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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

JORGE ABEL CORTEZ,
Petitioner,
vs.
R. GROUNDS, Warden, et. al.,
Respondent.

CASE NO. 11-CV-2063-H-(MDD)
**ORDER DENYING PETITION
FOR WRIT OF HABEAS
CORPUS AND ADOPTING
REPORT AND
RECOMMENDATION OF
MAGISTRATE JUDGE AND
DENYING CERTIFICATE OF
APPEALABILITY**

Jorge Abel Cortez (“Petitioner”), a state prisoner proceeding pro se, filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 on September 7, 2011. (Doc. No. 1.) Respondent filed an answer to the petition opposing relief on December 2, 2011. (Doc. Nos. 7, 8.) The magistrate judge filed a Report and Recommendation on August 14, 2012, recommending that the petition be denied. (Doc. No.11.) Petitioner filed an objection to the Report and Recommendation on September 6, 2012. (Doc. Nos. 14, 15.)

Background

Petitioner was arrested and charged with two counts of lewd and lascivious acts with his 13 year old male cousin. (Resp. Lodgment No. 1.) The District Attorney offered Petitioner a plea agreement of 12 years and 8 months while he was represented by a public defender. (Resp. Lodgment No. 2, Vol 1 at 1-4.) Petitioner was facing the possibility of life in prison

1 but he did not accept that plea agreement. (Id.) Petitioner then hired Mr. Raphael Acosta, who
2 discovered a Miranda violation that had allegedly occurred during Petitioner’s interrogation.
3 (Id. at 5-8, Resp. Lodgment No. 2, Vol. 4.) Counsel also negotiated for a stipulated ten year
4 sentence and the dismissal of six of the eight counts charged against Petitioner. (Id.) On May
5 5, 2009, Petitioner, aided by a Spanish interpreter, pled guilty to both counts while represented
6 by counsel. (Doc. No. 1, Ex. A, Resp. Lodgment No. 2, Vol. 2.) At the change of plea
7 hearing, the court asked Petitioner if he was aware of the legal effects of his plea, and found
8 that his plea was knowing, intelligent, and voluntary. (Id.)

9 On August 7, 2009, Petitioner filed motion to withdraw his guilty plea and have the
10 original charges reinstated. (Resp. Lodgment No. 1, at 30.) After hearing testimony by both
11 Petitioner and his counsel, the trial court held that for each count Petitioner had “pled guilty,
12 waived his rights, and understood the nature of the offense,” and thus denied Petitioner’s
13 motion to withdraw his guilty plea. (Resp. Lodgment No. 2, Vol. 4 at 56.) The California
14 Court of Appeal affirmed the trial court’s judgment and his petition for review was denied by
15 the California Supreme Court. (Resp. Lodgment No. 5; Resp Lodgment No. 8.)

16 On September 7, 2011, Petitioner filed this petition for habeas corpus. (Doc. No. 1.)
17 Petitioner first argues that his guilty plea was not valid because it did not comport with
18 constitutional standards. (Id.) He also argues that he received ineffective assistance of
19 counsel. (Id.) Finally, he argues that his statements to the detective were obtained in violation
20 of Miranda v. Arizona, 384 U.S. 436 (1996). (Id.)

21 Discussion

22 **I. Standard of Review**

23 A federal court reviews an application for a writ of habeas corpus on behalf of a person
24 in custody pursuant to the judgment of a State Court only on the ground that “he is in custody
25 in violation of the Constitution or laws or treaties of the United States.” 28 U.S.C. § 2254(a).
26 The Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”) governs the review
27 of the petition in this case. Lindh v. Murphy, 521 U.S. 320, 322-23 (1997); 28 U.S.C. 2254(d).
28 Section 2254(d) bars a federal court from relitigating any claim “adjudicated on the merits”

1 in state court unless the result “was contrary to, or involved an unreasonable application of
2 clearly established federal law, as determined by the Supreme Court of the United States” or
3 “was based on an unreasonable determination of the facts in light of the evidence presented
4 in the state court proceeding.” 28 U.S.C. § 2254(d)(1)-(2). “[R]eview under 28 U.S.C. §
5 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on
6 the merits.” Cullen v. Pinholster, ___ U.S. ___, 131 S. Ct. 1388, 1398 (2011). AEDPA imposes
7 a “highly deferential standard for evaluating state-court rulings,” requiring that “state court
8 decisions be given the benefit of the doubt.” Woodford v. Visciotti, 537 U.S. 19, 24 (2002),
9 (quoting Lindh, 521 U.S. at 333 n.7).

10 Under § 2254(d)(1), a decision is “contrary to” clearly established precedents if it
11 “applies a rule that contradicts the governing law set forth in our cases,” or if it “confronts a
12 set of facts that are materially indistinguishable from” a Supreme Court decision but reaches
13 a different result. Early v. Packer, 537 U.S. 3, 8 (2002). Under 2254(d)(2), a decision is “an
14 unreasonable application of clearly established federal law” if the state court “correctly
15 identifies the governing legal rule but applies it unreasonably to the facts of a particular
16 prisoner’s case.” Williams v. Taylor, 529 U.S. 362, 407-08. The decision must be more than
17 just “incorrect or erroneous;” it “must [be] objectively unreasonable.” Wiggins v. Smith, 539
18 U.S. 510, 520-21 (2003). The petitioner must show that “‘there was no reasonable basis’ for
19 the state high court’s decision.” Harrington v. Richter, ___ U.S. ___, 131 S. Ct. 770, 784 (2011).
20 If there is not clearly established federal law on an issue, a state court cannot be said to have
21 unreasonably applied the law as to that issue. See Carey v. Musladin, 549 U.S. 70, 74 (2006);
22 Holley v. Yarborough, 568 F.3d 1091, 1098 (9th Cir. 2009); Moses v. Payne, 555 F.3d 742,
23 753-754 (9th Cir. 2009). These standards are applied to “the last reasoned decision” by a state
24 court on the merits of the federal constitutional claims raised by a state prisoner seeking relief
25 from sentence. Campbell v. Rice, 408 F.3d 1166, 1170 (9th Cir. 2005).

26 **II. Analysis**

27 **A. Validity of Guilty Plea**

28 Petitioner contends that his guilty plea is invalid because the state court failed to comply

1 with the constitutional requirements of Boykin v. Alabama, 395 U.S. 238 (1969), and In re
2 Tahl, 1 Cal. 3d 122 (1969), when it accepted his plea. (Doc No. 1.) He also erroneously
3 claims that he was deprived the assistance of an interpreter to translate for him when he pled
4 guilty, when the record reflects that he had an interpreter. (Id.; Resp. Lodgment No. 2, Vol.
5 2, at 6.)

6 Boykin requires that a court ensure that a person pleading guilty does so voluntarily and
7 intelligently because a guilty plea waives several constitutional rights, such as the privilege
8 against self incrimination, the right to a jury trial, and the right to confront witnesses against
9 him. Boykin, 395 U.S. at 243-244. In California, the defendant must specifically address and
10 waive these rights in order for the guilty plea to be valid. Tahl, 1 Cal. 3d at 132.

11 The California Court of Appeal concluded that the trial court complied with Boykin and
12 Tahl when it accepted Petitioner’s guilty plea. (Resp. Lodgment No. 5.) This finding is
13 neither contrary to federal law nor is it an unreasonable application of federal law. 28 U.S.C.
14 § 2254(d)(1)-(2). The trial court asked petitioner if he was pleading guilty voluntarily and if
15 he understood that by pleading guilty he was waiving his constitutional right to a jury trial, his
16 right to confront the witnesses against him, and his right against self-incrimination. (Resp.
17 Lodgment No. 2, Vol. 2, at 6.) Furthermore, the record also shows that a Spanish language
18 interpreter was assisting Petitioner at the hearing. (Id. at 5.) Since the record shows that the
19 Petitioner made a voluntary and intelligent plea, and that he understood that he was waiving
20 his constitutional rights, the California Court of Appeal’s decision was an objectively
21 reasonable determination of clearly established federal law.

22 **B. Ineffective Assistance of Counsel**

23 Petitioner claims that he was deprived of effective assistance of counsel because
24 counsel “failed to investigate [Petitioner’s] entire case, failed to prepare for trial, and . . .
25 threatened and pressured . . . [Petitioner] into acceptance of the plea agreement.” (Doc No. 1.)
26 To prove that his counsel provided ineffective assistance, Petitioner must establish both
27 counsel's performance was unreasonably deficient and that the deficient performance
28 prejudiced the defense. Strickland v. Washington, 466 U.S. 668, 689 (1984). To establish

1 by Petitioner to a parent of the victim during a controlled phone call. (Resp. Lodgment No.
2 5.) Therefore, the California Court of Appeal's decision that Petitioner's Fifth Amendment
3 Rights were not violated is neither contrary to federal law nor an unreasonable application of
4 federal law.

5 **III. Denial of Certificate of Appealability**

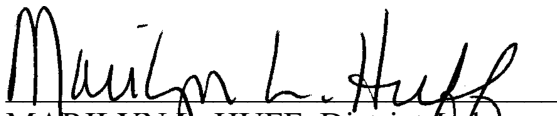
6 Under AEDPA, a state prisoner seeking to appeal a district court's denial of a habeas
7 petition must obtain a certificate of appealability from the district court judge or a circuit judge.
8 28 U.S.C. § 2253(c)(1)(A). A court may issue a certificate of appealability only if the
9 applicant has made "a substantial showing of the denial of a constitutional right." 28 U.S.C.
10 § 2253(c)(2). To satisfy this standard, the petitioner must show that "reasonable jurists would
11 find the district court's assessment of the constitutional claims debatable or wrong." Slack v.
12 McDaniel, 529 U.S. 473, 484 (2000). In the present case, the Court concludes that petitioner
13 has not made a substantial showing of the denial of a constitutional right. Therefore the Court
14 denies Petitioner a certificate of appealability.

15 **Conclusion**

16 Petitioner has not established that the state court's determination "was contrary to, or
17 involved an unreasonable application of clearly established federal law, as determined by the
18 Supreme Court of the United States" or that it "was based on an unreasonable determination
19 of the facts in light of the evidence presented in the state court proceeding." See 28 U.S.C. §
20 2254(d)(1), (2). Accordingly, the Court adopts the Magistrate Judge's report and
21 recommendation and denies the petition for habeas corpus. In addition, the Court denies
22 Petitioner a certificate of appealability.

23 **IT IS SO ORDERED.**

24 DATED: October 31, 2012

25 
26 MARILYN U. HUFF, District Judge
27 UNITED STATES DISTRICT COURT
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