UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

JESUS L. OROZCO,

Petitioner,

v.

RALPH DIAZ,

Respondent.

Case No. 19-cv-05828-EMC

ORDER DENYING PETITION FOR A WRIT OF HABEAS CORPUS

I. INTRODUCTION

Jesus L. Orozco, an inmate at the Correctional Training Facility in Soledad, filed this pro se action for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Respondent has filed an answer and Mr. Orozco has filed a traverse. Mr. Orozco's petition is now before the Court for review on the merits. For the reasons discussed below, the petition for writ of habeas corpus will be denied.

II. BACKGROUND

Mr. Orozco was prosecuted for sexual assault of a child,[1] and a jury found him guilty of six counts: Count 1- aggravated sexual assault of a child (Cal. Pen. Code § 269); Count 2- misdemeanor assault (Cal. Pen. Code § 240), Counts 3, 4, and 5- forcible lewd conduct on a child under 14 (Cal. Pen. Code § 288(b)(1)); and Count 6- lewd conduct on a child under 14 (Cal. Pen. Code § 288(a)). CT 262-263. On March 28, 2003, the trial court sentenced petitioner to a determinate term of 24 years consisting of consecutive sentences of six years each on Counts 3-6, and a consecutive indeterminate term of 15 years to life on Count 1. RT 501-503. The court also

[1] As the particular facts of the crime are not relevant to the issues in the habeas petition, they will not be discussed in this order.

sentenced Mr. Orozco to 10 days in jail on Count 2. RT 504-505.

The issues in this case involve correcting an incorrect memorializing by the clerk of the judgment of the superior court. In California state courts, an abstract of judgment is a written document that memorializes the judgment in a criminal case. There are two separate abstract of judgment forms – one for a determinate sentence (e.g., a term of years) and one for an indeterminate sentence (e.g., imprisonment for life with the possibility of parole after a specified number of years). When, as here, the sentence consists of both an indeterminate component and a determinate component, the clerk will prepare two abstracts of judgment: one for the indeterminate part of the sentence and one for the determinate part of the sentence.

When the abstract of judgment contains a mistake so that it does not accurately reflect the judgment pronounced by the court, that is a scrivener's error that can be corrected by the clerk. See People v. Flores, 177 Cal.App.2d 610, 613-14 (Cal. Ct. App. 1960). As the court discussed in Flores,

> In the first place, the judgment itself was not corrected. It was only the abstract of that judgment which was corrected to conform to the judgment as pronounced. The judgment is made by the court; the abstract of judgment is made by the clerk. Secondly, a court always has the inherent power to correct clerical errors in its records and in its judgments, and here it clearly appears from the judgment as pronounced and the rough minutes that the error in the abstract of judgment was clerical and inadvertent.

Id. at 613. Furthermore,

> The court has nothing to do with the entry of a judgment, since that is a duty devolving on the clerk of the court who is but an instrument of the court to make a correct memorial of its orders. . . . It is the ministerial duty of the clerk to enter a judgment in conformity to the decision of the court. So here, it was the duty of the clerk to make both a formal judgment and an abstract in conformity to the judgment pronounced by the court. The failure of the clerk so to do as to either one or both would be merely a clerical inadvertence. Being clerical, the clerk could have corrected the error himself.

Id. at 613-14 (internal citations and quotation marks omitted).

At the time of Mr. Orozco's sentencing, two abstracts of judgment were prepared by the court clerk-- one for the determinate term and one for the indeterminate term-- to memorialize the

trial court's oral pronouncement of sentence. The determinate term abstract correctly listed the consecutive six-year terms on Counts 3-6, for a total determinate term of 24 years. CT 266-267. Section 1 of the indeterminate term abstract correctly listed Count 1 as the sole felony for which the indeterminate term was imposed, section 6a correctly listed 15-years-to-life as the indeterminate term imposed, and sections 6a and 11 correctly noted the indeterminate term was consecutive to the determinate term of 24 years. CT 264-265. However, the clerk made a scrivener's error under section 6a, mistakenly listing Counts 3-6 instead of Count 1 as the counts for which the indeterminate term was imposed. CT 264.

On April 15, 2004, the California Court of Appeal affirmed the judgment. Docket No. 12-4. The issue raised on appeal was whether Mr. Orozco was convicted and punished for a single act in Counts 2 and 5. Id. On June 23, 2004, the California Supreme Court denied a petition for review. Docket No. 12-5.

More than a decade later, on January 31, 2018, Mr. Orozco filed a petition for writ of habeas corpus in the Santa Clara Superior Court, raising the issue of the error on his indeterminate term abstract, as well as other issues. Docket No. 12-6. The superior court denied the petition, noting that the abstract already had been amended and that the remaining issues were procedurally barred for reasons explained in prior orders. Docket No. 12-7 at 11. The superior court attached a copy of the amended abstract to its order. Id. at 12-14.

Mr. Orozco next filed a petition for writ of habeas corpus in the California Court of Appeal, claiming that he was "entitled to resentencing in his presence for due process to correct an illegal sentence." Docket No. 12-6 at 4. The California Court of Appeal issued a summary denial. Docket No. 19. Mr. Orozco then filed a petition for writ of habeas corpus in the California Supreme Court, raising the same due process claim he raised in the court of appeal. Docket No. 12-8. The California Supreme Court also summarily denied the petition. Docket No. 1 at 21. Thereafter, Mr. Orozco filed this federal habeas petition.

Mr. Orozco's petition for writ of habeas corpus in this federal action alleges the following claims: (1) that the sentence reflected on the abstract of judgment is incorrect, and (2) that Mr.

Orozco had a due process right to be present when the abstract of judgment was amended.[2] Docket No. 1 at 5-8.

III. JURISDICTION AND VENUE

This Court has subject matter jurisdiction over this action for a writ of habeas corpus under 28 U.S.C. § 2254. 28 U.S.C. § 1331. This action is in the proper venue because the petition concerns the conviction and sentence of a person convicted in Santa Clara County, California, which is within this judicial district. 28 U.S.C. §§ 84, 2241(d).

IV. STANDARD OF REVIEW

This Court may entertain a petition for writ of habeas corpus "in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a).

The Antiterrorism And Effective Death Penalty Act of 1996 ("AEDPA") amended § 2254 to impose new restrictions on federal habeas review. A petition may not be granted with respect to any claim that was adjudicated on the merits in state court unless the state court's adjudication of the claim: "(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 (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." 28 U.S.C. § 2254(d).

"Under the 'contrary to' clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the] Court has on a set of materially indistinguishable facts." Williams v. Taylor, 529 U.S. 362, 412-13 (2000).

"Under the 'unreasonable application' clause, 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." Id. at 413. "[A] federal habeas court may not issue the writ simply because that court concludes in its

[2] In his traverse Mr. Orozco also raises arguments concerning restitution, however, the Court has already dismissed his restitution claims. See Docket No. 9 at 3.

independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." Id. at 411. "A federal habeas court making the 'unreasonable application' inquiry should ask whether the state court's application of clearly established federal law was objectively unreasonable." Id. at 409.

The state-court decision to which § 2254(d) applies is the "last reasoned decision" of the state court, if there is a reasoned decision. See Ylst v. Nunnemaker, 501 U.S. 797, 803-04 (1991). When confronted with an unexplained decision from the last state court to have been presented with the issue, "the federal court should 'look through' the unexplained decision to the last related state-court decision that does provide a relevant rationale. It should then presume that the unexplained decision adopted the same reasoning." Wilson v. Sellers, 138 S. Ct. 1188, 1192 (2018).

When the state court has denied a federal constitutional claim on the merits without explanation, and there is no lower state court decision to "look through" to, the federal habeas court "must determine what arguments or theories supported or . . . could have supported, the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of [the U.S. Supreme] Court." Harrington v. Richter, 562 U.S. 86, 102 (2011).

V. DISCUSSION

A. Abstract of Judgment

Mr. Orozco claims that the abstract of judgment is incorrect because it shows no term imposed for Count 1 and shows 15 years to life as the term imposed for Counts 3, 4, 5, and 6. Pet., Docket No. 1 at 7-8.

The Santa Clara Superior Court stated in its order denying Mr. Orozco's habeas petition that CDCR's Legal Processing Unit had previously sent a letter of clarification to the court on the same issue, and that the court clerk had already amended the abstract to correct the error in response to CDCR's letter. See Docket No. 12-7 at 11. The superior court attached the amended abstract to its order and served it on petitioner. See id. at 12-13. The amended indeterminate abstract reflects that, on January 19, 2018, the clerk amended section 6a to correctly reflect that

the court imposed the indeterminate term of 15 years to life for Count 1. Id. This replaced the original indeterminate abstract that erroneously listed a 15 years-to-life sentence for Counts 3-6.

As the last reasoned decision from a state court, the Santa Clara Superior Court's decision is the decision to which § 2254(d) is applied. See Wilson, 138 S. Ct. at 1192. Mr. Orozco is entitled to habeas relief only if the Santa Clara Superior Court's decision was contrary to, or an unreasonable application of, clearly established federal law from the U.S. Supreme Court, or was based on an unreasonable determination of the facts in light of the evidence presented.

To the extent that Mr. Orozco is claiming that the original indeterminate term abstract of judgment contains an error, the error has already been corrected, as noted by the Santa Clara Superior Court in its order denying habeas. The issue is moot.

To the extent that Mr. Orozco is claiming that the amended abstract of judgment contains an error, he is factually wrong. The amended indeterminate term abstract of judgment lists the date of the original 2003 sentencing hearing, in Section 1 it correctly lists the felony that Mr. Orozco was convicted of in Count 1, and in Section 6a correctly lists Count 1 as the count for which the indeterminate term of 15 years to life was imposed. Docket No. 12-7 at 12-13. The amended abstract has the clerk's signature and the January 19, 2018 date of the amendment. It accurately reflects the sentence that was orally pronounced by the judge at the 2003 sentencing hearing. See RT 501-505. The judge's oral pronouncement of judgment state that, "On the determinant terms it's a total commitment of twenty-four years. And on the indeterminant term, count one, penal code 269, of course the sentence is fifteen years to life, it's statutory, it must be imposed. . . That term is to be served consecutive to the twenty-four years previously imposed." Id. at 502-503. Because the amended abstract fixed the mistake in the original abstract, there is no relief that this Court could grant. Mr. Orozco therefore is not entitled to the writ on his claim that he is now in custody pursuant to an incorrect abstract of judgment.

B. Right to Presence

Mr. Orozco claims that he "is entitled to resentencing in his presence for due process to correct an illegal sentence anytime." Pet., Docket No. 1 at 7. The Court understands Mr. Orozco's argument to be that he had a due process right to be present when the abstract of

judgment was corrected.

Mr. Orozco presented this due process claim in a petition for a writ of habeas corpus to the California Supreme Court. The court summarily denied relief. Because the state court denied the federal constitutional claim on the merits without explanation, this Court "must determine what arguments or theories supported or . . . could have supported, the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of [the U.S. Supreme] Court." Harrington, 562 U.S. at 102.

The California Supreme Court reasonably could have determined that the ministerial act of correcting the scrivener's error was not a stage of Mr. Orozco's criminal proceeding where he had a due process right to be present. Due process protects a defendant's right to be present "at any stage of the criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure." Kentucky v. Stincer, 482 U.S. 730, 745 (1987). A defendant has a "right to be present at all stages of the trial where his absence might frustrate the fairness of the proceedings," United States v. Reyes, 764 F.3d 1184, 1194 (9th Cir. 2014) (quotation marks omitted), but he is not required to be present when his presence "would be useless, or the benefit but a shadow." Id. at 1193 (quotation marks omitted).

There is nothing in the record that suggests a hearing was held in state court when the abstract of judgment was amended. Because the error in the abstract of judgment was merely clerical, it was an error that a court clerk could correct by him or herself. See Flores, 177 Cal.App.2d at 614. Here, it appears from the amended abstract that a court clerk simply used "white out" to cover the counts that were incorrectly listed in section 6a and handwrote "one" in that section to indicate that it was Count 1 for which the indeterminate term of 15 years to life was imposed. Docket No. 12-7 at 12-13. Contrary to Mr. Orozco's contention, the amended abstract of judgment did not change the offense for which he was convicted.

The California Supreme Court reasonably could have concluded that the ministerial act of a court clerk correcting a scrivener's error in the abstract of judgment was not a critical stage of the proceedings where Mr. Orozco's presence would have contributed to the fairness of the

proceeding. "When an amended judgment corrects a scrivener's error, it does not change the underlying judgment, but only the written record that erroneously reflects that judgment. As a result, an amended judgment correcting a scrivener's error has no legal consequences." Turner v. Baker, 912 F.3d 1236, 1239 (9th Cir. 2019) (internal citations and quotation marks omitted). This was not a "resentencing" as Mr. Orozco characterizes it, but rather a ministerial act of correcting the scrivener's error to conform the written abstract of judgment to the oral pronouncement of the judgment. See id.

Additionally, Mr. Orozco does not cite any U.S. Supreme Court case holding that a defendant has a right to be present during the ministerial act of correcting a scrivener's error on an abstract of judgment, nor has this Court found any such case. "[I]t is not an unreasonable application of clearly established Federal law for a state court to decline to apply a specific legal rule that has not been squarely established by this Court." Harrington, 562 U.S. at 101. Accordingly, the state court's rejection of petitioner's claim could not have been contrary to clearly established Supreme Court law.

Mr. Orozco argues that he had a right to be present when the abstract of judgment was amended, citing Diaz v. U.S., 223 U.S. 442 (1912). However, this case is distinguishable. In Diaz, the defendant was voluntarily absent from his own trial on two occasions during the examination and cross examination of witnesses, and consented that the trial should proceed in his absence but in the presence of his counsel. The Supreme Court, interpreting the law of the Philippine Islands, concluded that under Philippine law an accused is entitled to be present at all stages of a trial, but must be present at arraignment, when a guilty plea is taken, and when judgment is pronounced. See id. at 454. The Supreme Court then compared this to the Sixth Amendment rights of an accused in the United States, and determined that the relevant provision of Philippine law accorded to an accused the "full right expressed in the congressional enactment, as that right was recognized and understood in this country at the time is was carried to the Philippines." See id. at 459. This case has no relevance to Mr. Orozco's claim because judgment was not being pronounced at the time the scrivener's error was corrected, nor does Diaz stand for the proposition that Mr. Orozco had a right to be present during the ministerial act of correcting a

scrivener's error in the abstract of judgment. Mr. Orozco is not entitled to the writ on this claim.

C. No Certificate Of Appealability

A certificate of appealability will not issue because reasonable jurists "would not find the district court's assessment of the constitutional claims debatable or wrong." Slack v. McDaniel, 529 U.S. 473, 484 (2000). Accordingly, a certificate of appealability is denied.

VI. CONCLUSION

For the foregoing reasons, the petition for writ of habeas corpus is **DENIED**.

IT IS SO ORDERED.

Dated: August 31, 2020

EDWARD M. CHEN
United States District Judge

United States District Court
Northern District of California