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

JEROME JACKSON,

Petitioner,

No. CIV S-09-0618 DAD P

vs.

JOHN W. HAVILAND,

Respondent.

FINDINGS AND RECOMMENDATIONS

_____ /

Petitioner is a state prisoner proceeding pro se with a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. In his petition before this court petitioner challenges the sentence imposed by the Sacramento County Superior Court on November 16, 2006 pursuant to a plea bargain in which petitioner pled no contest to two counts of assault with a deadly weapon in violation of California Penal Code § 245(a)(1). Pursuant to that plea agreement, petitioner also admitted enhancement allegations for inflicting great bodily injury under circumstances involving domestic violence in violation of California Penal Code § 12022.7(e) and having a prior serious felony conviction within the meaning of the Three Strikes Law pursuant to California Penal Code § 667(a). Petitioner seeks federal habeas relief on the ground that he received ineffective assistance of counsel.

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1 As to the then-pending § 1385 motion, petitioner’s counsel informed the court as
2 follows:

3 I have filed a motion to strike the strike, and that’s something Mr.
4 Jackson wanted done as soon as possible. It is a little premature at
5 this point because there is no decision on guilt for this case, but I
did file it and put my arguments in there about the age of the prior
and his conduct since.

6 (Id. at 26.)

7 Later in the hearing, and after further discussion with his attorney, pursuant to
8 plea agreement petitioner entered a no contest plea to assault with a deadly weapon and admitted
9 an enhancement for personally inflicting great bodily injury under circumstances involving
10 domestic violence. (RT at 39-40.) Notwithstanding the then-pending §1385 motion, petitioner
11 also admitted a prior strike. (Id. at 40.)

12 Pursuant to this plea agreement entered into by the parties, on November 16,
13 2006, petitioner was sentenced to 15 years in prison in keeping with the agreement. (CT at 167.)

14 II. Appeal

15 Petitioner appealed his judgment of conviction to the California Court of Appeal
16 for the Third Appellate District. (Resp’t’s Lod. Doc. 1.) On appeal, petitioner argued that he
17 was denied his constitutional rights to a speedy trial and due process. (Resp’t’s Lod. Doc. 2.) He
18 also argued that the trial court abused its discretion in failing to dismiss petitioner’s prior felony
19 strike pursuant to California Penal Code § 1385. (Id. at 4.) He did not argue on appeal that he
20 had received ineffective assistance of counsel. On October 31, 2007, petitioner’s judgment of
21 conviction was affirmed on appeal in a reasoned opinion. (Resp’t’s Lod. Doc. 3.)

22 As to petitioner’s claim regarding the § 1385 motion, the California Court of
23 Appeal reasoned as follows:

24 Defendant’s final claim is that the court abused its discretion in
25 denying defendant’s motion to dismiss his strike prior pursuant to
26 Penal Code section 1385. On September 14, 2006, defense counsel
filed a motion to dismiss the strike allegation pursuant to Penal
Code section 1385. At the time, defendant had not yet changed his

1 plea to no contest. Four days later, defendant entered into a plea
2 agreement in which he agreed to a stipulated term of 15 years,
3 based on a three-year middle term for assault with a deadly
4 weapon, doubled to six years under the three strikes law, five
5 additional years for the prior serious felony conviction, and an
6 additional four years for the domestic violence enhancement.
7 Before defendant decided to accept the offer, defense counsel
8 noted the recently filed Penal Code section 1385 motion “is a little
9 premature at this point because there is no decision on guilt for this
10 case, but I did file it and put my arguments in there about the age of
11 the prior and his conduct since.”

12 The motion was never mentioned at sentencing. The principle that
13 failure to renew a motion constitutes a waiver or an abandonment
14 has been applied in a wide variety of contexts. (See People v.
15 Kenner (1990) 223 Cal.App.3d 56, 62 [failure to renew a pending
16 motion for self-representation under Faretta v. California (1975)
17 422 U.S. 806 [45 L.Ed.2d 562]]; People v. Murtishaw (1989) 48
18 Cal.3d 1001, 1036-1037 [failure to renew motion to exclude a
19 victim from the courtroom].) Defendant’s failure to renew the
20 motion at sentencing forfeits the claim on appeal.

21 (Id.)

22 Petitioner then filed a petition for review in the California Supreme Court, making
23 the same three arguments he had presented to the state appellate court. (Resp’t’s Lod. Doc. 4.)
24 Under the heading “Conclusion,” in his petition for review petitioner stated:

25 The plea should be reversed to correct constitutional violation, on
26 all three arguments, supra. Further, respondent [sic] contention of
the 1385 motion, has no merit, because the motion was filed prior
to sentencing, but was overlooked by defense counsel and the
court, but this does not constitute a waiver or an abandonment or
forfeits. If this is the case before us, this would bring us to another
issue of Ineffective Assistance of Counsel (I.A.C.) which is an
arguable error.

27 (Id. at 6) (emphasis added). The California Supreme Court summarily denied the petition for
28 review on January 16, 2008. (Resp’t’s Lod. Doc 4.)

29 ANALYSIS

30 I. Standards of Review Applicable to Habeas Corpus Claims

31 A writ of habeas corpus is available under 28 U.S.C. § 2254 only on the basis of
32 some transgression of federal law binding on the state courts. See Peltier v. Wright, 15 F.3d 860,

1 861 (9th Cir. 1993); Middleton v. Cupp, 768 F.2d 1083, 1085 (9th Cir. 1985) (citing Engle v.
2 Isaac, 456 U.S. 107, 119 (1982)). A federal writ is not available for alleged error in the
3 interpretation or application of state law. See Estelle v. McGuire, 502 U.S. 62, 67-68 (1991);
4 Park v. California, 202 F.3d 1146, 1149 (9th Cir. 2000); Middleton, 768 F.2d at 1085. Habeas
5 corpus cannot be utilized to try state issues de novo. Milton v. Wainwright, 407 U.S. 371, 377
6 (1972).

7 This action is governed by the Antiterrorism and Effective Death Penalty Act of
8 1996 (“AEDPA”). See Lindh v. Murphy, 521 U.S. 320, 336 (1997); Clark v. Murphy, 331 F.3d
9 1062, 1067 (9th Cir. 2003). Title 28 U.S.C. § 2254(d) sets forth the following standards for
10 granting habeas corpus relief:

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

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

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

18 See also Penry v. Johnson, 532 U.S. 782, 792-93 (2001); Williams v. Taylor, 529 U.S. 362
19 (2000); Lockhart v. Terhune, 250 F.3d 1223, 1229 (9th Cir. 2001). If the state court’s decision
20 does not meet the criteria set forth in § 2254(d), a reviewing court must conduct a de novo review
21 of a habeas petitioner’s claims. Delgadillo v. Woodford, 527 F.3d 919, 925 (9th Cir. 2008). See
22 also Frantz v. Hazey, 513 F.3d 1002, 1013 (9th Cir. 2008) (en banc) (“[I]t is now clear both that
23 we may not grant habeas relief simply because of § 2254(d)(1) error and that, if there is such
24 error, we must decide the habeas petition by considering de novo the constitutional issues
25 raised.”).

26 ////

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

13 II. Petitioner’s Claim

14 A. Exhaustion

15 Respondent argues that petitioner’s ineffective assistance of counsel claim is
16 unexhausted because he failed to present it to the California Court of Appeal and, in his petition
17 for review to the California Supreme Court, only mentioned it in passing. See Casey v. Moore,
18 386 F.3d 896, 918 (9th Cir. 2004 (federal constitutional claims not exhausted where raised for
19 first and only time to state’s highest court on discretionary review). (Answer at 6.) The
20 undersigned agrees that the record before this court establishes that petitioner has failed to
21 exhaust his ineffective assistance of counsel claim.

22 The exhaustion of state court remedies is a prerequisite to the granting of a
23 petition for writ of habeas corpus. 28 U.S.C. § 2254(b)(1). If exhaustion is to be waived, it must
24 be waived explicitly by respondent’s counsel. 28 U.S.C. § 2254(b)(3). A waiver of exhaustion,
25 thus, may not be implied or inferred. A petitioner satisfies the exhaustion requirement by
26 providing the highest state court with a full and fair opportunity to consider all claims before

1 presenting them to the federal court. Picard v. Connor, 404 U.S. 270, 276 (1971); Middleton v.
2 Cupp, 768 F.2d 1083, 1086 (9th Cir.), cert. denied, 478 U.S. 1021 (1986). This requires
3 petitioner to have “characterized the claims he raised in state proceedings specifically as federal
4 claims.” Castillo v. McFadden, 399 F.3d 993, 999 (9th Cir. 2005) (emphasis in original)
5 (internal citation omitted). “In short, the petitioner must have either referenced specific
6 provisions of the federal constitution or cited to federal or state cases involving the legal standard
7 for a federal constitutional violation. Mere ‘general appeals to broad constitutional principles,
8 such as due process, equal protection, and the right to a fair trial,’ do not establish exhaustion.”
9 Id. (quoting Hiiivala v. Wood, 195 F.3d 1098, 1106 (9th Cir. 1999)).

10 Here, not only did petitioner raise his ineffective assistance claim for the first time
11 on discretionary review to the California Supreme Court, but he referred to the potential claim
12 only briefly and without any citation to authority. This does not constitute a “full and fair”
13 presentation so as to satisfy the exhaustion requirement.

14 Respondent correctly notes, however, that a federal court has the power to deny an
15 unexhausted habeas claim on the merits. 28 U.S.C. § 2254(b)(2). A federal court considering a
16 habeas petition may deny an unexhausted claim on the merits when it is perfectly clear that the
17 claim is not “colorable.” Cassett v. Stewart, 406 F.3d 614, 624 (9th Cir. 2005). Accordingly, the
18 undersigned now turns to the merits of petitioner’s claim.

19 B. Ineffective Assistance

20 Petitioner alleges that he was denied the effective assistance of counsel. The
21 United States Supreme Court has enunciated the standards for judging ineffective assistance of
22 counsel claims. See Strickland v. Washington, 466 U.S. 668 (1984). First, a defendant must
23 show that, considering all the circumstances, counsel’s performance fell below an objective
24 standard of reasonableness. Strickland, 466 U.S. at 688. To this end, the defendant must identify
25 the acts or omissions that are alleged not to have been the result of reasonable professional
26 judgment. Id. at 690. The court must then determine whether in light of all the circumstances,

1 the identified acts or omissions were outside the wide range of professional competent assistance.
2 Id. Second, a defendant must affirmatively prove prejudice. Id. at 693. Prejudice is found where
3 “there is a reasonable probability that, but for counsel's unprofessional errors, the result of the
4 proceeding would have been different.” Id. at 694. A reasonable probability is “a probability
5 sufficient to undermine confidence in the outcome.” Id. See also United States v. Murray, 751
6 F.2d 1528, 1535 (9th Cir. 1985); United States v. Schaflander, 743 F.2d 714, 717-718 (9th Cir.
7 1984)(per curiam).

8 Here, petitioner argues that his attorney’s failure to “renew” the § 1385 motion to
9 strike the prior felony after petitioner had entered his no contest plea pursuant to the plea
10 agreement constitutes ineffective assistance of counsel. (Pet. at 7¹.) Petitioner states that at the
11 September 18, 2006 hearing his “trial counsel apparently took the 1385 motion off the court’s
12 calendar and preserved the right to renew the 1385 motion at a later (or, perhaps, an appropriate)
13 time.” (Id. at 10.) Petitioner complains that, while his attorney could have sought a § 1385
14 dismissal of petitioner’s prior strike any time before entry of judgment, he failed to pursue this
15 line of defense. Rather, petitioner claims, his attorney advised him to take the plea and then, “to
16 Petitioner’s detriment, never renewed the 1385 motion.” (Id. at 10-12.)

17 Petitioner’s argument in this regard is disingenuous. It fails to acknowledge that
18 in admitting to a prior strike as part of the plea bargain he entered into, petitioner was clearly
19 giving up his right to contest the prior strike allegation notwithstanding the § 1385 motion
20 previously filed by his counsel. As respondent observes, once petitioner admitted to the prior
21 strike at the time he entered his plea on September 18, 2006, the § 1385 motion was moot. In
22 failing to “renew” the § 1385 motion, petitioner’s attorney acted in an objectively reasonable
23 manner. For, it was reasonable to assume that if petitioner attempted to contest the prior felony
24 strike in violation of his plea agreement, the entire plea bargain would unravel and petitioner
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26 ¹ The court refers to the petition by the page numbers assigned by CM/ECF.

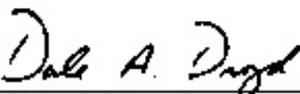
1 would once again be facing a possible twenty-nine year sentence alluded to by the prosecutor.
2 For this same reason, petitioner's attorney did not prejudice petitioner by failing to renew the
3 § 1385 motion. Because petitioner has no colorable claim for federal habeas relief, his
4 unexhausted petition should be denied on its merits.

5 CONCLUSION

6 Accordingly, IT IS HEREBY RECOMMENDED that petitioner's application for
7 a writ of habeas corpus (Doc. No. 1) be denied.

8 These findings and recommendations are submitted to the United States District
9 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty-
10 one days after being served with these findings and recommendations, any party may file written
11 objections with the court and serve a copy on all parties. Such a document should be captioned
12 "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections
13 shall be served and filed within fourteen days after service of the objections. Failure to file
14 objections within the specified time may waive the right to appeal the District Court's order.
15 Turner v. Duncan, 158 F.3d 449, 455 (9th Cir. 1998); Martinez v. Ylst, 951 F.2d 1153 (9th Cir.
16 1991). In any objections he elects to file petitioner may address whether a certificate of
17 appealability should issue in the event he elects to file an appeal from the judgment in this case.
18 See Rule 11, Federal Rules Governing Section 2254 Cases (the district court must issue or deny a
19 certificate of appealability when it enters a final order adverse to the applicant).

20 DATED: August 12, 2010.

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