

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

ALEJANDRO RANGEL GONZALEZ,

Petitioner,

No. CIV S-05-1954 LKK GGH P

vs.

DAVID L. RUNNELS,
Respondent.

ORDER &
FINDINGS AND RECOMMENDATIONS

_____/

Petitioner, proceeding with appointed counsel, filed a petition pursuant to 28 U.S.C. §2254. On March 18, 2009, the undersigned issued findings and recommendations recommending that two of petitioner’s three claims be denied. Petitioner’s third claim of ineffective assistance of counsel consisted of four different arguments in which the court recommended that three be denied.¹ The court ordered an evidentiary hearing regarding the fourth argument, that petitioner received ineffective assistance of counsel when trial counsel advised petitioner to reject a plea bargain of sixteen years, instead advising petitioner he would only get four to six years in prison if a jury convicted him. Petitioner was convicted and received a thirty-five (35) year sentence. On July 21, 2009, respondent filed a motion to vacate the evidentiary hearing.

¹ The findings and recommendations were adopted by Order on April 9, 2009.

1 As the undersigned noted in the March 18, 2009, findings and recommendations,
2 the allegations, if true, could lead to a finding of ineffective assistance of counsel. “The record
3 does not indicate if the prosecution did or did not make this offer and the only evidence of this
4 claim is petitioner’s own declaration. The undersigned cannot determine this matter without an
5 evidentiary hearing.”

6 An evidentiary hearing was scheduled for August 3, 2009, however, respondent
7 filed a motion to vacate the evidentiary hearing. Respondent also filed a stipulation of fact
8 signed by attorneys for petitioner and respondent indicating that after an investigation, it was
9 discovered that the prosecution did not make a plea offer of 16 years to petitioner or any plea
10 offer.

11 As it is now clear that there was no plea offer, trial counsel could not have advised
12 petitioner regarding it and there can be no finding of ineffective assistance of counsel. Thus, an
13 evidentiary hearing is no longer needed and the claim of ineffective assistance of counsel has no
14 merit and should be denied.

15 ACCORDINGLY IT IS HEREBY ORDERED that the evidentiary hearing
16 scheduled for August 3, 2009, before the undersigned is vacated.

17 IT IS HEREBY RECOMMENDED that petitioner’s remaining claim of
18 ineffective assistance of counsel regarding the plea offer be denied and the entire writ of habeas
19 corpus be denied.

20 These findings and recommendations are submitted to the United States District
21 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty
22 days after being served with these findings and recommendations, any party may file written
23 objections with the court and serve a copy on all parties. Such a document should be captioned
24 “Objections to Magistrate Judge’s Findings and Recommendations.” Any reply to the objections
25 shall be served and filed within ten days after service of the objections. The parties are advised

26 \\\

1 that failure to file objections within the specified time may waive the right to appeal the District
2 Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

3 Dated: July 28, 2009

/s/ Gregory G. Hollows

4
5 GREGORY G. HOLLOWES
6 UNITED STATES MAGISTRATE JUDGE

6 ggh:ab
7 gonz1954.hc2

8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26