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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Brian Allen Wilkins,)	
)	
Petitioner,)	CIV 10-00443 PHX JWS (MEA)
)	
v.)	REPORT AND RECOMMENDATION
)	
Suzanne Shirleson, Erica Freeman,)	
Arizona Attorney General,)	
)	
Respondent.)	
)	
_____)	

TO THE HONORABLE JOHN W. SEDWICK:

On or about March 1, 2010, Petitioner filed a *pro se* petition seeking a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The petition for habeas relief is captioned as being filed by an individual on probation, rather than a person in the custody of law enforcement. Respondents filed an Answer to Petition for Writ of Habeas Corpus ("Answer") (Doc. 31) on July 25, 2011. Petitioner filed a traverse (Doc. 32) on July 30, 2011.¹

¹ Petitioner filed a previous section 2254 action, docketed as 2:09 CV 00927, which was dismissed for the failure to exhaust the claims raised in the state courts.

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I Procedural History

The following information is summarized from Tempe Police DR#08- 123168:

On July 22, 2008, [Petitioner] was arrested for disorderly conduct, drug offenses, and aggravated assault. The investigation revealed that [Petitioner] had an argument with a neighbor, Michael Wood. [Petitioner] returned to his own apartment. He exited a short time later and discharged his pistol into the air. [Petitioner] then contacted Mr. Wood, allegedly pointed the gun at Mr. Wood's head, and told him he was going to shoot him. As [Petitioner] walked back to his own apartment, he fired two more rounds into the air. After he was detained, police found the handgun, marijuana, and drug paraphernalia in his residence.

When questioned by police, [Petitioner] admitted shooting the pistol because he felt threatened by Wood's name calling. He denied pointing the gun at anybody, and said [] Mr. Wood was threatening him via text messaging. One message said, "Nigger, I'm going to kill you." [Petitioner] admitted the marijuana and paraphernalia were for his personal use. Police noted that he appeared intoxicated.

Answer at 2-3, citing Doc. 7, Exh. 2 at 18-20.

A Direct Complaint was filed July 24, 2008. An order regarding Petitioner's custody was issued by the Maricopa County Superior Court on July 28, 2008. A motion to modify the terms of Petitioner's release conditions and to reduce the amount of bond was filed on July 30, 2008.

On July 31, 2008, a grand jury indictment charged Petitioner with unlawful discharge of a firearm, a class 6 dangerous felony (Count 1); disorderly conduct, a class 6 dangerous felony (Count 2); possession or use of marijuana, a class 6 felony (Count 3); and possession of drug paraphernalia,

1 a class 6 felony (Count 4). See Doc. 14. Petitioner was
2 arraigned and a not guilty plea entered on or about August 11,
3 2008.

4 On August 29, 2008, a motion to release Petitioner or
5 to modify the conditions of his release was filed and oral
6 argument requested and, on September 5, 2008, the trial court
7 set the motion for a hearing. On September 5, 2008, the state
8 filed notice of aggravating factors other than a prior
9 conviction and alleging the dangerous nature of a felony. The
10 state responded to Petitioner's motion for a reduction in his
11 bond on September 9, 2008. Petitioner was ordered released to
12 the supervision of pretrial services on September 16, 2008.

13 On March 2, 2009, Petitioner signed a written plea
14 agreement providing Petitioner would plead guilty to one count
15 of disorderly conduct, a class 6 undesignated offense (amended
16 Count 2); and one count of possession of drug paraphernalia, a
17 class 6 undesignated offense (amended Count 4). See Doc. 3.
18 The plea agreement provided that, with regard to the disorderly
19 conduct charge, there were no agreements as to whether
20 Petitioner would be sentenced to prison or placed on probation,
21 and no agreements as to whether the offense would be designated
22 a felony or left undesignated. Id.

23 The plea agreement further provided that, pursuant to
24 Petitioner's guilty plea to possession of drug paraphernalia,
25 Petitioner would be placed on probation, pay a fine of \$1380,
26 including surcharges, and perform not less than 24 hours of
27 community service. Id. The plea agreement provided that the
28

1 allegation of discharge of a firearm (Count 1) and possession or
2 use of marijuana (Count 3) and the allegation of dangerousness
3 would be dismissed,

4 Petitioner was sentenced on March 30, 2009. See Doc.
5 14. The sentencing court suspended imposition of sentence and
6 placed Petitioner on concurrent one-year terms of probation for
7 each offense, with each offense left "undesigned." Id.
8 Additionally, on amended Count 2, Petitioner was ordered to
9 serve 30 days in the county jail, with credit for 30 days
10 previously served, and further ordered to complete 200 hours of
11 community service. Id.² On amended Count 4, Petitioner was
12 ordered to pay a fine of \$1380 including surcharges, and perform
13 24 hours of community service.

14 Petitioner initiated a timely action for state post-
15 conviction relief pursuant to Rule 32, Arizona Rules of Criminal
16 Procedure. On July 2, 2009, the trial court issued a minute
17 entry indicating it had received Petitioner's notice of
18 post-conviction relief and that Petitioner had elected to
19 proceed without counsel. See Doc. 7. The state court ordered
20 transcripts of the change of plea and sentencing hearings be
21 prepared as part of the post-conviction proceedings. Id.

22 On July 13, 2009, Petitioner filed a pro se brief in
23 his Rule 32 action. Petitioner asserted the following claims:

25
26 ² Petitioner was taken into custody on the date of the
27 crimes and held on a \$54,000 bond. Petitioner's bond was reduced to
28 no bond and he was released after he had been detained for 57 days in
custody.

1 1. He was denied his constitutional right to the
2 effective assistance of counsel;

3 2. The unconstitutional suppression of evidence by the
4 state;

5 3. Unlawfully induced plea of guilty or no contest;

6 4. The abridgement of any other right guaranteed by the
7 constitution of the laws of this state, or the constitution of
8 the United States, including the Fifth, Sixth, Eighth, and
9 Fourteenth Amendments of the U.S. Constitution and Article 2 of
10 the Constitution of Arizona.

11 5. The obstruction by state officials of the right to
12 appeal. See Doc. 14 at 15-34.

13 On September 25, 2009, the trial court denied relief in
14 Petitioner's Rule 32 action. The trial court concluded: "Based
15 upon the matters presented the Court finds that the defendant
16 has failed to show any colorable claim for relief pursuant to
17 Rule 32.1 of the Arizona Rules of Criminal Procedure.³ It is

18 ³ This rule provides:

19 Grounds for relief are:

20 a. The conviction or the sentence was in
21 violation of the Constitution of the United
22 States or of the State of Arizona;

23 b. The court was without jurisdiction to render
24 judgment or to impose sentence;

25 c. The sentence imposed exceeded the maximum
26 authorized by law, or is otherwise not in
27 accordance with the sentence authorized by law;

28 d. The person is being held in custody after the
sentence imposed has expired;

 e. Newly discovered material facts probably
exist and such facts probably would have changed
the verdict or sentence. Newly discovered
material facts exist if:

 (1) The newly discovered material facts were
discovered after the trial.

1 ordered dismissing the petition pursuant to Rule 32.6(c)⁴ of the
2 Arizona Rules of Criminal Procedure." Doc. 3.

3
4 (2) The defendant exercised due diligence in
securing the newly discovered material facts.

5 (3) The newly discovered material facts are not
6 merely cumulative or used solely for impeachment,
7 unless the impeachment evidence substantially
8 undermines testimony which was of critical
9 significance at trial such that the evidence
probably would have changed the verdict or
sentence.

10 f. The defendant's failure to file a notice of
11 post-conviction relief of-right or notice of
12 appeal within the prescribed time was without
13 fault on the defendant's part; or

14 g. There has been a significant change in the
15 law that if determined to apply to defendant's
16 case would probably overturn the defendant's
conviction or sentence; or

17 h. The defendant demonstrates by clear and
18 convincing evidence that the facts underlying the
19 claim would be sufficient to establish that no
20 reasonable fact-finder would have found defendant
21 guilty of the underlying offense beyond a
22 reasonable doubt, or that the court would not
23 have imposed the death penalty.

24
25 ⁴This Rule provides:

26 The court shall review the petition within twenty
27 days after the defendant's reply was due. On
28 reviewing the petition, response, reply, files
and records, and disregarding defects of form,
the court shall identify all claims that are
procedurally precluded under this rule. If the
court, after identifying all precluded claims,
determines that no remaining claim presents a
material issue of fact or law which would entitle
the defendant to relief under this rule and that
no purpose would be served by any further
proceedings, the court shall order the petition
dismissed. If the court does not dismiss the
petition, the court shall set a hearing within
thirty days on those claims that present a
material issue of fact or law. If a hearing is
ordered, the state shall notify the victims, upon
the victims' request pursuant to statute or court
rule relating to victims' rights, of the time and
place of the hearing.

1 (10) He was denied his right to due process of law
2 because the state suppressed exculpatory evidence. See Doc. 4.

3 Respondent asserts that Petitioner procedurally
4 defaulted some of his federal habeas claims in the state courts.
5 Because Petitioner has not established cause and prejudice with
6 regard to his defaulted claims, Respond argues, the Court may
7 not grant habeas relief on those claims. Respondent also
8 contends that Petitioner waived some claims by pleading guilty
9 pursuant to a written plea agreement.

10 Respondent further argues that Petitioner's ineffective
11 assistance of counsel claims and his Faretta claim are without
12 merit. Respondent asserts Petitioner specifically waived his
13 right to appointed counsel in his Rule 32 proceedings and that
14 Petitioner is not entitled to a "hybrid" of self-representation
15 and appointed counsel and that Petitioner waived any right to
16 assert error in his arraignment by pleading guilty. Respondent
17 also contends Petitioner's claim of excessive bond was waived by
18 his guilty plea. Respondent maintains Petitioner procedurally
19 defaulted his claims of judicial impropriety with regard to most
20 of the judges against whom he asserts error and that, with
21 regard to the remaining judge, Petitioner alleges only that this
22 judge violated state rules, which does not state a claim for
23 violation of the federal right to due process of law.

24 **II Applicable law**

25 **A. Mootness**

26 At the time he filed his petition, Petitioner was
27 presumably still serving a term of probation. However, the

1 Magistrate Judge notes that Petitioner presumably completed
2 serving the concurrent one-year terms of probation imposed on
3 March 30, 2009, on or about March 30, 2010. Because the
4 sentence imposed has been completely served and there are no
5 serious non-speculative collateral consequences of the
6 convictions, the petition is arguably moot. See Zichko v.
7 Idaho, 247 F.3d 1015, 1019 (9th Cir. 2001). Compare Larche v.
8 Simons, 53 F.3d 1068, 1069 (9th Cir. 1995).

9 Article III, § 2 of the Constitution requires the
10 existence of a case or controversy through all stages of a
11 federal judicial proceeding. Accordingly, throughout the entire
12 proceedings, the petitioner "must have suffered, or be
13 threatened with, an actual injury ... likely to be redressed by
14 a favorable judicial decision." Spencer v. Kemna, 523 U.S. 1,
15 7, 118 S. Ct. 978, 983 (1998), quoting Lewis v. Continental Bank
16 Corp., 494 U.S. 472, 477, 110 S. Ct. 1249, 1253-54 (1990). See
17 also Olson v. Hart, 965 F.2d 940, 943 (10th 1992).

18 However, Respondents have not argued that the petition
19 is moot. Accordingly, the Magistrate Judge will proceed with a
20 further analysis of Petitioner's entitlement to habeas relief.

21 **B. Exhaustion and procedural default**

22 The District Court may only grant federal habeas relief
23 on the merits of a claim which has been exhausted in the state
24 courts. See O'Sullivan v. Boerckel, 526 U.S. 838, 842, 119 S.
25 Ct. 1728, 1731 (1999); Coleman v. Thompson, 501 U.S. 722, 729-
26 30, 111 S. Ct. 2546, 2554-55 (1991). To properly exhaust a
27 federal habeas claim, the petitioner must afford the state the

1 opportunity to rule upon the merits of the claim by "fairly
2 presenting" the claim to the state's "highest" court in a
3 procedurally correct manner. See, e.g., Castille v. Peoples,
4 489 U.S. 346, 351, 109 S. Ct. 1056, 1060 (1989); Rose
5 v. Palmateer, 395 F.3d 1108, 1110 (9th Cir. 2005).⁵

6 The Ninth Circuit Court of Appeals has concluded that,
7 in non-capital cases arising in Arizona, the "highest court"
8 test of the exhaustion requirement is satisfied if the habeas
9 petitioner presented his claim to the Arizona Court of Appeals,
10 either on direct appeal or in a petition for post-conviction
11 relief. See Swoopes v. Sublett, 196 F.3d 1008, 1010 (9th Cir.
12 1999). See also Crowell v. Knowles, 483 F. Supp. 2d 925, 932
13 (D. Ariz. 2007).

14 To satisfy the "fair presentment" prong of the
15 exhaustion requirement, the petitioner must present "both the
16 operative facts and the legal principles that control each claim
17 to the state judiciary." Wilson v. Briley, 243 F.3d 325, 327
18 (7th Cir. 2001). See also Kelly v. Small, 315 F.3d 1063, 1066
19 (9th Cir. 2003). The Supreme Court reiterated in Baldwin v.
20 Reese that the purpose of exhaustion is to give the states the
21 opportunity to pass upon and correct alleged constitutional
22 errors. See 541 U.S. 27, 29, 124 S. Ct. 1347, 1349 (2004).

23
24 ⁵ Prior to 1996, the federal courts were required to dismiss
25 a habeas petition which included unexhausted claims for federal habeas
26 relief. However, section 2254 now states: "An application for a writ
27 of habeas corpus may be denied on the merits, notwithstanding the
28 failure of the applicant to exhaust the remedies available in the
courts of the State." 28 U.S.C. § 2254(b)(2) (1994 & Supp. 2010).

1 Therefore, if the petitioner did not present the federal habeas
2 claim to the state court as asserting the violation of a
3 specific federal constitutional right, as opposed to violation
4 of a state law or a state procedural rule, the federal habeas
5 claim was not "fairly presented" to the state court. See, e.g.,
6 id., 541 U.S. at 33, 124 S. Ct. at 1351.⁶

7 A federal habeas petitioner has not exhausted a federal
8 habeas claim if he still has the right to raise the claim "by
9 any available procedure" in the state courts. 28 U.S.C. §
10 2254(c) (1994 & Supp. 2010). Because the exhaustion requirement
11 refers only to remedies still available to the petitioner at the
12 time they file their action for federal habeas relief, it is
13 satisfied if the petitioner is procedurally barred from pursuing
14 their claim in the state courts. See Woodford v. Ngo, 548 U.S.
15 81, 92-93, 126 S. Ct. 2378, 2387 (2006). If it is clear the
16 habeas petitioner's claim is procedurally barred pursuant to
17 state law, the claim is exhausted by virtue of the petitioner's
18 "procedural default" of the claim. See, e.g., id., 548 U.S. at
19 92, 126 S. Ct. at 2387.

20
21 ⁶ A petitioner must present to the state courts the
22 "substantial equivalent" of the claim presented in federal court.
23 Picard v. Connor, 404 U.S. 270, 278, 92 S. Ct. 509, 513-14 (1971);
24 Libberton v. Ryan, 583 F.3d 1147, 1164 (9th Cir. 2009). Full and fair
25 presentation requires a petitioner to present the substance of his
26 claim to the state courts, including a reference to a federal
27 constitutional guarantee and a statement of facts that entitle the
28 petitioner to relief. See Scott v. Schriro, 567 F.3d 573, 582 (9th
Cir. 2009); Lopez v. Schriro, 491 F.3d 1029, 1040 (9th Cir. 2007).
Although a habeas petitioner need not recite "book and verse on the
federal constitution" to fairly present a claim to the state courts,
Picard, 404 U.S. at 277-78, 92 S. Ct. at 512-13, they must do more
than present the facts necessary to support the federal claim. See
Anderson v. Harless, 459 U.S. 4, 6, 103 S. Ct. 276, 277 (1982).

1 Procedural default occurs when a petitioner has never
2 presented a federal habeas claim in state court and is now
3 barred from doing so by the state's procedural rules, including
4 rules regarding waiver and the preclusion of claims. See
5 Castille, 489 U.S. at 351-52, 109 S. Ct. at 1060. Procedural
6 default also occurs when a petitioner did present a claim to the
7 state courts, but the state courts did not address the merits of
8 the claim because the petitioner failed to follow a state
9 procedural rule. See, e.g., Ylst v. Nunnemaker, 501 U.S. 797,
10 802, 111 S. Ct. 2590, 2594-95 (1991); Coleman, 501 U.S. at 727-
11 28, 111 S. Ct. at 2553-57; Szabo v. Walls, 313 F.3d 392, 395
12 (7th Cir. 2002).

13 Because the Arizona Rules of Criminal Procedure
14 regarding timeliness, waiver, and the preclusion of claims bar
15 Petitioner from now returning to the state courts to exhaust any
16 unexhausted federal habeas claims, Petitioner has exhausted but
17 procedurally defaulted any claim not previously fairly presented
18 to the Arizona Court of Appeals in his state action for post-
19 conviction relief pursuant to Rule 32, Arizona Rules of Criminal
20 Procedure. See Insyxiengmay v. Morgan, 403 F.3d 657, 665 (9th
21 Cir. 2005); Beaty v. Stewart, 303 F.3d 975, 987 (9th Cir. 2002).
22 See also Stewart v. Smith, 536 U.S. 856, 860, 122 S. Ct. 2578,
23 2581 (2002) (holding Arizona's state rules regarding the waiver
24 and procedural default of claims raised in attacks on criminal
25 convictions are adequate and independent state grounds for
26 affirming a conviction and denying federal habeas relief on the
27 grounds of a procedural bar).

1 **C. Cause and prejudice**

2 The Court may consider the merits of a procedurally
3 defaulted claim if the petitioner establishes cause for their
4 procedural default and prejudice arising from that default.
5 "Cause" is a legitimate excuse for the petitioner's procedural
6 default of the claim and "prejudice" is actual harm resulting
7 from the alleged constitutional violation. See Thomas v. Lewis,
8 945 F.2d 1119, 1123 (9th Cir. 1991). Under the "cause" prong
9 of this test, Petitioner bears the burden of establishing that
10 some objective factor external to the defense impeded his
11 compliance with Arizona's procedural rules. See Moorman v.
12 Schriro, 426 F.3d 1044, 1058 (9th Cir. 2005); Vickers v.
13 Stewart, 144 F.3d 613, 617 (9th Cir. 1998); Martinez-Villareal
14 v. Lewis, 80 F.3d 1301, 1305 (9th Cir. 1996). To establish
15 prejudice, the petitioner must show that the alleged error
16 "worked to his actual and substantial disadvantage, infecting
17 his entire trial with error of constitutional dimensions."
18 United States v. Frady, 456 U.S. 152, 170, 102 S. Ct. 1584, 1595
19 (1982). See also Correll v. Stewart, 137 F.3d 1404, 1415-16
20 (9th Cir. 1998).

21 Generally, a petitioner's lack of legal expertise is
22 not cause to excuse procedural default. See Hughes v. Idaho
23 State Bd. of Corr., 800 F.2d 905, 908 (9th Cir. 1986).
24 Additionally, to establish prejudice, the petitioner must show
25 that the alleged constitutional error worked to his actual and
26 substantial disadvantage, infecting his entire trial with
27 constitutional violations. See Vickers, 144 F.3d at 617;

1 Correll, 137 F.3d at 1415-16. Establishing prejudice requires
2 a petitioner to prove that, "but for" the alleged constitutional
3 violations, there is a reasonable probability he would not have
4 been convicted of the same crimes. See Manning v. Foster, 224
5 F.3d 1129, 1135-36 (9th Cir. 2000); Ivy v. Caspari, 173 F.3d
6 1136, 1141 (8th Cir. 1999).

7 **D. Fundamental miscarriage of justice**

8 Review of the merits of a procedurally defaulted habeas
9 claim is required if the petitioner demonstrates review of the
10 merits of the claim is necessary to prevent a fundamental
11 miscarriage of justice. See Dretke v. Haley, 541 U.S. 386, 393,
12 124 S. Ct. 1847, 1852 (2004); Schlup v. Delo, 513 U.S. 298, 316,
13 115 S. Ct. 851, 861 (1995); Murray v. Carrier, 477 U.S. 478,
14 485-86, 106 S. Ct. 2639, 2649 (1986). A fundamental miscarriage
15 of justice occurs only when a constitutional violation has
16 probably resulted in the conviction of one who is factually
17 innocent. See Murray, 477 U.S. at 485-86, 106 S. Ct. at 2649;
18 Thomas v. Goldsmith, 979 F.2d 746, 749 (9th Cir. 1992) (showing
19 of factual innocence is necessary to trigger manifest injustice
20 relief). To satisfy the "fundamental miscarriage of justice"
21 standard, a petitioner must establish by clear and convincing
22 evidence that no reasonable fact-finder could have found him
23 guilty of the offenses charged. See Dretke, 541 U.S. at 393,
24 124 S. Ct. at 1852; Wildman v. Johnson, 261 F.3d 832, 842-43
25 (9th Cir. 2001).

1 **E. Standard of review**

2 The Court may not grant a writ of habeas corpus to a
3 state prisoner on a claim adjudicated on the merits in state
4 court proceedings unless the state court reached a decision
5 contrary to clearly established federal law, or the state court
6 decision was an unreasonable application of clearly established
7 federal law. See 28 U.S.C. § 2254(d) (1994 & Supp. 2010); Carey
8 v. Musladin, 549 U.S. 70, 75, 127 S. Ct. 649, 653 (2006);
9 Musladin v. Lamarque, 555 F.3d 834, 838 (9th Cir. 2009).
10 Factual findings of a state court are presumed to be correct and
11 can be reversed by a federal habeas court only when the federal
12 court is presented with clear and convincing evidence. See 28
13 U.S.C. § 2254(e)(1); Miller-El v. Dretke, 545 U.S. 231, 240-41,
14 125 S. Ct. 2317, 2325 (2005); Miller-El v. Cockrell, 537 U.S.
15 322, 340, 123 S. Ct. 1029, 1041 (2003); Crittenden v. Ayers, 624
16 F.3d 943, 950 (9th Cir. 2010); Stenson v. Lambert, 504 F.3d 873,
17 881 (9th Cir. 2007).

18 A state court decision is contrary to federal law if it
19 applied a rule contradicting the governing law of Supreme Court
20 opinions, or if it confronts a set of facts that is materially
21 indistinguishable from a decision of the Supreme Court but
22 reaches a different result. See, e.g., Brown v. Payton, 544
23 U.S. 133, 141, 125 S. Ct. 1432, 1438 (2005); Yarborough v.
24 Alvarado, 541 U.S. 652, 663, 124 S. Ct. 2140, 2149 (2004).

25 A state court decision is contrary to clearly
26 established federal law if it arrives at a
27 conclusion of law opposite to that of the
28 Supreme Court or reaches a result different
from the Supreme Court on materially

1 indistinguishable facts. Taylor v. Lewis,
2 460 F.3d 1093, 1097 n.4 (9th Cir. 2006). A
3 state court decision involves an unreasonable
4 application of clearly established federal
5 law if it correctly identifies a governing
6 rule but applies it to a new set of facts in
7 a way that is objectively unreasonable, or if
8 it extends, or fails to extend, a clearly
9 established legal principle to a new set of
10 facts in a way that is objectively
11 unreasonable. Id. An unreasonable
12 application of federal law is different from
13 an incorrect application of federal law. Id.

14 McNeal v. Adams, 623 F.3d 1283, 1287-88 (9th Cir. 2010), cert.
15 denied, 79 U.S.W.L. 3727 (June 27, 2011) (No. 10-10109).

16 For example, a state court's decision is considered
17 contrary to federal law if the state court erroneously applied
18 the wrong standard of review or an incorrect test to a claim.
19 See Knowles v. Mirzayance, 129 S. Ct. 1411, 1419 (2009); Wright
20 v. Van Patten, 552 U.S. 120, 124-25, 128 S. Ct. 743, 746-47
21 (2008); Norris v. Morgan, 622 F.3d 1276, 1288 (9th Cir. 2010),
22 cert. denied, 131 S. Ct. 1557 (2011). See also Frantz v. Hazy,
23 533 F.3d 724, 737 (9th Cir. 2008); Bledsoe v. Bruce, 569 F.3d
24 1223, 1233 (10th Cir. 2009).

25 The state court's determination of a habeas claim may
26 be set aside under the unreasonable application prong if, under
27 clearly established federal law, the state court was
28 "unreasonable in refusing to extend [a] governing legal
principle to a context in which the principle should have
controlled." Ramdass v. Angelone, 530 U.S. 156, 166, 120 S. Ct.
2113, 2120 (2000). See also Cheney v. Washington, 614 F.3d 987,
994 (9th Cir. 2010); Cook v. Schriro, 538 F.3d 1000, 1015 (9th
Cir. 2008). However, the state court's decision is an

1 unreasonable application of clearly established federal law only
2 if it can be considered objectively unreasonable. See, e.g.,
3 Renico v. Lett, 130 S. Ct. 1855, 1862 (2010). An unreasonable
4 application of law is different from an incorrect one. See id.;
5 Cooks v. Newland, 395 F.3d 1077, 1080 (9th Cir. 2005).⁷

6 A state court's determination that a claim
7 lacks merit precludes federal habeas relief
8 so long as "fairminded jurists could
9 disagree" on the correctness of the state
10 court's decision. Yarborough v. Alvarado,
11 541 U.S. 652, 664, 124 S. Ct. 2140, []
12 (2004). And as this Court has explained,
13 "[E]valuating whether a rule application was
14 unreasonable requires considering the rule's
15 specificity. The more general the rule, the
16 more leeway courts have in reaching outcomes
17 in case-by-case determinations." Ibid. "[I]t
18 is not an unreasonable application of clearly
19 established Federal law for a state court to
20 decline to apply a specific legal rule that
21 has not been squarely established by this
22 Court." Knowles v. Mirzayance, [] 129 S.Ct.
23 1411, 1413-14, [] (2009) (internal quotation
24 marks omitted).

25 Harrington v. Richter, 131 S. Ct. 770, 786 (2011). See also
26 Howard v. Clark, 608 F.3d 563, 567-68 (9th Cir. 2010).

27 Additionally, the United States Supreme Court recently
28 held that, with regard to claims adjudicated on the merits in
the state courts, "review under § 2254(d)(1) is limited to the
record that was before the state court that adjudicated the
claim on the merits." Cullen v. Pinholster, 131 S. Ct. 1388,
1398 (2011).

⁷ "That test is an objective one and does not permit a court
to grant relief simply because the state court might have incorrectly
applied federal law to the facts of a certain case." Adamson v.
Cathel, 633 F.3d 248, 255-56 (3d Cir. 2011).

1 If the Court determines that the state court's decision
2 was an objectively unreasonable application of clearly
3 established United States Supreme Court precedent, the Court
4 must review whether Petitioner's constitutional rights were
5 violated, i.e., the state's ultimate denial of relief, without
6 the deference to the state court's decision that the Anti-
7 Terrorism and Effective Death Penalty Act ("AEDPA") otherwise
8 requires. See Panetti v. Quarterman, 551 U.S. 930, 953-54, 127
9 S. Ct. 2842, 2858-59 (2007); Greenway v. Schriro, ___ F.3d ___,
10 2011 WL 3195310, at *14 (9th Cir.); Norris, 622 F.3d at 1286;
11 Howard, 608 F.3d at 568.

12 **III Analysis**

13 **A. Respondents assert that Petitioner waived several**
14 **of his habeas claims by pleading guilty and Petitioner contends**
15 **his guilty plea was invalid because the plea agreement had**
16 **"expired" before the date the plea was signed by Petitioner**

17 As a preliminary matter, Respondents contend that
18 Petitioner waived several of his habeas claims by signing a
19 written plea agreement.

20 Throughout his habeas petition and his reply to the
21 answer to his petition, Petitioner contends that his
22 constitutional rights were violated and his conviction must be
23 vacated and the charges against him must be dismissed because
24 the written plea agreement had "expired" on the date the
25 agreement was signed by Petitioner. Petitioner does not
26 explicitly assert that he involuntarily entered into the plea
27 agreement, but instead emphasizes that his counsel was
28 ineffective and incompetent with regard to advising Petitioner

1 to sign the agreement and that counsel pressured Petitioner into
2 signing the agreement. Petitioner alleges his public defender
3 was incompetent, *inter alia*, because counsel had "thousands" of
4 cases assigned to him in a year, and because counsel did not
5 spend enough time with Petitioner or spend enough time
6 investigating Petitioner's case.

7 The written plea agreement was dated as signed by
8 Petitioner's counsel on March 2, 2006 (the year is apparently an
9 error by counsel), and was dated as signed by the prosecutor on
10 September 9, 2008, and was dated as signed by Petitioner on
11 March 2, 2009. The plea agreement states on the first page that
12 the "offer" expires and is revoked if not accepted by October
13 22, 2008. The typed October date is scratched-out and the date
14 March 2, 2009, is written by hand next to the 2008 date.

15 Additionally, the plea agreement states that by
16 accepting the agreement Petitioner waived all motions and
17 defenses with regard to the entry of judgment and that
18 Petitioner also was expressly waiving the right to a direct
19 appeal. The plea agreement also provided that several charges
20 against Petitioner would be dismissed. As a result of the plea
21 agreement Petitioner received less than the maximum sentence
22 with regard to both jail time and fines on both convictions.

23 "A guilty plea operates as a waiver of important
24 rights, and is valid only if done voluntarily, knowingly, and
25 intelligently, 'with sufficient awareness of the relevant
26 circumstances and likely consequences.'" Bradshaw v. Stumpf,
27 545 U.S. 175, 183, 125 S. Ct. 2398, 2405-06 (2005), quoting

1 Brady v. United States, 397 U.S. 742, 748, 90 S. Ct. 1463, 1468-
2 69 (1970). The United States Supreme Court greatly limited the
3 grounds upon which a state prisoner may seek habeas relief after
4 entering a voluntary and intelligent guilty plea in Tollett v.
5 Henderson, 411 U.S. 258, 93 S. Ct. 1602 (1973) (holding that a
6 knowing and voluntary guilty plea waives all non-jurisdictional
7 defects occurring prior to the entry of the guilty plea).

8 Following Tollett, the federal courts have concluded
9 that a plea colloquy must satisfy several requirements in order
10 for a guilty plea to be considered voluntary and knowing. See,
11 e.g., Tanner v. McDaniel, 493 F.3d 1135, 1146-47 (9th Cir.
12 2007). A guilty plea is not considered voluntary and knowing
13 unless a defendant is informed of and waives his privilege
14 against self-incrimination, his right to trial by jury, and his
15 right to confront witnesses. Id., 493 F.3d at 1147, citing
16 Boykin v. Alabama, 395 U.S. 238, 243-44, 89 S. Ct. 1709, 1712-13
17 (1969). A defendant must understand the consequences of his
18 plea, including "the range of allowable punishment that will
19 result from his plea." Little v. Crawford, 449 F.3d 1075, 1080
20 (9th Cir. 2006).

21 The transcript of the pre-trial settlement conference⁸
22 and Petitioner's plea colloquy are attached to Respondents'

23 _____
24 ⁸ At the beginning of the settlement conference Petitioner
25 was advised that the purpose of the settlement conference was to see
26 if the parties could reach a settlement, to allow Petitioner to know
27 what evidence the state would present if Petitioner went to trial, to
28 give Petitioner an opportunity to ask questions of the settlement
judge and prosecutor with his counsel present, and to help Petitioner
decide if he wanted to accept the plea agreement or reject the
agreement and proceed to trial. See Answer, Exh. B at 3.

1 answer to the petition as Exhibit B and Exhibit C. The
2 settlement conference was conducted on March 2, 2009. At the
3 settlement conference Petitioner acknowledged he had no prior
4 felony convictions and volunteered that he had been convicted of
5 a misdemeanor DUI in 2001.⁹ The prosecutor stated he believed
6 Petitioner had been undercharged and that the circumstance
7 indicated an aggravated assault, i.e., a witness stated she
8 would testify Petitioner argued with the victim and that
9 Petitioner held a gun to the victim's head. The prosecutor
10 stated that, given the actual circumstances of the crime, i.e.,
11 that Petitioner had arguably been verbally provoked into an
12 argument with the victim, he would advocate for a sentence of
13 probation should Petitioner accept the plea.

14 At the settlement conference Petitioner re-stated that
15 he believed the truth was "on [his] side" although he also
16 believed that the victim and a witness would testify contrary to
17 the truth should he go to trial, and that his primary concern
18 was how to "get this thing done." Petitioner further
19 acknowledged that he would not be able to attend law school
20 because of "felony charges" which would make him ineligible for
21 financial aid; Petitioner acknowledged that the fact of the

22
23 ⁹ A criminal history report in the record produced by
24 Maricopa County on March 2, 2009, indicates that in 2000 Petitioner
25 was convicted of a misdemeanor, i.e., DUI in Iowa, on May 29, 2000,
26 and that Petitioner served two days in jail pursuant to this
27 conviction. The criminal history report also states that in 2005
28 Petitioner was charged with a civil violation, i.e., obtaining a game
or fishing license by fraud, for which violation Petitioner paid a
fine.

1 conviction would not prevent him from being accepted to law
2 school, but would prohibit him from receiving the financial aid
3 necessary to attend. The hearing judge explained the range of
4 potential sentences with and without the plea agreement and
5 repeatedly told Petitioner that accepting the plea or not
6 accepting the plea agreement was "completely up to you."¹⁰

7 At that time, i.e., immediately after the settlement
8 conference, Petitioner chose to go on the record before the
9 judge and enter a guilty plea as provided in the plea agreement.
10 During the settlement conference and during the immediately
11 subsequent plea hearing Petitioner never pointed out or
12 complained or raised the issue that the plea agreement had
13 "expired" or was otherwise "illegal". Petitioner agreed to
14 plead guilty to disorderly conduct and to possession of
15 paraphernalia and the state agreed to dismiss the charge of
16 possession of marijuana and the count of discharge of a weapon
17 and the allegation of dangerousness. At the hearing it was
18 explained to Petitioner that the only realistic possibility of
19 serving additional jail time was predicated on the finding of
20 dangerousness, i.e., that Petitioner had discharged a gun three
21 times into the air, a fact which Petitioner does not even now
22 dispute, although Petitioner argues that his actions were
23 justified because they were provoked by the victim.

24
25
26 ¹⁰ At that time Petitioner was "ten hours shy" of completing
27 a bachelor's degree and Petitioner averred to the state court that he
28 had registered for the fall semester of classes.

1 Petitioner stated that he had read the plea agreement,
2 that he understood the plea agreement, that he understood he was
3 giving up his right to a direct appeal. The judge told
4 Petitioner if he accepted the plea agreement he was waiving his
5 right to a jury trial, his right to remain silent, his right to
6 confront witnesses, and his right to be presumed innocent.

7 Petitioner's sentencing hearing was conducted March 30,
8 2009. When asked if he had anything to say at that hearing,
9 Petitioner stated that he did not have anything to say.

10 Petitioner's unsupported statements in his federal
11 habeas pleadings that his guilty plea was not voluntary do not
12 supply the "clear and convincing evidence" standard necessary
13 for the Court to conclude that Petitioner's plea was not knowing
14 or voluntary. Petitioner's contemporaneous statements regarding
15 his understanding of the plea agreement carry substantial weight
16 in determining if his entry of a guilty plea was knowing and
17 voluntary. See Blackledge v. Allison, 431 U.S. 63, 74, 97 S.
18 Ct. 1621, 1629 (1977) ("Solemn declarations in open court carry
19 a strong presumption of verity. The subsequent presentation of
20 conclusory allegations unsupported by specifics is subject to
21 summary dismissal, as are contentions that in the face of the
22 record are wholly incredible"); Doe v. Woodford, 508 F.3d 563,
23 571 (9th Cir. 2007); Restucci v. Spencer, 249 F. Supp. 2d 33, 45
24 (D. Mass. 2003) (collecting cases so holding).

25 Because Petitioner stated at the time of his guilty
26 plea that the plea was knowing and voluntary, the Court
27 concludes that, as a matter of fact, the plea was voluntary and

1 knowing. See, e.g., Chizen v. Hunter, 809 F.2d 560, 562 (9th
2 Cir. 1986). Accordingly, any federal habeas claim that
3 Petitioner was deprived of his constitutional rights may be
4 properly denied on the merits.

5 Additionally, with regard to Petitioner's contention
6 that his plea was not knowing and voluntary because he was
7 allegedly told by his counsel or otherwise led to believe his
8 sentences would be designated as misdemeanors at the time of
9 sentencing, a state court's factual finding that a plea was
10 voluntary and knowing is entitled to a presumption of
11 correctness by a federal habeas court. See Lambert v. Blodgett,
12 393 F.3d 943, 982 (9th Cir. 2004); Cunningham v. Diesslin, 92
13 F.3d 1054, 1060 (10th Cir. 1996). Factual findings of a state
14 court are presumed to be correct and can be reversed by a
15 federal habeas court only when the federal court is presented
16 with clear and convincing evidence. See Miller-El v. Dretke, 545
17 U.S. 231, 125 S. Ct. 2317, 2325 (2005); Anderson v. Terhune, 467
18 F.3d 1208, 1212 (9th Cir. 2006); Solis v. Garcia, 219 F.3d 922,
19 926 (9th Cir. 2000).

20 Petitioner's assertion that, because the plea agreement
21 had "expired," Petitioner's plea must be vacated and he would
22 thereby be rendered innocent, does not provide a basis for
23 federal habeas relief. Petitioner does not cite to any
24 published legal opinion so holding. A plea agreement may be
25 vacated by a habeas court when a term of the plea agreement has
26 been violated, such as when a prosecutor does not advocate for
27 a sentence as promised in the agreement. The fact that the
28

1 typed date on the written plea agreement was changed to
2 accommodate Petitioner's accepting of the plea on the date of
3 the settlement conference is not a due process violation or a
4 basis for concluding that there has been a fundamental
5 miscarriage of justice. Neither does this fact establish that
6 there are collateral consequences arising from the potential
7 dismissal of Petitioner's habeas action on the ground of
8 mootness.¹¹ A criminal defendant's right to due process extends
9 only insofar as to enforce the terms of his plea agreement.
10 See, e.g., Santobello v. New York, 404 U.S. 257, 261-62, 92 S.
11 Ct. 495, 498 (1971). When a promise on which a guilty plea
12 rests is violated, the remedy is either specific performance of
13 the plea agreement or the opportunity to withdraw the guilty
14 plea. Id., 404 U.S. at 262-63, 92 S. Ct. 495. See also Buckley
15 v. Terhune, 441 F.3d 688, 698-99 n.11 (9th Cir. 2006); Julian v.
16 Bartley, 495 F.3d 487, 499-500 (7th Cir. 2007); Horton v. Bomar,
17 335 F.2d 583, 584 (6th Cir. 1964). Were the Court to find,
18 hypothetically, that the plea agreement in this matter was
19 invalid for some reason, Petitioner would not be entitled to
20 dismissal of the charges, but to withdraw his guilty plea and
21 again stand charged with the counts stated in the indictment and
22 again face jeopardy therefrom.

23
24
25
26 ¹¹ Another judge in the United States District Court for the
27 District of Arizona rejected a similar claim regarding an "expired"
28 plea agreement in Farrall v. Schriro, 2010 WL 4269567, at *26.

1 **B. Petitioner's specific claims for relief other than**
2 **his general assertion that the plea agreement is void because it**
3 **had "expired".**

4 **1. Petitioner asserts he is entitled to federal habeas**
5 **relief because he was denied his right to a jury trial and his**
6 **right to a speedy trial.**

7 Petitioner asserts that he exhausted this claim by
8 raising it in his state Rule 32 action. Petitioner argues that
9 the trial court violated his federal constitutional right to a
10 jury trial and his right to a speedy trial when the court sua
11 sponte continued his trial on January 12, 2009.

12 In his state Rule 32 action Petitioner did not
13 expressly state either a federal speedy trial claim or that he
14 had been denied his federal constitutional right to a jury
15 trial. Petitioner did allude to his federal constitutional
16 right to a fair trial and to due process of law. Vague
17 references, however, are insufficient to exhaust a federal
18 habeas claim in the state courts. See, e.g., Fields v.
19 Waddington, 401 F.3d 1018, 1021-22 (9th Cir. 2005); Casey v.
20 Moore, 386 F.3d 896, 913-14 (9th Cir. 2004).

21 Petitioner has not established cause and prejudice for
22 his failure to properly exhaust some of his habeas claims in the
23 state courts. In response to the answer to his petition,
24 Petitioner asserts that the plea agreement was expired and
25 illegal and, accordingly, that the merits of all his claims must
26 be addressed and that his convictions and sentences be vacated.
27 These assertions do not constitute cause and prejudice for
28 Petitioner's procedural default. Nor has Petitioner established
that a fundamental miscarriage of justice will occur absent a

1 consideration of the merits of his defaulted claims.

2 Additionally, having concluded that Petitioner's guilty
3 plea was knowing and voluntary, Petitioner's claim is precluded
4 because Petitioner expressly waived his right to a jury trial in
5 the written plea agreement and at his plea colloquy.

6 Several federal constitutional rights are
7 involved in a waiver that takes place when a
8 plea of guilty is entered in a state criminal
9 trial. First, is the privilege against
10 compulsory self-incrimination guaranteed by
11 the Fifth Amendment and applicable to the
12 States by reason of the Fourteenth. Second,
13 is the right to trial by jury. Third, is the
14 right to confront one's accusers.

11 Boykin v. Alabama, 395 U.S. 238, 243, 89 S. Ct. 1709, 1712
12 (1969) (internal citations omitted).

13 Similarly, Petitioner waived his right to object to any
14 violation of his right to a speedy trial by entering into the
15 plea. The Sixth Amendment's provision of a "right to a speedy
16 and public trial ..." applies to state court proceedings
17 pursuant to the Fourteenth Amendment. See Klopper v. North
18 Carolina, 386 U.S. 213, 222-23, 87 S. Ct. 988, 993 (1967).
19 However, the federal courts have concluded that a defendant who
20 "knowingly, intelligently and voluntarily" enters a guilty plea
21 waives the right to challenge his conviction on speedy trial
22 grounds, a non-jurisdictional defect. See Tollett, 411 U.S. at
23 267, 93 S. Ct. at 1608; Becker v. Nebraska, 435 F.2d 157 (8th
24 Cir. 1970) ("A voluntary plea of guilty constitutes a waiver of
25 all non-jurisdictional defects[,] ... [and] the right to a
26 speedy trial is non-jurisdictional in nature."); Ralbovsky v.

1 Kane, 407 F. Supp. 2d 1142, 1152-53 (C.D. Cal. 2005) (holding a
2 guilty plea waived the petitioner's claim that counsel was
3 ineffective for failing to appear at arraignments). Compare
4 Doggett v. United States, 505 U.S. 647, 657 n.3, 112 S. Ct.
5 2686, 2694 n.3 (1992) (noting a Sixth Amendment speedy trial
6 claim was preserved by a conditional guilty plea).

7 Furthermore, the delay in Petitioner's criminal
8 proceedings was not so lengthy or prejudicial as to implicate
9 his federal constitutional rights. The Supreme Court
10 articulated a four-part test to determine when government delay
11 has abridged the Sixth Amendment right to a speedy trial in
12 Barker v. Wingo, 407 U.S. 514, 530, 92 S. Ct. 2182, 2192 (1972).
13 The factors to be considered include: (1) the length of the
14 delay; (2) the reasons for the delay; (3) the accused's
15 assertion of the right to speedy trial; and (4) the prejudice
16 caused by the delay. No single factor is necessary or
17 sufficient. Id. The first factor, the length of delay, is a
18 threshold issue, and unless the length of delay is presumptively
19 prejudicial, the Court need not review the remaining factors.
20 See United States v. Beamon, 992 F.2d 1009, 1012 (9th Cir.
21 1993). The delay in Petitioner's criminal proceedings was not
22 so lengthy as to violate his constitutional rights.¹² See Stuard

23
24 ¹² The Supreme Court has instructed the lower courts to
25 break this inquiry into two steps. See Doggett, 505 U.S. at 651-52;
26 Beamon, 992 F.2d at 1012. To trigger a speedy trial inquiry, an
27 accused must show that the period between indictment and trial passes
28 a threshold point of "presumptively prejudicial" delay. Barker, 407
U.S. at 530; Beamon, 992 F.2d at 1012. Prejudice normally is presumed
if the delay in bringing the defendant to trial has exceeded one year.
Doggett, 505 U.S. at 652, n.1. If this threshold is not met, the

1 v. Stewart, 401 F.3d 1064, 1068 (9th Cir. 2005); Norris v.
2 Schotten, 146 F.3d 314, 328 (6th Cir. 1998). Compare McNeely v.
3 Blanas, 336 F.3d 822, 829 (9th Cir. 2003).

4 Accordingly, this claim may be denied on the merits
5 regardless of any failure to properly exhaust the claim.

6 **2. Petitioner contends he was denied his right to the**
7 **effective assistance of counsel.**

8 Petitioner exhausted an ineffective assistance of
9 counsel claim in the state courts. In his state Rule 32 action
10 Petitioner alleged that the first public defender assigned to
11 him (Mr. Brown) was overworked, did not return Petitioner's
12 calls, and did not move at Petitioner's arraignment for modified
13 release conditions. Petitioner asserts that the second public
14 defender assigned to represent him (Mr. Ziemba) was ineffective
15 because he unnecessarily delayed a trial and did not object when
16 the judge set a settlement conference at a time when Petitioner
17 expected the judge to set a trial date. Petitioner contends
18 that, when he asked counsel to move the court to dismiss the
19 charges because Petitioner's right to a speedy trial had been
20 denied, counsel told Petitioner a speedy trial argument would
21 not be successful.

22 Additionally, Petitioner alleges that his counsel
23 coerced him to sign the plea agreement, telling Petitioner he
24 would go to prison if he did not agree to the plea and telling

25 _____
26 Court need not proceed with the other Barker factors. Id. at 651-52;
Barker, 407 U.S. 530; Beamon, 992 F.2d at 1012.

1 Petitioner that the court would designate the offenses as
2 misdemeanors if Petitioner signed the plea. Petitioner asserts
3 he only signed the plea agreement because he had been denied his
4 right to a trial in January of 2009, because counsel was not
5 willing to undertake a trial, and because Petitioner felt he was
6 physically and emotionally unable to wait until summer of 2009
7 for a trial. With regard to being prejudiced by counsel's
8 errors, Petitioner asserts he would have been acquitted at trial
9 or convicted only of misdemeanors had counsel not coerced
10 Petitioner into the plea agreement.

11 The "clearly established Federal law, as
12 determined by the Supreme Court of the United
13 States" at issue in this case is the test for
14 ineffective assistance of counsel claims set
15 forth in Strickland v. Washington, 466 U.S.
16 668, 104 S.Ct. 2052, [] (1984), and in Hill
17 v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, []
18 (1985). Under Strickland, to establish a
19 claim of ineffective assistance of counsel,
20 the petitioner must show (1) grossly
21 deficient performance by his counsel, and (2)
22 resultant prejudice. 466 U.S. at 687, 104
23 S.Ct. 2052. In Hill, the Supreme Court
24 adapted the two-part Strickland standard to
25 challenges to guilty pleas based on
26 ineffective assistance of counsel, holding
27 that a defendant seeking to challenge the
28 validity of his guilty plea on the ground of
ineffective assistance of counsel must show
that (1) his "counsel's representation fell
below an objective standard of
reasonableness," and (2) "there is a
reasonable probability that, but for [his]
counsel's errors, he would not have pleaded
guilty and would have insisted on going to
trial." 474 U.S. at 57-59, 106 S. Ct. 366.

25 Womack v. Del Papa, 497 F.3d 998, 1002 (9th Cir. 2007).

26 Even if Petitioner's counsel's performance was somehow
27 ineffective with regard to the consequences of his plea, i.e.,
28

1 that the charges would be designated as misdemeanors at the time
2 of sentencing, Petitioner was not prejudiced by his counsel's
3 prediction because the plea agreement and the state court
4 alerted Petitioner to the potential consequences of his guilty
5 plea. See Womack, 497 F.3d at 1003, citing Doganieri v. United
6 States, 914 F.2d 165, 168 (9th Cir. 1990) (holding that the
7 petitioner "suffered no prejudice from his attorney's prediction
8 because, prior to accepting his guilty plea, the court explained
9 that the discretion as to what the sentence would be remained
10 entirely with the court").

11 Additionally, to succeed on a claim that his counsel
12 was constitutionally ineffective regarding a guilty plea, a
13 petitioner must show that his counsel's advice as to the
14 consequences of the plea was not within the range of competence
15 demanded of criminal attorneys. Hill, 474 U.S. at 58, 106 S.
16 Ct. at 369. A lawyer's advice to plead guilty in the face of
17 strong inculpatory evidence does not constitute ineffective
18 assistance of counsel. See Schone v. Purkett, 15 F.3d 785, 790
19 (8th Cir. 1994); Jones v. Dugger, 928 F.2d 1020, 1028 (11th Cir.
20 1991).

21 [A] defendant has the right to make a
22 reasonably informed decision whether to
23 accept a plea offer. In McMann v. Richardson,
24 the seminal decision on ineffectiveness of
25 counsel in plea situations, the Court
26 described the question as not whether
27 "counsel's advice [was] right or wrong, but
28 ... whether that advice was within the range
of competence demanded of attorneys in
criminal cases." McMann, 397 U.S. at 771, 90
S.Ct. 1441, []. Thus, for [the petitioner] to
establish a claim of ineffective assistance,
he "must demonstrate gross error on the part

1 of counsel...." Id. at 772, 397 U.S. 759, 90
2 S. Ct. 1441, [].

3 Turner v. Calderon, 281 F.3d 851, 880 (9th Cir. 2002) (some
4 internal citations and quotations omitted).

5 Petitioner has not made such a showing in this matter.
6 The transcript of the settlement hearing held just prior to
7 Petitioner deciding to accept the plea agreement and enter a
8 guilty plea that day, and the transcript of Petitioner's
9 sentencing proceeding, indicate Petitioner's decision to accept
10 the plea was reasonably informed and his decision alone. The
11 state court's summary conclusion that Petitioner was not denied
12 his right to the effective assistance of counsel was not clearly
13 contrary to federal law and Petitioner is not entitled to habeas
14 relief on this claim.

15 **3. Petitioner maintains he was denied his right to**
16 **represent himself during his criminal proceedings, i.e., a**
"Faretta" rights violation".

17 Petitioner asserted in his Rule 32 action that the
18 trial court improperly ignored letters from Petitioner regarding
19 the amount of his bond because the requests were not formal
20 motions filed by Petitioner's appointed counsel. In his federal
21 habeas action Petitioner asserts that his counsel's failure to
22 file such requests resulted in Petitioner being incarcerated for
23 two months before his \$54,000 bond was reduced to no bond and
24 Petitioner was released.¹³

25
26 ¹³ Petitioner alleges he sent two letters to the state trial
27 court, seeking his release from custody by having the state court
28 lower his bond from \$54,000 to no bond. Petitioner was released on
a motion brought by counsel and opposed by the state on September 16,

1 Petitioner, arguably, raised a Faretta claim in his
2 state Rule 32 action. The state court's conclusion that
3 Petitioner was not entitled to relief was not clearly contrary
4 to federal law.

5 Petitioner had a "Faretta" right to self-representation
6 during his criminal proceedings, which right he did not clearly
7 and unequivocally exercise, nor was that right violated by the
8 trial court's preclusion of Petitioner's filing of pro se
9 motions. See McCormick v. Adams, 621 F.3d 970, 976 (9th Cir.
10 2010); Akins v. Easterling, ___ F.3d ___, 2011 WL 3366239, at
11 *10 (6th Cir. Aug. 5, 2011); Washington v. Renico, 455 F.3d 722,
12 734 (6th Cir. 2006); Gamble v. Secretary, Florida Dep't of
13 Corr., 450 F.3d 1245, 1249 (11th Cir. 2006); Munkus v. Furlong,
14 170 F.3d 980, 983-84 (10th Cir. 1999). Compare Schell v. Witek,
15 218 F.3d 1017, 1026 (9th Cir. 2000); Shafer v. Bowersox, 329
16 F.3d 637, 647-48 (8th Cir. 2003).

17 Petitioner has not established that his right to
18 represent himself in his criminal proceedings was violated and
19 he is not entitled to relief on the merits of this claim.

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26 2008, approximately 57 days after Petitioner was taken into custody
27 and Petitioner continued to be represented by counsel through his
28 settlement hearing and his plea colloquy without complaint from
Petitioner.

1 4. Petitioner argues he was denied his right to due
2 process of law because the he was not provided counsel at his
3 arraignment and he was not appointed stand-by counsel for his
4 Rule 32 proceedings.

5 Petitioner asserts he was denied his right to counsel
6 at his arraignment because Petitioner's appearance was
7 telephonic and his counsel was not at the jail. Petitioner also
8 contends he was denied his right to counsel because he was not
9 provided "stand by" counsel in his Rule 32 proceedings, in which
10 Petitioner elected to represent himself. Petitioner did not
11 exhaust these claims in the state courts.

12 In response to the answer to his petition, Petitioner
13 asserts that the plea agreement was expired and illegal and,
14 accordingly, that the merits of all his claims must be addressed
15 and that his convictions and sentences be vacated. Having found
16 that the plea agreement was not rendered involuntary and
17 unknowing by virtue of the plea agreement being "expired" or
18 otherwise, the Magistrate Judge has determined that Petitioner
19 is bound by the plea agreement and has waived all claims other
20 than that the plea agreement was not knowing or involuntary.
21 Accordingly, the Court should deny relief on this claim.

22 At the initiation of his Rule 32 proceedings Petitioner
23 expressly informed the state court that he wished to represent
24 himself in those proceedings, effectively waiving his right to
25 appointed counsel for his Rule 32 action. See Speights v.
26 Frank, 361 F.3d 962, 964-65 (7th Cir. 2004) (noting that much
27 less process is required when a defendant chooses to exercise
28 their right to self-representation during appeal, as compared to

1 before they are convicted). Additionally, Petitioner's
2 assertion that he was denied his right to "stand by counsel" for
3 his state Rule 32 proceedings does not state a claim for habeas
4 relief. A state criminal defendant does not have a federal
5 constitutional right to "stand by" counsel because the United
6 States Supreme Court has never held that a state criminal
7 defendant is constitutionally entitled to the effective
8 assistance of "standby" or advisory counsel. See Williams v.
9 Stewart, 441 F.3d 1030, 1047 n.6 (9th Cir. 2006); Wilson v.
10 Parker, 515 F.3d 682, 697 (6th Cir. 2008). The Circuit Courts
11 of Appeal have uniformly concluded that an indigent criminal
12 defendant does not have the right to either counsel of his own
13 choosing or "hybrid" representation. See, e.g., Wilson, 515
14 F.3d at 696; Simpson v. Battaglia, 458 F.3d 585, 597 (7th Cir.
15 2006). See also John-Charles v. California, ___ F.3d ___, 2011
16 WL 2937945, at *5-*6 (July 22, 2011).

17 Petitioner also asserts that he was denied his right to
18 counsel because, at his arraignment, Petitioner appeared via
19 closed-circuit camera and Petitioner's attorney was in the
20 courtroom. Petitioner cites to no published opinion of the
21 United States Supreme Court which holds that such representation
22 violated Petitioner's federal constitutional right to the
23 effective assistance of counsel in all critical stages of the
24 proceedings, and the Magistrate Judge can find no such opinion.
25 The Magistrate Judge further concludes that Petitioner waived
26 this claim by pleading guilty and thereby waiving all pre-plea
27 non-jurisdictional defects with regard to the entry of judgment

1 and sentencing.

2 **5. Petitioner contends the state violated his right to**
3 **due process of law by fabricating evidence and using false**
4 **evidence against Petitioner.**

5 Petitioner alleges the state fabricated evidence of a
6 prior conviction and alleged "multiple victims" as a result of
7 the charged crimes. Petitioner contends the state did not
8 "disclose" the information that, at the time of the crimes the
9 victim was on probation, that petitioner's gun was legally
10 owned, and that the victim sent Petitioner threatening text
11 messages. Petitioner states this evidence was suppressed in
12 his Rule 32 proceedings and that these facts were evidence that
13 his Rule 32 claims were meritorious and should not have been
14 dismissed as precluded or waived.

15 Petitioner asserts constitutional error with regard to
16 the state's actions in his state action for post-conviction
17 relief. Petitioner has not stated a claim for habeas relief.

18 The Supreme Court [has] held that a State's
19 process for postconviction relief is
20 constitutionally adequate unless it "offends
21 some principle of justice so rooted in the
22 traditions and conscience of our people as to
23 be ranked as fundamental," or "transgresses
24 any recognized principle of fundamental
25 fairness in operation." Id. at 2320 (quoting
26 Medina v. California, 505 U.S. 437, 446, 448,
27 112 S.Ct. 2572, 2577-78, 120 L.Ed.2d 353
28 (1992)). Federal courts may not interfere
unless the State's process is "fundamentally
inadequate to vindicate the substantive
rights provided." Id.

25 Cunningham v. District Attorney's Office for Escambia County,
26 592 F.3d 1237, 1260-61 (11th Cir. 2010).

1 **6. Petitioner contends he was denied his right to due**
2 **process and his right to be free of excessive bond.**

3 Petitioner asserts that the amount of bond set was
4 unreasonably high because he had no prior criminal history and
5 was a college student. Petitioner asserts that his bond was set
6 high because the crime was reported by the local media as an
7 attack on a white male by a black male. Petitioner contends
8 that the amount of his bond prohibited him from effectively
9 investigating his case and representing himself.

10 Petitioner did not raise this claim in his state action
11 for post-conviction relief and Petitioner has not shown cause
12 and prejudice regarding the procedural default of this claim.
13 Additionally, Petitioner waived any claim regarding the amount
14 of his bond when he pled guilty. See Mitchell v. Superior
15 Court, 632 F.2d 767, 769 (9th Cir. 1980) ("As a general rule,
16 one who has voluntarily and intelligently pled guilty to a
17 criminal charge may not subsequently seek federal habeas relief
18 on the basis of pre-plea constitutional violations."); Lambert
19 v. United States, 600 F.2d 476, 477-78 (5th Cir. 1979).

20 **7. Petitioner alleges his right to due process of law**
21 **was violated by the Arizona Superior Court's abuses of**
22 **discretion.**

23 Petitioner contends that several Superior Court judges
24 acted to abuse their discretion when processing his criminal
25 proceedings, including signing orders in his case when the
26 signing judge was not the assigned judge, sentencing him
27 pursuant to an "expired" plea agreement, and dismissing his Rule
28 32 action despite, Petitioner asserts, the presentation of

1 timely and meritorious claims. Petitioner also asserts a
2 Superior Court judge abused his discretion by failing to address
3 Petitioner's pro se motion to release him without bond.

4 Petitioner's claims of pretrial judicial error were
5 waived by his plea agreement. Additionally, Petitioner's claims
6 that various state court judges abused their discretion or that
7 they did not strictly comply with the Arizona Rules of Criminal
8 Procedure in Petitioner's post-conviction proceedings do not
9 state a claim for federal habeas relief because Petitioner's
10 claims of error do not constitute a claim that his federal
11 constitutional right to due process of law was violated. See
12 Duckett v. Godinez, 67 F.3d 734, 740 (9th Cir. 1995); Landrum v.
13 Mitchell, 625 F.3d 905, 927-28 (6th Cir. 2010); Lucas v.
14 McBride, 505 F. Supp. 2d 329, 355 (N.D.W. Va. 2007) (holding a
15 state court's abuse of discretion in not granting a continuance
16 was not cognizable). Likewise, infirmities in state
17 post-conviction relief proceedings cannot serve as the basis for
18 federal habeas relief. Violations of state law or state
19 criminal procedure which do not infringe upon specific federal
20 constitutional protections are not cognizable under section
21 2254. See, e.g., Estelle v. McGuire, 502 U.S. 62, 112 S. Ct.
22 475 (1991). Federal habeas relief is not available to redress
23 alleged procedural errors in state post-conviction proceedings.
24 See Ortiz v. Stewart, 149 F.3d 923, 939 (9th Cir. 1998); Bryant
25 v. Maryland, 848 F.2d 492 (4th Cir. 1988).

1 Therefore, the claims raised in Ground VII of the
2 habeas petition may be denied because Plaintiff has failed to
3 state a claim for relief cognizable in a section 2254 action.

4 **8. Petitioner alleges his constitutional rights were**
5 **violated because the state obstructed his right to a direct**
6 **appeal of his conviction and sentence.**

6 Petitioner asserted in his Rule 32 action that his
7 right to an appeal was blocked by the actions by his probation
8 officer, who Petitioner alleges threatened Petitioner in
9 retaliation for Petitioner telling the officer he intended to
10 appeal his convictions and sentences.

11 As iterated supra, Petitioner specifically waived his
12 right to a direct appeal of his convictions and sentences in
13 both the written plea agreement and in his plea colloquy. The
14 Magistrate Judge has found that the waiver was knowing and
15 voluntary. Accordingly, regardless of any action by
16 Petitioner's probation officer, this claim should be denied on
17 the merits of the claim.

18 **9. Petitioner contends his right to due process of law**
19 **was violated because he was sentenced "pursuant to an expired**
20 **plea agreement".**

20 Petitioner did not allege this habeas claim in his
21 state Rule 32 action. Petitioner has not shown cause for, nor
22 prejudice arising from his procedural default of this claim.

23 In traverse, Petitioner argues:

24 The Petitioner has diligently, aggressively,
25 and progressively represented himself
26 throughout this entire ordeal (except for
27 when Arizona would not respect this right),
28 and has presented valid claims which support
granting habeas relief. Throughout the past
three years, Petitioner has learned that case

1 law and courts are extremely coded and
2 complicated, and that state governments will
3 fight until the last drop of blood is
4 squeezed from petitioners, to keep said
5 individuals unconstitutionally convicted of
6 felonies. Petitioner respectfully requests
7 the Court grant habeas relief and order the
8 State of Arizona to dismiss the criminal
9 charges, with prejudice, against the
10 Petitioner.

11 Petitioner has not established cause and prejudice with
12 regard to the procedural default of this claim. Nor does
13 Petitioner argue his actual innocence of the charges, i.e., that
14 he did not possess drug paraphernalia or that he did not
15 discharge a gun. Accordingly, the Court should not consider the
16 merits of Petitioner's claim that the plea agreement was invalid
17 because it had "expired" when signed by Petitioner.

18 **10. Petitioner maintains he was denied his right to due
19 process of law because the state suppressed exculpatory
20 evidence.**

21 In his state Rule 32 action Petitioner asserted that
22 the state had "unconstitutionally" suppressed "evidence" that
23 the victim was on probation at the time of the incident, that
24 the victim had attempted to extort Petitioner, and that
25 Petitioner was the legal owner of the weapon which was
26 discharged.

27 In his habeas petition Petitioner asserts that his
28 constitutional rights were denied when, after his convictions
and sentences had been entered, he asked to see the grand jury
transcripts. Petitioner contends the state wrongfully failed to
inform the jury that the victim was intoxicated and on probation
at the time of the incident and that the victim had threatened

1 Petitioner. Petitioner does not explain how this violated his
2 right to due process of law or cite to any case with regard to
3 a violation of his right to due process in this regard. In
4 Petitioner's traverse he alleges that the state suppressed
5 evidence in the course of his Rule 32 action. Petitioner
6 alleges that the state suppressed grand jury transcripts and
7 records from the public defender's office which would have
8 established that he was entitled to post-conviction relief.

9 Petitioner waived any claim with regard to
10 improprieties in the grand jury proceeding when he pled guilty.
11 To the extent Petitioner asserts that the state violated his
12 right to due process during his Rule 32 proceedings by not
13 producing the grand jury transcripts, Petitioner has failed to
14 state a claim for relief. See Cooper v. Neven, 641 F.3d 322,
15 331-32 (9th Cir. 2011); Cunningham v. District Attorney's Office
16 for Escambia County, 592 F.3d 1237, 1260 (11th Cir. 2010)
17 ("Postconviction relief proceedings do not require the full
18 range of procedural rights that are available at trial, and
19 Brady v. Maryland has no application in the postconviction
20 context."). See also Franzen v. Brinkman, 877 F.2d 26, 26 (9th
21 Cir. 1989) ("[A] petition alleging errors in the state
22 post-conviction review process is not addressable through habeas
23 corpus proceedings."); Alston v. Department of Corr., 610 F.3d
24 1318, 1325-26 (11th Cir. 2010).

25 **IV Conclusion**

26 Petitioner forfeited most of his federal habeas claims
27 by pleading guilty to the charges against him. Petitioner has
28

1 not established that the guilty plea was not knowing or
2 voluntary and, accordingly, the guilty plea was valid and
3 Petitioner's waiver of his rights therein must be enforced.
4 Additionally, Petitioner failed to exhaust some of his claims in
5 the state courts and has not demonstrated cause for, nor
6 prejudice arising from the procedural default of his claims.
7 Some of Petitioner's federal habeas claims are not cognizable in
8 a section 2254 action.

9
10 **IT IS THEREFORE RECOMMENDED** that Mr. Wilkins' Petition
11 for Writ of Habeas Corpus be **denied and dismissed with**
12 **prejudice.**

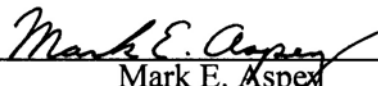
13
14 This recommendation is not an order that is immediately
15 appealable to the Ninth Circuit Court of Appeals. Any notice of
16 appeal pursuant to Rule 4(a)(1), Federal Rules of Appellate
17 Procedure, should not be filed until entry of the district
18 court's judgment.

19 Pursuant to Rule 72(b), Federal Rules of Civil
20 Procedure, the parties shall have fourteen (14) days from the
21 date of service of a copy of this recommendation within which to
22 file specific written objections with the Court. Thereafter,
23 the parties have fourteen (14) days within which to file a
24 response to the objections. Pursuant to Rule 7.2, Local Rules
25 of Civil Procedure for the United States District Court for the
26 District of Arizona, objections to the Report and Recommendation
27 may not exceed seventeen (17) pages in length.

1 Failure to timely file objections to any factual or
2 legal determinations of the Magistrate Judge will be considered
3 a waiver of a party's right to de novo appellate consideration
4 of the issues. See United States v. Reyna-Tapia, 328 F.3d 1114,
5 1121 (9th Cir. 2003) (en banc). Failure to timely file
6 objections to any factual or legal determinations of the
7 Magistrate Judge will constitute a waiver of a party's right to
8 appellate review of the findings of fact and conclusions of law
9 in an order or judgment entered pursuant to the recommendation
10 of the Magistrate Judge.

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

19 DATED this 6th day of September, 2011.

20
21 
22 _____
23 Mark E. Aspey
24 United States Magistrate Judge
25
26
27
28