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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Matthew Ronald Creamer,)	
)	
Petitioner,)	CIV 12-01781 PHX SRB (MEA)
)	
v.)	REPORT AND RECOMMENDATION
)	
Charles L. Ryan,)	
Arizona Attorney General,)	
)	
Respondents.)	
_____)	

TO THE HONORABLE SUSAN R. BOLTON:

Petitioner, proceeding pro se, filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 on or about August 16, 2012. Respondents filed an Answer to Petition for Writ of Habeas Corpus ("Answer") (Doc. 12) on February 25, 2013. In an order issued September 24, 2013, the Court allowed Petitioner until sixty days after the date the District Court decided Petitioner's motion for emergency injunctive relief to file a reply to the answer to his petition. See Doc. 25. The decision on the motion for injunctive relief was issued October 29, 2013. See Doc. 29. Accordingly, Petitioner's reply to the answer to his petition was due December 30, 2013.

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I Procedural History

An information filed June 14, 2004, charged Petitioner with one count of third-degree burglary and one count of theft. See Answer, Exh. A. The state also alleged that Petitioner had four historical felony convictions, i.e., a conviction for "criminal simulation" and three convictions for theft. The state further alleged that Petitioner had committed the charged offenses while on release for the most recent of the previous theft convictions. See id., Exhs. C & D.

On October 28, 2004, Petitioner filed a pro se motion asking the trial court for the appointment of alternate counsel because, he alleged, his relationship with his attorney was irretrievably compromised. Id., Exh. E. On November 1, 2004, the trial court discussed the motion with Petitioner and his attorney, and then denied the motion. Id., Exhs. F & G. On November 4, 2004, at the conclusion of a one-day trial, a jury found Petitioner guilty as charged. Id., Exhs. H-O.

The state court conducted a sentencing hearing on December 14, 2004. Id., Exhs. Q & R. The state court found that Petitioner had four historical prior felony convictions. The trial court declined to follow the state's recommendation that it impose an aggravated term of fifteen years imprisonment on each conviction. The state trial court instead sentenced Petitioner to concurrent, slightly aggravated terms of twelve years imprisonment on each of the counts of conviction. Id., Exh. Q at 20-21; Exh. R at 2-3.

1 pursuant to Rule 32, Arizona Rules of Criminal Procedure. Id.
2 (Doc. 1), Exh. M. In his Rule 32 action Petitioner asserted a
3 claim corresponding to his third federal habeas claim, and two
4 ineffective-assistance-of-counsel claims which correspond to his
5 fourth and fifth federal habeas claims. See id., Exh. H.
6 Petitioner also filed an amendment to his Rule 32 pleading in
7 which he raised an ineffective assistance claim that corresponds
8 to his sixth federal habeas claim. Id., Exh. I.

9 In a decision issued November 20, 2008, the state trial
10 court denied post-conviction relief. Doc. 1, Exh. J. In a
11 decision issued August 22, 2011, the Arizona Court of Appeals
12 summarily denied a petition for review of this decision. Id.,
13 Exh. K & Exh. L.

14 On August 16, 2012, Petitioner filed the pending
15 federal habeas petition in this Court, raising six claims for
16 relief. Respondents allow that the petition is timely filed.
17 Respondents also allow that Petitioner's claims for relief are
18 exhausted in the state courts.

19 **II Standard of review**

20 The Court may not grant a writ of habeas corpus to a
21 state prisoner on a claim adjudicated on the merits in state
22 court proceedings unless the state court reached a decision
23 contrary to clearly established federal law, or the state court
24 decision was an unreasonable application of clearly established
25 federal law. See 28 U.S.C. § 2254(d); Carey v. Musladin, 549
26 U.S. 70, 75, 127 S. Ct. 649, 653 (2006); Musladin v. Lamarque,
27 555 F.3d 834, 838 (9th Cir. 2009). "Under AEDPA, a federal
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1 court may not grant a petition for a writ of habeas corpus
2 unless the state court's adjudication on the merits was
3 'contrary to, or involved an unreasonable application of,
4 clearly established Federal law, as determined by the Supreme
5 Court of the United States.'" Lafler v. Cooper, 132 S. Ct.
6 1376, 1390 (2012), quoting 28 U.S.C. § 2254(d)(1).

7 A state court decision is contrary to federal law if it
8 applied a rule contradicting the governing law of United States
9 Supreme Court opinions, or if it confronts a set of facts that
10 is materially indistinguishable from a decision of the Supreme
11 Court but reaches a different result. See, e.g., Brown v.
12 Payton, 544 U.S. 133, 141, 125 S. Ct. 1432, 1438 (2005);
13 Yarborough v. Alvarado, 541 U.S. 652, 663, 124 S. Ct. 2140, 2149
14 (2004); Runnigeagle v. Ryan, 686 F.3d 758, 785 (9th Cir. 2012),
15 cert. denied, 133 S. Ct. 2766 (2013). For example, a state
16 court's decision is considered contrary to federal law if the
17 state court erroneously applied the wrong standard of review or
18 an incorrect test to a claim. See Knowles v. Mirzayance, 556
19 U.S. 111, 121, 129 S. Ct. 1411, 1419 (2009); Wright v. Van
20 Patten, 552 U.S. 120, 124-25, 128 S. Ct. 743, 746-47 (2008);
21 Runnigeagle, 686 F.3d at 784-85; Norris v. Morgan, 622 F.3d
22 1276, 1288 (9th Cir. 2010). See also Frantz v. Hazey, 533 F.3d
23 724, 737 (9th Cir. 2008); Bledsoe v. Bruce, 569 F.3d 1223, 1233
24 (10th Cir. 2009).

25 A state court decision involves an unreasonable
26 application of clearly established federal law if it correctly
27 identifies a governing rule but applies it to a new set of facts

1 in a way that is objectively unreasonable, or if it extends, or
2 fails to extend, a clearly established legal principle to a new
3 set of facts in a way that is objectively unreasonable. See
4 McNeal v. Adams, 623 F.3d 1283, 1287-88 (9th Cir. 2010). When
5 considering such a claim, "a habeas court must determine what
6 arguments or theories supported or ... could have supported, the
7 state court's decision; and then it must ask where it is
8 possible fair-minded jurists could disagree that those arguments
9 or theories are inconsistent with the holding in a prior
10 decision of this Court." Harrington v. Richter, 131 S. Ct. 770,
11 786 (2011).

12 The state court's determination of a habeas claim may
13 be set aside under the unreasonable application prong if, under
14 clearly established federal law, the state court was
15 "unreasonable in refusing to extend [a] governing legal
16 principle to a context in which the principle should have
17 controlled." Ramdass v. Angelone, 530 U.S. 156, 166, 120 S. Ct.
18 2113, 2120 (2000). See also Cheney v. Washington, 614 F.3d 987,
19 994 (9th Cir. 2010). However, the state court's decision is an
20 unreasonable application of clearly established federal law only
21 if it can be considered *objectively* unreasonable. See, e.g.,
22 Renico v. Lett, 559 U.S. 766, 130 S. Ct. 1855, 1862 (2010);
23 Runningeagle, 686 F.3d at 785. An unreasonable application of
24 law is different from an incorrect one. See Renico, 130 S. Ct.
25 at 1862; Cooks v. Newland, 395 F.3d 1077, 1080 (9th Cir. 2005).
26 "That test is an objective one and does not permit a court to
27 grant relief simply because the state court might have
28

1 incorrectly applied federal law to the facts of a certain case."

2 Adamson v. Cathel, 633 F.3d 248, 255-56 (3d Cir. 2011).

3 A state court's determination that a claim
4 lacks merit precludes federal habeas relief
5 so long as "fairminded jurists could
6 disagree" on the correctness of the state
7 court's decision. Yarborough v. Alvarado, 541
8 U.S. 652, 664, 124 S. Ct. 2140, [] (2004).
9 And as this Court has explained,
10 "[E]valuating whether a rule application was
11 unreasonable requires considering the rule's
12 specificity. The more general the rule, the
13 more leeway courts have in reaching outcomes
14 in case-by-case determinations." Ibid. "[I]t
15 is not an unreasonable application of clearly
16 established Federal law for a state court to
17 decline to apply a specific legal rule that
18 has not been squarely established by this
19 Court." Knowles v. Mirzayance, 556 U.S. 111,
20 129 S.Ct. 1411, 1413-14, [] (2009) (internal
21 quotation marks omitted).

22 Harrington, 131 S. Ct. at 786.

23 The phrase "clearly established Federal law"
24 refers to "the holdings, as opposed to the
25 dicta," of the Supreme Court's decisions "as
26 of the time of the relevant state-court
27 decision." Williams v. Taylor, 529 U.S. 362,
28 412, 120 S. Ct. 1495 [] (2000). A state
court's decision is "contrary to" this body
of law if it applies a rule that contradicts
the governing law articulated by the Supreme
Court or arrives at a result different than
that reached by the Supreme Court in a case
with materially indistinguishable facts. Id.
at 405-06, 529 U.S. 362, 120 S. Ct. 1495, [].

A decision involves an "unreasonable
application" of clearly established federal
law if it "identifies the correct governing
legal principle ... but unreasonably applies
that principle to the facts of the prisoner's
case." Id. at 413, 529 U.S. 362, 120 S. Ct.
1495 []. The Supreme Court has emphasized
that "an unreasonable application of federal
law is different from an incorrect
application of federal law." Id. at 410, 529
U.S. 362, 120 S. Ct. 1495, []. Accordingly,
"a federal habeas court may not issue the
writ simply because that court concludes in
its independent judgment that the relevant

1 state-court decision applied clearly
2 established federal law erroneously or
3 incorrectly." Id. at 411, 529 U.S. 362, 120
4 S. Ct. 1495. Instead, the court must
5 determine whether the state court's
6 application of Supreme Court precedents was
7 objectively unreasonable. Id. at 409, 529
8 U.S. 362, 120 S. Ct. 1495, []. Although the
9 Supreme Court's decisions are the focus of
10 the unreasonable-application inquiry, we may
11 look to Ninth Circuit case law as "persuasive
12 authority for purposes of determining whether
13 a particular state court decision is an
14 'unreasonable application' of Supreme Court
15 law." Duhaime v. Ducharme, 200 F.3d 597, 600
16 (9th Cir. 2000).

17 Howard v. Clark, 608 F.3d 563, 567-68 (9th Cir. 2010).

18 Accordingly, if the Supreme Court has not addressed a
19 specific issue in its holdings, the state court's adjudication
20 of the issue cannot be an unreasonable application of clearly
21 established federal law. See Stenson v. Lambert, 504 F.3d 873,
22 881 (9th Cir. 2007), citing Kane v. Garcia Espitia, 546 U.S. 9,
23 10, 126 S. Ct. 407, 408 (2006). Stated another way, if the
24 issue raised by the petitioner "is an open question in the
25 Supreme Court's jurisprudence," the Court may not issue a writ
26 of habeas corpus on the basis that the state court unreasonably
27 applied clearly established federal law by rejecting the precise
28 claim presented by the petitioner. Cook, 538 F.3d at 1016;
Crater v. Galaza, 491 F.3d 1119, 1123 (9th Cir. 2007). The
United States Supreme Court "has held on numerous occasions that
it is not an unreasonable application of clearly established
Federal law for a state court to decline to apply a specific
legal rule that has not been squarely established by this
Court." Knowles, 129 S. Ct. at 1419, citing Wright, 552 U.S. at

1 124-25, 128 S. Ct. at 746-47.

2 Factual findings of a state court are presumed to be
3 correct and can be reversed by a federal habeas court only when
4 the federal court is presented with clear and convincing
5 evidence. See 28 U.S.C. § 2254(e)(1); Miller-El v. Dretke, 545
6 U.S. 231, 240-41, 125 S. Ct. 2317, 2325 (2005); Miller-El v.
7 Cockrell, 537 U.S. 322, 340, 123 S. Ct. 1029, 1041 (2003);
8 Runnigeagle, 686 F.3d at 763 n.1; Crittenden v. Ayers, 624 F.3d
9 943, 950 (9th Cir. 2010); Stenson, 504 F.3d at 881; Anderson v.
10 Terhune, 467 F.3d 1208, 1212 (9th Cir. 2006). The "presumption
11 of correctness is equally applicable when a state appellate
12 court, as opposed to a state trial court, makes the finding of
13 fact." Sumner v. Mata, 455 U.S. 591, 593, 102 S. Ct. 1303,
14 1304-05 (1982). Additionally, the United States Supreme Court
15 has held that, with regard to claims adjudicated on the merits
16 in the state courts, "review under § 2254(d)(1) is limited to
17 the record that was before the state court that adjudicated the
18 claim on the merits." Cullen v. Pinholster, 131 S. Ct. 1388,
19 1398 (2011).

20 If the Court determines that the state court's decision
21 was an objectively unreasonable application of clearly
22 established United States Supreme Court precedent, the Court
23 must review whether Petitioner's constitutional rights were
24 violated, i.e., the state's ultimate denial of relief, without
25 the deference to the state court's decision that the
26 Anti-Terrorism and Effective Death Penalty Act ("AEDPA")
27 otherwise requires. See Lafler, 132 S. Ct. 1389-90; Panetti v.

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1 Quarterman, 551 U.S. 930, 953-54, 127 S. Ct. 2842, 2858-59
2 (2007); Runnigeagle, 686 F.3d at 785-86; Greenway v. Schriro,
3 653 F.3d 790, 805-06 (9th Cir. 2011).

4 **III Analysis**

5 **A. Petitioner's claims for relief**

6 **1. Petitioner contends the trial court's denial of his**
7 **motion to change counsel violated his Sixth Amendment rights.**

8 Petitioner argues that the state trial court's denial
9 of his motion to appoint alternate counsel violated his Sixth
10 Amendment right to the effective assistance of counsel.

11 The Arizona Court of Appeals rejected Petitioner's
12 substitution-of-counsel claim on the merits. The state
13 appellate court determined that, even assuming Petitioner's
14 claims were true, counsel's behavior was explained by his
15 obligations under the rules of ethics regarding suborning
16 perjury and not making false statements to the trial court, in
17 addition to being classified as strategic decisions regarding
18 Petitioner's defense. The Arizona Court of Appeals also
19 concluded:

20 What Creamer characterizes as his attorney's
21 failure to discuss the case in fact appears
22 to be Creamer's reticence to allow his
23 attorney to make the legal decisions
24 regarding his case. Disagreements over trial
25 strategy or a loss of confidence in one's
26 attorney do not warrant the appointment of
27 new counsel. State v. Cromwell, 211 Ariz.
28 181, 186-87, ¶¶ 29-30, 119 P.3d 448, 453-54
(2005). It was a strategic choice to hear the
State's witnesses' testimony before counsel
advised Creamer about whether or not he
should testify. Similarly, his attorney's
decision not to investigate the value of the
numerous stolen items was a strategic choice.

1 The attorney may have reasonably concluded
2 that the statutory minimum value, \$3,000, was
3 undoubtedly met. An officer testified that a
4 table in the hotel room was filled with
5 "hundreds of vinyl records ... [t]he bed was
6 covered with boxed ... [t]here was computer
7 equipment ... there [were] a lot of boxes of
8 baseball cards, football cards, hockey cards
9" The victim estimated the value of these
10 items as being between \$8,000 and \$12,000.
11 Finally, a jury found that the items were
12 worth at least \$3,000. Creamer's complaints
13 largely address his attorney's strategic
14 choices and not anything that constitutes an
15 irreconcilable conflict. Absent an
16 irreconcilable conflict, the remaining Moody
17 factors did not warrant granting Creamer's
18 motion....

11 Doc. 1, Exh. D, Attach. B.

12 The Arizona court's determination that Petitioner's
13 constitutional rights were not violated by the refusal to
14 appoint substitute counsel was not clearly contrary to nor an
15 unreasonable application of federal law. The federal courts
16 have determined that when a defendant contends an irreconcilable
17 conflict has arisen with their defense counsel, the trial court
18 must conduct a timely inquiry into the propriety of the
19 continued representation. See Holloway v. Arkansas, 435 U.S.
20 475, 484, 98 S. Ct. 1173, 1179 (1978). When a defendant
21 indicates dissatisfaction with his counsel, the trial court
22 ordinarily must conduct a thorough inquiry in order to discover
23 whether the situation is depriving the defendant of an adequate
24 defense. See Hudson v. Rushen, 686 F.2d 826, 829 (9th Cir.
25 1982). In determining whether the trial judge should have
26 granted a substitution motion, the reviewing habeas court may
27 consider the extent of the alleged conflict, whether the trial

1 judge made an appropriate inquiry into the extent of the
2 conflict, and the timeliness of the motion to substitute
3 counsel. See Daniels v. Woodford, 428 F.3d 1181, 1197-98 (9th
4 Cir. 2005).

5 A review of the record in this matter indicates that
6 the state trial court conducted the relevant inquiry. See King
7 v. Rowland, 977 F.2d 1354, 1357 (9th Cir. 1992). Accordingly,
8 the state court's decision that this alleged error did not
9 deprive Petitioner of a federal constitutional right was not
10 clearly contrary to nor an unreasonable application of federal
11 law.

12 **2. Petitioner contends he was denied his right to**
13 **access the courts, and that his right to due process was**
14 **violated, because he was not interviewed by the individual who**
15 **prepared a presentence report for the trial court.**

16 Petitioner argues that the presentence-report author's
17 failure to interview him denied him the opportunity to place
18 mitigating factors into the record and violated his right to
19 access to the courts and his right to due process of law.

20 The Arizona Court of Appeals' rejection of this claim
21 did not constitute an objectively unreasonable application of
22 United States Supreme Court precedent. The Supreme Court has
23 never interpreted the Sixth or the Fourteenth Amendment to
24 impose a federal constitutional obligation on a state government
25 to afford a criminal defendant a presentence interview in
26 preparation for a pending sentencing hearing, and Petitioner
27 points to no case so holding.

1 not one randomly drawn from Maricopa County as a whole", because
2 the system's purpose was to "ensure that persons living near the
3 southwest court complex, for example, were not required to drive
4 to the northwest court complex in order to fulfill their jury
5 responsibilities." Id. at 10.

6 Respondents contend Petitioner procedurally defaulted
7 this claim by failing to fairly present it to the Arizona Court
8 of Appeals in a procedurally correct manner. Petitioner raised
9 this claim in his Rule 32 proceedings and the state court denied
10 the claim based on a state rule precluding claims that could
11 have been raised in a direct appeal.

12 A federal court may not grant a habeas petition unless
13 the petitioner has exhausted all available state remedies. See
14 28 U.S.C. § 2254(b)(1)(A). A federal habeas claim is exhausted,
15 but procedurally defaulted, if it has been raised in the state
16 courts but the state court found the claim precluded by a state
17 procedural rule regarding waiver and the preclusion of claims.
18 See, e.g., Ylst v. Nunnemaker, 501 U.S. 797, 802, 111 S. Ct.
19 2590, 2594-95 (1991); Szabo v. Walls, 313 F.3d 392, 395 (7th
20 Cir. 2002). If the procedural default of the federal habeas
21 claim is based on an "an independent and adequate state
22 procedural rule," the claim is procedurally barred in federal
23 court unless the petitioner can excuse the default by showing
24 cause and prejudice or a fundamental miscarriage of justice.
25 See Hurles v. Ryan, 706 F.3d 1021, 1032 (9th Cir. 2013),
26 petition for cert. filed, 82 U.S.L.W. 3009 (June 17, 2013).

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1 A federal court is precluded from reviewing
2 the merits of a claim when the state court
3 has denied relief on the basis of an
4 independent and adequate state procedural
5 default. The state procedural bar must be
6 "independent" of the federal question and
"adequate to support the judgment." A state
procedural rule constitutes an "adequate" bar
to federal court review if it was "firmly
established and regularly followed" at the
time it was applied by the state court.

7 Cooper v. Brown, 510 F.3d 870, 924 (9th Cir. 2007) (internal
8 citations omitted)

9 Arizona's state rules regarding the waiver and
10 preclusion of claims have been found to be independent and
11 adequate bases for denying federal habeas relief on a claim
12 subject to those rules. Stewart v. Smith, 536 U.S. 856, 859-60,
13 122 S. Ct. 2578, 2581 (2002); Ortiz v. Stewart, 149 F.3d 923,
14 931-32 (9th Cir. 1998).

15 Petitioner has not established cause for, nor prejudice
16 arising from his procedural default of this federal habeas
17 claim, i.e., a reason why he did not present this claim in his
18 direct appeal. See Hurles, 706 F.3d at 1032. Petitioner has
19 not established that a fundamental miscarriage of justice will
20 occur absent the Court's consideration of the merits of the
21 claim. Therefore, the Court should not consider the merits of
22 the claim.

23 **4. Petitioner contends he was denied his right to the**
24 **effective assistance of counsel because his trial counsel did**
25 **not move to suppress the admission of evidence.**

26 In his fourth habeas claim, Petitioner argues that he
27 received ineffective assistance of counsel because his trial

1 counsel failed to file a motion to suppress evidence, i.e., the
2 victim's stolen property seized during a search of a hotel room
3 which was occupied by Petitioner and his girlfriend. Petitioner
4 contends a motion to suppress would have been successful: "the
5 court would have been required to suppress all evidence
6 discovered as a result of the warrantless search." Doc. 1 at
7 12.

8 The state trial court summarily denied all of
9 Petitioner's ineffective assistance claims on the merits,
10 concluding that "[u]nder these interesting circumstances it is
11 extremely difficult for this Court to find a material fact in
12 support of the Petitioner's claim of ineffective assistance of
13 counsel". The state court's decision denying this claim was not
14 an objectively unreasonable application of Supreme Court
15 precedent.

16 To state a claim for ineffective assistance of counsel,
17 a habeas petitioner must show both that his attorney's
18 performance was deficient and that the deficiency prejudiced the
19 outcome of his criminal proceedings. See Strickland v.
20 Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984).
21 The petitioner must overcome the strong presumption that
22 counsel's conduct was within the range of reasonable
23 professional assistance required of attorneys in that
24 circumstance. See id., 466 U.S. at 687, 104 S. Ct. at 2064.
25 Counsel's performance will be held constitutionally deficient
26 only if the habeas petitioner proves counsel's actions "fell
27 below an objective standard of reasonableness," as measured by

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1 "prevailing professional norms." Strickland, 466 U.S. at 688,
2 104 S. Ct. at 2064-65. See also Cheney v. Washington, 614 F.3d
3 987, 994-95 (9th Cir. 2010).

4 To establish deficient performance, a person
5 challenging a conviction must show that
6 counsel's representation fell below an
7 objective standard of reasonableness. A court
8 considering a claim of ineffective assistance
9 must apply a strong presumption that
10 counsel's representation was within the wide
11 range' of reasonable professional assistance.
12 The challenger's burden is to show that
13 counsel made errors so serious that counsel
14 was not functioning as the "counsel"
15 guaranteed the defendant by the Sixth
16 Amendment.

17 Premo v. Moore, 131 S. Ct. 733, 739 (2011) (internal citations
18 and quotations omitted), citing Harrington, 131 S. Ct. at 788.

19 To establish prejudice, the petitioner must establish
20 that there is "a reasonable probability that, but for counsel's
21 unprofessional errors, the result of the proceeding would have
22 been different." Strickland, 466 U.S. at 694, 104 S. Ct. at
23 2068. See also, e.g., Cheney, 614 F.3d at 994. To succeed on
24 an assertion his counsel's performance was deficient because
25 counsel failed to raise a particular argument, the petitioner
26 must establish the argument was likely to be successful, thereby
27 establishing that he was prejudiced by his counsel's omission.
28 See Tanner v. McDaniel, 493 F.3d 1135, 1144 (9th Cir. 2007);
Weaver v. Palmateer, 455 F.3d 958, 970 (9th Cir. 2006).
Accordingly, counsel's performance is not deficient nor
prejudicial when counsel "fails" to raise an argument that
counsel reasonably believes would be futile. See Premo, 131 S.
Ct. at 741; Harrington, 131 S. Ct. at 788.

1 Additionally, it is Petitioner's burden to establish
2 both that his counsel's performance was deficient and that he
3 was prejudiced thereby. See, e.g., Wong v. Belmontes, 558 U.S.
4 15, 16-17, 130 S. Ct. 383, 384-85 (2009). "It is not enough for
5 the defendant to show that the errors had some conceivable
6 effect on the outcome of the proceeding." Strickland, 466 U.S.
7 at 693, 104 S. Ct. at 2067. "Surmounting Strickland's high bar
8 is never an easy task." Padilla v. Kentucky, 555 U.S. 356, 371-
9 72, 130 S. Ct. 1473, 1485 (2010), quoted in Harrington, 131 S.
10 Ct. at 788.

11 In rejecting Petitioner's ineffective assistance of
12 counsel claim with regard to counsel's "failure" to file a
13 motion to suppress, the state trial court concluded:

14 Petitioner claims his counsel was
15 ineffective because he failed to file a
16 Motion to Suppress. The State's position is
17 that the Petition[er] did not have "standing"
18 to file a Motion to Suppress, therefore, his
19 attorney was not "ineffective."

20 Petitioner admitted to the investigating
21 officers that he stole the items in question
22 from the victim's storage locker. His
23 defense at trial was that he was innocent of
24 the burglary and theft charges; that his
25 girlfriend was guilty; and that he had lied
26 to the police in order to protect his
27 girlfriend.

28 In his Reply Memorandum, Petitioner argues
that, had the Motion to Suppress been filed,
it would not have been necessary to have his
girlfriend testify at trial in support of his
version of the truth. Further, that because
all of the property found in the motel room
belonged to him, he clearly had standing to
file the Motion to Suppress.

Under these interesting circumstances it is
extremely difficult for this Court to find a
material fact in support of Petitioner's
claim of ineffective assistance of counsel.

1 Doc. 1, Exh. J.

2 Petitioner's counsel's decision not to file a motion to
3 suppress can be considered a reasonable strategic decision not
4 to press a futile motion and, accordingly, neither deficient
5 performance nor a prejudicial act pursuant to Strickland.
6 Petitioner's claim that a motion to suppress would have been
7 successful is belied by the state court's rejection of the claim
8 based on application of the Strickland standard, i.e., the state
9 court impliedly concluded a motion to suppress would have been
10 denied by the trial court.

11 Because counsel's performance is not deficient nor
12 prejudicial if counsel fails to raise a meritless argument,
13 Petitioner has not met his burden of showing deficient
14 performance nor prejudice. Accordingly, the state court's
15 decision denying relief on this claim was not clearly contrary
16 to nor an unreasonable application of federal law and this claim
17 should be denied on the merits.

18 **5. Petitioner contends he was denied his right to the**
19 **effective assistance of counsel because his counsel did not**
20 **challenge the state's "failure" to prove the fair-market value**
21 **of the victim's stolen property.**

22 Petitioner argues that his attorney's failure to
23 require the state to inventory the stolen property deprived
24 Petitioner of the opportunity to show that the fair-market value
25 of the stolen property fell below \$3,000.00, which would have
26 reduced the felony classification from the Class 3 felony of
27 theft to a lesser crime.

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1 The state trial court rejected this claim when
2 presented in Petitioner's Rule 32 action without explaining its
3 decision in regard to this specific assignment of error by
4 counsel. After noting that Petitioner had first confessed to
5 the crime and then recanted his confession and then implicated
6 his girlfriend, the state court concluded: "Under these
7 interesting circumstances it is extremely difficult for this
8 Court to find a material fact in support of Petitioner's claim
9 of ineffective assistance of counsel."

10 The Court concludes there was no reasonable probability
11 Petitioner's counsel could have persuaded a jury that the value
12 of "thousands" of stolen sports cards and hundreds of music
13 records was less than \$3,000.00. Petitioner has not shown that
14 his counsel's alleged "failure" to establish the value of more
15 than 3,000 pieces of evidence to was not a reasonable strategic
16 decision. Nor has Petitioner met his burden of showing how
17 counsel's alleged deficient performance in this regard was
18 prejudicial. The state court's application of Strickland to
19 this decision by counsel was not an unreasonable application of
20 federal law. Accordingly, counsel's performance in failing to
21 raise a losing argument was not deficient and Petitioner was
22 not prejudiced as a result of counsel's decision.

23 **6. Petitioner contends his counsel's performance at**
24 **sentencing was ineffective.**

25 Petitioner contends that he received ineffective
26 assistance of counsel because counsel failed to investigate and
27 present at the sentencing hearing the mitigating evidence of
28

1 Petitioner's history of mental illness and substance abuse,
2 suicide attempts, and psychiatric issues and hospitalization.
3 Petitioner argues that his counsel neither investigated these
4 issues nor determined that an investigation was not necessary.
5 Petitioner asserts there is a "reasonable probability that the
6 result of the sentencing proceeding would have been different,
7 and could have resulted in a lesser sentence" had counsel
8 adequately investigated these issues.

9 The state court's decision denying this claim was not
10 contrary to nor an unreasonable application of Strickland.
11 Petitioner has not established that any alleged "failure" was
12 unreasonably deficient performance or prejudicial. Petitioner
13 made the sentencing court aware of mitigating factors and
14 Petitioner's friend wrote a letter on his behalf and spoke at
15 his sentencing regarding Petitioner's proficiency in the law,
16 the absence of any drug-abuse crimes, violence, or sex-related
17 crimes, and what they opined was the futility of an long
18 sentence. Petitioner spoke for himself at the sentencing
19 hearing. Petitioner's attorney emphasized that the offenses
20 were property-related and not violent offenses.

21 As noted by Respondents, Petitioner did not discuss any
22 mental-health history in his letter to the trial court, nor did
23 he discuss the issue during his allocution in the sentencing
24 court. Although Petitioner now asserts he is and was mentally
25 ill, he did not submit any mental-health records in his state
26 action for post-conviction relief.

27

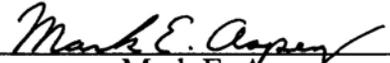
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1 parties have fourteen (14) days within which to file a response
2 to the objections. Pursuant to Rule 7.2, Local Rules of Civil
3 Procedure for the United States District Court for the District
4 of Arizona, objections to the Report and Recommendation may not
5 exceed seventeen (17) pages in length.

6 Failure to timely file objections to any factual or
7 legal determinations of the Magistrate Judge will be considered
8 a waiver of a party's right to de novo appellate consideration
9 of the issues. See United States v. Reyna-Tapia, 328 F.3d 1114,
10 1121 (9th Cir. 2003) (en banc). Failure to timely file
11 objections to any factual or legal determinations of the
12 Magistrate Judge will constitute a waiver of a party's right to
13 appellate review of the findings of fact and conclusions of law
14 in an order or judgment entered pursuant to the recommendation
15 of the Magistrate Judge.

16 Pursuant to 28 U.S.C. foll. § 2254, R. 11, the District
17 Court must "issue or deny a certificate of appealability when it
18 enters a final order adverse to the applicant." The undersigned
19 recommends that, should the Report and Recommendation be adopted
20 and, should Petitioner seek a certificate of appealability, a
21 certificate of appealability should be denied because Petitioner
22 has not made a substantial showing of the denial of a
23 constitutional right as required by 28 U.S.C.A § 2253(c)(2).

24 DATED this 3rd day of January, 2014.

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Mark E. Aspey
United States Magistrate Judge