UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

EASTERN DIVISION

EVAN P. GALVAN,

Petitioner,

v.

M.D. BITER, Warden,

Respondent.

No. ED CV 15-1819-GW (PLA)

ORDER ACCEPTING MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

Pursuant to 28 U.S.C. § 636, the Court has reviewed the Petition, the other records on file herein, the Magistrate Judge's Report and Recommendation, and petitioner's Objections to the Report and Recommendation. The Court has engaged in a de novo review of those portions of the Report and Recommendation to which objections have been made. The Court accepts the recommendations of the Magistrate Judge.

ACCORDINGLY, IT IS ORDERED:

1. The Report and Recommendation is accepted.
2. Judgment shall be entered consistent with this Order.
3. The clerk shall serve this Order and the Judgment on all counsel or parties of record.

DATED: October 11, 2016

George H. Wu

HONORABLE GEORGE H. WU
UNITED STATES DISTRICT JUDGE

"Appendix A"

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No. ED CV 15-1819-GW (PLA)

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This Report and Recommendation is submitted to the Honorable George H. Wu, United States District Judge, pursuant to 28 U.S.C. § 636 and General Order 05-07 of the United States District Court for the Central District of California. For the reasons discussed below, the Magistrate Judge recommends that the Petition for Writ of Habeas Corpus be dismissed with prejudice.

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I

PROCEDURAL HISTORY

A Riverside County Superior Court jury convicted petitioner of robbery, in violation of California Penal Code section 211, and possessing methamphetamine, in violation of California Health and Safety Code section 11377. (Clerk's Transcript ["CT"] 96, 103). The trial court found true the allegations that petitioner had served a prior prison term, that he had a prior felony, and that his prior felony qualified as a serious felony under California's Three Strikes Law (Cal. Penal Code §§ 667, 667.5). (Id. at 36, 104-05). The trial court then sentenced petitioner to eleven years in state prison. (Id. at 147-48).

Petitioner filed a direct appeal. (See Lodgment Nos. 3 & 4). On January 14, 2015, the California Court of Appeal affirmed the judgment against petitioner. (Lodgment No. 5). Petitioner then filed a petition for review. (Lodgment No. 6). On April 1, 2015, the California Supreme Court summarily denied the petition for review. (Lodgment No. 7).

Petitioner also filed a petition for writ of habeas corpus in the Riverside County Superior Court. (Lodgment No. 8). On July 8, 2014, the superior court denied the petition, stating that petitioner had failed to raise a prima facie case for relief. (Lodgment No. 9). Petitioner then filed a petition for writ of habeas corpus in the California Court of Appeal, which was summarily denied on August 21, 2014. (Lodgment Nos. 10 & 11). Thereafter, he filed a petition for writ of habeas corpus in the California Supreme Court. (Lodgment No. 12). On January 14, 2015, the California Supreme Court denied the petition on procedural grounds and on its merits. (Lodgment No. 13).

On August 31, 2015, petitioner initiated this action. (Docket No. 1). On November 24, 2015, respondent filed an Answer and a supporting Memorandum of Points and Authorities ("Answer"). (Docket No. 13). On February 1, 2016, petitioner filed a traverse.

This matter is deemed submitted and is ready for a decision.

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II

STATEMENT OF FACTS

The Court adopts the factual summary set forth in the California Court of Appeal's Opinion affirming petitioner's conviction.[1]

> On September 5, 2013, [petitioner] struggled with a convenience store clerk before taking a 12-pack of beer from her and walking out the door.
>
> On September 7, 2013, a sheriff's deputy arresting [petitioner] for public drunkenness found 0.2 grams of methamphetamine in one of [petitioner's] pockets.
>
> On November 27, 2013, the People filed an amended information charging [petitioner] with robbery (Pen. Code, § 211) and possessing methamphetamine (Health & Saf. Code, § 11377, subd. (a)). The People also alleged [petitioner] had a prison term prior (§ 667.5, subd. (b)), a serious felony prior (§ 667, subd. (a)) and a strike prior (§§ 667, subds.(c) & (e)(1), 1170.12, subd. (c)(1)).
>
> On December 11, 2013, a jury convicted [petitioner] on both counts. The clerk had testified at trial that she had seen [petitioner] in the convenience store about two or three times previously and had seen his companion in the convenience store a few times more than that, and was completely sure that [petitioner] was the person who took the beer from her on September 5, 2013.

(Lodgment No. 5 at 2 (footnote omitted)).

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[1] The Court "presume[s] that the state court's findings of fact are correct unless [p]etitioner rebuts that presumption with clear and convincing evidence." Tilcock v. Budge, 538 F.3d 1138, 1141 (9th Cir. 2008) (citations omitted); 28 U.S.C. § 2254(e)(1). Because petitioner has not rebutted the presumption with respect to the underlying events, the Court relies on the state court's recitation of the facts. Tilcock, 538 F.3d at 1141. To the extent that an evaluation of petitioner's individual claims depends on an examination of the trial record, the Court herein has made an independent evaluation of the record specific to those claims.

III

PETITIONER'S CONTENTIONS[2]

1. The trial court denied petitioner his Sixth Amendment right to counsel by denying his motion to substitute counsel. (Pet., Memo. Points & Auth. at 1-4).

2. Trial counsel deprived petitioner of his Sixth Amendment right to effective assistance of trial counsel by committing the following errors:

a. failing to conduct an adequate pre-trial investigation into the victim's identification of petitioner as the perpetrator of the robbery;

b. failing to obtain a copy of the photographic line-up from which the victim identified petitioner;

c. failing to investigate the surveillance footage of the robbery and to pursue a line of questioning based on that footage;

d. failing to impeach the victim's testimony that, on a previous occasion, petitioner had stolen beer from the convenience store; and

e. failing to conduct an adequate investigation into the likelihood of success of counsel's chosen defense to show that petitioner's use of force was not sufficient to meet the legal definition of robbery. (Id. at 4-6).

3. The trial court violated petitioner's right to due process by failing to adequately advise him of the charges against him, his right to hire counsel of his own choosing, or his right to represent himself, and trial counsel violated petitioner's right to counsel by neglecting to advise petitioner of a plea offer from the prosecutor. (Id. at 7).

IV

STANDARD OF REVIEW

The Petition was filed after the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 ("the AEDPA"). Pub. L. No. 104-132, 110 Stat. 1214 (1996). Therefore, the Court

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[2] In his Petition, petitioner also alleged a fourth ground for relief -- namely, that the prosecutor deprived petitioner of his right to due process by knowingly eliciting false testimony in order to secure the guilty verdict against him. (Id. at 8-9). In his traverse, however, petitioner has withdrawn that ground for relief. (Traverse at 11). Thus, the Court will not address that ground for relief herein.

applies the AEDPA in its review of this action. See Lindh v. Murphy, 521 U.S. 320, 336, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997).

Under the AEDPA, a federal court may not grant a writ of habeas corpus on behalf of a person in state custody "with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). As explained by the Supreme Court, section 2254(d)(1) "places a new constraint on the power of a federal habeas court to grant a state prisoner's application for a writ of habeas corpus with respect to claims adjudicated on the merits in state court." Williams v. Taylor, 529 U.S. 362, 412, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). In Williams, the Court held that:

> Under the "contrary to" clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts. Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case.

Williams, 529 U.S. at 412-13; see Weighall v. Middle, 215 F.3d 1058, 1061-62 (9th Cir. 2000) (discussing Williams). A federal court making the "unreasonable application" inquiry asks "whether the state court's application of clearly established federal law was objectively unreasonable." Williams, 529 U.S. at 409; Weighall, 215 F.3d at 1062. The Williams Court explained that "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." Williams, 529 U.S. at 411; accord: Lockyer v. Andrade, 538 U.S. 63, 75-76, 123 S.Ct. 1166, 155 L.Ed.2d 144 (2003). Section 2254(d)(1) imposes a "highly deferential standard for evaluating state-court rulings," Lindh, 521 U.S. at 333 n.7, that "demands that state court decisions be given the benefit of the doubt."

Woodford v. Visciotti, 537 U.S. 19, 24, 123 S.Ct. 357, 154 L.Ed.2d 279 (2002) (per curiam). A federal court may not "substitut[e] its own judgment for that of the state court, in contravention of 28 U.S.C. § 2254(d)." Id. at 25; Early v. Packer, 537 U.S. 3, 11, 123 S.Ct. 362, 154 L.Ed.2d 263 (2002) (per curiam) (holding that habeas relief is not proper where state court decision was only "merely erroneous").

The only definitive source of clearly established federal law under the AEDPA is the holdings (as opposed to the dicta) of the Supreme Court as of the time of the state court decision. Williams, 529 U.S. at 412. While circuit law may be "persuasive authority" for purposes of determining whether a state court decision is an unreasonable application of Supreme Court law (Duhaime v. Ducharme, 200 F.3d 597, 600-01 (9th Cir. 1999)), only the Supreme Court's holdings are binding on the state courts and only those holdings need be reasonably applied. Williams, 529 U.S. at 412; Moses v. Payne, 555 F.3d 742, 759 (9th Cir. 2009). Furthermore, under 28 U.S.C. § 2254(e)(1), factual determinations by a state court "shall be presumed to be correct" unless the petitioner rebuts the presumption "by clear and convincing evidence."

A federal habeas court conducting an analysis under § 2254(d) "must determine what arguments or theories supported, or, [in the case of an unexplained denial on the merits], could have supported, the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of [the Supreme Court]." Harrington v. Richter, 562 U.S. 86, 102, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011) ("A state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision."). In other words, to obtain habeas relief from a federal court, "a state prisoner must 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 103.

The United States Supreme Court has held that "[w]here there has been one reasoned state judgment rejecting a federal claim, later unexplained orders upholding that judgment or rejecting the same claim rest upon the same ground." Ylst v. Nunnemaker, 501 U.S. 797, 803,

111 S.Ct. 2590, 115 L.Ed.2d 706 (1991). Here, petitioner asserted each of his three remaining grounds for relief on appeal to the California Court of Appeal, which issued a reasoned opinion rejecting those grounds. (See Lodgment Nos. 3-5). Thereafter, the California Supreme Court summarily denied those grounds. (See Lodgment No. 7). Accordingly, this Court reviews the California Court of Appeal's reasoned opinion rejecting petitioner's grounds for relief under AEDPA's deferential standard. See Ylst, 501 U.S. at 803; Shackleford v. Hubbard, 234 F.3d 1072, 1079 n.2 (9th Cir. 2000) (district court "look[s] through" unexplained California Supreme Court decision to the last reasoned decision as the basis for the state court's judgment).

V

DISCUSSION

GROUND ONE: PETITIONER'S MOTION TO SUBSTITUTE COUNSEL

In his first ground for relief, petitioner contends that the trial court deprived him of his Sixth Amendment right to counsel by denying his motion to substitute counsel. (Pet., Memo. Points & Auth. at 1-4). The trial court erred in denying the motion, according to petitioner, because petitioner proved at trial that an irreconcilable conflict had arisen between him and his counsel. (See id. at 1-3).

A. Factual Background

During the early stages of trial, while the victim was testifying, petitioner passed a note to defense counsel asking counsel to move the trial court to appoint substitute counsel. (See Reporter's Transcript ["RT"] 39). Defense counsel notified the court of petitioner's request, and the trial court conducted a hearing on the matter. (Id.). At the hearing, petitioner leveled the following four complaints that, in his view, warranted the appointment of substitute counsel: (1) counsel did not obtain Brady[3] discovery from the People; (2) petitioner had never been advised of his right to hire counsel of his own choosing or to represent himself; (3) counsel ignored a note that petitioner had recently passed to counsel asking him to argue that, unlike petitioner, the

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[3] Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

suspect in the photographs and security video of the robbery did not have a large tattoo on his chest; and (4) counsel improperly conceded the issues of identity and alibi to concentrate on whether petitioner's conduct in taking the beer from the store clerk met the threshold of robbery. (Id. at 39-42).

After hearing petitioner's complaints, the trial court questioned trial counsel about his experience as a criminal defense attorney. (Id. at 42). Counsel stated that he had worked in criminal defense since 1899 -- first in the public defender's office and later in private practice. (Id.). He explained that he was on the conflicts panel and had been appointed to represent petitioner after the public defender's office had declared a conflict of interest. (Id. at 42-43). Upon being questioned about his preparation for petitioner's case, counsel explained that he had attended the preliminary hearing. (Id. at 43). He conceded that he had done little to no investigation on the issues of alibi or identity because there did not appear to be any question as to the identity of the perpetrator. (Id.). Rather, in counsel's view, the "issue seemed to be whatever act [petitioner] did, did that meet the threshold of being a robbery or not." (Id.). Counsel further stated that he did not believe that there was any outstanding Brady material, as no evidence in the prosecutor's possession would be beneficial to petitioner's defense. (Id.).

Having heard counsel's response, the trial court asked petitioner if he wanted to add anything further. (Id.). Petitioner complained that he was entitled to Brady material irrespective of whether it would help or hinder his defense. (Id.). The trial court then questioned petitioner about his experience in the criminal justice system. (Id. at 43-44). Petitioner stated that he had studied law in prison and that he had previously been through a criminal case as a defendant. (Id. at 44). He had been sentenced to prison in connection with that case. (Id.). Notwithstanding his prior experience as a criminal defendant, he claimed that he had just recently learned that he had the right to represent himself, as well as the right to hire his own attorney. (Id.). No one, according to petitioner, had ever advised him of those rights in connection with his previous case or with the current case. (Id.).

The trial court then found that trial counsel was credible, whereas petitioner was not. (Id. at 44). Specifically, the court stated:

> All right. To the extent that there are conflicts between the statements of [petitioner] and [trial counsel], I believe [trial counsel] and I disbelieve [petitioner] largely because [petitioner] has had previous experience as a defendant. I know the practice of the court in the vertical calenders as far as arraignments and letting people -- asking people if they would like a public defender to be appointed and then if the public defender declares a conflict appointing the conflict panel.

(Id. at 44-45). The trial court then found that counsel had done nothing to warrant removal and, furthermore, found that there was no conflict of interest between petitioner and counsel:

> I don't see [trial counsel] has done anything improper as far as his representation or that he's failed to do anything since there's no issue about the validity of the identification which seems to be the issue [petitioner] has. [¶] I do not believe it would be appropriate to relieve [trial counsel] at this time. I don't think that any deterioration in the relationship rises to the level of relieving [trial counsel], so I'm not going to grant that at this point. I'm going to deny the motion.

(Id. at 45).

When testimony resumed, defense counsel, in accordance with petitioner's request, asked the victim whether she remembered seeing any tattoos on the man who took the beer, whether she saw any tattoos on the man in the photo from the security video, and whether she noticed any tattoos on petitioner. (Id. at 47-48). In doing so, counsel asked petitioner to face the victim and open his shirt to allow the victim to see his chest tattoo. (Id. at 48). The victim responded that she did not see "those tattoos" on the perpetrator. (Id.).

B. The California Court of Appeal's Opinion

The California Court of Appeal rejected petitioner's challenge to the trial court's refusal to appoint substitute counsel on its merits. (Lodgment No. 5 at 3-5). In doing so, the court of appeal stated:

> "[S]ubstitute counsel should be appointed when, and only when, necessary under the Marsden standard, that is whenever, in the exercise of its discretion, the court finds that the defendant has shown that a failure to replace the appointed attorney would substantially impair the right to assistance of counsel [citation], or, stated slightly differently, if the record shows that the first appointed attorney is not providing adequate representation or that the defendant and the attorney have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result [citation]." (People

> v. Smith (1993) 6 Cal. 4th 684, 696 (Smith)). "The court should deny a request for new counsel at any stage unless it is satisfied that the defendant has made the required showing. This lies within the exercise of the trial court's discretion, which will not be overturned on appeal absent a clear abuse of that discretion." (Id. at p. 696).
>
> We do not find abuse of discretion by the trial court when it declined to appoint substitute counsel, for the following reasons. First, [petitioner] admitted that defense counsel told him that he believed the "DA gave as was [sic] all she had in her possession and he had told me that was all that she had in her possession." In addition, defense counsel told the court that he did not believe there was any Brady material. Second, [petitioner's] complaint that he was not advised of his right to hire defense counsel of his own choosing or to act as his own defense counsel is not relevant to whether defense counsel was providing adequate representation or whether [petitioner] and counsel had an irreconcilable conflict. Third, [petitioner's] point about counsel ignoring his note about him having a tattoo on his chest that is not shown in the security video and photos was made moot directly after the Marsden hearing when defense counsel asked the clerk whether she remembered seeing any tattoos on the man who took the beer, whether she saw any tattoos on a photo from the security video, and whether she saw any tattoos on [petitioner], whom counsel asked to face the clerk and open his shirt so the clerk could see his tattoos.[4] Fourth, counsel was not inadequate for conceding identity and alibi and concentrating on whether [petitioner's] actions constituted robbery. This is because the clerk was completely sure of her identification of [petitioner] because she had seen him in the convenience store a number of times. In addition, [petitioner] told the court during the Marsden hearing that he himself was not disputing "identification, but Brady discovery in general." A disagreement as to tactics and strategy is not sufficient to require a substitution of counsel. (People v. Stewart (1970) 6 Cal. App. 3d 457, 464-465). "[T]here is no constitutional right to an attorney who will conduct the defense of the case in accordance with an indigent defendant's whims." (People v. Nailor (1966) 240 Cal. App. 2d 489, 494). For these reasons, [petitioner's] arguments regarding the outcome of his Marsden hearing fail.

(Id. at 4-5 (footnote in original, renumbered)).

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[4] The People pointed out that on the day of the robbery only about four inches of [petitioner's] chest was showing through his polo shirt, whereas [petitioner] at trial showed his chest tattoos after unbuttoning two shirt buttons.

C. Federal Legal Standard and Analysis

In evaluating Sixth Amendment claims on habeas review, "'the appropriate inquiry focuses on the adversarial process, not on the accused's relationship with his lawyer as such.'" Wheat v. United States, 486 U.S. 153, 159, 108 S. Ct. 1692, 100 L. Ed. 2d 140 (1988) (citation omitted). Thus, "while the right to select and be represented by one's preferred attorney is comprehended by the Sixth Amendment, the essential aim of the Amendment is [not] to ensure that a defendant will inexorably be represented by the lawyer whom he prefers." Id. The Sixth Amendment guarantees effective assistance of counsel, not a "meaningful relationship" between an accused and his counsel. Morris v. Slappy, 461 U.S. 1, 14, 103 S. Ct. 1610, 75 L. Ed. 2d 610 (1983).

Nevertheless, the Ninth Circuit has recognized that compelling a criminal defendant to undergo a trial with the assistance of an attorney with whom the defendant has become embroiled in an irreconcilable conflict deprives the defendant of any counsel whatsoever. United States v. Moore, 159 F.3d 1154, 1159-60 (9th Cir. 1998). The denial of a criminal defendant's motion for substitution of counsel, therefore, may violate the defendant's Sixth Amendment right to counsel. See, e.g., id. at 1160 (where irreconcilable conflict existed between defendant and counsel, trial court's failure to appoint substitute counsel was reversible error); Brown v. Craven, 424 F.2d 1166, 1170 (9th Cir. 1970) (refusal to substitute new counsel violated the Sixth Amendment where relationship between defendant and particular public defender had completely collapsed).

"Given the commands of Sixth Amendment jurisprudence, a state trial court has no discretion to ignore an indigent defendant's timely motion to relieve an appointed attorney." Schell v. Witek, 218 F.3d 1017, 1025 (9th Cir. 2000) (en banc). "[I]t is well established and clear that the Sixth Amendment requires on the record an appropriate inquiry into the grounds for such a motion, and that the matter be resolved on the merits before the case goes forward." Id. In determining whether a refusal to allow substitution of attorney resulted in a denial of the constitutional right to effective assistance of counsel, three factors are considered: (1) the timeliness of the motion, (2) the adequacy of the court's inquiry into the defendant's complaint, and (3) whether the conflict between defendant and counsel was so great that it resulted in a total lack of communication preventing an adequate defense. United States v. Cassel, 408 F.3d 622, 637 (9th Cir. 2005).

The ultimate constitutional question is whether the trial court's error "actually violated" the petitioner's constitutional right because the conflict between the petitioner and his attorney "had become so great that it resulted in a total lack of communication or other significant impediment that resulted in turn in an attorney-client relationship that fell short of that required by the Sixth Amendment." Schell, 218 F.3d at 1026. If the petitioner shows that a serious conflict existed that resulted in the constructive denial of counsel, no showing of prejudice is required. Id. at 1028. However, if a serious conflict existed, but did not rise to the level of the denial of counsel, the petitioner must show that he was prejudiced by the conflict. Id.

Here, petitioner cannot show that the trial court deprived him of his Sixth Amendment right to counsel by denying his motion for substitution. First, the record shows that, before rejecting the substitution motion, the trial court conducted an adequate inquiry into the nature of petitioner's complaints. Cf. Schell, 218 F.3d at 1027-28 (remanding for further development of the record where trial court failed to address petitioner's substitution motion to determine nature of conflict between petitioner and counsel and whether conflict deprived petitioner of his Sixth Amendment right to counsel); Brown, 424 F.2d at 1169 (granting habeas relief based on denial of substitution motion where, among other things, trial court summarily denied motion to substitute counsel without conducting any inquiry into petitioner's repeated requests for substitute counsel). Specifically, once the complaint arose, the trial court allowed petitioner to enumerate each of trial counsel's purported shortcomings. The trial court then had trial counsel identify his experience as a criminal defense attorney and respond to petitioner's allegations. And, rather than ruling on the motion then, the trial court, instead, allowed petitioner to elaborate on his complaints. Only after having done so did the trial court rule on petitioner's motion. Although petitioner may disagree with that ruling, he cannot show that the trial court shirked its duty to adequately investigate his complaints.

Second, and more importantly, nothing in the record suggests that petitioner and his trial counsel had become embroiled in an irreconcilable conflict that deprived petitioner of any counsel whatsoever. As the Ninth Circuit has recognized, "[d]isagreements over strategical or tactical decisions do not rise to [the] level of a complete breakdown in communication." Stenson v.

Lambert, 504 F.3d 873, 886 (9th Cir. 2007) ("Disagreements over strategical or tactical decisions do not rise to [the] level of a complete breakdown in communication."); Schell, 218 F.3d at 1026 (noting that "decisions that are committed to the judgment of the attorney and not the client" do not deprive criminal defendant of Sixth Amendment right to conflict-free counsel); see also Brookhart v. Janis, 384 U.S. 1, 8, 86 S. Ct. 1245, 16 L. Ed. 2d 314 (1966) ("[A] lawyer may properly make a tactical determination of how to run a trial even in the face of his client's incomprehension or even explicit disapproval.").

This precedent forecloses petitioner's claim because his complaints regarding counsel's performance amount to, at most, disagreements about tactics in terms of whether trial counsel should have challenged the victim's identification of petitioner as the perpetrator of the robbery. Thus, for example, petitioner complains that counsel erred in failing to obtain copies of the photographic line-up from which the victim identified petitioner and that counsel failed to pursue a line of questioning that, in petitioner's opinion, would have cast doubt as to whether petitioner was the perpetrator of the crime. Counsel, however, opted to concede that petitioner was the perpetrator because, in counsel's view, the evidence as to the identity of the perpetrator was clear. Instead, counsel decided that petitioner's best chance of success was to show that petitioner's use of force was not sufficient to meet the legal definition of robbery. Thus, rather than establishing a conflict between him and his trial counsel, petitioner has shown nothing but a tactical disagreement with his trial counsel. As such, he cannot show that he was deprived of his Sixth Amendment right to counsel.

Moreover, even if petitioner could establish a conflict of interest, he nevertheless could show no prejudice because counsel pursued the very line of questioning that petitioner faulted counsel for failing to pursue. See Schell, 218 F.3d at 1026 (conflict will not give rise to habeas relief unless either it resulted in total denial of counsel or unless petitioner can show prejudice from conflict). Petitioner primarily faults counsel for failing to obtain the photographic line-up that the police used to obtain the victim's pre-trial identification and for failing to question the witness regarding the perpetrator's tattoos, or lack thereof. As to the first complaint, petitioner can show no prejudice because he points to nothing suggesting that the photographic line-up would have

benefitted his defense. On the contrary, the victim had no doubt about her identification and was familiar with petitioner from her past interactions with him. (RT 49-50). As to the latter complaint, petitioner can show no prejudice because defense counsel questioned the victim about whether or not she had seen tattoos on the perpetrator and about whether petitioner had tattoos. Indeed, at counsel's urging, petitioner opened his shirt in open court so that the victim could see that petitioner's chest was tattooed. (Id. at 47-48; Lodgment No. 5 at fn.3). Although petitioner may believe that counsel should have pursued this line of questioning earlier, counsel's failure to do so was not prejudicial. According to the hearing transcript, petitioner urged counsel to pursue this line of questioning only twenty minutes before petitioner moved the court to substitute counsel. When the resulting hearing ended, counsel immediately questioned the victim in accordance with petitioner's request. (Id.). Given this extremely short period of time between petitioner's request and counsel's decision to act upon that request, petitioner can show no prejudice from any delay in pursuing the line of questioning urged by petitioner.

Furthermore, petitioner can show no prejudice because counsel's decision to forego the issues of identity and alibi, albeit ultimately unsuccessful, was reasonable considering the evidence against petitioner. Indeed, the victim of the robbery was certain that petitioner was the culprit. (RT 49-50). Moreover, she testified that she had seen petitioner on several prior occasions, leaving little doubt as to the accuracy of her identification of petitioner. (Id. at 48). Further, the video surveillance footage corroborated the victim's testimony. (See id. at 30-34). What is more, petitioner, upon being arrested, conceded to police that, in fact, he was in the store and that he had a disagreement with the store clerk about his attempt to purchase a beer.[5] (Id. at 74; Pet., Exh. C). Given these circumstances, petitioner can show no prejudice from any conflict under which counsel was purportedly laboring.

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[5] Petitioner's statement to the arresting officer about being in the convenience store was not admitted into evidence. The prosecutor opted against introducing the statement because, in the prosecutor's view, the statement was "self-serving hearsay." (RT 3). Had trial counsel sought to discredit the victim's identification of petitioner by challenging the pre-trial identification procedure, however, the prosecutor could have introduced the statement to support the victim's identification.

Finally, the fact that petitioner may or may not have been advised of his right to hire counsel of his own choice or of his right to represent himself has no bearing on whether a conflict existed between him and his defense counsel. Indeed, petitioner has cited no reason why his purported ignorance of his constitutional right to hire counsel of his choice or to represent himself would have impacted on defense counsel's representation or performance. The record, moreover, contains no evidence showing how these purported facts impacted counsel's performance.

In short, petitioner has failed to show that a conflict existed between him and his counsel or that, if such a conflict existed, petitioner suffered any prejudice as a result. As such, the court of appeal's rejection of this ground for relief was neither contrary to, nor an unreasonable application of, clearly established federal law as determined by the Supreme Court.

GROUND TWO: INEFFECTIVE ASSISTANCE OF COUNSEL

In his second ground for relief, petitioner asserts that his trial counsel committed several errors that deprived petitioner of his Sixth Amendment right to effective assistance of counsel. (Pet., Memo. Points & Auth. at 4-6). Specifically, petitioner cites the following purported errors that counsel committed: (1) counsel failed to conduct an adequate pre-trial investigation into the victim's identification of petitioner as the perpetrator of the robbery; (2) counsel failed to obtain a copy of the photographic line-up from which the victim identified petitioner; (3) counsel failed to investigate the surveillance footage of the robbery and to pursue a line of questioning based on that footage; (4) counsel failed to impeach the victim's testimony that, on a previous occasion, petitioner had stolen beer from the store; and (5) counsel failed to conduct an adequate investigation into the likelihood of success of counsel's chosen defense to show that petitioner's use of force was not sufficient to meet the legal definition of robbery.[6] (Id.).

[6] The facts underlying this ground for relief essentially mirror those set forth in the factual background section of petitioner's preceding ground for relief. (See supra).

A. California Court of Appeal Opinion

The California Court of Appeal rejected petitioner's challenges to his trial counsel's performance on their merits. (Lodgment No. 5 at 6-7). In doing so, the court of appeal stated:

> Establishing a claim of ineffective assistance of counsel requires the defendant to demonstrate (1) counsel's performance was deficient in that it fell below an objective standard of reasonableness under prevailing professional norms, and (2) counsel's deficient representation prejudiced the defendant, i.e., there is a 'reasonable probability' that, but for counsel's failings, defendant would have obtained a more favorable result. [Citations.] A 'reasonable probability' is one that is enough to undermine confidence in the outcome. [Citations.]" (People v. Dennis (1998) 17 Cal. 4th 468, 540-541).)
>
> First, [petitioner] claims he would have received a more favorable result had defense counsel obtained a copy of the six-pack photo lineup that was shown to the clerk before she initially identified [petitioner] and generally conducted an investigation into the identification. Specifically, [petitioner] points out that in the initial police interview the clerk specified that she had seen [petitioner] in the store before when he stole beer by threatening that he had a gun. [Petitioner] believes defense counsel could have used this information from the police report to "cross-examine [the witness] thereby impeach her and discrediting her . . . identification" because the record contains no previous police report, 911 calls or other evidence to document that this statement of the clerk to the police officer was true. We do not see how this was ineffective assistance by counsel, or how it would have affected the outcome of the trial. Defense counsel chose as a matter of strategy to not contest the clerk's identification of [petitioner], supported as it was by her previous encounters with [him]. Had he chosen to contest the clerk's identification using the information to which [petitioner] points, there is no probability that [petitioner] would have obtained a better result. Second, regarding the security video, [petitioner] argues defense counsel should have more vigorously pursued whether the video surveillance showed enough of [petitioner's] chest to establish that the man in the video did not have chest tattoos and therefore could not have been [petitioner]. Again, defense counsel was allowed to choose the defense strategy of conceding identification but challenging the amount of force used. In addition, the still photo from the video surveillance that [petitioner] attaches to his supplemental petition as "Exhibit E" shows about four inches of [petitioner's] chest, as was discussed at trial, instead of the 10 inches that [petitioner] claims in his brief. For these reasons, we find counsel's assistance was not deficient and that any deficiency did not change the outcome of the trial. Third, regarding defense counsel's decision to pursue the "meritless defense" that [petitioner] used less force than is necessary to establish the elements of robbery, as opposed to petty theft, again, a defendant is not entitled to dictate to

> defense counsel which trial strategy to pursue. For these reasons, we find [petitioner] has not established ineffective assistance of counsel.

(Id.).

B. Federal Legal Standard and Analysis

Allegations of ineffective assistance of counsel are governed by the two-prong test set forth in Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Under the first prong of that test, the petitioner must prove that his attorney's representation fell below an objective standard of reasonableness. Id. at 687-88. To establish deficient performance, the petitioner must show his counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Id. at 687; Williams v. Taylor, 529 U.S. 362, 391, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000). In reviewing trial counsel's performance, however, courts "strongly presume[] [that counsel] rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Strickland, 466 U.S. at 690; Yarborough v. Gentry, 540 U.S. 1, 8, 124 S. Ct. 1, 157 L. Ed. 2d 1 (2003). Only if counsel's acts and omissions, examined within the context of all the surrounding circumstances, were outside the "wide range" of professionally competent assistance, will petitioner meet this initial burden. Kimmelman v. Morrison, 477 U.S. 365, 386, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986); Strickland, 466 U.S. at 690.

Under the second part of Strickland's two-prong test, the petitioner must show that he was prejudiced by demonstrating a reasonable probability that, but for his counsel's errors, the result would have been different. 466 U.S. at 694. The errors must not merely undermine confidence in the outcome of the trial, but must result in a proceeding that was fundamentally unfair. Williams, 529 U.S. at 393 n.17; Lockhart, 506 U.S. at 369. The petitioner must prove both deficient performance and prejudice. A court need not, however, determine whether counsel's performance was deficient before determining whether the petitioner suffered prejudice as the result of the alleged deficiencies. Strickland, 466 U.S. at 697.

Here, none of petitioner's allegations of ineffective assistance of counsel warrants federal habeas relief. At bottom, petitioner's allegations of attorney error, by and large, amount to little more than disagreements with counsel's strategic decisions to forego the issue of identity in favor of a challenge to the prosecution's evidence showing that petitioner used the requisite force to support a robbery conviction. Because counsel made an informed, strategic decision to pursue that defense theory, his decision cannot be second-guessed on habeas review. See id. at 690 (stating that "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable"); see also Silva v. Woodford, 279 F.3d 825, 844 (9th Cir. 2002) (noting United States Supreme Court precedent dictates that counsel commits no error when he or she makes an informed strategic decision) (citing Burger v. Kemp, 483 U.S. 776, 107 S. Ct. 3114, 97 L. Ed. 2d 638 (1987)).

Moreover, counsel's decision to concede identity in favor of challenging the force element of robbery was reasonable under the circumstances of petitioner's case. Indeed, as explained in connection with petitioner's preceding ground for relief (supra), there was no question that petitioner was the person who stole the beer from the convenience store. The store clerk was certain that petitioner was the perpetrator, and, furthermore, she recognized him from her past interactions with him. Additionally, the store's surveillance system captured petitioner's image. What is more, while not part of the trial evidence, petitioner admitted to police that he was in the convenience store and that he had argued with the store clerk about purchasing beer, although he denied stealing anything. Given this evidence, there is no likelihood that any challenge to petitioner's identity as the perpetrator would have succeeded.

Furthermore, the fact that counsel did not obtain the photographic six-pack that police used to obtain a positive identification of petitioner does not render counsel's strategic decision unreasonable. Aside from faulting counsel for failing to obtain the photographic six-pack, petitioner cites no reason to believe that the six-pack would have undermined the victim's identification of petitioner as the culprit. Such a result, moreover, was particularly unlikely considering the certainty that the victim displayed in identifying petitioner and considering that the victim knew petitioner from her previous interactions with him. In any event, the photographic line-

up was shown to the jury, and the deputy who presented the victim with the photographic line-up testified about the procedure that he used in obtaining the victim's identification of petitioner. (See RT 57-60). Nothing in the deputy's description of that procedure supported an argument that the victim misidentified petitioner.

Counsel, moreover, did not err in failing to more vigorously pursue the issue of whether or not the video surveillance footage showed enough of the perpetrator's chest to determine whether or not the perpetrator had a tattoo on his chest. Putting aside the fact that the photographic still from the footage captured petitioner's face, counsel had no reason to pursue the issue because the person in the stills from the surveillance footage is wearing a shirt that revealed only four inches of his chest. (Id. at 49). In other words, the fact that the victim may not have seen the tattoo would not, as petitioner believes, have shown that someone other than petitioner committed the robbery. Regardless, counsel questioned the victim about whether she noticed if the perpetrator had a tattoo. (Id. at 48). Counsel also asked the victim whether she could see a tattoo on the person in the stills from the surveillance footage. (Id.). And, counsel had petitioner unbutton his shirt -- more than a few inches from the top of his chest -- to reveal that, in fact, he had a tattoo. (See id.; Lodgment No. 5 at fn.3). Petitioner has failed to show how any additional questioning or demonstrations on this point would have benefitted his defense.

Finally, there is no merit to petitioner's allegation that counsel erred in challenging the victim's preliminary hearing testimony that petitioner had previously stolen beer from the store. According to petitioner, counsel should have challenged this testimony -- which was not introduced at trial -- because there were no police reports to substantiate it. That fact, however, would not have discredited the victim's identification. Petitioner provides no reason to believe that the victim falsely identified petitioner or that she was mistaken about whether he previously had robbed the store. Although petitioner notes that there were no police reports chronicling the previous robbery, that fact could be explained by the simple fact that the victim did not report the incident. More importantly, if counsel had pursued the line of questioning advanced by petitioner, counsel would have exposed the jury to testimony showing that petitioner had previously committed another robbery at the same store. Such testimony could not only prejudice the jury against petitioner, but

could also have strengthened the victim's credibility in the eyes of the jury. Pursuing the proposed line of questioning might also have caused the trial court to rethink its decision to exclude testimony regarding another convenience store robbery of which petitioner was convicted -- a robbery in which petitioner used a firearm. (Id. at 4). Before trial, when counsel had argued that identity was not an issue, the trial court excluded testimony regarding that crime as more prejudicial than probative. (Id. at 7).[7] Thus, by opting not to pursue the proposed line of questioning and by conceding a hopeless attempt to challenge the issue of identity, counsel ensured that the jury was not exposed to petitioner's prior bad acts.

For the foregoing reasons, petitioner cannot succeed on his ineffective assistance of trial counsel claim. Accordingly, habeas relief is not warranted with respect to this ground.

GROUND THREE: ADVISEMENT OF CONSTITUTIONAL RIGHTS

In his third ground for relief, petitioner contends that he was not advised of his right to hire counsel of his own choosing or his right to represent himself. (Pet., Memo. Points & Auth. at 7). According to petitioner, he discovered on his own that he was entitled to these rights after researching the issues in the prison law library. (See RT 44). Petitioner further claims that, had he been aware of these rights, he would have hired counsel of his choosing or opted to represent himself. (Pet., Memo. Points & Auth. at 7). Additionally, petitioner suggests that he was never advised of the charges against him, nor was he advised of a plea offer from the prosecutor. (Id.).

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[7] This evidence could only have been introduced into evidence if petitioner testified, which he did not. However, petitioner fails to recognize that, if counsel challenged the issue of identity and alibi, someone would have had to provide an alibi for petitioner. Considering that petitioner has identified no witness who would have been able to do so, the only logical result is that petitioner, himself, would have had to testify that he was somewhere other than at the convenience store when the robbery occurred. Had he done so, the prosecutor may have been able to introduce evidence regarding the prior robbery that petitioner committed at gunpoint. (See RT 4-7).

A. The California's Court of Appeal's Opinion

The California Court of Appeal rejected petitioner's claim on its merits. (Lodgment No. 5 at 8). In doing so, the court of appeal stated:

> The record belies each of these claims. The minute order for [petitioner's] arraignment on September 11, 2013, states "[Petitioner] Waives Reading of the Complaint/Information" and "Counsel stipulates to advisement of rights." The preliminary hearing transcript shows the prosecutor stated in open court that the People had offered [petitioner] 11 years to plead guilty. [Petitioner's] claims on these issues are meritless.

(Id.).

B. Federal Legal Standard and Analysis

The defendant in a criminal action has a constitutional right to be represented by counsel, and also a right to represent himself, if he so chooses. Faretta v. California, 422 U.S. 806, 807, 95 S. Ct. 2525, 2527, 45 L. Ed. 2d 562 (1975). Additionally, a criminal defendant has a right "to be informed of any charges against him, and that a charging document, such as an information, is the means by which such notice is provided. To satisfy this constitutional guarantee, the charging document need not contain a citation to the specific statute at issue; the substance of the information, however, must in some appreciable way apprise the defendant of the charges against him so that he may prepare a defense accordingly." Gautt v. Lewis, 489 F.3d 993, 1004 (9th Cir. 2007). Finally, "defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused." Missouri v. Frye, __ U.S. __, 132 S. Ct. 1399, 1404-08, 182 L. Ed. 2d 379 (2012).

Here, petitioner has failed to show that he was not advised of any of the rights of which he claims to have been uninformed. As to his right to self-representation and to select counsel of his choosing, petitioner waived the reading of those rights. (See CT 4). Specifically, at his arraignment, counsel stipulated to his advisement of rights. (Id.). Although petitioner may argue that he did not personally stipulate to his advisement of rights, that argument fails because petitioner is bound by his counsel's decision to waive the reading of petitioner's rights. See New York v. Hill, 528 U.S. 110, 114-115, 120 S. Ct. 659, 145 L. Ed. 2d 560 (2000) (holding that defendant is bound by counsel's decisions relating to conduct of trial); Wilson v. Gray, 345 F.2d

282, 286 (9th Cir. 1965) (same). In any event, the trial court found petitioner less than credible insofar as petitioner alleged to be unaware of his right to self-representation and to counsel of his own choosing. (See supra). In so finding, the trial court noted that petitioner had stood trial in another criminal matter, making his purported ignorance of those rights highly implausible. The trial court, moreover, made its credibility finding after observing petitioner's demeanor and hearing his complaints. As such, the trial court's credibility finding is entitled to deference on habeas review. See Snyder v. Louisiana, 552 U.S. 472, 477, 128 S. Ct. 1203, 170 L. Ed. 2d 175 (2008) ("determinations of credibility and demeanor lie 'peculiarly within a trial judge's province'" and are entitled to deference "'in the absence of exceptional circumstances'") (citation omitted).

The record also shows that petitioner was aware of the charges against him. As an initial matter, the information against petitioner adequately notified him of the charges against him. (CT 1-3). Petitioner does not contend that he was denied access to the information. On the contrary, he personally waived his right to have the information read in open court. (Id. at 4). Furthermore, at the preliminary hearing in this matter, the trial court, after hearing the testimony of the witnesses, explicitly found that there was sufficient information to support both of the counts alleged against petitioner. (See id. at 21-22). And, in doing so, the trial court stated the nature of the charges and identified the relevant statutory provisions criminalizing petitioner's conduct. (Id.). Petitioner was present at the preliminary hearing (RT 10) and, thus, was on notice of the charges against him. Putting that aside, petitioner's current allegation that he was unaware of the charges against him conflicts with the statements that he made at the hearing on his motion to substitute counsel. There, petitioner stated that, at his arraignment, "they read me my charges and scheduled me a date." (Id. at 42).

The record, furthermore, betrays petitioner's claim that he was not made aware of the prosecutor's plea offer. At the preliminary hearing in petitioner's case, the prosecutor stated the following:

> And so the court is aware, this is -- at our first FSC, an offer was not made; however, an offer was made this morning to [petitioner] of 11 years. That is the midterm on Count 1 doubled up and a nickle [sic] prior for a total of 11 years. No counteroffer has been made by defense. [¶] Per my

> supervisor, I was to put [petitioner] on notice that after the prelim and he is held to answer on the charges as stated, there will be no further offers by the People. Also, the People did turn over the video surveillance to defense counsel showing the incident. [¶] With that, the People are ready to proceed.

(CT 11-12). As mentioned earlier, petitioner was present at the preliminary hearing. (See RT 10). As such, he was aware of the prosecutor's plea offer, the terms of the offer, and the deadline within which to accept the offer.

In short, none of petitioner's allegations is supported by the record, and, in fact, the record, by and large, contradicts those allegations. Accordingly, the court of appeal's rejection of this ground for relief was neither an unreasonable application of, nor contrary to, clearly established federal law as determined by the Supreme Court.

VI

RECOMMENDATION

It is recommended that the District Judge issue an Order: (1) accepting this Report and Recommendation; and (2) directing that judgment be entered denying the Petition and dismissing this action with prejudice.

Dated: March 2, 2016

PAUL L. ABRAMS
UNITED STATES MAGISTRATE JUDGE

NOTICE

Reports and Recommendations are not appealable to the Court of Appeals, but are subject to the right of any party to file Objections as provided in the Local Rules Governing Duties of Magistrate Judges, and review by the District Judge whose initials appear in the docket number. No Notice of Appeal pursuant to the Federal Rules of Appellate Procedure should be filed until entry of the Judgment of the District Court.