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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

David Botello Otero,

Petitioner,

vs.

Charles L. Ryan, et al.,

Respondents.

No. CV-16-00733-PHX-PGR (MHB)

ORDER

Having reviewed *de novo* the Report and Recommendation of Magistrate Judge Burns in light of the petitioner’s Response and Objections to the Magistrate Judge’s Report and Recommendations (Doc. 11) and the respondents’ Response to Petitioner Otero’s Objections to the Magistrate Judge’s Report and Recommendation (Doc. 12), the Court finds that the petitioner’s objections should be overruled because the Magistrate Judge correctly concluded that the petitioner’s habeas petition, filed pursuant to 28 U.S.C. § 2254, should be denied.

The petitioner pleaded guilty to one count of first degree murder and one count of abandonment or concealment of a dead body. In Ground One of his habeas petition, the petitioner alleges that his Fifth and Sixth Amendment rights were violated during his grand jury proceedings. In Ground Two, he alleges that his

1 Sixth Amendment right was violated because he was denied effective assistance of
2 counsel during his grand jury proceedings. In Ground Three, he alleges that his Fifth
3 Amendment rights were violated when his involuntary and incriminating statements
4 were not suppressed. In Ground Four, he alleges that his counsel was ineffective for
5 filing to file a motion to suppress. In Ground Six, in what is in effect a combination
6 of his Grounds Two And Four, he alleges that his plea agreement violated his Fifth
7 and Sixth Amendment rights because his counsel was ineffective throughout the
8 case and his counsel's advice to plead guilty was unreasonable.

9 The Court agrees with the Magistrate Judge that Grounds One through Four
10 and Ground Six are barred by the petitioner's guilty plea pursuant to Tollett v.
11 Henderson, 411 U.S. 258 (1973), because they are all pre-plea constitutional claims
12 that are not based on a jurisdictional defect.

13 In Ground Five, the petitioner alleges that his counsel was ineffective, in
14 violation of his Sixth Amendment right, for failing to object to the state's
15 unreasonable characterization of the petitioner at his sentencing. The Court agrees
16 with the Magistrate Judge that this claim fails on its merits. The state PCR court's
17 conclusion that this claim was meritless because the sentencing transcript belied the
18 plaintiff's assertion, which conclusion the Arizona Court of Appeals adopted as its
19 own, was neither contrary to, or an unreasonable application of, clearly established
20 Supreme Court precedent, nor did it involve an unreasonable determination of the
21 relevant facts in light of the state court record. Therefore,

22 IT IS ORDERED that the Magistrate Judge's Report and Recommendation
23 (Doc. 10) is accepted and adopted by the Court.

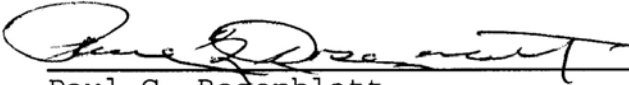
24 IT IS FURTHER ORDERED that the petitioner's Petition Under 28 U.S.C. §
25 2254 for a Writ of Habeas Corpus by a Person in State Custody is denied and that
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1 this action is dismissed with prejudice.

2 IT IS FURTHER ORDERED that a Certificate of Appealability shall not issue
3 and leave to proceed *in forma pauperis* on appeal is denied because the petitioner
4 has not made a substantial showing of the denial of a constitutional right.

5 IT IS FURTHER ORDERED that the Clerk of the Court shall enter judgment
6 accordingly.

7 DATED this 6th day of April, 2017.

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10 Paul G. Rosenblatt
11 United States District Judge
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