IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

CHARLIE CHONG THAO,

Petitioner, No. CIV S-09-3572 WBS DAD P

vs.

SWARTHOUTH, Warden, ORDER &

Respondent. FINDINGS AND RECOMMENDATIONS

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Petitioner is a state prisoner proceeding pro se with a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The petition before the court challenges petitioner's judgment of conviction entered in the Sacramento County Superior Court in 2007 for residential burglary, commercial burglary, robbery, kidnapping for the purpose of robbery, false imprisonment, and criminal threats. Petitioner seeks federal habeas relief on the grounds that (1) his trial counsel rendered ineffective assistance by failing to investigate and prepare for trial, specifically by failing to (a) make a discovery motion; (b) prepare jury instructions; (c) hire an investigator or conduct an independent investigation; (d) consult with a "facial expressionist expert"; (e) have an investigator meet with petitioner; (f) object to the admission of petitioner's confession based on a Miranda violation; (g) seek to exclude petitioner's confession based on coercion; (h) call defense witnesses to testify about petitioner's state of mind; (i) call the county

jail psychiatric staff; and (j) obtain a psychiatric evaluation or consult with a psychiatrist; (2) his appellate counsel rendered ineffective assistance by failing to raise the ineffective assistance of trial counsel claims listed above on appeal; and (3) that he is actually innocent. Petitioner also seeks an evidentiary hearing on Claims 1 and 2.

Upon careful consideration of the record and the applicable law, the undersigned will recommend that petitioner's application for habeas corpus relief be denied, in part due to his failure to exhaust all of his claims in state court and in part on the merits. The undersigned will also deny petitioner's request for an evidentiary hearing.

PROCEDURAL BACKGROUND

On November 15, 2007, a Sacramento County Superior Court jury found petitioner guilty of residential burglary and commercial burglary in violation of California Penal Code § 459[1]; robbery in violation of § 211; kidnapping for the purpose of robbery in violation of § 209(b)(1); false imprisonment in violation of § 236; and making criminal threats in violation of § 422. (Lod. Doc. 1 (hereinafter "CT") at 169-170.) On December 14, 2007, petitioner was sentenced to life in state prison with the possibility of parole, plus seven years. (CT 227-230.)

Petitioner appealed his judgment of conviction to the California Court of Appeal for the Third Appellate District. On October 21, 2008, in a reasoned opinion the state appellate court reduced petitioner's sentence to life in prison with the possibility of parole, plus four years and eight months, but otherwise affirmed the judgment. (Lod. Doc. 6 at 11.) Petitioner then filed a petition for review with the California Supreme Court. (Lod. Doc. 7.) On December 23, 2008, the California Supreme Court summarily denied that petition. (Lod. Doc. 8.)

On December 28, 2009, petitioner filed his original federal habeas petition in this court. (Doc. No. 1.) On January 13, 2010, petitioner filed a habeas corpus petition in the Sacramento County Superior Court, which was denied on March 2, 2010. (Lod. Docs. 9, 10.)

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[1] Subsequent statutory references are to the California Penal Code unless otherwise indicated.

On March 18, 2010, the magistrate judge previously assigned to this case recommended that the petition be dismissed on procedural grounds. (Doc. No. 7.) On April 6, 2010, petitioner filed a habeas corpus petition in the California Supreme Court. (Lod. Doc. 11.) On May 11, 2010, the previously assigned magistrate judge vacated his earlier findings and recommendations. (Doc. No. 9). By order dated June 22, 2010, this case was reassigned to the undersigned magistrate judge.[2] (Doc. No. 11.) On October 6, 2010, the undersigned dismissed the original habeas petition and granted petitioner leave to file an amended petition. (Doc. No. 13.) On October 13, 2010, the California Supreme Court summarily denied petitioner's habeas corpus petition. (Lod. Doc. 12.) On November 23, 2010, the undersigned issued findings and recommendations recommending that the federal habeas petition be dismissed without prejudice on procedural grounds. (Doc. No. 16.)

On December 7, 2010, petitioner filed his first amended petition (hereinafter "FAP"). (Doc. 18.) On January 13, 2011, the undersigned vacated the prior findings and recommendations and ordered a response to the FAP. (Doc. No. 19.) Respondent filed an answer on March 14, 2011. (Doc. No. 22.) Petitioner filed a traverse on April 18, 2011. (Doc. No. 27.)

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[2] The order of reassignment noted that petitioner had raised "the exact same challenges to the same conviction . . . in an earlier petition to this court, Case No. CIV S-09-3536 WBS DAD." (Doc. No. 11 at 1.) In that action (hereinafter "Thao I"), in an order dated January 29, 2010, the undersigned observed that "it appears [petitioner] did not raise any of the claims set forth in his pending federal petition on appeal or in any subsequent petitions for post-conviction relief to the California Supreme Court." (Thao I, Doc. 9 at 2.) Accordingly, the undersigned recommended that the petition be dismissed due to petitioner's failure to exhaust his claims in state court (id. at 4), and the assigned district judge entered judgment adopting those recommendations on March 5, 2010. (Thao I, Doc. 13.) Thereafter, petitioner completed pursuing a second round of review in the California Supreme Court. (See Lod. Doc. 12, described above). Accordingly, the exhaustion analysis set forth in Thao I is not applicable to this action. See Kuhlmann v. Wilson (1986) 477 U.S. 436, 449 (1986) ("'[A] subsequent application for a writ of habeas corpus . . . need not be entertained by a court of the United States or a justice or judge of the United States unless the application alleges and is predicated on a factual or other ground not adjudicated on the hearing of the earlier application for the writ, and unless the court, justice, or judge is satisfied that the applicant has not on the earlier application deliberately withheld the newly asserted ground or otherwise abused the writ.'")

FACTUAL BACKGROUND

In its unpublished memorandum and opinion, shortening petitioner's sentence as described above but in all other respects affirming his judgment of conviction on appeal, the California Court of Appeal for the Third Appellate District provided the following factual summary:

> In November 2006, L.P., branch manager and vice-president of a bank in Elk Grove, California, lived with her husband and daughter in the City of Galt.
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> On the morning of November 3, 2006, L.P.'s husband left the house to go to work at approximately 6:00 a.m. The couple's daughter left for school at approximately 7:10 a.m. As L.P. prepared for work, still wearing her robe and slippers, she heard the doorbell ring. She looked through the peephole but did not recognize the person standing there. When L.P. opened the door, defendant pointed a gun at her and entered the home. L.P. screamed. Defendant told her to be quiet and said, "Give me your money." L.P. gave defendant $75 that was sitting on the kitchen counter, and $40 to $50 from her purse. She told defendant that was all the money she had. He said, "Let's go to the bank." When L.P. said the bank was closed, defendant said, "You have the key. Get the key now." L.P. retrieved her keys from the bedroom and got into the back seat of defendant's car as instructed. Defendant climbed into the driver's seat and placed the gun on his lap.
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> Defendant drove to the bank where L.P. worked. During the drive, L.P. recognized defendant as a customer of the bank and her daughter's former tutor. When they arrived at the bank, defendant donned a black mask. L.P. unlocked the back door and entered the bank with defendant following behind her. L.P. silenced the alarm and opened the vault door. Unable to access the vault money without a second key, L.P. opened the safe deposit box containing her till money instead and gave defendant the contents -approximately $5,000, including $35 in "bait" money. FN2 Defendant said, "That's not enough. I want more." Although L.P. kept telling defendant she could not open the file cabinet to access the cash in the vault, defendant insisted she had a key. Finally, L.P. suggested that defendant shoot open the box containing the second access key. Defendant grabbed a tool and pried the lock box open. L.P. opened the cabinet and placed the cash, including "bait" money and an electronic tracking device, into defendant's backpack. Defendant said, "Let's go," and they left the bank. As she exited the bank, L.P. reset the alarm and locked the doors. Defendant ordered L.P. back into the car, and then climbed into the driver's seat. He laid the gun on his lap and told L.P. he was taking her home.

FN2. L.P. described "bait" money as bills from which the serial numbers have been recorded for tracking purposes in the event of a robbery.

Defendant initially headed in the direction of L.P.'s home. During the drive, L.P.'s cell phone rang twice, and defendant took it from her. As he neared Galt, defendant turned away from L.P.'s home and down a rural road unfamiliar to L.P. Defendant stopped the car and told L.P. not to identify him, threatening that he and some of his friends would hurt L.P. and her family if she did. When L.P. promised not to tell, he told her to get out of the car and told her to keep walking and not to stop to talk to anyone. L.P. got out of the car and started walking. Defendant drove away, but returned once, reminded her to "do what he said and keep walking," and then drove off. As L.P. walked towards her home, two people stopped and offered help. L.P. declined, fearing defendant would follow through on his threats. As she neared her home, L.P.'s husband, driving by on his way to check on her after hearing the bank had been robbed, stopped and picked her up. They drove back home, notified police and then drove to the Galt Police Department to report the incident.

Bank surveillance cameras recorded the defendant and L.P. in the bank that morning. L.P. provided police with a description of defendant and his vehicle and informed them he had worked at the Elk Grove Learning Center and had tutored their daughter. Police obtained defendant's name and address from the Learning Center, but were unable to find defendant in Sacramento County.

The next day, defendant was apprehended in San Francisco following a high-speed chase through the city. Defendant had in his possession the backpack used in the robbery, along with over $22,000 in cash. Police later recovered over $55,700 in cash, the electronic tracking device and the "bait" money, along with the pants, ski mask and replica pistol used by defendant in the robbery. Defendant admitted L.P.'s version of events, and told police he planned the crimes and acted alone. FN3

FN3. At trial, defendant testified he and L.P. planned the bank robbery and agreed to meet in San Francisco the next day to split the proceeds.

By complaint, deemed to be the information, defendant was charged with first degree residential burglary (count one), first degree robbery (count two), kidnapping for the purpose of robbery (count three), second degree commercial burglary (count four), second degree robbery (count five), false imprisonment (count six) and criminal threats (count seven).

Defendant was tried by a jury and found guilty on all counts. The court imposed a sentence of life with the possibility of parole on

> count three, plus a consecutive aggregate term of seven years comprised of the middle term of four years on count one; one year four months (one-third the middle term) on count two; the middle term of two years on count four; one year (one-third the middle term) on count five; the middle term of two years on count six; and eight months (one-third the middle term) on count seven. The court stayed execution of the sentences for second degree commercial burglary (count four) and false imprisonment (count six) pursuant to section 654.

(Lod. Doc. 6 at 1-5)[3]

ANALYSIS

I. Standards of Review Applicable to Habeas Corpus Claims

An application for a writ of habeas corpus by a person in custody under a judgment of a state court can be granted only for violations of the Constitution or laws of the United States. 28 U.S.C. § 2254(a). A federal writ is not available for alleged error in the interpretation or application of state law. See Wilson v. Corcoran, 562 U.S.___, ___, 131 S. Ct. 13, 16 (2010); Estelle v. McGuire, 502 U.S. 62, 67-68 (1991); Park v. California, 202 F.3d 1146, 1149 (9th Cir. 2000).

Title 28 U.S.C. § 2254(d) sets forth the following standards for granting federal habeas corpus relief:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim -
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> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
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> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

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[3] As noted, petitioner's sentence was modified on appeal to a term of life with the possibility of parole plus four years eight months. (Lod. Doc. 6 at 11.)

For purposes of applying § 2254(d)(1), "clearly established federal law" consists of holdings of the United States Supreme Court at the time of the state court decision. Stanley v. Cullen, 633 F.3d 852, 859 (9th Cir. 2011) (citing Williams v. Taylor, 529 U.S. 362, 405-06 (2000)). Nonetheless, "circuit court precedent may be persuasive in determining what law is clearly established and whether a state court applied that law unreasonably." Stanley, 633 F.3d at 859 (quoting Maxwell v. Roe, 606 F.3d 561, 567 (9th Cir. 2010).

A state court decision is "contrary to" clearly established federal law if it applies a rule contradicting a holding of the Supreme Court or reaches a result different from Supreme Court precedent on "materially indistinguishable" facts. Price v. Vincent, 538 U.S. 634, 640 (2003). Under the "unreasonable application" clause of § 2254(d)(1), a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from the Supreme / Court's decisions, but unreasonably applies that principle to the facts of the prisoner's case.[4] Lockyer v. Andrade, 538 U.S. 63, 75 (2003); Williams, 529 U.S. at 413; Chia v. Cambra, 360 F.3d 997, 1002 (9th Cir. 2004). In this regard, a federal habeas court "may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." Williams, 529 U.S. at 412. See also Schriro v. Landrigan, 550 U.S. 465, 473 (2007); Lockyer, 538 U.S. at 75 (it is "not enough that a federal habeas court, in its independent review of the legal question, is left with a 'firm conviction' that the state court was 'erroneous.'"). "A state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." Harrington v. Richter, 562 U.S.___,___,131 S. Ct. 770, 786 (2011) (quoting Yarborough v. Alvarado, 541 U.S. 652, 664 (2004)). Accordingly, "[a]s a condition for

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[4] Under § 2254(d)(2), a state court decision based on a factual determination is not to be overturned on factual grounds unless it is "objectively unreasonable in light of the evidence presented in the state court proceeding." Stanley v. Cullen, 633 F.3d 852, 859 (9th Cir. 2011) (quoting Davis v. Woodford, 384 F.3d 628, 638 (9th Cir. 2004)).

obtaining habeas corpus from a federal court, a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." Harrington,131 S. Ct. at 786-87.

If the state court's decision does not meet the criteria set forth in § 2254(d), a reviewing court must conduct a de novo review of a habeas petitioner's claims. Delgadillo v. Woodford, 527 F.3d 919, 925 (9th Cir. 2008); see also Frantz v. Hazey, 533 F.3d 724, 735 (9th Cir. 2008) (en banc) ("[I]t is now clear both that we may not grant habeas relief simply because of § 2254(d)(1) error and that, if there is such error, we must decide the habeas petition by considering de novo the constitutional issues raised.").

The court looks to the last reasoned state court decision as the basis for the state court judgment. Stanley, 633 F.3d at 859; Robinson v. Ignacio, 360 F.3d 1044, 1055 (9th Cir. 2004). If the last reasoned state court decision adopts or substantially incorporates the reasoning from a previous state court decision, this court may consider both decisions to ascertain the reasoning of the last decision. Edwards v. Lamarque, 475 F.3d 1121, 1126 (9th Cir. 2007) (en banc). "When a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary." Harrington, 131 S. Ct. at 784-85. This presumption may be overcome by a showing "there is reason to think some other explanation for the state court's decision is more likely." Id. at 785 (citing Ylst v. Nunnemaker, 501 U.S. 797, 803 (1991)). Where the state court reaches a decision on the merits but provides no reasoning to support its conclusion, a federal habeas court independently reviews the record to determine whether habeas corpus relief is available under § 2254(d). Stanley, 633 F.3d at 860; Himes v. Thompson, 336 F.3d 848, 853 (9th Cir. 2003). "Independent review of the record is not de novo review of the constitutional issue, but rather, the only method by which we can determine whether a silent state court decision is objectively unreasonable." Himes, 336 F.3d at

853. Where no reasoned decision is available, the habeas petitioner still has the burden of "showing there was no reasonable basis for the state court to deny relief." Harrington, 131 S. Ct. at 784.

When it is clear, however, that a state court has not reached the merits of a petitioner's claim, the deferential standard set forth in 28 U.S.C. § 2254(d) does not apply and a federal habeas court must review the claim de novo. Stanley, 633 F.3d at 860; Reynoso v. Giurbino, 462 F.3d 1099, 1109 (9th Cir. 2006); Nulph v. Cook, 333 F.3d 1052, 1056 (9th Cir. 2003).

II. Petitioner's Claims

A. Ineffective Assistance of Trial Counsel

In his FAP petitioner alleges that his trial counsel rendered ineffective assistance by failing to investigate and prepare for trial. Specifically, petitioner lists the following ways in which his attorney's performance allegedly fell short of Sixth Amendment standards: trial counsel failed to (a) make a discovery motion; (b) prepare jury instructions; (c) hire an investigator or conduct an independent investigation; (d) consult with a "facial expressionist expert"; (e) have an investigator meet with petitioner; (f) object to petitioner's confession being admitted into evidence based on a Miranda violation; (g) seek to exclude petitioner's confession based on the ground that it was obtained through coercion; (h) call defense witnesses to testify about petitioner's state of mind; (i) call the county jail psychiatric staff as defense witnesses at trial; and (j) obtain a psychiatric evaluation or consult with a psychiatrist. (FAP, Attached Mem. of P. & A. at 5-10.)

Respondent attacks most of these sub-claims on both procedural and substantive grounds. (Answer at 1) ("Petitioner's claim that his trial counsel was ineffective is in part untimely, in part unexhausted, and in part procedurally defaulted. [] Petitioner's trial counsel was not ineffective[.]") As discussed below, the court finds some of petitioner's ineffective assistance of counsel sub-claims to be clearly unexhausted and, therefore, will deny relief with

respect to those sub-claims on failure to exhaust grounds. As to timeliness, because AEDPA's statute of limitations is not jurisdictional, see Green v. White, 223 F.3d 1001, 1003-04 (9th Cir. 2000), the court elects to deny relief as to petitioner's remaining ineffective assistance of counsel sub-claims on the merits rather than reach the tolling issues raised by respondent.

Similarly, a reviewing court need not invariably resolve the question of procedural default prior to ruling on the merits of a claim where the default issue turns on difficult questions of state law. Lambrix v. Singletary, 520 U.S. 518, 524-25 (1997); see also Busby v. Dretke, 359 F.3d 708, 720 (5th Cir. 2004); Franklin v. Johnson, 290 F.3d 1223, 1232 (9th Cir. 2002 ("Procedural bar issues are not infrequently more complex than the merits issues presented by the appeal, so it may well make sense in some instances to proceed to the merits if the result will be the same.")) . Under the circumstances presented here the court finds that petitioner's ineffective assistance of trial counsel claim, to the extent it is not unexhausted, can be resolved more easily by addressing it on the merits. Accordingly, this court will assume that petitioner's ineffective assistance claim is not procedurally defaulted.

1. Exhaustion of State Remedies

Respondent argues that the following ineffective assistance sub-claims must be dismissed due to petitioner's failure to exhaust those sub-claims in state court: (a) failure to make a discovery motion; (b) failure to prepare jury instructions; (c) failure to hire an investigator or conduct an independent investigation; (d) failure to consult with a "facial expressionist expert"; (h) failure to call defense witnesses to testify about petitioner's state of mind; and (i) failure to call the county jail psychiatric staff as defense witnesses at trial. Respondent asserts that none of these sub-claims were presented in either of petitioner's two petitions filed with the California Supreme Court, the first on direct review and the second seeking habeas relief. (See Lod. Docs. 7, 11.)

State courts must be given the first opportunity to consider and address a state prisoner's habeas corpus claims. See Rhines v. Weber, 544 U.S. 269, 273-74 (2005) (citing Rose

v. Lundy, 455 U.S. 509, 518-19 (1982)); Scott v. Schriro, 567 F.3d 573, 583 (9th Cir. 2009) ("All exhaustion requires is that the state courts have the opportunity to remedy an error, not that they actually took advantage of the opportunity."); King v. Ryan, 564 F.3d 1133 (9th Cir. 2009) ("Habeas petitioners have long been required to adjudicate their claims in state court - that is, 'exhaust' them - before seeking relief in federal court."); Farmer v. Baldwin, 497 F.3d 1050, 1053 (9th Cir. 2007) ("This so-called 'exhaustion requirement' is intended to afford 'the state courts a meaningful opportunity to consider allegations of legal error' before a federal habeas court may review a prisoner's claims.") (quoting Vasquez v. Hillery, 474 U.S. 254, 257 (1986)). In general, a federal court will not grant a state prisoner's application for a writ of habeas corpus unless "the applicant has exhausted the remedies available in the courts of the State." 28 U.S.C. § 2254(b)(1). A state will not be deemed to have waived exhaustion unless the state, through counsel, expressly waives the requirement. 28 U.S.C. § 2254(b)(3).

A petitioner satisfies the exhaustion requirement by fairly presenting to the highest state court all federal claims before presenting the claims to the federal court. See Baldwin v. Reese, 541 U.S. 27, 29 (2004); Duncan v. Henry, 513 U.S. 364, 365 (1995); Picard v. Connor, 404 U.S. 270, 276 (1971); Wooten v. Kirkland, 540 F.3d 1019, 1025 (9th Cir. 2008). A federal claim is fairly presented if the petitioner has described the operative facts and the federal legal theory upon which his claim is based. See Wooten, 540 F.3d at 1025 ("Fair presentation requires that a state's highest court has 'a fair opportunity to consider . . . and to correct [the] asserted constitutional defect.'"); Lounsbury v. Thompson, 374 F.3d 785, 787 (9th Cir. 2004) (same) (quoting Picard, 404 U.S. at 276)); Weaver v. Thompson, 197 F.3d 359, 364 (9th Cir. 1999). This requires petitioner to have "characterized the claims he raised in state proceedings specifically as federal claims." Castillo v. McFadden, 399 F.3d 993, 999 (9th Cir. 2005) (emphasis in original) (internal citation omitted). "In short, the petitioner must have either referenced specific provisions of the federal constitution or cited to federal or state cases involving the legal standard for a federal constitutional violation. Mere 'general appeals to broad

constitutional principles, such as due process, equal protection, and the right to a fair trial,' do not establish exhaustion." Id. (quoting Hiivala v. Wood, 195 F.3d 1098, 1106 (9th Cir. 1999)). Thus, a claim is unexhausted where the petitioner did not fairly present the factual or legal basis for the claim to the state court. See Picard v. Connor, 404 U.S. at 275. "[I]t is not enough . . . that a somewhat similar state-law claim was made." Anderson v. Harless, 459 U.S. 4, 6 (1982). As a rule, the "mere similarity of claims is insufficient to exhaust." Duncan, 513 U.S. at 365-66.

On the other hand, "new factual allegations do not ordinarily render a claim unexhausted." Beatty v. Stewart, 303 F.3d 975, 989 (9th Cir. 2002). A claim is unexhausted only if new factual allegations "fundamentally alter the legal claim already considered by the state courts." Vasquez v. Hillery, 474 U.S. 254, 260 (1986). See also Beatty, 303 F.3d at 989-90; Weaver, 197 F.3d at 364. It is not necessary that "every piece of evidence" supporting federal claims have been presented to the state court. Chacon v. Wood, 36 F.3d 1459, 1469 n.9 (9th Cir. 1994) (emphasis in original). See also Davis v. Silva, 511 F.3d 1005, 1009 (9th Cir. 2008). Rather, the introduction of new evidence affects the fair presentation requirement only when it "substantially improves the evidentiary basis" for petitioner's claims. Aiken v. Spalding, 841 F.2d 881, 883 (9th Cir. 1988). New factual allegations that are merely cumulative of those presented to the state court do not transform the claim and thus do not require exhaustion. Hillery v. Pulley, 533 F. Supp. 1189, 1200-02 (E.D. Cal. 1982), aff'd, 733 F.2d 644 (9th Cir. 1984), aff'd, 474 U.S. 254 (1986). See also Weaver, 197 F.3d at 364 (acknowledging that although the "precise factual predicate" for a claim had changed after the evidentiary hearing in federal court, the claim remained rooted in the same incident and was therefore exhausted).

Thus, exhaustion does not require that every piece of evidence supporting the federal claim be presented to the highest state court. Davis, 511 F.3d at 1009. Rather, "to exhaust the factual basis of the claim, the petitioner must only provide the state court with the operative facts, that is, all of the facts necessary to give application to the constitutional principle upon which [the petitioner] relies." Id. (internal quotation marks omitted). Moreover, it is

important to keep in mind that habeas "petitions must be read in context" and that "pro se [habeas] petitions are held to a more lenient standard than counseled petitions." Davis, 511 F.3d at 1009 (quoting Peterson v. Lampert, 319 F.3d 1153, 1159 (9th Cir. 2003) (en banc) and Sanders v. Ryder, 342 F.3d 991, 999 (9th Cir. 2003)). Accordingly,"fair presentation" requires only that claims be alleged with as much particularity as is practicable under the circumstances. See Kim v. Villalobos, 799 F.2d 1317, 1320 (9th Cir. 1986).

Here, having carefully reviewed both of the petitions submitted by petitioner to the California Supreme Court, the undersigned concludes that sub-claims 1(a), 1(b) and 1(d) were not presented to the state's highest court, and thus are not exhausted. Indeed, petitioner did not so much as mention those sub-claims in either of his petitions submitted to the state high court. (Lod. Doc. 7, 11.)

In sub-claim 1(c), petitioner alleges that his trial counsel failed to hire an investigator or conduct an independent investigation. In his traverse, petitioner clarifies this claim by alleging that his trial counsel failed to investigate

> whether: (1) Petitioner force[d] his way into the victim's house or was he invited; (2) is Petitioner in any way malicious or threaten to the victim in the commerse [sic] of the crime at the bank or on the way to the bank (see police report); (3) and who directed Petitioner to break the save [sic]lock key; it was the victim who directed Petitioner to do what he did.

(Traverse at 16) (record citations omitted)). In contrast, petitioner's habeas petition submitted to the California Supreme Court alleged his trial counsel's failure to investigate a mental heath defense, as discussed below, but did not present any allegation that his trial counsel made the errors described above. Nor did the petition to the state high court present such facts as constituting a federal claim of any sort. This ineffective assistance of counsel sub-claim should therefore be dismissed due to petitioner's clear failure to exhaust the claim in state court.

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In sub-claim 1(h) of his ineffective assistance claim before this court, petitioner alleges:

> Counsel's lack of investigation also resulted in the failure to call important lay defense witnesses who would have helped the defense to negate the element necessary for aggravated kidnapping. Primarily, counsel failed to call petitioner's co-worker, petitioner's family . . . to testify as to petitioner's state of mind before and after being hospitalized of the commission of the crime.

(FAP, Attached Mem. of P. & A. at 7.) In his traverse, petitioner alleges that his co-workers "would have verified to the jury that Petitioner and the victim are friend[s]; thus, negate prosecution assertion that Petitioner kidnapped the victim." (Traverse at 6.) As to potential family member witnesses, petitioner suggests that if called they would have testified that "Petitioner has suffered a loss[] of his grand-parent that triggered a traumatic depression, dissociation with reality and post-traumatic symptoms that [a]ffects Petitioner's ability to form the necessary intent to commit kidnapping and robbery." (Traverse at 7.)

In comparison, in his habeas petition filed before the California Supreme Court, petitioner asserted that his trial counsel failed to "investigate mental health defenses"; "failed to introduce and do any pre-trial investigation as to any evidence whatsoever to establish petitioner's mental health at the time of the incident; and "failed to investigate psychiatric conditions that could have led to a conviction of a lesser charge[.]" (Lod. Doc. 11 at 7, 9-10.) Petitioner further claimed that he failed to receive "the U.S. Constitutionally mandated representation of effective assistance of trial and appellate counsel," and he described this as an "error of U.S. Constitutional magnitude." (Lod. Doc. 11 at 7.) In his habeas petition to the California Supreme Court petitioner cited one federal case, Brecht v. Abrahamson, 507 U.S. 619 (1993), which does not address ineffective assistance of counsel issues. Rather, in Brecht the U.S. Supreme Court discussed the "harmless error" analysis for federal claims of trial error, including "deprivation of the right to counsel." 507 U.S. at 629-30 (citing Gideon v. Wainwright, 372 U.S. 335 (1963)).

The undersigned finds that petitioner exhausted sub-claim 1(h) insofar as it alleges that petitioner's trial counsel failed to investigate the defense theory that petitioner's mental condition at the time of the crimes negated the element of intent necessary for conviction on one or more of the charges against him. However, not exhausted are petitioner's allegations contained in this sub-claim that his trial counsel failed to call as witnesses his co-worker who would have testified that petitioner and the victim were friends. Such allegations are a different matter entirely and were clearly not raised or alluded to in the habeas petition filed by petitioner with the California Supreme Court.

In sub-claim 1(i), petitioner alleges before this court that "[t]rial counsel could and should have called the staffs (doctors) [sic] who treated and provided [psychiatric] counseling to petitioner at county jail . . . [and] could have testif[ied] to the substantial body of medical knowledge directly connecting traumatic depression, dissociation with reality, and post-traumatic symptoms which can have a profound inhibiting effect upon the ability to think and act clearly and purposefully to commit the crime." (FAP, Mem. of P. & A. at 8.) As described above, in his habeas petition filed with the California Supreme Court petitioner generally alleged that his trial counsel failed to investigate and pursue a defense strategy based on petitioner's mental health at the time of his crimes. (Lod. Doc. 11 at 7, 9-10.) Because the court here is concerned only with weeding out any obviously unexhausted claims before turning to the merits, the court will allow that petitioner's sub-claim 1(i), like sub-claim 1(h), is exhausted to the extent it alleges that petitioner's trial counsel provided ineffective assistance in failing to investigate a mental health defense as to the question of intent in connection with one or more of the charged offenses.

In sum, the undersigned will recommend that only petitioner's ineffective assistance of trial counsel sub-claims 1(a), 1(b), 1(c), and 1(d) be dismissed due to his clear failure to exhaust those claims by presenting them to the California Supreme Court.

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2. Merits of Remaining Ineffective Assistance Claims

The court now turns to the merits of petitioner's remaining sub-claims of Claim 1, in which he alleges that his trial counsel rendered ineffective assistance by failing to: (e) have an investigator meet with petitioner; (f) object to the admission into evidence of petitioner's confession based on a Miranda violation; (g) seek to exclude petitioner's confession from evidence on the ground that it was coerced; (h/i) investigate petitioner's mental state at the time of the crimes (see discussion at II(a)(1), ante); and (j) obtain a psychiatric evaluation or consult with a psychiatrist.

In discussing the merits of these claims, respondent notes that the deferential AEDPA standard does not apply because they have never been adjudicated on the merits by a state court. (Answer at 6, fn.3.) As discussed above, petitioner raised claims 1(c), 1(h), and 1(i) in his habeas petition filed with the California Supreme Court. The court finds that petitioner also raised sub-claim 1(e), alleging that his trial counsel never had an investigator meet with petitioner, in his habeas petition before the California Supreme Court in which he alleged in part that "[p]etitioner never met with the investigator nor did anyone else[.]" Lod. Doc. 11 at 22. Finally, respondent concedes that petitioner raised ineffective assistance sub-claims 1(f), 1(g), and 1(j) in his petition filed before the California Supreme Court. (Answer at 18.) The California Supreme Court summarily denied the petition in its entirety (Lod. Doc. 12), which respondent interprets as a denial for untimeliness based on the look-through doctrine. (Answer at 12) (citing Ylst v. Nunnemaker, 501 U.S. 797, 803, (1991)); see also Lod. Doc. 10 at 1-2 (Sacramento Superior Court's denial of petitioner's habeas petition for untimeliness, among other reasons, on March 2, 2010)). Accordingly, the court will review all of the aforementioned ineffective assistance sub-claims de novo. Pirtle v. Morgan, 313 F.3d 1160, 1167 (9th Cir. 2002).

The Sixth Amendment guarantees the effective assistance of counsel. The United States Supreme Court set forth the test for demonstrating ineffective assistance of counsel in

Strickland v. Washington, 466 U.S. 668 (1984). To support a claim of ineffective assistance of counsel, a petitioner must first show that, considering all the circumstances, counsel's performance fell below an objective standard of reasonableness. 466 U.S. at 687-88. After a petitioner identifies the acts or omissions that are alleged not to have been the result of reasonable professional judgment, the court must determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. Id. at 690; Wiggins v. Smith, 539 U.S. 510, 521 (2003). Second, a petitioner must establish that he was prejudiced by counsel's deficient performance. Strickland, 466 U.S. at 693-94. Prejudice is found where "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. A reasonable probability is "a probability sufficient to undermine confidence in the outcome." Id. See also Williams, 529 U.S. at 391-92; Laboa v. Calderon, 224 F.3d 972, 981 (9th Cir. 2000). A reviewing court "need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies . . . . If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed." Pizzuto v. Arave, 280 F.3d 949, 955 (9th Cir. 2002) (quoting Strickland, 466 U.S. at 697).

Defense counsel has a "duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Strickland, 466 U.S. at 691. "This includes a duty to . . . investigate and introduce into evidence records that demonstrate factual innocence, or that raise sufficient doubt on that question to undermine confidence in the verdict." Bragg v. Galaza, 242 F.3d 1082, 1088 (9th Cir. 2001) (citing Hart v. Gomez, 174 F.3d 1067, 1070 (9th Cir. 1999)). In this regard, it has been recognized that "the adversarial process will not function normally unless the defense team has done a proper investigation." Siripongs v. Calderon (Siripongs II), 133 F.3d 732, 734 (9th Cir. 1998) (citing Kimmelman v. Morrison, 477 U.S. 365, 384 (1986)). Therefore, counsel must, "at a minimum,

conduct a reasonable investigation enabling him to make informed decisions about how best to represent his client." Hendricks v. Calderon, 70 F.3d 1032, 1035 (9th Cir. 1995) (quoting Sanders v. Ratelle, 21 F.3d 1446, 1456 (9th Cir. 1994) (internal citation and quotations omitted)). On the other hand, where an attorney has consciously decided not to conduct further investigation because of reasonable tactical evaluations, his or her performance is not constitutionally deficient. See Siripongs II, 133 F.3d at 734; Babbitt v. Calderon, 151 F.3d 1170, 1173 (9th Cir. 1998); Hensley v. Crist, 67 F.3d 181, 185 (9th Cir. 1995). "A decision not to investigate thus 'must be directly assessed for reasonableness in all the circumstances.'" Wiggins, 539 U.S. at 533 (quoting Strickland, 466 U.S. at 691). See also Kimmelman, 477 U.S. at 385 (counsel "neither investigated, nor made a reasonable decision not to investigate"); Babbitt, 151 F.3d at 1173-74.

A reviewing court must "examine the reasonableness of counsel's conduct 'as of the time of counsel's conduct.'" United States v. Chambers, 918 F.2d 1455, 1461 (9th Cir. 1990) (quoting Strickland, 466 U.S. at 690). Furthermore, "'ineffective assistance claims based on a duty to investigate must be considered in light of the strength of the government's case.'" Bragg, 242 F.3d at 1088 (quoting Eggleston v. United States, 798 F.2d 374, 376 (9th Cir. 1986)). In assessing an ineffective assistance of counsel claim "[t]here is a strong presumption that counsel's performance falls within the 'wide range of professional assistance.'" Kimmelman, 477 U.S. at 381 (quoting Strickland, 466 U.S. at 689).

In assessing an ineffective assistance of counsel claim "[t]here is a strong presumption that counsel's performance falls within the 'wide range of professional assistance.' " Kimmelman, 477 U.S. at 381 (quoting Strickland, 466 U.S. at 689). See also Harrington, 131 S.Ct. at 788 ("The question is whether an attorney's representation amounted to incompetence under 'prevailing professional norms,' not whether it deviated from best practices or most common custom.") (quoting Strickland, 466 U.S. at 690). There is in addition a strong

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presumption that counsel "exercised acceptable professional judgment in all significant decisions made." Hughes v. Borg, 898 F.2d 695, 702 (9th Cir. 1990) (citing Strickland, 466 U.S. at 689).

In his sub-claim 1(e), petitioner alleges that his trial counsel informed him that an investigator named Bill Lewis would come and talk to him at the Sacramento County Jail. A year later, when petitioner still had not met with the investigator, he voiced his concerns to his attorney, who handed petitioner an investigation report prepared by petitioner's former public defender. (FAP, Mem. of P. & A at 7; Traverse at 17-18; see FAP, Ex. C at 41-51 (investigative report)). Petitioner suggests that a proper investigation would have proved: (1) that petitioner and his victims were friends, thus petitioner could not have "kidnapped" her because she went with him willingly; and (2) that petitioner's psychological problems at the time of his crimes were so great as to negate the element of intent with respect to aggravated kidnapping and/or other offenses. (FAP, Attached Mem. of P. & A. at 7; Traverse at 7.)

Petitioner's mere suggestion that additional investigation would have aided his defense is insufficient to demonstrate what evidence, if any, additional investigation would have uncovered. See Bragg, 242 F.3d at 1088 (no ineffective assistance where petitioner did "nothing more than speculate that, if interviewed," a witness might have given helpful information); Dows v. Wood, 211 F.3d 480, 486 (9th Cir. 2000) (no ineffective assistance of counsel where there was no evidence in the record that a helpful witness actually existed and petitioner failed to present an affidavit establishing that the alleged witness would have provided helpful testimony for the defense); see also Richardson v. United States, 379 F.3d 485, 488 (7th Cir. 2004) ("When [counsel's] alleged deficiency is a failure to investigate, the movant must provide the court sufficiently precise information, that is, a comprehensive showing as to what the investigation would have produced.") (internal citation omitted); Chavez v. Pulley, 623 F. Supp. 672, 685 (E.D. Cal. 1985) (ineffective assistance claim denied due to petitioner's failure to make "specific allegation[s] of what such an investigation might have produced or show how its omission . . . prejudiced his defense[.]")

Having reviewed the trial record, the undersigned finds the first of these sub-claims (that proper investigation would have established that the victim went with him willingly) is simply not credible, and with respect to neither sub-claim has petitioner make a satisfactory showing as to what further investigation would have produced or how the result of such investigation would have changed the course of the trial. See United States v. Berry, 814 F.2d 1406, 1409 (9th Cir. 1987) (appellant failed to meet the prejudice prong of an ineffective assistance claim because he offered no indication of what potential witnesses would have testified to or how their testimony might have changed the outcome of the hearing); Wildman v. Johnson, 261 F.3d 832, 839 (9th Cir. 2001) (speculation that a helpful expert could be found or would testify on petitioner's behalf insufficient to establish prejudice); Richardson, 379 F.3d at 488. Of course, the Strickland standard "places the burden on the defendant, not the State, to show a 'reasonable probability' that the result would have been different." Wong v. Belmontes, ___ U.S. ___, 130 S. Ct. 383, 390-391 (2009) (quoting Strickland, 466 U.S. at 694). Petitioner has failed to meet that burden with respect to this aspect of his ineffective assistance of counsel claim. Accordingly, he is not entitled to federal habeas relief.

The undersigned notes that with respect to several of his ineffective assistance sub-claims, petitioner gives sort shrift to the prejudice prong of the Strickland standard. Rather, petitioner merely alleges some wrongdoing on his trial counsel's part without attempting to establish that "but for counsel's unprofessional errors," he would not have been convicted and/or sentenced to same extent. 466 U.S. at 694. Given the overwhelming evidence presented against petitioner at trial and his own credibility issues, petitioner is confronted with a daunting task in arguing that any one act or omission by his trial counsel would have changed the outcome of his prosecution. See Lod Doc. 6 at 4-5 (describing bank surveillance cameras' recording of petitioner's actions at the bank; police's recovery of cash, electronic tracking device, and "bait" money from petitioner, along with the pants, ski mask, and pistol used in the robbery; petitioner's confession to police that he planned the crime and acted alone); 2 RT 531 (trial court at

sentencing describes petitioner's version of events, in which he and the victim conspired to rob the bank, as "clearly fabricated")). Instead, petitioner limits himself to only general and conclusory statements regarding the prejudicial effect of his trial attorney's alleged errors. See FAP, Mem. of P. & A. at 9-10 (reduction of petitioner's sentence on direct appeal "prove[s] unequivocally the ineffective assistance of trial counsel"); Traverse at 19 ("[B]ecause of counsel's deficient performance, prejudice is the foregone conclusion as petitioner received several more years on his sentence.") Skirting the requirement that he establish prejudice flowing from the alleged ineffective assistance of counsel cannot avail petitioner, however. The court will therefore recommend that petitioner be denied relief as sub-claim 1(e).

In his ineffective assistance sub-claims 1(f) and 1(g), petitioner alleges that his trial counsel "failed to investigate and pursue 'Miranda'/voluntary situation[5] and/or the coercion that occurred with the threats against [petitioner] even with repeated requests to do so by petitioner." (FAP, Mem. of P. & A. at 7.) In support of these allegations, petitioner cites a portion of the record in which the parties stipulated that the following statement would be read to the jury at trial:

> During the defendant's interview, he stated on three occasions that he did not want to answer any more questions. The defendant then continued to answer questions. Detective Mitchell asked him where he obtained the idea to commit this type of crime. Detective Mitchell asked if he got the idea from a movie or television show. At that point, the defendant refused to answer any additional questions.

(2 RT at 423-424.) Unpacking these claims, the court presumes that petitioner takes the following position: By stipulating to the above statement to be read to the jury, without investigating and pursuing the defense theory that petitioner's confession was involuntary, coerced, and obtained in violation of his constitutional due process rights, trial counsel rendered ineffective assistance. Again, such allegations do not satisfy the Strickland test, since petitioner

[5] Miranda v. Arizona, 384 U.S. 436 (1966).

has not provided any context for the entry into this trial stipulation. Nor has petitioner provided any further information regarding the circumstances of his confession. Without more, it is impossible for this court to determine whether trial counsel could have successfully moved to exclude petitioner's confession on Miranda grounds. See Michigan v. Mosely, 423 U.S. 96, 102-103 (1975) (Miranda cannot "sensibly be read to create a per se proscription of indefinite duration upon any further questioning by any police officer on any subject, once the person in custody has indicated a desire to remain silent."). Similarly, petitioner's bare allegation that police made unspecified "threats" to coerce his confession is too vague and conclusory to show that counsel should have moved to have his confession excluded due to coercion.

Even assuming arguendo that petitioner's trial counsel incompetently failed to move to exclude petitioner's statements obtained in violation of his due process rights, there is no indication in this record that this would have changed the outcome of petitioner's trial. If petitioner's confession (in which he stated that he acted alone) was obtained in violation of Miranda, it would still have been admissible to impeach petitioner's testimony that he and the victim were co-conspirators in the robbery scheme. Harris v. New York, 401 U.S. 222, 225 (1971); Pollard v. Galaza, 290 F.3d 1030, 1033 (9th Cir. 2002). Moreover, given the overwhelming evidence arrayed against petitioner, the jury's verdict clearly did not hinge on petitioner's confession. Thus these ineffective assistance sub-claims should be rejected as well.

Sub-claims 1(h), 1(i) and 1(j) concern defense counsel's alleged failure to investigate and pursue a defense based on petitioner's mental condition at the time of the crimes. Here again, it is not clear from the allegations of the petition why petitioner believes his counsel's decision not to pursue a state-of-mind defense was unprofessional or incompetent. It could well be that defense counsel saw little to gain by inquiring into petitioner's mental health during his clearly premeditated crime spree. In this regard, petitioner merely argues that

> [t]he mental health defense would have been significant and substantial as Petitioner had no prior criminal history and this aberration in his life can only be explained by some sort of mental

> breakdown . . .[.] A reasonable jury would have concluded that Petitioner lacked the requisite mental state that constituted the elements of the charged offense(s) and found him not guilty of the aggravated kidnapping, yet possibly culpable for the lesser offense of kidnapping.

(Traverse at 21-22.) With respect to the charge of kidnapping for the purpose of robbery, petitioner's conviction was premised on a finding that he acted with the intent to commit robbery and did not actually and reasonably believe that the victim consented to being moved. (CT 144.) However, petitioner has alleged only that, prior to his crime spree, he was in emotional distress following the death of his grandfather. Nothing in the record or in petitioner's own allegations suggest that he was incapable of forming the intent required for conviction on this charge. Petitioner's bare assertion that further investigation into his mental state would have revealed evidence that would have negated the intent element of aggravated kidnapping in the minds of the jury, is too speculative to meet the high bar set by Strickland. Thus these ineffective assistance sub-claims fail as well.

In sum, petitioner is not entitled to federal habeas relief with respect to his any of his exhausted sub-claims of ineffective assistance of trial counsel.

B. Ineffective Assistance of Appellate Counsel

Petitioner asserts that his appellate counsel rendered ineffective assistance by failing to raise all of the ineffective assistance of trial counsel claims that he now presents in the FAP. (FAP, Mem. of P. & A. at 10-11.) He argues that the California Court of Appeal's reduction of his sentence in its October 2008 order was a "red flag" that should have spurred appellate counsel to raise these claims. (Id. at 11.) As before, respondent argues both procedural and substantive grounds for denial of the FAP. (Answer at 17-20.) Because the undersigned finds this claim clearly meritless, as discussed below, there is no need to address respondent's procedural arguments.

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Preliminarily, the court must determine whether this claim is subject to AEDPA review. For the reasons addressed below, the undersigned will review these claims de novo. As discussed above, petitioner's habeas petition filed with the California Supreme Court made numerous allegations of ineffective assistance of trial counsel, herein labeled sub-claims 1(e), 1(f), 1(g), 1(h), 1(i) and 1(j). In that state habeas petition, petitioner likewise argued that his appellate counsel was ineffective for failing to raise on appeal these various mistakes by trial counsel. (Lod. Doc. 11 at 22-25.) Looking through the California Supreme Court's summary denial of that petition (Lod. Doc. 12) to the last reasoned decision addressing petitioner's claims of ineffective assistance of appellate counsel, the Sacramento County Superior Court rejected this claim, stating:

> [P]etitioner claims that his appellate counsel was ineffective for failing to raise any of these ineffective assistance of trial counsel claims on appeal. [¶] As petitioner's ineffective assistance of trial counsel claims all fail, this claim fails. In addition, most of Petitioner's ineffective assistance of trial [counsel] claims involve matters outside the record, that appellate counsel could not have successfully raised on appeal.

(Lod. Doc. 10 at 3.) Respondent avers that: "The court denied all of Petitioner's IAC-trial counsel claims based on untimeliness. (Lod. Doc. 10 at 1-3 [internal citations omitted.]) Therefore, according to respondent, the Sacramento County Superior Court's statement that "[a]s petitioner's ineffective assistance of trial counsel claims all fail, this claim fails" means that the court was also denying the IAC-appellate counsel claims based on untimeliness." (Answer at 19.) Respondent proceeds to analyze petitioner's ineffective assistance of appellate counsel claims according to the Strickland standard, as will the undersigned.

The Strickland standards apply to appellate counsel as well as trial counsel. Smith v. Murray, 477 U.S. 527, 535-36 (1986); Miller v. Keeney, 882 F.2d 1428, 1433 (9th Cir. 1989). However, an indigent defendant "does not have a constitutional right to compel appointed counsel to press nonfrivolous points requested by the client, if counsel, as a matter of professional judgment, decides not to present those points." Jones v. Barnes, 463 U.S. 745, 751

(1983). Counsel "must be allowed to decide what issues are to be pressed." Id. Otherwise, the ability of counsel to present the client's case in accord with counsel's professional evaluation would be "seriously undermined." Id. See also Smith v. Stewart, 140 F.3d 1263, 1274 n. 4 (9th Cir. 1998) (counsel not required to file "kitchen-sink briefs" because it "is not necessary, and is not even particularly good appellate advocacy.") There is, of course, no obligation to raise meritless arguments on a client's behalf. See Strickland, 466 U.S. at 687-88 (requiring a showing of deficient performance as well as prejudice). Thus, appellate counsel is not deficient for failing to raise a weak issue. See Miller, 882 F.2d at 1434. In order to demonstrate prejudice in this context, petitioner must show that, but for appellate counsel's errors, he probably would have prevailed on appeal. Id at 1434 n. 9.

Here, the court has found that all of petitioner's ineffective assistance of trial counsel claims are meritless, most obviously because petitioner has not shown that he was prejudiced by any of trial counsel's actions. Petitioner's appellate counsel had no obligation to raise meritless issues on appeal. Strickland, 466 U.S. at 687-88. Accordingly, petitioner is not entitled to federal habeas relief with respect to his claim that his appellate counsel provided ineffective assistance.

C. Actual Innocence

Finally, petitioner asserts that he is actually innocent of some or all of the charges, (petitioner does not specify) of which he was convicted. Characterizing this as "part of" his ineffective assistance claim, petitioner makes no attempt to allege facts that would establish his innocence, apparently hoping that such facts might be unearthed at some future evidentiary hearing. (FAP, Mem. of P. & A. at 12; Traverse at 2.)

In Herrera v. Collins, 506 U.S. 390 (1993), a majority of the Supreme Court assumed, without deciding, that a freestanding claim of actual innocence is cognizable under federal law. In this regard, the court observed that "in a capital case a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant

unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim." 506 U.S. at 417. A different majority of the Supreme Court explicitly held that a freestanding claim of actual innocence is cognizable in a federal habeas proceeding. Compare 506 U.S. at 417 with 506 U.S. at 419, 430-37. See also Jackson v. Calderon, 211 F.3d 1148, 1165 (9th Cir. 2000) (noting that a majority of the Justices in Herrera would have found a free-standing claim of actual innocence). Although the Supreme Court did not specify the standard applicable to this type of "innocence" claim, it noted that the threshold would be "extraordinarily high" and that the showing would have to be "truly persuasive." Herrera, 506 U.S. at 417. More recently, the Supreme Court declined to resolve whether federal courts may entertain independent claims of actual innocence but concluded that the petitioner's showing of innocence in the case before it fell short of the threshold suggested in Herrera. House v. Bell, 547 U.S. 518, 554-551 (2006). Finally, the Supreme Court has recently once again assumed, without deciding, that a federal constitutional right to be released upon proof of "actual innocence" exists. District Attorney's Office for Third Judicial Dist. v. Osborne, ___U.S.___, 129 S. Ct. 2308 (2009). In doing so, the Supreme Court noted that it is an "open question" whether a freestanding claim of actual innocence exists and that the court has "struggled with it over the years, in some cases assuming, *arguendo,* that it exists while also noting the difficult questions such a right would pose and the high standard any claimant would have to meet." 129 S. Ct. at 2321.

Here, assuming arguendo that a freestanding claim of actual innocence may be maintained in this non-capital case, petitioner has failed to meet the high standard necessary to be entitle to federal habeas relief. As respondent observes, petitioner has not made any showing that would counter – or even cast the slightest doubt on – the overwhelming evidence presented at his trial pointing to petitioner's guilt of the crimes charged, as amply recounted in the trial record reviewed by this court. This claim should therefore be rejected as well.

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D. Evidentiary Hearing

Finally, petitioner seeks an evidentiary hearing on his ineffective assistance claims. Pursuant to 28 U.S.C. § 2254(e)(2), an evidentiary hearing is appropriate under the following circumstances:

> (e)(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that-
>
> (A) the claim relies on-
>
> (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
>
> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offense[.]

Under this statutory scheme, a district court presented with a request for an evidentiary hearing must first determine whether a factual basis exists in the record to support a petitioner's claims and, if not, whether an evidentiary hearing "might be appropriate." Baja v. Ducharme, 187 F.3d 1075, 1078 (9th Cir. 1999). See also Earp v. Ornoski, 431 F.3d 1158, 1166 (9th Cir. 2005); Insyxiengmay v. Morgan, 403 F.3d 657, 669-70 (9th Cir. 2005). A petitioner requesting an evidentiary hearing must also demonstrate that he has presented a "colorable claim for relief." Earp, 431 F.3d at 1167 (citing Insyxiengmay, 403 F.3d at 670, Stankewitz v. Woodford, 365 F.3d 706, 708 (9th Cir. 2004) and Phillips v. Woodford, 267 F.3d 966, 973 (9th Cir. 2001)). To show that a claim is "colorable," a petitioner is "required to allege specific facts which, if true, would entitle him to relief." Ortiz v. Stewart, 149 F.3d 923, 934 (9th Cir. 1998) (internal quotation marks and citation omitted). Moreover, the Supreme Court has recently held that "at a minimum . . . § 2254(e)(2) still restricts the discretion of federal habeas courts to

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consider new evidence when deciding claims that were not adjudicated on the merits in state court." Cullen v. Pinholster, 563 U.S. ___, ___, 131 S. Ct. 1388, 1398, 1400 (2011).

In any event, petitioner has not made the showing required by § 2254(e)(2). The court concludes that no additional factual supplementation is necessary in this case and that an evidentiary hearing is not appropriate because petitioner has not identified facts in support of his claims that, even if established at a hearing, would entitle him to federal habeas relief. Further, petitioner has not identified any factual conflict that would require this court to hold an evidentiary hearing in order to resolve. Rather, petitioner appears merely to seek "an alternative forum for trying facts and issues which a prisoner made insufficient effort to pursue in state proceedings." Cullen, 131 S.Ct. at 1401. Therefore, the undersigned will deny petitioner's request for an evidentiary hearing with respect to his claims.

CONCLUSION

IT IS HEREBY ORDERED that petitioner's request for an evidentiary hearing on Claims 1 and 2 of the First Amended Petition for a writ of habeas corpus (Doc. No. 18) is denied.

IT IS HEREBY RECOMMENDED that sub-claims 1(a), 1(b), 1(c), and 1(d) of the First Amended Petition be dismissed due to petitioner's failure to exhaust those sub-claims in state court, and that all remaining claims be denied on the merits.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty-one days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections shall be served and filed within seven days after service of the objections. Failure to file objections within the specified time may waive the right to appeal the District Court's order. Turner v. Duncan, 158 F.3d 449, 455 (9th Cir. 1998); Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991). In any objections he elects to file petitioner may address whether a certificate of

appealability should issue in the event he elects to file an appeal from the judgment in this case. See Rule 11, Federal Rules Governing Section 2254 Cases (the district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant).

DATED: June 24, 2011.

DALE A. DROZD
UNITED STATES MAGISTRATE JUDGE

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