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

ROBERT L. ROARK,

Petitioner,

No. CIV S-07-1338 LKK DAD P

vs.

JOHN MARSHALL, Warden, et al.,

AMENDED

Respondents.

FINDINGS AND RECOMMENDATIONS

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In light of petitioner’s objections to the findings and recommendations issued in this case and good cause appearing, this court vacates the findings and recommendations issued on October 9, 2009, and hereby issues the following amended findings and recommendations.

Petitioner is a former state prisoner proceeding pro se with a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner challenges a judgment of conviction entered against him on July 11, 2005 in the Nevada County Superior Court on charges of assault with a deadly weapon and making criminal threats, following his plea of nolo contendere to those charges. He seeks relief on the grounds that his trial counsel rendered ineffective assistance. Petitioner also requests an evidentiary hearing. Upon careful consideration of the record and the applicable law, the undersigned will recommend that petitioner’s application for habeas corpus relief be denied.

1 PROCEDURAL AND FACTUAL BACKGROUND

2 At petitioner’s preliminary examination, Alex Felty testified that on October 14,
3 2004, he was at his gold mining camp on the Bear River when he was approached by petitioner,
4 whom he had known and worked with for several years. (CT at 73-74.) Petitioner asked Felty to
5 return some mining equipment he had loaned to him, and which should have been returned the
6 day before. (Id. at 74-75.) Mr. Felty had been unable to return the equipment on the previous
7 day because he had run over his girlfriend’s puppy with his truck and had to stay home to console
8 his girlfriend. (Id. at 75-76.) When Felty explained this to petitioner, petitioner became very
9 angry and hit Felty on the forehead with a stick while threatening to kill him. (Id. at 76-77.) Mr.
10 Felty sustained a deep gash on his forehead and was treated at the hospital. (Id. at 78-79.) On
11 cross-examination, Mr. Felty testified that he and petitioner had quarreled in the past but had
12 “gotten back to the point where we were very good friends.” (Id. at 83.) He further testified that
13 petitioner’s girlfriend, T.C.; Felty’s “dredge partner” Richard Sales; and a woman named Lyne
14 McCarthy were present at the scene. (Id. at 85.)

15 Jesse King, a Nevada County Deputy Sheriff, testified that he responded to an
16 address in Grass Valley on the night of October 14, 2004. (Id. at 89.) He spoke to T.C., who told
17 him that petitioner threatened to kill Mr. Felty and assaulted him with a stick at Felty’s mining
18 camp. (Id. at 90-92.) Officer King arrested petitioner and searched his tent, where he found a
19 wooden stick and drug paraphernalia. (Id. at 91, 93-95.) On the way to the county jail, petitioner
20 told Officer King that he had been “framed” and that he had merely been defending himself
21 against Mr. Felty, who had a knife. (Id. at 101.) No other person mentioned to Officer King that
22 Mr. Felty had a knife. (Id. at 103-04.) Lyne McCarthy told Officer King that she heard petitioner
23 and Felty arguing and then saw petitioner chasing Felty with a stick or a bat in his hand. (Id. at
24 105-08.)

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1 Subsequently, petitioner

2 pleaded no contest to assault with a deadly weapon (Pen. Code, §
3 245, subd. (a)(1) [fn omitted]- -count 1) and threatening to commit
4 a crime that will result in death or great bodily injury (§ 422 --
5 count 2). In exchange, the prosecution amended count 2 from a
6 felony to a misdemeanor; and dismissed a great bodily injury
7 enhancement (§ 12022.7, subd. (a)) on count 1, a count of
8 possession of paraphernalia (Health & Saf. Code, § 11364 -- count
9 3), and an unrelated misdemeanor (case No. M05-063). Defendant
10 was sentenced to state prison for four years and to county jail for
11 six months consecutively. To satisfy the latter term, the court used
12 120 of the reported 265 days of custody credit and added 60 days
13 of conduct credit (180 days total). Defendant was awarded the
14 balance of 145 days of custody credit and 72 days of conduct
15 credit. He was ordered to pay a \$635 fine, including penalty
16 assessments, a \$200 restitution fine (§ 1202.4), and a \$200
17 restitution fine suspended unless parole is revoked (§ 1202.45).

18 (Resp'ts' Lodged Doc. 2, Decision of the California Court of Appeal for the Third Appellate
19 District, at 1-2.)

20 Petitioner's appellate counsel filed a timely notice of appeal and a brief in
21 accordance with the decision in People v. Wende, 25 Cal. 3d 436 (1979), in which counsel set
22 forth the facts of the case and requested that the appellate court review the record and determine
23 whether there were any arguable issues on appeal. (Resp'ts' Lodged Doc.1.) The California
24 Court of Appeal for the Third Appellate District modified the judgment to award petitioner
25 additional custody and conduct credits but otherwise affirmed petitioner's judgment of
26 conviction. (Resp'ts' Lodged Doc. 2 at 3.)

Petitioner subsequently filed a petition for a writ of habeas corpus in the Nevada
County Superior Court. (Lodged Doc. 3.) The Superior Court rejected petitioner's claims,
reasoning as follows:

Petitioner, following his plea of "no-contest" and sentence to
prison, has filed this petition for a writ of habeas corpus. He
claims he was denied effective assistance of counsel at his
preliminary hearing, because counsel did not investigate his
defenses beforehand. Assuming, without finding, that his
allegations are true, he is not entitled to relief. His "no contest"
plea waived any claim he had that he did not receive proper

1 representation at the preliminary hearing. See Blackledge v. Perry
2 (1974) 417 U.S. 21, 29-30.)

3 The petition is therefore denied.

4 (Resp'ts' Lodged Doc. 4.)

5 Petitioner subsequently filed petitions seeking habeas relief in the California
6 Court of Appeal for the Third Appellate District and California Supreme Court. (Resp'ts'
7 Lodged Docs. 5, 7.) Both of those petitions were summarily denied. (Resp'ts' Lodged Docs. 6,
8 8.)

9 ANALYSIS

10 I. Standards of Review Applicable to Habeas Corpus Claims

11 A writ of habeas corpus is available under 28 U.S.C. § 2254 only on the basis of
12 some transgression of federal law binding on the state courts. See Peltier v. Wright, 15 F.3d 860,
13 861 (9th Cir. 1993); Middleton v. Cupp, 768 F.2d 1083, 1085 (9th Cir. 1985) (citing Engle v.
14 Isaac, 456 U.S. 107, 119 (1982)). A federal writ is not available for alleged error in the
15 interpretation or application of state law. See Estelle v. McGuire, 502 U.S. 62, 67-68 (1991);
16 Park v. California, 202 F.3d 1146, 1149 (9th Cir. 2000); Middleton, 768 F.2d at 1085. Habeas
17 corpus cannot be utilized to try state issues de novo. Milton v. Wainwright, 407 U.S. 371, 377
18 (1972).

19 This action is governed by the Antiterrorism and Effective Death Penalty Act of
20 1996 ("AEDPA"). See Lindh v. Murphy, 521 U.S. 320, 336 (1997); Clark v. Murphy, 331 F.3d
21 1062, 1067 (9th Cir. 2003). Title 28 U.S.C. § 2254(d) sets forth the following standards for
22 granting habeas corpus relief:

23 An application for a writ of habeas corpus on behalf of a
24 person in custody pursuant to the judgment of a State court shall
25 not be granted with respect to any claim that was adjudicated on
26 the merits in State court proceedings unless the adjudication of the
claim -

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

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

5 See also Penry v. Johnson, 532 U.S. 782, 792-93 (2001); Williams v. Taylor, 529 U.S. 362
6 (2000); Lockhart v. Terhune, 250 F.3d 1223, 1229 (9th Cir. 2001). If the state court's decision
7 does not meet the criteria set forth in § 2254(d), a reviewing court must conduct a de novo review
8 of a habeas petitioner's claims. Delgadillo v. Woodford, 527 F.3d 919, 925 (9th Cir. 2008). See
9 also Frantz v. Hazey, 513 F.3d 1002, 1013 (9th Cir. 2008) (en banc) ("[I]t is now clear both that
10 we may not grant habeas relief simply because of § 2254(d)(1) error and that, if there is such
11 error, we must decide the habeas petition by considering de novo the constitutional issues
12 raised.").

13 The court looks to the last reasoned state court decision as the basis for the state
14 court judgment. Robinson v. Ignacio, 360 F.3d 1044, 1055 (9th Cir. 2004). If the last reasoned
15 state court decision adopts or substantially incorporates the reasoning from a previous state court
16 decision, this court may consider both decisions to ascertain the reasoning of the last decision.
17 Edwards v. Lamarque, 475 F.3d 1121, 1126 (9th Cir. 2007) (en banc). Where the state court
18 reaches a decision on the merits but provides no reasoning to support its conclusion, a federal
19 habeas court independently reviews the record to determine whether habeas corpus relief is
20 available under section 2254(d). Himes v. Thompson, 336 F.3d 848, 853 (9th Cir. 2003); Pirtle
21 v. Morgan, 313 F.3d 1160, 1167 (9th Cir. 2002). When it is clear that a state court has not
22 reached the merits of a petitioner's claim, or has denied the claim on procedural grounds, the
23 AEDPA's deferential standard does not apply and a federal habeas court must review the claim
24 de novo. Nulph v. Cook, 333 F.3d 1052, 1056 (9th Cir. 2003).

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1 II. Petitioner's Claim of Ineffective Assistance of Counsel

2 Petitioner claims that his trial counsel rendered ineffective assistance in several
3 respects. First, he claims that counsel failed to conduct sufficient investigation to enable him to
4 adequately challenge the testimony of government witnesses Felty and Deputy King at his
5 preliminary hearing. (Memorandum of Points and Authorities in support of petition (P&A) at 9-
6 12, 21-23.) Second, he contends that Deputy King testified falsely at the preliminary hearing
7 without objection by trial counsel. (Id. at 12-15.) Third, petitioner claims that his trial counsel
8 improperly failed to object to the illegal search of his tent. (Id. at 13-14.) Fourth, he claims that
9 his trial counsel was "burdened by a conflict between his client's interests and his own
10 sympathies to the prosecution's position." (Id. at 16.) Fifth, petitioner contends his trial counsel
11 failed to investigate whether Mr. Felty was armed, in order to support a possible defense of self-
12 defense. (Id.) Sixth, petitioner contends that his trial counsel failed to investigate and interview
13 potential defense witnesses. (Id. at 21-23; Traverse at 3-5.) Petitioner summarizes these claims
14 as follows:

15 By his inaction, deliberate or otherwise, [counsel] deprived himself
16 of the reasonable bases upon which to reach informed tactical and
17 strategic decisions. Most importantly, [counsel] called no
18 witnesses and presented no defense at the Preliminary
Examination, other than an inept attempt to cross-examine
prosecution witnesses. Thus, [counsel] defrauded both the court
and his client and ill served his client . . .

19 (P&A at 17.) In his traverse, petitioner also faults counsel for "refus[ing] to file briefs or motions
20 to suppress evidence." (Traverse at 2.)

21 In addition, petitioner claims that his trial counsel operated under a prejudicial
22 conflict of interest in that he failed to recognize that his investigator was too busy with other
23 cases to sufficiently investigate petitioner's case. (P&A at 18-24.) Petitioner faults his trial
24 counsel for failing to replace the defense investigator, and argues that this "conflict" resulted in
25 prejudice to his case. (Id. at 20; Traverse at 3, 7.) Petitioner alleges that his trial counsel hired
26 the investigator even though he knew he was not "willing to commit the time or undertake the

1 work necessary for a complicated case,” and that both counsel and the investigator “considered
2 petitioner guilty a foregone conclusion.” (P&A at 23.)

3 Petitioner also claims that there was an overall failure by his trial counsel to
4 conduct sufficient investigation. (Id. at 24-26.) He argues,

5 in representing a criminal defendant, counsel owes the client a duty
6 of loyalty, a duty to avoid conflicts of interest, a duty to advocate
7 the defendant’s cause, a duty to consult with the defendant on
8 important decisions, a duty to keep defendant informed of
9 important developments in the course of the prosecution, and a
10 duty to bring to bear such skill and knowledge as will render the
11 trial a reliable adversarial testing process.

12 (Id. at 26.) Petitioner claims that he entered a plea of nolo contendere because his trial counsel
13 advised him that prosecution witnesses Felty and Deputy King were credible, even though
14 counsel had not conducted sufficient investigation to determine whether they were credible or
15 not. (P&A at 7, et seq.)¹

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18 ¹ Petitioner also argues that the California courts “erred” in denying his state habeas
19 petitions. (P&A at 26-27; Traverse at 11-12.) This is not a separate claim for habeas relief and
20 will not be considered by this court as such because the question of whether the state courts’
21 rejection of petitioner’s habeas claims were contrary to or an unreasonable application of federal
22 law will be considered in connection with petitioner’s substantive ineffective assistance of
23 counsel claims. Petitioner also argues that he “was denied competent counsel, and because of
24 this constitutional infirmity, petitioner is entitled to relief under the Apprendi/Blakely appeal
25 Rights.” (Id. at 26.) Petitioner has not demonstrated any entitlement to habeas relief pursuant to
26 the decisions in Apprendi v. New Jersey, 530 U.S. 466 (2000) or Blakely v. Washington, 542
U.S. 296 (2004). Instead, it appears that petitioner has made this statement solely because he
specifically declined to waive his appeal rights with respect to any claim based on the Blakely
decision. (See Pet., Ex. Y.) Because he has presented no such claim in his federal habeas
petition, this court will not address any Apprendi and Blakely claim. Finally, in his traverse,
petitioner argues that because of his “unlawful incarceration,” he has “suffered cruel and unusual
punishment under the Eighth Amendment to the United States Constitution.” (Traverse at 2.) A
traverse is not the proper pleading to raise additional grounds for relief. See Cacoperdo v.
Demosthenes, 37 F.3d 504, 507 (9th Cir. 1994). Accordingly, to the extent petitioner is
attempting to belatedly raise an Eighth Amendment claim for the first time in the traverse, relief
should be denied. In any event, petitioner has failed to demonstrate that the sentence imposed in
his case constitutes cruel and unusual punishment under the Eighth Amendment. See Lockyer v.
Andrade, 538 U.S. 63 (2003). Accordingly, petitioner is not entitled to relief on any such claim.

1 III. Legal Standards for Ineffective Assistance of Counsel

2 The Sixth Amendment guarantees the effective assistance of counsel. The United
3 States Supreme Court set forth the test for demonstrating ineffective assistance of counsel in
4 Strickland v. Washington, 466 U.S. 668 (1984). To support a claim of ineffective assistance of
5 counsel, a petitioner must first show that, considering all the circumstances, counsel’s
6 performance fell below an objective standard of reasonableness. Id. at 687-88. After a petitioner
7 identifies the acts or omissions that are alleged not to have been the result of reasonable
8 professional judgment, the court must determine whether, in light of all the circumstances, the
9 identified acts or omissions were outside the wide range of professionally competent assistance.
10 Id. at 690; Wiggins v. Smith, 539 U.S. 510, 521 (2003).

11 Second, a petitioner must establish that he was prejudiced by counsel’s deficient
12 performance. Strickland, 466 U.S. at 693-94. Prejudice is found where “there is a reasonable
13 probability that, but for counsel’s unprofessional errors, the result of the proceeding would have
14 been different.” Id. at 694. A reasonable probability is “a probability sufficient to undermine
15 confidence in the outcome.” Id. See also Williams, 529 U.S. at 391-92; Laboa v. Calderon, 224
16 F.3d 972, 981 (9th Cir. 2000). A reviewing court “need not determine whether counsel’s
17 performance was deficient before examining the prejudice suffered by the defendant as a result of
18 the alleged deficiencies If it is easier to dispose of an ineffectiveness claim on the ground of
19 lack of sufficient prejudice . . . that course should be followed.” Pizzuto v. Arave, 280 F.3d 949,
20 955 (9th Cir. 2002) (quoting Strickland, 466 U.S. at 697).

21 In assessing an ineffective assistance of counsel claim “[t]here is a strong
22 presumption that counsel’s performance falls within the ‘wide range of professional assistance.’”
23 Kimmelman v. Morrison, 477 U.S. 365, 381 (1986) (quoting Strickland, 466 U.S. at 689). There
24 is in addition a strong presumption that counsel “exercised acceptable professional judgment in
25 all significant decisions made.” Hughes v. Borg, 898 F.2d 695, 702 (9th Cir. 1990) (citing
26 Strickland, 466 U.S. at 689).

1 IV. Analysis

2 All of the instances of ineffective assistance of trial counsel alleged by petitioner
3 occurred prior to the entry of petitioner's plea of nolo contendere to the charges against him. The
4 law is clear that petitioner may not raise claims of deprivation of his constitutional rights that
5 occurred prior to his plea. "When a criminal defendant has solemnly admitted in open court that
6 he is in fact guilty of the offense with which he is charged, he may not thereafter raise
7 independent claims relating to the deprivation of constitutional rights that occurred prior to the
8 entry of the guilty plea." Tollett v. Henderson, 411 U.S. 258, 267 (1973). See also McMann v.
9 Richardson, 397 U.S. 759, 770-71 (1970); Moran v. Godinez, 57 F.3d 690, 700 (9th Cir. 1994)
10 ("As a general rule, one who voluntarily pleads guilty to a criminal charge may not subsequently
11 seek federal habeas relief on the basis of pre-plea constitutional violations"), overruled on other
12 grounds in Lockyer v. Andrade, 538 U.S. 63, 75-76 (2003); Ortberg v. Moody, 961 F.2d 135, 137
13 (9th Cir. 1992) ("petitioner's nolo contendere plea precludes him from challenging alleged
14 constitutional violations that occurred prior to the entry of that plea"); Hudson v. Moran, 760
15 F.2d 1027, 1029-30 (9th Cir. 1985) (voluntary and intelligent guilty plea precludes federal habeas
16 relief based upon "independent claims" of pre-plea constitutional violations). Under these
17 circumstances, a prisoner may attack only the voluntary and intelligent character of his guilty
18 plea in habeas proceedings. Ortberg, 961 F.2d 135 at 137. To the extent that a petitioner seeks
19 to claim that he received ineffective assistance of counsel premised on his attorney's allegedly
20 faulty advice, he may do so only based upon that advice as it related to the decision to enter his
21 nolo contendere plea. Any ineffective assistance claims relating to other, earlier actions by his
22 counsel are barred by the holding in Tollett v. Henderson. See Moran, 57 F.3d at 700.

23 Petitioner attacks the voluntary and intelligent character of his guilty plea by
24 alleging that the advice he received from his counsel to plead guilty was inadequate because
25 counsel told him that witnesses Felty and Deputy King were credible, without having conducted

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1 sufficient investigation to be able to make that decision.² To prevail on such a claim, a petitioner
2 must show that: (1) counsel’s representation fell below the range of competence demanded of
3 attorneys in criminal cases, and (2) “there is a reasonable probability that, but for counsel's errors,
4 he would not have pleaded guilty and would have insisted on going to trial.” Hill v. Lockhart,
5 474 U.S. 52, 56 (1985). As explained in Hill,

6 where the alleged error of counsel is a failure to investigate or
7 discover potentially exculpatory evidence, the determination
8 whether the error “prejudiced” the defendant by causing him to
9 plead guilty rather than go to trial will depend on the likelihood
10 that discovery of the evidence would have led counsel to change
11 his recommendation as to the plea. This assessment, in turn, will
12 depend in large part on a prediction whether the evidence likely
13 would have changed the outcome of a trial.

14 474 U.S. at 59. Petitioner has failed to make the required showing.

15 Petitioner takes issue with his trial counsel’s failure to investigate specific
16 witnesses who could possibly have established that Axis Felty was a drug abuser and dangerous,
17 and that he had threatened petitioner in the past. (P&A at 22-23.) Petitioner also faults counsel
18 for failing to point out discrepancies in the testimony of Deputy King at the preliminary hearing.
19 However, there is no evidence that any of these witnesses would have testified as petitioner
20 hopes, that they would have been credible had they so testified, or that their testimony would
21 have undermined the case against petitioner. Petitioner’s unsubstantiated allegations are
22 insufficient to establish either deficient performance by counsel or prejudice. The allegations
23 also fail to demonstrate that further investigation of these witnesses would have led counsel to

24 ² Petitioner’s claims regarding trial counsel’s failure to object to the preliminary hearing
25 testimony of Officer King and Alex Felty, failure to object to the illegal search of his tent, failure
26 to investigate whether the victim was armed, failure to investigate and interview potential
defense witnesses, failure to present a competent defense at the preliminary hearing, failure to
“file briefs or motions to suppress evidence,” failure to replace his defense investigator, and
overall failure to conduct sufficient investigation into petitioner’s case, are all claims arising
prior to the entry of plea that do not implicate the voluntariness of petitioner’s plea of nolo
contendere and have therefore been waived by petitioner when he entered his nolo contendere
plea. Tollett, 411 U.S. at 267.

1 change his recommendation as to the plea or would have changed the outcome of a trial. In light
2 of these failures, petitioner cannot demonstrate that counsel's advice to plead guilty in exchange
3 for a reduced sentence was unreasonable or that petitioner's plea was involuntary. Although
4 petitioner implies that counsel's purportedly deficient performance, in general, contributed to his
5 decision to enter a plea, these allegations fall far short of establishing that his trial counsel's
6 allegedly erroneous advice contributed to petitioner's entry of an involuntary and unknowing
7 nolo contendere plea.

8 Petitioner was facing a possible sentence of eight years in prison, plus an
9 additional six months in jail. (Answer at 15.) Pursuant to his plea agreement, certain charges
10 against petitioner were reduced or dropped and petitioner was sentenced to the stipulated term of
11 four years in state prison and six months in the county jail with the appropriate credits being
12 awarded. In light of the benefit to petitioner resulting from his plea and the stipulated-to
13 sentence, counsel's advice to petitioner that he should accept the plea offer was certainly not
14 below an objective standard of reasonableness. Further, given this benefit, petitioner has not
15 established that, but for counsel's errors, he would not have pleaded guilty and would have
16 insisted on going to trial.

17 The state court record reflects that the defense investigator hired by petitioner's
18 trial counsel wrote a letter approximately four months after petitioner's preliminary examination
19 in which he advised counsel that, while he had been too busy to devote significant time to
20 petitioner's case before then, he was now "free to delve deeply into the merits and details of
21 *People v. Roark*." (Resp'ts' Lodged Doc. 9.) Petitioner argues that this letter demonstrates the
22 investigator did not conduct sufficient investigation into his case and that his trial counsel was
23 aware of this failure to investigate. However, the letter in question does not demonstrate that
24 petitioner's case had not been sufficiently investigated by the time trial counsel advised petitioner
25 to plead guilty, which occurred more than two weeks after the date of the letter. Nor do
26 petitioner's allegations, or the letter he points to in support thereof, establish that his trial counsel

1 had a “conflict of interest” by virtue of his failure to discharge the investigator. There is no
2 evidence before the court that the investigator’s performance or counsel’s relationship with the
3 investigator constituted a conflict which “deprived [petitioner] of representation guaranteed by
4 the Sixth Amendment.” Daniels v. Woodford, 428 F.3d 1181, 1197 (9th Cir. 2005).

5 In addition, this court has reviewed the transcript of petitioner’s change of plea
6 hearing and concludes that his nolo contendere plea was freely and voluntarily made, with full
7 knowledge of the consequences thereof.³ In this regard, a guilty plea must be knowing,
8 intelligent and voluntary. Brady v. United States, 397 U.S. 742, 748 (1970); Boykin v. Alabama,
9 395 U.S. 238, 242 (1969). “The voluntariness of [a petitioner’s] guilty plea can be determined
10 only by considering all of the relevant circumstances surrounding it.” Brady, 397 F.2d at 749. In
11 Blackledge v. Allison, 431 U.S. 63 (1977), the Supreme Court addressed the presumption of
12 verity to be given the record of plea proceeding when the plea is subsequently subject to a
13 collateral challenge. While noting that the defendant’s representations at the time of his guilty
14 plea are not “invariably insurmountable” when challenging the voluntariness of his plea, the
15 court stated that, nonetheless, the defendant’s representations, as well as any findings made by the
16 judge accepting the plea, “constitute a formidable barrier in any subsequent collateral
17 proceedings” and that “[s]olemn declarations in open court carry a strong presumption of verity.”
18 Blackledge, 431 U.S. at 74. See also Marshall v. Lonberger, 459 U.S. 422, 437 (1983) (plea is
19 presumed valid in habeas proceeding when the pleading defendant was represented by counsel);
20 Little v. Crawford, 449 F.3d 1075, 1081 (9th Cir. 2006); Chizen v. Hunter, 809 F.2d 560, 561
21 (9th Cir. 1986). The record must affirmatively show that a criminal defendant’s guilty plea is
22 intelligent and voluntary. Boykin, 395 U.S. at 242-43.

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25 ³ As noted, petitioner received the sentence that was stipulated to by the parties as part of
26 the plea agreement that was placed on the record at the time the plea was entered. (See
(Reporter’s Transcript of June 1, 2005 at 3; Reporter’s Transcript of July 11, 2005 at 8-11.)

1 Under Boykin, the record must reflect that a criminal defendant pleading guilty
2 understands, and is voluntarily waiving, his rights to the privilege against compulsory
3 self-incrimination, to trial by jury and to confront one's accusers. 395 U.S. at 243. However,
4 specific articulation of the Boykin rights “is not the sine qua non of a valid guilty plea.” Wilkins
5 v. Erickson, 505 F.2d 761, 763 (9th Cir. 1974). Rather, if the record demonstrates that a guilty
6 plea is knowing and voluntary, “no particular ritual or showing on the record is required.”
7 United States v. McWilliams, 730 F.2d 1218, 1223 (9th Cir. 1984).

8 In this case there was a full and complete colloquy between the court and
9 petitioner at the time he entered his plea. (Reporter’s Transcript on Appeal (RT) at 3-10.)
10 Petitioner affirmatively stated that he wanted to plead no contest to assault with a deadly weapon
11 and the misdemeanor charge of making criminal threats. (Id. at 4.) He stated that he had enough
12 time to talk to his trial counsel about the nature of the charges and any possible defenses that he
13 might have. (Id.) Petitioner stated he realized he had given up “any direct appeal [he] might
14 have to a higher Court except as to a sentencing error.” (Id.) Petitioner voluntarily waived his
15 rights to a trial by jury, the right to confront his accusers and his right against self-incrimination.
16 (Id. at 5.) Petitioner was informed of the maximum penalty he could receive. (Id.) Petitioner
17 affirmed that he was pleading no contest because he was guilty of the offenses or he understood
18 there was enough evidence to prove his guilt at trial. (Id. at 6.) Petitioner stated that no one had
19 made any promises to him about what his sentence would be. (Id.) In the change of plea form
20 signed by petitioner, he agreed that there was a factual basis for the plea and that his decision to
21 plead nolo contendere had been made “freely and voluntarily without threat or fear to me or to
22 anyone closely related to or associated with me.” (Clerk’s Transcript on Appeal (CT) at 37.)
23 Petitioner further acknowledged that he had “read, discussed, and have had explained to me by
24 my attorney” each of the items listed on the form. (Id. at 38.) Petitioner had notice of the nature
25 of the charges against him. (Id. at 3.) See Lonberger, 459 U.S. at 436 (in order for a plea to be
26 voluntary, an accused must receive notice of the nature of the charge against him, “the first and

1 most universally recognized requirement of due process") (quoting Smith v. O'Grady, 312 U.S.
2 329, 334 (1941)). This is sufficient for purposes of federal habeas review. Lonberger, 459 U.S.
3 at 436. There is nothing in the record before this court to overcome the presumption that
4 petitioner pled guilty voluntarily and intelligently. There is also no evidence that trial counsel's
5 alleged deficient performance affected the knowing and intelligent nature of petitioner's nolo
6 contendere plea.

7 Accordingly, for all of the foregoing reasons, petitioner is not entitled to relief on
8 his claims of ineffective assistance of counsel.

9 V. Evidentiary Hearing

10 Petitioner requests an evidentiary hearing with respect to his claims. Pursuant to
11 28 U.S.C. § 2254(e)(2), an evidentiary hearing is appropriate under the following circumstances:

12 (e)(2) If the applicant has failed to develop the factual basis of a
13 claim in State court proceedings, the court shall not hold an
evidentiary hearing on the claim unless the applicant shows that-

14 (A) the claim relies on-

15 (i) a new rule of constitutional law, made retroactive to cases on
16 collateral review by the Supreme Court, that was previously
unavailable; or

17 (ii) a factual predicate that could not have been previously
18 discovered through the exercise of due diligence; and

19 (B) the facts underlying the claim would be sufficient to establish
20 by clear and convincing evidence that but for constitutional error,
no reasonable fact finder would have found the applicant guilty of
the underlying offense[.]

21 Under this statutory scheme, a district court presented with a request for an
22 evidentiary hearing must first determine whether a factual basis exists in the record to support a
23 petitioner's claims and, if not, whether an evidentiary hearing "might be appropriate." Baja v.
24 Ducharme, 187 F.3d 1075, 1078 (9th Cir. 1999). See also Earp v. Ornoski, 431 F.3d 1158, 1166
25 (9th Cir. 2005); Insyxiengmay v. Morgan, 403 F.3d 657, 669-70 (9th Cir. 2005). A petitioner
26 requesting an evidentiary hearing must also demonstrate that he has a "colorable claim for relief."

1 Earp, 431 F.3d at 1167 (citing Insyxiengmay, 403 F.3d at 670; Stankewitz v. Woodford, 365 F.3d
2 706, 708 (9th Cir. 2004); and Phillips v. Woodford, 267 F.3d 966, 973 (9th Cir. 2001)). To show
3 that a claim is "colorable," a petitioner is "required to allege specific facts which, if true, would
4 entitle him to relief." Ortiz v. Stewart, 149 F.3d 923, 934 (9th Cir. 1998) (internal quotation
5 marks and citation omitted).

6 The court concludes that no additional factual supplementation is necessary and
7 that an evidentiary hearing is not appropriate with respect to the claims raised in the instant
8 petition. The facts alleged in support of these claims, even if established at a hearing, would not
9 entitle petitioner to relief. Therefore, petitioner's request for an evidentiary hearing should be
10 denied.

11 CONCLUSION

12 Accordingly, IT IS HEREBY RECOMMENDED that petitioner's application for
13 a writ of habeas corpus be denied.

14 These findings and recommendations are submitted to the United States District
15 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty-
16 one days after being served with these findings and recommendations, any party may file written
17 objections with the court and serve a copy on all parties. Such a document should be captioned
18 "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections
19 shall be served and filed within seven days after service of the objections. The parties are
20 advised that failure to file objections within the specified time may waive the right to appeal the
21 District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

22 DATED: January 20, 2010.

23
24 
25 _____
26 DALE A. DROZD
UNITED STATES MAGISTRATE JUDGE

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