

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

MICHAEL DAVIS,)	
)	
Petitioner,)	
)	
v.)	CIV 09-00296 PHX DGC (MEA)
)	
CHARLES L. RYAN and)	REPORT AND RECOMMENDATION
ARIZONA ATTORNEY GENERAL,)	
)	
Respondents.)	
_____)	

TO THE HONORABLE DAVID G. CAMPBELL:

On or about February 12, 2009, Petitioner filed a *pro se* petition seeking a writ of habeas corpus pursuant to 42 U.S.C. § 2254. Respondents filed an answer ("Answer") (Docket No. 18) to the petition on May 12, 2009. Petitioner filed a reply to the response on May 22, 2009. See Docket No. 20.¹

I Procedural History

On July 26, 2006, pursuant to a written plea agreement, the Maricopa County Superior Court accepted Petitioner's plea of guilty to one count of fraudulent schemes and artifices. Answer, Exh. A. As a result of this guilty plea, on December 15, 2006, Petitioner was sentenced to a term of three years

¹The pleading at docket number 20 is titled "Appellant's Opening Brief" and is the format of an appellate brief.

1 probation. Id., Exh. B.

2 On or about April 24, 2007, Petitioner's probation
3 officer alleged that he had violated several of the conditions
4 of his probation, including failing to make any payments on
5 ordered restitution, court costs, and fees, the failure to meet
6 with his probation officer, and his arrest resulting from the
7 failure to appear in court as ordered regarding an alleged
8 probation violation in another criminal matter. Id., Exh. C.

9 At a disposition hearing conducted April 27, 2007, at
10 which hearing Petitioner was represented by counsel, the court
11 informed Petitioner regarding the constitutional rights he would
12 be forfeiting if he admitted he had violated a term of his
13 probation. Id., Exh. E. The state court told Petitioner he had
14 a right to deny the allegation that he had violated his
15 probation and to have an evidentiary hearing on the charges.
16 Id., Exh. E. Petitioner was told that if he admitted a
17 probation violation at that time and was found to be in
18 violation of his probation he could not take a direct appeal of
19 that decision but that he could file a state action for post-
20 conviction relief. Id., Exh. E.

21 At that stage in the hearing Petitioner indicated he
22 understood the rights he was waiving by admitting that he had
23 violated a term of his probation, i.e., the failure to meet with
24 his probation officer. Id., Exh. E. Petitioner stated he was
25 satisfied with his counsel. Id., Exh. E.

26 The state trial court accepted Petitioner's admission
27 that he had violated one of the conditions of his probation.

28

1 Id., Exh. D & Exh. E. The state trial court revoked
2 Petitioner's probation and imposed the presumptive term of five
3 years imprisonment pursuant to Petitioner's 2006 conviction on
4 one count of fraudulent schemes or artifices. Id., Exh. D.
5 Petitioner's sentence was to date from April 27, 2007, with
6 credit for 403 days of presentence incarceration. Id., Exh. D.
7 At that time the state trial court granted a motion to dismiss
8 the allegation that Petitioner had violated other terms of his
9 probation. Id., Exh. D.

10 A few days later, on May 2, 2007, Petitioner initiated
11 an action for state post-conviction relief pursuant to Rule 32,
12 Arizona Rules of Criminal Procedure. Id., Exh. F. Petitioner
13 was represented by counsel in his Rule 32 action. Id., Exh. F.²
14 In his Rule 32 action Petitioner asserted that he was never
15 informed of his right to a separate post-violation hearing at
16 which he could present mitigation evidence before being
17 sentenced. Id., Exh. G. Petitioner also alleged his counsel
18 was ineffective because counsel failed to inform him that he had
19 the right to a separate hearing and because counsel did not
20 present evidence at the April 27, 2007 hearing. Id., Exh. G.

21 The state trial court summarily dismissed the Rule 32
22 action on January 28, 2008. Id., Exh. H. Petitioner sought
23 review of this decision by the Arizona Court of Appeals, which
24 denied review on December 29, 2008. Id., Exh. I & Exh. J.

25
26 ² James Harris represented Petitioner during his probation
27 violation proceedings. Kerrie Droban represented Petitioner in his
28 Rule 32 action.

1 Petitioner did not seek review by the Arizona Supreme Court.

2 In his federal habeas action Petitioner asserts he is
3 entitled to relief because he was not informed that he had a
4 right to a mitigation hearing separate from the hearing to
5 determine if he had violated a term of his probation.
6 Petitioner asserts he never waived his "fundamentally protected
7 due process right to postpone the imposition of sentencing..."
8 until after a mitigation hearing was conducted.

9 Petitioner also contends he was denied his right to the
10 effective assistance of counsel because his counsel did not
11 inform him of the right to a separate mitigation hearing,
12 because counsel did not "exercise" this right, and because
13 counsel failed to present adequate mitigation evidence.

14 Respondents assert Petitioner's first claim for relief
15 was not properly exhausted in the state courts as a federal due
16 process claim. Respondents also maintain Petitioner's right to
17 due process of law was not violated. Respondents further argue
18 Petitioner's counsel's performance was not deficient because it
19 is "clear" from the record that counsel had discussed proceeding
20 from the disposition hearing to the sentencing with Petitioner.
21 Respondents also contend any alleged deficiency was not
22 prejudicial because both counsel and Petitioner made the
23 sentencing court aware of the mitigating issues, i.e.,
24 Petitioner's mental illness, his childhood in foster care, and
25 his concerns regarding his infant son.

26

27

28

1 **II Analysis**

2 **A. Exhaustion and procedural default**

3 The District Court may only grant federal habeas relief
4 on the merits of a claim which has been exhausted in the state
5 courts. See O'Sullivan v. Boerckel, 526 U.S. 838, 842, 119 S.
6 Ct. 1728, 1731 (1999); Coleman v. Thompson, 501 U.S. 722, 729-
7 30, 111 S. Ct. 2546, 2554-55 (1991). To properly exhaust a
8 federal habeas claim, the petitioner must afford the state the
9 opportunity to rule upon the merits of the claim by "fairly
10 presenting" the claim to the state's "highest" court in a
11 procedurally correct manner. See, e.g., Castille v. Peoples,
12 489 U.S. 346, 351, 109 S. Ct. 1056, 1060 (1989); Rose
13 v. Palmateer, 395 F.3d 1108, 1110 (9th Cir. 2005). The Ninth
14 Circuit Court of Appeals has concluded that, in non-capital
15 cases arising in Arizona, the "highest court" test of the
16 exhaustion requirement is satisfied if the habeas petitioner
17 presented his claim to the Arizona Court of Appeals, either on
18 direct appeal or in a petition for post-conviction relief. See
19 Swoopes v. Sublett, 196 F.3d 1008, 1010 (9th Cir. 1999). See
20 also Crowell v. Knowles, 483 F. Supp. 2d 925, 932 (D. Ariz.
21 2007).

22 To satisfy the "fair presentment" prong of the
23 exhaustion requirement, the petitioner must present "both the
24 operative facts and the legal principles that control each claim
25 to the state judiciary." Wilson v. Briley, 243 F.3d 325, 327
26 (7th Cir. 2001). See also Kelly v. Small, 315 F.3d 1063, 1066
27 (9th Cir. 2003). In Baldwin v. Reese, the Supreme Court

1 reiterated that the purpose of exhaustion is to give the states
2 the opportunity to pass upon and correct alleged constitutional
3 errors. See 541 U.S. 27, 29, 124 S. Ct. 1347, 1349 (2004).
4 Therefore, if the petitioner did not present the federal habeas
5 claim to the state court as asserting the violation of a
6 specific federal constitutional right, as opposed to violation
7 of a state constitutional right or state law, the federal habeas
8 claim was not "fairly presented" to the state court. See, e.g.,
9 id., 541 U.S. at 33, 124 S. Ct. at 1351; Castillo v. McFadden,
10 399 F.3d 993, 999 (9th Cir. 2005). See also Lopez v. Schriro,
11 491 F.3d 1029, 1040 (9th Cir. 2007) ("a petitioner may provide
12 further facts to support a claim in federal district court, so
13 long as those facts do not fundamentally alter the legal claim
14 already considered by the state courts"), cert. denied, 128 S.
15 Ct. 1227 (2008).

16 For a habeas claim to be considered fairly presented to
17 the state courts as a federal claim, the petitioner must have
18 described both the operative facts and the federal legal theory
19 on which the claim is based to the state courts. See Lounsbury
20 v. Thompson, 374 F.3d 785, 788 (9th Cir. 2004); Kelly, 315 F.3d
21 at 1066. Although a habeas petitioner need not recite "book and
22 verse on the federal constitution" to fairly present a claim to
23 the state courts, Picard v. Connor, 404 U.S. 270, 277-78, 92 S.
24 Ct. 509, 512-13 (1971), they must do more than present the facts
25 necessary to support the federal claim. See Anderson v.
26 Harless, 459 U.S. 4, 6, 103 S. Ct. 276, 277 (1982).

1 **B. Standard of review regarding exhausted claims**

2 The Court may not grant a writ of habeas corpus to a
3 state prisoner on a claim adjudicated on the merits in state
4 court proceedings unless the state court reached a decision
5 contrary to clearly established federal law, or one involving an
6 unreasonable application of clearly established federal law, or
7 unless the state court's decision was based on an unreasonable
8 determination of the facts in light of the evidence presented in
9 the state proceeding. See 28 U.S.C. § 2254(d) (1994 & Supp.
10 2008); Carey v. Musladin, 549 U.S. 70, 74-75, 127 S. Ct. 649,
11 653 (2006); Musladin v. Lamarque, 555 F.3d 834, 838 (9th Cir.
12 2009).

13 Factual findings of a state court are presumed to be
14 correct and can be reversed by a federal habeas court only when
15 the federal court is presented with clear and convincing
16 evidence. See Miller-El v. Dretke, 545 U.S. 231, 240, 125 S.
17 Ct. 2317, 2325 (2005); Miller-El v. Cockrell, 537 U.S. 322, 340,
18 123 S. Ct. 1029, 1041 (2003) (the court must presume that state
19 court's factual findings are correct and may not reverse a state
20 court's factual finding "absent clear and convincing evidence"
21 that the finding is "objectively unreasonable."); Stenson v.
22 Lambert, 504 F.3d 873, 881 (9th Cir. 2007), cert. denied, 129 S.
23 Ct. 247 (2008); Anderson v. Terhune, 467 F.3d 1208, 1212 (9th
24 Cir. 2006); Solis v. Garcia, 219 F.3d 922, 926 (9th Cir. 2000)
25 ("The state court's factual findings are entitled to a
26 presumption of correctness unless the petitioner rebuts the
27 presumption with clear and convincing evidence."). The
28

1 "presumption of correctness is equally applicable when a state
2 appellate court, as opposed to a state trial court, makes the
3 finding of fact." Sumner v. Mata, 455 U.S. 591, 593, 102 S. Ct.
4 1303, 1304-05 (1982).

5 A state court decision is contrary to federal law if it
6 applied a rule contradicting the governing law of Supreme Court
7 opinions or if it reaches a different result than a Supreme
8 Court case on the presentation of materially indistinguishable
9 facts. See Williams v. Taylor, 529 U.S. 362, 405-06, 120 S. Ct.
10 1495, 1519 (2000). If the state court erroneously applied only
11 harmless error review to the Petitioner's claims of
12 constitutional error, the state court's decision is considered
13 contrary to federal law. See Frantz v. Hazey, 533 F.3d 724, 737
14 (9th Cir. 2008) (en banc).

15 The state court's decision is an unreasonable
16 application of clearly established federal law only if it can be
17 considered objectively unreasonable. Williams, 529 U.S. at 409,
18 120 S. Ct. at 1521. United States Supreme Court holdings at the
19 time of the state court's decision are the source of "clearly
20 established federal law" for the purpose of the "unreasonable
21 application" prong of federal habeas review. Id., 529 U.S. at
22 412, 120 S. Ct. at 1523; Barker v. Fleming, 423 F.3d 1085, 1093
23 (2005).

24 **C. Petitioner's claims for relief**

25 **Procedural due process**

26 Petitioner asserts that his federal constitutional
27 right to due process of law was violated because he was not
28

1 informed of his right to a separate hearing at which he could
2 present evidence establishing that mitigation of his sentence
3 was appropriate. Respondents contend Petitioner did not
4 properly exhaust this claim in the state courts by fairly
5 presenting it as a claim that Petitioner's federal
6 constitutional right to due process was violated.

7 It is arguable whether the claim was "fairly presented"
8 to the state courts. The section of Petitioner's state Rule 32
9 brief discussing this claim, drafted by counsel, briefly
10 mentions the United States Supreme Court's proclamation of the
11 right to due process in probation revocation proceedings and the
12 Arizona rules enacted to ensure this right to due process.
13 However, the claim may be denied on the merits regardless of any
14 failure to fairly present or exhaust the claim.³

15 The United States Supreme Court established minimum due
16 process requirements for parole violation hearings in Morrissey
17 v. Brewer. See 408 U.S. 471, 92 S. Ct. 2593 (1972). The
18 Supreme Court extended these minimal due process protections to
19 probation revocation hearings in Gagnon v. Scarpelli, 411 U.S.
20 778, 786, 93 S. Ct. 1756, 1761-62 (1973), and Black v. Romano,
21 471 U.S. 606, 612, 105 S. Ct. 2254, 2258 (1985). Because the
22 revocation of probation is not part of a criminal prosecution,
23 the "full panoply of rights due a defendant in such a proceeding

24
25 ³Prior to 1996, the federal courts were required to dismiss
26 a habeas petition which included unexhausted claims for federal habeas
27 relief. However, section 2254 now states: "An application for a writ
28 of habeas corpus may be denied on the merits, notwithstanding the
failure of the applicant to exhaust the remedies available in the
courts of the State." 28 U.S.C. § 2254(b)(2) (1994 & Supp. 2008).

1 does not apply..." Morrissey, 408 U.S. at 480, 92 S. Ct. at
2 2600. In the context of the revocation of probation, the
3 "minimum requirements" of due process consist of written notice
4 of the claimed violations, disclosure of the evidence against
5 the accused, an opportunity to be heard in person and to present
6 witnesses and documentary evidence, the right to confront and
7 cross-examine adverse witnesses, a neutral and detached hearing
8 body, and a written statement by the fact-finders as to the
9 evidence relied on and the reasons for revoking probation. See
10 Gagnon, 411 U.S. at 782-87, 93 S. Ct. at 1760.

11 Petitioner received written notice and had the
12 opportunity to be heard. The "right" to a separate disposition
13 hearing at which he could present evidence establishing that
14 mitigation of his sentence was appropriate is not one stated in
15 Morrissey or Gagnon. Accordingly, the state court's decision
16 denying Petitioner's due process claim in his state Rule 32
17 action was not clearly contrary to federal law. Furthermore,
18 Petitioner and his counsel both presented mitigating factors to
19 the sentencing judge prior to sentencing and, accordingly, any
20 failure to hold a separate mitigation hearing was harmless. See
21 United States v. Havier, 155 F.3d 1090, 1092 (9th Cir. 1998).

22 Additionally, to the extent this habeas claim is
23 predicated on the assertion that Petitioner's right to due
24 process was violated because the state court violated any state
25 rules of criminal procedure, the claim is not a cognizable basis
26 for federal habeas relief. See Estelle v. McGuire, 502 U.S. 62,
27 67-68, 112 S. Ct. 475, 480 (1991) (holding federal habeas relief
28

1 is not available for alleged errors in the interpretation or
2 application of state law); Floyd v. Alexander, 148 F.3d 615, 619
3 (6th Cir. 1998).

4 **Ineffective assistance of counsel**

5 Petitioner also asserts that his counsel for his
6 probation revocation proceedings was ineffective because counsel
7 failed to advise him of his "right" to separate disposition and
8 sentencing hearings. Petitioner further alleges his counsel
9 failed to present any mitigation evidence.

10 To be entitled to relief on a habeas claim based on the
11 alleged ineffective assistance of counsel, a petitioner must
12 show that his attorney's performance was deficient and that the
13 deficiency prejudiced the petitioner's defense. See Strickland,
14 466 U.S. at 687, 104 S. Ct. at 2064. The petitioner must
15 overcome the strong presumption that counsel's conduct was
16 within the range of reasonable professional assistance required
17 of attorneys in that circumstance. See id.

18 To prevail on the merits of a habeas claim of
19 ineffective assistance of counsel, "it is the habeas applicant's
20 burden to show that the state court applied Strickland to the
21 facts of his case in an objectively unreasonable manner. An
22 unreasonable application of federal law is different from an
23 incorrect application of federal law." Woodford v. Visciotti,
24 537 U.S. 19, 25, 123 S. Ct. 357, 360 (2002) (internal quotations
25 omitted). "A fair assessment of attorney performance requires
26 that every effort be made to eliminate the distorting effects of
27 hindsight, to reconstruct the circumstances of counsel's

1 challenged conduct, and to evaluate the conduct from counsel's
2 perspective at the time." Strickland, 466 U.S. at 689, 104 S.
3 Ct. at 2065. Indeed, "strategic choices made after thorough
4 investigation of law and facts relevant to plausible options are
5 *virtually unchallengeable....*" Id., 466 U.S. at 690-91, 104 S.
6 Ct. at 2066 (emphasis added).

7 Petitioner presents no evidence that counsel's advice
8 to continue from a disposition hearing to a sentencing hearing
9 was incompetent representation or anything but a strategic
10 choice to which he acquiesced. Petitioner has failed to show
11 that his counsel's performance at the hearing fell below
12 objective standards of reasonableness. Furthermore, because
13 both Petitioner and counsel presented the sentencing court with
14 lengthy statements regarding the mitigating circumstances of
15 Petitioner's violation, there is no evidence that any alleged
16 deficiency was prejudicial. Accordingly, the state court's
17 decision denying this claim in Petitioner's Rule 32 proceedings
18 is not clearly contrary to federal law.

19 **III Conclusion**

20 Petitioner's claims that his probation revocation
21 proceedings and ensuing sentence of incarceration must be
22 reversed based on violations of his federal constitutional
23 rights may be denied on the merits of those claims.

24

25 **IT IS THEREFORE RECOMMENDED** that Mr. Davis' Petition
26 for Writ of Habeas Corpus be **denied and dismissed with**
27 **prejudice.**

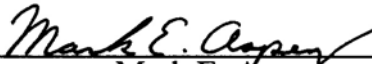
28

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

6 Pursuant to Rule 72(b), Federal Rules of Civil
7 Procedure, the parties shall have ten (10) days from the date of
8 service of a copy of this recommendation within which to file
9 specific written objections with the Court. Thereafter, the
10 parties have ten (10) days within which to file a response to
11 the objections. Pursuant to Rule 7.2, Local Rules of Civil
12 Procedure for the United States District Court for the District
13 of Arizona, objections to the Report and Recommendation may not
14 exceed seventeen (17) pages in length.

15 Failure to timely file objections to any factual or
16 legal determinations of the Magistrate Judge will be considered
17 a waiver of a party's right to de novo appellate consideration
18 of the issues. See United States v. Reyna-Tapia, 328 F.3d 1114,
19 1121 (9th Cir. 2003) (en banc). Failure to timely file
20 objections to any factual or legal determinations of the
21 Magistrate Judge will constitute a waiver of a party's right to
22 appellate review of the findings of fact and conclusions of law
23 in an order or judgment entered pursuant to the recommendation
24 of the Magistrate Judge.

25 DATED this 18th day of June, 2009.

26
27 
28 _____
Mark E. Aspey
United States Magistrate Judge