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NOT FOR CITATION
IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRYANT E. DAVIS,)	No. C 07-3232 JF (PR)
)	
Petitioner,)	ORDER DENYING PETITION FOR
)	WRIT OF HABEAS CORPUS
vs.)	
)	
MATTHEW C. KRAMER, Warden,)	
)	
Respondent.)	
_____)	

Petitioner, proceeding pro se, seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2254. On September 12, 2008, the Court dismissed the petition with leave to amend because one of the two claims was not exhausted. On October 29, 2008, Petitioner filed an amended petition setting forth only the exhausted claim. In an order to show cause issued on October 29, 2007, this Court found that the amended petition set forth a cognizable claim for federal habeas relief and ordered Respondent to show cause why the writ should not be granted. Respondent filed an answer addressing the merits of the petition. Petitioner filed a traverse. Having reviewed the papers and the underlying record, the Court concludes that Petitioner is not entitled to federal habeas corpus relief and will deny the petition.

Order Denying Petition for Writ of Habeas Corpus
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1 **BACKGROUND**

2 On January 5, 2004, the Alameda County District Attorney charged Petitioner with
3 one count of murder committed in the course of a robbery and one count of second-degree
4 robbery, and alleged that Petitioner had suffered eight prior felony convictions and had
5 served five prior prison terms. On February 3, 2004, Petitioner admitted the prior
6 convictions. A jury thereafter found Petitioner guilty of robbery but deadlocked on the
7 murder charge.

8 On May 21, 2004, the parties entered into a negotiated agreement disposing of the
9 case. Under the terms of the agreement, Petitioner agreed to a sentence of ten years on
10 the robbery conviction, consisting of an aggravated term of five years plus five one-year
11 enhancements for the prior prison terms. Petitioner also agreed to waive his right to be
12 sentenced by the judge who had adjudicated the trial, and to waive his right to appeal the
13 robbery conviction. In return, the murder charge was dismissed..

14 On July 9, 2004, pursuant to People v. Marsden, 2 Cal. 3d 118 (1970), the trial
15 court held a hearing on Petitioner’s motion to substitute counsel, following which it
16 denied the motion. At Petitioner’s sentencing hearing later that day, the trial court denied
17 Petitioner’s motion to withdraw his waiver of his right to appeal the robbery conviction,
18 and sentenced him to a term of ten years in state prison pursuant to the parties’ agreement.

19 Petitioner filed an appeal claiming, as he does here, that the waiver of his right to
20 appeal was not valid. On January 31, 2006, the California Court of Appeal dismissed the
21 appeal after finding the waiver valid. Petitioner also filed a concurrent petition for a writ
22 of habeas corpus in the California Court of Appeal in which he argued that his sentence
23 should be reduced by one year because he had only served four prior prison terms. The
24 California Court of Appeal ordered Respondent to show cause why the petition should
25 not be granted, and, after a hearing on July 3, 2006, the trial court modified Petitioner’s
26 sentence to nine years, consisting of five years for the robbery and four years for the prior
27 prison terms. On May 10, 2006, the California Supreme Court summarily denied the
28 petition for review of the California Court of Appeal’s dismissal of the appeal.

1 Petitioner filed the instant federal petition on May 11, 2006, in the Central District
2 of California. Thereafter, the petition was transferred to this court.

3 DISCUSSION

4 I. Standard of Review

5 This Court will entertain a petition for a writ of habeas corpus “in behalf of a
6 person in custody pursuant to the judgment of a State court only on the ground that he is
7 in custody in violation of the Constitution or laws or treaties of the United States.” 28
8 U.S.C. § 2254(a). The petition may not be granted with respect to any claim adjudicated
9 on the merits in state court unless the state court’s adjudication of the claim: “(1) resulted
10 in a decision that was contrary to, or involved an unreasonable application of, clearly
11 established federal law, as determined by the Supreme Court of the United States; or (2)
12 resulted in a decision that was based on an unreasonable determination of the facts in
13 light of the evidence presented in the State court proceeding.” 28 U.S.C. § 2254(d).

14 “Under the ‘contrary to’ clause, a federal habeas court may grant the writ if the
15 state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a
16 question of law or if the state court decides a case differently than [the] Court has on a set
17 of materially indistinguishable facts.” Williams (Terry) v. Taylor, 529 U.S. 362, 412-413
18 (2000). “Under the ‘reasonable application clause,’ a federal habeas court may grant the
19 writ if the state court identifies the correct governing legal principle from [the] Court’s
20 decisions but unreasonably applies that principle to the facts of the prisoner’s case.” Id.
21 at 413. “[A] federal habeas court may not issue the writ simply because that court
22 concludes in its independent judgment that the relevant state-court decision applied
23 clearly established federal law erroneously or incorrectly. Rather, that application must
24 also be unreasonable.” Id. at 411.

25 “[A] federal habeas court making the ‘unreasonable application’ inquiry should
26 ask whether the state court’s application of clearly established federal law was
27 ‘objectively unreasonable.’” Id. at 409. In examining whether the state court decision
28 was objectively unreasonable, the inquiry may require analysis of the state court’s method

1 as well as its result. Nunes v. Mueller, 350 F.3d 1045, 1054 (9th Cir. 2003). The
2 standard for “objectively unreasonable” is not “clear error” because “[t]hese two
3 standards . . . are not the same. The gloss of error fails to give proper deference to state
4 courts by conflating error (even clear error) with unreasonableness.” Lockyer v.
5 Andrade, 538 U.S. 63, 75 (2003).

6 A federal habeas court may grant the writ if it concludes that the state court’s
7 adjudication of the claim “results in a decision that was based on an unreasonable
8 determination of the facts in light of the evidence presented in the State court
9 proceeding.” 28 U.S.C. § 2254(d)(2). The court must presume correct any determination
10 of a factual issue made by a state court unless the petitioner rebuts the presumption of
11 correctness by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

12 Where, as here, the highest state court to consider Petitioner’s claims issued a
13 summary opinion which does not explain the rationale of its decision, federal review
14 under § 2254(d) is of the last state court opinion to reach the merits. See Ylst v.
15 Nunnemaker, 501 U.S. 797, 801-06 (1991); Bains v. Cambra, 204 F.3d 964, 970-71, 973-
16 78 (9th Cir. 2000). In this case, the last state court opinion to address the merits of
17 Petitioner’s claims is the opinion of the California Court of Appeal. (Resp’t Ex. F
18 (People v. Davis, No. A107183, slip op. 1, 4-6 (Cal. Ct. App. Jan. 31, 2005).)

19 **II. Legal Claim and Analysis**

20 Petitioner claims that the waiver of his right to appeal violated his right to due
21 process because it was not knowing and voluntary.

22 Respondent argues as an initial matter that Petitioner’s claim should be denied
23 because there is no constitutional right to appeal a criminal conviction. Respondent is
24 correct that the Constitution does not require states to permit appeals as of right in
25 criminal cases. See Evitts v. Lucey, 469 U.S. 387, 393 (1985). However, if a state does
26 provide a system for appellate review, its procedures must comport with the demands of
27 constitutional due process and equal protection. See id.

28 At his change-of-plea hearing on May 21, 2004, after stating that he understood

1 and agreed to the sentence he would receive under the terms of the negotiated disposition,
2 Petitioner expressly waived his right to appeal in the following colloquy:

3 [Prosecutor]: Also waive all of the appellate rights on the trial.
The Court: That's my understanding as well. [Defense Counsel]?
4 [Defense Counsel]: Yes.
The Court: Mr. Davis?
5 [Defense Counsel]: He understood he waived it at this point.
The Court: Is that right?
6 Defendant Davis: Yes.

7 (Resp't Ex. A at 452-53.)

8 An express waiver of the right to appeal in a negotiated disposition of a criminal
9 cases, such as Petitioner's waiver in this case, is valid if knowingly and voluntarily made.
10 See United States v. Desantiago-Martinez, 980 F.2d 582, 582-83 (9th Cir. 1992),
11 amended, 38 F.3d 394 (9th Cir. 1994). The colloquy at the plea hearing establishes that
12 Petitioner understood that he was waiving his right to appeal his robbery conviction. See,
13 e.g., United States v. Nguyen, 235 F.3d 1179, 1182-84 (9th Cir. 2000) (examination of
14 plea colloquy established waiver knowingly and voluntarily made). There is no
15 indication from the colloquy or the transcript of the plea hearing that Petitioner's waiver
16 was involuntary, or that Petitioner did not understand that he was waiving his right to
17 appeal. In addition, as the trial court noted at the Marsden hearing, Petitioner had passed
18 through the state criminal court system on many prior occasions in connection with his
19 eight prior felony convictions and five prior prison terms, so it was very unlikely that he
20 did not know what an appeal was or the nature of the "appellate rights" he was waiving.
21 (Resp't Ex. A at 11-12.) The state courts reasonably could conclude from this record that
22 Petitioner waived his right to appeal knowingly and voluntarily.

23 Petitioner nonetheless argues that his waiver was not knowing and voluntary
24 because his attorney informed him that waiving the right to appeal would not preclude
25 him from filing a habeas petition in the appellate court, which was the proper avenue for
26 Petitioner to pursue a claim of ineffective assistance of counsel.¹ According to Petitioner,

27
28 ¹At the Marsden hearing, defense counsel confirmed that he had given Petitioner
this advice. (Resp't. Ex. A at 8, 10-11.)

1 after he waived his right to appeal, he returned to jail where a “legally literate inmate”
2 informed him that his waiver would in fact preclude him from filing such a habeas
3 petition, and that counsel’s advice therefore was a “misrepresentation.” Petitioner is
4 incorrect. Petitioner’s waiver did not preclude him from filing a petition for a writ of
5 habeas corpus in the California Court of Appeal. Indeed, Petitioner filed such a petition
6 and obtained relief in the form of a modified sentence. Consequently, counsel’s statement
7 that Petitioner could file a habeas petition in the state courts notwithstanding his waiver
8 was not a “misrepresentation” and did not render Petitioner’s waiver of his appellate
9 rights involuntary or unknowing.

10 In his traverse, Petitioner again raises the claim that the Court dismissed
11 previously on exhaustion grounds, that his attorney provided ineffective assistance of
12 counsel in advising him that the waiver of his appellate rights did not preclude filing a
13 petition for a writ of habeas corpus in the state appellate courts. Petitioner does not
14 contend that this claim has been exhausted, but he argues that exhaustion should be
15 excused because dismissal of the claim would result in a miscarriage of justice. Such an
16 argument should have been raised in opposition to Respondent’s motion to dismiss, when
17 the issue of exhaustion was raised. Even if Petitioner’s argument were to be entertained
18 at this stage, Petitioner still would have to show his “actual innocence” of the robbery
19 charges in order to be excused from exhaustion, a showing that Petitioner has not even
20 attempted to make. See Schlup v. Delo, 513 U.S. 298, 327 (1995) (holding that the
21 Supreme Court limits "miscarriage of justice" exception to habeas petitioners who can
22 show that "constitutional violation has probably resulted in the conviction of one who is
23 actually innocent"). Finally, excusing exhaustion would not do Petitioner any good
24 because, for the reasons discussed above, counsel’s advice that Petitioner could still
25 pursue a state habeas petition was correct, and consequently Petitioner’s claim would fail
26 on its merits.

27 Petitioner’s waiver of his right to appeal did not violate his right to due process.
28 Accordingly, the state courts’ decisions denying Petitioner’s claim were not contrary to,

1 or an unreasonable application of, clearly established Supreme Court precedent, nor were
2 they based on an unreasonable determination of the facts in light of the evidence
3 presented. See 28 U.S.C. § 2254(d)(1), (2).

4
5 **CONCLUSION**

6 The Court concludes that Petitioner has failed to show any violation of his federal
7 constitutional rights in the underlying state court proceedings. Accordingly, the petition
8 for writ of habeas corpus is DENIED. The Clerk shall enter judgment and close the file.

9 IT IS SO ORDERED.

10 Dated: 3/24/10

11 
12 _____
13 JEREMY FOGEL
14 United States District Judge

1
2 UNITED STATES DISTRICT COURT
3 FOR THE
4 NORTHERN DISTRICT OF CALIFORNIA
5

6 BRYANT E. DAVIS,
7 Plaintiff,

Case Number: CV07-03232 JF

CERTIFICATE OF SERVICE

8 v.

9 / et al,

10 Defendant.
11 _____/

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

14 That on 4/6/10, I SERVED a true and correct copy(ies) of the attached, by placing
15 said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by
16 depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office
17 delivery receptacle located in the Clerk's office.

18 Bryant E. Davis V44561
19 Folsom State Prison
20 PO Box
21 Folsom, CA 95763

Dated: 4/6/10

/s/

Richard W. Wieking, Clerk
By: