

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

DEC 18 2023

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

LARRY DONNELL DUNLAP,

Petitioner - Appellant,

v.

AGAZ - ARIZONA OFFICE OF THE
ATTORNEY GENERAL and RYAN
THORNELL, Director of the Arizona
Department of Corrections, Rehabilitation,

Respondents - Appellees.

No. 23-1758

D.C. No. 4:21-cv-00457-RCC
District of Arizona, Tucson

ORDER

Before: R. NELSON and COLLINS, Circuit Judges.

The request for a certificate of appealability is denied because appellant has not shown 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).

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**
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9 Larry Donnell Dunlap,

10 Petitioner,

11 v.

12 David Shinn, *et al.*,

13 Respondents.

No. CV-21-0457-TUC-RCC (EJM)

REPORT AND RECOMMENDATION

14 Currently pending before the Court is Petitioner Larry Donnell Dunlap's Petition
15 Under 28 U.S.C. § 2254 for a Writ of Habeas Corpus by a Person in State Custody (Non-
16 Death Penalty) ("Petition") (Doc. 1). Respondents have filed a Limited Answer to Petition
17 for Writ of Habeas Corpus ("Answer") (Doc. 14) and Petitioner replied (Doc. 17). The
18 Petition is ripe for adjudication.

19 Pursuant to Rules 72.1 and 72.2 of the Local Rules of Civil Procedure,¹ this matter
20 was referred to Magistrate Judge Markovich for Report and Recommendation. The
21 Magistrate Judge recommends that the District Court deny the Petition (Doc. 1).

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¹ Rules of Practice of the United States District Court for the District of Arizona.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. Trial, Direct Appeal, and Previous Post-Conviction Proceedings

The Arizona Court of Appeals provided the following background:

Based on acts occurring in 1995, Dunlap was convicted after a jury trial of one count of sexual abuse and five counts of child molestation. His first appeal resulted in his resentencing on four of the child molestation counts, *State v. Dunlap*, No. 2 CA-CR 96-0643 (Ariz. App. Apr. 21, 1998) (mem. decision), at which the trial court imposed consecutive seventeen-year prison terms on each count, for an aggregate prison term of 69.5 years, *State v. Dunlap*, No. 2 CA-CR 99-0084 (Ariz. App. Mar. 30, 2000) (mem. decision). He has since sought and been denied post-conviction relief on numerous occasions. See *State v. Dunlap*, No. 2 CA-CR 2020-0112-PR (Ariz. App. July 6, 2020) (mem. decision); *State v. Dunlap*, No. 2 CA-CR 2019-0271-PR (Ariz. App. May 11, 2020) (mem. decision); *State v. Dunlap*, No. 2 CA-CR 2016-0209-PR (Ariz. App. Aug. 17, 2016) (mem. decision); *State v. Dunlap*, No. 2 CA-CR 2013-0215-PR (Ariz. App. Oct. 7, 2013) (mem. decision); *State v. Dunlap*, No. 2 CA-CR 2011-0196-PR (Ariz. App. Oct. 19, 2011) (mem. decision); *State v. Dunlap*, No. 2 CA-CR 2004-0276-PR (Ariz. App. Feb. 11, 2005) (mem. decision); *State v. Dunlap*, No. 2 CA-CR 2002-0215-PR (Ariz. App. Sept. 11, 2003) (mem. decision).

State v. Dunlap, 2021 WL 2134851, at *1 (Ariz. Ct. App. May 26, 2021).

B. Clemency Proceedings

1. Commutation Application

On July 25, 2017, Petitioner filed his Application for Commutation of Sentence. Answer (Doc. 14), Petr.'s Appl. for Commutation of Sent. (Exh. "6"). Petitioner asserted that he was falsely accused and innocent of the crimes for which he was convicted. *Id.* at 58–59.² Petitioner asserted that he “ha[s] been denied the opportunity by the corrupt justice systems in Tucson from presenting evidences [sic] and witnesses of my innocents [sic] in this case.” *Id.* at 59. Petitioner indicated that he and his family were raising money through a GoFundMe account to “hire the best criminal attorney in Arizona[.]” *Id.* Petitioner further noted that he was “giving the Governor the opportunity to avoid a Huge Civil Rights lawsuit if he would grant [Petitioner] a full pardon before [he and his family] hire this

² Page citations refer to the CM/ECF page numbers, unless otherwise noted.

1 attorney in his criminal case.” *Id.*

2 Petitioner opined that his sentence was excessive because the trial judge got angry
3 on remand and sentenced Petitioner to a longer term of imprisonment than he had initially
4 imposed. Answer (Doc. 14), Exh. “6” at 61. Petitioner urged that “[o]nce [he is] free[,]
5 [he] will fight for a better Justice System and . . . fight to get some of these laws off the
6 book that enslave poor people.” *Id.* Petitioner indicated that he had received a disciplinary
7 ticket in 2017 because a prison official had turned the prison “back into a yard of racism.”
8 *Id.* at 64. Petitioner indicated in his release plan that he intended to be reunited with his
9 son. *Id.* at 66.

10 On December 18, 2017, the Arizona Board of Executive Clemency (“AZBEC”)
11 decided not to pass Petitioner’s application to Phase II. Answer (Doc. 14), Clemency Hr’g
12 Results 12/18/2017 (Exh. “8”).

13 **2. Special Action**

14 **a. Trial Court**

15 On January 23, 2018, Petitioner delivered his petition for special action challenging
16 the denial of his clemency application to prison authorities for mailing. Answer (Doc. 14),
17 Petr.’s Special Action Pet., *Dunlap v. Ducey, et al.*, No. LC2018-000050 (Maricopa Cnty.
18 Super. Ct. Jan. 23, 2018) (Exh. “9”). Petitioner presented the following questions for
19 review:

- 20 1. Whether Respondents has [sic] failed to exercise discretion which they
21 have a duty to exercise, or to perform a duty required by law as to which
22 he has no discretion?
- 23 2. Whether a determination was arbitrary and capricious or an abuse of
discretion?

24 *Id.*, Exh. “9” at 79. Petitioner asserted that he is “an innocent black man, wrongfully
25 arrested, falsely accused, wrongfully convicted and wrongfully imprison [sic] for crimes
26 that he was falsely accused by the victims and that Petitioner have [sic] overwhelming
27 [sic] evidences [sic] and witnesses that he is innocent[.]” *Id.*, Exh. “9” at 79–80. Petitioner
28 alleged that a prosecutor with the Attorney General’s Office threatened his witnesses with

1 arrest if they appeared at trial because they were undocumented. *Id.*, Exh. “9” at 80.
2 Petitioner further alleged “[t]hat the Arizona Board of Executive Clemency denied
3 Petitioner’s request to have his sentence of 69 years in prison commuted to time served
4 because he’s a black convicted sex offender and that the Board members are told by the
5 Governor of Arizona Douglas Ducey that they are not to send to his office any black
6 convicted sex offender men to his office for any type of commutation of their sentences.”
7 *Id.*, Exh. “9” at 81. Petitioner opined that the Governor did “not want any convicted sex
8 offenders or black convicted sex offenders men [sic] to be presented to his office for a
9 commutation of sentence because of the political consequences he would face in his re-
10 election bid for Governor in 2018.” Answer (Doc. 14), Petr.’s Special Action Pet., *Dunlap*
11 *v. Ducey, et al.*, No. LC2018-000050 (Maricopa Cnty. Super. Ct. Jan. 23, 2018) (Exh. “9”)
12 at 81. Petitioner further alleged “[t]hat the Arizona Board members failed to consider all
13 the evidence[] presented to the Board members and that the Board members failed to call
14 Petitioner’s family in Texas that the meeting was beginning about Petitioner’s clemency
15 application so that Petitioner’s family could listen to hearing in this case.” *Id.*, Exh. “9” at
16 81–82. Petitioner asserted that these actions by the Board members were discriminatory.
17 *Id.*, Exh. “9” at 82. Petitioner further asserted “[t]hat the actions of the Board members
18 and Governor Douglas Ducey was [sic] arbitrary [sic] and capricious and abuse [sic] of their
19 discretion in this case.” *Id.* Petitioner urged that “[t]he center issue is whether a Black
20 male sex offender who’s victim was white can get a fair and unbiased [sic] hearing by the
21 Arizona Board of Executive Clemency.” *Id.* “Petitioner claim[ed] that he was singled out
22 of hundreds of clemency applications by the Board of Clemency members at the direction
23 of the Governor’s office to deny him clemency because petitioner is a black convicted sex
24 offender in this case.” Answer (Doc. 14), Petr.’s Special Action Pet., *Dunlap v. Ducey, et*
25 *al.*, No. LC2018-000050 (Maricopa Cnty. Super. Ct. Jan. 23, 2018) (Exh. “9”) at 82.
26 Petitioner sought a court order finding “the laws, rules, regulations and policies that have
27 been established by the Governor and the Arizona Legislation[,] . . . [which] singles out a
28 group of men convicted of sex offenses[,] . . . unconstitutional.” *Id.*, Exh. “9” at 83.

On April 2, 2018, the Governor and Arizona Board of Executive Clemency responded to Petitioner's special action. Answer (Doc. 14), Respondents' Response to Pet. for Special Action *Dunlap v. Ducey*, No. LC2018-000050-001 DT (Maricopa Cnty. Super. Ct. Apr. 2, 2018) (Exh. "10"). Respondents observed that "[t]he courts of this state cannot act as a superparole board." *Id.*, Exh. "10" at 89 (quoting *Cooper v. Arizona Bd. of Pardons & Paroles*, 717 P.2d 861, 863 (Ariz. 1986)). Respondents further noted that "[j]udicial review is only available for the limited purpose of insuring that any applicable due process requirements have been met and that the Board has acted within the scope of its powers." *Id.* (citing *Cooper*, 717 P.2d at 863). Respondents also observed that "[t]he Supreme Court [of the United States] emphasized that inmates have no constitutional or inherent right to commutation of their sentences." Answer (Doc. 14), Exh. "10" at 91 (citing *Connecticut Bd. of Pardons v. Dumschat*, 452, U.S. 458, 464–65 (1981)). Finally, Respondents asserted that Petitioner received the requisite due process and was not denied equal protection. *Id.*, Exh. "10" at 93–95.

On April 9, 2018, the trial court determined that it "d[id] not have jurisdiction to review the decisions of the Board of Executive Clemency[,] . . . [and] f[ound] that any other relief sought by Petitioner [were] not proper subjects of special action." Answer (Doc. 14), *Dunlap v. Ducey*, No. LC2018-000050-001 DT, Minute Entry (Maricopa Cnty. Super. Ct. Apr. 9, 2018) (Exh. "11").

b. Reconsideration

On April 19, 2018, Petitioner delivered his Motion for the Reconsideration of the Court's Decision to Dismiss Plaintiff's Special Action Petition to prison officials for mailing to the trial court. Answer (Doc. 14), Petr.'s Mot. for Recon., *Dunlap v. Ducey*, No. LC2018-000050-001 DT (Maricopa Cnty. Super. Ct. Apr. 18, 2018) (Exh. "12"). Plaintiff claimed that the trial court erred in denying jurisdiction. *Id.*, Exh. "12" at 147. Plaintiff asserted that "the Respondents did not act within the scope of its power." *Id.*, Exh. "12" at 148. Plaintiff alleged that "he was discriminated against because he is a convicted Black Sex Offender and that the Respondents do not give commutation or reduction of

1 time to convicted Black Sex Offenders.” *Id.*, Exh. “12” at 148. Petitioner further alleged
2 that “Respondents have granted to those convicted Black men who are not convicted of sex
3 offenses more that [sic] 60% to 90% commutation and reduction of their sentences versus
4 the 0% of the Respondents granting convicted Black Sex Offenders in similarly situations
5 of submitter an application to those Respondents for commutation of their sentences.” *Id.*,
6 Exh. “12” at 148–49. Plaintiff next claimed that Section 31-402(c)(2), Arizona Revised
7 Statutes, “is unconstitutional and is discriminatory toward convicted Black Sex Offenders,
8 and this statutes [sic] violated Plaintiff’s 14th Amendment Right to the Federal
9 Constitution in this case.” Answer (Doc. 14), Petr.’s Mot. for Recon., *Dunlap v. Ducey*,
10 No. LC2018-000050-001 DT (Maricopa Cnty. Super. Ct. Apr. 18, 2018) (Exh. “12”) at
11 149–50. Petitioner also asserted that his equal protection rights were violated by the
12 alleged lack of commutations granted to black sex offenders. *Id.*, Exh. “12” at 150.
13 Petitioner also complained about the Arizona Department of Corrections (“ADOC”)
14 policies that segregate sex offenders from general population prisoners. *Id.*, Exh. “12” at
15 244.

16 On April 27, 2018, the trial court denied Petitioner’s Motion for Reconsideration
17 without comment. Answer (Doc. 14), *Dunlap v. Ducey*, No. LC2018-000050-001 DT
18 (Maricopa Cnty. Super. Ct. Apr. 27, 2018) (Exh. “13”).

19 **c. Arizona Court of Appeals**

20 On November 9, 2018, Petitioner delivered his Opening Brief to prison officials for
21 mailing to the Arizona Court of Appeals. Answer (Doc. 14), Petr.’s Opening Br., *Dunlap*
22 *v. Ducey*, No. 1 CA-CV 18-0332 (Ariz. Ct. App. Nov. 9, 2018) (Exh. “14”). Petitioner
23 raised thirteen issues for review, including whether: 1) the trial court abused its discretion
24 in dismissing Petitioner’s case before his reply; 2) Respondents’ policies, laws, rules, and
25 statutes discriminate against Black, male, sex offenders who apply for commutation of their
26 sentences; 3) Respondents’ policies, laws, rules, and statutes discriminate against male sex
27 offenders who apply for commutation of their sentences; 4) Petitioner was discriminated
28 against because he is a convicted, Black, sex offender seeking commutation of his sentence;

1 5) Petitioner was discriminated against because he is a convicted, male, sex offender
2 seeking commutation of his sentence; 6) Respondents have been practicing discrimination
3 against Black, male, sex offenders who apply for commutation of their sentences from
4 1995 to 2018; 7) Respondents have been practicing discrimination against male sex
5 offenders who apply for commutation of their sentences from 1995 to 2018; 8)
6 Respondents have failed to exercise the discretion required of them by law; 9) a
7 determination was arbitrary and capricious or an abuse of discretion; 10) Respondents
8 violated Petitioner's due process rights; 11) Black males are a suspect class; 12)
9 Respondents treated Petitioner differently from similar White, male, sex offenders; and 13)
10 a rational government interest exists for the dissimilar treatment of Petitioner. *Id.*, Exh.
11 "14" at 169–70. Petitioner asserted that he sought "limited discovery for numbers and
12 statistics on how many Black sex offenders have received commutation of sentence from
13 1995 to 2018, and how many sex offenders males Black and White have received
14 commutation of their sentences from 1995 to 2018." *Id.*, Exh. "14" at 171. "Petitioner
15 claim[ed] that the trial court judge refused to allow the Respondents to answer Petitioner's
16 request for limited discovery in this case." *Id.* Petitioner further asserted that his due
17 process and equal protection rights had been violated by the Board's decisions. Answer
18 (Doc. 14), Exh. "14" at 172–73. Petitioner also opined that because the Arizona statutes
19 that govern the Board's behavior do not specifically bar discrimination on the basis of race,
20 gender, religion, or disability, the Board acts in a discriminatory manner. *Id.*, Exh. "14" at
21 173.

22 On May 7, 2019, the Arizona Court of Appeals affirmed the superior court's
23 dismissal order. *See State v. Dunlap*, 2019 WL 2004524 (Ariz. Ct. App. May 7, 2019). As
24 an initial matter, the appellate court observed that "[t]he superior court did not err in
25 dismissing Dunlap's petition without his filing a reply[,] [because] [a] petitioner has no
26 right to file a reply in a special action." *Id.* at *1 (citing Ariz. R. P. Spec. Act. 4(d) (2019)).
27 The appellate court further noted that "to the extent [Dunlap] presses arguments for the
28 first time on appeal, those arguments are waived." *Id.* (citing *Odom v. Farmers Ins. Co. of*

1 *Ariz.*, 169 P.3d 120, 125 (Ariz. Ct. App. 2007)). The appellate court further observed that
2 “[a]lthough Dunlap obtained a recording of the Board’s hearing, neither that recording, nor
3 a transcript of that hearing, are included in the record[;] [a]ccordingly, to the extent
4 Dunlap’s arguments turn on what occurred at that hearing, the missing recording or
5 transcript is presumed to support the Board’s conclusions.” *Id.* at *2 (citing *Myrick v.*
6 *Maloney*, 333 P.3d 818, 822 (Ariz. Ct. App. 2014)). The appellate court also recognized
7 that “the Board has ‘exclusive power’ to recommend commutation to the Governor if it
8 finds ‘by clear and convincing evidence that the sentence imposed is clearly excessive . . .
9 and that there is a substantial probability that when released the offender will conform the
10 offender’s conduct to the requirements of law.’” *Id.* (alterations in original) (citing A.R.S.
11 § 31-402(A), (C)(2). The appellate court noted that “[b]ecause the act of granting
12 commutation is strictly a matter of executive grace, . . . commutation decisions are rarely,
13 if ever, appropriate subjects for judicial review.” *Dunlap*, 2019 WL 2004524, at *2
14 (quotations and citations omitted). The appellate court also noted that “[j]udicial review is
15 appropriate only ‘to [e]nsure that the requirements of due process have been met and that
16 the [Board] has acted within the scope of its powers.’” *Id.* (alterations in original) (citing
17 *Cooper v. Ariz. Bd. of Pardons & Paroles*, 717 P.2d 861, 863 (Ariz. 1986)). The appellate
18 court held that “Dunlap does not argue, and the record does not suggest, that the Board
19 failed to provide Dunlap ‘notice and an opportunity to be heard[.]’ in violation of his due
20 process rights. *Id.* The appellate court reiterated that “absent a constitutional deprivation,
21 th[e] court lack[ed] appellate review over Board decisions.” *Id.* (citations omitted). Next,
22 the appellate court noted “Dunlap cannot rely on ‘mere speculation about bias’ to show the
23 Board violated his constitutional rights; rather, he ‘must show actual bias.’” *Id.* (quoting
24 *Emmett McLoughlin Realty, Inc. v. Pima Cty.*, 132 P.3d 290, 296 (Ariz. Ct. App. 2006)).
25 Similarly, the appellate court declined to consider any facial challenge to the “policies,
26 laws, rules and statutes governing commutation” because Petitioner failed to show that they
27 were unconstitutional as applied to him. *Dunlap*, 2019 WL 2004524, at *2. Finally, the
28 appellate court observed that “[t]here is no right to discovery in a special action” and the

1 superior court's dismissal of Petitioner's special action was a denial of his motion for
2 discovery. *Id.*

3 **d. Arizona Supreme Court**

4 On December 5, 2019, the Arizona Supreme Court denied Petitioner's Petition for
5 Review. *See* Answer (Doc. 14), *State v. Dunlap*, No. CV-19-0155-PR, Order (Ariz. Jan.
6 10, 2020) (Exh. "17"). On January 10, 2020, the Arizona Supreme Court denied
7 Petitioner's motion for reconsideration. *Id.*

8 On February 3, 2020, Petitioner filed a Notice of Appeal from the Arizona Supreme
9 Court State of Arizona in the District of Arizona. *Dunlap v. Ducey*, Petr.'s Not. of Appeal
10 from the Ariz. Supreme Ct. State of Ariz., No. CV-20-265-PHX-DJH (DMF) (D. Ariz.
11 Feb. 3, 2020) (Doc. 1).³ The district court observed that under the *Rooker-Feldman*⁴
12 doctrine, it was without subject matter jurisdiction to review a state court decision. *Dunlap*
13 *v. Ducey*, No. CV-20-00265-PHX-DJH (DMF), Order (D. Ariz. Feb. 10, 2020). The
14 district court dismissed the case without prejudice. *Id.*

15 **C. The Instant Habeas Proceeding**

16 On November 5, 2021, Petitioner filed his Petition Under 28 U.S.C. § 2254 for a
17 Writ of Habeas Corpus by a Person in State Custody (Doc. 1). Petitioner asserts a single
18 ground for relief alleging a "[v]iolation of [his] 14th Amendment Rights to the Federal
19 Constitution of due process." Petition (Doc. 1) at 6. Petitioner asserts "[t]hat Respondents
20 Douglas Ducey and the Board members of the Executive Board of Clemency and the
21 Attorney General of Arizona have shown that the Arizona laws, rules, policies and statutes
22

23 ³ "The court may judicially notice a fact that is not subject to reasonable dispute because
24 it: (1) is generally known within the trial court's territorial jurisdiction; or (2) can be accurately
25 and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R.
26 Evid. 201(b). "A court may take judicial notice of 'matters of public record' . . . [b]ut a court may
27 not take judicial notice of a fact that is 'subject to reasonable dispute.'" *See Lee v. City of Los*
Angeles, 250 F.3d 668, 689 (9th Cir. 2001) (citations omitted); *see also Dawson v. Mahoney*, 451
F.3d 550, 551 n.1 (9th Cir. 2006) (taking judicial notice of orders and proceedings before another
tribunal).

28 ⁴ *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923); *District of Columbia Ct. of Appeals v. Feldman*, 460 U.S. 462 (1983).

shows that the Respondents have been practicing for decades intentional discrimination against male black sex offenders by ordering the Executive Board of Clemency to not recomend [sic] to Governor Ducey any names of convicted black sex offender[s] for clemency or any reduction of time or to be released on COVID19 pandemic virus outbreak release in the matter.” *Id.* “Petitioner claims that Governor Douglas Ducey have released 145 White sex offender males and have release [sic] 35 black sex offender who were in their 60s and that they died shortly after being release [sic] from prison.” *Id.* Petitioner further alleges “[t]hat Respondents Governor Douglas Ducey have release [sic] 275 White Female sex offenders and release [sic] 65 black female sex offenders in the almost 8 years that he’s been governor.” *Id.*

On March 18, 2022, Respondents filed their Answer (Doc. 14), and Petitioner replied (Doc. 17).

II. STATUTE OF LIMITATIONS

A. *Timeliness*

As a threshold matter, the Court must consider whether Petitioner’s petition is barred by the statute of limitation. *See White v. Klizkie*, 281 F.3d 920, 921–22 (9th Cir. 2002). The AEDPA mandates that a one-year statute of limitations applies to applications for a writ of habeas corpus by a person in state custody. 28 U.S.C. § 2244(d)(1). Section 2244(d)(1) provides that the limitations period shall run from the latest of:

- (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
- (B) the date on which the impediment to filing an application created by the State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
- (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
- (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

1 28 U.S.C. § 2244(d)(1); *Shannon v. Newland*, 410 F.3d 1083 (9th Cir. 2005). “The time
2 during which a properly filed application for State post-conviction or other collateral
3 review with respect to the pertinent judgment or claim is pending shall not be counted
4 toward any period of limitation under this subsection.” 28 U.S.C. § 2244(d)(2).

5 The other subsections being inapplicable, Petitioner must have filed his habeas
6 petition within one year from “the date on which the judgment became final by the
7 conclusion of direct review or the expiration of the time for seeking such review.” 28
8 U.S.C. § 2244(d)(1)(A); *see also McQuiggin v. Perkins*, 569 U.S. 383 (2013). On
9 December 5, 2019, the Arizona Supreme Court denied review, thereby affirming the
10 Arizona Court of Appeals’ decision upholding the trial court’s dismissal of Petitioner’s
11 special action challenging the Arizona Board of Executive Clemency’s denial of
12 Petitioner’s application for commutation of his sentence. *See Answer (Doc. 14), State v.*
13 *Dunlap*, No. CV-19-0155-PR, Order (Ariz. Jan. 10, 2020). As such, Petitioner’s judgment
14 became final on March 4, 2020, after the expiration of the ninety (90) day period to file a
15 petition for certiorari from the Supreme Court of the United States. *Bowen v. Roe*, 188
16 F.3d 1157, 1158–59 (9th Cir. 1999) (“[T]he period of ‘direct review’ in 28 U.S.C. §
17 2244(d)(1)(A) includes the [90-day] period within which a petitioner can file a petition for
18 a writ of certiorari from the United States Supreme Court, whether or not the petitioner
19 actually files such a petition.”).

20 Pursuant to the AEDPA, Petitioner’s one-year limitation period expired, absent
21 tolling, on March 4, 2021. *See White*, 281 F.3d at 924 (“[T]he question of when a
22 conviction becomes final, so as to start the running of the statute of limitations under §
23 2244(d)(1)(A), is fundamentally different from the question of how long the statute of
24 limitations is tolled under § 2244(d)(2).”). Petitioner filed his Petition (Doc. 1) on
25 November 5, 2021. Therefore, absent tolling, the Petition (Doc. 1) is untimely.

26 ***C. Equitable Tolling of the Limitations Period***

27 The Supreme Court of the United States has held “that § 2244(d) is subject to
28 equitable tolling in appropriate cases.” *Holland v. Florida*, 560 U.S. 631, 645 (2010). The

1 Ninth Circuit Court of Appeals “will permit equitable tolling of AEDPA’s limitations
 2 period only if extraordinary circumstances beyond a prisoner’s control make it impossible
 3 to file a petition on time.” *Miles v. Prunty*, 187 F.3d 1104, 1107 (9th Cir. 1999) (quotations
 4 and citations omitted). Moreover, Petitioner “bears the burden of establishing two
 5 elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary
 6 circumstance stood in his way.” *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005); *see also*
 7 *Holland*, 260 U.S. at 649 (quoting *Pace*).

8 Petitioner has not offered any reason to support equitable tolling. As such, his
 9 Petition (Doc. 1) should be dismissed as untimely. Even if the Petition (Doc. 1) were
 10 timely, Petitioner is not entitled to relief.

11 12 **III. STANDARD OF REVIEW**

13 The federal courts shall “entertain an application for a writ of habeas corpus in
 14 behalf of a person in custody pursuant to the judgment of a State court only on the ground
 15 that he is in custody *in violation of the Constitution or laws of treaties of the United States*.”
 16 28 U.S.C. § 2254(a) (emphasis added). Moreover, a petition for habeas corpus by a person
 17 in state custody:

18 shall not be granted with respect to any claim that was adjudicated on the
 19 merits in State court proceedings unless the adjudication of the claim – (1)
 20 resulted in a decision that was contrary to, or involved an unreasonable
 21 application of, clearly established Federal law, as determined by the Supreme
 22 Court of the United States; or (2) resulted in a decision that was based on an
 unreasonable determination of the facts in light of the evidence presented in
 the State court proceeding.

23 28 U.S.C. § 2254(d); *see also Cullen v. Pinholster*, 563 U.S. 170, 181 (2011). Correcting
 24 errors of state law is not the province of federal habeas corpus relief. *Estelle v. McGuire*,
 25 502 U.S. 62, 67 (1991). Ultimately, “[t]he statute’s design is to ‘further the principles of
 26 comity, finality, and federalism.’” *Panetti v. Quarterman*, 551 U.S. 930, 945 (2007)
 27 (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003)). Furthermore, this standard is
 28 difficult to meet and highly deferential “for evaluating state-court rulings, [and] . . .

1 demands that state-court decisions be given the benefit of the doubt.” *Pinholster*, 563 U.S.
2 at 181 (citations and internal quotation marks omitted).

3 The Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), 110 Stat.
4 1214, mandates the standards for federal habeas review. *See* 28 U.S.C. § 2254. The
5 “AEDPA erects a formidable barrier to federal habeas relief for prisoners whose claims
6 have been adjudicated in state court.” *Burt v. Titlow*, 571 U.S. 12, 19 (2013). Federal
7 courts reviewing a petition for habeas corpus must “presume the correctness of state courts’
8 factual findings unless applicants rebut this presumption with ‘clear and convincing
9 evidence.’” *Schriro v. Landrigan*, 550 U.S. 465, 473–74 (2007) (citing 28 U.S.C. §
10 2254(e)(1)). Moreover, on habeas review, the federal courts must consider whether the
11 state court’s determination was unreasonable, not merely incorrect. *Id.*, 550 U.S. at 473;
12 *Gulbrandson v. Ryan*, 738 F.3d 976, 987 (9th Cir. 2013). Such a determination is
13 unreasonable where a state court properly identifies the governing legal principles
14 delineated by the Supreme Court, but when the court applies the principles to the facts
15 before it, arrives at a different result. *See Harrington v. Richter*, 562 U.S. 86, (2011);
16 *Williams v. Taylor*, 529 U.S. 362 (2000); *see also Casey v. Moore*, 386 F.3d 896, 905 (9th
17 Cir. 2004). “AEDPA requires ‘a state prisoner [to] show that the state court’s ruling on the
18 claim being presented in federal court was so lacking in justification that there was an error
19 ... beyond any possibility for fairminded disagreement.’” *Burt*, 571 U.S. at 19–20 (quoting
20 *Harrington*, 562 U.S. at 103) (alterations in original).

21 22 **IV. ANALYSIS**

23 Petitioner asserts a single ground for relief alleging a violation of his due process
24 rights. Petition (Doc. 1) at 6. Broadly construed, Petitioner also argues that the Governor
25 and members of the Executive Board of Clemency discriminated against him in denying
26 release related to the COVID-19 pandemic. *Id.* Petitioner also alleges racial discrimination
27 in the denial of clemency. *Id.*; Reply (Doc. 17) at 9. Petitioner’s claims are without merit.

28 ...

1 **A. Due Process**

2 “[P]ardon and commutation decisions have not traditionally been the business of
3 courts; as such, they are rarely, if ever, appropriate subjects for judicial review.”
4 *Connecticut Bd. of Pardons v. Dumschat*, 452 U.S. 458, 464 (1981) (citing *Meachum v.*
5 *Fano*, 427 U.S. 215, 225 (1976)). Furthermore, “an inmate has ‘no constitutional or
6 inherent right’ to commutation of his sentence.” *Id.* (citing *Greenholtz v. Nebraska Penal*
7 *Inmates*, 442 U.S. 1, 9–10 (1979)). “In terms of the Due Process Clause, a . . . felon’s
8 expectation that a lawfully imposed sentence will be commuted or that he will be pardoned
9 is . . . simply a unilateral hope.” *Id.* at 465 (citing *Greenholtz*, 442 U.S. at 11).

10 The appellate court observed that “[b]ecause ‘the act of granting commutation is
11 strictly a matter of executive grace,’ *Arnold v. Ariz. Bd. of Pardons & Paroles*, 167 Ariz.
12 155, 158 (App. 1990), commutation decisions ‘are rarely, if ever, appropriate subjects for
13 judicial review[.]’” *Dunlap v. Ducey*, 2019 WL 2004524, at *2 (Ariz. Ct. App. May 7,
14 2019) (citing *Dumschat*, 452 U.S. at 464). The appellate court held that “Dunlap does not
15 argue, and the record does not suggest, that the Board failed to provide Dunlap ‘notice and
16 an opportunity to be heard[.]’ in violation of his due process rights. *Id.* The appellate court
17 reiterated that ‘absent a constitutional deprivation, th[e] [trial] court lack[ed] appellate
18 review over Board decisions.” *Id.* (citations omitted).

19 Petitioner’s unilateral hope that his sentence would be commuted is insufficient to
20 sustain a due process claim. *Dumschat*, 452 U.S. at 465 (citing *Greenholtz*, 442 U.S. at
21 11). Furthermore, Petitioner has failed to show that the appellate court’s decision was
22 contrary to clearly established Federal law or otherwise based on an unreasonable
23 determination of the facts presented. *See* 28 U.S.C. § 2254(d); *see also Cullen v.*
24 *Pinholster*, 563 U.S. 170, 181 (2011). As such, Petitioner’s claim is denied.

25 **B. COVID-19**

26 Petitioner asserts that “the Arizona laws, Rules, Policies and statutes shows [sic]
27 that the Respondents have been practicing for decades intentional discrimination against
28 male Black sex offenders by ordering the Executive Board of Clemency to not recomend

1 [sic] to Governor Ducey any names of convicted black sex offender [sic] . . . to be released
 2 on COVID19 pandemic virus outbreak release[.]” Petition (Doc. 1) at 6.

3 As an initial matter, prior to application for a writ of habeas corpus, a person in state
 4 custody must exhaust all of the remedies available in the State courts. 28 U.S.C. §
 5 2254(b)(1)(A). This “provides a simple and clear instruction to potential litigants: before
 6 you bring any claims to federal court, be sure that you first have taken each one to state
 7 court.” *Rose v. Lundy*, 455 U.S. 509, 520 (1982). Petitioner did not raise this claim to the
 8 state courts. Because Petitioner has failed to exhaust this claim, it is denied.

9 The Court further notes that Petitioner appears to be attempting to circumvent prior
 10 rulings by raising similar claims in multiple cases. Petitioner initially filed a case pursuant
 11 to 42 U.S.C. § 1983 seeking “monetary damages, his court costs and fees, and immediate
 12 release from prison,[] alleging his Fourteenth Amendment rights have been violated by the
 13 Arizona Governor and three members of the Arizona Board of Executive Clemency
 14 because (1) the Governor is unwilling to commute the sentences of convicted Black sex
 15 offenders and is unwilling to approve clemency for inmates requesting ‘COVID19 releases
 16 from prison,’ and (2) the members of the Arizona Board of Executive Clemency are
 17 retaliating against him for filing a special action against them and are ‘in agreement with
 18 Defendant[] Ducey in denying Plaintiff clemency due to his conviction as a black sex
 19 offender.’” *Dunlap v. Ducey*, No. CV-20-01084-PHX-DJH (DMF), Order at 3–4 (D. Ariz.
 20 Aug. 24, 2020). Petitioner’s case was dismissed pursuant to Section 1915(g), Title 28,
 21 United States Code, because he failed to pay the filing fee.⁵ *See id.* Petitioner then filed a
 22 habeas petition “assert[ing] his continued custody is a violation of his Eighth Amendment
 23 protection against cruel and unusual punishment because he has various health issues and
 24 Respondents[] have failed to protect him from the Coronavirus.” *Dunlap v. Shinn*, No.

25
 26 ⁵ The court determined that Petitioner had “filed at least three actions . . . that were
 27 dismissed as frivolous, malicious, or as failing to state a claim . . . [and] [t]herefore, . . . [could]
 28 not bring a civil action without complete prepayment of the \$350.00 filing fee and \$50.00
 administrative fee unless he is in imminent danger of serious physical injury.” *Dunlap v. Ducey*,
 No. CV-20-01084-PHX-DJH (DMF), Order at 2 (D. Ariz. Aug. 24, 2020). The court concluded
 that Petitioner was not in imminent danger. *Id.* at 2–4.

CV-21-00111-TUC-RCC (EJM), Order at 2 (D. Ariz. July 22, 2021). In explaining to Petitioner that he did not have a right to immediate release in a § 2254 habeas proceeding, the Court stated:

A § 2254 habeas petition is an avenue for relief for inmates challenging the duration or validity of their state conviction and sentence. *Nettles[v. Grounds]*, 835 F.3d [922,] 927 [(9th Cir. 2016)]. Dunlap's instant § 2254 challenges neither duration no validity of his conviction of sentence. He is asking the Court to release him because, in his opinion, the facility at which he is incarcerated is not taking proper measures to protect him from Covid-19. This is a challenge to the conditions of his confinement which may only be raised in a § 1983 petition.

Dunlap v. Shinn, No. CV-21-00111-TUC-RCC (EJM), Order at 6 (D. Ariz. July 22, 2021). Upon reconsideration, the Court reiterated that "even if Petitioner had exhausted in the state appellate court, the Court informed Petitioner he was not entitled to relief because his § 2254 habeas is not cognizable because the habeas petition 'challenges neither duration nor validity of his conviction or sentence. He is asking the Court to release him because, in his opinion, the facility at which he is incarcerated is not taking proper measures to protect him from Covid-19. this is a challenge to the conditions of his confinement which may only be raised in a § 1983 petition.'" *Dunlap v. Shinn*, No. CV-21-00111-TUC-RCC (EJM), Order at 2–3 (D. Ariz. Aug. 5, 2021).

Here, Petitioner adds a racial discrimination component to the claims he has previously raised; however, his Petition is devoid of any evidence suggesting racial animus. Furthermore, his claims are nearly identical to those raised in his previous § 1983 claim. *See Dunlap v. Ducey*, No. CV-20-01084-PHX-DJH (DMF), Order at 3–4 (D. Ariz. Aug. 24, 2020). This Court surmises that Petitioner filed this habeas petition to avoid paying the filing fee. As has been previously outlined, Petitioner is not entitled to relief under § 2254. As such, Petitioner's claim is denied.

C. Racial Discrimination

Petitioner asserts that "the Arizona laws, Rules, Policies and statutes shows [sic] that the Respondents have been practicing for decades intentional discrimination against

1 male Black sex offenders by ordering the Executive Board of Clemency to not recomend
2 [sic] to Governor Ducey any names of convicted black sex offender [sic] for clemency or
3 any reduction of time[.]” Petition (Doc. 1) at 6.

4 The Arizona Court of Appeals declined to consider any facial challenge to the
5 “policies, laws, rules and statutes governing commutation” because Petitioner failed to
6 show that they were unconstitutional as applied to him.” *Dunlap v. Ducey*, 2019 WL
7 2004524, at *2 (Ariz. Ct. App. May 7, 2019): The appellate court noted that “Dunlap
8 cannot rely on ‘mere speculation about bias’ to show the Board violated his constitutional
9 rights; rather, he ‘must show actual bias.’” *Id.* (quoting *Emmett McLoughlin Realty, Inc.*
10 *v. Pima Cty.*, 132 P.3d 290, 296 (Ariz. Ct. App. 2006)).

11 In the instant habeas, Petitioner appears to have made up numbers in an effort to
12 manufacture a claim. Compare Petition (Doc. 1) at 6, with Response (Doc. 14) at 10 n.3
13 & Whitton Decl. (Exh. “18”). Of the fifty (50) individuals the Executive Board sent to the
14 governor, twenty-four (24) were white, thirteen (13) were Mexican, and eight (8) were
15 Black.⁶ See Response (Doc. 14), Exh. “18.” Petitioner has failed to present any actual
16 evidence, beyond mere speculation, of racial discrimination. To the extent that Petitioner
17 asserts a separate equal protection argument in reply, that claim is waived. *Cacoperdo v.*
18 *Demosthenes*, 37 F.3d 504, 507 (9th Cir. 1994) (“A Traverse is not the proper pleading to
19 raise additional grounds for relief.”). Petitioner’s unilateral hope that his sentence would
20 be commuted is insufficient to sustain a claim of racial bias. *Dumschat*, 452 U.S. at 465
21 (citing *Greenholtz*, 442 U.S. at 11). Furthermore, Petitioner has failed to show that the
22 appellate court’s decision was contrary to clearly established Federal law or otherwise
23 based on an unreasonable determination of the facts presented. See 28 U.S.C. § 2254(d);
24 see also *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011). As such, Petitioner’s claim is
25 denied.

26
27 ⁶ The Court looked up each individual in the Arizona Department of Corrections
28 Rehabilitation & Reentry inmate locator to determine race. Inmate Data Search, available at
<https://corrections-az.gov/inmate-data-search> (last visited June 23, 2023). The Court was unable
to locate five (5) individuals.

1
2 **V. CONCLUSION**

3 Based upon the foregoing, the Court finds that Petitioner's Petition (Doc. 1)
4 untimely and otherwise without merit. As such, it should be denied.
5

6 **VI. RECOMMENDATION**

7 For the reasons delineated above, the Magistrate Judge recommends that the District
8 Judge enter an order DENYING Petitioner's Petition Under 28 U.S.C. § 2254 for a Writ
9 of Habeas Corpus by a Person in State Custody (Doc. 1).

10 Pursuant to 28 U.S.C. § 636(b) and Rule 72(b)(2), Federal Rules of Civil Procedure,
11 any party may serve and file written objections within fourteen (14) days after being served
12 with a copy of this Report and Recommendation. A party may respond to another party's
13 objections within fourteen (14) days after being served with a copy. Fed. R. Civ. P.
14 72(b)(2). No replies shall be filed unless leave is granted from the District Court. If
15 objections are filed, the parties should use the following case number: **CV-21-0457-TUC-**
16 **RCC.**

17 Failure to file timely objections to any factual or legal determination of the
18 Magistrate Judge may result in waiver of the right of review.
19

20 Dated this 26th day of June, 2023.

21 

22 Eric J. Markovich
23 United States Magistrate Judge
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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

FEB 1 2024

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

LARRY DONNELL DUNLAP,

Petitioner - Appellant,

v.

ARIZONA OFFICE OF THE ATTORNEY
GENERAL and RYAN
THORNELL, Director of the Arizona
Department of Corrections, Rehabilitation,

Respondents - Appellees.

No. 23-1758

D.C. No. 4:21-cv-00457-RCC
District of Arizona,
Tucson

ORDER

Before: WARDLAW and H.A. THOMAS, Circuit Judges.

Appellant's motion for reconsideration (Docket Entry No. 9) is denied. *See*
9th Cir. R. 27-10.

No further filings will be entertained in this closed case.