

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

3
4 JOSEPH FLOWERS,

No. C 14-0589 CW

5 Petitioner,

ORDER ON MOTIONS
FOR

6 v.

RECONSIDERATION
AND MOTION TO
DISMISS

7
8 F. FOULK, Warden,

9 Respondent.

10 _____/

11 Petitioner Joseph Flowers filed a petition for writ of
12 habeas corpus pursuant to 28 U.S.C. § 2254 following his state
13 convictions of robbery and kidnapping.¹ Before the Court are
14 Respondent's motion to reconsider its denial of Respondent's
15 motion to dismiss claim 5(b) and his motion to dismiss claims
16 1(b), 1(c) and 3(b) as procedurally defaulted, as well as several
17 motions filed by Petitioner.

18 BACKGROUND

19 The underlying facts are restated in this Court's order
20 granting in part Respondent's motion to dismiss. Following that
21 order, the claims that remain are claims 1(b), 1(c),² 2(a), 2(c),
22 3(a), 3(b), 5(a), 5(b) and 6. MTD Order at 22. In lieu of
23 filing an answer following the Court's order on his motion to
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26 ¹ The documents at Docket Numbers 25 and 27 together constitute
the operative petition.

27 ² Only a portion of claim 1(c) remains. The Court dismissed the
part that was predicated on Petitioner's appellate counsel's
28 alleged ineffective assistance for failing to raise trial
counsel's ineffective assistance in failing to investigate a
robbery victim's background. MTD Order at 6 n.4.

1 dismiss, Respondent filed a motion to dismiss claims 1(b), 1(c)
2 and 3(b) as procedurally defaulted. In addition, the Court
3 granted Respondent's motion for leave to file a motion to
4 reconsider the denial of the motion to dismiss claim 5(b).
5 Thereafter, Respondent filed supplemental briefing.

6 PRELIMINARY MOTIONS

7 Petitioner moves to seal his declaration describing
8 discussions with his appellate counsel. Docket No. 78. This
9 motion is GRANTED. If Petitioner is able to pursue claims of
10 ineffective assistance of both trial and appellate counsel, these
11 documents may have to be unsealed or stricken.

12 Petitioner requests that Docket Numbers 80 and 81 be
13 considered timely. Docket No. 83. The Court GRANTS Petitioner's
14 request.

15 Petitioner moves "for of leave for discovery." Docket No.
16 80. Habeas corpus petitioners may conduct discovery to the
17 extent that the judge in the exercise of discretion and for good
18 cause shown grants leave to do so. Rule 6(a) of the Rules
19 Governing Section 2254 Cases. Good cause is shown where a
20 petitioner demonstrates, through specific allegations, that there
21 is reason to believe that he may be entitled to relief. Bracy v.
22 Gramley, 520 U.S. 899, 908-09 (1997) (quoting Harris v. Nelson,
23 394 U.S. 286, 300 (1969)). Because Petitioner fails to satisfy
24 his burden, this motion is DENIED.

25 Petitioner files three requests that the Court make public
26 documents private or strike them. See Docket Nos. 87, 89, 91.
27 Those include documents subject to attorney-client privilege and
28 documents that list his social security number. Petitioner

1 explains that these documents are publicly available in
2 California state courts as well as in this Court. It is not
3 clear which such documents, if any, are publicly available in the
4 record of this case. The Court cannot order California state
5 courts to seal their documents. The Court DENIES Petitioner's
6 requests, without prejudice to Petitioner filing a new request
7 that lists the offending documents in this case by Docket Number
8 and page.³

9 Docket Number 91 specifically contains a request to "strike"
10 Exhibit Z(7). See Docket No. 25-3. That document has already
11 been filed in the public record. The Court has already ruled
12 that it does not contain confidential material. Docket No. 32,
13 Order Denying Motion to Seal at 3. Therefore, the Court DENIES
14 Petitioner's request to strike Exhibit Z(7).⁴

15 Petitioner requests paper copies of particular documents,
16 namely those at Docket Numbers 27, 65, 67, 70 and 73. Docket No.
17 92. The Court GRANTS Petitioner's request and instructs the
18 Clerk's office to mail Petitioner hard copies of those documents
19 along with this order.

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22 LEGAL STANDARD

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25 ³ Petitioner also argues that, by failing to point out that these
26 privileged documents were public, Respondent failed to safeguard
27 Petitioner's constitutional rights. This argument does not fall
28 within the scope of any alleged constitutional violations within
his habeas petition.

⁴ Petitioner also requests that Respondent's Exhibit 10 be
stricken. This document is the Supreme Court copy of
Petitioner's declaration labeled "Amendments of the Habeas Corpus
Petition." Docket No. 50-5. The Court denies this request.

1 "A federal habeas court will not review a claim rejected by
2 a state court if 'the decision of [the state] court rests on a
3 state law ground that is independent of the federal question and
4 adequate to support the judgment.'" Walker v. Martin, 562 U.S.
5 307, 315 (2011) (quoting Beard v. Kindler, 558 U.S. 53, 55
6 (2009)). The state law ground may be "a procedural barrier to
7 adjudication of the claim on the merits." Id.

8 The procedural default analysis proceeds in two steps.
9 First, the federal court must consider whether the state
10 procedural rule the state court invoked to bar the claim is both
11 "independent" and "adequate" to preclude federal review. See
12 Bennett v. Mueller, 322 F.3d 573, 580 (9th Cir. 2003). Once the
13 state has adequately plead the existence of an independent and
14 adequate state procedural ground as a defense, the burden to
15 place that defense at issue shifts to the petitioner, who "may
16 satisfy this burden by asserting specific factual allegations
17 that demonstrate the inadequacy of the state procedure, including
18 citation to authority demonstrating inconsistent application of
19 the rule." Id. at 586. "The scope of the state's burden of
20 proof thereafter will be measured by the specific claims of
21 inadequacy put forth by the petitioner." Id. at 584-85 (citation
22 omitted).

23 If the procedural rule invoked by the state court is both
24 adequate and independent, then the next step of the evaluation
25 requires the federal court to consider whether the petitioner has
26 established either "cause" for the default and "actual prejudice"
27 as a result of the alleged violation of federal law, or whether
28 failure to consider the claim will result in a fundamental

1 miscarriage of justice. Coleman v. Thompson, 501 U.S. 722, 750
2 (1991). If a petitioner cannot meet this burden, then federal
3 habeas review of that claim is barred. Noltie v. Peterson, 9
4 F.3d 802, 804-05 (9th Cir. 1993).

5 DISCUSSION

6 I. Petitioner's Motions for Reconsideration

7 Petitioner moves for "modification of order granting in part
8 of dismissal" regarding claims 1 and 4. Docket No. 79.
9 Petitioner also requests "[Amending Petition] modification of
10 Reconsidering of [Grounds 1 & 4]." Docket No. 88. The Court
11 construes these filings as motions for reconsideration. See Civ.
12 L. R. 7-9. The portions of claim 1 that were not withdrawn⁵ were
13 not dismissed in the previous order. Thus, the Court evaluates
14 these filings as motions to reconsider its dismissal of claim 4
15 as procedurally defaulted.

16 To prevail on a motion for reconsideration, Petitioner "must
17 specifically show reasonable diligence in bringing the motion"
18 and one of the following circumstances: (1) that "at the time of
19 the motion for leave, a material difference in fact or law exists
20 from that which was presented to the Court before entry of the
21 interlocutory order for which reconsideration is sought" and
22 "that in the exercise of reasonable diligence the party applying
23 for reconsideration did not know such fact or law at the time of
24 the interlocutory order"; (2) new material facts or law emerged
25 after the order was issued; or (3) there was a "manifest failure
26 by the Court to consider material facts or dispositive legal

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28 ⁵ Petitioner's request to reinstate the portion of claim 1 that he
withdrew is DENIED.

1 arguments which were presented to the Court before such
2 interlocutory order." Civ. L. R. 7-9(b). Further, Petitioner
3 may not repeat any argument that was made in opposition to the
4 earlier order. See Civ. L. R. 7-9(c).

5 Petitioner does not satisfy this standard. Many of his
6 arguments do not relate to any of these factors. Others were
7 already argued. Aside from these arguments, Petitioner argues
8 that he recently located new evidence and cites Exhibits A, R and
9 H. However, these are exhibits that were attached to his
10 original petition. See Docket No. 1. This evidence already
11 existed when the original motion to dismiss was filed.
12 Petitioner's motions to reconsider the dismissal of claim 4 are
13 DENIED.⁶

14 The Court construes Petitioner's motion at Docket Number 85
15 as another motion for reconsideration of its dismissal of claim
16 4. Petitioner argues that there was a change in the law that
17 "stated in part every person unlawfully imprisoned or restrained
18 [sic] of his liberty under any pretense of may prosecute a
19 petition is abled [sic] to inquire of his imprisonment or
20 restraints." Docket No. 85 at 1. He explains that this change
21 in the law, dated February 27, 2015, "raises the defense" that
22 state officials had knowledge that attorney-client visitations
23 were being recorded. Id. at 2. Petitioner also argues that
24 evidence of eavesdropping was not discovered until after the
25 trial. Importantly, the change in law or fact must have occurred

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28 ⁶ Petitioner's requests for discovery and evidentiary hearings
relating to these motions to reconsider the dismissal of claim 4
are also DENIED (Docket Nos. 90, 79).

1 between the Court's consideration of the order at issue and the
2 motion for reconsideration. See Civ. L. R. 7-9(b). Petitioner's
3 arguments relate to changes that predate the Court's order
4 dismissing claim 4. For this reason, Petitioner's motion is
5 DENIED.

6 II. Respondent's Motion to Reconsider claim 5(b)

7 Claim 5(b) states that there was insufficient evidence of
8 the identity of the kidnap victim to support the conviction of
9 kidnapping for robbery. Because the California Supreme Court's
10 citation to In re Clark, 5 Cal. 4th 750, 797-98 (1993) relates to
11 two possible procedural bars, untimeliness and successiveness,
12 and because Respondent briefed untimeliness alone, the Court
13 concluded that Respondent did not meet his burden to plead the
14 existence of an independent and adequate procedural bar.
15 Respondent assumed that untimeliness subsumes successiveness and,
16 therefore, did not brief successiveness or the relationship
17 between untimeliness and successiveness.

18 Respondent now argues that the California Supreme Court's
19 citation to In re Clark could be construed as invoking both an
20 untimeliness bar and a successive petition bar. The Court
21 agrees. California's untimeliness rule is an adequate and
22 independent state ground for procedural bar purposes. Lee v.
23 Jacquez, 788 F.3d 1124, 1129 (9th Cir. 2015), rev'd on other
24 grounds by Johnson v. Lee, 136 S. Ct. 1802 (2016). California's
25 bar against successive petitions is also adequate and
26 independent. See, e.g., Rutledge v. Katavich, 2012 WL 2054975,
27 at *6-*7 (N.D. Cal.) (concluding that California's successiveness
28 bar is adequate and independent as of May 21, 2008); Arroyo v.

1 Curry, 2009 WL 723877, at *3-*6 (N.D. Cal.) (concluding that the
2 successive petition bar is adequate and independent as of March
3 6, 2006); Ingram v. Cate, 2014 WL 3672921, at *16 (C.D. Cal.),
4 report and recommendation adopted, 2014 WL 3672924 (citing Field
5 v. Calderon, 125 F.3d 757, 763-64 (9th Cir. 1997) and Siripongs
6 v. Calderon, 35 F.3d 1308, 1318 (9th Cir. 1994)).

7 Petitioner argues that the state procedural bar is
8 inadequate. However, he failed to assert any specific factual
9 allegations demonstrating the inadequacy of the untimeliness or
10 successiveness bars. See Bennett, 322 F.3d at 580.

11 Because the bars are both adequate and independent,
12 Petitioner may only avoid default if he establishes either cause
13 and prejudice or that failure to consider his claim will result
14 in a fundamental miscarriage of justice. Coleman, 501 U.S. at
15 750.

16 Petitioner argues that the ineffective assistance of his
17 trial and appellate counsel satisfy the cause and prejudice test.
18 However, as explained below, Petitioner cannot circumvent the
19 procedural bar that applies to those claims.

20 Petitioner also argues that the CDC interfered with property
21 such that bringing this argument was impracticable. However, as
22 explained below, any evidence of Wendy Zhang's true identity
23 would not have been relevant to Petitioner's conviction.

24 Finally, Petitioner's miscarriage of justice claim lacks
25 merit. As explained below, Wendy Zhang's identity need not be
26 proven for a kidnapping conviction.

27 For all these reasons, the Court dismisses claim 5(b).

28 III. Respondent's Motion to Dismiss Claims 1(b), 1(c) and 3(b)

1 Respondent moves to dismiss claims 1(b), the remainder of
2 1(c) and 3(b) as procedurally defaulted based on the same
3 citation to Clark discussed above.⁷ Claim 1(b) alleges that trial
4 counsel was ineffective for failing to move to dismiss the
5 kidnapping count based on a discrepancy between the victim's name
6 as listed on the information and the victim's own recitation of
7 her name at trial. Claim 1(c) alleges that appellate counsel was
8 ineffective for failing to raise claim 1(b) on appeal. Claim
9 3(b) alleges that the prosecutor presented false evidence
10 regarding the identity of the kidnap victim. None of these
11 claims amounts to cause and prejudice or miscarriage of justice.

12 Constitutionally ineffective assistance of counsel amounts
13 to cause for the cause and prejudice test. Walker v. Martel, 709
14 F.3d 925, 938 (9th Cir. 2013). For ineffective assistance of
15 counsel to constitute cause, the ineffective assistance claim
16 must have been presented as an independent claim to the state
17 courts. Murray v. Carrier, 477 U.S. 478, 489 (1986). Where that
18 ineffective assistance of counsel claim has itself been
19 procedurally defaulted, it cannot excuse the default of another
20 habeas claim unless the ineffective assistance claim itself can
21 satisfy the cause and prejudice standard. See Edwards v.
22 Carpenter, 529 U.S. 446, 453 (2000).⁸ Here, both ineffective

23 _____
24 ⁷ The Court construes Petitioner's motion to dismiss Respondent's
25 motion as a response and DENIES the motion (Docket No. 93). See
26 O'Bremski v. Maass, 915 F.2d 418, 420 (9th Cir. 1990) (explaining
that, under Rule 4 of the Rules Governing Section 2254, district
courts may summarily dismiss the petition on the merits when no
claim for relief is stated).

27 ⁸ The Ninth Circuit has concluded that, where a claim of
28 ineffective assistance of trial counsel was procedurally
defaulted, trial counsel's performance could not constitute
cause. Cockett v. Ray, 333 F.3d 938, 943 (9th Cir. 2003). In

1 assistance of counsel claims, claims 1(b) and 1(c), were
2 procedurally defaulted.

3 Cause to excuse procedural default on an ineffective
4 assistance of counsel claims exists where 1) the claim of
5 ineffective assistance of trial counsel was "substantial,"
6 2) there was no counsel during the state collateral review
7 proceeding, 3) the state collateral review proceeding was the
8 initial review proceeding with respect to the ineffective
9 assistance of trial counsel claim and 4) claims of ineffective
10 assistance of trial counsel must be raised in an initial-review
11 collateral proceeding. Trevino v. Thaler, 133 S. Ct. 1911, 1918
12 (2013); Martinez v. Ryan, 132 S. Ct. 1309, 1320 (2012). Here,
13 the ineffective assistance of counsel claim is not substantial.

14 The standard for substantiality is the same as the standard
15 for issuing a certificate of appealability. Detrich v. Ryan, 740
16 F.3d 1237, 1245 (9th Cir. 2013) (en banc). To raise a
17 substantial claim, "a petitioner must show that reasonable
18 jurists could debate" the issue. Id. (quoting Miller-El v.
19 Cockrell, 537 U.S. 322, 336 (2003)).

20 The Sixth Amendment's right to counsel guarantees not only
21 assistance, but effective assistance, of counsel. Strickland v.
22 Washington, 466 U.S. 668, 686 (1984). The benchmark for judging
23 any claim of ineffectiveness is whether counsel's conduct so
24 undermined the proper functioning of the adversarial process that

25
26 light of the Supreme Court's statement in Edwards, the Court
27 recognizes that a procedurally-defaulted ineffective assistance
28 claim could excuse the procedural default of another claim if the
ineffective assistance claim's procedural default could itself be
excused. See Castaneda v. Cash, 2013 WL 6155605, at *15 (N.D.
Cal.).

1 the trial cannot be relied upon as having produced a just result.
2 Id. In order to prevail on a Sixth Amendment ineffective
3 assistance of counsel claim, a petitioner must establish two
4 things. First, he must demonstrate that counsel's performance
5 was deficient and fell below an "objective standard of
6 reasonableness" under prevailing professional norms. Id. at 687-
7 88. Second, he must establish that he was prejudiced by
8 counsel's deficient performance, i.e., that "there is a
9 reasonable probability that, but for counsel's unprofessional
10 errors, the result of the proceeding would have been different."
11 Id. at 694. A reasonable probability is a probability sufficient
12 to undermine confidence in the outcome. Id. The relevant
13 inquiry under Strickland is not what defense counsel could have
14 done, but rather whether counsel's choices were reasonable. See
15 Babbitt v. Calderon, 151 F.3d 1170, 1173 (9th Cir. 1998).

16 A "doubly deferential" standard of judicial review is
17 appropriate in analyzing ineffective assistance of counsel claims
18 under § 2254. See Cullen v. Pinholster, 563 U.S. 170, 202
19 (2011). The "question is not whether counsel's actions were
20 reasonable. The question is whether there is any reasonable
21 argument that counsel satisfied Strickland's deferential
22 standard." Harrington v. Richter, 562 U.S. 86, 105 (2011).

23 Here, Petitioner alleges that trial counsel was ineffective
24 for not moving to dismiss the kidnapping count where a victim's
25 name as stated on the information differed from the victim's name
26 that she stated at trial. Kidnapping is defined in California
27 Penal Code section 207. Neither this section nor California's
28 model jury instructions require the jury to agree on the victim's

1 real name. See CALJIC 9.50. Both require only that some person
2 was moved or compelled to move. Thus, it cannot be said that
3 reasonable jurists could debate that there exists any reasonable
4 argument that trial counsel was ineffective for not moving to
5 dismiss based on this discrepancy.

6 Because there is no substantial claim of ineffective
7 assistance of trial counsel, Petitioner does not satisfy the
8 Martinez/Trevino exception that would excuse procedural default
9 on claims 1(b) and (c). None of Petitioner's cause and prejudice
10 or miscarriage of justice arguments, including ineffective
11 assistance of counsel, defeats the procedural bar for claim 3(b).

12 The Court GRANTS Respondent's motion to dismiss claims 1(b),
13 1(c) and 3(b) (Docket No. 86).

14 CONCLUSION

- 15 1. Petitioner's motion to seal (Docket Number 78) is GRANTED.
16 2. Petitioner's request that Docket Numbers 80 and 81 be
17 considered timely (Docket Number 83) is GRANTED.
18 3. Petitioner's motion for leave for discovery (Docket Number
19 80) is DENIED.
20 4. Petitioner's motions to strike (Docket Numbers 87, 89 and
21 91) are DENIED, without prejudice to Petitioner bringing a
22 similar motion if he can identify any offending documents in
23 this Court's file by Docket Number and page.
24 5. Petitioner's request for copies of the documents at Docket
25 Numbers 27, 65, 67, 70 and 73 is GRANTED (Docket No. 92).
26 The Court directs the Clerk's office to mail Petitioner hard
27 copies of those documents along with this order.
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6. Petitioner's motions to reconsider the dismissal of claim 4 (Docket Numbers 79, 85 and 88) are DENIED. His requests for discovery and evidentiary hearings related to these motions are also DENIED (Docket Nos. 79, 90).

7. Petitioner's motion at Docket Number 93 is DENIED.

8. The Court dismisses claim 5(b). The Court also GRANTS Respondent's motion to dismiss claims 1(b), 1(c) and 3(b) (Docket No. 86). The remaining claims are claims 2(a), 2(c), 3(a), 5(a) and 6.

9. No later than sixty days from the date of this Order, Respondent shall file with this Court and serve upon Petitioner an Answer conforming in all respects to Rule 5 of the Rules Governing Section 2254 Cases, showing cause why a writ of habeas corpus should not be issued. Respondent shall file with the Answer all portions of the state record that have been transcribed previously and are relevant to the determination of the issues presented by the petition. If Petitioner wishes to respond to the Answer, he shall do so by filing a Traverse with the Court and serving it on Respondent no later than thirty days from his receipt of the Answer. If he does not do so, the petition will be deemed submitted and ready for decision on the date the Traverse is due. In an abundance of caution, Respondent may answer any of the dismissed claims on their merits.

IT IS SO ORDERED.



Dated: September 6, 2016

CLAUDIA WILKEN
United States District Judge

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JOSEPH J. FLOWERS,
Plaintiff,

v.

F. FOULK,
Defendant.

Case No. [14-cv-00589-CW](#)


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 September 6, 2016, 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.

Joseph J. Flowers ID: F82065 (with copies of docket nos. 27, 65, 67, 70 & 73)
B3191
California Mens Colony State Prison
P.O. Box 8101
San Luis Obispo, CA 93409-8101

Dated: September 6, 2016

Susan Y. Soong
Clerk, U.S. District Court
By: 
Nichole Peric, Deputy Clerk to
the Honorable CLAUDIA WILKEN