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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

APRIL ROSIE LOPEZ TREVIZO,

 Petitioner,

 v.

DEAN BORDERS,

 Respondent.

No. 1:16-cv-01845-DAD-SKO (HC)

ORDER ADOPTING FINDINGS AND
RECOMMENDATIONS AND DENYING
PETITION FOR WRIT OF HABEAS
CORPUS

(Doc. No. 77)

Petitioner April Rosie Lopez Trevizo is a state prisoner represented by court-appointed counsel proceeding on a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. This matter was referred to a United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 302.

On October 19, 2021, the assigned magistrate judge issued findings and recommendations, recommending that the pending federal habeas petition be denied on its merits. (Doc. No. 77.) Those findings and recommendations were served upon all parties and contained notice that any objections thereto were to be filed within thirty (30) days after service. On November 18, 2021, counsel filed objections to the findings and recommendations on petitioner’s behalf. (Doc. No. 78.)

In those objections, petitioner argues that she exhausted her first ineffective assistance of counsel claim by raising that claim in the state habeas petition she filed with the California Court

1 of Appeal for the Fifth Appellate District and by then attaching that petition as an exhibit to her
2 subsequent habeas petition filed with the California Supreme Court. (*Id.* at 2–3.)¹ Petitioner
3 asserts that those attached exhibits were incorporated and adopted by reference into her petition
4 filed with the California Supreme Court and the claim was therefore properly exhausted by its
5 presentation to California’s highest court. (*Id.* at 3.) Petitioner has raised no other objections to
6 the pending findings and recommendations. (*Id.*)

7 Although the record is not entirely clear in this regard, it does appear that petitioner
8 attached the *pro se* habeas petition she had filed with the Tulare County Superior Court, in which
9 she raised an ineffective assistance claim and referred to the plea bargaining stage of her case, to
10 the habeas petition she filed in the California Supreme Court. Petitioner was proceeding *pro se* in
11 filing the state court habeas petitions and, of course, *pro se* filings (particularly those filed by
12 prisoners) are to be construed liberally. *United States v. Qazi*, 975 F.3d 989, 992–93 (9th Cir.
13 2020) (citing *Hughes v. Rowe*, 449 U.S. 5, 9 (1980) and *Hamilton v. United States*, 67 F.3d 761,
14 764 (9th Cir. 1995)). Of course, a federal habeas petitioner satisfies the exhaustion requirement
15 only by providing the highest state court with a full and fair opportunity to consider all claims
16 before presenting them to the federal court. *Picard v. Connor*, 404 U.S. 270, 276 (1971);
17 *Middleton v. Cupp*, 768 F.2d 1083, 1086 (9th Cir. 1985). In the pending objections, petitioner
18 relies upon the decisions in *Hamilton v. United States*, 67 F.3d 761, 764 (9th Cir. 1995) and *Dye*
19 *v. Hofbauer*, 546 U.S. 1, 3–4 (2005) in arguing that proper exhaustion of the ineffective

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21 ¹ In advancing this objection, petitioner’s counsel has provided citations, presumably to the
22 record, in support of petitioner’s argument that her ineffective assistance of counsel during plea
23 negotiations claim was properly exhausted because it was presented to the California Supreme
24 Court by way of the attachment of her habeas petition filed with the Tulare County Superior
25 Court. (Doc. No. 78 at 2.) Counsel provides citations to “ECF 28, Lodged Document 33040237”
26 “ECF 28, Lodged Doc., 33028131” and “ECF 28, Lodged Document 33021555 at 00006” in this
27 regard (*Id.* at 2–3.) However, these citations have proven somewhat unhelpful to the court
28 because it cannot determine what document or page they refer to. Docket Number 28 is merely a
Notice of Lodging/Filing of Paper Documents and the court has been unable to identify any pages
in that paper lodging in the court’s record designated as “33040237,” “33028131,” or “33021555
at 00006.” Nonetheless, because the undersigned is declining to adopt the recommendation that
petitioner be denied habeas relief as to her ineffective assistance of counsel during plea
negotiations claim based on her failure to exhaust that claim, this uncertainty has no impact on the
court’s resolution of the pending petition.

1 assistance of counsel at plea bargaining claim was accomplished by attachment. The undersigned
2 does not read those decisions as providing clear or strong support for petitioner's objection
3 regarding the exhaustion issue, though they provide some basis for the argument. However, "a
4 court may skip over the exhaustion issue if it is easier to deny (not grant, of course, but deny) the
5 petition on the merits without reaching the exhaustion question." *Santiago-Lugo v. Warden*, 785
6 F.3d 467, 475 (11th Cir. 2015) (citing *Granberry v. Greer*, 481 U.S. 129, 131 (1987) ("[T]here
7 are some cases in which it is appropriate for an appellate court to address the merits of a habeas
8 corpus petition notwithstanding the lack of complete exhaustion.")). Such is the case here and the
9 undersigned will decline to adopt the findings and recommendations to the extent they
10 recommend denial of the pending petition on the ground of petitioner's failure to exhaust the
11 ineffective assistance of counsel claim.

12 Nonetheless, the undersigned concurs with the magistrate judge's reasoning that
13 petitioner's claim must be rejected on its merits because: 1) it is barred by the terms of
14 petitioner's plea agreement in the underlying state court criminal case; 2) petitioner has not
15 demonstrated that her trial court counsel provided her ineffective assistance in connection with
16 plea negotiations; and 3) finally, petitioner has not demonstrated any prejudice resulting from her
17 counsel's alleged ineffective assistance. (Doc. No. 77 at 8–10.) Petitioner's objections present
18 no grounds for questioning the magistrate judge's analysis and rejection of her ineffective
19 assistance of counsel claim on the merits.

20 In accordance with the provisions of 28 U.S.C. § 636 (b)(1)(C), the court has conducted a
21 *de novo* review of the case. Having carefully reviewed the entire file, including petitioner's
22 objections, the court concludes that the magistrate judge's findings and recommendations are
23 supported by the record and proper analysis.

24 Having determined that petitioner is not entitled to habeas relief, the court now turns to
25 whether a certificate of appealability should issue. A state prisoner seeking a writ of habeas
26 corpus has no absolute entitlement to appeal a district court's denial of his petition, and an appeal
27 is only allowed in certain circumstances. *Miller-El v. Cockrell*, 537 U.S. 322, 335–36 (2003); *see*
28 *also* 28 U.S.C. § 2253. If a court denies a habeas petition on the merits, the court may only issue

1 a certificate of appealability “if jurists of reason could disagree with the district court’s resolution
2 of [the petitioner’s] constitutional claims or that jurists could conclude the issues presented are
3 adequate to deserve encouragement to proceed further.” *Miller-El*, 537 U.S. at 327; *see also*
4 *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). While the petitioner is not required to prove the
5 merits of his case, he must demonstrate “something more than the absence of frivolity or the
6 existence of mere good faith on his . . . part.” *Miller-El*, 537 U.S. at 338. If a court denies a
7 petitioner’s habeas petition, the court may only issue a certificate of appealability when a
8 petitioner makes a substantial showing of the denial of a constitutional right. 28 U.S.C. §
9 2253(c)(2). To make a substantial showing, the petitioner must establish that “reasonable jurists
10 could debate whether (or, for that matter, agree that) the petition should have been resolved in a
11 different manner or that the issues presented were ‘adequate to deserve encouragement to proceed
12 further.’” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quoting *Barefoot v. Estelle*, 463 U.S.
13 880, 893 (1983)). In the present case, the court finds that petitioner has not made the required
14 substantial showing of the denial of a constitutional right to justify the issuance of a certificate of
15 appealability. Reasonable jurists would not find the court’s determination that petitioner is not
16 entitled to federal habeas corpus relief debatable, wrong, or deserving of encouragement to
17 proceed further. Thus, the court declines to issue a certificate of appealability.

18 Accordingly,

- 19 1. The findings and recommendations issued on October 19, 2021 (Doc. No. 77) are
20 adopted in part;
- 21 2. The petition for writ of habeas corpus is denied on the merits;
- 22 3. The court declines to issue a certificate of appealability; and
- 23 4. The Clerk of the Court is directed to close this case.

24 IT IS SO ORDERED.

25 Dated: July 14, 2022

26 
UNITED STATES DISTRICT JUDGE