

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

MAR 15 2019

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

EDWARD FAYE PARKS,

Plaintiff-Appellant,

v.

BRUNO STOLC; ATTORNEY GENERAL
FOR THE STATE OF ARIZONA,

Respondents-Appellees.

No. 18-17370

D.C. No. 2:16-cv-04570-DLR
District of Arizona,
Phoenix

ORDER

Before: CANBY and WARDLAW, Circuit Judges.

The request for a certificate of appealability is denied because the notice of appeal was not timely filed. *See* 28 U.S.C. §§ 2107, 2253(c)(2).

Any pending motions are denied as moot.

DENIED.

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

9 Edward F. Parks,

10 Petitioner,

11 v.

12 Attorney General of the State of Arizona,
13 et al.,

14 Respondents.

NO. CV-16-4570-PHX-DLR (DKD)

REPORT AND RECOMMENDATION

15 TO THE HONORABLE DOUGLAS L. RAYES, U.S. DISTRICT JUDGE:

16 Edward F. Parks filed an Amended Petition for Writ of Habeas Corpus
17 (“Amended Petition”), challenging his convictions in Mohave County Superior Court.
18 Respondents contend that some of the claims in his Amended Petition are procedurally
19 barred, one is not cognizable in habeas, and one fails on the merits. As explained below,
20 the Court recommends that Parks’ Amended Petition be denied and dismissed with
21 prejudice.

22 **I. Background**

23 Eight calendar days before the start of his jury trial, Parks moved to continue
24 during a case management conference. (Doc. 32-1 at 26, 32-2 at 2) The Superior Court
25 denied the motion to continue but informed Parks that “denying the request to continue
26 does not preclude you from hiring your own attorney.” (Doc. 32-1 at 30: 12-13) Parks
27 did not hire private counsel for the trial. (Doc. 32-2 at 3)
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1 The case proceeded to trial and Parks was convicted by a jury in Mohave County
2 Superior Court of one count of disorderly conduct with a weapon, a class 6 felony; one
3 count of aggravated assault of a peace officer, a class 2 felony; and one count of
4 aggravated assault of a peace officer, a class 4 felony. (Doc. 32-4 at 80) He was
5 sentenced to “concurrent prison terms of 3.75 years, 15.75 years, and 10 years
6 respectively.” *State v. Parks*, 2013 WL 2731694, at *1 (Ariz. App., 2013).¹ He timely
7 appealed and argued that the Superior Court should not have (1) denied his motion to
8 continue so that Parks could have additional time to hire private counsel; (2) admitted
9 statements made by a witness; and (3) admitted rebuttal evidence. (Doc. 32-4 at 75)

10 Specifically, the Arizona Court of Appeals noted that Parks had “merely conveyed
11 that he was “looking into” hiring counsel and “saving money” to do so. He had not yet
12 retained counsel and gave no indication that he had the current financial wherewithal to
13 do so.” *State v. Parks*, 2013 WL 2731694, at *2, ¶ 11 (Ariz. App., 2013). The Court of
14 Appeals concluded that the Superior Court “did not prevent Parks from hiring private
15 counsel for trial on February 14 and did not abuse its discretion in denying a continuance
16 for that purpose, especially when Parks gave no indication he was capable of retaining
17 counsel presently or in the near future.” *Id.* at *3, ¶ 12. The Court of Appeals found the
18 Superior Court did not abuse its discretion on any of Parks’ claims and affirmed Parks’
19 convictions and sentences. *Id.* at *4, ¶ 23. Parks did not petition the Arizona Supreme
20 Court for review. (Doc. 32-5 at 2)

21 Parks timely initiated post-conviction relief proceedings and argued that he had
22 received ineffective assistance of trial counsel because his appointed counsel had not
23 provided him adequate information to make an informed decision about the State’s plea
24 offer. (Docs. 32-4 at 154-57, 32-5 at 4-26) The Superior Court conducted an evidentiary
25 hearing where Parks’ trial counsel testified that she had informed Parks about the

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27 ¹ Respondents did not provide the Court with a sufficient record and only included
28 one page of the Superior Court’s ruling, did not include any of the appellate briefing, and
did not include either of the Court of Appeals’ decisions. This is not the first such issue
in this matter. See Doc. 23 at n.1 and Doc. 26. The Court trusts that this pattern will not
be repeated.

1 sentence he was facing at trial. (Doc. 32-5 at 59-74) The Court “found that trial counsel
2 had properly advised Parks regarding the State’s burden, and that Parks would not have
3 agreed to the plea offer regardless, as he would only accept a probation-only offer. The
4 trial court denied relief.” *State v. Parks*, 2016 WL 7093864, at *1 (Ariz. App. 2016).
5 Parks timely appealed and the Arizona Court of Appeals granted review but denied relief.
6 *Id.* at *2.

7 Parks petitioned the Arizona Supreme Court for review and, while that Petition
8 was pending, Parks initiated these habeas proceedings. The Court granted him leave to
9 file his Amended Petition and then stayed this matter until the termination of Parks’ state
10 court proceedings. (Docs. 9, 23, 29) Now, the state court proceedings have concluded
11 and Respondents have filed an Answer. (Docs. 32) Parks has not filed a reply and the
12 time to do so has now expired. He has filed several additional motions and notices and
13 the Court considers the Amended Petition to be fully briefed. (Docs. 30, 31, 33, 34, 35,
14 36, 37, 38, 39, 40)

15 **II. Analysis: Ground 2(a)**

16 It appears that, in Ground Two of his Amended Petition, Parks is raising the same
17 claim as in his direct appeal, namely that the Superior Court should have stayed his trial
18 so that he could retain private counsel. (Doc. 10 at 13)

19 On habeas review, this Court can only grant relief if the petitioner demonstrates
20 prejudice because the adjudication of a claim either “(1) resulted in a decision that was
21 contrary to, or involved an unreasonable application of, clearly established Federal law,
22 as determined by the Supreme Court of the United States; or (2) resulted in a decision
23 that was based on an unreasonable determination of the facts in light of the evidence
24 presented in the State court proceeding.” 28 U.S.C § 2254(d). This is a “‘highly
25 deferential standard for evaluating state-court rulings’ which demands that state-court
26 decisions be given the benefit of the doubt.” *Woodford v. Visciotti*, 537 U.S. 19, 24
27 (2002) (per curiam) (quoting *Lindh v. Murphy*, 521 U.S. 320, 333 n. 7 (1997)).

1 This means that “a decision adjudicated on the merits in a state court and based on
2 a factual determination will not be overturned on factual grounds unless objectively
3 unreasonable in light of the evidence presented in the state-court proceeding.” *Miller-El*
4 *v. Cockrell*, 537 U.S. 322, 340 (2003) (citing 28 U.S.C. § 2254(d)(2) and *Williams v.*
5 *Taylor*, 529 U.S. 362, 399 (opinion of O’Connor, J.)). Put another way, “[a] state court’s
6 determination that a claim lacks merit precludes federal habeas relief so long as
7 ‘fairminded jurists could disagree’ on the correctness of the state court’s decision.”
8 *Harrington v. Richter*, 562 U.S. 86, 101 (2011) (citing *Yarborough v. Alvarado*, 541 U.S.
9 652, 664 (2004)).

10 Here, the Court of Appeals found that the trial court “did not abuse its discretion in
11 denying a continuance . . . especially when Parks gave no indication he was capable of
12 retaining counsel presently or in the near future.” *State v. Parks*, 2013 WL 2731694, at
13 *3, ¶12 (Ariz. App., 2013). This conclusion was based on Parks’ statements to the
14 Superior Court. Applying the appropriate standard of review, the Court cannot say that
15 the Court of Appeals’ decision was objectively unreasonable. Accordingly, Parks is not
16 entitled to relief on this claim.

17 **III. Analysis: Remaining Claims**

18 A state prisoner must properly exhaust all state court remedies before this Court
19 can grant an application for a writ of habeas corpus. 28 U.S.C. § 2254(b)(1), (c); *Duncan*
20 *v. Henry*, 513 U.S. 364, 365 (1995); *Coleman v. Thompson*, 501 U.S. 722, 731 (1991).
21 Arizona prisoners properly exhaust state remedies by fairly presenting claims to the
22 Arizona Court of Appeals in a procedurally appropriate manner. *O’Sullivan v. Boerckel*,
23 526 U.S. 838, 843-45 (1999); *Swoopes v. Sublett*, 196 F.3d 1008, 1010 (9th Cir. 1999);
24 *Roettgen v. Copeland*, 33 F.3d 36, 38 (9th Cir. 1994). To fairly present a claim, a
25 petitioner must support it with a statement of the operative facts and the specific federal
26 legal theory. *Baldwin v. Reese*, 541 U.S. 27, 32-33 (2004); *Gray v. Netherland*, 518 U.S.
27 152, 162-63 (1996); *Duncan*, 513 U.S. at 365-66. General appeals to broad constitutional
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1 principles, "such as due process, equal protection, and the right to a fair trial," do not
2 establish exhaustion. *Hiivala v. Wood*, 195 F.3d 1098, 1106 (9th Cir. 1999).

3 Here, except as noted above, the Amended Petition does not include claims that
4 were fairly presented to the Arizona Court of Appeals. Instead, he argues in Ground One
5 that he was unlawfully arrested at his residence in violation of the First, Fourth, Sixth,
6 Eighth, and Fourteenth Amendments. (Doc. 10 at 12) In Ground Two, he argues that he
7 was denied his Sixth Amendment right to have witnesses at trial and that there was no
8 probable cause to impound a truck that was on private property. (Doc. 10 at 13) In
9 Ground Three, he argues that his PCR counsel filed his PCR petition six months late and
10 failed to raise issues regarding lack of evidence. (Doc. 10 at 14) Finally, he argues in
11 Ground Four that he is unlawfully imprisoned for five years on a lesser included offense
12 that was dismissed by the jury due to lack of evidence. (Doc. 10 at 15) Even construing
13 his claims broadly, these arguments were not presented to the Arizona Court of Appeals.

14 Moreover, it is now too late to do so which renders these claims subject to an
15 implied procedural bar because these claims was not fairly presented in state court and no
16 state remedies remain available to Parks. *Teague v. Lane*, 489 U.S. 288, 298-99 (1989);
17 *Rose v. Lundy*, 455 U.S. 509, 519-20 (1982); *Beaty v. Stewart*, 303 F.3d 975, 987 (9th Cir.
18 2002); *Poland v. Stewart*, 169 F.3d 573, 586 (9th Cir. 1999); *White v. Lewis*, 874 F.2d
19 599, 602 (9th Cir. 1989).

20 This Court can review a procedurally defaulted claim if the petitioner can
21 demonstrate either cause for the default and actual prejudice to excuse the default, or a
22 miscarriage of justice. 28 U.S.C. § 2254(c)(2)(B); *Schlup v. Delo*, 513 U.S. 298, 321
23 (1995); *Coleman*, 501 U.S. at 750; *Murray v. Carrier*, 477 U.S. 478, 495-96 (1986);
24 *States v. Frady*, 456 U.S. 152, 167-68 (1982). Here, Parks has not attempted to
25 demonstrate either and the Court sees no independent grounds for any such
26 demonstration.

27 Accordingly, the Court cannot review the claims in Parks' Amended Petition.
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1 **IV. Additional Motions and Notices**

2 The Court has reviewed all of the Notices filed by Parks as well as his four
3 pending Motions. (Docs. 24, 25, 30, 31, 33, 34, 35, 36, 37, 38, 39, 40) The Notices do
4 not entitle Parks to relief. The Motions are not well taken and will be denied.

5 **IT IS THEREFORE ORDERED** denying Parks' Motion (Doc. 30), Motion for
6 Order to Show Cause (Doc. 35), Motion to Dismiss Case (Doc. 36), and Motion
7 Requesting Consideration of Newly Discovered Evidence (Doc. 40).

8 **IT IS THEREFORE RECOMMENDED** that Edward F. Parks' Amended
9 Petition for Writ of Habeas Corpus be **denied and dismissed with prejudice**.

10 **IT IS FURTHER RECOMMENDED** that a Certificate of Appealability and
11 leave to proceed *in forma pauperis* on appeal be **denied** because dismissal of the Petition
12 is justified by a plain procedural bar and jurists of reason would not find the ruling
13 debatable.

14 This recommendation is not an order that is immediately appealable to the Ninth
15 Circuit Court of Appeals. Any notice of appeal pursuant to Rule 4(a)(1), Federal Rules
16 of Appellate Procedure, should not be filed until entry of the district court's judgment.
17 The parties shall have fourteen days from the date of service of a copy of this
18 recommendation within which to file specific written objections with the Court. *See*, 28
19 U.S.C. § 636(b)(1); Rules 72, 6(a), 6(b), Federal Rules of Civil Procedure. Thereafter,
20 the parties have fourteen days within which to file a response to the objections. Failure
21 timely to file objections to the Magistrate Judge's Report and Recommendation may
22 result in the acceptance of the Report and Recommendation by the district court without
23 further review. *See United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003).
24 Failure timely to file objections to any factual determinations of the Magistrate Judge will
25 be considered a waiver of a party's right to appellate review of the findings of fact in an


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1 order or judgment entered pursuant to the Magistrate Judge's recommendation. *See* Rule
2 72, Federal Rules of Civil Procedure.

3 Dated this 2nd day of May, 2018.

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8 David K. Duncan
9 United States Magistrate Judge
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Edward F. Parks,

Petitioner,

v.

Attorney General of the State of Arizona, et
al.,

Respondents.

No. CV-16-4570-PHX-DLR-(DKD)

ORDER

and

**DENIAL OF CERTIFICATE OF
APPEALABILITY AND IN FORMA
PAUPERIS STATUS**

Pending before the Court is the Report and Recommendation ("R&R") of Magistrate Judge David K. Duncan (Doc. 41) regarding petitioner's Amended Petition for Writ of Habeas Corpus filed pursuant to 28 U.S.C. § 2254 (Doc. 10). The R&R recommends that the Amended Petition be denied and dismissed with prejudice. The Magistrate Judge advised the parties that they had fourteen days from the date of service of a copy of the R&R to file specific written objections with the Court. (Doc. 41 at 6 (citing 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 6(a), 6(b) and 72).) Petitioner filed objections on May 9, 2018, (Doc. 42) and May 10, 2018 (Doc. 43).

The Court has considered the objections and reviewed the R&R de novo. *See* Fed. R. Civ. P. 72(b); 28 U.S.C. § 636(b)(1) (stating that the court must make a de novo determination of those portions of the Report and Recommendation to which specific objections are made).

1 As to Ground Two, the Court agrees with the Magistrate Judge's determination
2 that Petitioner's claim is meritless. This Court can overturn a fact based decision
3 adjudicated on the merits in a state court only when it finds that the state court decision is
4 objectively unreasonable. *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003) (citing 28
5 U.S.C. § 2254(d)(2) and *Williams v. Taylor*, 529 U.S. 362, 399 (opinion of O'Connor, J)).
6 The Magistrate Judge correctly found that this Court cannot say that the Arizona Court of
7 Appeals' finding that the trial court "did not abuse its discretion in denying a continuance
8 . . . especially when Parks gave no indication he was capable of retaining counsel . . ."
9 was objectively unreasonable. See *State v. Parks*, No. CA-CR 12-284, 2013 WL
10 2731694, at *3 ¶12 (Ariz. Ct. App. April 23, 2013).

11 As to the remaining grounds the Court agrees with the findings of the Magistrate
12 Judge that none of the remaining claims were fairly presented to the Arizona Court of
13 Appeals. A state prisoner must properly exhaust all state court remedies before this
14 Court can grant an application for a writ of habeas corpus. 28 U.S.C. § 2254(b)(1), (c).

15 As to the Notices and four Motions which were ruled upon by the Magistrate
16 Judge, the Court agrees with the Magistrate Judge that the Notices do not entitle Parks to
17 relief and the Motions are not well taken and were properly denied.

18 The Court accepts the recommended decision within the meaning of Rule 72(b),
19 Fed. R. Civ. P., and overrules Petitioner's objections. See 28 U.S.C. § 636(b)(1) (stating
20 that the district court "may accept, reject, or modify, in whole or in part, the findings or
21 recommendations made by the magistrate").

22 **IT IS ORDERED** that Report and Recommendation of the Magistrate Judge
23 (Doc. 41) is accepted.

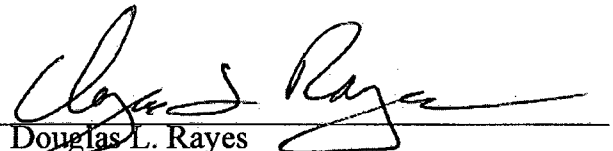
24 Having considered the issuance of a Certificate of Appealability from the order
25 denying Petitioner's Petition for a Writ of Habeas Corpus, a Certificate of Appealability
26 and leave to proceed in forma pauperis on appeal are denied because the dismissal of the
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1 Petition is justified by a plain procedural bar and reasonable jurists would not find the
2 ruling debatable, and because Petitioner has not made a substantial showing of the denial
3 of a constitutional right.

4 **IT IS FURTHER ORDERED** that the Clerk of the Court enter judgment
5 denying and dismissing Petitioner's Petition for Writ of Habeas Corpus filed pursuant to
6 28 U.S.C. § 2254 (Doc. 1) with prejudice. Petitioner's motion for new trial (Doc. 44) is
7 dismissed as moot. The Clerk shall terminate this action.

8 Having considered the issuance of a Certificate of Appealability from the order
9 denying Petitioner's Petition for a Writ of Habeas Corpus, a Certificate of Appealability
10 and leave to proceed in forma pauperis on appeal are denied because dismissal of the
11 Petition is justified by a plain procedural bar.

12 Dated this 22nd day of June, 2018.

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18 Douglas L. Rayes
19 United States District Judge
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