UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

JOSE A. NARANJO,

Petitioner,

v.

SCOTT KERNAN,[1]

Respondent.

Case No.: 15CV2666 AJB (BGS)

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE TO DENY PETITION FOR WRIT OF HABEAS CORPUS

Petitioner Jose A. Naranjo ("Petitioner" or "Naranjo") has filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. Petitioner asserts the state trial court violated his Due Process rights by (1) denying his motion to withdraw his guilty plea and (2) refusing to grant a continuance and pressuring Petitioner to make a decision regarding how to proceed in obtaining the partial relief he was granted in his prior federal petition.[2]

[1] The Court **ORDERS** the substitution of Scott Kernan, Secretary of the California Department of Corrections and Rehabilitation as Respondent in place of Jeffrey Beard, former Secretary of the California Department of Corrections and Rehabilitation.

[2] As explained in more detail below, Petitioner filed a prior federal habeas petition on July 1, 2011 in Naranjo v. Beard, Case No. 11cv1487 WQH (PCL). He was granted relief on one claim. His second claim in the current Petition challenges the state trial court's handling of the federal district court's order for relief.

The Court submits this Report and Recommendation to United States District Judge Anthony J. Battaglia pursuant to 28 U.S.C. § 636(b)(1) and Local Civil Rule HC.2 of the United States District Court for the Southern District of California. After consideration of the Petition, Respondent's Answer, Petitioner's Traverse, and lodgments, the Court recommends the Petition be **DENIED**.

I. BACKGROUND

Petitioner's two claims primarily arise out of two state court proceedings separated by more than four years. Claim One arises from the state superior court's denial of his motion to withdraw his guilty plea. On March 12, 2009, approximately a month after he plead guilty, Petitioner filed a pro se motion to withdraw his guilty plea. It was followed by appointment of counsel for the motion and counsel's filing of a motion to withdraw Petitioner's plea on March 17, 2009. At the conclusion of a June 3, 2009 hearing on the motion, in which Petitioner and his prior counsel testified, the motion was denied. No direct appeal was filed, but Petitioner pursued state habeas relief and then a federal habeas petition in 2011. That federal petition was partially granted.

Claim Two arises from a series of hearings on July 17, 18, 2013 and August 5, 2013. Petitioner's federal petition had been granted on one claim — ineffective assistance of counsel based on counsel's failure to consult with Petitioner about or file an appeal of the denial of his motion to withdraw his plea.[3] The federal district court had ordered the state court to vacate and reinstate its June 3, 2009 judgment to allow Petitioner to file a direct appeal of the denial of his motion to withdraw his guilty plea. Petitioner argues in Claim Two that the judge in those hearings pressured him to make specific decisions and should have granted him a continuance to provide him more time to consider how he wanted to proceed.

[3] Relief was denied on his other three claims challenging the state court's denial of his request to withdraw his plea.

A. Factual Background

The following summary of the allegations against Petitioner is drawn from the Court of Appeal's March 24, 2015 decision. (Lodgment 8.) It is a summary of the evidence presented at Petitioner's preliminary hearing. (Id. at 2, n.1.)

> Naranjo dated the victim for about 10 years. On the evening of the day he ended their relationship, she went to a nightclub, which upset him. He drove to her home the next evening and she came outside to talk to him. She got into his truck and he started hitting her in the face. She tried to get out of the truck and escape, but he pushed her back inside and resumed hitting her.
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> He continued hitting her as he drove her to a carpentry shop about six minutes away from her home. When they arrived at the shop, he insulted her and threatened to kill her. She removed her shoes, ran away, and yelled for help. He caught her and they fell to the ground. He covered her mouth and nose with his hand and told her to stop yelling.
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> He took her back to the shop. As he was trying to open the shop door, she ran away again and tried to dial 911 on her phone. He caught her by her hair and took the phone from her. She passed out. He lifted her and carried her toward the shop. She regained consciousness along the way. He then put her down and they walked into the shop, where, after securing the door, he told her he was going to chop her into little pieces using the table saw.
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> He started moving toward the table saw and she begged him not to hurt her. He pulled her up and took her to a stool. He asked her why she had disrespected him by going to the nightclub. He bent her over the stool, pulled her pants down, put his penis into her vagina and started moving. She cried and told him she did not want him to do what he was doing. He told her she had asked for it by going to the nightclub.
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> He then took her off the stool, put her on the floor, and began moving his penis in and out of her rectum. She told him he was hurting her and she could not breathe because her nose was bleeding, but he did not stop.
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> After he ejaculated, he had her get dressed and get back into his truck. He ran an errand and then took her home. She pretended everything was fine and kissed him goodbye. When she got to her door, she called the police. Her injuries included bleeding, a fractured nose, bites on her back, and injuries to her right thigh.

B. Procedural Background

1. Initial Proceedings Before the State Courts

On February 11, 2009, Petitioner pled guilty to forcible rape (Cal. Penal Code § 261(a)(2), forcible sodomy (Cal. Penal Code § 286(c)(2)), assault likely to produce great bodily injury (Cal. Penal Code § 245(a)) enhanced under California Penal Code § 12022.7(a) based on Petitioner's admission that he personally inflicted great bodily injury, and making criminal threats (Cal. Penal Code § 422). (Lodgment 1 at 24-27; Lodgment 2 at 2-10.) In exchange for his guilty plea to these charges, additional charges that might have resulted in a sentence of 25-years to life were dismissed and Petitioner received a stipulated sentence of 18 years and 8 months. (Lodgment 2 at 3, 10; Lodgment 1 at 24.)

On March 12, 2009, Petitioner filed a pro se motion to withdraw his guilty plea claiming he entered his plea out of fear and under pressure from counsel and wanted an attorney that would dedicate more time to his case and get him a more equitable plea agreement. (Lodgment 1 at 28-31.) The trial court appointed new counsel and his new counsel filed a motion to withdraw his guilty plea. (Lodgment 1 at 32-34.)

The trial court held a hearing on the motion on June 3, 2009, heard testimony from Petitioner and his prior counsel, and denied his motion. (Lodgment 2 at 13-31.) Petitioner was sentenced under the terms of the plea agreement to 18 years and 8 months. (Lodgment 2 at 31-33.) Petitioner did not file a direct appeal of the denial of his motion to withdraw his guilty plea.

On June 3, 2010, Petitioner filed a habeas corpus petition in San Diego Superior Court arguing he was unduly influenced by his counsel to plead guilty, he did not understand the waiver forms he signed when entering his plea, he should have been allowed to withdraw his plea, and his counsel should have filed an appeal of the denial of

the motion to withdraw his plea. (Case No. 11cv1487, Lodgment 4.[4]) It was denied on July 20, 2010. (Case No. 11cv1487, Lodgment 5.) Petitioner filed a petition with the California Court of Appeal on September 16, 2010. (Case No. 11cv1487, Lodgment 6.) It was denied in a reasoned decision. (Case No. 11cv1487, Lodgment 7.) Petitioner filed a petition with the California Supreme Court. (Case No. 11cv1487, Lodgment 8.) It was summarily denied. (Case No. 11cv1487, Lodgment 11.)

2. Prior Federal Habeas Proceedings

On July 1, 2011, Petitioner filed his first federal habeas petition raising four claims: (1) he was unduly influenced by his counsel to plead guilty; (2) he did not understand the charges to which he was pleading guilty; (3) the trial court erred in denying his motion to withdraw his guilty plea; and (4) he received ineffective assistance of counsel because his attorney failed to file a notice of appeal and failed to consult with him about filing a notice of appeal. (Case No. 11cv1487, Petition [ECF No.1].) The district court denied habeas relief on the first three claims, but allowed submission of all relevant evidence in support of claim four. (Case No. 11cv1487, November 29, 2012 Order at 4-9.) Following the submission of additional evidence, the district court found Petitioner received ineffective assistance of counsel based on counsel's failure to consult with Petitioner about filing an appeal or filing an appeal on his behalf on the denial of his motion to withdraw his plea. (Lodgment 1 at 105-120.)

On this basis, the district court granted habeas relief and ordered the state court to vacate the June 3, 2009 judgment and reinstate it to allow Petitioner to file a timely appeal. (Id. at 120.) The district court later modified its order to state that "The Petition for Writ of Habea Corpus is GRANTED as to claim four. Respondent shall release

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[4] Respondent cites the procedural history section of the district court's April 10, 2013 Order for this and the remainder of Respondent's cites to the initial state habeas proceedings. The Court cites the actual filings included as lodgments in Case No. 11cv1487.

Petitioner from custody on June 9, 2013 unless, prior to that date, the Superior Court of California, County of San Diego has vacated its June 3, 2009 order and judgment and then reinstated that order and judgment, thereby allowing Petitioner to initiate the appeal process from the reinstated judgment by seeking a certificate of probable cause." (Case No. 11cv1487, May 1, 2013 Order at 3.) The district court also granted Petitioner a certificate of appealability as to claims one, two, and three. (Id. at 4.) The initial deadline for the state court to comply was extended a number of times by the district court and then Respondent filed an appeal with the Ninth Circuit and sought and obtained a 30-day stay of the district court's order on July 17, 2013. (Case No. 11cv1487, ECF 52.)

3. State Court Proceedings Following Grant of Petition on Ineffective Assistance of Counsel for Failing to File Appeal

On July 17, 2013, a hearing was held before the state superior court to address compliance with the district court order. (Lodgment 2 at 39-42.) The trial court noted that upon reviewing the situation, he had ordered counsel appointed for Petitioner — Jose Badillo — who was present in court. (Id. at 39.) It appears the trial court determined, after consultation with counsel for Petitioner, the attorney general's office, and the district attorney's office, that the only way the court could obtain jurisdiction to comply with the district court's directive to vacate and reinstate the judgment to allow Petitioner to appeal was for Petitioner to file a state habeas petition seeking that relief.[5]

As discussed in more detail below, after an additional hearing on July 18, 2013 before the state trial court, Petitioner filed a state habeas petition on July 30, 2013 seeking the relief granted by the district court. Petitioner then attempted to rescind it by

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[5] The Court of Appeal's noted as much, finding "[t]he trial court believed it lacked jurisdiction to vacate and reinstate the judgment unless Naranjo filed a new state habeas petition seeking this relief." (Lodgment 8 at 9.) The Court of Appeal did not address the accuracy of this determination because it was not raised on appeal. (Id. at n.5.)

letter on July 31, 2013, but then confirmed on the record at an August 5, 2013 hearing that he wanted it filed. (Lodgment 2 at 37-63; Lodgment 1 at 69, 99-104.) The trial court granted the state habeas petitioner during the August 5, 2013 hearing, finding Petitioner received ineffective assistance of counsel based on counsel's failure to consult with Petitioner about an appeal or file an appeal of the denial of the request to withdraw his plea. The trial court vacated the June 3, 2009 judgment, reinstated it, and imposed the same stipulated 18-year 8-month sentence. (Lodgment 2 at 64-65.)

On appeal, Petitioner again challenged the denial of his motion to withdraw his plea as well as claiming the trial court judge became excessively involved in the state habeas proceedings and should have granted Petitioner a continuance. (Lodgment 3.) The Court of Appeal affirmed the judgment in a reasoned decision. (Lodgment 8.) Petitioner filed a Petition for Review with the California Supreme Court. (Lodgment 9.) It was summarily denied on July 8, 2015. (Lodgment 10.)

4. Current Federal Petition

In his current federal Petition, Naranjo asserts two claims: (1) he was denied Due Process because his guilty plea was entered under duress and the trial court should have granted his motion to withdraw it; and (2) he was denied Due Process because, in the state court proceedings following his grant of federal habeas relief, the trial court failed to grant a continuance to allow Petitioner to make an informed decision and pressured him to make specific decisions. (Pet. at 4-15.)

II. STANDARD OF REVIEW

Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), applicable to this Petition, a habeas petition will not be granted unless that adjudication: (1) resulted in a decision that was contrary to, or involved an unreasonable application of clearly established federal law; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented at the state court proceeding. 28 U.S.C. § 2254(d); Early v. Packer, 537 U.S. 3, 8 (2002). "This is a 'difficult to meet' and 'highly deferential standard for evaluating state-court rulings,

which demands that state-court decisions be given the benefit of the doubt.'" Cullen v. Pinholster, 563 U.S. 170, 181 (2011) (quoting Harrington v. Richter, 562 U.S. 86, 102 (2011) and Woodford v. Visciotti, 537 U.S. 19, 24 (2002)).

"The 'contrary to' and 'unreasonable application of' clauses in § 2254(d)(1) are distinct and have separate meanings." Moses v. Payne, 555 F.3d 742, 751 (9th Cir. 2008) (citing Lockyer v. Andrade, 538 U.S. 63, 73-75 (2003)). "Under the 'contrary to' clause of § 2254(d)(1), a federal court may grant relief only when 'the state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law or if the state court decides a case differently than the Supreme Court has on a set of materially indistinguishable facts.'" Loher v. Thomas, 825 F.3d 1103, 1111 (9th Cir. 2016) (quoting Williams v. Taylor, 529 U.S. 362, 413 (2000)).

"Under the 'unreasonable application' clause of § 2254(d)(1), 'a state-court decision involves an unreasonable application of the Supreme Court's precedent if the state court identifies the correct governing legal rule . . . but unreasonably applies it to the facts of the particular state prisoners case.'" Id. (quoting White v. Woodall, 134 S. Ct. 1697, 1705 (2014). Unreasonable application is "not merely wrong" or "even clear error." Woods v. Donald, 135 S. Ct. 1372, 1376 (2015). It must be "objectively unreasonable." Id. "To satisfy this high bar, a habeas petitioner is required to 'show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.'" Id. at 1377 (quoting Harrington, 562 U.S. at 103). "[R]elief is available under § 2254(d)(1)'s unreasonable application clause if, and only if, it is obvious that a clearly established rule applies to a given set of facts that there could be no 'fairminded disagreement' on the question." Woodall, 134 S. Ct. at 1706-07 (citing Harrington, 562 U.S. at 103); see also Williams, 529 U.S. at 411 ("[A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established

federal law erroneously or incorrectly. Rather, that application must also be unreasonable.").

Under § 2254(d)(2) "a petitioner may challenge the substance of the state court's finding and attempt to show that those findings were not supported by substantial evidence" or "challenge the fact-finding process itself on the ground that it was deficient in some material way." Hibbler v. Benedetti, 693 F.3d 1140, 1146 (9th Cir. 2012). "Regardless of the type of challenge, 'the question under AEDPA is not whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable — a substantially higher threshold." Id. "[W]hen the challenge is to the state courts procedure, . . . [the court] must be satisfied that any appellate court to whom the defect in the state court's fact-finding process is pointed out would be unreasonable in holding that the state courts fact-finding process was adequate.'" Id. at 1146-47; see also Taylor v. Maddox, 366 F.3d 992, 1001 (9th Cir. 2004) (the federal court "must be convinced that an appellate panel, applying the normal standards of appellate review, could not reasonably conclude that the finding is supported by the record.").

Where, as here, there is no reasoned decision from the state's highest court, the Court "looks through" to the last reasoned decision and presumes it provides the basis for the higher court's denial of a claim or claims. See Ylst v. Nunnemaker, 501 U.S. 797, 805-06 (1991);[6] see also Johnson v. Williams, 133 S. Ct. 1088, 1094 n.1 (2013). Here, the California Court of Appeal's March 24, 2015 decision is the last reasoned decision.

[6] The Court notes that the United States Supreme Court granted certiorari in Wilson v. Sellers, 2017 WL 737820, on February 27, 2017 to address whether the Supreme Court's decision in Harrington, 562 U.S. 86 silently abrogated Ylst's direction to look through a summary ruling to the last reasoned decision.

III. DISCUSSION

A. Claim One — Denying Motion to Withdraw Guilty Plea[7]

Petitioner argues that the trial court erred in denying his motion to withdraw his guilty plea because "the plea was based on duress, mistake, ignorance, and without free judgment." (Pet. at 7.) Petitioner appears to allege that his guilty plea was not voluntary, knowing, and intelligent because: his counsel advised him that if he did not take the 18-year and 8-month offer, he would never be released from prison; counsel met with him in person only two times; and counsel was in trial on another matter for a period of time prior to his plea. (Pet. at 6-7; Traverse 2-3.) More specifically, Petitioner claims he feared his counsel was not prepared to defend him despite having a viable defense — "the acts alleged were [n]othing more than a domestic violence matter that ended with make-up sex." (Traverse at 3.) He also argues he was coerced and threatened with a much longer sentence and the prospect of never seeing his children again, regardless of his innocence, if he did not accept the plea offer. (Id.)

Respondent argues Petitioner's plea was voluntary and focuses on both the evidentiary hearing before the trial court and the Court of Appeal's decision on the denial of the motion to withdraw his plea. (Answer at 4-6.) Respondent emphasizes that while Petitioner complained that his counsel did not spend enough time on his case, Petitioner also testified that there was nothing in particular he asked his counsel to do that he did

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[7] Respondent does not argue this claim is successive and the Court declines to raise it sua sponte. Petitioner's claim in the current federal Petition arises from an intervening new judgment, the August 5, 2013 judgment, rather than the June 3, 2009 judgment challenged in the first federal petition. "[W]here . . . there is a new judgment intervening between the two habeas petitions, an application challenging the resulting new judgment is not second or successive at all." Magwood v. Patterson, 561 U.S. 320, 341 (2010). Petitioner's current Petition arises from the August 5, 2013 judgment entered between his two federal habeas petitions. Although this case is distinguishable from Magwood because the judgment entered here was an identical reinstatement of the prior judgment challenged in the previous federal petition, there is "a new judgment intervening between the two habeas petitions." Id.

not do and his counsel testified that he met with him twice in person and twice by video conference. (Id. at 4-5.) Additionally, Respondent argues that the trial court accurately concluded that the only pressure imposed on Petitioner was the kind inherent to his circumstances — he faced a long determinate sentence with a plea or a possible life sentence by going to trial. (Id. at 5-6.)

1. Court of Appeal's Decision on Guilty Plea

In its March 24, 2015 decision,[8] the Court of Appeal found the trial court did not abuse its discretion in denying Petitioner's motion to withdraw his plea. (Lodgment 8 at 9.) More specifically, the Court of Appeal concluded that Petitioner's plea was not the result of duress or any other factor overcoming his free judgment. (Id.) The Court of Appeal found Petitioner signed and initialed a plea form acknowledging he understood the rights he was giving up by pleading and in which he indicated that his plea was voluntary and not based on fear or threats. (Id. at 6.) In addition to these forms, the trial court also questioned Petitioner. (Id. at 6.) The trial court confirmed that Petitioner understood the plea agreement, he was not being threatened to plead, he knew the rights he was giving up by pleading, and that the forms noted above, that he signed, were translated for him. The trial court also specifically confirmed that Petitioner understood he would be sentenced to 18 years and 8 months and each offense he was pleading to was a prior strike. (Id. at 6-7.)

As to the evidentiary hearing on Petitioner's motion before the trial court to withdraw his guilty plea, the Court of Appeal explained that Petitioner's trial counsel testified that he had communicated multiple times with Petitioner before Petitioner pled

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[8] As noted above, Petitioner was granted federal habeas relief on his fourth claim in his first federal petition. The district court found he received ineffective assistance of counsel based on counsel's failure to pursue an appeal from the denial of his motion to withdraw his guilty plea. The state court followed the district court's directive to vacate the June 3, 2009 judgment and reinstate it to allow Petitioner to pursue a direct appeal of the denial of that motion.

guilty, did everything Petitioner asked of him prior to the plea, and denied threatening Petitioner to accept the plea agreement. (Id. at 7.) Counsel also testified that he warned Petitioner that he was facing a possible life sentence if convicted of some of the charges and some of the enhancements. (Id.)

The court found trial counsel truthfully conveyed that Petitioner faced a possible life sentence if he rejected the plea offer and went to trial and he would get a lengthy determinate sentence of 18 years and 8 months under the plea agreement. (Id. at 9.) The court also rejected Petitioner's challenge based on his trial counsel not devoting enough time to his case and noted that Petitioner failed to identify anything counsel could or should have done differently. (Id.) The Court of Appeal found the trial court's assessment, that Petitioner simply had "buyer's remorse," was supported by the record. (Id.)

2. Legal Standard

A guilty plea must be intelligent, voluntary, and "done with sufficient awareness of the relevant circumstances and likely consequences." Brady v. United States, 397 U.S. 742, 748 (1970); Boykin v. Alabama, 395 U.S. 238, 242 (1969). "The standard was and remains whether the plea represents a voluntary and intelligent choice among the alternative choices of action open to the defendant." Parke v. Raley, 506 U.S. 20, 29 (1992). "[W]hen the judgment of conviction upon a guilty plea has become final and the offender seeks to reopen the proceeding, the inquiry is ordinarily confined to whether the underlying plea was both counseled and voluntary." United States v. Broce, 488 U.S. 563, 569 (1989). If the plea is counseled and voluntary, "then the conviction and plea, as a general rule, foreclose collateral attack." Broce, 488 U.S. at 569.

"Where . . . a defendant is represented by counsel during the plea process and enters his plea upon the advice of counsel, the voluntariness of the plea depends on whether counsel's advice 'was within the range of competence demanded of attorneys in criminal cases.'" Hill v. Lockhart, 474 U.S. 52, 56 (1985) (quoting McMann v. Richardson, 397 U.S. 759, 771 (1970)). "[A] defendant who pleads guilty upon the

advice of counsel 'may only attack the voluntary and intelligent character of the guilty plea by showing" ineffective assistance of counsel under Strickland v. Washington, 466 U.S. 668 (1984). Id. at 56-57 (quoting Tollett v. Henderson, 411 U.S. 258 (1973) and extending *Strickland's* standard to "claims arising out of the plea process."); see also Mahrt v. Beard, 849 F3d 1164, 1170 (9th Cir. 2017).

Under Strickland, a defendant must "show that counsel's performance was deficient." 466 U.S. at 687. This "first prong sets a high bar." Buck v. Davis, 137 S. Ct. 759, 775 (2017). Counsel's constitutional obligation under Strickland is satisfied "so long as his decisions fall within the 'wide range' of professionally competent assistance." Id. (quoting Strickland, 466 U.S. at 690); see also Harrington, 562 U.S. at 104 (A reviewing court must indulge "a strong presumption that counsel's representation was within the 'wide range' of reasonable professional assistance."). "The question is whether an attorney's representation amounted to incompetence under 'prevailing professional norms,' not whether it deviated from best practices or most common custom." Harrington, 562 U.S. at 105 (quoting Strickland, 466 U.S. at 690.) "It is only when the lawyer's errors were 'so serious that counsel was not functioning as the 'counsel' guaranteed . . . by the Sixth Amendment' that Strickland's first prong is satisfied." Buck, 137 S. Ct. at 775 (quoting Strickland, 466 U.S. at 687).

The Court need not address both the deficiency prong and the prejudice prong if the defendant fails to make a sufficient showing of either one. Strickland, 466 U.S. at 697. However, assuming a defendant can establish deficient performance under this highly deferential standard, prejudice must also be shown. Harrington, 562 U.S. at 104. In considering ineffective assistance of counsel in the plea process, a petitioner "must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Hill, 474 U.S. at 59.

3. Application

Petitioner does not assert his claim regarding his guilty plea as an ineffective assistance of counsel claim,[9] although he does criticize counsel in the context of the plea. He argues his plea was not voluntary and he should not be held to it. As noted above, when a defendant pleads "guilty upon the advice of counsel, he is limited to challenging his plea by demonstrating that the advice he received from counsel did not constitute effective representation." Lambert v. Blodgett, 393 F.3d 943, 979 (9th Cir. 2004).[10] Because Petitioner's claims regarding his guilty plea can only be brought as an ineffective assistance of counsel claim and he did not bring an ineffective assistance of counsel claim, this itself provides a basis for denying the claim. Notwithstanding, the Court has considered whether the Court of Appeal reasonably concluded Petitioner's plea was knowing and voluntary,[11] considered whether the record itself reflects Petitioner's plea was knowing and voluntary, and considered whether Petitioner received ineffective assistance of counsel in the plea proceedings.

a) Knowing and Voluntary Plea

Although the Court of Appeal did not specifically apply the standard noted above, the court considered the circumstances and consequences Petitioner was aware of when

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[9] The Court notes Petitioner did not raise an ineffective assistance of counsel claim in the state court proceedings he is now challenging in the current federal petition. However, his arguments on appeal do identify, and the Court of Appeal addressed, some of his criticisms of his counsel in the context of the voluntariness of his plea.

[10] In Lambert v. Blodgett, the court explained that although the petitioner attempted to assert two theories, an attack on his guilty plea and fault with his counsel's representation in connection with the entry of his plea, the petitioner could only challenge the plea based on ineffective assistance of counsel. 393 F.3d at 979.

[11] The state court is not required to cite or even be aware of Supreme Court cases, "so long as neither the reasoning nor the result of the state-court decision contradicts them," Early, 537 U.S. at 8. Although the Court of Appeal was not required to rely on the cases relied on by this Court and neither the reasoning or the result contradict them, the Court has reviewed the record and finds his plea was knowing and voluntary.

he pled, particularly the possible sentence he faced if he went to trial, his explicit waiver of his rights in both written form and in response to questioning by the trial court and that he indicated he understood he would be getting 18 years and 8 months. The court also considered that Petitioner indicated he was not threatened to plead and his counsel testified he did not threaten Petitioner.

The Court cannot find the state court's conclusion that Petitioner's plea was voluntary was "opposite to that reached by the Supreme Court on a question of law or [that] the state court decide[d] [the] case differently than the Supreme Court on a set of materially indistinguishable facts." Williams, 529 U.S. at 413 (explaining standard for contrary to clause of § 2254(d)(1). Petitioner has also not shown the state court decision was objectively unreasonable, i.e. "so lacking in justification that there was an error well understood and comprehended in existing law beyond fair-minded disagreement. Woods, 135 S. Ct. at 1376 (explaining standard for unreasonable application clause of § 2254(d)(1)). The Court of Appeal's conclusion that his plea "was not the result of any factor overcoming his exercise of free judgment" and nothing more than "buyer's remorse" is accurate.

Even under a de novo review, the Court would conclude his guilty plea was knowing and voluntary. Petitioner completed a plea form in which he pled guilty to the charges noted above with an enhancement as to one. (Lodgment 1 at 24.) He initialed next to a line indicating he was pleading to those counts, the balance of the charges would be dismissed, and he would get an 18 year and 8 month stipulated sentence. (Id.) He also initialed next to each of the constitutional rights he acknowledged giving up (trial, confront witnesses, remain silent, present evidence). (Id.) He initialed next to the line indicating he understood he would have four strikes as a result of the conviction. (Id. at 25.) He also initialed next to series of additional consequences of the plea, including sex offender registration and a prison prior. (Id.) He also initialed next to a brief description of the facts as to each charge. (Id. at 26.) The trial court also confirmed all of the above through direct questioning of Petitioner. The trial court confirmed the form

was translated for him, his initials were those on the form, and it was his signature on the form. (Lodgment 2 at 5.) After asking individually if he understood he was giving up each of the rights noted above, the judge specifically asked him "The maximum penalty for these offenses is exactly what you will receive: 18 years, eight months state prison and up to a $10,000 fine. You're aware that you[r] going to get that prison sentence and that fine is possible." (Id. at 5-6.) Defendant responded yes. (Id. at 6.) Petitioner also responded yes to understanding he would have a prison prior, four strikes, and that he would be required to serve 85% of the 18 years and 8 months he was being sentenced to. (Id.) The court also explained that the four strikes meant if he was convicted of any felony he would get life in prison. (Id.) And finally, the court confirmed Petitioner's plea of guilty to forcible rape, sodomy by use of force, assault by means likely to produce great bodily injury with an admission he did personally inflict great bodily injury, and making a criminal threat. (Id. at 7-8.)

At the hearing on Petitioner's motion to withdraw his plea, he and his counsel testified. When Petitioner was asked why he wished to withdraw his plea, he testified that his counsel had advised him "that if I did not sign for the 18 years, 8 months that they were about to give me the sentence, then I will never be able to be released from prison." (Id. at 17.) He reiterated the same later in his testimony, saying he did not feel like he had a choice in taking the plea "[because he told me that if I wanted to ever see the light of day outside again, that I had to sign." (Id. at 19.) When asked if there were any other reasons he plea should be set aside, he says "I just ask for a fair amount of time and to have less strikes on my record. I know that I am not innocent. But I want something that is fair." (Id. at 19-20.) He went on to explain that after he signed the form, he asked his counsel about getting the sentence lowered. (Id.) Petitioner indicated his counsel advised him he was facing a 25 to life sentence and under the plea agreement he would not. (Id. at 24.) He also explained that his claim he was threatened by the district attorney to plead was based on his counsel telling him this would be the only offer

he would get from the district attorney. (Id.) He goes on to say that that was the reason he pled. (Id. at 25.)

To the extent Petitioner is arguing that he believed the result of his sentence would be anything other than four strikes and an 18-year 8-month sentence, he has no basis in the record for that view. Even if he had mistakenly believed he could get a lower sentence and less strikes, the trial court explicitly dispelled either of those notions in questioning Petitioner before accepting his plea.

As discussed more below, there was also no improper threat or coercion in advising Petitioner that if convicted of some of the charges and some of the enhancements he might end up in prison for life. The pressure to plead guilty to avoid that possibility is simply a choice inherent in every plea entered to avoid a possible life sentence, even if explained to him as never seeing his children or the light of day again to drive home the seriousness. A guilty plea is not compelled "whenever motivated by the defendant's desire to accept the certainty or probability of a lesser penalty rather than face a wider range of possibilities extending from acquittal to conviction and a higher penalty authorized by law for the crime charged." Brady, 397 U.S. at 751. That is exactly what happened here. Petitioner may have second guessed his decision because he thought he deserved less time or strikes, but it was not because he did not understand that was what he was pleading to at the time or because he was threatened or forced to.

Petitioner also seems to argue he did not feel he had a viable choice to go to trial because his counsel was not prepared. But, as explained below, Petitioner fails to identify anything his counsel could or should have done that he did not do. He criticizes counsel's lack of availability for a two-week time period following his preliminary hearing, but does not indicate what additional meetings, beyond the four they did have (two in person and two by video conference, (Lodgment 2 at 27)), would have changed in terms of his defense or plea.

In short, because there is nothing in the record suggesting Petitioner did not understand the rights he was waiving, the consequences of his plea, or the sentence he

would and did receive, the Court cannot find his guilty plea was anything but knowing and voluntary.

b) Ineffective Assistance of Counsel

The Court of Appeal did not consider Petitioner's claim regarding his guilty plea as an ineffective assistance of counsel claim because he did not raise an ineffective assistance of counsel claim on appeal. (Lodgment 3.) However, even applying only Strick*land's* deferential review, rather than the doubly deferential review created by Strickland and AEDPA's state court deference combined, on a review of the record, the claim fails. See Woods, 135 S. Ct. at 1376 (explaining doubly deferential review).

Petitioner's trial counsel's conduct was well "within the range of competence demanded of attorneys in criminal cases." Hill, 474 U.S. at 56. Petitioner has not shown counsel's performance was deficient. As discussed more above, there was no deficiency in counsel advising Petitioner that if he rejected the plea offer and was convicted of some of the charges and some of the enhancements, he might end up with a life sentence. Nor is the number of times counsel met with Petitioner an indicator that his counsel was deficient. Petitioner seems to argue he did not think his case was a priority to his counsel because counsel did not meet with him more and had a two-week trial in another case. But, Petitioner's impression of counsel's level of interest in his case does not mean counsel was deficient in advising concerning his plea or otherwise. Additionally, as the Court of Appeal noted, Petitioner failed to identify anything counsel could or should have done differently. In his Traverse, Petitioner argues counsel should have pursued a viable defense of "domestic violence followed by make up sex," but Petitioner does not explain how counsel could or should have done that and did not. (Traverse at 3.) In fact he makes no mention of any defense during the hearing on his motion to withdraw his plea. Even if the Court assumes this was a theory Petitioner suggested to counsel, and the

Court assumes counsel elected not to pursue it,[12] given the "strong presumption counsel's representation was within the wide range of professional assistance," the Court cannot find counsel was deficient for advising him to take the deal rather than pursue that defense. Finally, the Court notes that counsel reasonably may not have assessed it as quite as viable a defense as Petitioner. For instance, maybe counsel thought it would be hard to argue to a jury that his client beat up this woman to the point of a fractured nose, chased her down, and grabbed her phone away as she tried to call 911, but she had consensual sex with him. Petitioner has not shown counsel was deficient under Strickland.

The Court need not address the prejudice prong because Petitioner has failed to show deficiency in counsel's performance. Strickland, 466 U.S. at 697. Nevertheless, the Court additionally finds Petitioner has not shown "there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Hill, 474 U.S. at 59. Petitioner obviously continues to challenge the denial of withdrawal of his plea, the granting of which could result in his going to trial. However, even assuming there was some error in counsel's performance, absent which Petitioner would not have pleaded guilty, the Court is not convinced he would have gone to trial. The record in this case, including Petitioner's conduct before the state court after the partial grant of habeas relief reflects Petitioner consistently making decisions in open court on the record and in writing and then shortly thereafter backing out or attempting to undo these decisions. Additionally, although the Court does need not rely on it, the record also suggests Petitioner was seeking only a better deal. In his pro se motion to withdraw his plea, he requests an "equitable plea agreement truly in Defendant's best

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[12] Both of these assumptions conflict with counsel's testimony that there was not anything Petitioner asked counsel to do prior to his plea that counsel did not do and Petitioner's testimony that the only thing counsel did not do was provide him with discovery. (Lodgment 2 at 18-19, 28.)

interest" and in his first habeas petition to the Court of Appeal he is negotiating for a 10-year sentence. (Lodgment 1 at 31; Case No. 11cv1487, Lodgment 6, Ex. C.) Before the trial court during the hearing on his motion to withdraw his plea he asks "for a fair amount of time and to have less strikes on my record. I know that I am not innocent. But I want something fair." (Lodgment 2 at 20, 25.) Even if counsel was somehow deficient, the Court doubts Petitioner would have actually followed through with going to trial knowing he was facing a life sentence. Petitioner has not met either prong of Strickland.

The Court of Appeal's conclusion that Petitioner's plea was knowing and voluntary was not unreasonable, the record itself reflects Petitioner's plea was knowing and voluntary, and Petitioner has not shown he received ineffective assistance of counsel in the plea proceedings. Accordingly, the Court recommends relief on Claim One be **DENIED**.

B. Claim Two — Denial of Continuance and Judicial Involvement

Petitioner argues the trial court erred because the court coerced him into filing a state habeas petition by forcing him to make a quick decision, appointing counsel to represent him, and in denying his request for a continuance of those proceedings.

Respondent argues that this claim is not cognizable on federal habeas review because Petitioner is simply challenging the trial judge's involvement in a state court proceeding. Respondent argues that even if this violated state law, contrary to the Court of Appeal's decision, it does not give rise to a federal claim. Respondent argues in the alternative that if there were any federal violation, it was harmless because Petitioner obtained the only relief he was entitled to under the district court's order — the prior judgment was vacated and reinstated and petitioner was allowed to file a direct appeal.

1. Court of Appeals Decision

The Court of Appeal found the trial court's involvement in Petitioner's state court proceedings consisted of ensuring Petitioner understood the possible result of reopening his criminal case (a possible life sentence) as opposed to preserving his 18-year and 8-month sentence and pursuing his appeal rights. (Lodgment 8 at 13.) The court also

found the trial court did not give Petitioner additional time to contemplate whether to file the state habeas petition because Petitioner had already decided not to file it and the state court itself had limited time to comply with the district court's order. (Id.) The Court of Appeal found the trial court was just trying to get his decision on the record for purposes of advising the federal court of where the matter stood. (Id.) The court concluded it was Petitioner's federal and state counsel, not the trial court, that persuaded him to file the state habeas petition. (Id.) The court specifically found "[t]he trial court's only avowed interests were complying with the federal district court's order to provide Naranjo with an opportunity for appeal and ensuring Naranjo understood the potential consequences of a decision that hindered the trial court's compliance efforts." (Id. at 14.) Finally, the Court of Appeal concluded that the trial court's actions to comply with the district court's order did not warrant reversal because Petitioner received "precisely the relief the federal district court intended." (Id.)

The Court of Appeal also found that while Petitioner was not pleased with his counsel's ability to get him the sentence he believed he deserved, he never sought to represent himself or retain counsel, but rather confirmed before and during a Marsden[13] hearing on August 5, 2013 that he wanted appointed counsel. (Id.) The court also rejected any idea that his state appointed counsel sought to bind him to a predetermined course of action. (Id.) Rather, the court found the decision to proceed with filing a new state habeas petition was left to Petitioner. (Id.)

2. Analysis

It appears that Petitioner is raising two issues in claiming Due Process violations with regard to the proceedings in state court following the district court's order. First, he argues the trial court pressured him to make specific decisions. Second, he claims the trial court should not have denied him a continuance.

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[13] A request for new counsel is referred to as a Marsden motion for People v. Marsden, 2 Cal. 3d 118 (1970).

a) Prejudice

Although the Court analyzes each of these issues in more detail below, the Court finds first that even if either constituted a constitutional violation, Petitioner is not entitled to relief because he was in no way prejudiced by either. See Davis v. Ayala, 135 S. Ct. 2187, 2197 (2015) (habeas relief only available if prejudice established). This is the fundamental problem with Petitioner's claim. Petitioner was only entitled to have the June 3, 2009 judgment vacated and reinstated to allow him to pursue an appeal. And, that is exactly what he received.

Petitioner argues he was denied a trial and an opportunity to confront witnesses. However, Petitioner had no right to a trial at that point. The district court afforded him an opportunity to pursue a direct appeal of the denial of his motion to withdraw his plea based on counsel failing to do that on his behalf in the first instance. The district court sought to accomplish this by ordering the state court to vacate and reinstate the judgment against Petitioner to give him a new 60-day clock to pursue an appeal. The district court did not order he be allowed to withdraw his plea and go to trial. Rather, the district court found he was not entitled to relief on the other claims concerning his withdrawal of his plea. (Case No. 11cv1487, November 29, 2012 Order [ECF No. 20].)

Even if the trial court should have granted him more time to state his refusal to file the state habeas petition on the record, he could not have obtained any other relief than what he received. The state habeas petition was granted, the prior judgment was vacated and reinstated as the district court directed, and his counsel filed a notice of appeal on his behalf. Petitioner may have wanted a trial, but that is not the relief he was granted by the district court. He could not be prejudiced in not receiving something he was not entitled to and the district court had specifically denied. As the Court of Appeal reasonably found, "Naranjo received precisely the relief the federal district court intended." (Lodgment 8 at 14.)

b) Coercion by the Trial Court

At the outset, the Court finds Petitioner's claim that he was pressured by the trial court to make a specific decision about whether to file a state habeas petition is not a federal claim. Petitioner is challenging the state court's handling of the filing of a state habeas petition. That it was prompted by a federal district court's order does not transform the state proceeding to comply with it into a federal issue. Nonetheless, the Court considers Petitioner's arguments through the lens of Due Process as that is the basis Petitioner identifies. [14]

It is not entirely clear what Due Process protections apply in a state court hearing seeking to provide a federal habeas petitioner with the exact relief ordered by the federal court. However, "[t]he touchstone [of Due Process] is 'fundamental fairness.'" United States v. Harrington, 749 F.3d 825; see also Dowling v. United States, 493 U.S. 342, 352 (1990) (framing the Due Process inquiry as whether the alleged violation "is so extremely unfair that [it] violated fundamental conceptions of justice."). "[W]hen determining whether a due process violation has occurred, courts 'are to determine only whether the action complained of . . . violates those fundamental conceptions of justice which lie at the base of our civil and political institutions, and which define the community's sense of fair play and decency.'" McKinney v. Rees, 993 F.3d 1378, 1384 (9th Cir. 1993) (quoting Dowling, 493 U.S. at 353).

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[14] To the extent Petitioner argues the trial judge was biased against him, there is nothing in the record to support such a claim, certainly nothing rising to the level of a Due Process violation. Larson v. Palmateer, 515 F.3d 1057, 1067 (9th Cir. 2008) ("In the absence of any evidence of some extrajudicial source of bias or partiality, neither adverse rulings nor impatient remarks are generally sufficient to overcome the presumption of judicial integrity, even if those remarks are 'critical or disapproving of or even hostile to, counsel, the parties, or their cases."). At best, the trial court judge was frustrated as he was thwarted in his attempts to order the only relief Petitioner had been afforded by the district court.

There was nothing about this proceeding that was unfair or violated any fundamental conception of justice. At the July 17, 2013 hearing to address compliance with the district court order the trial court noted it had appointed counsel for Petitioner, Mr. Badillo, explained a state habeas petition was the only way to provide the relief ordered and, noted Petitioner's counsel had not been authorized to file it on Petitioner's behalf. (Lodgment 2 at 39-42.) Petitioner then stated he had an attorney, Victor Pippins, and he wanted a preliminary hearing, a trial, and wanted to talk to Pippins before anything else happened. (Id. at 40-41.) The trial court agreed and trailed the hearing to the next day, July 18, 2013. (Id. at 42.)

At the July 18, 2013 hearing, Petitioner had both his state appointed counsel, Mr. Badillo and, as requested, his federal appointed counsel, Mr. Pippins, present. (Id. at 46.) The Court noted the Ninth Circuit had issued a 30-day stay of the district court order the day before and required the filing of a status report. (Id. at 47) The trial court expressed frustration that Petitioner was refusing to request, via a state habeas petition, the only relief he had been granted by the district court, indicated he hoped a status report to the appropriate federal court might provide some perspective on the situation, and asked the parties if they had anything to put on the record. (Id. at 42-48.) The district attorney's office requested a status in three weeks to revisit the jurisdictional issue followed by the trial court explaining that he would like to get to the merits of the claim. (Id. at 48-49.) As the trial court proceeded to schedule the next hearing, counsel for the attorney general's office requested Petitioner be advised that if he refused to file the state habeas petition and everything started over, he might be facing a 64-life sentence. (Id. at 50.) The trial court did so by explaining that if his current deal was somehow set aside he might face a 64-life sentence and even explained that meant he would not be eligible for parole for 64 years. (Id. at 51-52.) The prosecutor then asked that Petitioner himself acknowledge that he had been given the opportunity to file a state habeas petition and was refusing to do so. (Id. at 52.) Petitioner acknowledged he had the right to file the state habeas petition, but when the judge asked Petitioner if he was refusing to file the

petition, his federal counsel interrupted and requested he not answer until the later status. (Id. at 52.) The trial court asked Petitioner again and this time state counsel interrupted and requested time to talk to Petitioner. (Id. at 53.)

Then an exchange followed between the court and Mr. Badillo in which counsel raised the complexity of the issue and the Judge responded that it was not complicated at all. (Id. at 54.) The Judge noted Petitioner had an interpreter, he had state and federal counsel, and he had been told he could have what he was asking for. (Id.) He then returned to his question again, to which Mr. Badillo responded Petitioner was now instructing them to file the state habeas petition. (Id. at 54.) The trial court then confirmed the same with Petitioner directly. (Id. at 55.) The court set an August 5, 2013 deadline for the petition to be filed. (Id. at 56.)

There is nothing improperly coercive about the July 17 or 18 hearings. The trial court is faced with a deadline to actually comply with the district court's order and believes he has no way to do it. The trial court is trying to get Petitioner's position on the record for purposes of a status report to the federal court. Although the judge seems frustrated, he is not telling Petitioner, with two attorneys at his side, what to do. He is simply trying to put his position (not filing the state habeas petition), that his state and federal counsel had already conveyed to the trial court, on the record.

The state habeas petition was filed on July 30, 2013. (Lodgment 1 at 99-104.) It requested the state court afford the relief ordered by the district court. (Id. at 101.) However, on July 31, 2013, the trial court received a letter from Petitioner indicating the state petition was not authorized and he had fired Mr. Badillo. (Lodgment 2 at 60; Lodgment 1 at 121.) At the August 5, 2013 hearing, before addressing the letter, the court conducted a Marsden hearing at Petitioner's request for appointment of another lawyer and denied the request. (Id. at 62.) The court then indicated it was unclear if Petitioner wanted to withdraw the state petition. (Id.) Mr. Badillo indicated that after he and Mr. Pippins explained his options, Petitioner wanted to continue to file the state habeas petition. (Id. at 62-63.) The trial court confirmed that directly with Petitioner and

the state stipulated to the granting of the petition to vacate the June 3, 2009 judgment and reinstate it to allow a new 60-day period to request a certificate of probable cause for an appeal. (Id. at 64.) The Court cannot identify anything unfair in these proceedings. The trial court is again just trying to find out Petitioner's position — does he want the state habeas petition filed or not.

The trial court does not insist that Petitioner do anything except put the position he has conveyed through his counsel on the record. This is quite understandable given Petitioner's propensity to recant and disavow almost every decision he had made before the court under oath and in writing and the impending deadline set by the federal court. Similarly, there is no basis for Petitioner to argue his appointed counsel was steering him in a particular direction at the behest of the trial court. On the contrary, Mr. Badillo attempted, unsuccessfully, to avoid having Petitioner put his position on the record. This would certainly not indicate he was acting at the trial court's direction since getting Petitioner's decision on the record was seemingly the only goal of the trial court other than giving Petitioner the relief he was afforded by the district court. To the extent Petitioner was even persuaded at all by the trial court, it was certainly not into a particular decision, but rather into putting his decision, whatever it was, on the record so the matter could proceed.

Court of Appeal's decision on this issue is not contrary to or an unreasonable application of clearly established federal law. § 2254(d). There is no Supreme Court authority prohibiting a state court from asking a petitioner if they do or do not want to file a state habeas petition to obtain relief ordered by a federal district court, particularly when represented by counsel. Loher v. Thomas, 825 F.3d at 1111 ("federal court may grant relief only when the state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law or if the state court decides a case differently than the Supreme Court has on a set of materially indistinguishable facts.") Nor can the Court find the Court of Appeal's conclusion that there was nothing improper about the trial court's handling of this proceeding was "so lacking in justification that there was an

error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." Woods, 135 S. Ct. at1377 (describing high bar for showing unreasonable application).

c) Denial of Continuance

The only request for a continuance the Court can identify in the record[15] is Mr. Pippins' and Mr. Badillo's consecutive requests for more time before Petitioner himself stated on the record that he had instructed his counsel not to file the state habeas petition. Those requests came amidst the trial court's attempts to get Petitioner to acknowledge what his counsel had already conveyed to the court — that he was not authorizing them to file the state habeas petition seeking the relief ordered by the district court.

The Court of Appeal found no error in the trial court not giving Petitioner more time before putting Petitioner's position, that counsel had already stated (not to file the state habeas petition) on the record. (Lodgment 8 at 13.) The Court of Appeal recognized the trial court had limited time to comply with a district court order and merely wanted to get his position on the record so the issue could be put back in federal court. (Id.)

Looking to the circumstance present at the time the request was denied, the Court cannot find this was an arbitrary "insistence on expeditiousness in the face of a justifiable request for delay." Ungar v. Sarafite, 376 U.S. 575, 589 (1964) ("The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied."); see also Morris v. Slappy, 461 U.S. 1, 11-12 (1983).

Again, to the extent there is even a federal issue presented, the Court of Appeal's conclusion is not contrary to or an unreasonable application of clearly established federal law or based on an unreasonable determination of the facts in light of the record. §

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[15] The Court will not repeat the summary of the record noted above, (Section III.B.2.a)), but references it as appropriate for this issue.

2254(d). Not only is there no Supreme Court authority finding a denial of a continuance under these or similar circumstances a Due Process violation, this was not an arbitrary insistence on expeditiousness in the face of a justifiable request for delay. The court was insisting on getting Petitioner's position on the record because he was trying to comply with a federal order and provide the federal court with an accurate status of the trial court's compliance and the reason for the delay. That is not arbitrary. Nor was the request for delay justified. Petitioner had made the decision not to file the state petition and it had been conveyed by his counsel. There was no reason to delay his confirming that decision, as the trial court noted, "he can either stop playing games or get going on this." (Lodgment 2 at 54) This was after the trial court indicated he just wanted to get to the merits and give him the relief afforded by the federal court. Which is exactly what he did when Petitioner confirmed in open court that he wanted the state habeas petition filed. (Id. at 64.)

For the foregoing reasons, it is recommended relief on Claim Two be **DENIED**.

C. State Law Issue

To the extent Petitioner is arguing he is entitled to federal habeas relief for a violation of California Penal Code § 1018,[16] such a claim is not cognizable on federal habeas review. Even assuming there were a violation of § 1018, it would be only a violation of state law not cognizable on federal habeas review. Federal habeas writs may not issue on the basis of a perceived error of a state law. Estelle v. McGuire, 502 U.S. 62, 67-68 (1991) ("[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions.") A petitioner cannot transform a state law issue into a federal one by labeling it a due process violation. See Langford v. Day, 110 F.3d 1380, 1389 (9th Cir.1996); Little v. Crawford, 449 F.3d 1075, 1083 n. 6 (9th Cir. 2006) (Courts "cannot treat a mere error of state law, if one occurred, as a denial of due process;

[16] Petitioner makes only one reference to § 1018 in his Petition and does not address it in his Traverse. (Pet. at 5.)

otherwise, every erroneous decision by a state court on state law would come here as a federal constitutional question.") Petitioner is not entitled to federal habeas relief based on an alleged error in applying § 1018.

IV. Evidentiary Hearing

AEDPA prescribes the manner in which federal habeas courts must approach the factual record and "substantially restricts the district court's discretion to grant an evidentiary hearing." Baja v. Ducharme, 187 F.3d 1075, 1077 (9th Cir.1999). "[A] determination of a factual issue made by a State court shall be presumed to be correct," with the petitioner having "the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1). Section 2254(e)(2) limits "the discretion of federal habeas courts to take new evidence in an evidentiary hearing." Cullen, 563 U.S. at 185.

"If a claim has been adjudicated on the merits by a state court, a federal habeas petitioner must overcome the limitation of § 2254(d)(1) on the record that was before that state court." Cullen, 563 U.S. at 185("[E]vidence introduced in federal court has no bearing on § 2254(d)(1) review"). If a claim subject to 28 U.S.C. § 2254(d)(1) does not satisfy that statutory requirement, it is "unnecessary to reach the question whether § 2254(e)(2) would permit a [federal] hearing on th[at] claim." Id. at 184 (citation omitted). "In practical effect, . . . this means that when the state-court record 'precludes habeas relief' under the limitations of § 2254(d), a district court is 'not required to hold an evidentiary hearing.'" Cullen, 563 U.S. at 183. (citation omitted). Since Cullen, the Ninth Circuit has held that a federal habeas court may consider new evidence only on de novo review, subject to the limitations of § 2254(e)(2). See Stokley v. Ryan, 659 F.3d 802, 808 (9th Cir. 2011).

As explained above, Petitioner is not entitled to relief under § 2254(d) and has not met any of the exacting requirements for an evidentiary hearing on federal habeas review. Additionally, he does not identify any reason an evidentiary hearing would be necessary.

Accordingly, the Court recommends Petitioner's request for an evidentiary hearing be **DENIED**.

V. CONCLUSION & RECOMMENDATION

For all the foregoing reasons, **IT IS HEREBY RECOMMENDED** the Court issue an Order: (1) approving and adopting this Report and Recommendation; and (2) denying the Petition.

IT IS ORDERED that no later than **April 25, 2017,** any party to this action may file written objections with the Court and serve a copy on all parties. The document should be captioned "Objections to Report and Recommendation."

IT IS FURTHER ORDERED that any reply to the objections shall be filed with the Court and served on all parties no later than **May 9, 2017.**

The parties are advised that failure to file objections within the specified time may waive the right to raise those objections on appeal of the Court's order. Turner v. Duncan, 158 F.3d 449, 455 (9th Cir. 1998); Martinez v. Ylst, 951 F.2d 1153, 1156 (9th Cir. 1991).

Dated: April 4, 2017

Hon. Bernard G. Skomal
United States Magistrate Judge