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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Michael Steel,
Petitioner,
vs.
Charles L. Ryan,* et al.,
Respondents.

No. CIV 08-1030-PHX-PGR (DKD)
REPORT AND RECOMMENDATION

TO THE HONORABLE PAUL G. ROSENBLATT, U.S. DISTRICT JUDGE:

Petitioner Michael Steel filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254, challenging his conviction for Possession of a Narcotic Drug for Sale, with a prior felony conviction, and the trial court’s imposition of a 9.25-year term of imprisonment. In his three grounds for habeas relief, he argues that his constitutional rights were violated as follows: (1) the trial court failed to consider all mitigating evidence at sentencing; (2) Steel was not mentally competent to enter into a plea agreement; and (3) his trial counsel was ineffective. Respondents argue that the petition is untimely. The Court agrees and recommends that the petition be denied and dismissed with prejudice.

* Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, Charles L. Ryan, the Interim Director of the Arizona Department of Corrections, replaces Dora Schriro.

1 Following the entry of Steel’s guilty plea on February 1, 2005 and his sentencing on
2 March 11, 2005, he filed a Notice of Post-Conviction Relief which the trial court dismissed
3 by minute entry as untimely:

4 Defendant filed on March 27, 2006, an untimely Notice of Post-
5 Conviction Relief. He was sentenced on March 11, 2005 following his guilty
6 plea. He claims he has just obtained his mental health records and this “new
7 evidence” should have been presented to the Court in mitigation at sentencing.
8 He does not explain what these records show or provide a copy of any records.
9 As such, defendant has failed to provide the Court with sufficient information
10 to substantiate his claim of newly discovered evidence, as required by Rule
11 32.2(b), Arizona Rules of Criminal Procedure.

12 **IT IS THEREFORE ORDERED** dismissing defendant’s Notice of Post-
13 Conviction Relief.

14 (Doc. #8, Exh D).

15 Steel filed a second Notice of Post-Conviction Relief on August 22, 2006. On September
16 8, the trial court also dismissed that notice as untimely:

17 Defendant filed on August 22, 2006, an untimely Notice of Post-
18 Conviction Relief and Petition for Post-Conviction Relief. He was sentenced
19 on March 11, 2005 following his guilty plea. Rule 32.4(a), Arizona Rules of
20 Criminal Procedure, provides that the notice must be filed within 90 days of
21 entry of judgment and sentencing, and that any notice not timely filed may
22 only raise claims pursuant to Rule 32.1(d),(e), (f), or (h).

23 Defendant claims that he was incompetent at the time he committed the
24 crime, entered his guilty plea and was sentenced, and that his attorney
25 provided ineffective assistance. These claims fall under rule 32.1(a) and
26 therefore are not within the exceptions that excuse defendant from failing to
27 timely pursue rule 32 relief.

28 **IT IS THEREFORE ORDERED** dismissing defendant’s Notice and
Petition for Post-Conviction Relief.

(Minute Entry, 9/08/06, CR2004022451 *available at* [http://www.superiorcourt.maricopa.gov/docket/minute entries](http://www.superiorcourt.maricopa.gov/docket/minute%20entries)).

In order to be timely, Steel was required to file his federal petition within one year of the time his conviction became final “by the conclusion of direct review or the expiration of the time for seeking such review.” *See* 28 U.S.C. § 2244(d)(1)(A). However, because Steel pleaded guilty, he waived the right to seek direct review. He was therefore entitled to bring an “of-right” post-conviction relief proceeding under Rule 32.1 of the Arizona Rules of

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

14 DATED this 18th day of May, 2009.

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18 David K. Duncan
19 United States Magistrate Judge
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