claim is rooted in defense
2 counsel’s failure to litigate a Fourth Amendment issue, as it is here, petitioner must show
3 that (1) the overlooked motion to suppress would have been meritorious and (2) there is a
4 reasonable probability that the jury would have reached a different verdict absent the
5 introduction of the unlawful evidence.” *Ortiz-Sandoval v. Clarke*, 323 F.3d 1165, 1170
6 (9th Cir. 2003). Movant is not entitled to relief on Ground One because he fails to show
7 that a motion to suppress on such grounds would have been meritorious because (1) his
8 detention during the search was not unlawful and (2) he fails to show a causal connection
9 between his allegedly unlawful detention and the discovery of the evidence he wanted to
10 suppress.

11 **1. Lawfulness of Detention.**

12 “The Fourth Amendment is not . . . a guarantee against *all* searches and seizures,
13 but only against *unreasonable* searches and seizures.” *United States v. Sharpe*, 470 U.S.
14 675, 682 (1985). “[A] warrant to search for contraband [or evidence] founded on probable
15 cause implicitly carries with it the limited authority to detain the occupants of the premises
16 while a proper search is conducted.” *Michigan v. Summers*, 452 U.S. 692, 705 (1981); *see*
17 *Dawson v. City of Seattle*, 435 F.3d 1054, 1066 (9th Cir. 2006) (extending this rule to all
18 searches supported by probable cause). “An officer’s authority to detain incident to a search
19 is categorical; it does not depend on the ‘quantum of proof justifying detention or the extent
20 of the intrusion to be imposed by the seizure.’” *Muehler v. Mena*, 544 U.S. 93, 98 (2005)
21 (quoting *Summers*, 452 U.S. at 705 n.19). Only individuals within “the immediate vicinity
22 of the premises to be searched” may be detained pursuant to this authority. *Bailey v. United*
23 *States*, 568 U.S. 186, 199 (2013).

24 Here, law enforcement had authority to detain Movant during the search because he
25 was present at the home at the time of the search. *Summers*, 452 U.S. at 705. Movant agrees
26 his “initial seizure and detention was lawful” but alleges it transformed into an unlawful
27 “arrest” when law enforcement handcuffed him and placed him in a police vehicle parked
28 in front of his house. (Doc. 24 at 1; Doc. 1 at 5.)

1 Movant’s arguments are unavailing. “Inherent in [the authority] to detain an
 2 occupant of the place to be searched is the authority to use reasonable force to effectuate
 3 the detention.” *Mena*, 544 U.S. at 98–99. Given the inherent danger of the weapons and
 4 ammunition that law enforcement was tasked with recovering from Movant’s home, it was
 5 not unreasonable for law enforcement to place Movant in handcuffs and inside a police
 6 vehicle outside of the home while they searched for these items and other evidence. *See id.*
 7 at 100 (“[The] safety risk inherent in executing a search warrant for weapons [is] sufficient
 8 to justify the use of handcuffs.”); *Halvorsen v. Baird*, 146 F.3d 680, 685 (9th Cir. 1998)
 9 (“Moving a suspect from one location to another does not automatically turn a detention
 10 into an arrest, where reasons of safety and security justify moving the person.”); *see also*
 11 *Florida v. Royer*, 460 U.S. 491, 504–05 (1983) (“[T]here are undoubtedly reasons of safety
 12 and security that would justify moving a suspect from one location to another during an
 13 investigatory detention, such as from an airport concourse to a more private area.”).
 14 Because the measures law enforcement used to effectuate the detention of Movant were
 15 reasonable under the circumstances, the detention was not unconstitutional.

16 **2. Causal Connection Between Detention and Evidence.**

17 Even *if* Movant’s detention during the search had exceeded what is permissible
 18 under the Fourth Amendment, a motion to suppress the evidence obtained during the search
 19 would not have been meritorious for lack of a causal connection between the detention and
 20 the discovery of the evidence. “Suppression [of evidence] is not justified unless the
 21 evidence is in some sense the product of illegal governmental activity.” *United States v.*
 22 *Pulliam*, 405 F.3d 782, 786 (9th Cir. 2005) (cleaned up). For evidence to be excluded as
 23 such, the illegal governmental activity must have been “the ‘but for’ cause of the discovery
 24 of the evidence.” *Id.* (citation omitted). Here, Movant does not allege or point to any
 25 evidence suggesting that law enforcement searched his home *because* of his detention, or
 26 anything he said or did during it. Rather, law enforcement searched his home because a
 27 valid warrant authorized them to do so. The evidence discovered in the home was therefore
 28 the fruit of a lawful search rather than Movant’s allegedly unlawful detention. Thus, even

1 if Movant could succeed in showing his detention during the search was unlawful, such an
 2 illegality would not be sufficient grounds for suppression of the evidence because it “did
 3 not contribute or lead to” the discovery of the evidence he wanted to suppress. *Id.* at 791.

4 **3. Conclusion.**

5 A motion to suppress the evidence discovered during the search of Movant’s home
 6 on the basis that Movant had been unlawfully detained during the search would not have
 7 been meritorious for the reasons discussed above. As such, Movant fails to show that
 8 counsel was ineffective for failing to move for suppression of the evidence on such
 9 grounds. *Ortiz-Sandoval*, 323 F.3d at 1170; *see also Sexton v. Cozner*, 679 F.3d 1150, 1157
 10 (9th Cir. 2012) (“Counsel is not necessarily ineffective for failing to raise even a
 11 nonfrivolous claim, so clearly we cannot hold counsel ineffective for failing to raise a claim
 12 that is meritless.”). Accordingly, the Court recommends Ground One be dismissed for lack
 13 of merit.

14 **B. Ground Two.**

15 In Ground Two, Movant claims the interstate commerce element of 18 U.S.C.
 16 § 922(g) was neither sufficiently alleged in the indictment nor proven by sufficient
 17 evidence at trial.⁶ (Doc. 1 at 8–9.) Movant alleges the government “simply asserted and
 18 proved [the] firearms and/or ammunition w[ere] manufactured in a different state or
 19 territory than where they were found,” which was “irrelevant” and “[in]sufficient to prove
 20 an allegation of ‘possessing’ and/or ‘receiving’ in interstate commerce.” (*Id.* at 9.) As a
 21 result, Movant alleges the Court lacked jurisdiction over the case and the government
 22 lacked standing to prosecute him. (*Id.*)

23 Petitioner did not raise this claim on appeal. The failure to raise an issue on direct
 24 appeal ordinarily constitutes a procedural default and precludes a defendant’s ability to
 25 raise that issue for the first time in a § 2255 motion. *See United States v. Frady*, 456 U.S.
 26 152, 167–68 (1982) (the Court has “long and consistently affirmed that a collateral

27 ⁶ Under 18 U.S.C. § 922(g)(1), it is “unlawful for any person [convicted of a felony] to
 28 ship or transport in interstate or foreign commerce, or possess in or affecting commerce,
 any firearm or ammunition; or to receive any firearm or ammunition which has been
 shipped or transported in interstate or foreign commerce.”

challenge may not do service for an appeal”). When a defendant has procedurally defaulted a claim by failing to raise it on direct review, the claim may be raised in habeas only if the defendant can first demonstrate “cause” and actual “prejudice,” or that he is “actually innocent.” *Bousley*, 523 U.S. at 622. Petitioner offers no excuse to establish cause and prejudice for the failure to address the claim on direct appeal. Petitioner did not address the issue in his Traverse. (Doc. 24.) Petitioner could have brought a claim on direct appeal attacking the sufficiency of the evidence regarding interstate commerce, but he did not do so. Petitioner’s claim is procedurally defaulted. *See United States v. Braswell*, 501 F.3d 1147, 1150 (9th Cir. 2007) (failure to challenge “adequacy of his indictment on direct appeal” resulted in procedural default of claim).

For the reasons explained below, the assertions of Ground Two are also without merit.⁷

1. Sufficiency of the Indictment & Evidence at Trial.

The indictment and the evidence at trial sufficiently alleged and proved, respectively, the interstate commerce element of 18 U.S.C. § 922(g). To satisfy this element, “the government need only show a minimal nexus that the firearm [or ammunition] had been, at some time, in interstate commerce.” *United States v. Paopao*, 469 F.3d 760, 768 (9th Cir. 2006) (cleaned up); *see United States v. Sherbondy*, 865 F.2d 996, 999 (9th Cir. 1988) (“[T]he government need only prove that the gun had at one time crossed state lines.”).

Here, the indictment alleged that the unlawfully possessed firearms and ammunition “had been previously shipped and transported in interstate and foreign commerce.” (CR Doc. 66 at 3.) The government proved this allegation at trial through the testimony of an “interstate nexus expert” who testified that all of the firearms and ammunition had been

⁷ As an initial matter, contrary to Movant’s assertion, a deficiency in the indictment or in the evidence at trial does not deprive a federal court of jurisdiction over a federal criminal prosecution. *See United States v. Cotton*, 535 U.S. 625, 630 (2002) (“[D]efects in an indictment do not deprive a court of its power to adjudicate a case.”); *United States v. Ratigan*, 351 F.3d 957, 964 (9th Cir. 2003) (“[A]ny challenge claiming that the government failed to prove at trial [an] essential element does not thereby undermine the court’s subject-matter jurisdiction, or its power to hear the case.”).

1 manufactured outside of Arizona—in some cases, outside of the United States—which
 2 necessarily meant that, at some point in time, they had crossed state or international lines
 3 prior to their discovery in Movant’s home in Arizona. (CR Doc. 355 at 69–70, 75–84.)
 4 Through this testimony, the government established the “minimal nexus” required to prove
 5 the interstate commerce element of 18 U.S.C. § 922(g). *See Paopao*, 469 F.3d at 768;
 6 *Sherbondy*, 865 F.2d at 999 (finding minimal nexus established where the gun had been
 7 manufactured in one state and possessed by the defendant in another). Contrary to
 8 Movant’s assertions, the government did not need to show anything more to prove this
 9 element.

10 **2. Jurisdiction & the Government’s Authority to Prosecute.**

11 Movant previously challenged the Court’s jurisdiction and the government’s
 12 authority to prosecute him in his October 3, 2017 motion to dismiss the indictment. (*See*
 13 CR Doc. 212 at 10–17.) On October 18, 2017, the Court denied this motion and concluded
 14 (1) it had subject-matter jurisdiction over the case pursuant to 28 U.S.C. § 1331 and 18
 15 U.S.C. § 3231; (2) it had personal jurisdiction over Movant because he was “arrested in
 16 Arizona for federal crimes allegedly committed in Arizona, and made [his] initial
 17 appearance . . . in this Court”; and (3) the government—specifically, the United States
 18 Attorney for the District of Arizona—had authority to prosecute Movant for the federal
 19 crimes charged in the indictment pursuant to 28 U.S.C. § 547. (CR Doc. 234 at 3–4.)

20 Nothing asserted in the present Motion compels the Court to reach a different
 21 conclusion with respect to these issues here. As such, for the reasons discussed above and
 22 in the Court’s October 18, 2017 Order (*id.*), the Court affirms its prior determination that
 23 it had subject-matter jurisdiction over Movant’s criminal prosecution and personal
 24 jurisdiction over Movant and that the government had authority to prosecute Movant for
 25 the federal crimes charged in the indictment.

26 **3. Conclusion.**

27 Because the claims of Ground Two are also without merit as explained above, the
 28 Court recommends Ground Two be dismissed due to procedural default and for lack of

1 merit.

2 **C. Ground Three.**

3 In Ground Three, Movant again claims the interstate commerce element of 18
4 U.S.C. § 922(g) was neither sufficiently alleged in the indictment nor proven by sufficient
5 evidence at trial. (Doc. 1 at 10–11.) Movant appears to argue that although his wife
6 purchased firearms/ammunition in interstate commerce, there were insufficient allegations
7 and evidence that he constructively possessed weapons/ammunition in interstate
8 commerce. Movant states it “is a proven fact that Mia Taylor purchased firearms in
9 interstate commerce.” (Doc. 1 at 10.) But he argues “constructive possession of
10 firearms/ammunition . . . purchased in intrastate commerce does not amount to an actual
11 act of ‘possessing’ or ‘receiving’ ‘in interstate or foreign commerce.’” (*Id.*) Additionally,
12 Movant claims his counsel was ineffective for failing to raise these alleged defects. (*Id.* at
13 11.)

14 As explained in Ground Two, this claim was not brought on direct appeal is
15 procedurally defaulted without excuse. Also, the indictment and the evidence at trial
16 sufficiently alleged and proved, respectively, the interstate commerce element of 18 U.S.C.
17 § 922(g). Movant’s assertions in Ground Three to the contrary are therefore without merit
18 for the reasons explained in Ground Two. Because the assertions of Ground Three are
19 meritless, Movant’s counsel was not ineffective for failing to raise them. *See Sexton*, 679
20 F.3d at 1157 (“[W]e cannot hold counsel ineffective for failing to raise a claim that is
21 meritless.”).

22 Accordingly, the Court recommends Ground Three be dismissed for lack of merit.

23 **D. Ground Four.**

24 In Ground Four, Movant asserts the indictment was defective because it “lacked
25 necessary allegations of criminal intent” regarding knowledge of “prohibited possessor
26 status” and knowingly engaging in interstate commerce. (Doc 1 at 12.) Movant further
27 argues his counsel was ineffective for failing to raise these alleged defects at trial. (*Id.* at
28 13–14.)

Movant did not raise a challenge to the indictment on direct appeal. (*See* CR 16-1377, Doc. 373.) Movant’s indictment challenges are procedurally defaulted. *Fraday*, 456 U.S. 152. “To challenge a conviction in a § 2255 proceeding based upon a claim of error that could have been raised on direct appeal but was not, a defendant must demonstrate both cause to excuse the procedural default, as well as actual prejudice resulting from that error.” *United States v. Seng Chen Yong*, 926 F.3d 582, 590 (9th Cir. 2019). Movant does not argue cause and prejudice to excuse the procedural default of the claim, except to argue that counsel provided ineffective assistance by failing to raise the claim. The Court will review Movant’s ineffective assistance of counsel claim. *United States v. Ratigan*, 351 F.3d 957, 964–65 (9th Cir. 2003) (“Constitutionally ineffective assistance of counsel constitutes cause sufficient to excuse a procedural default.”) (citing *Murray v. Carrier*, 477 U.S. 478, 488 (1986)).

To prevail on a claim of ineffective assistance of counsel, Movant must satisfy a two-prong test, demonstrating: (1) deficient performance, such that counsel’s actions were outside the wide range of professionally competent assistance, and (2) that Movant was prejudiced by reason of counsel’s actions. *See Strickland v. Washington*, 466 U.S. 668, 686-90. (1984). “Failure to satisfy either prong of the Strickland test obviates the need to consider the other.” *Rios v. Rocha*, 299 F.3d 796, 805 (9th Cir. 2002).

1. Deficient Indictment – Knowing of Prohibited Possessor Status.

Movant asserts “the indictment is deficient” because it did not allege he had “criminal intent” of “acting knowingly or willingly” as “the government must prove for a 922(g) conviction.” (Doc. 1 at 12–14.) He asserts the indictment “lacked necessary allegation of criminal intent with regard to knowingly being of prohibited possessor status.” (*Id.* at 12.) (internal quotations omitted). He argues “the failure to include the element of ‘willfulness or knowingly’ renders an indictment constitutionally defective.” The Court will assume Movant has raised a claim under *Rehaif v. United States*, 139 S. Ct. 2191 (2019) (“We conclude that in a prosecution under 18 U.S.C. § 922(g) and § 924(a)(2), the Government must prove both that the defendant knew he possessed a firearm and that he

1 knew he belonged to the relevant category of persons barred from possessing a firearm.”).
2 The Court is required to construe Movant’s pro se pleading liberally. *See, e.g., Hughes v.*
3 *Rowe*, 449 U.S. 5, 9 (1980) (“It is settled law that the allegations of [pro se] complaint[s],
4 however inartfully pleaded, are held to less stringent standards than formal pleadings
5 drafted by lawyers.” (quotations omitted)); *United States v. Qazi*, 975 F.3d 989, 994 (9th
6 Cir. 2020) (finding defendant’s pro se § 922(g) motion was sufficient to invoke *Rehaif*
7 where it alleged the indictment “failed to include a necessary element of the offense at
8 issue”).

9 Movant fails to demonstrate cause to excuse the procedural default of this claim. At
10 the time of Movant’s trial in 2017, then-binding Ninth Circuit authority did not require
11 proof Movant knew he was in a category of persons barred from possessing a weapon. *See,*
12 *e.g., United States v. Miller*, 105 F.3d 552, 555 (9th Cir. 1997) (“We agree with the
13 decisions from other circuits that the § 924(a) knowledge requirement applies only to the
14 possession element of § 922(g)(1), not to the interstate nexus or to felon status.”). Counsel
15 did not provide ineffective assistance by failing to anticipate the decision in *Rehaif*. *See*
16 *Lowry v. Lewis*, 21 F. 3d 344, 346 (9th Cir. 1994) (“Lowry’s lawyer cannot be required to
17 anticipate our decision in this later case, because his conduct must be evaluated for
18 purposes of the performance standard of *Strickland* as of the time of counsel’s conduct.”)
19 (quotation and citation omitted).

20 Movant also does not prove prejudice because he fails to demonstrate that there is a
21 reasonable probability that, but for counsel’s unprofessional errors, the result of the
22 proceedings would have been different. *Strickland* at 694–95. Movant had multiple felony
23 convictions for which he was exposed to more than one year of imprisonment. In 2014,
24 Movant was convicted in the Arizona Superior Court of Transporting Marijuana for Sale
25 (CR Doc. 326-6), which carried a minimum sentence of two years in prison as a Class 3
26 felony. (CR Doc. 326-e at 2.) Movant was on probation for that offense when he committed
27 his § 922(g) offense. (CR Doc. 322 at 11.) In 2004, Movant was also sentenced to four
28 years of imprisonment (two years suspended) for Possession of Cocaine and Firearm. (CR

Doc. 322 at 8.) In 2010, Movant was convicted of Carrying a Handgun without a License, for which he was sentenced to “two years of imprisonment, served on community corrections home detention.” (CR Doc. 322 at 10.) Movant fails to argue or prove the outcome of the case would have been different if the prosecution had to prove this added element. *See, e.g., Greer v. United States*, 141 S. Ct. 2090, 2098 (2021) (“Importantly, on appeal, neither Greer nor Gary has argued or made a representation that they would have presented evidence at trial that they did not in fact know they were felons when they possessed firearms. Therefore, Greer cannot show that, but for the *Rehaif* error in the jury instructions, there is a reasonable probability that a jury would have acquitted him.”)⁸; *United States v. Hessiani*, 786 Fed. App’x. 658, 661 (9th Cir. 2019) (denying *Rehaif* claim “because the record before the jury established that Hessiani knew he had previously been convicted in California and sentenced to imprisonment for more than one year when he possessed a firearm, the error did not affect Hessiani’s substantial rights or seriously affect the fairness, integrity, or public reputation of the judicial proceedings.”)⁹; *United States v. Johnson*, 979 F.3d 632, 639 (9th Cir. 2020) (“Johnson cannot plausibly argue that a jury . . . would find that he was unaware of his status as someone previously convicted of an offense punishable by more than a year in prison. After all, he had in fact already served three prior prison sentences exceeding one year.”); *United States v. Martinez*, 811 Fed. App’x. 396, 400 (9th Cir. 2020) (finding that “the short period of time [five years] between Martinez’s conviction and his possession of the firearm is strong evidence that he knew of the conviction at the time of possession”).

2. Knowingly Possessing a Firearm in Interstate Commerce.

Movant argues the prosecution failed to prove he knowingly possessed a firearm or ammunition in interstate commerce. Petitioner admits that it “is a proven fact that Mia Taylor purchased firearms in interstate commerce.” (Doc. 1 at 10.) Movant does not dispute

⁸ In *Greer*, the Supreme Court also held that “when an appellate court conducts plain-error review of a *Rehaif* instructional error, the court can examine relevant and reliable information from the entire record—including information contained in a pre-sentence report.” *See* 141 S. Ct. at 2098.

⁹ The proof required to overcome procedural default imposes a “significantly higher hurdle” than the plain error standard applied in *Hessiani*. *See Frady*, 456 U.S. at 166.

1 that the weapons previously traveled in interstate or foreign commerce. The Court
 2 concludes he is arguing the prosecution was required to prove he possessed a weapon in
 3 interstate commerce. Movant provides no authority for this claim. As discussed in Ground
 4 Two, Movant's claim fails. "Section 922(g)'s requirement that the firearm have been, at
 5 some time, in interstate commerce is sufficient to establish its constitutionality under the
 6 Commerce Clause." *United States v. Hanna*, 55 F.3d 1456, 1462 n.2 (9th Cir. 1995)
 7 (quoting *Scarborough v. United States*, 431 U.S. 563, 575 (1977)). *See also United States*
 8 *v. Montano*, 2022 WL 72353, at *2 (9th Cir. 2022) (finding evidence that the "gun was
 9 manufactured in California, later reported stolen in Nevada, and ultimately found in
 10 Montano's possession in California" was sufficient to sustain § 922(g)(1) conviction). The
 11 prosecution was required to prove a firearm or ammunition was shipped or transported in
 12 interstate commerce. Movant does not deny this fact was proven. Counsel did not provide
 13 ineffective assistance of counsel by failing to bring Movant's claim.

14 For the reasons explained under Ground Eight, Movant also fails to establish actual
 15 innocence. Petitioner's challenges to the Indictment are procedurally defaulted without
 16 excuse.

17 **E. Grounds Five & Six.**

18 Grounds Five and Six are presented as "Truth Affidavits" in which Movant claims
 19 that he (and/or his alleged alter-ego)¹⁰ did not consent to the laws of the United States and
 20 is therefore not subject to them. (Doc. 1 at 15–22.) Specifically, Movant claims, *inter alia*,
 21 he "never knowingly, willingly and voluntarily waived unalienable rights as an American
 22 national citizen"; "is not subject to corporate code" of the United States; and is neither
 23 "property" nor a "14th Amendment citizen" of the United States and "any presumed
 24 agreement" between him and the United States suggesting otherwise "is undisclosed,
 25 unconscionable, and thereby null and void"; "false"; or non-existent. (*Id.* at 15–16, 18–20.)
 26 As a result, Movant argues that his conviction must be vacated and his case dismissed due

27
 28 ¹⁰ Movant alleges that "Taylor, Thintinus N., *sui juris*," is a "living soul" and "trustee" of
 "Thintinus Noseth Taylor BTO, EIN#: 85-6731778, an unincorporated business trust."
 (Doc. 1 at 18–19.)

1 to a lack of subject-matter jurisdiction and/or a lack of personal jurisdiction. (*Id.* at 16.)

2 Movant is not entitled to relief on Grounds Five and Six because, as explained in
3 Ground Two, *supra*, the Court had subject-matter jurisdiction over Movant’s criminal
4 prosecution and personal jurisdiction over Movant and the government had authority to
5 prosecute him. Movant’s assertions of individual sovereignty and self-identity as an
6 “unincorporated business trust” as patently frivolous and without any legal support or
7 validity in American law. *See, e.g., United States v. Studley*, 783 F.2d 934, 937 & n.3 (9th
8 Cir. 1986) (“Studley contends that she is not a ‘taxpayer’ because she is an absolute,
9 freeborn and natural individual. This argument is frivolous.”); *United States v. Benabe*, 654
10 F.3d 753, 767 (7th Cir. 2011) (“We have repeatedly rejected . . . theories of individual
11 sovereignty, immunity from prosecution, and their ilk.”).

12 Accordingly, the Court recommends Grounds Five and Six be dismissed for lack of
13 merit.

14 **F. Ground Seven.**

15 In Ground Seven, Movant claims his counsel was ineffective for failing to ensure
16 the jury was properly instructed on the “implicit elements” of 18 U.S.C. § 922(g) and that
17 the omission of these “elements” from the jury instructions rendered the instructions
18 “overly broad” which constructively amended the indictment. (Doc. 5-1 at 1–4.) Movant’s
19 claim is procedurally defaulted because he did not raise this claim on direct appeal. Movant
20 fails to establish cause and prejudice to excuse the procedural default of this claim.

21 Movant is not entitled to relief on Ground Seven because the “elements” allegedly
22 missing from the jury instructions were not elements the government had to allege or prove
23 to convict Movant under 18 U.S.C. § 922(g). Rather, the alleged “elements” consist of
24 various facts Movant believes the government had to allege and establish in order to satisfy
25 the interstate commerce element of 18 U.S.C. § 922(g). However, as explained in Ground
26 Two, the *only* showing the government had to make to satisfy the interstate commerce
27 element was that the firearms and ammunition had some “minimal nexus” with interstate
28 or foreign commerce at some point in time. *Paopao*, 469 F.3d at 768. As further explained

1 in Ground Two, the government made the requisite showing by establishing at trial that the
 2 firearms and ammunition had crossed states lines. Contrary to Movant’s assertions in
 3 Grounds Two, Three, and Seven, the government did not have to show anything more with
 4 respect to interstate commerce in order to convict him. For instance, the government did
 5 not have to show that *Movant* engaged in interstate or foreign commerce.

6 Therefore, because none of the “elements” allegedly omitted from the jury
 7 instructions were elements the government had to prove, counsel was not ineffective for
 8 failing to ensure they were included in the jury instructions. *See Sexton*, 679 F.3d at 1157
 9 (“[W]e cannot hold counsel ineffective for failing to raise a claim that is meritless.”).
 10 Accordingly, the Court recommends Ground Seven be dismissed for lack of merit.

11 **G. Ground Eight.**

12 In Ground Eight, Movant claims he is actually innocent because none of his prior
 13 convictions are proper predicates under 18 U.S.C. § 922(g)(1) in light of *United States v.*
 14 *McAdory*, 935 F.3d 838 (9th Cir. 2019) (holding that a predicate felony under § 922(g)(1)
 15 must have “actually exposed” defendant to a sentence greater than one year of
 16 imprisonment) and *United States v. Valencia-Mendoza*, 912 F.3d 1215 (9th Cir. 2019),
 17 which were decided during the pendency of his appeal. (Doc. 5-2.) “One way a petitioner
 18 can demonstrate actual innocence is to show in light of subsequent case law that he cannot,
 19 as a legal matter, have committed the alleged crime.” *Vosgien v. Persson*, 742 F.3d 1131,
 20 1134 (9th Cir. 2014). To establish actual innocence, Movant must prove “that it is more
 21 likely than not that no reasonable juror would have found petitioner guilty beyond a
 22 reasonable doubt.” *Schlup v. Delo*, 513 U.S. 298, 327 (1995).

23 In the Ninth Circuit, at the time of Movant’s conviction in late 2017, whether a prior
 24 conviction was “punishable” by more than one year in prison—and therefore a predicate
 25 offense under § 922(g)(1)—was determined solely by reference to the maximum sentence
 26 defined by the applicable statute. *See, e.g., United States v. Murillo*, 422 F.3d 1152, 1155
 27 (9th Cir. 2005), *overruled by Valencia-Mendoza*, 912 F.3d at 1222. However, during the
 28 pendency of Movant’s appeal in early 2019, the Ninth Circuit overruled its prior cases

1 holding such and held that “when determining whether an offense is ‘punishable’ by a
 2 certain term of imprisonment” a court must consider “a crime’s statutory elements *and*
 3 sentencing factors.” *Valencia-Mendoza*, 912 F.3d at 1224. A few months later, the Ninth
 4 Circuit extended this holding to prosecutions under § 922(g)(1) and held that whether a
 5 prior conviction was “punishable” by more than one year in prison depends on whether the
 6 defendant was “actually exposed” to more than one year in prison based on the state’s
 7 mandatory sentencing scheme and any written findings of the sentencing court. *McAdory*,
 8 935 F.3d at 843–44.

9 Movant is not entitled to relief on Ground Eight because he fails to prove actual
 10 innocence. Notwithstanding the intervening changes in circuit law, at least one of Movant’s
 11 prior convictions remains a proper predicate under § 922(g)(1). As noted above, in 2014,
 12 Movant was convicted in Arizona Superior Court for transporting marijuana for sale (CR
 13 Doc. 326-6), which carried a minimum sentence of two years in prison as a Class 3 felony.
 14 (CR Doc. 326-e at 2.) Movant was also sentenced to four years of imprisonment (two years
 15 suspended) in 2004 for Possession of Cocaine and Firearm. (CR Doc. 322 at 8.) Because
 16 these convictions “actually exposed” Movant to more than one year in prison, each
 17 qualified as a predicate offense under § 922(g)(1). *McAdory*, 935 F.3d at 844. Movant
 18 therefore fails to show he is actually innocent as a matter of law.

19 Accordingly, the Court recommends Ground Eight be dismissed for lack of merit.

20 **H. Motion for Summary Judgment.**

21 On July 27, 2021, Movant filed a Motion for Summary Judgment. (Doc. 18.)
 22 Movant argues that numerous claims and facts presented in his Motion are undisputed by
 23 the Government. (Doc. 18 at 2-5.) He asserts that because there is no “genuine issue of
 24 material fact” he is entitled to a judgment as a matter of law. (*Id.* at 5.) Here, the United
 25 States responded to the Motion (and Two Supplements) pursuant to the Court’s scheduling
 26 Order. (Doc. 4.) The Court’s January 11, 2022 order affirmed this point. (Doc. 30.) Because
 27 Movant’s motion is procedurally defaulted or meritless, Movant’s request for summary
 28 judgment should be denied. *See Kornfeld v. Puentes*, No. 1:19-cv-00263-JLT-HC, 2019

1 WL 1004578, at *1 (E.D. Cal. Mar. 1, 2019) (“For all practical purposes, summary
 2 judgment is equivalent to the Court's making a determination on the merits of a habeas
 3 petition.”); *United States v. Carlos*, No. CR-05-0252-PHX-NVW, 2009 WL 414015, at *4
 4 (D. Ariz. Feb. 18, 2009) (order adopting report and recommendation and denying as moot
 5 motion for summary judgment where court addressed claims through ruling on § 2255
 6 motion).

7 **VI. Conclusion.**

8 All eight grounds asserted within the Motion are procedurally defaulted or without
 9 merit for the reasons explained in this Report & Recommendation. Accordingly, the Court
 10 will recommend that the Motion be denied and dismissed with prejudice. Because the
 11 record is sufficiently developed, the Court does not find an evidentiary hearing necessary
 12 for resolution of the Motion. *See Rhoades v. Henry*, 638 F.3d 1027, 1041 (9th Cir. 2011).

13 **VII. Certificate of Appealability.**

14 “The district court must issue or deny a certificate of appealability when it enters a
 15 final order adverse to the applicant.” Rule 11(a), Rules Governing Section 2255
 16 Proceedings, 28 U.S.C. § 2255. The district court may issue a certificate of appealability
 17 “only if the applicant has made a substantial showing of the denial of a constitutional right.”
 18 28 U.S.C. § 2253(c)(2). “A petitioner satisfies this standard by demonstrating that jurists
 19 of reason could disagree with the district court’s resolution of his constitutional claims or
 20 that jurists could conclude the issues presented are adequate to deserve encouragement to
 21 proceed further.” *Miller–El v. Cockrell*, 537 U.S. 322, 327 (2003).

22 Movant has not made the requisite showing here. Accordingly, the Court will
 23 recommend that a certificate of appealability be denied.

24 **IT IS THEREFORE RECOMMENDED** that the Motion to Vacate, Set Aside or
 25 Correct Sentence (doc. 1) be **denied** and **dismissed with prejudice**.

26 **IT IS FURTHER RECOMMENDED** that the Motion for Summary Judgment
 27 (doc. 18) be **denied**.

28 **IT IS FURTHER RECOMMENDED** that a certificate of appealability be **denied**.

1 This recommendation is not an order that is immediately appealable to the Ninth
2 Circuit Court of Appeals. Any notice of appeal pursuant to Fed. R. App. P. 4(a)(1) should
3 not be filed until entry of the District Court's judgment. The parties shall have 14 days
4 from the date of service of a copy of this recommendation within which to file specific
5 written objections with the Court. *See* 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 6, 72.
6 Thereafter, the parties have 14 days within which to file a response to the objections.

7 Failure to file timely objections to the Magistrate Judge's Report and
8 Recommendation may result in the acceptance of the Report and Recommendation by the
9 District Court without further review. *See United States v. Reyna-Tapia*, 328 F.3d 1114,
10 1121 (9th Cir. 2003). Failure to file timely objections to any factual determinations of the
11 Magistrate Judge may be considered a waiver of a party's right to appellate review of the
12 findings of fact in an order or judgment entered pursuant to the Magistrate Judge's
13 recommendation. *See* Fed. R. Civ. P. 72.

14 Dated this 13th day of January, 2022.

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16 
17 Honorable John Z. Boyle
18 United States Magistrate Judge
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