

UNITED STATES COURT OF APPEALS

FILED

FOR THE NINTH CIRCUIT

FEB 11 2020

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

DEMETRIUS A. WILSON, AKA
Demetrius Wilson, AKA Demetrius A.
Wilson, AKA Demetrius Antwon Wilson,

Petitioner-Appellant,

v.

CHARLES L. RYAN; MARK BRNOVICH,
Attorney General,

Respondents-Appellees.

No. 19-16514

D.C. No. 2:18-cv-04627-DLR
District of Arizona, Phoenix

ORDER

Before: LEAVY and MILLER, Circuit Judges.

The request for a certificate of appealability (Docket Entry No. 4) is denied because appellant has not shown that “jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also* 28 U.S.C. § 2253(c)(2); *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012); *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Any pending motions are denied as moot.

DENIED.

Demetrius Antwon Wilson #165175
TUCSON-AZ-TUCSON-ASPC-WHETSTONE
WHETSTONE UNIT
P.O. BOX 24402
TUCSON, AZ 85734

District Court of Phoenix
Appendix

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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
8

9 Demetrius Antwon Wilson,

10 Petitioner,

11 v.

12 Charles L Ryan, et al.,

13 Respondents.
14

NO. CV-18-04627-PHX-DLR

JUDGMENT IN A CIVIL CASE

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

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

21 Brian D. Karth
22 District Court Executive/Clerk of Court

23 June 19, 2019

24 By s/ Rebecca Kobza
25 Deputy Clerk
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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
8

9 Demetrius Antwon Wilson,
10 Petitioner,

11 v.

12 Charles L Ryan, et al.,
13 Respondents.
14

No. CV-18-4627-PHX-DLR(DMF)

ORDER

15
16 Before the Court is the Report and Recommendation (“R&R”) of Magistrate Judge
17 Deborah M. Fine (Doc. 18) regarding Petitioner’s Petition for Writ of Habeas Corpus filed
18 pursuant to 28 U.S.C. § 2254 (Doc. 1). The R&R recommends that the petition be denied
19 and dismissed with prejudice. The Magistrate Judge advised the parties that they had
20 fourteen days from the date of service of a copy of the R&R to file specific written
21 objections with the Court. Petitioner filed an objection to the R&R on May 24, 2019 (Doc.
22 21), Respondents filed their response on May 29, 2019 (Doc. 22), and Petitioner
23 subsequently filed a Motion for Full Discovery of Medical Records Filed August 17, 2018
24 in the Court of Appeals (Doc. 23).

25 The Court has considered the objections and reviewed the R&R de novo. *See* Fed.
26 R. Civ. P. 72(b); 28 U.S.C. § 636(b)(1). The Magistrate Judge correctly found that
27 Petitioner waived the right to assert the claims alleged in his petition when he pled guilty.
28 The Magistrate Judge also applied the correct habeas review standard as set forth in 28

1 U.S.C. § 2254(d), and correctly found that Petitioner did not establish that the Arizona
2 Court of Appeals decision of his appeal was contrary to or involved an unreasonable
3 application of clearly established federal law or was based on an unreasonable application
4 of the facts.

5 Petitioner's objection does not point to any particular error in the R&R. Rather, the
6 Petitioner argues that the Magistrate Judge was biased because she was the judge in another
7 of Petitioner's cases, unrelated to this matter. However, because Petitioner does not argue
8 or point to any evidence that the Magistrate Judge displayed, in either case, "a deep-seated
9 favoritism or antagonism that would make fair judgment impossible," her involvement in
10 the other case does not constitute a basis for a bias or partiality motion. *Liteky v. United*
11 *States*, 510 U.S. 540, 555 (1994).

12 Petitioner also has moved to have this Court gather his medical records filed in the
13 Arizona Court of Appeals. The Court assumes that Petitioner believes that if the Court
14 combs through his medical records filed in the Court of Appeals, the Court will find records
15 that confirm that he could not have knowingly and voluntarily entered into the plea
16 agreement. The Court is not required to comb the record looking for evidence to support
17 a party's claims or defenses. Further, the Court, in its discretion, will not consider issues
18 or evidence presented for the first time in an objection to the R&R.

19 **IT IS ORDERED** that the R&R (Doc.18) is **ACCEPTED**.

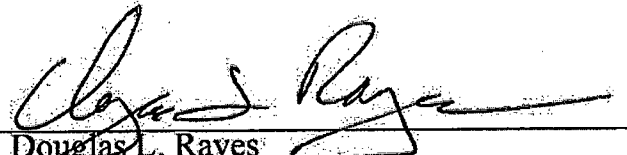
20 **IT IS FURTHER ORDERED** that Petitioner's Motion for Full Discovery of
21 Medical Records Filed August 17, 2018 in the Court of Appeals (Doc. 23) is **DENIED**.

22 **IT IS FURTHER ORDERED** that Petitioner's Petition for Writ of Habeas Corpus
23 filed pursuant to 28 U.S.C. § 2254 (Doc. 1) is **DISMISSED** with prejudice.

24 **IT IS FURTHER ORDERED** that a Certificate of Appealability and leave to
25 proceed in forma pauperis on appeal are **DENIED** because the dismissal of the petition is
26 justified because reasonable jurists would not find the ruling debatable, and because
27 Petitioner has not made a substantial showing of the denial of a constitutional right. The
28 Clerk of the Court shall enter judgment denying and dismissing Petitioner's Petition for

1 Writ of Habeas Corpus filed pursuant to 28 U.S.C. § 2254 (Doc. 1) with prejudice and shall
2 terminate this action.

3 Dated this 18th day of June, 2019.

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8 Douglas L. Rayes
9 United States District Judge
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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
8

9 Demetrius Antwon Wilson,

10 Petitioner,

11 v.

12 Charles L. Ryan, et al.,

13 Respondents.
14

No. CV-18-4627-PHX-DLR (DMF)

REPORT AND RECOMMENDATION

15 TO THE HONORABLE DOUGLAS L. RAYES, UNITED STATES DISTRICT JUDGE:

16 On December 7, 2018, Petitioner Demetrius Antwon Wilson ("Petitioner") filed a
17 *pro se* Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254, challenging the
18 constitutionality of his arrest and actions taken by the state trial judge prior to his entry into
19 a plea agreement. (Doc. 1)¹ ("Petition"). Petitioner is confined in the Arizona State Prison
20 Complex in Tucson, Arizona. (*Id.* at 1) Respondents filed a limited answer to the Petition
21 (Doc. 11) with a record supplement at the Court's direction (Docs. 16, 17). Petitioner
22 replied (Doc. 12) and supplemented his reply with a notice (Doc. 13). This matter is ripe
23 for decision and is on referral to the undersigned pursuant to Rules 72.1 and 72.2 of the
24 Local Rules of Civil Procedure for further proceedings and a report and recommendation.
25 As set forth below, the undersigned recommends that the Petition be denied and dismissed
26 with prejudice and that a certificate of appealability be denied.
27

28 ¹ Citation to the record indicates documents as displayed in the official Court
electronic document filing system maintained by the District of Arizona.

1 It is noted that Petitioner filed an interlocutory appeal (Doc. 14) in this habeas matter
2 after reply and before this Report and Recommendation. The Ninth Circuit assigned an
3 appellate case number but declined to set a briefing schedule until “the district court and, if
4 necessary, [the Ninth Circuit] determine whether a certificate of appealability should issue.”
5 (Doc. 15)

6 **I. BACKGROUND**

7 **A. Summary of events underlying the criminal charges**

8 At approximately 10:51 a.m. on May 13, 2014, Petitioner entered his victim’s home
9 through a window and confronted the victim, who was sleeping on a recliner in his living
10 room. (Doc. 11-2 at 87)² Petitioner restrained his victim, an 82-year-old man, by pushing
11 down on his chest while demanding money and guns. (*Id.*) The victim gave Petitioner
12 three envelopes containing about \$10,000.00 in cash. (*Id.*) After Petitioner left, the victim
13 called the police and gave them a description of his assailant. (*Id.*) Police officers searched
14 the area surrounding the victim’s house and observed Petitioner running and jumping over
15 fences. (*Id.*) When they began pursuing Petitioner, the officers saw him dropping cash on
16 the ground. (*Id.*)

17 **B. Indictment, trial proceedings, plea agreement, and sentencing**

18 On May 21, 2014, Petitioner was indicted in Maricopa County Superior Court on
19 one count of second-degree burglary and on one count of theft, each a Class 3 felony, and
20 on a count of robbery, a Class 4 felony. (Doc. 11-1 at 3-4) The record reveals that
21 Petitioner’s pre-trial proceedings were extensive and time-consuming, involving repeated
22 trial settings because Petitioner filed at least ten separate motions to change counsel, and
23 were also characterized by his appointed defense lawyers’ concerns “that [Petitioner]
24 intentionally refused to cooperate in counsel’s efforts to represent [Petitioner] and to
25 prepare for trial.” (Doc. 11-1 at 7) The superior court noted it “reluctantly” had allowed
26 Petitioner to represent himself and had reiterated that he would not be granted any further
27

28 ² These facts are taken from Petitioner’s presentence investigation report. (Doc. 11-2 at 87-90)

1 trial continuances and would not be permitted to revisit or re-litigate deadlines or issues
2 already decided by the court. (*Id.* at 8) However, Petitioner's trial was required to be
3 rescheduled because of his hospitalization due to internal bleeding. (*Id.*)

4 In an order dated July 1, 2016, Petitioner's trial court judge decided that Petitioner
5 would be allowed to proceed to trial in *pro per* status with advisory counsel if he complied
6 with conditions including following the court's orders, properly comporting himself in
7 court, taking medications as prescribed, and not refusing transport from the jail to the court
8 without a physician-verified medical justification. (*Id.* at 12-13)

9 On July 6, 2016, Petitioner appeared at the first day of trial along with advisory
10 counsel. (Doc. 11-1 at 18) After complaining he did not feel well during jury selection,
11 Petitioner asked the court to permit his advisory counsel to represent him so that he could
12 return to the jail and lie down. (*Id.* at 98) He later said that he felt that he was being forced
13 into a situation where he was feeling too sick to represent himself, but did not want his
14 advisory counsel to take over because of conflicts between them. (*Id.* at 102-103) When
15 Petitioner proposed having advisory counsel take over just for that day, the judge reminded
16 him that her pre-trial order required that if Petitioner asked for advisory counsel to
17 represent him, he would not be permitted to "switch back and forth." (*Id.* at 104) After
18 remarking that he was "being bullied," Petitioner said he understood and told the court to
19 have advisory counsel take over his representation. (*Id.*) At that point, his counsel
20 requested a continuance, averring that he believed Petitioner was truly sick and needed to
21 be medically evaluated by a physician. (*Id.* at 105-106) The judge advised counsel that
22 she understood his concern but reminded him of her belief that Petitioner had exaggerated
23 his symptoms in the past to avoid trial, and that Petitioner's own actions, including his
24 refusal to let people help him, were causing his problems. (*Id.* at 107) The court stated
25 she still believed Petitioner was exaggerating his symptoms or even malingering, that
26 Petitioner was refusing to see a specialist and had refused a break to eat a meal, that
27 Petitioner's trial had been pending for two years, and that it was "just time to go." (*Id.* at
28 107-110)

1 Eight calendar days after trial had begun, Petitioner was admitted to the hospital for
2 symptoms including symptomatic iron deficiency anemia, lower gastrointestinal bleeding,
3 and abdominal pain related to a colostomy reversal in December 2015. (Doc. 12 at 15)
4 His treatment notes indicated he had experienced anemia since March 2016 requiring
5 intermittent blood transfusions. (*Id.*) While in the hospital, physicians performed
6 laproscopic surgery to separate bowel adhesions and remove some bowel tissue. (*Id.* at 16)

7 A settlement conference was conducted on August 11, 2016 by another superior
8 court judge at which Petitioner was represented by court-appointed counsel. (Doc. 11-2 at
9 2-42) The prosecutor discussed the fact that at trial, the state was “three witnesses away
10 [from] resting [its] case” when Petitioner required an emergency procedure, and that the
11 court was about to lose jurors due to the trial delay. (*Id.* at 6) After lengthy discussion on
12 possible parameters of a potential settlement, the court adjourned with a subsequent hearing
13 set for a change of plea in the event Petitioner decided to accept a plea. (*Id.* at 39-42)

14 Pursuant to a plea agreement dated August 17, 2016, Petitioner pleaded guilty to
15 one count of second-degree burglary, a Class 3 felony, with one prior conviction. (*Id.* at
16 45) The parties stipulated to a sentencing range of 6.5 to 12 years. (*Id.* at 46) Petitioner
17 was sentenced at a hearing conducted on January 13, 2017. (*Id.* at 92-132) The sentencing
18 judge also had presided over Petitioner’s trial and change of plea hearing. She initially
19 addressed Petitioner’s motion to withdraw his plea. (*Id.* at 95-99) Petitioner argued he had
20 entered into the plea agreement because he was sick, “didn’t know what was going on,”
21 and was just “following what the attorney was telling me that I had to say in front of you.”
22 (*Id.* at 96) He said he had not understood that by entering the plea agreement he gave up
23 the right to challenge his identity evidence or suppression evidence, alleged violation of
24 his speedy trial rights, or events that occurred at trial, and declared his trial attorney said
25 he could contest such issues in a post-conviction relief (“PCR”) action. (*Id.*) Petitioner’s
26 counsel was not willing to speak about how he had advised Petitioner, citing attorney-client
27 privilege, and Petitioner said he was not willing to waive that right and allow his counsel
28 to testify. (*Id.* at 97)

1 The judge said she clearly remembered the change of plea hearing and had reviewed
2 a video recording of the hearing. (*Id.* at 95) Finding no manifest injustice, the judge denied
3 Petitioner's motion to withdraw from his plea agreement. (*Id.* at 99, Doc. 11-3 at 3) On
4 Petitioner's motion to change counsel, the judge advised Petitioner she would permit him
5 to represent himself at the hearing with counsel in an advisory capacity but would not
6 continue the sentencing hearing. (Doc. 11-2 at 99) Petitioner complained that his stomach
7 hurt and said that because he was still sick he would permit counsel to continue to represent
8 him. (*Id.* at 99-100)

9 The superior court sentenced Petitioner on January 13, 2017 to an aggravated term
10 of 10 years' imprisonment with 977 days of time-served credit, followed by community
11 supervision. (*Id.* at 130-131, Doc. 11-3 at 3-4) The court advised Petitioner of his rights
12 to seek post-conviction relief within 90 days. (Doc. 11-2 at 131)

13 **C. Petitioner's PCR action**

14 Petitioner timely filed a notice of request for PCR on January 26, 2017. (Doc. 11-3
15 at 8-14) Although Petitioner was appointed counsel for his PCR action, he successfully
16 moved to represent himself. (*Id.* at 20) Petitioner filed his petition for PCR in December
17 2017, requesting a new trial. (*Id.* at 22-25) Read liberally, Petitioner appeared to assert:
18 (1) his constitutional rights to due process were violated when, during jury selection, the
19 trial court would not permit advisory counsel to take over Petitioner's representation while
20 Petitioner was feeling ill on the first day of trial unless counsel assumed representation for
21 the rest of trial; and (2) he had been incompetent to stand trial and was unable to assist in
22 his defense because of his medical condition. (*Id.* at 26-35) In his reply, Petitioner
23 additionally argued the trial court erred by not having him evaluated for competency, that
24 his burglary victim's identification of him was unconstitutionally "tainted and suggestive,"
25 and that the police did not properly preserve evidence from the crime. (*Id.* at 47-50)

26 The superior court concluded Petitioner had failed to raise any colorable claims to
27 warrant an evidentiary hearing or assert any material issues of law or fact that would entitle
28 him to relief. (*Id.* at 53) The court summarily dismissed the PCR petition. (*Id.*)

1 In his petition for review to the Arizona Court of Appeals, Petitioner reasserted the
 2 same claims and arguments he had presented to the superior court. (Doc. 17-1) He
 3 contended that the medical records, together with his pleadings and other evidence, were
 4 sufficient to establish a colorable claim for PCR relief and the need to hold an evidentiary
 5 hearing. (*Id.* at 8)

6 The Arizona Court of Appeals granted review but denied relief. (*Id.* at 57-58) The
 7 court of appeals held that “acceptance of a guilty plea waives all non-jurisdictional
 8 defenses, errors, and defects which occurred prior to the plea, including deprivations of
 9 constitutional rights[,]” and that accordingly Petitioner could only “attack the voluntary
 10 and intelligent character of the guilty plea.” (*Id.* at 57, quoting *Tollett v. Henderson*, 411
 11 U.S. 258, 267 (1973)) The court further detailed that a defendant “must understand and
 12 agree to the terms of the plea agreement, be advised of the constitutional rights he waived
 13 by pleading guilty, and the plea cannot be the ‘result of force, threats or promises.’” (*Id.*
 14 at 58, citing Ariz. R. Crim. P. 17.3(a)) The court found that the superior court had
 15 explained to Petitioner the rights he would waive by entering the plea agreement, and that
 16 despite his “symptoms associated with a colostomy reversal,” these symptoms had not
 17 “impacted his cognitive functions at either the settlement conference or the change of plea
 18 hearing.” (*Id.*) After Petitioner failed to file either a motion for reconsideration or a
 19 petition for review, the court of appeals issued its mandate in January 2019. (*Id.* at 55)

20 **D. Petitioner’s habeas claims**

21 Petitioner asserts three grounds in his Petition, which was filed with this Court on
 22 December 10, 2018.³ (Doc. 1) In Ground One, Petitioner alleges a violation of his rights
 23 under the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution when
 24 the superior court judge “wouldn’t let [Petitioner] leave her courtroom unless [Petitioner]

25 ³ The Petition was docketed by the Clerk of Court on December 10, 2018 (Doc. 1). The
 26 Petition contains a certificate of service indicating that Petitioner placed the Petition in the
 27 prison mailing system on December 7, 2018 (Doc. 1 at 15). Pursuant to the prison mailbox
 28 rule, the undersigned has used December 7, 2018, as the filing date. *Porter v. Ollison*, 620
 F.3d 952, 958 (9th Cir. 2010) (“A petition is considered to be filed on the date a prisoner
 hands the petition to prison officials for mailing.”).

gave up [his] constitutional rights” to represent himself *pro per*. (Doc. 1 at 9-10) In Ground Two, Petitioner argues that his identification by his victim was unconstitutionally suggestive when police did not conduct a line up, coached the victim to estimate how sure he was about his identification of Petitioner, and showed the victim an envelope and recovered cash that had been stolen from him. (*Id.* at 11) Petitioner’s Ground Three claim is that the state violated his due process protections guaranteed by the Fourteenth Amendment when police asked the victim what “percentage” he was certain of his identification of Petitioner, and when the police officers did not impound the recovered cash taken from the victim shortly before, but instead returned the cash to the victim. (*Id.* at 12)⁴

II. LEGAL STANDARD

A. Waiver of constitutional claims by pleading guilty

“When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea.” *Tollett v. Henderson*, 411 U.S. 258, 267 (1973); *see United States v. Caperell*, 938 F.2d 975, 977 (9th Cir. 1991) (a guilty plea generally waives all claims of a constitutional nature occurring before the plea); *Ortberg v. Moody*, 961 F.2d 135, 136-38 (9th Cir. 1992) (petitioner’s guilty plea barred habeas consideration of claims, which included claim of an unlawful search). When a criminal defendant pleads guilty, he “may only attack the voluntary and intelligent character of the guilty plea.” *Tollett*, 411 U.S. at 267.

B. 28 U.S.C. § 2254 habeas petition – merits standard of review

On habeas review, this Court may grant relief if the petitioner demonstrates prejudice because the adjudication of a claim on the merits in state court either: “(1)

⁴ Petitioner filed an interlocutory appeal (Doc. 14) in this habeas matter after reply and before this Report and Recommendation. The Ninth Circuit assigned an appellate case number but also declined to set a briefing schedule until “the district court and, if necessary, [the Ninth Circuit] determine whether a certificate of appealability should issue.” (Doc. 15)

1 resulted in a decision that was contrary to, or involved an unreasonable application of,
2 clearly established Federal law, as determined by the Supreme Court of the United States;
3 or (2) resulted in a decision that was based on an unreasonable determination of the facts
4 in light of the evidence presented in the State court proceeding.” 28 U.S.C. § 2254(d).
5 This is a “‘highly deferential standard for evaluating state court rulings’ which demands
6 that state court decisions be given the benefit of the doubt.” *Woodford v. Visciotti*, 537
7 U.S. 19, 24 (2002) (per curiam) (quoting *Lindh v. Murphy*, 521 U.S. 320, 333 n. 7 (1997)).

8 Under the “unreasonable application” prong of § 2254(d)(1), a federal habeas court
9 may grant relief where a state court “identifies the correct governing legal rule from [the
10 Supreme] Court’s cases but unreasonably applies it to the facts of the particular ... case” or
11 “unreasonably extends a legal principle from [Supreme Court] precedent to a new context
12 where it should not apply or unreasonably refuses to extend that principle to a new context
13 where it should apply.” *Williams v. Taylor*, 529 U.S. 362, 407 (2000). For a federal court
14 to find a state court’s application of Supreme Court precedent “unreasonable” under §
15 2254(d)(1), the petitioner must show that the state court’s decision was not merely incorrect
16 or erroneous, but “objectively unreasonable.” *Id.* at 409.

17 To make a determination pursuant to § 2254(d)(1), the Court first identifies the
18 “clearly established Federal law,” if any, that governs the sufficiency of the claims on
19 habeas review. “Clearly established” federal law consists of the holdings of the United
20 States Supreme Court which existed at the time the petitioner’s state court conviction
21 became final. *Id.* at 412. The Supreme Court has emphasized that “an *unreasonable*
22 application of federal law is different from an *incorrect* application of federal law.” *Id.* at
23 410 (emphasis in original). Under AEDPA, “[a] state court’s determination that a claim
24 lacks merit precludes federal habeas relief so long as ‘fairminded jurists could disagree’ on
25 the correctness of the state court’s decision.” *Harrington v. Richter*, 562 U.S. 86, 101
26 (2011). Accordingly, to obtain habeas relief from this Court, Petitioner “must show that
27 the state court’s ruling on the claim being presented in federal court was so lacking in
28

1 justification that there was an error well understood and comprehended in existing law
2 beyond any possibility for fairminded disagreement.” *Id.* at 103.

3 With respect to § 2254(d)(2), a state court decision “based on a factual determination
4 will not be overturned on factual grounds unless objectively unreasonable in light of the
5 evidence presented in the state-court proceeding.” *Miller-El v. Cockrell*, 537 U.S. 322,
6 340 (2003). A “state-court factual determination is not unreasonable merely because the
7 federal habeas court would have reached a different conclusion in the first instance.” *Wood*
8 *v. Allen*, 558 U.S. 290, 301 (2010). As the Ninth Circuit has explained, to find that a factual
9 determination is unreasonable under § 2254(d)(2), the court must be “convinced that an
10 appellate panel, applying the normal standards of appellate review, could not reasonably
11 conclude that the finding is supported by the record.” *Taylor v. Maddox*, 366 F.3d 992,
12 1000 (9th Cir. 2004), *abrogated on other grounds by Murray v. Schriro*, 745 F.3d 984, 1000
13 (9th Cir. 2014). “This is a daunting standard—one that will be satisfied in relatively few
14 cases.” *Id.*

15 **III. DISCUSSION**

16 Petitioner’s grounds for habeas relief are that his federal constitutional rights were
17 violated prior to the point at which he entered into the plea agreement. Petitioner’s claims
18 fail, however, because he waived the right to assert these claims when he pleaded guilty
19 and he does not establish the Arizona Court of Appeals’ adjudication of his claim was
20 contrary to, or involved an unreasonable application of, clearly established federal law, or
21 was based on an unreasonable evaluation of the facts. 28 U.S.C. § 2254(d).

22 As noted, Petitioner alleges the state violated his federal constitutional rights when:
23 (1) the superior court judge refused to permit Petitioner to leave on the first day of trial
24 unless he agreed to have advisory counsel take over his representation (Ground One); (2)
25 his identification by the victim was unconstitutionally suggestive (Ground Two); and
26 police officers asked the victim what “percentage” he was certain in his identification of
27 Petitioner and did not impound the recovered cash taken from the victim shortly before,
28 but instead returned the cash to the victim. (Doc. 1 at 9-12)

1 Citing *Tollett*, the Arizona Court of Appeals noted that Petitioner had waived “all
2 non-jurisdictional defenses, errors, and defects which occurred prior to the plea, including
3 deprivations of constitutional rights.” (Doc. 11-3 at 57) It correctly concluded that because
4 Petitioner pleaded guilty, his only avenue to contest his plea was the voluntary and
5 intelligent character of the guilty plea. (*Id.*) The court declared that in entering his plea
6 agreement, Petitioner understood and agreed to the terms of the plea agreement, had
7 been advised of the constitutional rights waived by pleading guilty, and that the plea
8 was not the “result of force, threats or promises.” (*Id.* at 57-58, citing Ariz. R. Crim.
9 P. 17.3(a)) The court of appeals found that the superior court had:

10 explained each term of Wilson's plea agreement, including the rights he
11 waived by entering a guilty plea. Although Wilson suffered from
12 symptoms associated with a colostomy reversal, his medical issues did
13 not impact his cognitive functions at either the settlement conference or
14 the change of plea hearing. Moreover, the record shows that Wilson was
15 cleared to return to court by Correctional Health Services. Under these
16 facts, Wilson voluntarily and intelligently entered a plea agreement and
waived his right to allege errors that may have occurred prior to the plea.
See Murdaugh, 209 Ariz. at 27, ¶ 33.

17 (*Id.* at 58) Accordingly, the court of appeals held that Petitioner had waived his claims of
18 constitutional violations, and further found that his plea had been entered voluntarily and
19 intelligently.

20 While the “plea or sentencing proceeding record, although imposing, is not
21 invariably insurmountable,” a petitioner seeking to repudiate his statements made at a plea
22 hearing faces a heavy burden. *Blackledge v. Allison*, 431 U.S. 63, 73-74 (1977). “[T]he
23 representations of the defendant, his lawyer, and the prosecutor at such a hearing, as well
24 as any findings made by the judge accepting the plea, constitute a formidable barrier in any
25 subsequent collateral proceedings. Solemn declarations in open court carry a strong
26 presumption of verity.” *Id.*

27 At his change of plea hearing, Petitioner listed medications he was taking for pain
28 and affirmed that he was able to understand what his attorney and the court were saying.

1 (Doc. 11-2 at 52-53) He stated he had read the entire agreement, that his counsel had
2 explained the agreement to him, and that he understood it. (*Id.* at 53-54) The court
3 addressed information suggesting that Petitioner was hoping that once he pleaded guilty,
4 he could be transferred from the infirmary to the general jail population. (*Id.* at 54-57)
5 Petitioner said he understood that his entry into the plea agreement would not guarantee he
6 would be transferred. (*Id.* at 56-57) Petitioner affirmed that no one had promised him
7 anything that was not written in the plea agreement, and no one threatened him or otherwise
8 forced him to enter the agreement. (*Id.* at 59) The court cautioned Petitioner that once the
9 court accepted his guilty plea, he would not be able to withdraw from the agreement
10 without demonstrating that the withdrawal was necessary to correct a manifest injustice,
11 which she advised him is “a very, very hard thing to prove.” (*Id.* at 68) Petitioner said he
12 understood. (*Id.*) The court listed constitutional rights Petitioner would be “giving up” by
13 pleading guilty, including the rights inherent to proceeding with trial and having a jury
14 decide whether he was guilty. (*Id.* at 69) Petitioner said he understood. (*Id.*) Plaintiff
15 agreed with the factual basis for the Count I charge of second-degree burglary and pleaded
16 guilty to that charge. (*Id.* at 71) He also affirmed he had been convicted of a prior felony
17 charge of armed robbery. (*Id.* at 72) Petitioner had initialed paragraph 6 of the plea
18 agreement to indicate he had read and understood that he was waiving and giving up “any
19 and all motions, defenses, objections, or requests which he has made or raised, or could
20 assert hereafter, to the court’s entry of judgment against him and imposition of a sentence
21 upon him consistent with this agreement.” (*Id.* at 46, 47)

22 At Petitioner’s sentencing, the court initially recognized that the health services
23 provider at the jail where Petitioner was housed had notified the court that Petitioner was
24 medically able to proceed with his sentencing. (*Id.* at 94) The prosecutor testified the state
25 had gone over the plea agreement with Petitioner at settlement conferences “pretty much
26 line by line.” (*Id.* at 98) While Petitioner said his stomach hurt and reported he was still
27 eliminating blood, he made an extensive and cogent statement apologizing for his actions,
28 describing his ongoing symptoms from a gastrointestinal bleed, explaining the meaning of

1 medical terms, and asserting that incarceration was not helping his situation in life. (*Id.* at
2 127-129) Additionally, the record indicates that during his hospital treatment in July 2016,
3 he was documented to have been “alert and oriented to person, place, and time[.]” (*See*,
4 *e.g.*, Doc. 12 at 18)

5 In his reply to Respondents’ limited answer, Petitioner avers that due to his
6 “physical and mental capacity,” he was not able to stand trial or to sign a plea [agreement].”
7 (Doc. 12 at 4) He states he had been “under duress when signing a plea because [he] did
8 not know what was going on in court while [he was] in [the] hospital[.]” (*Id.* at 8) Without
9 explicitly saying so, Plaintiff appears to argue that his continuing medical condition and
10 the associated pain caused his guilty plea to be given involuntarily and unknowingly.

11 However, the evidence in the record does not indicate that Petitioner entered his
12 guilty plea with anything but full awareness of the consequences. Petitioner’s statements
13 that his plea was made under duress or involuntarily are insufficient to overcome the strong
14 presumption of verity accorded Petitioner’s representations at his change of plea hearing.
15 Petitioner’s statements at the plea colloquy carry the strong presumption of truth. *See*
16 *Blackledge*, 431 U.S. at 73-74 (1977); *United States v. Ross*, 511 F.3d 1233, 1236 (9th Cir.
17 2008). At his change of plea hearing, although the Petitioner said his stomach hurt, he
18 acknowledged he understood the court proceedings and the rights he was waiving. (Doc.
19 11-2 at 52-69)

20 To overcome the Arizona Court of Appeals’ decision on the merits that Petitioner’s
21 plea was rendered voluntarily and intelligently, he would need to argue that the state courts’
22 adjudication of his PCR claims of constitutional violations resulted in a decision that was
23 based on an unreasonable determination of the facts in light of the evidence or in a decision
24 that was contrary to, or involved an unreasonable application of, clearly established federal
25 law. 28 U.S.C. § 2254(d)(1), (2). He does not make that argument, and a review of the
26 record compels the conclusion such an argument would fail for lack of support.

27 The undersigned recommends the Court deny and dismiss the Petition.

28 Accordingly,

IT IS RECOMMENDED that Demetrius Antwon Wilson’s Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 (Doc. 1) be denied and dismissed with prejudice.

IT IS FURTHER RECOMMENDED that a Certificate of Appealability be denied because Petitioner has not “made a substantial showing of the denial of a constitutional right,” 28 U.S.C. § 2253(c)(2), and jurists of reason would not find the Court’s assessment of Petitioner’s constitutional claims “debatable or wrong,” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

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

Dated this 13th day of May, 2019.

Deborah M. Fine
Honorable Deborah M. Fine
United States Magistrate Judge

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2014-122610-001 DT

08/01/2018

HON. ROSA MROZ

CLERK OF THE COURT
J. Matlack
Deputy

STATE OF ARIZONA

GERALD R GRANT

v.

DEMETRIUS ANTWAN WILSON (001)

DEMETRIUS ANTWAN WILSON
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P O BOX 24401
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NATALEE SEGAL

COURT ADMIN-CRIMINAL-PCR
JUDGE MROZ

PETITION FOR POST-CONVICTION RELIEF DISMISSED

The Court has considered the Defendant's Pro-Per Petition for Post-Conviction Relief, the State's Response, and the Defendant's Reply.

The Court agrees with the arguments set forth in the State's Response. The Court did not find any colorable claims which would warrant an evidentiary hearing. The Court also did not find any material issues of fact or law which would entitle the Defendant to relief. Accordingly,

IT IS ORDERED that the Defendant's Petition for Post-Conviction Relief shall be summarily dismissed.

Superior Court
Appendix-B