IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Michael Anthony Jefferson,

Petitioner,

v.

Charles L. Ryan, *et al.*,

Respondents.

No. CV-17-04197-PHX-JJT (ESW)

ORDER

At issue is the Report and Recommendation (Doc. 22) ("R&R") submitted by United States Magistrate Judge Eileen S. Willett in this matter recommending that the Court deny and dismiss with prejudice the Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 (Doc. 1). Petitioner has filed timely Objections to the R&R (Doc. 24), as well as an Application for Certificate of Appealability from the District Court (Doc. 25). Upon consideration of all of the above, the Court will overrule the Objections, adopt the R&R and dismiss the Petition.

Judge Willett's R&R thoroughly and exhaustively analyzed each of the five bases on which Petitioner claimed ineffective assistance of his former counsel in the underlying matter, and correctly concluded that none of those five claims met the standard for ineffective assistance set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). For the reasons set forth in abundant detail in the R&R, Judge Willett correctly concludes that in none of the five instances argued does Petitioner satisfy either prong of *Strickland*: there is no showing of either objectively deficient performance by counsel or prejudice. Indeed in

Grounds Four and Five, Petitioner's proffered courses of action all would have been outright futile. To wit: the fruits of a search that Petitioner had to consent to as a condition of probation (Ground Four) cannot as a matter of law be suppressed as unconstitutionally obtained. Similarly, it is hornbook law that jail calls (Ground Five) are not testimonial in nature and therefore their introduction into evidence at trial does not violate the confrontation clause. Moreover, Judge Willett correctly concluded that the state court's own application of the *Strickland* standard was not unreasonable.

Petitioner's Objections merely re-argue precisely what he stated in his Petition. They raise nothing that calls into question Judge Willett's reasoning. And they similarly ignore the law set forth in the R&R. Accordingly,

IT IS ORDERED overruling the Objections (Doc. 24) and adopting in whole the R&R (Doc. 22).

IT IS FURTHER ORDERED denying and dismissing with prejudice the Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 (Doc. 1). The Clerk of Court shall enter judgment accordingly and close this matter.

IT IS FURTHER ORDERED denying Petitioner's Application for Certificate of Appealability (Doc. 25) and leave to proceed *in forma pauperis* in this matter. Petitioner has not made a substantial showing of the denial of a constitutional right in his claims for relief.

Dated this 8th day of March, 2019.

Honorable John J. Tuchi
United States District Judge

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JUDGMENT IN A CIVIL CASE

Decision by Court. This action came for consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED adopting the Report and Recommendation of the Magistrate Judge as the order of this Court. Petitioner's Petition for Writ of Habeas Corpus pursuant to 28 U. S. C. § 2254 is denied and this action is hereby dismissed with prejudice.

Brian D. Karth
District Court Executive/Clerk of Court

March 8, 2019

By s/ L. Dixon
Deputy Clerk

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REPORT AND RECOMMENDATION

TO THE HONORABLE JOHN J. TUCHI, UNITED STATES DISTRICT COURT JUDGE:

Pending before the Court is Michael Anthony Jefferson's ("Petitioner")"Petition Under 28 U.S.C. § 2254 for Writ of Habeas Corpus" (Doc. 1) (the "Petition"). After reviewing the parties' briefing (Docs. 1, 9, 14), the undersigned finds that Petitioner's habeas claims are without merit. It is therefore recommended that the Court dismiss the Petition (Doc. 1) with prejudice.

I. BACKGROUND

On July 13, 2010, the State of Arizona filed a criminal complaint against Petitioner charging him with the following counts: (i) illegal control of an enterprise, a class 3 felony (Count 1); (ii) money laundering in the first degree, a class 2 felony (Count 2); (iii) three counts of aggravated taking identity of another, a class 3 felony (Counts 3,

4, and 6); (iv) fraudulent schemes and artifices, a class 2 felony (Count 5); and (v) trafficking in the identity of another, a class 2 felony (Count 7). (Doc. 9-1 at 4-7). On August 16, 2010, the State filed an information charging Petitioner with those same crimes. (*Id.* at 12-15). Petitioner's convictions arise out of fraudulent charges made in 2006 and 2007 to a number of financial accounts by an entity named "Diamond Dice Records" that Petitioner controlled. (*See, e.g.*, Doc. 9-1 at 102-11, 119-31, 143-49, 151-79, 201-07, 208-13; Doc. 9-3 at 6-13).

Following trial, a jury found Petitioner guilty as charged. (Doc. 9-6 at 131-33). The trial court sentenced Petitioner to 11.25 years each on Counts 1, 3, 4, and 6 and 15.75 years each on Counts 2, 5, and 7. (Doc. 9-7 at 70-73). The sentences for Counts 1 through 6 run concurrently; the sentence on Count 7 runs consecutively to those sentences. (*Id.* at 74). The Arizona Court of Appeals affirmed Petitioner's convictions and sentences. (*Id.* at 171-74).

After his direct appeal, Petitioner filed a Notice of Post-Conviction Relief ("PCR"). (Doc. 9-8 at 15-68). The trial court dismissed the PCR proceeding on December 2015. (*Id.* at 105). Petitioner sought further review by the Arizona Court of Appeals, which affirmed the trial court's ruling on October 31, 2017. (*Id.* at 112). Petitioner did not seek further review by the Arizona Supreme Court. (*Id.* at 117).

On November 13, 2017, Petitioner initiated this federal habeas proceeding (Doc. 1). Petitioner raises five claims for habeas relief. Respondents do not assert that Petitioner's habeas claims are unexhausted or procedurally defaulted. However, as explained below, all claims are meritless.

II. LEGAL STANDARDS

In reviewing the merits of a habeas claim, the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA") requires federal courts to defer to the last reasoned state court decision. *Woods v. Sinclair*, 764 F.3d 1109, 1120 (9th Cir. 2014); *Henry v. Ryan*,720 F.3d 1073, 1078 (9th Cir. 2013). To be entitled to relief, a state prisoner must show that the state court's adjudication of his or her claims either:

> 1. resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> 2. resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d)(1), (2); *see also, e.g., Woods*, 764 F.3d at 1120; *Parker v. Matthews*, 132 S. Ct. 2148, 2151 (2010); *Harrington v. Richter*,562 U.S. 86, 99 (2011).

As to relief under 28 U.S.C. § 2254(d)(1), "clearly established federal law" refers to the holdings of the U.S. Supreme Court's decisions applicable at the time of the relevant state court decision. *Carey v. Musladin*, 549 U.S. 70, 74 (2006); *Thaler v. Haynes*, 559 U.S. 43, 47 (2010). A state court decision is "contrary to" such clearly established federal law if the state court (i) "applies a rule that contradicts the governing law set forth in [U.S. Supreme Court] cases" or (ii) "confronts a set of facts that are materially indistinguishable from a decision of the [U.S. Supreme Court] and nevertheless arrives at a result different from [U.S. Supreme Court] precedent." *Price v. Vincent*, 538 U.S. 634, 640 (2003) (quoting *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000)).

As to relief under 28 U.S.C. § 2254(d)(2), factual determinations by state courts are presumed correct unless the petitioner can show by clear and convincing evidence to the contrary. 28 U.S.C. § 2254(e)(1); *see also Stanley v. Cullen*, 633 F.3d 852, 859 (9th Cir. 2011). A state court decision "based on a factual determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state-court proceeding." *Davis v. Woodford*, 384 F.3d 628, 638 (9th Cir. 2004) (as amended) (internal quotation marks and citation omitted).

The Petition raises five ineffective assistance of counsel claims. The "clearly established federal law" for an ineffective assistance of counsel claim is the two-part test articulated in *Strickland v. Washington*, 466 U.S. 668 (1984). Under *Strickland*, a petitioner arguing an ineffective assistance of counsel claim must establish that his or her

counsel's performance was (i) objectively deficient and (ii) prejudiced the petitioner. *Strickland*, 466 U.S. at 687. This is a deferential standard, and "[s]urmounting *Strickland's* high bar is never an easy task." *Clark v. Arnold*, 769 F.3d 711, 725 (9th Cir. 2014) (quoting *Padilla v. Kentucky*, 559 U.S. 356, 371 (2010)).

In assessing the performance factor of *Strickland's* two-part test, judicial review "must be highly deferential" and the court must try not "to second-guess counsel's assistance after conviction." *Clark*, 769 F.3d at 725 (internal quotation marks and citation omitted). To be constitutionally deficient, counsel's representation must fall below an objective standard of reasonableness such that it was outside the range of competence demanded of attorneys in criminal cases. *Id.* A reviewing court considers "whether there is any reasonable argument" that counsel was effective. *Rogovich v. Ryan*,694 F.3d 1094, 1105 (9th Cir. 2012).

To establish the prejudice factor of *Strickland's* two-part test, a petitioner must demonstrate a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. In other words, it must be shown that the "likelihood of a different result [is] substantial, not just conceivable." *Richter*, 562 U.S. at 112.

Although the performance factor is listed first in *Strickland's* two-part test, a court may consider the prejudice factor first. In addition, a court need not consider both factors if the court determines that a petitioner has failed to meet one factor. *Strickland*, 466 U.S. at 697 ("If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed."); *LaGrand v. Stewart*, 133 F.3d 1253, 1270 (9th Cir. 1998) (a court need not look at both deficiency and prejudice if the habeas petitioner cannot establish one or the other).

Finally, on federal habeas review, the "pivotal question is whether the state court's application of the *Strickland* standard was unreasonable." *Richter*, 131 S.Ct. at 785. And "it is the habeas applicant's burden to show that the state court applied *Strickland* to the

facts of his case in an objectively unreasonable manner." *Woodford v. Visciotti*, 537 U.S. 19, 25 (2002) (per curium). "Relief is warranted only if no reasonable jurist could disagree that the state court erred." *Murray v. Schriro*, 746 F.3d 418, 465-66 (9th Cir. 2014) (internal quotation marks and citation omitted).

III. ANALYSIS

A. Ground One

In Ground One, Petitioner alleges that his trial counsel was constitutionally ineffective for "failing to file a motion to dismiss the case due to a 5 ½ year prejudicial pre-accusation delay[.]" (Doc. 1 at 6). In his Reply (Doc. 14 at 9), Petitioner incorrectly asserts that there was a "5 year delay lag between [Petitioner's] charge and arrest[.]" Although the criminal complaint and information charged Petitioner with crimes committed in 2006 and 2007, they were not filed until 2010. (Doc. 9-1 at 4-15). Because the Sixth Amendment right to a speedy trial does not attach until a suspect is formally charged or arrested, the speedy trial inquiry does not apply in analyzing the delay between the date of Petitioner's crimes and the date Petitioner was charged.[1] *Doggett v. United States*, 505 U.S. 647, 651-52 (1992); *United States v. Marion*, 404 U.S. 307, 321 (1971) ("Invocation of the speedy trial provision thus need not await indictment, information, or other formal charge. But we decline to extend that reach of the amendment to the period prior to arrest.").

As the Supreme Court has explained, "statutes of limitations, which provide predictable, legislatively enacted limits on prosecutorial delay, provide 'the primary guarantee, against bringing overly stale criminal charges.'" *United States v. Lovasco*, 431 U.S. 783, 789 (1977) (quoting *Marion*, 404 U.S. at 322). Yet the "[d]elay prior to arrest or indictment may give rise to a claim of denial of due process." *United States v. Kidd*, 734 F.2d 409, 412 (9th Cir. 1984) (citing *Lovasco*, 431 U.S. at 788-89). To

[1] Petitioner's trial commenced in October 2011. (Doc. 9-1 at 61). To the extent Petitioner argues that his counsel was ineffective for failing to present a speedy trial claim, Respondents correctly explain that such a claim is without merit. (Doc. 9 at 15-16).

succeed on a claim that preindictment or preinformation delay denied a defendant's due process rights, a defendant must first prove that the delay caused actual, non-speculative prejudice to his defense. *United States v. Huntley*, 976 F.2d 1287, 1290 (9th Cir. 1992). Reliance "solely on the real possibility of prejudice inherent in any extended delay," such as "that memories will dim, witnesses become inaccessible, and evidence be lost," are possibilities not in themselves adequate to show that a defendant could not receive a fair trial due to preindictment or preinformation delay. *Marion*, 404 U.S. at 325-26. "Thus *Marion* makes clear that proof of prejudice is generally a necessary but not sufficient element of a due process claim, and that the due process inquiry must consider the reasons for the delay as well as the prejudice to the accused." *Lovasco*, 431 U.S. at 790. "[T]he length of the delay, when balanced against the reason for the delay, must offend those 'fundamental conceptions of justice which lie at the base of our civil and political institutions.'" *Huntley*, 976 F.2d at 1290 (citations omitted).

In support of Ground One, Petitioner contends that the "delay in this case was so prejudicial that the State used fake fabricated witnesses to bolster their case; witnesses who had nothing to do with this case." (Doc. 1 at 14). Petitioner supports this contention by making the following bare citation to the record: "See October 12, 2011 RT pg 52 Id at 1-17 + pg 53. See also October 19, 2011 Rt pg 55, 56 Id 13-14, also October 24, 2011 RT pg 11." (*Id.*). Petitioner's conclusory assertion followed by bare citations to the trial transcripts is insufficient to support habeas relief. *See Mayle v. Felix*, 545 U.S. 644, 656 (2005) (noting that Rule 2(c) "demand[s] that habeas petitioners plead with particularity"); *James v. Borg*, 24 F.3d 20, 26 (9th Cir. 1994) ("Conclusory allegations which are not supported by a statement of specific facts do not warrant habeas relief."). Moreover, the Court must give the Arizona Court of Appeals' decision deference under AEDPA. A federal habeas court "may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather that application must also be unreasonable." *Williams*, 529 U.S. at 411; *Lockyer v. Andrade*, 538 U.S. 63, 75

(2003) (explaining that it is "not enough that a federal habeas court, in its independent review of the legal question, is left with a 'firm conviction' that the state court was 'erroneous'"). The undersigned has reviewed the transcripts and does not find any support for the contention that the State called witnesses who were "fake" or "fabricated." The portions of the record cited by Petitioner are discussed below.

As Respondents correctly explain, Petitioner's first citation to the record refers to the October 12, 2011 testimony of Joann Cota, the Director of Business Services for the Arizona Secretary of State. (Doc. 9 at 13; Doc. 9-1 at 101). Ms. Cota testified that the tradename Diamond Dice Records was assigned to Petitioner on May 1, 2006. (Doc. 9-1 at 107, 109). On cross-examination, Ms. Cota testified that she did not personally receive the application assigning Diamond Dice Records to Petitioner and the person who did process the application no longer works for the Secretary of State. (*Id.* at 112). Yet on re-direct examination, Ms. Cota explained that the document appeared to be normally processed. (*Id.* at 114-17). The undersigned concurs with Respondents' assertion that Petitioner "fails to show in any way that Cota was a 'fake' witness who lacked the qualifications to discuss the trade name filings." (Doc. 9 at 14).

Petitioner's second citation to the record refers to the October 19, 2011 testimony of Roy Tadeo, Jr., a senior fraud investigator at the Arizona Federal Credit Union. (Doc. 9-4 at 56). Mr. Tadeo stated that he did not conduct a fraud investigation of the accounts that belonged to Diamond Dice Records or Petitioner. (*Id.* at 57). However, Mr. Tadeo explained that as part of his job duties, he is "familiar with reviewing different records for Arizona Federal Credit Union." (*Id.*). Mr. Tadeo reviewed account documentation regarding Diamond Dice Records and testified that money was moved from Diamond Dice Records' account to other accounts. Petitioner has failed to show that Mr. Tadeo was a "fake" or "fabricated" witness.

Petitioner's third citation to the record refers to Petitioner's October 24, 2011 cross-examination of Detective Stout. Petitioner asked "Can you tell us why . . . you could bring somebody from Arizona Federal who is not part of the case, and how – can

we bring somebody in where these crimes were alleged, to testify." (Doc. 9-5 at 101). The trial court sustained the State's objection to the question. (*Id.*).

When considering ineffective assistance of counsel claims under 28 U.S.C. § 2254(d), "it is the habeas applicant's burden to show that the state court applied *Strickland* to the facts of his case in an objectively unreasonable manner." *Woodford*, 537 U.S. at 25; *Bell v. Cone*, 535 U.S. 685, 698-699 (2002) (stating that a federal habeas petitioner "must do more than show that he would have satisfied *Strickland's* test if his claim were being analyzed in the first instance, because under § 2254(d)(1), it is not enough to convince a federal habeas court that, in its independent judgment, the state-court decision applied *Strickland* incorrectly. . . . Rather, he must show that the [state court] applied *Strickland* to the facts of his case in an objectively unreasonable manner."). After reviewing the record, the undersigned concludes that Petitioner has failed to show that the rejection of Petitioner's claim in Ground One was contrary to or involved an unreasonable application of clearly established federal law, or was based on an unreasonable determination of the facts. It is recommended that the Court deny Ground One.

B. Ground Two

In his discussion regarding Ground Two, Petitioner explains that the State initiated the criminal case at issue immediately after he successfully moved to suppress evidence in another unrelated criminal case, which was subsequently dismissed. (Doc. 1 at 7). Petitioner contends that Petitioner's trial counsel "was ineffective for failing to move for dismissal due to prosecutorial vindictiveness." (*Id.*). Petitioner asserts that the "State retaliated against [him] for exercising his constitutional right in having the other case dismissed." (*Id.*).

The Fourteenth Amendment's Due Process Clause is "intended to secure the individual from the arbitrary exercise of the powers of government." *Daniels v. Williams*, 474 U.S. 327, 331 (1986) (internal quotations omitted). "[T]he Due Process Clause is not offended by all possibilities of increased punishment . . . but only by those

that pose a realistic likelihood of 'vindictiveness.'" *Blackledge v. Perry*, 417 U.S. 21, 27 (1974). "In our system, so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file . . . generally rests entirely in his discretion." *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978). "'[T]he conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation' so long as 'the selection was [not] deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification.'" *Id.* (quoting *Oyler v. Boles*, 368 U.S. 448, 456 (1962)) (alteration in the original).

"To establish a prima facie case of prosecutorial vindictiveness, a defendant must show either direct evidence of actual vindictiveness or facts that warrant an appearance of such." *Nunes v. Ramirez-Palmer*, 485 F.3d 432, 441 (9th Cir. 2007) (internal quotation marks and citation omitted). A presumption of vindictiveness is warranted, however, only "in cases in which a reasonable likelihood of vindictiveness exists." *United States v. Goodwin*, 457 U.S. 368, 373 (1982). "The burden then shifts to the prosecution to show that independent reasons or intervening circumstances dispel the appearance of vindictiveness and justify its decisions." *Nunes*, 485 F.3d at 442 (internal quotation marks and citation omitted). The presumption of vindictiveness may be "overcome by objective evidence justifying the prosecutor's action." *Goodwin*, 457 U.S. at 376 n.8. The Supreme Court requires "exceptionally clear proof" before inferring an abuse of prosecutorial discretion. *McCleskey v. Kemp*, 481 U.S. 279, 297 (1987); *United States v. Armstrong*, 517 U.S. 456, 463 (1996) (the defendant's "standard [of proof] is a demanding one").

Respondents accurately recount that the "only evidence [Petitioner] presented to the PCR courts [in support of Ground Two] was that the State charged him with the present offenses four days after he won the suppression motion in the [other unrelated criminal] case." (Doc. 9 at 17; Doc. 9-8 at 49-50). Although Petitioner asserts that the prosecutor "was so angry" that Petitioner successfully moved to suppress evidence in the

other case and "even cussed" at Petitioner's counsel (Doc. 1 at 17), this assertion is not supported by the record. The affidavit by Petitioner's trial counsel, which Petitioner submitted with his PCR Petition, merely states that one of the Deputy County Attorneys "was vocal throughout the evidentiary hearing" in the other case. (Doc. 9-8 at 50). The Arizona Court of Appeals' rejection of Petitioner's claim in Ground Two was not contrary to or involved an unreasonable application of clearly established federal law, and was not based on an unreasonable determination of the facts. *See Rupe v. Wood*, 93 F.3d 1434, 1444-45 (9th Cir.1996) (defense counsel's failure to raise a meritless argument or to take a futile action does not constitute ineffective assistance of counsel); *James*, 24 F.3d at 27 ("Counsel's failure to make a futile motion does not constitute ineffective assistance of counsel."); *Toomey v. Bunnell*, 898 F.2d 741, 743-44 (9th Cir. 1990) ("[P]etitioner must further show a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. . . . In short, we find the prospects of success . . . too remote for counsel's failure to have pressed [the issue] to have constituted a [S]ixth [A]mendment violation."). Accordingly, the undersigned recommends that the Court deny Ground Two.

C. Ground Three

In Ground Three, Petitioner alleges that the "[i]neffective assistance of counsel failing to move for new trial, mistrial or dismissal due to the Judge's misconduct when the Trial Judge was recused by the Commission on Judicial Conduct for misconduct[.]" (Doc. 1 at 8).[2] Following Petitioner's filing of a complaint with the Judicial Conduct Commission, the trial judge recused herself on January 6, 2012. (Doc. 9-6 at 169; Doc. 9-7 at 66-67). Petitioner represented himself at the sentencing hearings held on January

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[2] Petitioner also states that his appellate counsel "was ineffective for failing to raise this claim on direct appeal." (Doc. 1 at 8). The state courts did not unreasonably reject the claim *See Pollard v. White*, 119 F.3d 1430, 1435 (9th Cir. 1997) ("A hallmark of effective appellate counsel is the ability to weed out claims that have no likelihood of success, instead of throwing in a kitchen sink full of arguments with the hope that some argument will persuade the court."); *Wildman v. Johnson*, 261 F.3d 832, 840 (9th Cir. 2001) (appellate counsel's failure to raise an issue on direct appeal cannot constitute ineffective assistance when "appeal would not have provided grounds for reversal").

13, 2012 and January 27, 2012. (Doc. 9-6 at 183, 192, 194, 200; Doc. 9-7 at 13-79). Moreover, Petitioner filed pro se motions for a new trial prior to those hearings, which the trial court denied. (Doc. 9-6 at 173-81, 205; Doc. 9-7 at 17-20).

The record reflects that Petitioner knowingly, intelligently, and voluntarily waived his right to representation by counsel at various times during trial and sentencing. (Doc. 9-2 at 16). Petitioner "cannot make an ineffective assistance of counsel claim after electing to represent himself." *Charles v. Maass*, 217 F. App'x 710, 711 (9th Cir. 2007) (citing *Faretta v. California*, 422 U.S. 806, 835 n.46 (1975). ("[A] defendant who elects to represent himself cannot thereafter complain that the quality of his own defense amounted to a denial of 'effective assistance of counsel.'"). Petitioner does not persuasively argue that the Arizona Court of Appeals' decision rejecting the claim in Ground Three is contrary to or an unreasonable application of *Strickland* or is based on an unreasonable determination of the facts. The undersigned finds that Petitioner has failed to meet his burden of establishing entitlement to habeas relief. *Woodford*, 537 U.S. at 25; *Bell*, 535 U.S. at 698–699. It is therefore recommended that the Court deny Ground Three.

D. Ground Four

Ground Four alleges that Petitioner's trial counsel "was ineffective for failing to file a motion to suppress illegally seized evidence in violation of the U.S. Constitution 4th 5th 6th 14th Amendment." (Doc. 1 at 9).

"When the Sixth Amendment ineffective assistance of counsel claim is rooted in defense counsel's failure to litigate a Fourth Amendment issue, as it is here, petitioner must show that (1) the overlooked motion to suppress would have been meritorious and (2) there is a reasonable probability that the jury would have reached a different verdict absent the introduction of the unlawful evidence." *Ortiz–Sandoval v. Clarke*, 323 F.3d 1165, 1170 (9th Cir. 2003) (citing *Kimmelman v. Morrison*, 477 U.S. 365, 375 (1986)); *see also Bailey v. Newland*, 263 F.3d 1022, 1029 (9th Cir. 2001) ("in order to show prejudice when a suppression issue provides the basis for an ineffectiveness claim, the

petitioner must show that he would have prevailed on the suppression motion, and that there is a reasonable probability that the successful motion would have affected the outcome").

As Respondents correctly explain, Petitioner was on probation and had agreed to warrantless searches as a condition of probation. (Doc. 9-2 at 30-32, 37-38). Petitioner's counsel was not ineffective because the motion to suppress would have been futile. *See James*, 24 F.3d at 27 ("Counsel's failure to make a futile motion does not constitute ineffective assistance of counsel."); *Rupe v. Wood*, 93 F.3d 1434, 1445 (9th Cir. 1996) (failure to take futile action can never be deficient performance); *Boag v. Raines*, 769 F.2d 1341, 1344 (9th Cir. 1985) (the "[f]ailure to raise a meritless argument does not constitute ineffective assistance"); *Hernandez v. Harrington*, 720 F. Supp. 2d 1161, 1171-72 (C.D. Cal. 2010) (trial counsel held not to be ineffective for failing to make a motion to sever when it was "highly unlikely" that the motion would have been granted). It is recommended that the Court deny Ground Four.

E. Ground Five

At trial, the State played a recording of a call between Petitioner and Petitioner's son while Petitioner was in jail. (Doc. 9-5 at 27-28, 57-58). In Ground Five, Petitioner alleges that his trial counsel "was ineffective for failing to object or suppress a jail call CD that violated his confrontational rights in violation of U.S. Constitution 4th 5th 6th 14th Amendments." (*Id.* at 10). Petitioner states that

> The [State's] bases for the jail call CD was to show the jury that the Petitioner called his son and told his son to pay a phone bill with someone's credit card number. Defense counsel did not object to the admission of this evidence and the unknown cardholder was not in court to testify that the Petitioner did not have permission to use the cardholders number which violates due process of the 6th Amendment to confront ones accuser [sic] against him. . . . The State did not seek to secure the alleged victim to testify about the use of the credit card so this evidence was unreliable to the charge and the evidence violated the defendants right to confront the alleged cardholder. Counsel should have least [sic] made a record and file a motion to suppress the CD due to the

> Confrontation violation and the inadmissibility of this evidence.

(Doc. 1-1 at 3-4).

Petitioner represented himself at the time the trial court admitted the jail call recording into evidence. (Doc. 9-5 at 9, 24-31, 54-63). However, when Petitioner was represented by counsel, Petitioner's counsel told the trial court that he and the prosecutor "had previously sat down and gone through and agreed upon what was relevant and what was irrelevant to be left out of the recordings. So that's one thing that—they are not here marked in evidence yet, but they will be coming."[3] (Doc. 9-2 at 16-17). When conducting the colloquy regarding Petitioner's request to waive counsel, the trial court asked Petitioner "do you understand, sir, that you are—you're bound by the actions of your attorney up-to-date?" (*Id.* at 17). Petitioner answered affirmatively. (*Id.*).

Petitioner has failed to show how his trial counsel's performance was constitutionally deficient with respect to counsel's stipulation as to the admissibility of portions of the jail call. Petitioner's claim that admission of the call violated the Confrontation Clause is without merit and it would have been futile for counsel to raise it. The phone conversation between Petitioner and his son was the kind of communication that courts have repeatedly held to be nontestimonial and outside the protection of the Confrontation Clause.[4] *See, e.g., Desai v. Booker*, 732 F.3d 628, 630 (6th Cir. 2013) ("the Confrontation Clause no longer applied to nontestimonial hearsay such as the

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[3] In their Answer, Respondents incorrectly state that the record reflects that trial counsel told the trial court that "he and Jefferson listened to all of the calls together." (Doc. 9 at 23).

[4] The Confrontation Clause of the Sixth Amendment provides that in criminal cases the accused has the right to "be confronted with witnesses against him." U.S. Const. amend. VI. The Confrontation Clause bars the admission of "testimonial" statements made by persons who are not subject to cross-examination regardless of whether a hearsay exception would otherwise allow the admission of the statements. *Crawford v. Washington*, 541 U.S. 36, 68-69 (2004). "Testimony . . . is typically a solemn declaration or affirmation made for the purpose of establishing or proving some fact." *Id.* at 51 (citations and quotation marks omitted); *see id.* ("An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not.").

friend-to-friend confession"); *United States v. Berrios*, 676 F.3d 118, 127-28 (3d Cir. 2012) (admission of evidence of surreptitiously recorded jailhouse conversations between codefendants did not violate the Confrontation Clause because they were not testimonial); *United States v. Nguyen*, 267 F. App'x 699, 705 (9th Cir. 2008) (finding that statements made between co-conspirators in casual conversation were "plainly non-testimonial" under *Crawford*); *Saechao v. Oregon*, 249 F. App'x 678, 679 (9th Cir. 2007) (affirming the determination that tape-recorded statement by a non-testifying co-defendant made during a jailhouse telephone call to a friend was not "testimonial"). The undersigned concludes that Petitioner has failed to show that the Arizona Court of Appeals' decision rejecting the claim in Ground Five is contrary to or an unreasonable application of *Strickland* or is based on an unreasonable determination of the facts. Accordingly, Ground Five should be denied.

F. Petitioner's Request for an Evidentiary Hearing

In his Petition (Doc. 1-1 at 6), Petitioner requests an evidentiary hearing. Review of Section 2254(d) claims "is limited to the record that was before the state court that adjudicated the claim on the merits." *Cullen v. Pinholster*, 563 U.S. 170, 180 (2011). As explained by the U.S. Supreme Court, allowing "a petitioner to overcome an adverse state-court decision with new evidence introduced in a federal habeas court and reviewed by that court in the first instance effectively de novo" would be contrary to the purpose of affording state courts the primary responsibility for considering a petitioner's claims. *Id.* at 182 ("It would be strange to ask federal courts to analyze whether a state court's adjudication resulted in a decision that unreasonably applied federal law to facts not before the state court.").

Here, all of the grounds for relief in the Petition were adjudicated on the merits in Arizona state court. The undersigned has recommended that all of Petitioner's federal habeas claims be denied. Where, as here, "the record refutes the [habeas] applicant's factual allegations or otherwise precludes habeas relief, a district court is not required to hold an evidentiary hearing." *Schriro v. Landrigan*, 550 U.S. 465, 474 (2007) (a hearing

is not required if the allegations would not entitle the petitioner to relief under Section 2254(d)); *Totten v. Merkle*, 137 F.3d 1172, 1176 (9th Cir. 1998) ("[A]n evidentiary hearing is *not* required on issues that can be resolved by reference to the state court record.") (emphasis in original). Therefore, the undersigned recommends that the Court deny Petitioner's request for an evidentiary hearing.[5]

IV. CONCLUSION

Based on the foregoing,

IT IS RECOMMENDED that the Court deny and dismiss the Petition (Doc. 1) with prejudice.

IT IS FURTHER RECOMMENDED that a certificate of appealability and leave to proceed in forma pauperis on appeal be denied because Petitioner has not made a substantial showing of the denial of a constitutional right in his claims for relief.

This Report and Recommendation is not an order that is immediately appealable to the Ninth Circuit Court of Appeals. Any notice of appeal pursuant to Fed. R. App. P. 4(a)(1) should not be filed until entry of the District Court's judgment. The parties shall have fourteen days from the date of service of a copy of this Report and Recommendation within which to file specific written objections with the Court. *See* 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 6, 72. Thereafter, the parties have fourteen days within which to file a response to the objections. Failure to file timely objections to the Magistrate Judge's Report and Recommendation may result in the acceptance of the Report and Recommendation by the District Court without further review. Failure to file timely objections to any factual determinations of the Magistrate Judge may be considered a waiver of a party's right to appellate review of the findings of fact in an order or judgment entered pursuant to the Magistrate Judge's recommendation. *See United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003); *Robbins v. Carey*,

[5] The undersigned has considered the arguments raised in the parties' briefing concerning Petitioner's "Request for Evidentiary Hearing" (Doc. 13), which the Court denied as premature on August 17, 2018 (Doc. 19).

481 F.3d 1143, 1146-47 (9th Cir. 2007).

Dated this 20th day of December, 2018.

Eileen S. Willett
United States Magistrate Judge

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

NOV 8 2019

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

MICHAEL ANTHONY JEFFERSON,

Petitioner-Appellant,

v.

CHARLES L. RYAN, named as: Charles Ryan; ATTORNEY GENERAL FOR THE STATE OF ARIZONA; BRUNO STOLC,

Respondents-Appellees.

No. 19-15487

D.C. No. 2:17-cv-04197-JJT
District of Arizona,
Phoenix

ORDER

Before: SILVERMAN and OWENS, Circuit Judges.

Appellant's motion for reconsideration en banc (Docket Entry No. 10) is denied on behalf of the court. *See* 9th Cir. R. 27-10; 9th Cir. Gen. Ord. 6.11.

No further filings will be entertained in this closed case.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

SEP 13 2019

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

MICHAEL ANTHONY JEFFERSON, Petitioner-Appellant, v. CHARLES L. RYAN, named as: Charles Ryan; ATTORNEY GENERAL FOR THE STATE OF ARIZONA; BRUNO STOLC, Respondents-Appellees.	No. 19-15487 D.C. No. 2:17-cv-04197-JJT District of Arizona, Phoenix ORDER

Before: M. SMITH and HURWITZ, Circuit Judges.

The request for a certificate of appealability (Docket Entry No. 3) is denied because appellant has not made a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see also Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Any pending motions are denied as moot.

DENIED.

Additional material from this filing is available in the Clerk's Office.