UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

EDWARD JAMES DRYG,

Petitioner,

v.

SHEILA E. MITCHELL, Chief, Santa Clara County Probation Department,

Respondent.
_____/

No. C 06-7729 PJH

ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS

Before the court is the petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254, filed by state prisoner, Edward James Dryg ("Dryg"), who is presently on probation following a judgment of conviction in the Superior Court of California, County of Santa Clara. Having reviewed the parties' papers, the record, and having carefully considered their arguments and the relevant legal authorities, the court hereby DENIES the petition.

BACKGROUND

A. Procedural Background

On May 3, 2001, Dryg was first charged in Santa Clara Superior Court with felony violations of California Penal Code § 261.5(c) (unlawful sexual intercourse with minor more than three years younger than perpetrator), § 288a(b)(1) (oral copulation with minor), and § 289(h) (forcible sexual penetration by foreign or unknown object of person under age of eighteen), all alleged to have occurred on August 13, 1998. On September 3, 2003, the trial court dismissed the charges without prejudice, and the state re-filed the charges on October 14, 2003, and subsequently amended the information on February 18, 2004.

Dryg entered a no contest plea to all three charges on July 20, 2004. On September

30, 2004, the trial court sentenced Dryg to probation and imposed a one-year county jail term. Dryg filed a notice of appeal that same day.

On November 29, 2004, the trial court denied Dryg's application for a certificate of probable cause, and the California Court of Appeal dismissed the appeal for failure to obtain such a certificate on December 15, 2005. On March 23, 2006, Dryg filed a petition for writ of habeas corpus with the state trial court, which it denied on May 22, 2006, and subsequently denied on reconsideration on July 5, 2006. Dryg then filed a petition for habeas relief with California Supreme Court on August 28, 2006, which the court summarily denied on September 27, 2006.

On December 18, 2006, Dryg filed the instant petition for federal habeas relief.

B. Factual Background

The charges stem from the following alleged conduct. During the summer of 1998, Dryg, who was forty-five years-old at the time, met the sixteen year-old female victim via an internet chat room. Dryg lived in Los Gatos, California; the victim was from Houston, Texas, and was living in a dormitory at the University of California-Berkeley campus attending a chemistry program that summer. After meeting online, Dryg invited the victim to a coffee shop near campus, and they met and had lunch. A few days later, Dryg contacted the victim and offered to pay her to have sex with him. The victim agreed, and on August 13, 2008, Dryg picked up the victim and took her to Palo Alto, where they had dinner. After dinner, Dryg took the victim to his home, where he orally copulated her, she orally copulated him, he had sexual intercourse with her, and he penetrated the victim anally with a dildo. Dryg subsequently paid the victim $250.00. There was no further sexual activity between Dryg and the victim following that night.

A year later, in October 1999, the victim was hospitalized for suicidal tendencies, and, in the course of treatment, revealed the incident with Dryg. She then reported the incident to the Palo Alto Police Department, but because the victim was unaware of Dryg's last name, authorities were unable to locate him.

Meanwhile, also in October 1999, Dryg was arrested in the Northern District of

Illinois and charged with traveling in interstate commerce for the purpose of engaging in sexual acts with a person under 18 years of age, after he unknowingly corresponded on the internet with an FBI agent posing as a young girl and then traveled to Chicago, Illinois. On September 12, 2000, Dryg pleaded guilty to the charge, and was sentenced to forty-one months in prison and to three years supervised release. In the course of those federal proceedings, Dryg admitted to the incident with the victim in this case, and the Los Gatos Police Department investigated, resulting in the charges against Dryg underlying this federal habeas case.

ISSUE

Dryg raised a single claim in his habeas petition before this court: that his trial counsel rendered ineffective assistance by not properly raising and preserving his challenge to the Interstate Agreement on Detainers.

STANDARD OF REVIEW

This court may entertain a petition for writ of habeas corpus "on 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). Because the petition in this case was filed after the effective date of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), the provisions of that act apply here. *See Lindh v. Murphy*, 521 U.S. 320, 327 (1997). Under the AEDPA, a district court may not grant a petition challenging a state conviction or sentence on the basis of a claim that was reviewed 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).

A state court decision is "contrary to" Supreme Court authority, falling within the first clause of § 2254(d)(1), only 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 decided a case differently than [the Supreme] Court has on a set of materially indistinguishable facts." *Williams v. Taylor*, 529 U.S. 362, 412-413 (2000). "Clearly established federal law" under § 2254(d)(1) is the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision." *Lockyer v. Andrade*, 538 U.S. 63, 71-72 (2003). This "clearly established" law "refers to the holdings, as opposed to the dicta, of [Supreme] Court decisions as of the time of the relevant state court decision." *Id.*

"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." *Id*. at 74. However, this standard "requires the state court decision to be more than incorrect or erroneous." *Id.* For the federal court to grant habeas relief, the state court's application of the Supreme Court authority must be "objectively unreasonable." *Id.* at 74-75. The "objectively unreasonable" standard is different from the "clear error" standard in that "the gloss of clear error fails to give proper deference to state courts by conflating error (even clear error) with unreasonableness." *Id.* at 75; *see also Clark v. Murphy*, 331 F.3d 1062, 1068 (9th Cir. 2003). Therefore, "[i]t is not enough that a habeas court, in its independent review of the legal question, is left with a firm conviction that the state court was erroneous . . . Rather, the habeas court must conclude that the state court's application of federal law was objectively unreasonable." *Andrade*, 538 U.S. at 75; *see also Clark*, 331 F.3d at 1068.

As for state court findings of fact, under § 2254(d)(2), a federal court may not grant a habeas petition by a state prisoner unless the adjudication of a claim on the merits by a state court 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)(2). The "clearly erroneous" standard of unreasonableness that applies in determining the "unreasonable application" of federal law under § 2254(d)(1) also applies in determining the "unreasonable determination of facts in light of the evidence" under §

2254(d)(2). *See Torres v . Prunty*, 223 F.3d 1103, 1107-1108 (9th Cir. 2000). To grant relief under 2254(d)(2), a federal court must be "left with a firm conviction that the determination made by the state court was wrong and that the one [petitioner] urges was correct." *Id.* at 1108.

However, when the state court decision does not articulate the rationale for its determination or does not analyze the claim under *federal* constitutional law, a review of that court's application of clearly established federal law is not possible. *See Delgado v. Lewis*, 223 F.3d 976, 981-82 (9th Cir. 2000); *see also* 2 J. Liebman & R. Hertz, Federal Habeas Corpus Practice and Procedure § 32.2, at 1424-1426 & nn. 7-10 (4th ed. 2001). When confronted with such a decision, a federal court must conduct an independent review of the record and the relevant federal law to determine whether the state court's decision was "contrary to, or involved an unreasonable application of, "clearly established federal law." *Delgado*, 223 F.3d at 982.

> When a state court does not furnish a basis for its reasoning, we have no basis other than the record for knowing whether the state court correctly identified the governing legal principle or was extending the principle into a new context. . . .[A]lthough we cannot undertake our review by analyzing the basis for the state court's decision, we can view it through the 'objectively reasonable' lens ground by *Williams* [, 529 U.S. 362]. . . . Federal habeas review is not de novo when the state court does not supply reasoning for its decision, but an independent review of the record is required to determine whether the state court clearly erred in its application of controlling federal law. . . . Only by that examination may we determine whether the state court's decision was objectively reasonable.

Id.

DISCUSSION

A. Legal Standards

1. Ineffective Assistance of Counsel Following a Guilty Plea

The Sixth Amendment to the United States Constitution guarantees the effective assistance of counsel. To support a claim of ineffective assistance of counsel, a petitioner must make a two-part showing. First, he must establish that, considering all the circumstances, counsel's performance fell below an objective standard of reasonableness. *See Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). Second, he must

demonstrate that he was prejudiced by counsel's deficient performance. *Id.* 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.

Where a defendant voluntarily and intelligently pleads guilty to a criminal charge, he cannot later raise in habeas corpus proceedings independent claims relating to the deprivation of constitutional rights that occurred before the plea of guilty. *Haring v. Prosise*, 462 U.S. 306, 319-20 (1983) (guilty plea forecloses consideration of pre-plea constitutional deprivations); *Tollett v. Henderson*, 411 U.S. 258, 267 (1973) (same); *Hudson v. Moran*, 760 F.2d 1027, 1029-30 (9th Cir. 1985) (no constitutional violation where defendant was not informed that guilty plea would foreclose subsequent habeas relief). A plea of nolo contendere has the same effect as a plea of guilty. *See Ortberg v. Moody*, 961 F.2d 135, 137 (9th Cir. 1992) ("petitioner's nolo contendere plea precludes him from challenging alleges constitutional violations that occurred prior to the entry of that plea").

A criminal defendant who pleads guilty may not collaterally challenge a voluntary and intelligent guilty plea entered into with the advice of competent counsel. *United States v. Broce*, 488 U.S. 563, 574 (1989). The only challenge left open in federal habeas corpus after a guilty plea is a challenge to the voluntary and intelligent character of the plea based on the nature of the advice of counsel to plead. *Hill v. Lockhart*, 474 U.S. 52, 56-57 (1985). A defendant who pleads guilty on advice of counsel may attack the voluntary and intelligent character of the guilty plea only by showing that the advice he received from counsel was not within the range of competence demanded of attorneys in criminal cases. *Tollett*, 411 U.S. at 266-67; *Lambert v. Blodgett*, 393 F.3d 943, 979-80 (9th Cir. 2004). He must also show a reasonable probability that but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial. *Strickland*, 466 U.S. at 688; *see also Hill*, 474 U.S. at 58-59.

2. Relevant State Law and Procedures

a. Detainers

A "detainer" is a notification filed with the institution in which a prisoner is serving a

sentence, advising that he is wanted to face pending criminal charges in another jurisdiction. *United States v. Mauro*, 436 U.S. 340, 359 (1978). However, the lodging of a detainer is more than mere notice that an inmate is wanted in another jurisdiction. A detainer asks the institution to "hold the prisoner for the agency or to notify the agency when release of the prisoner is imminent." *People v. Oiknine*, 79 Cal.App.4th 21, 23 (Cal. Ct. App. 1999). A "formal detainer" must be filed before an inmate may invoke the provisions of the Interstate Agreement on Detainers ("IAD"). *People v. Rhoden*, 216 Cal. App.3d 1242, 1251 (Cal. Ct. App. 1989).

California Penal Code § 1389 represents the state's codification of the IAD. It establishes a procedure by which a prisoner against whom a detainer has been lodged may demand trial within 180 days of a written request for final disposition properly delivered to the prosecutor and appropriate court of the prosecutor's jurisdiction. Cal. Penal Code § 1389, art. III. California Penal Code § 1389, art. III provides in pertinent part:

> (a) Whenever a person has entered upon a term of imprisonment in a penal or correctional institution of a party state, and whenever during the continuance of the term of imprisonment there is pending in any other party state any untried indictment, information or complaint on the basis of which a detainer has been lodged against the prisoner, he shall be brought to trial within one hundred eighty days after he shall have caused to be delivered to the prosecuting officer and the appropriate court of the prosecuting officer's jurisdiction written notice of the place of his imprisonment and his request for a final disposition to be made of the indictment, information or complaint: provided that for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance. The request of the prisoner shall be accompanied by a certificate of the appropriate official having custody of the prisoner, stating the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time earned, the time of parole eligibility of the prisoner, and any decisions of the state parole agency relating to the prisoner.
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> (b) The written notice and request for final disposition referred to in paragraph (a) hereof shall be given or sent by the prisoner to the warden, commissioner of corrections or other official having custody of him, who shall promptly forward it together with the certificate to the appropriate prosecuting official and court by registered or certified mail, return receipt requested.
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> (c) The warden, commissioner of corrections or other official having custody of the prisoner shall promptly inform him of the source and contents of any detainer lodged against him and shall also inform him of his right to make a request for final disposition of the indictment, information or complaint on which the detainer is based.

> (d) Any request for final disposition made by a prisoner pursuant to paragraph (a) hereof shall operate as a request for final disposition of all untried indictments, informations or complaints on the basis of which detainers have been lodged against the prisoner from the state to whose prosecuting official the request for final disposition is specifically directed. The warden, commissioner of corrections or other official having custody of the prisoner shall forthwith notify all appropriate prosecuting officers and courts in the several jurisdictions within the state to which the prisoner's request for final disposition is being sent of the proceeding being initiated by the prisoner. Any notification sent pursuant to this paragraph shall be accompanied by copies of the prisoner's written notice, request, and the certificate. If trial is not had on any indictment, information or complaint contemplated hereby prior to the return of the prisoner to the original place of imprisonment, such indictment, information or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.
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> (e) Any request for final disposition made by a prisoner pursuant to paragraph (a) hereof shall also be deemed to be a waiver of extradition with respect to any charge or proceeding contemplated thereby or included therein by reason of paragraph (d) hereof, and a waiver of extradition to the receiving state to serve any sentence there imposed upon him, after completion of his term of imprisonment in the sending state. The request for final disposition shall also constitute a consent by the prisoner to the production of his body in any court where his presence may be required in order to effectuate the purposes of this agreement and a further consent voluntarily to be returned to the original place of imprisonment in accordance with the provisions of this agreement. Nothing in this paragraph shall prevent the imposition of a concurrent sentence if otherwise permitted by law.
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> (f) Escape from custody by the prisoner subsequent to his execution of the request for final disposition referred to in paragraph (a) hereof shall void the request.

The IAD, in turn, also gives a state the right to obtain a prisoner for purposes of trial, in which case the state must try the prisoner within 120 days of his arrival in the state, and must not return the prisoner to his original place of imprisonment prior to that trial. *Id.*, art. IV; *see also Alabama v. Bozeman*, 533 U.S. 146, 148-50 (2001). That article provides:

> (a) The appropriate officer of the jurisdiction in which an untried indictment, information or complaint is pending shall be entitled to have a prisoner against whom he has lodged a detainer and who is serving a term of imprisonment in any party state made available in accordance with Article V(a) hereof upon presentation of a written request for temporary custody or availability to the appropriate authorities of the state in which the prisoner is incarcerated: provided that the court having jurisdiction of such indictment, information or complaint shall have duly approved, recorded and transmitted the request: and provided further that there shall be a period of thirty days after receipt by the appropriate authorities before the request be honored, within which period the governor of the sending state may disapprove the request for temporary custody or availability, either upon his own motion or upon motion of the prisoner.

> (b) Upon receipt of the officer's written request as provided in paragraph (a) hereof, the appropriate authorities having the prisoner in custody shall furnish the officer with a certificate stating the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time earned, the time of parole eligibility of the prisoner, and any decisions of the state parole agency relating to the prisoner. Said authorities simultaneously shall furnish all other officers and appropriate courts in the receiving state who have lodged detainers against the prisoner with similar certificates and with notices informing them of the request for custody or availability and of the reasons therefor.
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> (c) In respect of any proceeding made possible by this Article, trial shall be commenced within one hundred twenty days of the arrival of the prisoner in the receiving state, but for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance.
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> (d) Nothing contained in this Article shall be construed to deprive any prisoner of any right which he may have to contest the legality of his delivery as provided in paragraph (a) hereof, but such delivery may not be opposed or denied on the ground that the executive authority of the sending state has not affirmatively consented to or ordered such delivery.
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> (e) If trial is not had on any indictment, information or complaint contemplated hereby prior to the prisoner's being returned to the original place of imprisonment pursuant to Article V(e) hereof, such indictment, information or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.

Cal. Penal Code § 1389, art. iv.

If the state[1] receiving the detainer request fails to act in compliance with the IAD, or "in the event that an action on the indictment, information or complaint on the basis of which the detainer has been lodged is not brought to trial within the period provided in Article III or Article IV," an order shall be entered dismissing the pending criminal charges with prejudice. Cal. Penal Code § 1389, art. V(c); *see, e.g., Mauro*, 436 U.S. at 364; *People v. Brooks*, 189 Cal.App.3d 866, 872 (Cal. Ct. App. 1987). In order to take advantage of the sanction of dismissal, however, the prisoner must strictly comply with the procedural requirements of the IAD. *People v. Garner*, 224 Cal.App.3d 1363, 1371 (Cal. Ct. App. 1990); *Rhoden*, 216 Cal.App.3d at 1252.

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[1] "State" includes "a state of the United States; the United States of America; a territory or possession of the United States; the District of Columbia; the Commonwealth of Puerto Rico." Cal. Penal Code § 1389, art. II.

b. Speedy Trial Rights

California Penal Code § 1381.5, which is part of California's Speedy Trial Act, permits federal prisoners with criminal proceedings pending in California courts to request to be brought to trial or to be sentenced in the state proceeding within 90 days of making the request. If the defendant is not brought to trial or for sentencing as provided by § 1381.5, the court in which the action is pending "shall . . . dismiss the action." Cal. Penal Code § 1381.5.

c. Relationship between Speedy Trial Rights and IAD Rights

Where the defendant is a federal prisoner, California Penal Code section 1381.5, governing speedy trial rights, and section 1389, governing IAD rights, might both apply. While a dismissal under section 1389 for failure to comply with the statutory IAD time limits constitutes a dismissal *with* prejudice, that is not the case for a dismissal related to a speedy trial violation under section 1381.5. *See Selfa v. Superior Court*, 109 Cal.App.3d 182 (Cal. Ct. App. 1980); *People v. Cella*, 114 Cal.App.3d 905 (Cal. Ct. App. 1981).

As a general rule, in California, an order dismissing an action for violation of the speedy trial statute is a bar to further prosecution for the same offense if it is a misdemeanor, but not if it is a felony or a misdemeanor joined with a felony. 5 Witkin, California Criminal Law, Criminal Trials § 327 (3d ed. 2000). Therefore, a new felony action may ordinarily be instituted after the dismissal and within the period of the statute of limitations. In *Crockett v. Superior Court*, 14 Cal. 3d 433, 436 (Cal. 1975), the California Supreme Court explained as follows:

> Section 1387 provides that an order of dismissal of a criminal charge is not "a bar to any other prosecution for the same offense . . . if it is a felony." Included in such orders of dismissal are those granted by reason of the fact that the defendant was not brought to trial within statutory time limits. Although the right to a speedy trial is grounded in both the United States and California Constitutions, the timely refiling of charges once dismissed for denial of a speedy trial has been deemed constitutionally permissible absent a showing by the accused of actual prejudice.

In *Selfa*, the California Court of Appeal held that in cases where sections 1381.5 and 1389 both apply, the 90-day period of section 1381.5 prevails. 109 Cal. App.3d at 186. In

harmonizing the two statutes, which contain different deadlines, the court noted that "a more specific statute will normally control over a general one." *Id.* at 188. It held that section 1389 was the "more general" of the two statutes, in contrast to the speedy trial statute, section 1381.5, which "applies specifically to California, and focuses upon the right of prisoners in federal institutions in our state to the same 90-day trial right as provided prisoners in state institutions." *Id.*

B. Petitioner's Habeas Claim

1. Background

At the time the state charges in this case were initially filed on May 3, 2001, Dryg was in the custody of the Federal Bureau of Prisons at the Federal Correctional Institution in Lompoc, California, serving the sentence on his federal conviction for traveling in interstate commerce for the purpose of engaging in sexual acts with a person under 18 years-old, imposed by the district court in the Northern District of Illinois. On May 29, 2001, the Santa Clara County District Attorney lodged a detainer with the federal warden.

Subsequently, on June 12, 2001, Dryg wrote a letter to Santa Clara County District Attorney George Kennedy, stating that he would be released from federal custody no later than September 27, 2002. Suppl. Exh. G. Dryg then asked whether the district attorney "could . . be so kind as to continue [the state case] until that time?" *Id.* On August 17, 2001, the Santa Clara County District Attorney nevertheless mailed the warden at FCI Lompoc a "Form V Request for Temporary Custody" pursuant to California Penal Code § 1389, which the federal prison received on August 20, 2001.

A few days later, on August 23, 2001, Dryg filed a request with the federal prison that Santa Clara County be denied temporary custody. Suppl. Exh. K. Subsequently, on September 9, 2001, a manager at the federal prison called the Santa Clara County district attorney's office and spoke with a legal clerk. The manager told the clerk that Dryg wanted to stay in federal custody until his release date, and that he wanted to speak to a deputy district attorney. Clerk's Transcripts ("C.T.") 176. Supervising deputy district attorney, Victoria Brown, returned the call and spoke with Cheryl Hyatt, a case manager at the

federal prison. Hyatt confirmed that Dryg requested to serve out his federal sentence, and that he had expressed concern regarding adequate time to prepare his state case. C.T. 177.

On September 14, 2001, Dryg received a response to his request that Santa Clara County be denied temporary custody. Supp. Exh. K. The federal warden stated in that response:

> In investigating this matter, the required paperwork has not been received to initiate a temporary custody transfer to Santa Clara County. Therefore, in according to Program Statement 5130.06, Detainers and the Interstate Agreement on Detainers Act, dated March 1, 1999, you are not eligible for transfer at this time.

Suppl. Exh. K. In effect, this response reassured Dryg that he wouldn't be transferred in the near future.

Approximately five months later, on February 6, 2002, Dryg signed a form entitled "Notice and Demand for Trial Pursuant to California Penal Code § 1381.5 [California's speedy trial statute] by a Person in Federal Custody." The form was mailed to the Santa Clara District Attorney, where it was received on February 11, 2002, and was filed in the Santa Clara Superior Court on February 19, 2002.

On May 31, 2002, Dryg filed a pro se motion to dismiss, asserting that the prosecution had violated the statutory time limits of both the speedy trial statute and California's IAD statute, Penal Code §§ 1381.5 and 1389, art. IV. Regarding the IAD, Dryg argued now – contrary to his prior objections to any transfer pursuant to § 1389 – that the state was required to try him within 180 days of the district attorney's August 2001 request for temporary custody, which would have been around February 11, 2002. Dryg also argued that the state violated his speedy trial rights under § 1381.5 by failing to bring him to trial by early May 2002, ninety days from February 6, 2002, the date that Dryg filed his notice and demand for trial pursuant to that statute.

In July 2002, the state called the federal prison to inquire regarding the status of its request for temporary custody, and was told that Dryg refused to complete and sign the necessary paperwork for his release, and thus could not be transferred to state custody.

Reporter's Transcripts ("R.T.") at 35-36; C.T. 177. Apparently, Dryg refused to sign forms that would release him for trial on at least two occasions. R.T. 40, R.T. 53-54; C.T. 177. Additionally, Dryg again wrote to District Attorney George Kennedy on September 18, 2002, communicating that he was "not terribly interested in going to trial [at the time]," and that the state could continue his trial until his release. R.T. 41.[2]

Dryg ultimately remained in federal custody at FCI Lompoc until he had finished serving his federal sentence on September 27, 2002, when he was placed in the custody of the Santa Clara County Superior Court. On November 13, 2002, Dryg waived time. C.T. 178. Apparently, an information was not filed until June 30, 2003. R.T. 36. After Dryg was brought to Santa Clara County, he was arraigned, entered a not guilty plea, and was subsequently released from custody on bail.

Santa Clara County Superior Court Judge Marc Poche held a two-day hearing on Dryg's motion to dismiss, filed in May 2002, on August 29, 2003 and September 3, 2003. In the meantime, Dryg had retained counsel, Jerome Mullins, who represented him at the hearings. The court heard argument all day on August 29, 2003. Dryg admitted a number of exhibits, A-V, in conjunction with the hearing.[3] The court then continued the hearing to September 3, 2003 to provide it and the parties additional time to consider the relevant authority.

Following an additional lengthy hearing on September 3, 2003, the court granted Dryg's motion to dismiss, but without prejudice. The court found that the 90-day limit of § 1381.5, the speedy trial statute – not the 120-day limit of § 1389 – applied, based on the rule articulated in *Selfa.* 109 Cal.App.3d at 188 (where prisoner's demand for speedy trial

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[2]At the August 29, 2003 hearing, Dryg's counsel, Mullins, argued that it was irrelevant that Dryg may have subsequently indicated a desire to remain in federal custody instead of proceeding to trial on the state charges. R.T. 43. Mullins argued that once Dryg made the demand for a speedy trial on February 6, 2002, the state must honor that request and the defendant is not subsequently able to withdraw his request for a speedy trial other than through an open court waiver of his speedy trial right. R.T. 44-45.

[3]The court has referred to those exhibits, a part of the record before this court, as "supplemental exhibits."

complies with both § 1381.5 and § 1389, 90-day period provided by § 1381.5 controls over 180-day period provided by § 1389). The court noted that under Penal Code § 1387, the dismissal would be without prejudice. The court also indicated that were it not for the *Selfa* rule, it would have found that Dryg made a proper demand under Article III of the IAD, section 1389, and that the dismissal would have been with prejudice. Finally, the court suggested on the record that perhaps an extraordinary writ should be explored. R.T. 91.

Dryg, however, did not file an appeal or seek an extraordinary writ following the trial court's September 3, 2003 dismissal without prejudice. He asserts that this was because "the prosecution did not immediately re-file the charges." Petition at ¶ 19. According to Dryg, he does not fault his then-attorney, Jerome Mullins' failure to seek post-dismissal relief because "there was no basis to file an appeal." *Id.* Dryg concedes that when the district attorney re-filed the felony charges against him approximately forty days later on October 14, 2003, "the time for filing an appeal from the first case had passed." *Id.*[4]

After the charges were re-filed on October 14, 2003, Dryg made his first appearance on November 11, 2003, and represented himself at the preliminary hearing on December 2, 2003.[5] On December 16, 2003, the state filed the information, and Dryg was arraigned on December 22, 2003, at which time he signed an application to represent himself. On January 14, 2004, however, Dryg decided to seek another attorney.

On February 4, 2004, Dryg retained attorney Guyton Jinkerson, and filed a demurrer to the charges, on the ground that the three-year statute of limitations had run,[6] and also based on the fact that the information failed to provide any justification for an extension of the limitations period. On February 18, 2004, the trial court sustained Dryg's demurrer, but

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[4]The court thus notes that it is clear that Dryg does *not* claim here, nor did he ever raise the issue before the state courts, that *Mullins'* failure to file an appeal or seek an extraordinary writ of the September 3, 2003 dismissal without prejudice constituted ineffective assistance of counsel.

[5]In the current petition, Dryg simply states that he was "unable to retain Mr. Mullins" for the second prosecution. Petition at ¶ 20.

[6] Under California Penal Code § 803, the statute of limitations on the charged offenses was three years.

granted the prosecution's request to amend the information in order to address the statute of limitations issue. The state filed its first amended information on February 18, 2004.

On March 17, 2004, Dryg subsequently filed another demurrer to the first amended information, again arguing that the state failed to allege that the statute of limitations for the charged offenses had been tolled. C.T. 92. In an order issued April 7, 2004, Santa Clara County Superior Court Judge Kevin Murphy found that the prior prosecution for the same offenses tolled the statute of limitations. C.T. 115-119. The superior court noted that there had been approximately three months and ten days left in the limitations period at the time the first prosecution began on May 3, 2001 (the date of issuance of the original warrant); that the limitation period was tolled until the first prosecution was terminated on September 3, 2003; and that the second prosecution began on October 28, 2003 (the date of issuance of the new arrest warrant). Because the elapsed time between September 3, 2003, and October 28, 2003, was less than the number of days left in the limitations period, the court concluded that the limitations period had not yet run. However, the court agreed with Dryg that on its face, the amended information failed to plead facts indicating that the charges were not barred by the statute of limitations. The court therefore granted the prosecution leave to amend again so that the information would facially comply with the statute of limitations, and denied Dryg's demurrer in all other respects.

On April 7, 2004, Dryg filed a "once in jeopardy" plea. Subsequently, on April 28, 2004, Dryg filed another motion to dismiss the information based on speedy trial violations. C.T. 129. In support, Dryg argued that based on California case law, *Zimmerman v. Superior Court*, 248 Cal.App.2d 56, 62 (Cal. Ct. App. 1967), the charges contained in the information should be dismissed based on the state's failure to respond to Dryg's §§ 1381.5 and 1389 demands for a speedy trial. Dryg further argued that the statute of limitations should not be tolled during the time between May 2002, when he filed his first motion to dismiss pursuant to §§ 1381.5 and 1389, and September 2003, when the trial court finally heard his motion. Dryg also argued that it was the state's burden to establish good cause for the delay upon refiling charges after the speedy trial dismissal in September 2003.

Alternatively, Dryg argued that he had suffered actual prejudice as a result of the delay due to the loss of: (1) physical evidence, (2) favorable evidence, (3) material witnesses, and (4) the opportunity to receive concurrent sentences and other procedural rights. C.T. 138.

The state opposed Dryg's motion, and noted that one of the reasons that he was not released from federal custody until September 2002 was because the state never received the required documents from the federal prison granting it temporary custody of him, as required by § 1381.5, and thus the state was unable to complete the required forms to transport Dryg to Santa Clara County. C.T. 177. The state further noted that one of the reasons that it did not receive the requisite documents was because Dryg refused to sign them. *Id.*

As for the law, the state argued that after a dismissal on speedy trial grounds pursuant to § 1381.5, it was the *defendant's* burden to show actual prejudice, and not the state's burden to show good cause at the time of refiling the criminal charges. The state further argued that Dryg had not shown actual prejudice.

Santa Clara County Superior Court Judge Randolph Rice heard Dryg's motion to dismiss on June 25, 2004. The court denied Dryg's motion, concluding that the time period at issue was indeed statutorily tolled. However, the court denied without prejudice, and declined to rule on the issue regarding whether the delay prejudiced Dryg, determining that the issue was "more properly heard by the trial judge who hears the evidence in this case." June 25, 2004 Transcripts at 14.

However, on July 20, 2004, Dryg entered a plea of no contest to all three charges. Subsequently, on August 26, 2004, Dryg filed a motion to arrest judgment, arguing that each charge in the amended information was barred by the statute of limitations, and that the statute of limitations was not tolled by the filing of the arrest warrant on May 3, 2001, because the case was dismissed. Dryg also renewed the arguments he had made in connection with his April 28, 2004 motion to dismiss based on the alleged violations of Penal Code §§ 1381.5 and 1389. On September 30, 2004, the superior court denied the motion to arrest judgment and imposed sentence pursuant to the terms of the plea

agreement.

That same day, on September 30, 2004, Dryg filed a notice of appeal, appealing the trial court's: (1) April 7, 2004 order overruling his demurrer to the first amended information; (2) June 25, 2004 denial of his motion to dismiss; (3) September 30, 2004 denial of his motion to arrest of judgment; and (4) September 30, 2004 order granting probation. Subsequently, on November 24, 2004, current federal habeas counsel, Andrew Parnes, filed an application for issuance of a certificate of probable cause on Dryg's behalf. In that application, Dryg asserted that there were reasonable constitutional or jurisdictional grounds regarding the legality of the proceeding for review on appeal that were not related to a challenge of the validity of the plea itself. C.T. 328. He contended that these issues included whether the statute of limitations was violated, and whether the state complied with Penal Code §§ 1381.5 and 1389.

On November 29, 2004, the Superior Court summarily denied the application for a certificate of probable cause, and the California Court of Appeal subsequently dismissed the appeal on December 15, 2005.

On March 23, 2006, Dryg filed a petition for writ of habeas corpus in the Santa Clara Superior Court. In that petition, Dryg alleged that Jinkerson was ineffective for failing to argue that the re-filed charges should have been dismissed with prejudice pursuant to § 1389 and for failing to preserve that issue for appeal. In spite of the fact that the same court had previously denied a certificate of probable cause on the issues, the superior court nevertheless addressed Dryg's claims on the merits on habeas review. It found that Dryg's February 2002 speedy trial request under § 1381.5 failed to comply with the requirements of Penal Code § 1389, and that Dryg was therefore not entitled to seek a dismissal with prejudice under § 1389. The court concluded that Jinkerson was therefore not ineffective for failing to "resurrect" the § 1389 dismissal claim, or for failing to obtain a certificate of probable cause on the issue.

Dryg subsequently sought reconsideration of the superior court's order denying him habeas relief. Dryg argued in the motion that "at a pre-trial proceeding, the trial judge

found that [Dryg's] notice did comply with the requirements of a § 1389 motion and that the court [was] bound to give that decision effect under the doctrines of res judicata and collateral estoppel." Exh. C at 228-29.[7] In denying Dryg's motion for reconsideration, the court noted that under state law, there was no "law of the case" preventing it from concluding that the trial court had erred to the extent that it believed Dryg met the requirements of a § 1389 motion. Exh. C at 229. The court further noted the problems with Dryg's argument, asserting that if Dryg "were correct, then the doctrines of res judicata and collateral estoppel would [also] necessarily prevent him from challenging, on collateral attack, the trial court's decision to dismiss without prejudice." *Id.*

On August 28, 2006, Dryg subsequently filed a petition for writ of habeas corpus before the California Supreme Court, which summarily denied his petition on September 27, 2006.

2. Analysis

As this court noted in its January 18, 2007 order to show cause, because Dryg pleaded guilty, he cannot simply raise *any* ineffective assistance of counsel claim he chooses. Dryg waived any claims for ineffective assistance of counsel based on conduct that occurred *prior* to the entry of his no contest plea on July 20, 2004. The only claims that Dryg may now raise concern: (1) counsel's omissions and/or conduct that occurred *after* the entry of his plea; and/or (2) advice that Dryg received in connection with his decision to plead no contest that rendered his plea involuntary.

In its January 18, 2007 order to show cause, the court liberally construed Dryg's petition and accompanying declaration to set forth such cognizable claim(s). However, the court expressed concern regarding whether or not Dryg had exhausted such claim(s) before the state courts, and required briefing on the issue. Again, on July 10, 2007, the

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[7]Presumably, the "finding" to which Dryg referred in his motion for reconsideration was a statement made by Superior Court Judge Poche on September 3, 2003 in dismissing the case without prejudice. *See* R.T. at 183 ("My view [is] that 1389 was violated in the sense that [Dryg] made his demand in the proper forum, the proper way and he was not brought to trial within the time limits set forth within.").

court ruled in Dryg's favor, liberally construing his California Supreme Court habeas petition – which included the claim that his trial counsel rendered ineffective assistance by not properly raising and preserving his challenge to the Interstate Agreement on Detainers – to have nevertheless exhausted the above cognizable post-no contest plea claim(s), and allowed for briefing on the merits.

Unfortunately, in the briefing that followed this court's July 10, 2007 order, the parties, especially Dryg, have to a large degree argued Dryg's ineffective assistance of counsel sub-claims as straightforward ones for ineffective assistance of counsel, rather than framing them in light of the appropriate legal standards given the fact that Dryg pleaded no contest. Upon close review, the majority of Dryg's arguments do not concern his counsel's post-plea performance or advice that he received from counsel *in conjunction with his no contest plea,* but instead concern his counsel's performance prior to the entry of his plea. Because those arguments were waived by Dryg's no contest plea, the court declines to address them.

The waived, non-cognizable sub-claims include Dryg's argument that Jinkerson provided ineffective assistance of counsel by failing to pursue detainer challenges prior to the entry of his guilty plea, by specifically (a) failing to renew the motion to dismiss under § 1389 after the charges were re-filed; (b) failing to argue under *Zimmerman v. Superior Court*, 248 Cal. App. 2d 56 (1967), that it was "unreasonable" to permit the prosecution to file a new complaint on the same charges after the expiration of the statute of limitations when the prosecution was at fault for not bringing him to trial within the 180 days required under § 1389, art. III, or within the 120 days required under § 1389, art. IV; (c) failing to argue a claim based on petitioner's alleged "once in jeopardy" plea; and (d) failing to argue that even before Dryg filed his Art. III section 1389 request, he was entitled to dismissal under Article IV section 1389.

By contrast, the only cognizable sub-claims raised by Dryg include his arguments that Jinkerson provided ineffective assistance of counsel by: (a) failing to inform him that a certificate of probable cause was necessary for him to appeal certain claims if he pleaded

guilty or no contest; (b) failing to inform him that he could pursue a petition for writ of mandate or prohibition before trial on the detainer-related issues; and (c) failing to properly preserve issues regarding the detainer for appeal.

In a declaration that he filed with this court and with his habeas petitions before the state courts, Dryg attests that his counsel, Jinkerson "knew that I believed that my rights under *Zimmerman* and [Penal Code § 1389, arts. III & IV] had been violated, and that I wished to pursue this legal issue to the higher courts." Exh. O, Petition. He also asserts that Jinkerson told him that all of his appellate rights would be preserved if he pled no contest. Dryg further asserts that "[o]n advice of counsel, and clearly believing my appeal rights were indeed preserved and would survive a guilty plea, I did so consent to plead guilty." Finally, he attests that Jinkerson's assessment of the legal issues and his advice that Dryg's issues would be preserved for appeal were "the only factors I considered regarding my decision to accept the guilty plea in the trial court." *Id.*

a. Failure to Preserve Issues for Appeal

Dryg asserts that although Jinkerson filed a notice of appeal, he did not properly preserve his issues for appeal. Reply at 5. To the extent that Dryg is arguing that Jinkerson failed to file a request for a certificate of probable cause, any such failure was not prejudicial because Dryg's current federal habeas counsel filed a timely request for such a certificate.

As noted above, on September 30, 2004, the same day that the trial court denied Dryg's post-plea motion to arrest judgment, Jinkerson filed a notice of appeal on Dryg's behalf, listing several issues. Jinkerson, however, did not file a request for a certificate of probable cause.

In the case of a judgment of conviction following a guilty plea, California Penal Code section 1237.5 authorizes an appeal only as to a particular category of issues and requires that steps in addition to filing a notice of appeal be taken. *In re Chavez*, 30 Cal. 4th 643,

650 (Cal. 2003).[8] In order to challenge any issues concerning the validity of a guilty plea, a defendant must first obtain a certificate of probable cause from the trial court, and an appeal of any such issues will not be operative unless the defendant does so. *See id.* The procedural requirement is applied in a "strict manner," *People v. Mendez*, 19 Cal. 4th 1084, 1096-97 (Cal. 1999), "regardless of other procedural challenges being made." *Chavez*, 30 Cal. 4th at 650. "For example, a defendant who has filed a motion to withdraw a guilty plea that has been denied by the trial court must still secure a certificate of probable cause in order to challenge on appeal the validity of the guilty plea." *Id.*

The purpose in requiring a certificate of probable cause following guilty pleas is "to promote judicial economy by screening out wholly frivolous guilty plea appeals before time and money are spent on such matters as the preparation of the record on appeal, the appointment of appellate counsel, and, of course, consideration and decision of the appeal itself." *Chavez*, 30 Cal. 4th at 651 (quoting *Mendez*, 19 Cal. 4th at 1095). Under section 1237.5, the trial court has the discretion to deny a certificate when an appeal would raise frivolous and vexatious issues. *People v. Hoffard*, 10 Cal. 4th 1170, 1178-79 (Cal. 1995); *see also Ramis v. People*, 74 Cal.App.3d 325, 376 (Cal. Ct. App. 1977) (concluding that superior court did not abuse its discretion in denying certificate of probable cause where the record indicated that defendant did not have any grounds for setting aside his plea); *People v. Nigro*, 39 Cal.App.3d 506 (Cal. Ct. App. 1974) (concluding that record supported trial court's denial of certificate where it showed that in pleading nolo contendere, defendant conceded that he "knew quite well" what he was doing and did not support defendant's

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[8]Section 1237.5 provides:

> No appeal shall be taken by the defendant from a judgment of conviction upon a plea of guilty or nolo contendre, or a revocation of probation following an admission of violation, except where both of the following are met:
>
> (a) The defendant has filed with the trial court a written statement, executed under oath or penalty of perjury showing reasonable constitutional, jurisdictional, or other grounds going to the legality of the proceedings.
>
> (b) The trial court has executed and filed a certificate of probable cause for such appeal with the clerk of the court.

vague, subjective feeling of pressure or coercion).

At the time that Dryg appealed to the California courts, former California Rule of Court 31(d) set forth the applicable deadlines, as well as other conditions, for filing a request for a certificate for probable cause, and provided in pertinent part:

> If a judgment of conviction is entered upon a plea of guilty or nolo contendere, the defendant shall, within 60 days after the judgment is rendered, file as an intended notice of appeal the statement required by section 1237.5 of the Penal Code; but the appeal shall not be operative unless the trial court executes and files the certificate of probable cause required by that section. Within 20 days after the defendant files the statement the trial court shall execute and file either a certificate of probable cause or an order denying a certificate and shall forthwith notify the parties of the granting or denial of the certificate.[9]

Although Jinkerson did not file a request for such a certificate, Dryg's current counsel subsequently filed a timely request, which the superior court subsequently considered and denied on the merits. Petition, Exh. K. Accordingly, Jinkerson's failure to request such a certificate did not prejudice Dryg. Moreover, to the extent that this claim is a veiled attempt to argue that Jinkerson's performance prior to Dryg's plea was ineffective, this claim is not cognizable for the reasons stated above.

b. Counsel's Advice re: the Necessity of a Certificate of Probable Cause and the Possibility of a Petition for Writ of Mandate or Prohibition

Because Dryg's current counsel filed a timely request for a certificate of probable cause, which was adjudicated by the state court on the merits, Dryg's argument cannot be that Jinkerson's failure to inform him of the necessity of the certificate prevented him from timely seeking one. Instead, although it is not clear, it appears that Dryg's argument is that he would have preferred to raise the issues contained in his application for a certificate of probable cause via a writ of prohibition or mandamus prior to trial, or perhaps on direct appeal, if possible, as opposed to having the issues screened for frivolity as they are prior

[9] After Dryg's appeal, the Judicial Council of California repealed Rule 31(d) and moved its provisions, as amended to former Rule 30(b), effective January 1, 2004. It then renumbered Rule 30(b), as Rule 8.304(b).

to issuance of a certificate of probability.[10] *See Hoffard*, 10 Cal. 4th at 1178-79.

Assuming that Jinkerson indeed failed to advise Dryg of the above, the court concludes that Jinkerson's conduct was not deficient, and also that Dryg was not prejudiced by any such failure. First, there is no evidence that Dryg would not have pled guilty had he known that he was required to request a certificate of probable cause. Dryg simply asserts that he pled guilty on counsel's advice that counsel would preserve his appellate rights. As noted above, Dryg's appellate rights were preserved to the maximum extent possible following a guilty plea. Jinkerson simply could not have predicted, nor was he required to predict that the trial court would deny Dryg's request for a certificate of appealability as frivolous. *See Turner v. Calderon*, 281 F.3d 851, 881 (9th Cir. 2002) (in advising a defendant, "[c]ounsel cannot be required to accurately predict what the . . . court might find, but he can be required to give the defendant the tools he needs to make an intelligent decision").

Second, to the extent a writ was available to Dryg pre-plea to challenge the trial court's 2003 dismissal without prejudice, the record demonstrates that the request for such writ should have been filed by Mullins - as opposed to Jinkerson. Dryg himself admits that Jinkerson did not enter the case until, in Dryg's view, there was no point in filing an appeal (or presumably a writ). Furthermore, Dryg very clearly has not challenged Mullins' performance as ineffective.

Finally, the superior court's denial of the request for the certificate of appealability was *not* the last word on Dryg's detainer-related claims. Dryg raised them in habeas petitions before the state courts, albeit unsuccessfully, and the courts addressed and rejected his claims on the merits.

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[10]In his California Supreme Court petition, Dryg argued that "[t]rial counsel did not inform [him] that he could file a Petition for Writ of Mandamus or Prohibition before trial, if the motion to dismiss had been made and denied in trial court." Exh. C at 22. However, Dryg altered the argument in the petition filed before this court such that it differs slightly from the argument that Dryg actually exhausted. In his opening petition before this court, Dryg instead asserts that "[t]rial counsel informed [him] that . . . there was no need to raise the issue in a Petition for Writ of Mandate or Prohibition before trial." Petition at 10. Pursuant, to this court's July 10, 2007 order, the court will adjudicate the issue *as exhausted* before the state courts.

For these reasons, Dryg's claim fails.

C. Request for Evidentiary Hearing and Discovery

In his traverse, Dryg requests that in the event the court "believes that there may have been some strategic reason for [Jinkerson's] failure to raise and preserve the issues for appeal," that he be provided the opportunity to depose Jinkerson. However, because the court concludes that Dryg's appellate rights were preserved to the maximum extent possible following a guilty plea, a deposition would be fruitless, and Dryg's request is therefore DENIED.

Dryg also requests an evidentiary hearing on his claims. The requirements of 28 U.S.C. § 2254(e)(2), govern requests for evidentiary hearings. *See Cooper-Smith v. Palmateer,* 397 F.3d 1236, 1241 (9th Cir. 2005). Section 2254(e)(2) provides:

> 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 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 factfinder would have found the applicant guilty of the underlying offense.

The United States Supreme Court has interpreted the opening paragraph of the section to provide that where a petitioner has indeed exercised diligence to "develop the factual bases" of his claims in state court, the requirements of section 2254(e)(2)(A)&(B) do not apply to his request for an evidentiary hearing. *Williams v. Taylor*, 529 U.S. 420, 435 (2000); *Holland v. Jackson*, 542 U.S. 649, 652-53 (2004). In other words, a petitioner who has exercised such diligence will be taken out of the purview of section 2254(e)(2). *Griffey v. Williams*, 345 F.3d 1058 (9th Cir. 2003), *vacated on other grounds as moot*, 349 F.3d 1157 (9th Cir.2003) (petitioner died); *Williams*, 529 U.S. at 430 (showing under 2254(e)(2)

"applies only to prisoners who have 'failed to develop the factual basis of a claim in state court proceedings'").

Diligence "depends upon whether petitioner made a reasonable attempt, in light of the information available at the time, to investigate and pursue claims in state court." *Cooper-Smith*, 397 F.3d at 1241 (quoting *Williams*, 529 U.S. at 435). Diligence requires in the usual case that the prisoner, at a minimum, seek an evidentiary hearing in state court in the manner prescribed by state law. *Williams*, 529 U.S. at 435.

Dryg did exercise diligence in so far as he requested an evidentiary hearing before the state courts in conjunction with his state habeas petitions. However, even though Dryg may have exercised diligence in making the request before the state court, there is no per se requirement for an evidentiary hearing. *Turner*, 281 F.3d at 890. A petitioner is entitled to an evidentiary hearing on ineffective assistance of counsel claims only if he can demonstrate that, if his allegations were proven at the evidentiary hearing, deficient performance and prejudice would be established. *See id.* Here, the court finds that there is nothing "more an evidentiary hearing might reveal of material import." *See Gandarela v. Johnson*, 286 F.3d 1080, 1087 (9th Cir. 2002) (denying petitioner's request for evidentiary hearing regarding his assertion of actual innocence). Because Dryg's claims may be resolved by reference to the state court record and the documentary evidence he has submitted, the court denies his request for an evidentiary hearing. *See Griffey*, 345 F.3d at 1067 (even where petitioner had shown diligence entitling him to evidentiary hearing, Ninth Circuit concluded that petitioner was not entitled to evidentiary hearing because his claims could be resolved by reference to the state court record and the documentary evidence he submitted); *see also Campbell v. Wood*, 18 F.3d 662, 679 (9th Cir. 1994).

CONCLUSION

For the reasons set forth above, Dryg's petition for writ of habeas corpus is DENIED because the state court's decision was neither contrary to, nor an unreasonable application of, clearly established federal law; nor was it based on an unreasonable determination of the facts in light of the evidence presented. This order fully adjudicates this case and

terminates all pending motions. The clerk shall close the file.

IT IS SO ORDERED.

Dated: April 13, 2009

PHYLLIS J. HAMILTON
United States District Judge