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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

TYLON SIMS,
Petitioner,
v.
CALIPATRIA STATE PRISON, et
al.,
Respondents.

NO. CV 10-715-DSF (AGR)

ORDER ACCEPTING FINDINGS
AND RECOMMENDATION OF
UNITED STATES MAGISTRATE
JUDGE

Pursuant to 28 U.S.C. § 636, the Court has reviewed the petition, records on file, and the Report and Recommendation of the United States Magistrate Judge. Further, the Court has engaged in a *de novo* review of those portions of the Report to which Petitioner has objected. The Court accepts the findings and recommendation of the Magistrate Judge.

Petitioner’s two claims of ineffective assistance of appellate counsel were presented in a state habeas petition to the California Supreme Court (Lodged Document (“LD”) 7) and summarily denied (LD 8). A summary denial of a habeas petition before the California Supreme Court is an adjudication on the merits and entitled to deference. *Harrington v. Richter*, 131 S. Ct. 770, 785, 178 L. Ed. 2d

1 624 (2011). In one of the claims, Petitioner alleges his counsel was ineffective
2 because he did not file a petition for review in the California Supreme Court on
3 direct appeal. (Petition at 5.) Petitioner's counsel advised Petitioner that in his
4 professional judgment there were no meritorious grounds on which to base a
5 petition for review. (Dkt. No. 19, Ex. A at 1.) As the Report correctly found,
6 Petitioner did not identify in the instant petition any grounds he believed counsel
7 should have raised, and did not show a reasonable probability that, but for his
8 counsel's errors, he would have prevailed on his appeal. (Report at 14.)

9 In his objections, Petitioner argues for the first time that his appellate
10 counsel should have argued that the prosecutor committed misconduct during
11 trial. (Objections at 2.) However, such a claim is unexhausted. In his state
12 petition before the California Supreme Court, Petitioner did not identify any
13 grounds, including prosecutorial misconduct, that his appellate counsel should
14 have raised on appeal. (LD 7.)¹ Federal habeas relief is not available for
15 unexhausted grounds. 28 U.S.C. § 2254(b)(1).

16 Petitioner's remaining objections have no merit.

17 IT IS ORDERED that judgment be entered denying the petition and
18 dismissing this action with prejudice.

19 5/18/12



20 DATED: _____

21 _____
22 DALE S. FISCHER
United States District Judge

23 _____
24 ¹ Petitioner also argues that the issues appellate counsel should have
25 raised were "stronger" than other issues. (Objections at 2-3.) In *Knowles v.*
26 *Mirzayance*, 556 U.S. 111, 121-22, 129 S. Ct. 1411, 173 L. Ed. 2d 251 (2009),
27 the United States Supreme Court specifically rejected the "nothing to lose"
28 standard for evaluating ineffective assistance claims under *Strickland v.*
Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). The
Court of Appeals' finding that counsel was ineffective was "based, in large
measure, on its application of an improper standard of review – it blamed counsel
for abandoning the . . . claim because there was nothing to lose by pursuing it."
Mirzayance, 556 U.S. at 121-22.