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United States District Court  
For the Northern District of California

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

TAYLOR STEVEN LANGENDORF,  
Petitioner,  
vs.  
RICHARD KIRKLAND, Warden,  
Respondent.

No. C 05-1629 JSW (PR)

**ORDER DENYING PETITION  
FOR WRIT OF HABEAS  
CORPUS AND DENYING  
CERTIFICATE OF  
APPEALABILITY**

This is a habeas corpus case filed pro se by a state prisoner pursuant to 28 U.S.C. § 2254.

**PROCEDURAL BACKGROUND**

In 2005, the court issued an order to show cause as to three of the four issues in Petitioner’s original petition. Respondent filed an answer and Petitioner filed a traverse. The Court then granted Petitioner a stay for the purposes of returning to the state courts to exhaust his claims.

In 2008, after Petitioner completed exhaustion, the Court reopened the case and issued another order to show cause. On February 10, 2009, Respondent filed a supplemental answer in response to that order. Petitioner did not file a supplemental traverse, but on January 12, 2009 – before the answer was filed – he had filed a document labeled a “traverse” and exhibits in support of it. This “traverse” contained arguments in support of Petitioner’s claims.

After Respondent’s supplemental answer was filed, Petitioner moved to “Amend/Correct” the memorandum of points and authorities he had filed in support of

1 the January 12 “traverse,” saying that he wished to reply to Respondent’s supplemental  
2 answer. That motion was granted in an order entered on September 21, 2009. In that  
3 Order the Court also denied Petitioner’s motion to disregard the supplemental answer as  
4 untimely. Petitioner has not amended his traverse, despite having been granted leave to  
5 do so.

6 In an order entered on May 11, 2010, the Court denied Petitioner’s motion to  
7 reconsider the denial of sanctions against Respondent. On June 1, 2010, Petitioner filed  
8 a notice of appeal directed to the Court’s denial of his motion to reconsider. The appeal  
9 is interlocutory. It thus does not stay proceedings in this Court. *See City of Los Angeles*  
10 *v. Santa Monica Baykeeper*, 254 F.3d 882, 885-86 (9th Cir. 2001).

11 The Court has not entered the statement allowed by 28 U.S.C. § 1292(b), that the  
12 order involves a controlling question of law as to which there is a substantial ground for  
13 difference of opinion and that an immediate appeal would materially advance the  
14 ultimate termination of the litigation. Petitioner based his motion for sanctions on his  
15 belief that Respondent’s motion for an extension of time, having been filed after  
16 expiration of the deadline for responding to the order to show cause, violated Local Rule  
17 6-1(b). Rule 6-1(b) requires that requests for extensions that affect matters scheduled for  
18 hearing or on the court’s calendar must be filed at least fourteen days prior to the  
19 scheduled date. There was no hearing scheduled in this matter, and it was not  
20 calendared. The denial did not, therefore, involve a question of law as to which there is  
21 a substantial ground for difference of opinion. And even if there were room for a  
22 difference of opinion as to the application of Local Rule 6-1(b), it is clear that the writ  
23 should not be granted simply because of minor and harmless untimeliness on the part of  
24 the Respondent. Also, the Court’s ruling undoubtedly would be affirmed on appeal, if  
25 one were allowed, so allowing the appeal would not advance termination of the  
26 litigation.

27 For these reasons, to whatever extent the notice of appeal could be construed as a  
28 request that the Court amend the ruling to include such a statement, the request is

1 DENIED. *See* Fed. R.App.P. 5(b) (permitting amendment of order at any time to include  
2 the § 1292(b) statement). The Court has not entered, and does not intend to enter, the  
3 statement contemplated by 28 U.S.C. § 1292(b).

#### 4 **BACKGROUND**

5 In July of 2002, Petitioner pled guilty to assault and battery with a gang  
6 enhancement. He was sentenced to a term of seven years in state prison. He did not  
7 appeal, but he did file state habeas petitions that were denied by Napa County Superior  
8 Court, the Court of Appeal, and the California Supreme Court.

#### 9 **EVIDENTIARY HEARING**

10 Petitioner asks for an evidentiary hearing in his January 12, 2009, traverse.

11 An evidentiary hearing is held in federal habeas cases only under the most limited  
12 circumstances. *Baja v. Ducharme*, 187 F.3d 1075, 1077-79 (9th Cir. 1999). An  
13 evidentiary hearing on a claim for which the Petitioner failed to develop a factual basis  
14 in state court can be held only if Petitioner shows that: (1) the claim relies either on (a) a  
15 new rule of constitutional law that the Supreme Court has made retroactive to cases on  
16 collateral review, or (b) a factual predicate that could not have been previously  
17 discovered through the exercise of due diligence, and (2) the facts underlying the claim  
18 would be sufficient to establish by clear and convincing evidence that but for  
19 constitutional error, no reasonable fact finder would have found the applicant guilty of  
20 the underlying offense. 28 U.S.C. § 2254(e)(2)(A)-(B). In short, if Petitioner did not  
21 attempt to present in state court the facts he wishes to present now, for instance by  
22 attempting to develop them in his state habeas proceedings, he cannot do so now unless  
23 he can show that he meets the provisions of section 2254(e)(2) outlined above.

24 A prisoner "fails" to develop the factual basis of a claim, triggering § 2254(e)(2),  
25 if "there is lack of diligence, or some greater fault, attributable to the prisoner or the  
26 prisoner's counsel." *Williams (Michael) v. Taylor*, 529 U.S. 420, 432 (2000). "Diligence  
27 will require in the usual case that the prisoner, at a minimum, seek an evidentiary hearing  
28 in state court in the manner prescribed by state law." *Id.* at 437. Accordingly, where the

1 prisoner has met the burden of showing he was diligent in efforts to develop the facts  
2 supporting his claims in state court, an evidentiary hearing may be held without regard to  
3 whether the "stringent" requirements of § 2254(e)(2) apply. *Id.* at 437; *Jaramillo v.*  
4 *Stewart*, 340 F.3d 877, 882 (9th Cir. 2003); *Jones v. Wood*, 114 F.3d 1002, 1013 (9th  
5 Cir. 1997).

6 It is Petitioner's burden to show that he attempted to develop the facts in state  
7 court but was prevented from doing so, for instance by showing that the state court  
8 denied a request for an evidentiary hearing. *Hutchison v. Bell*, 303 F.3d 720, 747 (6th  
9 Cir. 2002) (requiring Petitioner to demonstrate "sufficient diligence"); *Baja*, 187 F.3d at  
10 1078-79. He has not carried that burden; indeed, he does not even discuss any efforts to  
11 develop the facts in state court. For that reason, because he has not attempted to show  
12 that the exceptions of Section 2254(e)(2)(A)-(B) apply to him, is not entitled to an  
13 evidentiary hearing.

14 The motion for an evidentiary hearing will be denied.

#### 15 **STANDARD OF REVIEW**

16 A district court may not grant a petition challenging a state conviction or sentence  
17 on the basis of a claim that was reviewed on the merits in state court unless the state  
18 court's adjudication of the claim: "(1) resulted in a decision that was contrary to, or  
19 involved an unreasonable application of, clearly established Federal law, as determined  
20 by the Supreme Court of the United States; or (2) resulted in a decision that was based  
21 on an unreasonable determination of the facts in light of the evidence presented in the  
22 State court proceeding." 28 U.S.C. § 2254(d). The first prong applies both to questions  
23 of law and to mixed questions of law and fact, *Williams (Terry) v. Taylor*, 529 U.S. 362,  
24 407-09 (2000), while the second prong applies to decisions based on factual  
25 determinations, *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003).

26 A state court decision is "contrary to" Supreme Court authority, that is, falls  
27 under the first clause of § 2254(d)(1), only if "the state court arrives at a conclusion  
28 opposite to that reached by [the Supreme] Court on a question of law or if the state court

1 decides a case differently than [the Supreme] Court has on a set of materially  
2 indistinguishable facts.” *Williams (Terry)*, 529 U.S. at 412-13. A state court decision is  
3 an “unreasonable application of” Supreme Court authority, falling under the second  
4 clause of § 2254(d)(1), if it correctly identifies the governing legal principle from the  
5 Supreme Court’s decisions but “unreasonably applies that principle to the facts of the  
6 prisoner’s case.” *Id.* at 413. The federal court on habeas review may not issue the writ  
7 “simply because that court concludes in its independent judgment that the relevant state-  
8 court decision applied clearly established federal law erroneously or incorrectly.” *Id.* at  
9 411. Rather, the application must be “objectively unreasonable” to support granting the  
10 writ. *Id.* at 409.

11 Under 28 U.S.C. § 2254(d)(2), a state court decision “based on a factual  
12 determination will not be overturned on factual grounds unless objectively unreasonable  
13 in light of the evidence presented in the state-court proceeding.” *Miller-El*, 537 U.S. 322  
14 at 340; *see also Torres v. Prunty*, 223 F.3d 1103, 1107 (9th Cir. 2000).

15 When there is no reasoned opinion from the highest state court to consider the  
16 petitioner’s claims, the court looks to the last reasoned opinion. *See Ylst v. Nunnemaker*,  
17 501 U.S. 797, 801-06 (1991); *Shackleford v. Hubbard*, 234 F.3d 1072, 1079, n. 2 (9th  
18 Cir.2000).

## 19 DISCUSSION

20 In the amended petition, filed after the stay for exhaustion, Petitioner asserts that:  
21 (1) the conviction rests on outrageous government conduct; (2) the trial court imposed an  
22 enhancement based on false testimony; (3) his counsel was ineffective in failing to  
23 investigate and challenge the selective prosecution of Petitioner and the outrageous  
24 government conduct;(4) the prosecution failed to disclose exculpatory evidence to the  
25 defense; and (5) counsel was ineffective in not following up on a subpoena for jail  
26 records that had been obtained by prior counsel.

### 27 I. Effect of Guilty Plea

28 A defendant who enters a valid guilty plea cannot later raise in habeas corpus

1 proceedings independent claims relating to the deprivation of constitutional rights that  
2 occurred before the plea. *Haring v. Prosise*, 462 U.S. 306, 319-20 (1983) (guilty plea  
3 forecloses consideration of pre-plea constitutional deprivations); *Tollett v. Henderson*,  
4 411 U.S. 258, 266-67 (1973) (same); *Moran v. Godinez*, 57 F.3d 690, 700 (9th Cir.  
5 1994) (refusing to consider contention that petitioner’s attorneys were ineffective  
6 because they failed to attempt to prevent the use of his confession; claim involved pre-  
7 plea constitutional violation).

8 Only a valid guilty plea waives prior claims. The long-standing test for  
9 determining the validity of a guilty plea is "whether the plea represents a voluntary and  
10 intelligent choice among the alternative courses of action open to the defendant." *Parke*  
11 *v. Raley*, 506 U.S. 20, 29 (1992) (quoting *North Carolina v. Alford*, 400 U.S. 25, 31  
12 (1970)). However, if the guilty plea was entered into with the advice of competent  
13 counsel, the voluntary and intelligent character of the guilty plea is immune from  
14 challenge. *United States v. Broce*, 488 U.S. 563, 574 (1989); *Mabry v. Johnson*, 467  
15 U.S. 504, 508 (1984). Thus, a defendant who pleads guilty upon the advice of counsel  
16 may only attack the voluntary and intelligent character of the guilty plea by showing that  
17 the advice he or she received from counsel was not within the range of competence  
18 demanded of attorneys in criminal cases. *Tollett*, 411 U.S. 258 at 267; *Lambert v.*  
19 *Blodgett*, 393 F.3d 943, 979 (9th Cir. 2004); *United States v. Signori*, 844 F.2d 635, 638  
20 (9th Cir. 1988).

21 **A. Claim One**

22 Petitioner’s first claim is that the government’s conduct in allegedly putting him  
23 in a holding cell with a known enemy was “outrageous conduct,” such that the  
24 conviction cannot stand. See *United States v. Pemberton*, 853 F.2d 730, 735 (9th Cir.  
25 1988) (discussing cases adopting rule that “outrageous government conduct” can be a  
26 violation of due process). This is a claim that arose before the plea of guilty and that  
27 does not go to the validity of that plea, so cannot directly be the basis for habeas relief  
28 here. It will, however, be discussed further below as a possible basis for one of

1 Petitioner’s ineffective assistance claims.

2 **B. Claims Three and Five**

3 Construed liberally, claims three and five are claims that counsel failed to  
4 adequately investigate possible defenses, which in turn led to counsel’s purportedly  
5 ineffective advice to plead guilty. When the validity of advice to accept a guilty plea  
6 offer is attacked on grounds counsel’s investigation was inadequate, “the salient inquiry  
7 is whether ‘discovery of the evidence would have led counsel to change his  
8 recommendation as to the plea.’” *Lambert*, 393 F.3d at 982 (quoting *Hill v. Lockhart*,  
9 474 U.S. 52, 59 (1985)). “In turn, the result of this inquiry may depend on whether ‘the  
10 defense would have likely succeeded at trial.’” *Id.* (quoting *Hill*, 474 U.S. at 59).

11 In claim three, Petitioner contends that his counsel failed to adequately investigate  
12 the selective prosecution of Petitioner and the outrageous government conduct of putting  
13 him in the holding cell with a known enemy. He say that “[b]ecause counsel failed to  
14 take action when told of exculpatory evidence then his advice to accept the plea renders  
15 the plea agreement involuntary and unintelligent and had the issue been raised prior to  
16 the plea then there was a probability that the case could have been dismissed.” (Amen.  
17 Pet. at 12.)

18 As was the case in *Lambert*, the question of whether counsel’s failure to develop  
19 the selective prosecution and outrageous conduct theories caused his advice to plead  
20 guilty to be ineffective turns on whether those defenses would have succeeded in the  
21 absence of a plea. *See Lambert*, 393 F.3d at 982.

22 To establish selective prosecution under California law, “[t]here must be  
23 discrimination and that discrimination must be intentional and unjustified and thus  
24 ‘invidious’ because it is unrelated to legitimate law enforcement objectives. . . .” *Baluyut*  
25 *v. Superior Court*, 12 Cal.4th 826, 833 (1996). Here, there simply is no evidence in the  
26 record showing that the decision to prosecute Petitioner and not prosecute the victim was  
27 “unrelated to legitimate law enforcement objectives.” In the absence of such evidence,  
28 Petitioner cannot establish that a defense of selective prosecution would have succeeded

1 at trial, and thus cannot establish that counsel’s advice to plead guilty was ineffective.

2 As to the “outrageous conduct” defense, “[i]n each of the cases in which an  
3 outrageous conduct defense has succeeded, the government essentially manufactured the  
4 crime.” *United States v. Bogart*, 783 F.2d 1428, 1436 (9th Cir.1986) (vacated and  
5 remanded as to defendant Wingender; *see United States v. Wingender*, 790 F.2d 802 (9th  
6 Cir.1986)). That is, “government agents engineer[ed] and direct[ed] the criminal  
7 enterprise from start to finish.” *United States v. Ramirez*, 710 F.2d 535, 539 (9th  
8 Cir.1983). Here, according to Petitioner’s version of the facts, the government set up the  
9 crime. Even so, it was Petitioner’s choice to assault the victim; that was not something  
10 the government did. The defense thus would not have succeeded at trial, so this basis for  
11 Petitioner’s contention that counsel’s advice to plead guilty was ineffective is without  
12 merit.

13 In claim five, Petitioner contends that counsel’s advice to plead guilty was  
14 ineffective assistance because he had not followed up on a subpoena that was  
15 incompletely answered by the prosecution. He asserts that “[h]ad counsel actively  
16 sought the subpoenaed records that Mr. West failed to turn over, it is likely that he would  
17 not have insisted that Petitioner accept the plea, Petitioner would not have been inclined  
18 to do so, and the record would have shown evidence supporting outrageous government  
19 conduct and selective prosecution.” (Amen. Pet. at 15.)

20 The materials subpoenaed would have gone to the selective prosecution and  
21 outrageous conduct defenses discussed above, both of which the Court has concluded  
22 would not have succeeded at trial. This claim is without merit.<sup>1</sup> *See Lambert*, 393 F.3d  
23 at 982 (question whether discovery of evidence would have led counsel to recommend  
24 rejection of plea “may depend on whether ‘the defense would have likely succeeded at  
25 trial.’”) (quoting *Hill*, 474 U.S. at 59).

26 \_\_\_\_\_  
27 <sup>1</sup> To whatever extent Petitioner may be attempting to claim that counsel was  
28 ineffective in not raising selective prosecution or outrageous government conduct as  
grounds to dismiss the charges, those claims are waived by the guilty plea.

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3 **II. Other Claims**

4 Petitioner also contends that he received a gang enhancement to his sentence  
5 because of perjured testimony given at the preliminary hearing. The enhancement was,  
6 however, not based on preliminary hearing testimony, but on the plea bargain. (Ex. 1  
7 (initialed plea agreement) at 2.) This claim is frivolous.

8 Finally, Petitioner contends that the prosecution failed to turn over exculpatory  
9 evidence to the defense. *See Brady v. Maryland*, 373 U.S. 83, 87 (1963) ("the  
10 suppression by the prosecution of evidence favorable to an accused . . . violates due  
11 process where the evidence is material either to guilt or to punishment, irrespective of  
12 the good faith or bad faith of the prosecution.").

13 Evidence is material "if there is a reasonable probability that, had the evidence  
14 been disclosed to the defense, the result of the proceeding would have been different. A  
15 'reasonable probability' is a probability sufficient to undermine confidence in the  
16 outcome." *United States v. Bagley*, 473 U.S. 667, 682 (1985). The evidence that  
17 Petitioner contends was not turned over is that requested in the subpoena discussed  
18 above, evidence that would have gone to Petitioner's selective prosecution and  
19 outrageous conduct defenses. For the reasons discussed in section I(B) above, those  
20 defenses would not have succeeded at trial, so the evidence that purportedly was not  
21 turned over was not material. There was no *Brady* violation.

22 **III. Appealability**

23 The federal rules governing habeas cases brought by state prisoners require a  
24 district court that denies a habeas petition to grant or deny a certificate of appealability in  
25 the ruling. *See* Rule 11(a), Rules Governing § 2254 Cases, 28 U.S.C. foll. § 2254  
26 (effective December 1, 2009).

27 A petitioner may not appeal a final order in a federal habeas corpus proceeding  
28 without first obtaining a certificate of appealability (formerly known as a certificate of

1 probable cause to appeal). *See* 28 U.S.C. § 2253(c); Fed. R. App. P. 22(b). A judge  
2 shall grant a certificate of appealability "only if the applicant has made a substantial  
3 showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The certificate  
4 must indicate which issues satisfy this standard. *See id.* § 2253(c)(3). "Where a district  
5 court has rejected the constitutional claims on the merits, the showing required to satisfy  
6 § 2253(c) is straightforward: the petitioner must demonstrate that reasonable jurists  
7 would find the district court's assessment of the constitutional claims debatable or  
8 wrong." *Slack v. McDaniel*, 120 S.Ct. 1595, 1604 (2000).

9 This was not a close case. Petitioner's claims are patently without merit, so  
10 jurists of reason would not find the result debatable or wrong. A certificate of  
11 appealability will be denied. Petitioner is advised that he may not appeal the denial of a  
12 COA, but he may ask the court of appeals to issue a COA under Rule 22 of the Federal  
13 Rules of Appellate Procedure. *See* Rule 11(a), Rules Governing § 2254 Cases.

14 **CONCLUSION**

15 Petitioner's motion for an evidentiary hearing (document number 39 on the  
16 docket) is DENIED. The petition for a writ of habeas corpus is DENIED. A certificate  
17 of appealability is DENIED. The Clerk shall close the file.

18 **IT IS SO ORDERED.**

19 DATED: July 9, 2010

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JEFFREY S. WHITE  
UNITED STATES DISTRICT JUDGE

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UNITED STATES DISTRICT COURT  
FOR THE  
NORTHERN DISTRICT OF CALIFORNIA

LANGENDORF,

Plaintiff,

v.

et al,

Defendant.

Case Number: CV05-01629 JSW

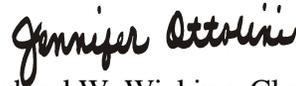
**CERTIFICATE OF SERVICE**

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on July 9, 2010, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Taylor S. Langendorf  
Kern Valley State Prison  
P74142  
P.O. Box 5103  
Delano, CA 93216

Dated: July 9, 2010



Richard W. Wieking, Clerk  
By: Jennifer Ottolini, Deputy Clerk