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**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

ENCARNACION AGUILAR,

Petitioner,

vs.

D.W. NEVEN, *et al.*

Respondents.

2:06-cv-00385-RCJ-LRL

ORDER

This habeas matter under 28 U.S.C. § 2254 comes before the Court: (a) for consideration of possible issuance of a certificate of appealability (COA), following upon the Clerk's docketing of the notice of appeal also as an application (#36) for a certificate of appealability, petitioner's application (#38) for a certificate of appealability, and the limited remand by the Court of Appeals in connection with same, and (b) on petitioner's motion (#39) for copy of the docket sheet.

Petitioner Encarnacion Aguilar seeks to appeal the final order and judgment dismissing the remaining claims in the petition on the merits. Petitioner challenges his 2004 Nevada state conviction, pursuant to a jury verdict, of transport of a controlled substance, to wit, cocaine, and trafficking in a controlled substance, in the charged amount of approximately 672 grams of cocaine or a mixture containing cocaine.

Under 28 U.S.C. § 2253(c), the petitioner must make a "substantial showing of the denial of a constitutional right" in order to obtain a COA when the district court has denied a

1 habeas claim on the merits. *Slack v. McDaniel*, 529 U.S. 473, 483-84, 120 S.Ct. 1595, 1603-
2 04, 146 L.Ed.2d 542 (2000); *Hiivala v. Wood*, 195 F.3d 1098, 1104 (9th Cir. 1999). To satisfy
3 this standard, the petitioner “must demonstrate that reasonable jurists would find the district
4 court’s assessment of the constitutional claim debatable or wrong.” *Slack*, 529 U.S. at 484,
5 120 S.Ct. at 1604.

6 The application will be granted in part and denied in part. A COA will be granted as to
7 Ground 1, although the Court remains of the view that its decision as to this ground was
8 correct. A COA will be denied as to the remaining grounds. The Court briefly discusses the
9 grounds as to which a COA is denied below.

10 ***Ground 3: Miranda Waiver***

11 In Ground 3,¹ petitioner alleged that he was denied Fifth Amendment rights to an
12 attorney and to remain silent when officers allegedly failed to ask him specifically whether he
13 was willing to waive his *Miranda* rights.

14 Jurists of reason would not find debatable or wrong this Court’s conclusion that the
15 state supreme court’s rejection of this claim was neither contrary to nor an unreasonable
16 application of clearly established federal law. Petitioner’s claim was premised upon the
17 proposition that the State failed to establish a valid waiver of his *Miranda* rights because the
18 officer asked “Do you understand these rights?” rather than “Do you waive these rights?”
19 However, clearly established federal law does not require that an officer talismanically utter
20 the words “Do you waive these rights?” in order to establish a predicate for a valid waiver. A
21 valid waiver instead can be inferred from the circumstances. Here, Aguilar was fully advised
22 of the *Miranda* rights in Spanish by a Spanish-speaking officer; he acknowledged that he
23 understood those rights; and he then elected to answer the officers’ questions. The state
24 court’s rejection of this claim was neither contrary to nor an unreasonable application of clearly
25 established federal law. Jurists of reason therefore would not find the denial of this claim
26 debatable or wrong. See #32, at 15-17.

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¹The Fourth Amendment claim in Ground 2 was dismissed as noncognizable. See #14, at 3-5.

1 **Ground 4: Effective Assistance – Statute of Limitations Defense**

2 In Ground 4, petitioner alleged that he was denied effective assistance of trial counsel
3 when counsel failed to pursue a statute of limitations defense as an affirmative defense to be
4 tried to the jury at trial and that he was denied effective assistance of appellate counsel when
5 counsel failed to raise the statute of limitations defense on appeal.

6 Jurists of reason would not find the Court’s rejection of the claim on *de novo* review
7 debatable or wrong.

8 The state district court held that the applicable Nevada limitations period was tolled
9 during the time that Aguilar was outside the country after being deported up through his arrest
10 when he attempted to reenter the country.

11 At bottom, petitioner failed to establish that the limitations defense ultimately would
12 have been successful under Nevada state law in his case, whether the defense was pursued
13 as an affirmative defense at trial or raised on appeal. The Supreme Court of Nevada implicitly
14 ruled against petitioner on the purely state law limitations and tolling issues when it held, on
15 a related claim, that petitioner had failed to demonstrate that a pretrial petition pursuing the
16 issue would have been successful. The state supreme court is the final arbiter of Nevada
17 state law. Petitioner cited no apposite Nevada law establishing, to the contrary of the state
18 supreme court’s implicit holding, that the limitations period was not tolled during the time that
19 Aguilar was out of the country. Petitioner thus failed to establish that he was prejudiced by
20 counsel’s failure to pursue the limitations defense, whether as an affirmative defense at trial,
21 on appeal, or otherwise. See #32, at 18-20.

22 Jurists of reason therefore would not find the Court’s denial of this claim debatable or
23 wrong.²

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25 ²In his COA application, petitioner presents argument as to Ground 4 regarding claims that were not
presented in Ground 4.

26 Petitioner provides argument as to a claim that trial counsel should have pursued the limitations issue
27 in a pretrial petition. This claim was exhausted in the state courts, but it was not presented in federal Ground
28 4. The claim is related to but distinct from the claims in Ground 4. In any event, the state supreme court’s

(continued...)

1 **Ground 5: Effective Assistance – Preliminary Hearing Delay**

2 In Ground 5, petitioner alleged that he was denied effective assistance of trial counsel
3 when counsel failed to move for dismissal of the indictment based upon preliminary hearing
4 delay.

5 Jurists of reason would not find debatable or wrong this Court’s conclusion that the
6 state supreme court’s rejection of this claim was neither contrary to nor an unreasonable
7 application of clearly established federal law.

8 Defense counsel did in fact seek dismissal of the indictment – based upon the
9 preliminary hearing delays and under the case law cited by petitioner – through to a rejection
10 of the claim on the merits by the state supreme court on direct appeal. The factual findings
11 of the state courts in rejecting the claim that the State did not act in a willful or consciously
12 indifferent manner are adequately supported by the state court record, and those findings
13 therefore are clothed with a presumption of correctness under 28 U.S.C. § 2254(e)(1). The
14 state supreme court is the final arbiter of Nevada state law, and its rejection of the underlying
15 substantive claim under the relevant Nevada state law standard is binding on this Court. The
16 state supreme court’s rejection of the underlying substantive state law claim necessitates the
17 conclusion that petitioner cannot establish prejudice on the claim of ineffective assistance of
18 counsel, because the state high court specifically rejected the substantive claim that petitioner

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20 ²(...continued)

21 rejection of the claim was neither contrary to nor an unreasonable application of clearly established federal
22 law, for substantially the reasons discussed in the order of dismissal and herein as to Ground 4.

23 Petitioner further provides argument as to a claim that trial counsel should have filed a pretrial petition
24 seeking to protect him from being subjected to double jeopardy. No such claim was presented in Ground 4.
25 In order to present additional claims after respondents’ answer, petitioner would have had to file a motion for
26 leave to amend the petition. On any such motion, he would have been required to demonstrate that a grant
27 of leave to amend would not be futile because of, e.g., timeliness and exhaustion concerns. Petitioner may
28 not pursue new claims for the first time on appeal that were not even alleged in the district court.

29 On the claims that were raised in Ground 4, petitioner relies upon *United States v. Cronic*, 466 U.S.
30 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984), for the proposition that a plain error standard rather than the
31 *Strickland* standard applies to his claim. *Cronic* fully supports the application of the *Strickland* standard to
32 specific claims of attorney error such as those presented in this case. See, e.g., *Cronic*, 466 U.S. at 666 &
33 n.41, 104 S.Ct. at 2051 & n.41.

1 alleges should have been pursued and which in fact was pursued by counsel. At bottom,
2 Aguilar merely is rehashing with the ineffective assistance claim a substantive state law claim
3 that was expressly rejected by the state's highest court. See #32, at 21-23.

4 Jurists of reason therefore would not find the Court's denial of this claim debatable or
5 wrong.³

6 **Ground 6: Due Process – Preliminary Hearing Delay**

7 In Ground 6, petitioner alleged that he was denied due process by the same delays in
8 the justice court preliminary hearing proceedings that served as the backdrop for the claim of
9 ineffective assistance of counsel in Ground 5. He maintained that he was denied due process
10 because the State allegedly violated the requirements of the Nevada state cases that he also
11 relied upon on Ground 5.

12 A federal constitutional due process claim – as opposed to a corresponding claim
13 asserting only state law error – was not exhausted in the state courts. This Court rejected
14 the due process claim in federal Ground 6 on *de novo* review. See #32, at 23-24.

15 Jurists of reason would not find the rejection of the claim debatable or wrong.
16 Petitioner claimed in this Court that he was denied due process of law because of an alleged
17 violation of Nevada decisional law. A petitioner may not transform an alleged state-law error
18 into a federally cognizable claim merely by claiming that the alleged state-law violation violates
19 due process. See, e.g., *Little v. Crawford*, 449 F.3d 1075, 1083 & n.6 (9th Cir. 2006). Even
20 if a court were to assume, *arguendo*, that a due process claim could be based upon the state
21 law error alleged in this case, the state courts rejected both the factual and legal predicates
22 for petitioner's claim that the standards in the Nevada state cases were violated. The
23 Supreme Court of Nevada, the final arbiter of Nevada state law, held that there was no state

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25 ³Petitioner urges in his COA application that the Court has jurisdiction to prevent a fundamental
26 miscarriage of justice. In noncapital cases, a procedurally defaulted claim may be heard if the petitioner
27 demonstrates that a fundamental miscarriage of justice would result if the claim were not reviewed because
28 the petitioner is actually innocent of crime. Ground 6 was dismissed on the merits, not on the basis of
procedural default. Aguilar further clearly has not demonstrated actual innocence, as he was apprehended
with a rather large quantity of cocaine or cocaine mixture. In any event, petitioner's allegation that he was
impermissibly brought to trial after dismissal of the complaint in the justice court is without merit.

1 law violation. Aguilar thus had no basis for a due process violation premised upon a state law
2 violation, because there was no state law violation. See #32, at 24.

3 Jurists of reason therefore would not find the rejection of the claim debatable or
4 wrong.⁴

5 **Ground 7: Effective Assistance – Failure to Move to Strike Expert Witness**

6 In Ground 7, petitioner alleged that he was denied effective assistance of trial counsel
7 when counsel allegedly failed to move to strike the testimony of the State’s expert witness who
8 performed the chemical analysis of the substance seized from Aguilar and to move for a
9 mistrial.

10 Jurists of reason would not find debatable or wrong this Court’s conclusion that the
11 state supreme court’s rejection of this claim was neither contrary to nor an unreasonable
12 application of clearly established federal law.

13 The underlying issue at trial regarding the expert witness concerned the adequacy of
14 the State’s notice to the defense of the witness. Defense counsel did in fact file a motion to
15 strike the witness’ testimony, and she pursued the issue vigorously. The potential relief under
16 consideration included a possible mistrial. However, the state court record reflects that the
17 state district court clearly would not grant a mistrial request that would lead to a double
18 jeopardy objection to a retrial. Faced with these alternatives, Aguilar himself personally

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20 ⁴In the COA application, petitioner seeks to present a different due process claim based upon delay
21 that was not presented in Ground 6 and that instead relies upon federal cases. The claim presented in this
22 Court in Ground 6 instead clearly was based upon the State’s alleged violation of substantive standards from
Nevada state cases. See #8, at 8-P through 8-U. Petitioner may not pursue new claims and arguments for
the first time on appeal that were not raised in the district court in the first instance.

23 In any event, the federal authorities relied upon pertain to a due process claim based upon continued
24 *detention*. See, e.g., *Baker v. McCollan*, 443 U.S. 137, 145, 99 S.Ct. 2689, 2695, 61 L.Ed.2d 433 (1979);
25 *Armstrong v. Squadrito*, 152 F.3d 564, 575-76 (7th Cir. 1998). While petitioner refers to approximately 1452
26 days of delay, petitioner was deported and out of the country – not detained – for most of that period. And he
clearly was not “detain[ed] . . . indefinitely without procedural protections,” 152 F.3d at 575, following his
rearrest. See #32, at 4. Aguilar was released when the justice court dismissed the complaint. #24-13, Ex.
34, at 14, line 22.

27 While petitioner seeks to present new claims in the stead of the meritless claims under Grounds 4
28 and 6 that were dismissed by the Court, the new claims that he seeks to assert for the first time on appeal
also clearly lack merit.

1 elected, on the record, to go forward then with the trial rather than requesting either a
2 continuance or a mistrial without double jeopardy consequences. Aguilar cannot make such
3 a strategic choice amongst the available alternatives and then come back years later on post-
4 conviction review and successfully urge that defense counsel instead should have pursued
5 another alternative that he himself opted not to pursue at the time. If Aguilar wanted defense
6 counsel to further pursue a motion for mistrial, the time for him to have her do so was at trial.
7 He instead opted not to do so. #32, at 25-27.

8 Jurists of reason therefore would not find this Court's rejection of the claim debatable
9 or wrong.⁵

10 **Ground 8: Effective Assistance – Grand Jury Notice**

11 In Ground 8, petitioner alleged that he was denied effective assistance of trial counsel
12 when counsel did not move to dismiss the indictment for failure to serve Aguilar with the notice
13 of the grand jury proceedings required by N.R.S. 172.241, also known as a *Marcum* notice.
14 He alleged that a due process objection based on the alleged state-law error was not raised.

15 Jurists of reason would not find debatable or wrong this Court's conclusion that the
16 state supreme court's rejection of this claim was neither contrary to nor an unreasonable
17 application of clearly established federal law.

18 The state court record clearly reflects that Aguilar was given a *Marcum* notice – written

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20 ⁵Petitioner again urges that the *Cronic* decision discussed in note 2, *supra*, requires the application of
21 a plain error standard rather than the *Strickland* standard. As discussed previously, *Cronic* fully supports the
application of the *Strickland* standard to specific claims of attorney error such as those presented in this case.

22 Petitioner further urges that he did not comprehend the enormity of his decision to proceed with the
23 trial rather than seek a continuance for a week. Be that – *arguendo* – as it may, petitioner may not make a
24 strategic decision to pursue one alternative and then later present a viable claim of ineffective assistance of
counsel based upon an allegation that his counsel should have pursued an alternative other than the one that
he chose.

25 Petitioner further seeks to present a new substantive claim that the trial court abused its discretion in
26 declining to grant a motion for mistrial without double jeopardy consequences. Ground 7 presented a claim of
27 ineffective assistance of counsel for failing to move to strike the testimony. Ground 7 did not present an
28 independent substantive claim challenging the trial court's refusal to grant a mistrial with double jeopardy
consequences. Petitioner once again is seeking to shift to a different claim on the federal appeal that was not
presented in the federal district court in the first instance. He may not raise new claims for the first time in a
COA application that were not raised in the pleadings in the federal district court. See note 2, *supra*.

1 in Spanish – at the conclusion of the preliminary hearing. The form notice advised Aguilar in
2 Spanish, *inter alia*, of the number to contact if he wished to present testimony or evidence,
3 and the notice stated in Spanish that it was the only notice that he would receive. Petitioner
4 acknowledged in the federal petition that he received this form notice at the conclusion of the
5 preliminary hearing, but he contended that the notice was not adequate under the Nevada
6 statute and Nevada state case law applying the statute. The state supreme court’s holdings
7 that the notice met the requirements of state law and that a motion to dismiss therefore would
8 have been unsuccessful are fatal to any claim of prejudice by petitioner. The absence of any
9 state-law violation removed the predicate for any viable due process objection by counsel
10 based upon alleged state-law error. Any further contention that the notice given otherwise
11 violated due process separate and apart from state-law error was both unsupported and
12 unpersuasive. #32, at 27-28.

13 Jurists of reason therefore would not find this Court’s rejection of the claim debatable
14 or wrong.

15 ***Ground 9: Effective Assistance – Suppression Hearing***

16 In Ground 9, petitioner alleged that he was denied effective assistance of trial counsel
17 when counsel allegedly failed to protect his right against unreasonable search and seizure by
18 failing to impeach the testimony of the State’s witnesses at the suppression hearing and trial
19 on a number of points.

20 This Court reviewed this claim *de novo*, and it examined each one of the points for
21 impeachment or argument relied upon by petitioner. On each such point, there was not a
22 reasonable probability that further pursuit of the point would have altered the outcome of the
23 proceeding. See #32, at 28-32. Jurists of reason would not find the rejection of the claim of
24 ineffective assistance of counsel in this regard debatable or wrong.⁶

25 A certificate of appealability accordingly will be granted as to Ground 1 but denied as
26 to the remaining claims.

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28 ⁶Petitioner reliance upon *Cronic* is misplaced here as well. See note 2, *supra*.

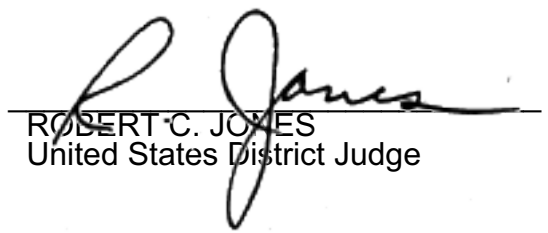
1 IT THEREFORE IS ORDERED, pursuant to 28 U.S.C. § 2253(c) and Rule 22(b) of the
2 Federal Rules of Appellate Procedure, that the applications (## 36 & 38) for a certificate of
3 appealability are GRANTED IN PART and DENIED IN PART, such that a certificate of
4 appealability is GRANTED as to the appeal of the denial of Ground 1 and is DENIED as to the
5 appeal of the denial of all remaining grounds.

6 IT FURTHER IS ORDERED that petitioner's motion(#39) for copy of the docket sheet
7 is GRANTED, such that the Clerk shall provide petitioner a copy of the updated docket sheet
8 along with the service copy of this order.

9 The Clerk of Court shall forward a copy of this order to the Ninth Circuit in a
10 supplemental transmittal and/or notice of electronic filing, as per current practice, and the
11 Clerk otherwise shall comply with any remaining unfulfilled directives in the order (#40) of the
12 Court of Appeals.

13 DATED: February 25, 2010

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ROBERT C. JONES
United States District Judge