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

DAYLE WAYNE JONES,

Petitioner,

No. CIV S-09-2169 JAM GGH P

vs.

MATTHEW CATE,

Respondent.

FINDINGS & RECOMMENDATIONS

I. Introduction

Petitioner is a state prisoner proceeding pro se with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner challenges his 2006 guilty plea to dissuading a witness, attempting to dissuade a witness and evading a police officer. He admitted two prior strike convictions and was sentenced to a term of 25 years to life. This action is proceeding on the original petition filed August 6, 2009, raising the following claims: 1) the trial court erred in denying petitioner’s motion to substitute counsel, framed in state court as a Marsden¹ motion; 2) counsel for the plea was ineffective for not obtaining a change of venue; 3) counsel for the plea

¹ In People v. Marsden, 2 Cal.3d 118 (1970), the California Supreme Court held that a trial court must permit a defendant seeking a substitution of counsel to specify the reasons for his request.

1 was ineffective for failing to attack a prior conviction; 4) counsel for the plea was ineffective for
2 failing to obtain the medical records of the victim; and 5) petitioner's substitute counsel was
3 ineffective for failing to move to withdraw the guilty plea. ² Petition at 5-11.

4 After carefully considering the record, the court recommends that the petition be
5 denied.

6 II. Anti-Terrorism and Effective Death Penalty Act (AEDPA)

7 The Anti-Terrorism and Effective Death Penalty Act (AEDPA) "worked
8 substantial changes to the law of habeas corpus," establishing more deferential standards of
9 review to be used by a federal habeas court in assessing a state court's adjudication of a criminal
10 defendant's claims of constitutional error. Moore v. Calderon, 108 F.3d 261, 263 (9th Cir.
11 1997).

12 In Williams (Terry) v. Taylor, 529 U.S. 362, 120 S. Ct. 1495 (2000), the Supreme
13 Court defined the operative review standard set forth in § 2254(d). Justice O'Connor's opinion
14 for Section II of the opinion constitutes the majority opinion of the court. There is a dichotomy
15 between "contrary to" clearly established law as enunciated by the Supreme Court, and an
16 "unreasonable application of" that law. Id. at 1519. "Contrary to" clearly established law applies
17 to two situations: (1) where the state court legal conclusion is opposite that of the Supreme
18 Court on a point of law, or (2) if the state court case is materially indistinguishable from a
19 Supreme Court case, i.e., on point factually, yet the legal result is opposite.

20 "Unreasonable application" of established law, on the other hand, applies to
21 mixed questions of law and fact, that is, the application of law to fact where there are no factually
22 on point Supreme Court cases which mandate the result for the precise factual scenario at issue.
23 Williams (Terry), 529 U.S. at 407-08, 120 S. Ct. at 1520-1521 (2000). It is this prong of the
24 AEDPA standard of review which directs deference to be paid to state court decisions. While the

25
26 ² For the reasons discussed below the undersigned has addressed petitioner's claims in a
different order than presented in the petition and answer.

1 deference is not blindly automatic, “the most important point is that an *unreasonable* application
2 of federal law is different from an incorrect application of law....[A] federal habeas court may not
3 issue the writ simply because that court concludes in its independent judgment that the relevant
4 state-court decision applied clearly established federal law erroneously or incorrectly. Rather,
5 that application must also be unreasonable.” Williams (Terry), 529 U.S. at 410-11, 120 S. Ct. at
6 1522 (emphasis in original). The habeas corpus petitioner bears the burden of demonstrating the
7 objectively unreasonable nature of the state court decision in light of controlling Supreme Court
8 authority. Woodford v. Viscotti, 537 U.S. 19, 123 S. Ct. 357 (2002).

9 “Clearly established” law is law that has been “squarely addressed” by the United
10 States Supreme Court. Wright v. Van Patten, 552 U.S. 120, 125, 128 S.Ct. 743, 746 (2008).
11 Thus, extrapolations of settled law to unique situations will not qualify as clearly established.
12 See e.g., Carey v. Musladin, 549 U.S. 70, 76, 127 S.Ct. 649, 653-54 (2006) (established law not
13 permitting state sponsored practices to inject bias into a criminal proceeding by compelling a
14 defendant to wear prison clothing or by unnecessary showing of uniformed guards does not
15 qualify as clearly established law when spectators’ conduct is the alleged cause of bias injection).

16 The state courts need not have cited to federal authority, or even have indicated
17 awareness of federal authority in arriving at their decision. Early v. Packer, 537 U.S. 3, 123 S.
18 Ct. 362 (2002). Nevertheless, the state decision cannot be rejected unless the decision itself is
19 contrary to, or an unreasonable application of, established Supreme Court authority. Id. An
20 unreasonable error is one in excess of even a reviewing court’s perception that “clear error” has
21 occurred. Lockyer v. Andrade, 538 U.S. 63, 75-76, 123 S. Ct. 1166, 1175 (2003). Moreover, the
22 established Supreme Court authority reviewed must be a pronouncement on constitutional
23 principles, or other controlling federal law, as opposed to a pronouncement of statutes or rules
24 binding only on federal courts. Early v. Packer, 537 U.S. at 9, 123 S. Ct. at 366.

25 However, where the state courts have not addressed the constitutional issue in
26 dispute in any reasoned opinion, the federal court will independently review the record in

1 adjudication of that issue. “Independent review of the record is not de novo review of the
2 constitutional issue, but rather, the only method by which we can determine whether a silent state
3 court decision is objectively unreasonable.” Himes v. Thompson, 336 F.3d 848, 853 (9th Cir.
4 2003).

5 III. Background

6 The opinion of the California Court of Appeal contains a factual summary. After
7 independently reviewing the record, the court finds this summary to be accurate and adopts it
8 below.

9 On July 4, 2004, [petitioner] got into an argument with his wife, D., after she
10 consoled their young son, whom [petitioner] had accidentally hit while closing a
11 sliding glass door. As they argued, [petitioner] placed his hands on D.'s shoulder
and face and shoved her to the couch with both hands. Their son witnessed the
fight.

12 The next day, D. heard her son crying. She went to investigate and saw him
13 stumble in his bedroom. D. asked [petitioner] what happened and he told her it
14 was none of her business. D. responded by saying perhaps this was for children's
protective services. [Petitioner] responded that if D. called the authorities he
would kill her before they arrived.

15 [Petitioner] grabbed D. by the arms and pushed her from the bedroom to the
16 kitchen, where she struck the stove and counter. As a result of [petitioner's]
17 assault, D. sustained bruises to her hip, lower back, and arm. D. subsequently
secured an emergency protective order, which was served on [petitioner].

18 Amador County Sheriff's Sergeant Gary Redman had been told that [petitioner]
19 had been at D.'s place of employment in violation of the protective order. On July
20 7, 2004, around 11:50 a.m., Redman activated his lights and siren after seeing
21 [petitioner] in his truck. [Petitioner] first slowed down to pull over and then
rapidly accelerated to between 45 and 55 miles per hour. During the chase
[petitioner] reached speeds of 85 to 90 miles per hour, forced numerous vehicles
off the road, and collided with a car. [Petitioner] was eventually stopped and
arrested.

22 Between July 7, 2004, and April 20, 2005, [petitioner] made a series of telephone
23 calls to his wife, his brother, his mother, and other people in an attempt to prevent
24 his wife, son, and others from testifying against him. The calls were recorded and
transcribed.

25 People v. Jones, 2008 WL 510558 at *1.

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1 IV. Analysis

2 Standards for an Evidentiary Hearing

3 The ordinary standards under federal law for an evidentiary hearing, which are
4 well known and well established in the Ninth Circuit, are as follows. “To obtain an evidentiary
5 hearing on an ineffective assistance of counsel claim, a habeas petitioner must establish that (1)
6 his allegations, if proven, would constitute a colorable claim, thereby entitling him to relief and
7 (2) the state court trier of fact has not, after a full and fair hearing, reliably found the relevant
8 facts.” Correll v Stewart, 137 F.3d 1404, 1413 (9th Cir. 1998). Nevertheless, the court does not
9 have to hold an evidentiary hearing when the record clearly refutes the collateral factual
10 allegations raised by petitioner. Schiro v Landrigan, 550 U.S. 465, 127 S. Ct. 1933, 1940
11 (2007). Moreover, Schiro also announced that in determining whether to grant an evidentiary
12 hearing the federal court must apply the AEDPA deferential standards to legal and factual
13 questions necessarily reached by the state courts. Id. Thus, for example, if the reasons for
14 counsel actions were at issue, but under deferential standards, the court could not find prejudice,
15 no evidentiary hearing would be necessary.

16 In addition, the undersigned emphasizes that in order to obtain an evidentiary
17 hearing, the claim, when viewed in light of the allegations, must be colorable. “It is well settled
18 that ‘[c]onclusory allegations which are not supported by a statement of specific facts do not
19 warrant habeas relief.’” Jones v. Gomez, 66 F.3d 199, 204 (9th Cir. 1995) quoting James v.
20 Borg, 24 F.3d 20, 26 (9th Cir. 1994). This includes the recitation of critical facts supporting the
21 alleged violation, including any requirement of prejudice. The necessity for the statement of a
22 colorable claim is important for the resolution of several claims herein without holding an
23 evidentiary hearing.

24 For the reasons set forth below, petitioner has not set forth colorable claims that
25 would require an evidentiary hearing regarding any of the claims in the petition.

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1 Claim 1- Substitute Counsel Denied (Related to Marsden Motion)

2 Petitioner first argues that his “motion for substitute counsel was improperly
3 denied in violation of 6th Amendment right to effective assistance of counsel.” Respondent
4 considers this simply an assertion that petitioner’s Marsden motion was improperly denied, and
5 thus, simply an assertion of state law violation. However, respondent cannot restate petitioner’s
6 expressly stated claim simply to fit an argument respondent would like to make. While the
7 federal claim, as discussed below, has much similarity with the state claim, it is still a federal
8 claim.³

9 Legal Standard

10 A defendant has a Sixth Amendment right to conflict-free representation.
11 United States v. Moore, 159 F.3d 1154, 1157 (9th Cir. 1998). Not every
12 conflict between a defendant and counsel, however, implicates the Sixth
13 Amendment. See Schell v. Witek, 218 F.3d 1017, 1027 (9th Cir. 2000).
14 As the Supreme Court has explained, the right to counsel does not
15 guarantee “a right to counsel with whom the accused has a ‘meaningful
16 attorney-client relationship.’” Morris v. Slappy, 461 U.S. 1, 3-4, 103 S.Ct.
17 1610 (1983). Nevertheless, where a court “compel[s] one charged with [a]
18 grievous crime to undergo a trial with the assistance of an attorney with
19 whom he has become embroiled in [an] irreconcilable conflict[it]
20 deprive[s] him of the effective assistance of any counsel whatsoever.”
21 Brown v. Craven, 424 F.2d 1166, 1170 (9th Cir. 1970). Thus, a reviewing
22 court must assess the nature and extent of the conflict and whether that
23 conflict deprived the defendant of representation guaranteed by the Sixth
24 Amendment. Schell, 218 F.3d at 1027.

18 Daniels v. Woodford, 428 F.3d 1181, 1196-97 (9th Cir. 2005)⁴

19 Discussion

20 Although the Court of Appeal discussed this issue in the context of a Marsden

22 ³ Similarly, respondent’s tautological statement that the claims have been exhausted to the
23 extent they were exhausted will not permit an argument now that exhaustion of the *federal*
24 substitution of counsel claim has not been performed. Respondent has waived any exhaustion
25 claim by indicating his position that the claim is exhausted and by not actually arguing a lack of
26 exhaustion.

25 ⁴ Although Daniels was not an AEDPA case, the law on this point is reflective of
26 established Supreme Court authority. See McCord v. California, 377 Fed. Appx. 631 (9th Cir.
2010).

1 motion, its reasoning is instructive to the federal issue:

2 Four months after pleading guilty and admitting prior convictions, [petitioner]
3 made a Marsden motion. In support of his motion, he told the court that his
4 counsel had never filed a change of venue motion that [petitioner] had requested.
5 He also complained about counsel's failure to obtain the transcripts from the
6 preliminary hearing for his prior robbery conviction and counsel's failure to obtain
7 [petitioner's] medical records.

8 Counsel replied by telling the court he had been unable to find someone to do the
9 polling to support a change of venue motion, but had told the prosecutor that he
10 would file the motion if the prosecutor continued to make statements about the
11 case to the press. The prosecutor agreed to stop making comments about the case,
12 so counsel felt a change of venue motion was no longer necessary.

13 Counsel told the court he “honestly believe[d]” he had the preliminary hearing
14 transcripts from the prior robbery and “remember[ed]” reading them. He could
15 not find the transcripts, but counsel felt they would not “undermine that robbery
16 significantly.” Counsel had no explanation for not getting [petitioner's] medical
17 records, and told the court [petitioner] had also asked counsel to get his wife's
18 psychological records, which he had not yet done.

19 The trial court stated [petitioner] had not been in the news every day, and a change
20 of venue motion was unlikely to succeed. Regarding the medical records, the
21 court was not sure how they would be relevant to his sentence. The court also
22 informed [petitioner] that the preliminary hearing transcript from the prior robbery
23 conviction would be of very limited utility to his defense. After an exchange
24 about [petitioner's] possible sentence, the court denied the Marsden motion.

25 [Petitioner] contends the trial court was presented with three reasons that justified
26 granting the Marsden motion-counsel's failure to secure the preliminary hearing
transcript from the prior conviction, failing to get the wife's medical records, and
not filing a change of venue motion. We disagree.

A defendant is entitled to discharge his appointed counsel only if the record
clearly shows counsel is not providing adequate representation or that defendant
and counsel have become so embroiled in conflict that ineffective representation
will likely result. (People v. Barnett (1998) 17 Cal.4th 1044, 1085.) We review
the trial court's denial of a Marsden motion for abuse of discretion, and will find
such an abuse only where the defendant has shown the failure to replace appointed
counsel would substantially impair defendant's right to assistance of counsel.
(Ibid.)

We agree with the trial court that [petitioner] failed to carry his burden of showing
ineffective representation. The trial court, a member of the community, indicated
the change of venue motion was not likely to succeed. Counsel told the court he
had used the threat of a change of venue motion to get the prosecution to refrain
from talking to the press about the case. The record provides us with no reason to
conclude [petitioner] was at risk of an unfair venue or that the trial court abused
its discretion in determining [petitioner] was not prejudiced by counsel's failure to
file the change of venue motion.

1 Nor can we find counsel's failure to locate the preliminary hearing transcripts
2 justification for granting a Marsden motion. While the circumstances of a prior
3 conviction are relevant on a motion to dismiss a strike (People v. Williams (1998)
4 17 Cal.4th 148, 161), we cannot say [petitioner's] allegations established a
5 likelihood of prejudice resulting from counsel's actions.

6 The prior robbery conviction stemmed from an incident in which [petitioner] was
7 found inside the victim's sports utility vehicle (SUV) in a parking lot. The
8 victim's husband parked directly behind the SUV, blocking [petitioner] in.
9 [Petitioner] started the SUV, put it into reverse, and hit the husband's car.
10 [Petitioner] then took a cell phone and the keys from the SUV and fled; he was
11 eventually apprehended.

12 At the Marsden hearing, [petitioner] told the court he wanted the preliminary
13 hearing transcript because it contained testimony that the vehicle [petitioner] hit
14 was not parked and [petitioner] did not intend to ram the vehicle.

15 [Petitioner's] allegation concerning what the preliminary hearing transcript of his
16 prior robbery conviction might show would not have affected the court's
17 sentencing decision. This is because [petitioner] admitted all of the elements of
18 that crime with his guilty plea. The court was also presented with the rest of his
19 criminal record, his current felony convictions, and the numerous counts of
20 domestic abuse that were dismissed with a Harvey [citation omitted] waiver.

21 A sentencing court has only limited discretion to strike a prior felony conviction
22 in the furtherance of justice. (People v. Superior Court (Romero) (1996) 13
23 Cal.4th 497, 530.) Any failure by trial counsel regarding the preliminary hearing
24 transcript of the prior robbery did not prejudice [petitioner].

25 [Petitioner's] final contention regarding the Marsden motion, that counsel was
26 ineffective for failing to seek D.'s psychological records, was brought to the trial
court's attention by counsel rather than by [petitioner]. While his wife's mental
health records could have been relevant had defendant gone to trial, defendant
raised his Marsden motion after pleading guilty.

We also reject [petitioner's] contention that examination of D.'s medical records
might have made counsel aware that D. would be unwilling to go through the
rigors of a trial. D. was not the only witness to [petitioner's] attacks against her.
Their son also told officers that he saw [petitioner] push his mother onto the
couch and that he had witnessed prior attacks by [petitioner] against her. The
letter submitted at the restitution hearing does not indicate that D. was too
incapacitated to go through the rigors of a trial. Any contention that she might
have been unwilling to go through a trial is speculative and not a ground for
granting the Marsden motion.

Confronted with the Marsden motion, the trial court gave [petitioner] a chance to
explain his dissatisfaction with counsel, and required counsel to respond where
appropriate. [Petitioner] has not "shown that a failure to replace the appointed
attorney would substantially impair the right to assistance of counsel" or that he
has received inadequate representation from his appointed counsel. (People v.
Smith (1993) 6 Cal.4th 684, 696.) The trial court's denial of the Marsden motion

1 was not an abuse of discretion.

2 People v. Jones, 2008 WL 510558 at *1-3.

3 Petitioner has failed to set forth any facts demonstrating the state court opinion is
4 contrary to any established Supreme Court authority. The facts set forth in the opinion show only
5 a post-hoc disagreement of tactics or performance. Petitioner merely states herein that the trial
6 court decision was incorrect without setting forth any arguments or factual background to his
7 claim. Instead of setting forth factual allegations, petitioner requests an evidentiary hearing to
8 shed light on his claim.

9 However, petitioner must allege some facts showing that communication with his
10 counsel had broken down, not merely that he disagreed with his counsel's tactics or performance.
11 And, as shown below, petitioner cannot demonstrate any prejudice stemming from his
12 disagreements with counsel—even if some of these disagreements had been raised prior to his
13 guilty plea and not months afterwards. The court will not hold an evidentiary hearing on the
14 mere chance that petitioner might obtain some facts as to relationship breakdown— facts which
15 petitioner has not even alleged here. As this claim is meritless, petitioner's request for an
16 evidentiary hearing is denied. Moreover, as petitioner has failed to show a violation of
17 established Supreme Court authority this claim should be denied.

18 Claims 2-4: Ineffective Assistance of Counsel

19 In the instant federal petition, petitioner makes three allegations of ineffective
20 assistance of counsel based on the claims raised in the Marsden hearing. Petitioner alleges that
21 counsel for the plea was ineffective for not obtaining a change of venue, failing to attack a prior
22 conviction and failing to obtain the medical records of the victim.

23 While these claims were raised in the federal petition it is not entirely clear if they
24 were properly exhausted on direct appeal.⁵ The California Court of Appeal opinion, while
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26 ⁵ Respondent has not raised this issue.

1 addressing these claims with respect to the Marsden motion, did not address the claims with
2 respect to a separate claim of ineffective assistance of counsel. The undersigned does not have a
3 copy of petitioner’s brief to the Court of Appeal, so it is unknown what issues were raised or how
4 they were raised. Yet, petitioner’s brief to the California Supreme Court did raise ineffective
5 assistance of counsel with respect to these three claims, and these claims were summarily denied.

6 Rather than order briefing on the exhaustion issue, the undersigned will look to
7 the merits of these claims, as respondent has waived any exhaustion issue and, in any event, a
8 petition may be denied on the merits without exhaustion of state court remedies. 28 U.S.C. §
9 2254(b)(2).

10 Legal Standard

11 If a state court denies constitutional claims without an explicated decision, a
12 federal court reviewing a habeas corpus application pursuant to § 2254(a) “ha[s] no basis other
13 than the record for knowing whether the state court correctly identified the governing legal
14 principle or was extending the principle into a new context.” Delgado v. Lewis, 223 F.3d 976,
15 981-82 (9th Cir. 2000). “While Supreme Court precedent is the only authority that is controlling
16 under AEDPA, we look to Ninth Circuit case law as ‘persuasive authority for purposes of
17 determining whether a particular state court decision is an “unreasonable application” of
18 Supreme Court law.’ ” Luna v. Cambra, 306 F.3d 954, 960 (9th Cir.2002). Thus, pursuant to
19 Delgado, the Court must conduct an independent review of the record to determine whether the
20 state court’s decision was objectively unreasonable. In Delgado, the Ninth Circuit held that,
21 “Federal habeas review is not de novo when the state court does not supply reasoning for its
22 decision, but an independent review of the record is required to determine whether the state court
23 clearly erred in its application of controlling federal law.” 223 F.3d at 982; see also Luna, 306
24 F.3d at 954 (quoting Fisher v. Roe, 263 F.3d 906, 915 (9th Cir. 2001) (internal citation omitted)
25 (“We reverse only if ‘a careful review of the record and the applicable case law leaves us with
26 the “firm conviction” that the state court was wrong.’ ”)).

1 In Strickland v. Washington, 466 U.S. 668, 694, 104 S.Ct. 2052 (1984), the
2 Supreme Court held that there are two components to an ineffective assistance of counsel claim:
3 “deficient performance” and “prejudice.” The Strickland test applies to ineffective assistance of
4 counsel claims relating from the plea process. See Turner v. Calderon, 281 F.3d 851, 879 (9th
5 Cir. 2002) (citing Hill, 474 U.S. at 57-58).

6 “Deficient performance” in this context means unreasonable representation falling
7 below professional norms prevailing at the time of trial. Strickland, 466 U.S. at 688-89. To
8 show “deficient performance,” petitioner must overcome a “strong presumption” that his lawyer
9 “rendered adequate assistance and made all significant decisions in the exercise of reasonable
10 professional judgment.” Id. at 690. Further, petitioner “must identify the acts or omissions of
11 counsel that are alleged not to have been the result of reasonable professional judgment.” Id.
12 The Court must then “determine whether, in light of all the circumstances, the identified acts or
13 omissions were outside the range of professionally competent assistance.” Id. The Supreme
14 Court in Strickland recognized that “it is all too easy for a court, examining counsel's defense
15 after it has proved unsuccessful, to conclude that a particular act or omission of counsel was
16 unreasonable.” Id. at 689. Accordingly, to overturn the strong presumption of adequate
17 assistance, petitioner must demonstrate that “the challenged action cannot reasonably be
18 considered sound trial strategy under the circumstances of the case.” Lord v. Wood, 184 F.3d
19 1083, 1085 (9th Cir. 1999). In the context of a guilty plea, “the ineffectiveness inquiry probes
20 whether the alleged ineffective assistance impinged on the defendant's ability to enter an
21 intelligent, knowing and voluntary plea of guilty.” See Lambert v. Blodgett, 393 F.3d 942, 979
22 (9th Cir. 2004).

23 To meet his burden of showing the distinctive kind of “prejudice” required by
24 Strickland, petitioner must affirmatively “show that there is a reasonable probability that, but for
25 counsel's unprofessional errors, the result of the proceeding would have been different. A
26 reasonable probability is a probability sufficient to undermine confidence in the outcome.”

1 Strickland, 466 U.S. at 694; see also Lockhart v. Fretwell, 506 U.S. 364, 372, 113 S.Ct. 838, 122
2 L.Ed.2d 180 (1993) (noting that the “prejudice” component “focuses on the question whether
3 counsel's deficient performance renders the result of the trial unreliable or the proceeding
4 fundamentally unfair”). In the context of a guilty plea challenge, in order to satisfy the Strickland
5 prejudice requirement, the defendant must show there is a reasonable probability that, but for
6 counsel's errors, he would not have pleaded guilty and would have insisted on going to trial. Hill
7 v. Lockhart, 474 U.S. 52, 58-59, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985); United States v. Howard,
8 381 F.3d 873, 882 (9th Cir.2004) (“To satisfy Strickland's prejudice prong, [a defendant] must
9 allege that but for counsel's errors, he would either have gone to trial or received a better plea
10 bargain.”).

11 Change of Venue

12 Petitioner first argues that counsel was ineffective for failing to move for a change
13 of venue.

14 The Sixth Amendment guarantees every defendant the right to a fair trial by an
15 impartial jury. “If pretrial publicity is such that it is impossible to seat such a jury, a judge must
16 grant a defendant's request for a change of venue.” Randolph v. California, 380 F.3d 1133, 1142
17 (9th Cir. 2004). The requirement of an impartial jury, however, does not require “a jury
18 completely ignorant of the facts.” United States v. Sherwood, 98 F.3d 402, 410 (9th Cir. 1996).

19 In order to establish a constitutional violation on the basis of pretrial publicity, the
20 defendant must establish either actual or presumed prejudice. Randolph, 380 F.3d at 1142.

21 Actual prejudice is established when the defendant demonstrates that “jurors exhibited actual
22 partiality or hostility that could not be laid aside.” Id. “Prejudice is presumed only in extreme
23 instances ‘when the record demonstrates that the community where the trial was held was
24 saturated with prejudicial and inflammatory media publicity about the crime.’” Daniels v.
25 Woodford, 428 F.3d 1181, 1211 (9th Cir. 2005) (quoting Ainsworth v. Calderon, 138 F.3d 787,
26 795 (9th Cir. 1998), as amended, 152 F.3d 1223).

1 Petitioner alleges that a change of venue should have been filed by counsel due to
2 the prejudicial pretrial publicity. However, petitioner does not describe the publicity that would
3 have allegedly implicated his right to a fair trial.⁶ During the Marsden hearing, the trial court
4 stated the following:

5 . . . in terms of change of venue, the rule generally is that, you know, just because
6 you ask for it doesn't mean that the attorney feels that he needs to do it. I can
7 understand his perspective in this case, far cry from the Peterson case.⁷ You
8 haven't been in the news everyday since the event took place. I tend to concur
9 that your chances of prevailing on change of venue would be difficult, just based
10 on what's happened in this community and the level of publication that was here.

11 Reporters Transcript 1, Marsden Hearing (RT1) at 95.

12 On appeal, the Court of Appeal also discussed lack of merit with respect to
13 petitioner's requested change of venue motion.

14 Counsel replied by telling the court he had been unable to find someone to do the
15 polling to support a change of venue motion, but had told the prosecutor that he
16 would file the motion if the prosecutor continued to make statements about the
17 case to the press. The prosecutor agreed to stop making comments about the case,
18 so counsel felt a change of venue motion was no longer necessary. . .

19 . . .

20 We agree with the trial court that [petitioner] failed to carry his burden of showing
21 ineffective representation. The trial court, a member of the community, indicated
22 the change of venue motion was not likely to succeed. Counsel told the court he
23 had used the threat of a change of venue motion to get the prosecution to refrain
24 from talking to the press about the case. The record provides us with no reason to
25 conclude [petitioner] was at risk of an unfair venue or that the trial court abused
26 its discretion in determining [petitioner] was not prejudiced by counsel's failure to
file the change of venue motion.

27 People v. Jones, 2008 WL 510558 at *1-2.

28 Here, there is no evidence of any pretrial publicity that would rise to the level
29 necessary for a change of venue motion. There is no indication that the size of the community or

30 ⁶ There are references to statements from the prosecutor, but none of these statements
31 have been provided to the court.

32 ⁷ The undersigned believes the trial court was referring to the Scott Peterson murder case
33 and notes the instant case dealt with assault, dissuading a witness and evading police.

1 petitioner's status within the community somehow would have implicated his right to a fair and
2 impartial trial. Petitioner does not explain why his violent domestic dispute, and charges which
3 stemmed from that dispute, would have aroused the citizenry to the point where most would have
4 been biased against him. In fact, petitioner has not even described the alleged negative pretrial
5 publicity. Under these circumstances, petitioner fails to meet either prong of the Strickland
6 standard. Petitioner's inability to even posit facts about the need to change venue does not
7 permit an evidentiary hearing on why counsel did not so move. Thus, this claim should be
8 denied.

9 Prior Felony

10 Petitioner next contends that counsel was ineffective for failing to obtain the
11 transcripts related to a prior [robbery] conviction in order to strike that conviction.

12 The Court of Appeal opinion sets forth the relevant background of this claim:

13 Counsel told the court he “honestly believe[d]” he had the preliminary hearing
14 transcripts from the prior robbery and “remember[ed]” reading them. He could
15 not find the transcripts, but counsel felt they would not “undermine that robbery
16 significantly.”

15 . . .

16 Nor can we find counsel's failure to locate the preliminary hearing transcripts
17 justification for granting a Marsden motion. While the circumstances of a prior
18 conviction are relevant on a motion to dismiss a strike (People v. Williams (1998)
19 17 Cal.4th 148, 161), we cannot say [petitioner's] allegations established a
20 likelihood of prejudice resulting from counsel's actions.

19 The prior robbery conviction stemmed from an incident in which [petitioner] was
20 found inside the victim's sports utility vehicle (SUV) in a parking lot. The
21 victim's husband parked directly behind the SUV, blocking [petitioner] in.
22 [Petitioner] started the SUV, put it into reverse, and hit the husband's car.
23 [Petitioner] then took a cell phone and the keys from the SUV and fled; he was
24 eventually apprehended.

23 At the Marsden hearing, [petitioner] told the court he wanted the preliminary
24 hearing transcript because it contained testimony that the vehicle [petitioner] hit
25 was not parked and [petitioner] did not intend to ram the vehicle.

25 [Petitioner's] allegation concerning what the preliminary hearing transcript of his
26 prior robbery conviction might show would not have affected the court's
sentencing decision. This is because [petitioner] admitted all of the elements of
that crime with his guilty plea. The court was also presented with the rest of his

1 criminal record, his current felony convictions, and the numerous counts of
2 domestic abuse that were dismissed with a Harvey [citation omitted] waiver.

3 A sentencing court has only limited discretion to strike a prior felony conviction
4 in the furtherance of justice. (People v. Superior Court (Romero) (1996) 13
5 Cal.4th 497, 530.) Any failure by trial counsel regarding the preliminary hearing
6 transcript of the prior robbery did not prejudice [petitioner].

7 People v. Jones, 2008 WL 510558 at *1-3.

8 At his plea colloquy petitioner admitted the prior conviction related to the
9 robbery. Reporter’s Transcript 2 (RT2) at 69-70. It is not disputed that the prior crime was a
10 felony from 1998. The United States Supreme Court held in Lackawanna County District
11 Attorney v. Coss, 532 U.S. 394, 121 S.Ct. 1567 (2001), that “once a state conviction is no longer
12 open to direct or collateral attack in its own right because the defendant failed to pursue those
13 remedies while they were available the conviction may be regarded as conclusively valid. If
14 that conviction is later used to enhance a criminal sentence, the defendant generally may not
15 challenge the enhanced sentence through a petition under § 2254 on the ground that the prior
16 conviction was unconstitutionally obtained.” Lackawanna, 532 U.S. at 403-04.

17 In the instant case, it appears that petitioner does not challenge the validity of the
18 prior strike, rather he argues that counsel was ineffective for failing to argue that the
19 circumstances of the prior felony were such that the trial court in the instant case should not have
20 considered it. If such an argument could be made, it needed to be made because avoidance of the
21 Three Strikes sentence depended upon the discretionary striking of the prior.

22 The Marsden hearing was held on February 7, 2006. RT1 at 1. On that date,
23 petitioner presented his arguments concerning the transcript and why he felt counsel was
24 ineffective for not obtaining them prior to the plea to facilitate the striking the felony. However,
25 petitioner still had the opportunity to file a Romero motion to strike the felony.⁸ Yet, on March

26 ⁸ In People v. Superior Court (Romero), 13 Cal. 4th 497 (1996), the California Supreme Court held a trial judge has the discretion to strike a prior felony conviction, within the meaning of California's “Three Strikes Law” for the purposes of sentencing.

1 28, 2006, petitioner withdrew his Romero motion, even though he still had the ability to
2 challenge the strike. RT2 at 113. In the instant petition, petitioner does not address why he
3 chose not to attack the prior conviction at sentencing and instead wait until now.

4 While petitioner faults counsel for not obtaining the transcript, counsel testified
5 that while he no longer had the transcript in his possession, he had read the transcript and did not
6 feel it would undermine the felony. Regardless of the fact that counsel read the transcript, the
7 Court of Appeal also discussed the facts of petitioner's claim and found that petitioner's prior
8 felony would not have been struck. The undersigned repeats that description set forth in the facts
9 for the first claim, supra:

10 The prior robbery conviction stemmed from an incident in which
11 [petitioner] was found inside the victim's sports utility vehicle (SUV) in a
12 parking lot. The victim's husband parked directly behind the SUV,
13 blocking [petitioner] in. [Petitioner] started the SUV, put it into reverse,
14 and hit the husband's car. [Petitioner] then took a cell phone and the keys
15 from the SUV and fled; he was eventually apprehended.

16 The record supplied to the court does not contain a preliminary hearing transcript from the prior
17 robbery. It does, however, contain the arrest reports from that prior incident. CT2 at 498-511
18 Those reports have been reviewed in detail, and may well have been the basis for the Court of
19 Appeal's description. More importantly, petitioner does not take issue with the description.

20 In addition, the arrest reports for this prior reference another prior where petitioner
21 was convicted of orchestrating an attempted homicide on a probation officer who managed to
22 survive her gunshot wounds. Petitioner does not contest use of this prior to enhance his sentence.

23 There is little wonder that the Romero motion was withdrawn; it did not have a
24 chance. Whatever the facts are with respect to defense counsel's reading a preliminary hearing
25 transcript, and even assuming counsel did not read the transcript⁹, petitioner could have suffered
26 no prejudice from his counsel's lack of diligence.

⁹ It may be that counsel confused reading the arrest reports with having read a transcript.

1 For all these reasons this claim should be denied.

2 Medical Records

3 Plaintiff's final argument involves counsel's failure to obtain the medical records
4 of the victim.

5 The Court of Appeal opinion sets forth the relevant background of this claim:

6 [Petitioner's] final contention regarding the Marsden motion, that counsel was
7 ineffective for failing to seek D.'s psychological records, was brought to the trial
8 court's attention by counsel rather than by [petitioner]. While his wife's mental
9 health records could have been relevant had defendant gone to trial, defendant
10 raised his Marsden motion after pleading guilty.

11 We also reject [petitioner's] contention that examination of D.'s medical records
12 might have made counsel aware that D. would be unwilling to go through the
13 rigors of a trial. D. was not the only witness to [petitioner's] attacks against her.
14 Their son also told officers that he saw [petitioner] push his mother onto the
15 couch and that he had witnessed prior attacks by [petitioner] against her. The
16 letter submitted at the restitution hearing does not indicate that D. was too
17 incapacitated to go through the rigors of a trial. Any contention that she might
18 have been unwilling to go through a trial is speculative and not a ground for
19 granting the Marsden motion.

20 People v. Jones, 2008 WL 510558 at *3.

21 Even reviewing this claim under an ineffective assistance of counsel standard,
22 petitioner's argument fails. Petitioner's argument is far too tenuous to demonstrate any errors on
23 counsel's behalf. Petitioner is assuming there would have been valuable evidence, but there is no
24 indication that any relevant medical evidence actually existed, petitioner merely theorizes.
25 Moreover, a prediction about whether the victim would be able to testify based on a medical
26 condition set forth in medical records would require extreme speculation except in the clearest of
27 medical situations. Whatever condition the victim had, it certainly did not stop her from
28 obtaining a protective order. Nor did petitioner believe that she would not testify on account of a
29 medical condition; that is why he affirmatively attempted to dissuade her from so doing in the
30 first place. As the state court noted, even if there was medical evidence that could have been
31 used against the victim, or if she did not testify, there was another witness available to testify.
32 Furthermore, any medical evidence would have been irrelevant to the charges of evading a police

1 officer and dissuading witnesses.

2 This claim should be denied.

3 Claim 5- Withdrawal of Guilty Plea

4 Petitioner next argues that his substitute counsel was ineffective for failing to
5 move to withdraw the guilty plea.

6 This claim was also denied on direct appeal by the Court of Appeal.

7 After the trial court denied the Marsden motion, [petitioner] immediately moved
8 to withdraw his guilty plea. The court then appointed another attorney to
9 represent [petitioner] “for the limited purposes of filing, preparing a motion for
10 him to withdraw his plea.” Fifteen days later, substitute counsel informed the
11 court he had obtained copies of the preliminary hearing and felony plea
transcripts, the felony plea and waiver form, had reviewed the probation report,
had spoken with trial counsel, and had met with [petitioner]. Counsel declared he
could “find no legal reason or justification to file a motion to withdraw a guilty
plea” on [petitioner’s] behalf.

12 As justification for this statement, substitute counsel informed the court it was his
13 understanding and belief that [petitioner] “understood the charges pending against
14 him, that he was informed of those charges. He was properly informed of his
15 rights to go to trial” along with his other statutory and constitutional rights.
Substitute counsel stated he would not file a frivolous motion on behalf of
[petitioner]. [Petitioner] expressed his disagreement and requested appointment
of new counsel to file a writ of mandate. The trial court denied the request.

16 [Petitioner] contends the evidence brought forth at the Marsden hearing
17 demonstrates trial counsel was ineffective for allowing [petitioner] to plead guilty,
18 and therefore substitute counsel was ineffective for failing to review the Marsden
transcripts. We disagree.

19 To establish ineffective assistance of counsel, [petitioner] must demonstrate that
20 counsel's performance was deficient and defendant suffered prejudice as a result.
21 (Strickland v. Washington (1984) 466 U.S. 668, 687-688, 691-692 [80 L.Ed.2d
674].) As we have already ruled, [petitioner’s] Marsden motion did not establish
he had been prejudiced by trial counsel's representation. Therefore, trial counsel
was not ineffective in allowing [petitioner] to plead guilty.

22 Nor did substitute counsel render ineffective assistance to [petitioner] by failing to
23 file a motion to withdraw the guilty plea. Penal Code section 1018 provides in
24 relevant part: “On application of the defendant at any time before judgment ..., the
25 court may, ... for a good cause shown, permit the plea of guilty [or no contest] to
26 be withdrawn and a plea of not guilty substituted.... This section shall be liberally
construed to effect these objects and to promote justice.” “Mistake, ignorance or
any other factor overcoming the exercise of free judgment is good cause for
withdrawal of a guilty plea. [Citations.] But good cause must be shown by clear
and convincing evidence.” (People v. Cruz (1974) 12 Cal.3d 562, 566.)

1 Since the Marsden motion did not establish any basis for concluding trial counsel
2 was ineffective, substitute counsel's failure to examine the transcript of the
Marsden hearing did not prejudice [petitioner].

3 Lacking grounds for a motion to vacate the plea, substitute counsel correctly
4 refused to file the motion. Counsel was not required to undertake futile acts or
file a meritless motion. (People v. Anderson (2001) 25 Cal.4th 543, 587.)
5 [Petitioner] has not shown ineffective assistance by either counsel.

6 People v. Jones, 2008 WL 510558 at *3-4.

7 Petitioner requested a new attorney to investigate withdrawing his guilty plea and
8 the trial court complied. The substitute attorney investigated the claims and ultimately felt there
9 was no basis to withdraw the plea. That petitioner did not agree with this decision, will not
10 support a claim of ineffective assistance of counsel. Similar to California law, the Ninth Circuit
11 has held that failure to raise a meritless legal argument does not constitute ineffective assistance
12 of counsel. James v. Borg, 24 F.3d 20, 27 (9th Cir. 1994).

13 Even if substitute counsel erred by not moving to withdraw the plea, petitioner has
14 failed to show that any such motion would have been successful. By all accounts it appears that
15 any motion would have been denied, thus petitioner cannot show prejudice. Each of the
16 allegations plaintiff set forth in the Marsden hearing that he now uses to demonstrate that his plea
17 should be withdrawn, was discussed by the undersigned above and allegations were found to be
18 meritless. Petitioner's claim herein is likewise is frivolous and should be denied.

19 V. Conclusion

20 As all of petitioner's allegations fail to set forth colorable claims, an evidentiary
21 hearing is not required and this petition should be denied.

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

24 If petitioner files objections, he shall also address if a certificate of appealability
25 should issue and, if so, as to which issues. A certificate of appealability may issue under 28
26 U.S.C. § 2253 "only if the applicant has made a substantial showing of the denial of a

1 constitutional right.” 28 U.S.C. § 2253(c)(2). The certificate of appealability must “indicate
2 which specific issue or issues satisfy” the requirement. 28 U.S.C. § 2253(c)(3).

3 These findings and recommendations are submitted to the United States District
4 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen
5 days after being served with these findings and recommendations, any party may file written
6 objections with the court and serve a copy on all parties. Such a document should be captioned
7 “Objections to Magistrate Judge’s Findings and Recommendations.” Any reply to the objections
8 shall be served and filed within fourteen days after service of the objections. The parties are
9 advised that failure to file objections within the specified time may waive the right to appeal the
10 District Court’s order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

11 Dated: October 8, 2010

/s/ Gregory G. Hollows

UNITED STATES MAGISTRATE JUDGE

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