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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

BRIAN ALLEN WILKINS,)
)
Petitioner,) CIV 10-00443 PHX MHM (MEA)
)
v.) REPORT AND RECOMMENDATION
)
ATTORNEY GENERAL OF THE STATE)
ARIZONA,)
)
Respondents.)
_____)

TO THE HONORABLE MARY H. MURGUIA:

On or about March 1, 2010, Petitioner filed a *pro se* petition seeking a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner filed exhibits in support of his request for habeas relief. See Docket No. 3 & Docket No. 7. Respondents filed a motion to dismiss the petition on April 29, 2010. See Docket No. 14 ("Motion"). On March 10, 2010, Petitioner filed a response to the motion to dismiss his habeas petition. See Docket No. 15.

I Procedural background

A grand jury indictment filed in the Maricopa County Superior Court on July 31, 2008, charged Petitioner with one count each of unlawful discharge of a firearm, disorderly conduct, possession of marijuana, and possession of drug

1 paraphernalia. See Motion, Exh. A. The charges arose from an
2 altercation between Petitioner and a neighbor, during which
3 altercation Petitioner brandished and fired a weapon; it was not
4 alleged that Petitioner fired the weapon at any individual.
5 Id., Exh. A. See also Docket No. 7, Exh. Q.

6 Pursuant to a written plea agreement dated as signed by
7 Petitioner on March 2, 2009, and dated as signed by his counsel
8 on March 2, 2006, and dated as signed by the prosecutor on
9 September 9, 2008, Petitioner pled guilty to disorderly conduct
10 and possession of drug paraphernalia. See Docket No. 3, Exh. A
11 & Motion, Exh. C. The plea agreement states that it expires or
12 would be revoked if not accepted on or before March 2, 2009.
13 Docket No. 3, Exh. A. The date March 2, 2009, is handwritten
14 above a crossed-out date of October 22, 2008. Id., Exh. A.

15 The plea agreement provided Petitioner would plead
16 guilty to the charge of disorderly conduct, "a class 6
17 undesignated offense". Id., Exh. A. The plea agreement stated
18 that the trial court could designate the disorderly conduct
19 offense as a felony or leave the charge undesignated at the time
20 of sentencing. The plea agreement did not state an agreement
21 with regard to whether Petitioner would be sentenced to prison
22 or placed on probation pursuant to his guilty plea on the
23 disorderly conduct charge. Id., Exh. A. Regarding Petitioner's
24 plea of guilty to the drug paraphernalia charge, the parties
25 agreed Petitioner would be placed on probation, pay a fine and
26 perform community service. Id., Exh. A. The plea agreement
27 provided that the other counts of the indictment would be

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1 dismissed and the allegation of dangerousness would be
2 dismissed. Id., Exh. A.

3 A hearing was conducted on March 2, 2009, regarding
4 Petitioner's guilty plea. See Docket No. 7, Exh. T. Petitioner
5 was sentenced on March 30, 2009. See Motion, Exh. B & Docket
6 No. 3, Exh. G. The state court suspended sentence and ordered
7 Petitioner to serve concurrent, one-year terms of probation for
8 each offense, dating from March 30, 2009. Motion, Exh. B.
9 Petitioner was further ordered to serve a jail term of 30 days
10 as a term of probation pursuant to his conviction for disorderly
11 conduct, with credit for the 30 days served after his arrest.
12 See id., Exh. B. Petitioner was further ordered to pay fines and
13 surcharges and sentenced to a term of community service. See
14 id., Exh. B.

15 On July 13, 2009, Petitioner filed a pro per petition
16 for state post-conviction relief pursuant to Rule 32, Arizona
17 Rules of Criminal Procedure. See Motion, Exh. D.¹ Petitioner
18 indicated he did not wish the appointment of counsel in his Rule
19 32 proceedings. See Docket No. 7, Exh. M. Petitioner argued he
20 was entitled to relief because: he was denied the effective
21 assistance of counsel; the state improperly suppressed evidence
22 in Petitioner's criminal proceedings; his guilty plea was
23 unlawfully induced; and his federal constitutional rights were
24 violated, including his rights pursuant to the Fifth, Sixth,

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26 ¹ On May 1, 2009, Petitioner filed an action for federal
27 habeas relief, which was dismissed without prejudice for failure to
28 exhaust his claims in the state courts. See CV 09-927 MHM MEA.

1 Eighth, and Fourteenth Amendments. See id., Exh. D & Docket No.
2 7, Exh. H.

3 On or about September 14, 2009, Petitioner filed a
4 special action in the Arizona Court of Appeals, asserting the
5 trial court had failed to act on his Rule 32 petition in a
6 timely fashion, and seeking de novo review of the claims raised
7 in his Rule 32 action. See Petition at 4 & Docket No. 7, Exh.
8 I.

9 The state trial court denied relief and dismissed
10 Petitioner's Rule 32 action in a decision issued September 25,
11 2009. See Docket No. 3, Exh. B. The state court determined:
12 "Based upon the matters presented the Court finds that the
13 defendant has failed to show any colorable claim for relief
14 pursuant to Rule 32.1 of the Arizona Rules of Criminal
15 Procedure. It is ordered dismissing the petition pursuant to
16 Rule 32.6(c) of the Arizona Rules of Criminal Procedure."
17 See id., Exh. B.

18 On October 2, 2010, the Arizona Supreme Court declined
19 to review the Court of Appeals' decision denying relief in
20 Petitioner's special action and also denied Petitioner's motion
21 to consolidate his special action with his Rule 32 proceedings.
22 See Docket No. 3, Exh. C.

23 On October 8, 2009, Petitioner sought review of the
24 trial court's decision denying his Rule 32 petition by the
25 Arizona Court of Appeals. Petitioner alleged he was entitled to
26 relief because he was denied his right to a speedy jury trial,
27 he was denied his right to the effective assistance of counsel,

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1 he was denied his right to represent himself, his guilty plea
2 was unlawfully induced, and he was denied his right to counsel
3 at his arraignment. Petitioner further asserted that the state
4 improperly suppressed evidence and that his right to due process
5 was violated because the state fabricated evidence and used
6 falsified evidence. The state filed a brief in the Court of
7 Appeals asserting that summary dismissal of the Rule 32 petition
8 was correct. See Docket No. 3, Exh. E

9 On January 20, 2010, Petitioner filed a pleading in the
10 state appellate court, "[c]orrecting [e]rrors" in his petition
11 for review of the Arizona trial court's decision dismissing his
12 Rule 32 action. See Motion, Exh. G.

13 Petitioner filed his federal habeas action on March 1,
14 2009. In the petition he asserts he is entitled to relief
15 because:

16 1. He was denied his right to a jury trial and to a
17 speedy trial in violation of the Sixth Amendment. Petitioner
18 contends the trial court violated his constitutional rights by
19 sua sponte continuing his trial date from January 20, 2009.
20 Petitioner argues the trial judge violated his right to a jury
21 trial and a speedy trial in order to "force him" into signing a
22 plea agreement.

23 2. He was denied his right to the effective assistance
24 of counsel. Petitioner alleges that his first public defender
25 encouraged Petitioner to accept a plea agreement providing a
26 year in prison without investigating the circumstances of his
27 case. Petitioner contends this public defender's performance

1 was deficient because the number of cases assigned to this
2 individual exceeded a limit set by the Arizona Supreme Court.
3 Petitioner also asserts his first counsel did not appear at his
4 arraignment. Petitioner contends his second public defender
5 allowed trial dates to be improperly vacated and that counsel
6 told Petitioner he would be incarcerated if he did not accept
7 the plea agreement. Petitioner alleges his second counsel erred
8 by not obtaining evidence of an extortion attempt by the
9 neighbor involved in the altercation sent to Petitioner
10 electronically on the night of the altercation.² Petitioner
11 asserts his third counsel erred by failing to object when the
12 trial court accepted the "expired" plea agreement.

13 3. He was denied his right to represent himself in his
14 criminal proceedings, invoked in an August 2008 motion to modify
15 his release conditions, based on his dissatisfaction with his
16 public defender.

17 4. He was denied his Sixth Amendment right to have
18 counsel present at all critical stages of his criminal
19 proceedings and his right to procedural due process of law
20 because counsel was not present at his arraignment and the court
21 did not appoint advisory counsel in his Rule 32 proceedings.

22 5. He was denied his right to due process of law
23 because the state fabricated evidence, including a false prior
24 criminal charge, used to elevate his crimes to dangerous crimes

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26 ² Attached to Petitioner's pleadings are defense counsel's
27 subpoenas for records from Spring regarding Petitioner's cell phone
dated October 7, 2008, and January 8, 2009. See Docket No. 7, Exh.
28 O.

1 and provide further bargaining power for the state with regard
2 to a plea agreement.

3 6. He was held on excessive bond, set at \$54,000,
4 based on his race and the fact that the altercation was
5 "sensationalized" by local media. Petitioner notes he was
6 eventually released without bond on the motion of his counsel.

7 7. He was denied his right to due process because each
8 of the four state trial court judges who signed orders in his
9 criminal proceedings did so in excess of their jurisdiction.

10 8. The state impeded his ability to appeal his criminal
11 convictions and sentences. Petitioner asserts his probation
12 officer seized a tape recorder Petitioner intended to use to
13 tape conversations between himself and the officer. Petitioner
14 contends the officer improperly approached a state judge to
15 revoke probation and impose a term of imprisonment based on
16 Petitioner's stated intent to appeal his convictions and
17 sentences.

18 9. He was denied his right to due process because the
19 state trial court accepted an expired plea agreement.

20 10. He was denied his right to due process of law
21 because the state improperly suppressed evidence, i.e., grand
22 jury transcripts. Petitioner contends the state improperly
23 withheld from the grand jury the fact that the victim was
24 intoxicated and on probation when the altercation occurred and
25 that the victim had extorted and assaulted Petitioner prior to
26 his acts.

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1 In his federal habeas petition Petitioner states that,
2 at that time, his appeal of the state trial court's decision
3 dismissing his Rule 32 petition was pending before the state
4 Court of Appeals.

5 In their motion to dismiss the habeas petition filed
6 April 29, 2010, Respondents contend that Petitioner did not
7 exhaust his claims in the state courts prior to bringing this
8 section 2254 action and, accordingly, that the petition must be
9 dismissed. Respondents aver that, as of April 29, 2010, the
10 Arizona Court of Appeals has not issued a ruling on Petitioner's
11 petition for review. Respondents assert that the state Court of
12 Appeals could render the federal habeas proceedings moot.
13 Respondents argue that, therefore, Petitioner's habeas claim is
14 premature and must be dismissed for failure to exhaust state
15 remedies. Respondents state:

16 Petitioner filed in this Court a previous
17 petition for writ of habeas corpus requesting
18 the "vacating, with prejudice, of the
19 judgment and forced plea agreement" entered
20 in State v. Wilkins, Maricopa County Superior
21 Court No. CR2008-145947, which is the same
22 criminal case at issue in the instant
23 petition for writ of habeas corpus. See
24 09-CV-927-MHM-MEA. By order filed June 9,
25 2009, the Court dismissed the Second Amended
26 Petition for "failure to exhaust state
27 remedies." See Docket 11, 09-CV-927-MHM-MEA.
28 On December 7, 2009, this Court denied
Petitioner's "Motion for Relief from an
Order" filed in that matter, wherein
Petitioner requested the Court reverse its
order of dismissal and allow Petitioner leave
to file a third amended petition.

Id. at n.1.

1 Petitioner contends that exhausting his claims in the
2 state courts "will not work..." Docket No. 15 at 1. Petitioner
3 asserts he was forced to file a special action in the state
4 courts because his efforts to properly proceed in his Rule 32
5 action were not facilitated by the state courts. Petitioner
6 asserts the state trial court erred by denying relief in his
7 Rule 32 action without addressing the merits of his claims.

8 Petitioner further contends that the state courts have
9 violated his federal constitutional rights. Petitioner alleges
10 that his probation was prematurely discharged on March 5, 2010,
11 in an effort to prevent him from seeking federal habeas relief.

12 Petitioner filed a second special action on October 2,
13 2009, and on February 17, 2010, the Arizona Supreme Court denied
14 review of the Arizona Court of Appeals' decision denying special
15 action relief. See Petition at 6 & Docket No. 3, Exh. D. The
16 public docket in Petitioner's criminal proceedings reflects that
17 the Arizona Court of Appeals issued an order in Petitioner's
18 case on March 24, 2010. The public docket indicates that, in
19 the order of March 24, 2010, the appellate court declined review
20 of a special action, but it is unclear from the record before
21 this Court what special action was pending before the state
22 appellate court since that order was entered subsequent to the
23 state Supreme Court's order of February 17, 2010, dismissing the
24 special action filed October 2, 2009.

25 The public docket in Petitioner's criminal proceedings
26 indicates that a discharge of order of probation was entered on
27 March 8, 2010. Additionally, on April 22, 2010, an order of
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1 discharge of probation was entered.

2 **II Analysis**

3 **A. Jurisdiction**

4 The United States District Courts have the power to
5 grant a writ of habeas corpus only to individuals "in custody in
6 violation of the Constitution or laws or treaties of the United
7 States". Maleng v. Cook, 490 U.S. 488, 490, 109 S. Ct. 1923,
8 1925 (1989), citing 28 U.S.C. § 2241(c)(3)). See also 28
9 U.S.C. § 2254(a). Custody is determined on the date that a
10 habeas petition is first filed. See Carafas v. LaVallee, 391
11 U.S. 234, 238-40, 88 S. Ct. 1556, 1559 (1968); Spencer v. Kemna,
12 523 U.S. 1, 7, 118 S. Ct. 978, 983 (1998). The Ninth Circuit
13 has stated that "a petitioner is 'in custody' for the purposes
14 of habeas jurisdiction while he remains on probation." Chaker
15 v. Crogan, 428 F.3d 1215, 1219 (9th Cir. 2005). Once a
16 defendant is discharged from probation or parole, he is no
17 longer "in custody." See, e.g., Henry v. Lungren, 164 F.3d
18 1240, 1241 (9th Cir. 1999). At the time he filed his habeas
19 action Petitioner was still on probation for both counts of
20 conviction, which were not discharged any sooner than March 8,
21 2010. Accordingly, the Court may properly exercise jurisdiction
22 over the petition.

23 **B. Mootness**

24 Neither is the habeas petition moot. Article III, § 2
25 of the Constitution requires the existence of a case or
26 controversy through all stages of a federal judicial proceeding.
27 Accordingly, throughout the entire proceedings, the petitioner

1 "must have suffered, or be threatened with, an actual injury ...
2 likely to be redressed by a favorable judicial decision."
3 Spencer v. Kemna, 523 U.S. 1, 7, 118 S. Ct. 978, 983 (1998),
4 quoting Lewis v. Continental Bank Corp., 494 U.S. 472, 477, 110
5 S. Ct. 1249, 1253-54 (1990).

6 [E]ven if the probationary period has expired
7 by now, a petition for habeas relief is not
8 moot, so long as the petition was filed
9 during the probationary period and the
10 conviction will have adverse collateral
11 consequences. See Carafas v. LaVallee, 391
12 U.S. 234, 237-40, 88 S. Ct. 1556, 1559-1561,
13 [] (1968). The record on appeal does not
14 reveal whether these conditions were met;
15 thus, on remand, the district court will have
16 to determine whether habeas relief may be
17 available. Although the court obviously
18 cannot discharge the appellant from custody
19 if he is not in custody, the court may grant
20 other relief that it deems equitable. Id. at
21 239, 88 S. Ct. at 1560.

22 Olson v. Hart, 965 F.2d 940, 943 (10th 1992).

23 Petitioner filed his habeas action before the discharge
24 of probation. Petitioner has alleged adverse collateral
25 consequences arising from his convictions. Accordingly, the
26 petition is not moot despite the fact that Petitioner is not
27 currently serving a term of incarceration or probation.

28 **C. Exhaustion**

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

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

6 The Ninth Circuit Court of Appeals has concluded that,
7 in cases arising in Arizona in which the sentence imposed is not
8 a capital sentence, the "highest court" test of the exhaustion
9 requirement is satisfied if the habeas petitioner presented his
10 claim to the Arizona Court of Appeals, either on direct appeal
11 or in a petition for post-conviction relief. See Swoopes v.
12 Sublett, 196 F.3d 1008, 1010 (9th Cir. 1999). See also Paige v.
13 Schriro, 648 F. Supp. 2d 1151, 1168-69 (D. Ariz. 2009); Crowell
14 v. Knowles, 483 F. Supp. 2d 925, 932 (D. Ariz. 2007).
15 Petitioner's plea agreement waived his right to a direct appeal.
16 Accordingly, any claim not presented to the Arizona Court of
17 Appeals in his Rule 32 action has not been completely exhausted.
18 See Paige, 648 F. Supp. 2d at 1168-69.

19 A federal habeas petitioner has not exhausted a federal
20 habeas claim if he still has the right to raise the claim "by
21 any available procedure" in the state courts. 28 U.S.C. §
22 2254(c) (1994 & Supp. 2009). Because the exhaustion requirement
23 refers only to remedies still available to the petitioner at the
24 time they file their action for federal habeas relief, it is
25 satisfied if the petitioner is clearly procedurally barred from
26 pursuing their claim in the state courts. See Woodford v. Ngo,
27 548 U.S. 81, 126 S. Ct. 2378, 2387 (2006); Castille, 489 U.S. at

1 351, 109 S. Ct. at 1060. If it is clear the habeas petitioner's
2 claim is procedurally barred pursuant to state law, the claim is
3 exhausted by virtue of the petitioner's "procedural default" of
4 the claim. See, e.g., Woodford, 126 S. Ct. at 2387.

5 We recognize two types of procedural bars:
6 express and implied. An express procedural
7 bar occurs when the petitioner has presented
8 his claim to the state courts and the state
9 courts have relied on a state procedural rule
10 to deny or dismiss the claim. An implied
11 procedural bar, on the other hand, occurs
12 when the petitioner has failed to fairly
13 present his claims to the highest state court
14 and would now be barred by a state procedural
15 rule from doing so.

16 Robinson v. Schriro, 595 F.3d 1086, 1100 (9th Cir. 2010).

17 With regard to claims that were expressly barred by
18 the state courts:

19 The doctrine of procedural default provides
20 that a federal habeas court may not review
21 constitutional claims when a state court has
22 declined to consider their merits on the
23 basis of an adequate and independent state
24 procedural rule. A state procedural rule is
25 adequate if it is regularly or consistently
26 applied by the state courts and it is
27 independent if it does not depend on a
28 federal constitutional ruling. Where a state
procedural rule is both adequate and
independent, it will bar consideration of the
merits of claims on habeas review unless the
petitioner demonstrates cause for the default
and prejudice resulting therefrom or that a
failure to consider the claims will result in
a fundamental miscarriage of justice.

29 McNeill v. Polk, 476 F.3d 206, 211 (4th Cir. 2007) (internal
30 citations and quotations omitted). See also Stewart v. Smith,
31 536 U.S. 856, 860, 122 S. Ct. 2578, 2582 (2002); Johnson v.
32 Mississippi, 486 U.S. 578, 587, 108 S. Ct. 1981, 1987 (1988).

1 Petitioner's appeal of the trial court's decision
2 denying Rule 32 relief is apparently still pending in the
3 Arizona Court of Appeals. The matter has now been fully briefed
4 for approximately six or seven months. The state has argued to
5 the Court of Appeals that Petitioner's ineffective assistance of
6 counsel claims are not colorable and that Petitioner's other
7 claims for relief from his convictions were waived by
8 Petitioner's guilty plea.³ It is possible the state appellate
9 court will grant relief and it is possible that the state
10 appellate court will deny relief based on a state procedural
11 rule. At this time, Petitioner's claims have not been denied
12 based on their merits or based on a procedural rule.

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16 ³ In Arizona, claims not previously presented to the state
17 courts via either direct appeal or collateral review are generally
18 barred from federal review because an attempt to return to state court
19 to present them is futile unless the claims fit in a narrow category
20 of claims for which a successive petition is permitted. See Ariz. R.
21 Crim. P. 32.1(d)-(h) & 32.2(a) (precluding claims not raised on appeal
22 or in prior petitions for post-conviction relief, except for narrow
23 exceptions). See also Ariz. R. Crim. P. 32.4 (time bar). Because
24 Arizona's preclusion rule, Rule 32.2(a), has been found both
25 "independent" and "adequate," either its specific application to a
26 claim by an Arizona court, or its operation to preclude a return to
27 state court to exhaust a claim, will procedurally bar subsequent
28 review of the merits of that claim by a federal habeas court. See
Stewart, 536 U.S. at 860 (determinations made under Arizona's
procedural default rule are "independent" of federal law); Smith v.
Stewart, 241 F.3d 1191, 1195 n.2 (9th Cir. 2001) ("We have held that
Arizona's procedural default rule is regularly followed ["adequate"]
in several cases.") (citations omitted); Ortiz v. Stewart, 149 F.3d
923, 931-32 (rejecting argument that Arizona courts have not "strictly
or regularly followed" Rule 32 of Arizona Rules of Criminal
Procedure).

1 Presented with unexhausted claims which are still
2 pending in the state courts, the Court could dismiss the habeas
3 petition without prejudice presumably without adverse
4 consequences to Petitioner. However it is unclear if the
5 statute of limitations is again running against Petitioner,
6 i.e., if the appellate court has rendered a decision in his
7 appeal of the trial court's dismissal of his Rule 32 petition.

8 **III Conclusion**

9 The AEDPA requires that a petition be filed in federal
10 district court before the end of the one-year statute of
11 limitations period, see 28 U.S.C. § 2244(d), and that the
12 petition not be granted until, if at all, all claims contained
13 in the petition have been exhausted at the state level. See 28
14 U.S.C. § 2254(b)(1). Therefore, a habeas petition may be filed
15 but not granted prior to total exhaustion of state remedies, and
16 a stay pending exhaustion is perfectly consistent with these
17 rules.

18 If the state appellate court has affirmed the trial
19 court's decision denying Rule 32 relief, either on the merits of
20 those claims or based on a procedural rule, then the Court
21 should review that decision to properly determine if Petitioner
22 is entitled to relief based on the standard stated in section
23 2254. If Petitioner's Rule 32 action is still pending in the
24 Arizona Court of Appeals, then Petitioner has neither fully
25 exhausted nor procedurally defaulted his federal habeas claims.

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1 Accordingly,

2 **IT IS RECOMMENDED** that the motion to dismiss [Docket
3 **No. 14]** based on a failure to exhaust state court remedies be
4 **denied, and**

5 **IT IS FURTHER RECOMMENDED** that this habeas action be
6 **stayed** pending the future filing by either party of the Arizona
7 Court of Appeals' decision with regard to its review of the
8 state trial court's denial of relief in Petitioner's Rule 32
9 action.

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

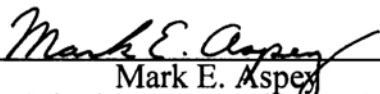
15 Pursuant to Rule 72(b), Federal Rules of Civil
16 Procedure, the parties shall have fourteen (14) days from the
17 date of service of a copy of this recommendation within which to
18 file specific written objections with the Court. Thereafter,
19 the parties have fourteen (14) days within which to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

24 Failure to timely file objections to any factual or
25 legal determinations of the Magistrate Judge will be considered
26 a waiver of a party's right to de novo appellate consideration
27 of the issues. See United States v. Reyna-Tapia, 328 F.3d 1114,

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1 1121 (9th Cir. 2003) (en banc). Failure to timely file
2 objections to any factual or legal determinations of the
3 Magistrate Judge will constitute a waiver of a party's right to
4 appellate review of the findings of fact and conclusions of law
5 in an order or judgment entered pursuant to the recommendation
6 of the Magistrate Judge.

7 DATED this 24th day of June, 2010.

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11 Mark E. Asper
12 United States Magistrate Judge
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