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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

JASON MARTINEZ VARGAS,	)	1:03-cv-6622-OWW-SMS-HC
	)	
Petitioner,	)	ORDER DENYING MOTION IN LIMINE
	)	(DOC. 77)
	)	
v.	)	ORDER DENYING AS MOOT
	)	PETITIONER'S APPLICATION FOR WRIT
CHERYL PLILER,	)	OF HABEAS CORPUS AD TESTIFICANDUM
	)	(DOC. 78)
Respondent.	)	
	)	ORDER SETTING DEADLINE OF
	)	AUGUST 20, 2010, FOR FILING OF
	)	APPLICATION FOR WRIT OF HABEAS
	)	CORPUS AD TESTIFICANDUM

ORDER SETTING TELEPHONIC STATUS  
CONFERENCE  
**Date: August 25, 2010**  
**Time: 10:00 a.m.**

ORDER SETTING DUE DATE FOR FILING  
JOINT STATEMENT  
**Date: October 1, 2010**

ORDER SETTING TELEPHONIC STATUS  
CONFERENCE  
**Date: October 5, 2010**  
**Time: 10:00 a.m.**

ORDER SETTING EVIDENTIARY HEARING  
**Date: October 14, 2010**  
**Time: 1:00 p.m.**  
**Place: Courtroom 7**

1           Petitioner is a state prisoner proceeding with a petition  
2 for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The  
3 matter has been referred to the Magistrate Judge pursuant to 28  
4 U.S.C. § 636(b)(1) and Local Rules 72-302 and 72-303. Pending  
5 before the Court is Respondent's motion in limine, filed on July  
6 7, 2010, to limit the evidentiary hearing to the following  
7 specific issue: whether trial defense counsel was asleep during  
8 any portion of the testimony of gang expert Frank Gonzales.  
9 Petitioner filed opposition on July 23, 2010; no reply was filed.

10           I. Motion in Limine

11           The in limine motion of Respondent came on regularly for  
12 hearing on August 6, 2010, at 9:30 a.m. in Courtroom 7 before the  
13 Honorable Sandra M. Snyder, United States Magistrate Judge.  
14 Carolyn Phillips appeared telephonically on behalf of Petitioner,  
15 and Paul E. O'Connor appeared telephonically on behalf of  
16 Respondent. The Court had reviewed all the papers submitted by  
17 the parties. After argument, the matter was submitted to the  
18 Court.

19           A. Background

20           Respondent argues that the issue of whether defense counsel  
21 was asleep during any portion of the testimony of gang expert  
22 Frank Gonzales is the only issue which has been exhausted in the  
23 state courts. Further, it is the only issue that has been timely  
24 presented pursuant to 28 U.S.C. § 2244(d)(1). Petitioner's first  
25 amended habeas petition was timely filed in this Court on  
26 November 22, 2004, and raised this issue. (Pet., ground 8, p.  
27 6c.)

28           Petitioner declared in his verified amended petition that

1 his trial counsel, George Quick, had fallen asleep during the  
2 direct examination of the gang expert Mr. Gonzales, and that Mr.  
3 Vargas had to jar Mr. Quick awake. The transcript of the trial  
4 confirms these allegations. On the next day of trial, Friday,  
5 January 19, 2001, after both the defense and prosecution  
6 had rested, Mr. Quick advised the court that he was very fatigued  
7 and not prepared to begin his closing argument. The court denied  
8 his request to put over closing until Monday, June 22, 2001.  
9 (Mot., Ex. 2, R.T. January 19, 2001, pp. 448, 478.) Petitioner  
10 contends that Mr. Quick's admitted fatigue the day after he said  
11 he had been sleeping corroborates Petitioner's claim that Mr.  
12 Quick slept during the gang expert's testimony, and that such  
13 evidence should not be excluded because it goes directly to the  
14 issue of whether Mr. Quick was tired, and in fact was so tired  
15 that he slept during the trial.

16 The operative allegations in the first amended petition are  
17 as follows:

18 During the course of the trial counsel slept through  
19 portions of the prosecutors examination of adverse  
20 witness Frank Gonzales' testimony. Counsel during one  
21 stage of the testimony had to be jarred awake by the  
22 petitioner to get counsel to object to the prosecutions  
23 solicitation of testimony petitioner considered irrelevant,  
24 counsel in coming awake objected and acknowledged that he  
had been asleep and had missed the question and answer  
posed by the prosecutor. As a result of counsel's having  
slept through a substantial and significant portion of  
the trial proceedings, petitioner was denied the  
right to representation by counsel during every  
critical stage of the proceedings.

25 (Pet. 6c: 7-17.)

26 With respect to the directions from the appellate court, in  
27 a memorandum of decision filed June 26, 2009, the United States  
28 Court of Appeals for the Ninth Circuit wrote the following:

1 Vargas argues that he was denied the effective  
2 assistance of counsel, in violation of the Sixth  
3 Amendment, as a result of his trial counsel's  
4 sleeping during a substantial portion of the trial.  
5 Vargas alleges facts that, if true, may amount  
6 to a violation of his right to the effective  
7 assistance of counsel. See Strickland v. Washington,  
8 466 U.S. 668, 680-96 (1984); United State v. Cronin,  
9 466 U.S. 648, 659-60 (1984). Respondent Pliker asks  
10 us to assume that counsel was asleep--for how long  
11 or through what portion of the trial we do not know--  
but to conclude nevertheless that Vargas suffered  
no prejudice. Such a assumption would force us to  
engage in a series of speculations to answer a  
serious question about an important constitutional  
right. We conclude that Vargas's claim cannot be  
resolved by reference to the state court record in  
this case. See Schriro v. Landrigan, 550 U.S. 465,  
474 (2007). Nor should it be resolved in the manner  
the state proposes. We, therefore, remand to the  
district court to conduct an evidentiary hearing.

12 (Vargas v. Pliker, no. 1:03-cv-06622 OWW SMS HC, doc. 69, 2.)

13 B. Analysis

14 The memorandum from the appellate court clearly refers to  
15 sleeping during substantial portions of the trial; it does not  
16 segregate particularized portions of the trial proceedings.  
17 Further, the appellate court clearly intends this Court to take  
18 evidence to determine during what portions of the trial, if any,  
19 defense counsel slept, including how long he slept, how often he  
20 slept, and what trial proceedings were going on at the time he  
21 slept. The limitation sought by Respondent does not appear to be  
22 warranted by the broad language used in the order of remand.

23 Insofar as Respondent contends that consideration of  
24 counsel's sleeping during other trial proceedings would not be  
25 exhausted or timely, Respondent relies on Petitioner's single  
26 specification in the amended petition of the facts appearing in  
27 the appellate record that affirmatively reflect what could be  
28 considered an admission by counsel that during the presentation

1 of evidence and examination of witnesses, he had been sleeping  
2 and/or was not even sure when he was asleep and when he was  
3 awake.

4 A habeas petition "may be amended... as provided in the  
5 rules of procedure applicable to civil actions." 28 U.S.C. §  
6 2242. An amendment to a pleading relates back to the date of the  
7 original pleading when 1) the law that provides the applicable  
8 statute of limitations allows relation back, 2) the amendment  
9 asserts a claim or defense that arose out of the conduct,  
10 transaction, or occurrence set out, or attempted to be set out,  
11 in the original pleading, or 3) the amendment changes the party  
12 or naming of a party under specified circumstances. Fed. R. Civ.  
13 P. 15(c)(1). Rule 2(c) of the Rules Governing Section 2254 Cases  
14 in the United States District Courts (Habeas Rules) requires that  
15 a habeas petition not simply meet the general standard of notice  
16 pleading, but rather specify all the grounds for relief available  
17 to the petitioner and state the facts supporting each ground.

18 An amended habeas petition that concerns the same trial,  
19 conviction, or sentence as a previously filed petition does not  
20 relate back (and thereby avoid AEDPA's one-year time limit) when  
21 it asserts a new ground for relief supported by facts that differ  
22 in both time and type from those set forth in the original  
23 pleading. Mayle v. Felix, 545 U.S. 644, (2005) (facts concerning  
24 admission of a defendant's statement in violation of the Fifth  
25 Amendment were different from facts supporting a claim of a Sixth  
26 Amendment violation premised on admission of a videotape of a  
27 third party's statement made at a different time and place).

28 The Court must determine the appropriate level of generality

1 or specificity with which to identify the common core of  
2 operative facts of Petitioner's claim concerning denial of his  
3 right to the effective assistance of counsel. A claim concerning  
4 an allegedly erroneous jury instruction does not relate back to a  
5 claim of erroneous admission of evidence. Hebner v. McGrath, 543  
6 F.3d 1133, 1138-39 (9th Cir. 2008). Analogously, relation back  
7 is not appropriate where a petitioner alleges one type of  
8 ineffective assistance in the original petition, and then amends  
9 the petition to assert another ineffective assistance claim based  
10 upon an entirely distinct type of attorney misfeasance. See,  
11 United States v. Ciampi, 419 F.3d 20, 24 (1st Cir. 2005), cert.  
12 denied, 547 U.S. 1217 (2006).

13 In the amended petition, Petitioner alleged that counsel  
14 slept during substantial portions of the trial, including during  
15 the portion of the trial involving the examination of witnesses.  
16 Examining the entire trial proceedings before the jury for  
17 indicia of counsel's having slept would involve a single type of  
18 attorney misfeasance. The trial proceedings before the jury  
19 include a substantial portion of the critical stages of the trial  
20 referred to by Petitioner. The examination of the witnesses  
21 before the jury occurred in a continuous proceeding that may be  
22 characterized as an occurrence. Sleeping of counsel during the  
23 presentation of, and argument concerning, the evidence would  
24 occur within a common nucleus of facts involving counsel's  
25 conduct in relation to the witnesses, the Court, the jury, and  
26 Petitioner. The Court concludes that counsel's sleepiness during  
27 closing argument is related to and arose out of the conduct,  
28 transaction, or occurrence set out, or attempted to be set out,

1 in the timely pleading.

2 Further, the Court is mindful that it can be difficult to  
3 determine by objective observation alone a person's state of  
4 consciousness. Therefore, consideration of the trial proceedings  
5 as a unit is a logical choice of context because the Court will  
6 have the ability to evaluate the effect of any substandard  
7 conduct of counsel on Petitioner's defense in light of all the  
8 evidence. Assuming the Court reaches the merits of Petitioner's  
9 claim, governing law will require the Court to determine whether  
10 1) counsel's representation fell below an objective standard of  
11 reasonableness under prevailing professional norms in light of  
12 all the circumstances of the particular case; and 2) unless  
13 prejudice is presumed, it is reasonably probable that, but for  
14 counsel's errors, the result of the proceeding would have been  
15 different. Strickland v. Washington, 466 U.S. 668, 687-94  
16 (1984); Lowry v. Lewis, 21 F.3d 344, 346 (9th Cir. 1994). In  
17 determining prejudice, a reasonable probability is a probability  
18 sufficient to undermine confidence in the outcome of the  
19 proceeding. Strickland, 466 U.S. at 694. In the context of a  
20 trial, the question is thus whether there is a reasonable  
21 probability that, absent the errors, the fact finder would have  
22 had a reasonable doubt respecting guilt. Strickland, 466 U.S. at  
23 695. This Court must consider the totality of the evidence  
24 before the fact finder and determine whether the substandard  
25 representation rendered the proceeding fundamentally unfair or  
26 the results thereof unreliable. Strickland, 466 U.S. at 687,  
27 696.

28 Respondent asserts that fatigue during oral argument is

1 beyond the scope of the directions for remand given by the Court  
2 of Appeal.

3       Strictly speaking, fatigue alone, unaccompanied by sleeping,  
4 and otherwise separated from the context of the trial  
5 proceedings, would appear to be outside the scope of the remand  
6 directed by the appellate court. However, the Court understands  
7 its task upon remand to be to explore the entirety of the trial  
8 proceedings; to take evidence in order to determine during what  
9 portions of the trial, if any, Petitioner's trial counsel was  
10 asleep; and to apply the appropriate standard of review and make  
11 findings and recommendations to the District Judge concerning the  
12 extent of counsel's sleeping and the extent of any prejudicial  
13 effect therefrom upon Petitioner's rights to the effective  
14 assistance of counsel and to a defense.

15       At this point the nature and extent of any evidence to be  
16 presented to the Court is unclear, and the Court cannot foresee  
17 how, if at all, any fatigue of counsel was related to sleeping  
18 during the proceedings. With respect to the issues ultimately to  
19 be decided, the Court recognizes the primacy of trial counsel's  
20 sleeping and its effect on Petitioner's right to counsel; any  
21 wholesale exploration of counsel's fatigue, unrelated to sleeping  
22 or the effect of sleeping on Petitioner's right to the effective  
23 assistance of counsel, is foreclosed.

24       However, in order to be able to make informed findings and  
25 recommendations on the main issues to be decided, the Court  
26 retains its discretion to explore the relevant behavior  
27 concerning, and effects of, any sleeping, such as indicia of  
28 fatigue or confusion, or other phenomena such as questionable



1 conduct or inaction, that are related to episodes of counsel's  
2 sleeping during the trial and are relevant to an assessment of  
3 any prejudice to Petitioner's right to the effective assistance  
4 of counsel in his defense.

5 Accordingly, Respondent's motion to limit the evidentiary  
6 hearing to the sole issue of counsel's sleeping while examining  
7 witness Frank Gonzales is DENIED.

8 II. Denial of Motion for Writ of Habeas Corpus  
9 ad Testificandum

10 As the Court stated at the hearing, Petitioner's motion for  
11 issuance of a writ of habeas corpus ad testificandum (Doc. 78) is  
12 DENIED as moot without prejudice to Petitioner's filing a renewed  
13 application on or before August 20, 2010.

14 III. Telephonic Conference concerning Stipulation  
15 regarding the Prosecutor's Testimony

16 In view of a dispute concerning the need to redact, and the  
17 admissibility of, a stipulation concerning the testimony of  
18 prosecutor Jared Hamilton, counsel shall MEET AND CONFER  
19 regarding the dispute; SUBMIT a paper copy of the relevant  
20 stipulation and/or declarations DIRECTLY to the chambers of the  
21 Honorable Sandra M. Snyder, Chief Magistrate Judge, at least  
22 three days in advance of the telephonic conference; and  
23 PARTICIPATE in a telephonic conference on August 25, 2010, at  
24 10:00 a.m. Respondent shall ARRANGE the conference call with the  
25 other parties and direct it to Frances Robles at (559) 499-5690  
26 at the appointed time.

27 The parties are CAUTIONED not to file the documents or to  
28 send them to the office of the Clerk of the Court; rather, the  
documents must be submitted DIRECTLY to the chambers of the

1 undersigned Magistrate Judge.

2 IV. Joint Statement and Telephonic Status Conference

3 Counsel agreed that one-half day was sufficient for the  
4 hearing, at which counsel anticipated examining no more than  
5 several witnesses, including Petitioner, who is housed at  
6 Corcoran; the defense attorney, George Wright Quick; the trial  
7 judge, the Honorable Clarence Westra; and Jared Hamilton, the  
8 prosecutor, whose testimony might become the subject of a  
9 stipulation or declaration.

10 Counsel agreed that argument and briefing should occur after  
11 the hearing, at which time a schedule shall be set for receipt of  
12 the transcript and the filing of briefing.

13 Counsel shall continue to meet and confer concerning all  
14 matters pertinent to the upcoming evidentiary hearing.

15 Counsel shall FILE no later than October 1, 2010, a joint  
16 statement concerning the scope of the hearing and the witnesses  
17 and evidence.

18 Further, counsel shall PARTICIPATE in a telephonic status  
19 conference concerning the hearing set for October 5, 2010, at  
20 10:00 a.m. Respondent shall ARRANGE the conference call with the  
21 other parties and direct it to Frances Robles at (559) 499-5690  
22 at the appointed time.

23 Accordingly, it IS ORDERED that

24 1) Respondent's in limine motion is DENIED; and

25 2) The evidentiary hearing in this matter is SET for October  
26 14, 2010, at 1:00 p.m., before the undersigned Magistrate Judge  
27 in Courtroom 7; and

28 3) The motion of Petitioner for writ of habeas corpus ad

