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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MICHAEL JAMES HORTON, Petitioner-Appellant, v. CLARK E. DUCART, Warden, Respondent-Appellee.	No. 17-56539 D.C. No. 2:15-cv-07847-RSWL-SK Central District of California, Los Angeles ORDER

Before: McKEOWN and N.R. SMITH, Circuit Judges.

The request for a certificate of appealability (Docket Entry No. 2) is denied because appellant has not made a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see also Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Any pending motions are denied as moot.

DENIED.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MICHAEL JAMES HORTON,

Petitioner-Appellant,

v.

CLARK E. DUCART, Warden,

Respondent-Appellee.

No. 17-56539

D.C. No. 2:15-cv-07847-RSWL-SK
Central District of California,
Los Angeles

ORDER

Before: W. FLETCHER and WATFORD, Circuit Judges.

The motion for reconsideration (Docket Entry No. 4) is denied. *See* 9th Cir. R. 27-10.

No further filings will be entertained in this closed case.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

MICHAEL JAMES HORTON, Petitioner, v. CLARK E. DUCART, Respondent.	Case No. 2:15-CV-07847-RSWL (SK) **ORDER DENYING FIRST AMENDED PETITION AND CERTIFICATE OF APPEALABILITY**

I.

PROCEEDINGS

Petitioner is a California state prisoner serving a sentence of 99 years to life for two counts of attempted murder with prior felony convictions. In his first appeal, Petitioner challenged the trial court's refusal to sever the attempted-murder charges, its rejection of Petitioner's post-verdict request to represent himself, and its denial of Petitioner's motion to disclose a confidential informant's identity. (LD 10). The California Court of Appeal rejected the first two claims on the merits but found procedural error in the denial of the motion to disclose the informant's identity. (ECF No. 1 at 11-26). Because California law requires that the hearing on an informant's identity have, in addition to an optional *in camera* procedure, a public portion where the parties can offer evidence, *see* Cal. Evid. Code § 1042(d),

the Court of Appeal held that the trial court had erred by conducting its hearing exclusively *in camera*. (ECF No. 1 at 26). It also found that the information provided in the *in camera* proceeding was inadequate to permit meaningful appellate review. (ECF No. 1 at 25). Thus, the court conditionally reversed Petitioner's convictions and ordered a new § 1042(d) hearing with the required public portion. (ECF No. 1 at 26).

At the § 1042(d) hearing on remand, Petitioner's appointed trial counsel attended but Petitioner was not present. (ECF No. 1 at 33). Based on an *in camera* proceeding only, the trial court found that the confidential informant was not a material witness who could have exonerated Petitioner and therefore concluded that the non-disclosure of the informant's identity had not denied Petitioner a fair trial. (ECF No. 1 at 33). However, unlike in the first *in camera* proceeding, the trial court in the second *in camera* proceeding heard police testimony under oath, elicited what specific information the informant had provided police, and determined the source of the informant's information. (ECF No. 1 at 33). In Petitioner's second direct appeal, therefore, the Court of Appeal held that even though the trial court had erred again by not holding the public portion of the § 1042(d) hearing with Petitioner present, any error was harmless because the record of the *in camera* proceeding was sufficient for the Court of Appeal to determine independently that the informant was not a material witness who could have provided exculpatory evidence. (ECF No. 1 at 41-42).

The Court of Appeal also rejected Petitioner's claim that his Sixth Amendment rights were violated by his absence from the § 1042(d) hearing. According to Petitioner, if he had been allowed to attend the hearing, he would have either come with paid counsel or proceeded pro se, but would not have chosen to be represented by his appointed counsel. (ECF No. 1 at 35). But the Court of Appeal found that Petitioner's Sixth Amendment rights

had never been triggered in the first place because the record revealed no evidence that Petitioner had moved to substitute retained counsel or relieve appointed counsel so that he could represent himself. (ECF No. 1 at 36).

Finally, on state collateral review, Petitioner filed successive habeas petitions in the California state courts claiming that his appellate counsel had been ineffective for not raising several additional claims on direct appeal. (LD 22, 24, 29). Among other challenges, Petitioner claimed that appellate counsel was ineffective by appealing the denial of his severance motion just under California law, but not also under federal law. The Los Angeles County Superior Court denied his petition on the merits, followed by the California Court of Appeal's summary denial, and the California Supreme Court's rejection of his petition on procedural grounds. (LD 23, 25, 30).

II.

DISCUSSION

Petitioner may not relitigate in federal habeas proceedings the same claims that the California state courts have already denied on the merits unless their decisions were "contrary to, or involved an unreasonable application of, clearly established Federal law" as determined by the U.S. Supreme Court. 28 U.S.C. § 2254(d)(1). Petitioner must show that the state courts' decisions were not merely incorrect, but "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility of fairminded disagreement." *Harrington v. Richter*, 562 U.S. 86, 103 (2011). Petitioner's claims cannot meet this standard.

A. The Ineffective Assistance Claim Does Not Merit Relief

To prevail on his claim of ineffective appellate counsel, Petitioner had to show that counsel's failure to raise an issue on appeal was both objectively deficient and that he would have prevailed on appeal but for counsel's error. *See Strickland*, 466 U.S. at 695; *Smith v. Robbins*, 528 U.S. 259, 285 (2000).

The "two [*Strickland*] prongs partially overlap when evaluating the performance of appellate counsel." *Miller v. Keeney*, 882 F.2d 1428, 1434 (9th Cir. 1989). "In many instances, appellate counsel will fail to raise an issue because she foresees little or no likelihood of success on that issue." *Id.* "Counsel need not appeal every possible question of law at the risk of being found to be ineffective." *Gustave v. United States,* 627 F.2d 901, 906 (9th Cir. 1980). To the contrary, "the weeding out of weaker issues is widely recognized as one of the hallmarks of effective appellate advocacy." *Miller*, 882 F.2d at 1434.

The fact that counsel challenged the joinder of the two attempted-murder counts under only California law was not an objectively unreasonable choice. There is no federal "constitutional right to compel appointed counsel to press nonfrivolous points" if counsel, "as a matter of professional judgment, decides not to present those points." *Jones v. Barnes*, 463 U.S. 745, 751 (1983). The Supreme Court does not expect "that defense counsel will recognize and raise every conceivable constitutional claim," *Engle v. Isaac*, 456 U.S. 107, 134 (1982), but rather has "emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible." *Jones*, 463 U.S. at 751. This case, in fact, underscores the effectiveness of careful claim selection on appeal: counsel secured a conditional reversal of Petitioner's convictions with the possibility of unconditional reversal on remand. (ECF No. 1 at 11-26).

Moreover, "[i]mproper joinder does not, in itself, violate the Constitution." *United States v. Lane*, 474 U.S. 438, 446 n.8 (1986). Nor has the Supreme Court "yet made a clear ruling that admission of irrelevant or overtly prejudicial evidence constitutes a due process violation sufficient to warrant issuance of the writ." *Holley v. Yarborough*, 568 F.3d 1091, 1101 (9th Cir. 2009). By contrast, California state law on severance of criminal

offenses is longstanding and well-developed. *See* Cal. Penal Code § 954; *People v. Arias*, 13 Cal. 4th 92 (1996). Thus, in the absence of a clearly-established federal constitutional right to severance of criminal offenses, counsel's decision to challenge joinder under well-settled California law instead of unsettled federal constitutional law does not fall "below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688.

Nor is there any likelihood that Petitioner would have prevailed on appeal even if counsel had added federal due process as an additional legal basis for relief on the misjoinder claim. Just because the claim may not have been couched as a federal claim does not mean the state court applied materially different reasoning. *Cf. Early v. Packer*, 537 U.S. 3, 8 (2002). Whether under California law or federal constitutional law, Petitioner could not obtain relief without showing that the joinder was unduly prejudicial. *See Arias*, 13 Cal. 4th at 126-27; *Lane*, 474 U.S. at 446 n.8. In both federal and state court, Petitioner's claim would be reviewed for abuse of discretion. *See People v. Carter*, 36 Cal. 4th 1114, 1153 (2005); *United States v. Sanchez-Lopez*, 879 F.2d 541, 551 (9th Cir. 1989). And the factors that a reviewing court must consider are substantively identical under both federal and state law. *Compare Sandoval v. Calderon*, 241 F.3d 765, 772 (9th Cir. 2000) ("risk of undue prejudice" from "joinder of counts" may arise if joinder "allows evidence of other crimes to be introduced in a trial where the evidence would otherwise be inadmissible" or "from the joinder of a strong evidentiary case with a weaker one"); *with Carter*, 36 Cal. at 1153 (danger of prejudice may exist if "evidence concerning the crimes to be jointly tried would not be cross-admissible in separate trials" or "a 'weak' case has been joined with a 'strong' case"). Thus, because the substantive standard for relief would have been the same whether a misjoinder claim was raised under federal or state law, there was no likelihood that the Court of Appeal

would have decided the claim differently if only appellate counsel had added a federal "due process" label to the misjoinder claim.

B. The *Faretta* Claim Does Not Merit Relief

The Court of Appeal did not unreasonably uphold the denial of Petitioner's belated request under *Faretta v. California*, 422 U.S. 806 (1975). The Court of Appeal ruled that Petitioner had not brought his *Faretta* request within a reasonable time because it was made after the verdict had been returned on the substantive offenses but before the bench trial took place on the prior convictions; thus, the motion was made "at midtrial." (ECF No. 1 at 8-11). Petitioner made his *Faretta* request a month after the verdict on the morning set for the bench trial, and he requested an extension of time to prepare a motion for a new trial. (5 RT at 1810, 2101, 2108). "Because the Supreme Court has not clearly established when a *Faretta* request is untimely, other courts are free to do so as long as their standards comport with the Supreme Court's holding that a request 'weeks before trial' is timely." *Marshall v. Taylor*, 395 F.3d 1058, 1061 (9th Cir. 2005). Here, the Court of Appeal's determination that a *Faretta* request is untimely when made after the jury has returned its verdict comports with the Supreme Court's guidance and therefore is not contrary to, or an unreasonable application of, clearly-established federal law.

C. The Confidential-Informant Claim Does Not Merit Relief

The Supreme Court has established that "a defendant is guaranteed the right to be present at any stage of the criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure." *Kentucky v. Stincer*, 482 U.S. 730, 745 (1987). But no Supreme Court case has held that a pre-trial, public hearing to disclose the identity of a confidential informant is a "critical stage" or that a defendant's absence from such a hearing would impair the "fairness of the procedure" –

especially where, as here, he is represented by counsel at the hearing. Thus, the Court of Appeal's conclusion that Petitioner's presence was not required at the § 1042(d) hearing on remand could not have contradicted or unreasonably applied clearly-established federal law. *See Knowles v. Mirzayance*, 556 U.S. 111, 122 (2009).

Moreover, while the Supreme Court has recognized that "the disclosure of an informer's identity" may be required to ensure a fair trial if disclosure "is relevant and helpful to the defense of an accused," *Rovario v. United States*, 353 U.S. 53, 60-61 (1957), it has "consistently declined to hold that an informer's identity need always be disclosed" in a criminal trial. *McCray v. Illinois,* 386 U.S. 300, 312 (1967). Instead, the Supreme Court has concluded that a defendant's right to exculpatory information must be balanced against the government's need to maintain confidential information and that therefore due process may be satisfied by *in camera* review to determine if the confidential information is material. *See Pennsylvania v. Ritchie,* 480 U.S. 39, 59–61 (1987). Even if a public hearing with Petitioner's presence may have been required under California law, the Constitution does not demand the same. *See Snyder v. Massachusetts*, 291 U.S. 97, 107-08 (1934); *United States v. Ordonez,* 737 F.2d 793, 809 (9th Cir. 1983); *United States v. Anderson,* 509 F.2d 724, 728–30 (9th Cir. 1974); *United States v. Rawlinson,* 487 F.2d 5, 7 (9th Cir. 1973). Thus, it was not unreasonable for the Court of Appeal to have concluded that an *in camera* hearing to determine the materiality of an informant's identity was sufficient to pass muster under the Constitution.

Finally, Petitioner's claim that he was denied his Sixth Amendment rights because he had intended to either retain private counsel or represent himself at the § 1042(d) hearing does not merit relief. If Petitioner had no clearly-established constitutional right to be present at the hearing, it follows

that he could not have had a Sixth Amendment right to counsel or self-representation. *See, e.g., Ritchie,* 480 U.S. at 59 (*in camera* procedure does not violate Constitution even though it may deny defendant benefit of an "advocate's eye"). Furthermore, the Court of Appeal's finding that there was no evidence that Petitioner had actually moved to substitute or relieve his attorney of record is not unreasonable. Despite whatever intentions Petitioner may have privately harbored, the fact remains that fairminded jurists could agree that on the basis of the available objective record, there was no indication that Petitioner had either waived his right to counsel or moved to substitute appointed counsel with paid counsel. The Court of Appeal therefore reasonably found that the "trial court could not deprive [Petitioner] of rights he never asserted." (ECF No. 1 at 36, 38).

III.

CONCLUSION

For the reasons set forth above, the First Amended Petition is DENIED and Judgment dismissing this action with prejudice shall be entered. A Certificate of Appealability is also DENIED because Petitioner has not made a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2); Fed. R. App. P. 22(b).

IT IS SO ORDERED.

DATED: 9/21/2017

s/ RONALD S.W. LEW
HON. RONALD S.W. LEW
U.S. DISTRICT JUDGE

PRESENTED BY:

HON. STEVE KIM
U.S. MAGISTRATE JUDGE

Additional material from this filing is available in the Clerk's Office.