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**UNITED STATES DISTRICT COURT**  
**EASTERN DISTRICT OF CALIFORNIA**

MIGUEL GARCIA,  
  
                    Petitioner,  
  
          v.  
  
F. FOULK, Warden,  
  
                    Respondent.

Case No. 1:14-cv-00461-AWI-SKO HC

**FINDINGS AND RECOMMENDATIONS  
RECOMMENDING THAT THE  
COURT DENY THE PETITION FOR  
WRIT OF HABEAS CORPUS**

Petitioner is a state prisoner proceeding *pro se* with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner claims ineffective assistance of trial counsel arising from counsel's failure to file a timely notice of appeal on Petitioner's behalf. The procedural status of this case, however, makes the claim much more complex. The California Court of Appeal subsequently granted a writ of habeas corpus to permit Petitioner to file a late notice of appeal, but Petitioner himself never filed a notice of appeal. Because Petitioner's inaction superseded the trial attorney's ineffective assistance, the undersigned recommends that the Court deny habeas relief.

**I. Procedural Background<sup>1</sup>**

On March 20, 2012, after ten days of trial in the California Superior Court for the County of Kings, Petitioner pleaded guilty to one count of voluntary manslaughter contrary to California Penal

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<sup>1</sup> The following information is derived from the pleadings in this case and from state court records lodged by Respondent with his response.

1 Code § 192(A). On May 30, 2012, the Superior Court imposed a twenty-nine year term of  
2 imprisonment. Petitioner did not file a direct appeal within the statutory time period.

3 On June 25, 2012, in Kings County Superior Court, Petitioner filed a petition for writ of  
4 habeas corpus asserting the following grounds for relief:

5 1. During my trial there was a lot of maliciou[s] conduct and inadmissible  
6 evidence presented to the jury that my attorney never objected to, A lot of  
7 fabrication as well.

8 2. Has to do with "prejudice" from the judge Mr. Barnes in department 2.

9 Lodged document 1.

10 Petitioner sought to withdraw his plea.

11 On July 17, 2012, Petitioner filed an untimely notice of appeal, in which he contended that  
12 defense counsel provided ineffective assistance and the district attorney presented false evidence.

13 On August 27, 2012, the California Court of Appeals for the Fifth Appellate District denied  
14 the habeas petition as to those issues that could have been raised in a timely direct appeal. It rejected  
15 Petitioner's claim of ineffective assistance of counsel, concluding that Petitioner's claims were  
16 "insufficient to establish anything more than a difference of opinion between him and his appointed  
17 counsel regarding trial tactics." Lodged document 2.

18 On September 18, 2012, Petitioner filed a petition for writ of habeas corpus in the California  
19 Court of Appeals in which he requested leave to file a notice of appeal more than sixty days after  
20 sentencing. On January 16, 2013, the appellate court granted Petitioner leave to file a notice of  
21 appeal on or before February 11, 2013. Petitioner never filed the notice of appeal.  
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23 On April 25, 2013, Petitioner filed a petition for writ of habeas corpus in the California  
24 Supreme Court. He raised three grounds: (1) his trial attorney failed to file a notice of appeal despite  
25 Petitioner's request that he do so; (2) the trial court fabricated physical evidence; and (3) officers lied  
26 under oath. The California Supreme Court summarily denied the petition on July 10, 2013.  
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1 On August 29, 2013, Petitioner filed a petition for writ of habeas corpus in the California  
2 Court of Appeal, contending he was entitled to relief (that is, late filing of a direct appeal) under the  
3 constructive filing doctrine. The Court of Appeals denied the petition, stating:

4 In an opinion filed on January 16, 2013, this court granted petitioner leave to file  
5 a notice of appeal on or before February 11, 2013. (*In re Miguel Garcia*,  
6 F065733.) Petitioner failed to file a notice of appeal on or before February 11,  
7 2013. Petitioner has failed to make an adequate showing that he is entitled to  
relief under the constructive filing doctrine, that is, that he relied on an affirmative  
representation of counsel to file a timely notice of appeal on his behalf.

8 Lodged document 8.

9 On March 19, 2014, Petitioner filed a federal petition for writ of habeas corpus under 28  
10 U.S.C. § 2254 in the Central District of California. His sole ground for relief is that because his trial  
11 attorney failed to file a notice of appeal despite Petitioner's request, the California court erred in  
12 holding that his motion to file a late appeal constituted procedural default. The Central District  
13 Court transferred the petition to this Court on March 27, 2014.

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15 **II. Standard of Review**

16 Habeas corpus is neither a substitute for a direct appeal nor a device for federal review of the  
17 merits of a guilty verdict rendered in state court. *Jackson v. Virginia*, 443 U.S. 307, 332 n. 5 (1979)  
18 (Stevens, J., concurring). Habeas corpus relief is intended to address only "extreme malfunctions" in  
19 state criminal justice proceedings. *Id.* Under AEDPA, a petitioner can prevail only if he can show  
20 that the state court's adjudication of his claim:  
21

22 (1) resulted in a decision that was contrary to, or involved an unreasonable  
23 application of, clearly established Federal law, as determined by the Supreme  
Court of the United States; or

24 (2) resulted in a decision that was based on an unreasonable determination of the  
25 facts in light of the evidence presented in the State court proceeding.

26 28 U.S.C. § 2254(d); *Lockyer v. Andrade*, 538 U.S. 63, 70-71 (2003); *Williams v.*  
27 *Taylor*, 529 U.S. 362, 413 (2000).

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1 "By its terms, § 2254(d) bars relitigation of any claim 'adjudicated on the merits' in state court,  
2 subject only to the exceptions set forth in §§ 2254(d)(1) and (d)(2)." *Harrington v. Richter*, 562 U.S.  
3 86, 98 (2011).

4 As a threshold matter, a federal court must first determine what constitutes "clearly  
5 established Federal law, as determined by the Supreme Court of the United States." *Lockyer*, 538  
6 U.S. at 71. To do so, the Court must look to the holdings, as opposed to the dicta, of the Supreme  
7 Court's decisions at the time of the relevant state-court decision. *Id.* The court must then consider  
8 whether the state court's decision was "contrary to, or involved an unreasonable application of,  
9 clearly established Federal law." *Id.* at 72. The state court need not have cited clearly established  
10 Supreme Court precedent; it is sufficient that neither the reasoning nor the result of the state court  
11 contradicts it. *Early v. Packer*, 537 U.S. 3, 8 (2002). The federal court must apply the presumption  
12 that state courts know and follow the law. *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002). The  
13 petitioner has the burden of establishing that the decision of the state court is contrary to, or involved  
14 an unreasonable application of, United States Supreme Court precedent. *Baylor v. Estelle*, 94 F.3d  
15 1321, 1325 (9<sup>th</sup> Cir. 1996).

16 The AEDPA standard is difficult to satisfy since even a strong case for relief does not  
17 demonstrate that the state court's determination was unreasonable. *Harrington*, 562 U.S. at 102. "A  
18 federal habeas court may not issue the writ simply because the court concludes in its independent  
19 judgment that the relevant state-court decision applied clearly established federal law erroneously or  
20 incorrectly." *Lockyer*, 538 U.S. at 75-76. "A state court's determination that a claim lacks merit  
21 precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the  
22 state court's decision." *Harrington*, 562 U.S. at 101 (quoting *Yarborough v. Alvarado*, 541 U.S. 652,  
23 664 (2004)).

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1 **III. Ineffective Assistance of Counsel**

2 Petitioner contends that he received ineffective assistance of counsel because his trial  
3 attorney failed to file a timely notice of direct appeal even though Petitioner asked him to do so.

4 The purpose of the Sixth Amendment right to counsel is to ensure that the defendant receives  
5 a fair trial. *Strickland v. Washington*, 466 U.S. 668, 686 (1984). "[T]he right to counsel is the right  
6 to effective assistance of counsel." *McMann v. Richardson*, 397 U.S. 759, 771 n. 14 (1970). "The  
7 benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so  
8 undermined the proper functioning of the adversarial process that the trial cannot be relied on as  
9 having produced a just result." *Strickland*, 466 U.S. at 686.

10 To prevail on a claim of ineffective assistance of counsel, a petitioner must demonstrate that  
11 his trial counsel's performance "fell below an objective standard of reasonableness" at the time of  
12 trial and "that there is a reasonable probability that, but for counsel's unprofessional errors, the result  
13 of the proceeding would have been different." *Id.* at 688, 694. The *Strickland* test requires  
14 Petitioner to establish two elements: (1) his attorneys' representation was deficient and (2) prejudice.  
15 Both elements are mixed questions of law and fact. *Id.* at 698.

16 These elements need not be considered in order. *Id.* at 697. "The object of an  
17 ineffectiveness claim is not to grade counsel's performance." *Id.* If a court can resolve an  
18 ineffectiveness claim by finding a lack of prejudice, it need not consider whether counsel's  
19 performance was deficient. *Id.* Under *Strickland* and *Rodriguez v. United States*, 395 U.S. 327, 330  
20 (1969), courts may assume prejudice when trial counsel fails to file a notice of appeal. *Canales v.*  
21 *Roe*, 151 F.3d 1226, 1229 (9<sup>th</sup> Cir. 1998).

22 In its January 14, 2013, opinion, the California Court of Appeals granted habeas relief  
23 (Petitioner's September 18, 2012 petition) based on the failure of Petitioner's trial attorney to file a  
24 notice of appeal as Petitioner requested:

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1 Although a criminal defendant has the burden of filing a notice of appeal, the  
2 burden may be delegated to trial counsel. (*In re Fountain* (1977) 74 Cal.App.3d  
3 715, 719.) "A criminal defendant seeking relief from his default in failing to file a  
4 timely notice of appeal is entitled to such relief, absent waiver or estoppel due to  
5 delay, if he made a timely request of his trial attorney to file a notice of appeal,  
6 thereby placing the attorney under a duty to file it, instruct the defendant how to  
7 file it, or secure other counsel for him [citation]; or if the attorney made a timely  
8 promise to file a notice of appeal, thereby invoking reasonable reliance on the part  
9 of the defendant [citation]." (*People v. Sanchez* (1969) 1 Cal.3d 496, 500.)

10 Doc. 34 at 5.

11 Inexplicably, Petitioner failed to file a notice of appeal within the time period that the Court of  
12 Appeals provided to him.

13 In *Canales*, as here, the question is "the relationship between [trial] counsel's failure to file  
14 the notice and the ultimate loss of [the petitioner's] appeal rights." 151 F.3d at 1230. "The question  
15 is really whether counsel's failure to timely file is what deprived [the petitioner] of his appeal in the  
16 courts of California." *Id.* Canales lost his right to appeal by failing to seek relief from the California  
17 Court of Appeals for over 18 months even though he was repeatedly informed of his right to petition  
18 the appellate court for such relief. *Id.* at 1231. Here, Petitioner sought relief from the California  
19 Court of Appeals, then failed to file the notice of appeal within the time period in which his right to  
20 appeal was reinstated. Like Canales, Petitioner initially lost his right to appeal by his trial attorney's  
21 ineffective assistance, but ultimately lost it again through his own failure to act after the California  
22 Court of Appeals reopened a time period in which he could file a notice of appeal.

23 When a defendant fails to follow the path to relief mapped out for him by the state court, "it  
24 cannot be said that inadequate performance by counsel denied him the right to an appeal." *Id.* at  
25 1230. In such cases, a defendant's loss of his appeal rights arises not from counsel's original error  
26 but from his own failure to timely pursue his appeal rights after the state court reinstated them to  
27 allow late filing of a notice of appeal. *Id.* at 1231. In its January 10, 2014, order denying the August  
28 29, 2013, petition for writ of habeas corpus, the California Court of Appeals rejected Petitioner's

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1 claim for relief under the constructive filing doctrine, explaining that Petitioner "failed to file a  
2 notice of appeal on or before February 11, 2013," and "failed to make an adequate showing . . . that  
3 he relied on an affirmative representation of counsel to file a timely notice of appeal on his behalf."  
4 Lodged document 8. The state court's conclusion was a reasonable application of federal law.

5 **IV. Certificate of Appealability**

6 A petitioner seeking a writ of habeas corpus has no absolute entitlement to appeal a district  
7 court's denial of his petition, but may only appeal in certain circumstances. *Miller-El v. Cockrell*,  
8 537 U.S. 322, 335-36 (2003). The controlling statute in determining whether to issue a certificate of  
9 appealability is 28 U.S.C. § 2253, which provides:  
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11 (a) In a habeas corpus proceeding or a proceeding under section 2255 before a  
12 district judge, the final order shall be subject to review, on appeal, by the court of  
13 appeals for the circuit in which the proceeding is held.

14 (b) There shall be no right of appeal from a final order in a proceeding to test the  
15 validity of a warrant to remove to another district or place for commitment or  
16 trial a person charged with a criminal offense against the United States, or to test  
17 the validity of such person's detention pending removal proceedings.

18 (c) (1) Unless a circuit justice or judge issues a certificate of appealability, an  
19 appeal may not be taken to the court of appeals from—

20 (A) the final order in a habeas corpus proceeding in which the detention  
21 complained of arises out of process issued by a State court; or

22 (B) the final order in a proceeding under section 2255.

23 (2) A certificate of appealability may issue under paragraph (1) only if the  
24 applicant has made a substantial showing of the denial of a constitutional  
25 right.

26 (3) The certificate of appealability under paragraph (1) shall indicate which  
27 specific issues or issues satisfy the showing required by paragraph (2).

28 If a court denies a habeas petition, the court may only issue a certificate of appealability "if  
jurists of reason could disagree with the district court's resolution of his constitutional claims or that  
jurists could conclude the issues presented are adequate to deserve encouragement to proceed

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1 further." *Miller-El*, 537 U.S. at 327; *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Although the  
2 petitioner is not required to prove the merits of his case, he must demonstrate "something more than  
3 the absence of frivolity or the existence of mere good faith on his . . . part." *Miller-El*, 537 U.S. at  
4 338.

5 In the present case, reasonable jurists would not find the Court's determination that Petitioner  
6 is not entitled to federal habeas corpus relief debatable, wrong, or deserving of encouragement to  
7 proceed further. Petitioner has not made the required substantial showing of the denial of a  
8 constitutional right. Accordingly, the undersigned recommends that Court decline to issue a  
9 certificate of appealability.  
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11 **V. Conclusion and Recommendation**

12 Although the California court provided Petitioner an opportunity to file a late notice of  
13 appeal following his trial attorney's failure to file timely notice, Petitioner did not file a notice of  
14 appeal within the time provided. As a result, the ultimate loss of Petitioner's right to appeal resulted  
15 from Petitioner's own inaction. The undersigned recommends that the Court (1) deny the Petition  
16 for writ of habeas corpus, (2) decline to issue a certificate of appealability, and (3) order judgment  
17 for Respondent.  
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19 These Findings and Recommendations will be submitted to the United States District Judge  
20 assigned to the case, pursuant to the provisions of 28 U.S.C § 636(b)(1). Within **thirty (30) days**  
21 after being served with these Findings and Recommendations, either party may file written  
22 objections with the Court. The document should be captioned "Objections to Magistrate Judge's  
23 Findings and Recommendations." Replies to the objections, if any, shall be served and filed within  
24 **fourteen (14) days** after service of the objections. The parties are advised that failure to file  
25 objections within the specified time may constitute waiver of the right to appeal the District Court's  
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1 order. *Wilkerson v. Wheeler*, 772 F.3d 834, 839 (9th Cir. 2014) (citing *Baxter v. Sullivan*, 923 F.2d  
2 1391, 1394 (9th Cir. 1991)).

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4 IT IS SO ORDERED.

5 Dated: October 27, 2015

/s/ Sheila K. Oberto  
UNITED STATES MAGISTRATE JUDGE

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