UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

FRANKLIN LARANCE FORCH, Petitioner, v. DANIEL PARAMO, ET AL., Respondents.	NO. CV 12-8554-AG(E) REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This Report and Recommendation is submitted to the Honorable Andrew J. Guilford, United States District Judge, pursuant to 28 U.S.C. section 636 and General Order 05-07 of the United States District Court for the Central District of California.

PROCEEDINGS

On September 26, 2012, Petitioner, a state prisoner, filed a "Petition for Writ of Habeas Corpus" in the United States District Court for the Southern District of California. On October 1, 2012, the United States District Court for the Southern District of

California transferred the action to this Court.

The Petition originally alleged four "Grounds." On February 1, 2013, Respondent filed an Answer, contending inter alia that Grounds One, Three and Four of the Petition were unexhausted. Petitioner filed a "Motion for Traverse" on February 27, 2013.

On July 31, 2013, the Court issued an "Order Re Exhaustion Issues," ruling that certain of Petitioner's claims were unexhausted and ordering Petitioner to file: (1) a document stating Petitioner's intent to delete Petitioner's unexhausted claims; (2) a document requesting dismissal of this entire proceeding without prejudice; or (3) a motion for a stay pursuant to Rhines v. Weber, 544 U.S. 269, 273-74 (1995) ("Rhines") and/or Kelly v. Small, 315 F.3d 1063 (9th Cir.), cert. denied, 548 U.S. 1042 (2003), overruled on other grounds, Robbins v. Carey, 481 F.3d 1143 (9th Cir. 2007) ("Kelly").

On August 30, 2013, Petitioner filed a "Motion for a Stay of Ruling of Habeas Corpus." On September 25, 2013, the Court issued an "Order Denying Motion for Stay," ruling that Petitioner was not entitled to a stay under either Rhines or Kelly. The Court ordered Petitioner to dismiss the Petition in its entirety or to dismiss all of the unexhausted claims ("Order Denying Motion for Stay" at 6-8). Petitioner failed to comply with this Order within the allotted time.

On November 19, 2013, the Magistrate Judge filed a "Report and Recommendation of United States Magistrate Judge" ("the prior report"). The prior report recommended that the Petition be denied

and dismissed without prejudice for failure to comply with the Court's September 25, 2013 Order.

On December 4, 2013, Petitioner filed a "Written Statement of Objection to Report and Recommendation" ("the prior objection"). The Court construed the prior objection as Petitioner's belated notice of voluntary dismissal of Petitioner's unexhausted claims. See Minute Order filed December 9, 2013. The prior report therefore was withdrawn, and the Court ordered supplemental briefing on Ground Two of the Petition, Petitioner's only remaining Ground (id.).[1]

Respondent filed a Supplemental Answer on January 7, 2014. Petitioner filed an "Answer Supplemental to Habeus [sic] Corpus" on January 22, 2014.

BACKGROUND

Pursuant to a plea of no contest, Petitioner was convicted of second degree murder (Lodged Documents 1 and 2). The Superior Court denied Petitioner's request for a certificate of probable cause (Lodged Document 3 at n.1). Petitioner's appellate counsel filed a

///

///

[1] Because the pages of the Petition containing Petitioner's grounds for relief appear to be out of order, the numbering of the grounds is somewhat confusing. See "Order re Exhaustion of Issues," filed July 31, 2013, at n.2. Petitioner's only remaining Ground is the Ground referenced in Respondent's Answer as "Ground Two," which is the Ground set forth on page "8 of 140" of the Petition as scanned into ECF.

Wende[2] brief (id. at 4; Lodged Document 9). Petitioner filed several letters with the California Court of Appeal, and received several extensions of time within which to file a supplemental brief (Lodged Document 3 at 5). After these extensions expired, and after the Court of Appeal denied Petitioner's requests for a further extension, the Court of Appeal affirmed the conviction in a reasoned decision (id.). The Court of Appeal stated, inter alia: "Having examined the entire record and considered the contents of defendant's letters, we are satisfied that defendant's appellate counsel has fully complied with his responsibilities and that no arguable issues exist" (id. at 5). Petitioner did not file a petition for review in the California Supreme Court.[3]

Petitioner subsequently filed several habeas corpus petitions in the California Supreme Court. See "Order re Exhaustion Issues," filed July 31, 2013, at 2-3. The California Supreme Court summarily denied these petitions. See id.

///

---

[2] See People v. Wende, 25 Cal. 3d 436, 158 Cal. Rptr. 839, 600 P.2d 1071 (1979) (appellate counsel may file a brief raising no specific issues and calling upon the court to review the entire record to determine for itself whether there exist any arguable appellate issues).

[3] The Court takes judicial notice of the California Supreme Court's docket, available on the California courts' website at www.courts.ca.gov. See Porter v. Ollison, 620 F.3d 952, 954-55 n.1 (9th Cir. 2010) (taking judicial notice of state court dockets). The docket shows no person named Franklin Forch ever filed a petition for review in that court. Although Petitioner appears to allege he filed a petition for review, he references only his two California Supreme Court habeas petitions (see Petition, p. 2).

In Ground Two, Petitioner's only remaining Ground, Petitioner contends: (1) appellate counsel allegedly rendered ineffective assistance by failing to show "just cause" for a "new trial" and by failing to prove Petitioner's supposed innocence; and (2) the actions of prison staff in allegedly harassing and intimidating Petitioner, confining Petitioner in administrative segregation and denying Petitioner library access, assertedly hindered Petitioner from filing a pro se brief in the California Court of Appeal.

STANDARD OF REVIEW

Under the "Antiterrorism and Effective Death Penalty Act of 1996" ("AEDPA"), a federal court may not grant an application for writ of habeas corpus on behalf of a person in state custody with respect to any claim that was adjudicated on the merits in state court proceedings unless the adjudication of the claim: (1) "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States"; or (2) "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d); Woodford v. Visciotti, 537 U.S. 19, 24-26 (2002); Early v. Packer, 537 U.S. 3, 8 (2002); Williams v. Taylor, 529 U.S. 362, 405-09 (2000).

"Clearly established Federal law" refers to the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision on the merits. Greene v. Fisher, 132

S. Ct. 38, 44 (2011); Lockyer v. Andrade, 538 U.S. 63, 71-72 (2003). A state court's decision is "contrary to" clearly established Federal law if: (1) it applies a rule that contradicts governing Supreme Court law; or (2) it "confronts a set of facts . . . materially indistinguishable" from a decision of the Supreme Court but reaches a different result. See Early v. Packer, 537 U.S. at 8 (citation omitted); Williams v. Taylor, 529 U.S. at 405-06.

Under the "unreasonable application prong" of section 2254(d)(1), a federal court may grant habeas relief "based on the application of a governing legal principle to a set of facts different from those of the case in which the principle was announced." Lockyer v. Andrade, 538 U.S. at 76 (citation omitted); see also Woodford v. Visciotti, 537 U.S. at 24-26 (state court decision "involves an unreasonable application" of clearly established federal law if it identifies the correct governing Supreme Court law but unreasonably applies the law to the facts). A state court's decision "involves an unreasonable application of [Supreme Court] precedent if the state court either unreasonably extends a legal principle from [Supreme Court] precedent to a new context where it should not apply, or unreasonably refuses to extend that principle to a new context where it should apply." Williams v. Taylor, 529 U.S. at 407 (citation omitted).

"In order for a federal court to find a state court's application of [Supreme Court] precedent 'unreasonable,' the state court's decision must have been more than incorrect or erroneous." Wiggins v. Smith, 539 U.S. 510, 520 (2003) (citation omitted). "The state court's application must have been 'objectively unreasonable.'" Id.

at 520-21 (citation omitted); see also Waddington v. Sarausad, 555 U.S. 179, 190 (2009); Davis v. Woodford, 384 F.3d 628, 637-38 (9th Cir. 2004), cert. dism'd, 545 U.S. 1165 (2005). "Under § 2254(d), a habeas court must determine what arguments or theories supported, . . . or could have supported, the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court." Harrington v. Richter, 131 S. Ct. 770, 786 (2011). This is "the only question that matters under § 2254(d)(1)." Id. (citation and internal quotations omitted). Habeas relief may not issue unless "there is no possibility fairminded jurists could disagree that the state court's decision conflicts with [the United States Supreme Court's] precedents." Id. at 786-87 ("As a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.").

In applying these standards, the Court looks to the last reasoned state court decision. See Delgadillo v. Woodford, 527 F.3d 919, 925 (9th Cir. 2008). Where no reasoned decision exists, as where the state court summarily denies a claim, "[a] habeas court must determine what arguments or theories . . . could have supported the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court." Cullen v. Pinholster, 131 S. Ct. 1388, 1403 (2011) (citation,

quotations and brackets omitted).

Additionally, federal habeas corpus relief may be granted "only on the ground that [Petitioner] is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). In conducting habeas review, a court may determine the issue of whether the petition satisfies section 2254(a) prior to, or in lieu of, applying the standard of review set forth in section 2254(d). Frantz v. Hazey, 533 F.3d 724, 736-37 (9th Cir. 2008) (en banc).

DISCUSSION

For the reasons discussed below, the Petition should be denied and dismissed with prejudice.[4]

I. Alleged Ineffective Assistance of Appellate Counsel

To establish ineffective assistance of counsel, Petitioner must prove: (1) counsel's representation fell below an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. Strickland v. Washington, 466 U.S. 668, 688, 694, 697

[4] The Court assumes arguendo the timeliness of Petitioner's claims. See Van Buskirk v. Baldwin, 255 F.3d 974, 976 (9th Cir.), amended and superseded on other grounds, 265 F.3d 1080 (9th Cir. 2001), cert. denied, 535 U.S. 950 (2002) (declining to address statute of limitations issue where habeas petition lacked merit); see also Trussel v. Bowersox, 447 F.3d 588, 590 (8th Cir.), cert. denied, 549 U.S. 1034 (2006) (addressing merits rather than limitations issue in the interest of judicial economy).

(1984) ("Strickland"). A reasonable probability of a different result "is a probability sufficient to undermine confidence in the outcome." Id. at 694. The court may reject the claim upon finding either that counsel's performance was reasonable or the claimed error was not prejudicial. Id. at 697; see Gentry v. Sinclair, 705 F.3d 884, 889 (9th Cir.), cert. denied, 134 S. Ct. 726 (2013) ("[f]ailure to meet either [Strickland] prong is fatal to a claim"); Rios v. Rocha, 299 F.3d 796, 805 (9th Cir. 2002) ("Failure to satisfy either prong of the Strickland test obviates the need to consider the other.") (citation omitted).

Review of counsel's performance is "highly deferential" and there is a "strong presumption" that counsel rendered adequate assistance and exercised reasonable professional judgment. Williams v. Woodford, 384 F.3d 567, 610 (9th Cir. 2004), cert. denied, 546 U.S. 934 (2005) (quoting Strickland, 466 U.S. at 689). The court must judge the reasonableness of counsel's conduct "on the facts of the particular case, viewed as of the time of counsel's conduct." Strickland, 466 U.S. at 690. The court may "neither second-guess counsel's decisions, nor apply the fabled twenty-twenty vision of hindsight. . . ." Matylinsky v. Budge, 577 F.3d 1083, 1091 (9th Cir. 2009), cert. denied, 558 U.S. 1154 (2010) (citation and quotations omitted); see Yarborough v. Gentry, 540 U.S. 1, 8 (2003) ("The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight.") (citations omitted). Petitioner bears the burden to show that "counsel made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment." Harrington v. Richter, 131 S. Ct. at 787 (citation and

internal quotations omitted); see Strickland, 466 U.S. at 689.

A state court's decision rejecting a Strickland claim is entitled to "a deference and latitude that are not in operation when the case involves review under the Strickland standard itself." Harrington v. Richter, 131 S. Ct. at 785. "When § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied Strickland's deferential standard." Id. at 788.

"In assessing prejudice under Strickland, the question is not whether a court can be certain counsel's performance had no effect on the outcome. . . ." Id. at 791-92 (citations omitted). Rather, the issue is whether, in the absence of counsel's alleged error, it is "'reasonably likely'" that the result would have been different. Id. at 792 (quoting Strickland, 466 U.S. at 696). "The likelihood of a different result must be substantial, not just conceivable." Id.

The standards applicable to claims of ineffective assistance of trial counsel apply equally to claims of ineffective assistance of appellate counsel. Smith v. Robbins, 528 U.S. 259, 285-86 (2000) ("Smith"); Alford v. Rolfs, 867 F.2d 1216, 1220 (9th Cir. 1989). Under Strickland, appellate counsel has no constitutional obligation to raise all nonfrivolous issues on appeal. Pollard v. White, 119 F.3d 1430, 1435 (9th Cir. 1997).

To succeed on his claim of ineffective assistance of appellate counsel in the present case, Petitioner must show: (1) counsel's

decision to file a Wende brief was objectively unreasonable; and (2) but for counsel's failure to discover appellate issues and to file a brief discussing the merits of those issues, Petitioner would have prevailed on appeal. Smith, 528 U.S. at 285-86; see also Strickland, 466 U.S. at 694. Petitioner has made neither showing. Petitioner has not shown that appellate counsel "unreasonably failed to discover nonfrivolous issues." Smith, 528 U.S. at 285-86. The record shows that appellate counsel filed a Wende brief after counsel reviewed the record and found no arguable issues on appeal. The Court of Appeal also reviewed the entire record and reasonably concluded that "appellate counsel has fully complied with his responsibilities and . . . no arguable issues exist." Because no arguable issues existed, appellate counsel did not act unreasonably by filing a Wende brief. See Pollard v. White, 119 F.3d at 1437 (appellate counsel not deficient for failing to present claims with no likelihood of success). For the same reason, Petitioner was not prejudiced by counsel's failure to raise any specific issues on appeal. See Smith, 528 U.S. at 285-86 (to prevail, a petitioner "must show a reasonable probability that, but for his counsel's unreasonable failure to file a merits brief, he would have prevailed on his appeal"). Petitioner's extremely conclusory allegations that counsel should have shown "just cause" for a "new trial" and should have proven Petitioner's supposed innocence cannot support habeas relief. See Jones v. Gomez, 66 F.3d 199, 205 (9th Cir. 1995), cert. denied, 517 U.S. 1143 (1996) ("It is well settled that conclusory allegations which are not supported by a statement of specific facts do not warrant habeas relief") citations and quotations omitted).

///

Furthermore, several legal obstacles would have discouraged any reasonable appellate counsel from attempting to prove Petitioner's supposed innocence. Petitioner's plea presented the first such obstacle. "When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea." Tollett v. Henderson, 411 U.S. 258, 267 (1973); see also United States v. Cazares, 121 F.3d 1241, 1246-48 (9th Cir. 1997) (guilty plea admits all facts essential to the validity of the conviction). In California, this principle applies to no contest pleas as well as to guilty pleas. Rosenfeld v. Warden, 2012 WL 3930348, at *10 n.7 (C.D. Cal. Aug. 3, 2012), adopted, 2012 WL 3930345 (C.D. Cal. Sept. 6, 2012) ("Under California law, the legal effect of Petitioner's no contest plea was the same as the effect accorded to a plea of guilty") (citations omitted). Accordingly, Petitioner's plea amply refutes his conclusory claim of actual innocence. United States v. Mancinas-Flores, 588 F.3d 677, 681 (9th Cir. 2009) ("a guilty plea is an admission of all the elements of a formal criminal charge") (citation omitted); United States v. Benboe, 157 F.3d 1181, 1184 (9th Cir. 1998) ("Any attempt to contradict the factual basis of a valid plea must fail") (citation and internal quotations omitted); see also United States v. Dungee, 228 Fed. App'x 298, 303 (4th Cir. 2007) ("A knowing and voluntary guilty plea 'conclusively establishes the elements of the offense and the material facts necessary to support the conviction,' and 'constitutes a waiver of all nonjurisdictional defects,' such as claims of actual innocence.") (citations omitted); Hernandez v. Mendoza-Powers, 2005 WL 2089807, at *5 (E.D. Cal.

Aug. 29, 2005) ("Petitioner's claim of actual innocence is a pre-plea matter which is barred by *Tollet[t]*"); People v. McNabb, 228 Cal. App. 3d 462, 470-71, 279 Cal. Rptr. 11, 16 (1991) ("the issue of guilt or innocence is waived by a guilty plea"); see also In re Chavez, 30 Cal. 4th 643, 649, 134 Cal. Rptr. 2d 54, 68 P.2d 347 (2003) (in California, "when a defendant pleads guilty or no contest and is convicted without a trial, only limited issues are cognizable on appeal").

Second, the denial of the certificate of probable cause prevented Petitioner's appellate counsel from raising any issues Petitioner now suggests, including Petitioner's supposed innocence. Under California law, the denial of a certificate of probable cause limits the scope of any direct appeal to the pre-plea denial of a motion to suppress evidence or grounds arising post-plea that do not challenge the plea's validity. See Cal. Penal Code § 1237.5; Cal. R. Ct. 8.304(b). Petitioner has not suggested any issues that could have been appealed in the absence of a certificate of probable cause.

A third separate obstacle also would have prevented Petitioner's counsel from attempting to prove Petitioner's "innocence" on direct appeal. Any such attempt would have required recourse to matters outside the appellate record. The appellate court "is ordinarily confined in its review to the proceedings that took place in the court below and are brought up for review in a properly prepared record on appeal." 9 Witkin, Cal. Proc., Appeal § 334 (5th ed. 2008); see Brosterhous v. State Bar, 12 Cal. 4th 315, 325, 48 Cal. Rptr. 2d 87, 93, 906 P.2d 1242, 1248 (1995). The only evidence in the appellate record regarding Petitioner's guilt or innocence consisted

of Petitioner's no contest plea and the preliminary hearing transcript, both of which reflected Petitioner's guilt.[5]

In sum, Petitioner has failed to demonstrate that any action or inaction by appellate counsel was unreasonable or prejudicial. See Moormann v. Ryan, 628 F.3d 1102, 1109 (9th Cir. 2010), cert. denied, 132 S. Ct. 346 (2011) (counsel is not required to raise a meritless issue on appeal); Wildman v. Johnson, 261 F.3d 832, 840 (9th Cir. 2001) (appellate counsel's failure to raise an issue on direct appeal cannot constitute ineffective assistance when "the appeal would not have provided grounds for reversal.") (citation omitted).

II. Alleged Interference with Petitioner's Filing of a Pro Se Supplemental Brief on Appeal

Federal habeas corpus relief may be granted "only on the ground that [Petitioner] is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). Mere errors in the application of state law are not cognizable on federal habeas review. Id.; Estelle v. McGuire, 502 U.S. 62, 67-68 (1991) ("it is not the province of a federal habeas corpus court to reexamine state-court determinations on state-law questions"); accord Pulley v. Harris, 465 U.S. 37, 41 (1984).

///

///

---

[5] See Lodged Document 1 (plea transcript) and Lodged Document 8 (Clerk's Transcript containing the preliminary hearing transcript at pages 3 through 37).

Petitioner's complaints regarding the treatment he assertedly received in prison during his direct appeal, including the alleged interference with his ability to file a pro se supplemental brief, fail to raise any issue of federal law cognizable on habeas corpus. The Wende procedures followed by the California Court of Appeal satisfied federal constitutional requirements. See Smith, 528 U.S. at 266. A criminal defendant has no constitutional entitlement to direct the course of proceedings on appeal. See Martinez v. Court of Appeal, 528 U.S. 152 (2000) (criminal defendant has no constitutional right to represent himself or herself on appeal); Jones v. Barnes, 463 U.S. 745, 754 (1983) (criminal defendant has no constitutional right to have appellate counsel raise every non-frivolous issue that the defendant seeks to raise); Smith v. Cox, 435 F.2d 453, 458-59 (4th Cir. 1970), vacated on other grounds, 404 U.S. 53 (1971) ("however desirable" it may be that appellate counsel "consult with his client at least once to ascertain his client's desires with regard to the alleged trial errors which the appellant wishes to press," it is not constitutionally required). Although California state law generally permits the filing of a pro se supplemental brief when counsel has filed a Wende brief, Petitioner had no federal constitutional right to file such a brief. See McMeans v. Brigano, 228 F.3d 674, 684 (6th Cir. 2000), cert. denied, 532 U.S. 958 (2001); Nelson v. Lackner, 2013 WL 6178544, at *12-13 (E.D. Cal. Nov. 22, 2013).

To the extent the state post-conviction review procedures violated any non-constitutional standards, such violation would not be cognizable in habeas corpus. "[F]ederal habeas relief is not available to redress alleged procedural errors in state post-

conviction proceedings." Ortiz v. Stewart, 149 F.3d 923, 939 (9th Cir. 1998), cert. denied, 526 U.S. 1123 (1999); Franzen v. Brinkman, 877 F.2d 26, 26 (9th Cir.), cert. denied, 493 U.S. 1012 (1989) ("a petition alleging errors in the state post-conviction review process is not addressable through habeas corpus proceedings"). This rule applies to alleged procedural errors in the state appeals process. See Madrid v. Marshall, 1995 WL 91329, *2 (N.D. Cal. Jan. 30, 1995), aff'd, 99 F.3d 1146 (9th Cir. 1996) (unpublished table opinion), cert. denied, 519 U.S. 1130 (1997) ("Petitioner alleges that the California Court of Appeal erred in striking his supplemental brief contesting issues his appellate counsel would not raise. Because Petitioner's assertions of error in the state post-conviction review process do not represent an attack on his detention, they are not addressable through habeas corpus proceedings") (citing Franzen v. Brinkman).

RECOMMENDATION

For all of the foregoing reasons, IT IS RECOMMENDED that the Court issue an Order: (1) accepting and adopting this Report and Recommendation; and (2) directing that Judgment be entered denying and dismissing the Petition with prejudice.

DATED: January 31, 2014.

_____/S/_____
CHARLES F. EICK
UNITED STATES MAGISTRATE JUDGE

NOTICE

Reports and Recommendations are not appealable to the Court of Appeals, but may be subject to the right of any party to file objections as provided in the Local Rules Governing the Duties of Magistrate Judges and review by the District Judge whose initials appear in the docket number. No notice of appeal pursuant to the Federal Rules of Appellate Procedure should be filed until entry of the judgment of the District Court.

If the District Judge enters judgment adverse to Petitioner, the District Judge will, at the same time, issue or deny a certificate of appealability. Within twenty (20) days of the filing of this Report and Recommendation, the parties may file written arguments regarding whether a certificate of appealability should issue.