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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JUAN MATIAS TORRES, Petitioner-Appellant, v. RALPH M. DIAZ, Warden, Respondent-Appellee.	No. 18-16061 D.C. No. 4:12-cv-06224-YGR Northern District of California, Oakland ORDER

Before: W. FLETCHER and WATFORD, Circuit Judges.

The request for a certificate of appealability is denied because appellant has not shown that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also* 28 U.S.C. § 2253(c)(2); *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012); *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Any pending motions are denied as moot.

DENIED.

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JUAN MATIAS TORRES, Petitioner-Appellant, v. RALPH M. DIAZ, Warden, Respondent-Appellee.	No. 18-16061 D.C. No. 4:12-cv-06224-YGR Northern District of California, Oakland ORDER

Before: SILVERMAN and WATFORD, Circuit Judges.

Appellant's motion for reconsideration (Docket Entry No. 7) is denied. *See* 9th Cir. R. 27-10.

No further filings will be entertained in this closed case.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

JUAN MATIAS TORRES,

Petitioner,

v.

RALPH M. DIAZ, Warden,

Respondent.

Case No. 12-cv-06224-YGR (PR)

ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS; AND DENYING CERTIFICATE OF APPEALABILITY

Petitioner Juan Matias Torres, a state prisoner currently incarcerated at the California State Prison-Solano, brings the instant *pro se* habeas action under 28 U.S.C. § 2254 to challenge his 2007 conviction and sentence stemming from charges in two separate cases, Santa Clara County Superior Court case numbers CC591335 and CC629776. Petitioner's Amended Petition is the operative pleading in this action.[1] Dkt. 59. Having read and considered the papers filed in connection with this matter and being fully informed, the Court hereby DENIES the petition for the reasons set forth below.

I. BACKGROUND

A. Factual Background

The California Court of Appeal summarized the facts of Petitioner's offenses and sentencing as follows. This summary is presumed correct. *See Hernandez v. Small*, 282 F.3d 1132, 1135 n.1 (9th Cir. 2002); 28 U.S.C. § 2254(e)(1).

> **Case No. CC591335/Assault on an Officer**
>
> On May 6, 2005, a San Jose police officer pulled up next to appellant in his vehicle and noticed "exceptionally loud music." Although appellant turned the music down, the officer stopped appellant's vehicle. When the officer walked up to appellant's vehicle, it sped away. The officer followed, saw the vehicle parked erratically, and saw appellant walking away at a "hurried pace."

[1] In his Amended Petition, which had nine claims, only the three claims from his original petition remain pending as the Court previously granted Respondent's motion to dismiss the six additional claims as untimely under the one-year statute of limitations established by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2244(d). *See* Dkt. 74.

The officer followed appellant and ultimately apprehended him after appellant took a combative stance and was tasered and hit with the officer's baton. Appellant threw something at the officer who had to duck, and the officer later determined that it was a curved knife. Appellant's blood alcohol level, an hour and a half later, was .06.

As a result of these events appellant was charged with three felonies and five misdemeanors. The felonies charged were assault on a peace officer (Pen. Code, § 245, subd. (c)), exhibition of a deadly weapon at a peace officer (Pen. Code, § 417.8), and carrying a concealed dirk or dagger (Pen. Code, § 12020, subd. (a)(4)). The misdemeanors were flight from an officer (Veh. Code, § 2000.1, subd. (a)); driving under the influence (Veh. Code, § 23152, subd. (a)), driving with a blood alcohol level of .08 or more, (Veh. Code, § 23152, subd. (b)), delaying a peace officer (Pen. Code, § 148, subd. (a)(1)), and resisting a peace officer by threat (Pen. Code, § 69). The information also contained enhancing allegations including that appellant had suffered two prior prison term convictions (Pen. Code, § 667.5, subd. (b)), two prior serious felony convictions (Pen. Code, § 667, subd. (a)) and two prior strike[2] convictions (Pen. Code, §§ 667, subds.(b)-(i), 1170.12). The prior serious felony convictions that were alleged to have been "brought and tried separately" were brandishing a firearm at a peace officer (Pen. Code, § 417.8) in Santa Clara County Superior Court docket no. EE117692 and accessory in furtherance of gang activity (Pen. Code, § 32/186.22, subd. (b)(1)) in Santa Clara County Superior Court docket no. EE117692.

Case No. CC629776/Downtown Stabbing

In the early morning hours of May 14, 2006, appellant was in downtown San Jose when he became involved in an altercation after someone made an apparently offensive comment about gloves that the man who was with appellant was wearing. Appellant stabbed a woman once in the abdomen and stabbed a man seven times in his upper body. Appellant fled when police officers attempted to apprehend him and was struck three times with an officer's baton before he stopped running. As a result of this incident, appellant was charged with two counts of assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1)) and one count of resisting arrest (Pen. Code, § 148). The information also alleged enhancing allegations including two prior serious felony convictions (Pen. Code, § 667, subd. (a)(1)). The prior serious felony convictions alleged to have been brought and tried separately were brandishing a firearm at a peace officer (Pen. Code § 417.8) in Santa Clara County Superior Court docket no. EE117692 and brandishing a firearm at a peace officer (Pen. Code, § 417.8) in Santa Clara County Superior Court docket no. EE117692.

[2] The existence of the two prior "strike" convictions meant that Petitioner was subject to sentencing under California's Three Strikes Law. The Three Strikes Law consists of two almost identical statutory schemes—one adopted by initiative and the other passed by the legislature—that allow harsher sentences for defendants who are convicted of felonies and have previously been convicted of one or more serious or violent felonies. *See* Cal. Penal Code §§ 667, 1170.12.

Trial Court Proceedings

On April 25, 2007, as to both informations, appellant pleaded no contest to all of the charges and admitted all of the enhancing allegations. As for the serious felonies conviction allegations in the assault on an officer case, the trial court asked appellant if he admitted "the five year prior under 667 of the Penal Code one for the personal use or brandishing a firearm at an officer?" Appellant answered, "Yes." The court said, "and you admit that another serious felony of 667A for accessory and furtherance of gang activity?" Appellant answered, "Yes." In the stabbing case, the court asked appellant as to his brandishing a firearm at a peace officer prior conviction, "And you admit the five years serious felony prior on that same offense under 667A?" Appellant answered, "Yes." The trial court also asked appellant if he "admit[ted] the second prior to accessory in furtherance of gang activity? . . . And for that same offense five year prior under 667A of the Penal Code, you admit that?" Appellant answered, "Yes."

The trial court further advised appellant, "at the time of sentencing we will have you . . . complete a statement of assets, pay a $10 fine, actual restitution to the victims; a restitution fund fine of not less than $200 no more than $10,000 and an equal amount imposed but suspended. General funds fine not to exceed ten thousand."

Appellant's case was set for a motion to dismiss prior strike convictions pursuant to *People v. Superior Court* (*Romero*) (1996) 13 Cal. 4th 497. Under consideration were the brandishing a firearm at a peace officer conviction and the accessory in furtherance of gang activity conviction. In support of this motion, defense counsel argued that appellant's "strike priors were committed only six days apart. Although the cases were plead separately, they were sentenced at the same time." The prosecutor's opposition to this motion acknowledged, "The defendant's strike priors were originally charged in separate docket[s], but were consolidated for purposes of trial." At the hearing on the motion, defense counsel told the court that the two prior convictions had been consolidated for sentencing and the prosecutor corrected him and stated that they were "consolidated for trial." The probation report included appellant's arrest history which showed that both prior convictions are listed under one District Attorney case no. 010409242.

On December 18, 2007, the trial court granted appellant's motion to dismiss one prior strike conviction alleged in one count of case no. CC629776 (the stabbing case) and one prior strike conviction as to each of three counts in case no. CC591335 (the assault on an officer). The court said it was "going to base that on the family support the defendant has, his age, the fact that he had stable employment and some prospects." The court denied the motion to dismiss as to one of the prior strike convictions in case no. CC629776.

In case no. CC629776 (the stabbing) the trial court imposed a total state prison term of 25-years-to-life consecutive to a 24-year term. This included two consecutive five-year terms for the prior serious felony allegations imposed pursuant to Penal Code section 667,

> subdivision (a). In case no. CC591335 (the assault on an officer), the court imposed a total term of 12 years, eight months, including two consecutive five-year terms for the prior serious felony allegations imposed pursuant to Penal Code section 667, subdivision (a).
>
> The court said, "Two hundred dollar restitution fund fine with an equal amount imposed but suspended." The court then asked, "Actually, did we do the restitution fund right?" The probation officer said, "It would be the maximum amount." The court said that on case no. CC629776 (the stabbing), "it's 10,000 with an equal amount imposed but suspended rather than 200." The court then said that on case no. CC591335 (the assault on an officer), "it's the same . . . except that on twelve [years], eight [months] the restitution fund fine would be—" The probation officer interjected, "4,800." The court said, "4,800 with an equal amount imposed but suspended." Thus, pursuant to Penal Code sections 1202.4 and 1202.45, the court imposed restitution fines and suspended parole fines totaling $14,800.

People v. Torres, No. H032441, 2009 WL 389994, *1-3 (Feb. 18, 2009) (footnote added).

B. Procedural Background

The following procedural background is taken from the Court's May 10, 2017 Order Granting Respondent's Motion to Dismiss New Claims in Amended Petition as Untimely:

> On December 18, 2007, the trial court sentenced Petitioner in both cases to state prison for a total determinate term of 36 years and 8 months, with a consecutive indeterminate term of 25-years-to-life. Resp't Exs. 1A at 134-137; 2C at 87-89.
>
> On December 20, 2007, Petitioner filed a notice of appeal in both cases. Resp't Exs. 1A at 138; 1B at 441. The cases were considered together on appeal in California Court of Appeal case number H032441. Resp't Ex. 8 at 1. On February 18, 2009, the state appellate court struck one of the serious prior felony convictions in case number CC591335, thereby reducing the sentence in that case to seven years and eight months; struck one of the five-year serious prior felony convictions in case number CC629776, thereby reducing the determinate sentence in that case to 19 years; and reduced the restitution and parole revocation fines in both cases to $10,000 each. *See id.* The state appellate court otherwise affirmed the judgments. *See id.*
>
> On March 23, 2009, the People filed a petition for review in California Supreme Court case number S171429. Resp't Ex. 9. On May 20, 2010, the California Supreme Court transferred the case back to the state appellate court with directions to vacate its decision and reconsider the cause in light of *People v. Soria*, 48 Cal. 4th 58 (2010). Resp't Ex. 10.
>
> On July 28, 2010, the state appellate court withdrew that part of its previous opinion pertaining to the restitution and parole revocation fines, left intact its decision regarding the sentence reductions, and

otherwise affirmed the judgments. Resp't Ex. 11.

On August 29, 2010, Petitioner filed a petition for review in California Supreme Court case number S186045, which was denied on October 13, 2010. Resp't Exs. 12, 13.

On April 5, 2011, the trial court resentenced Petitioner in accordance with the opinion of the California Court of Appeal. Resp't Ex. 19.

On April 20, 2011, Petitioner filed a notice of appeal in case number H036807, but he later voluntarily abandoned the appeal (in a notice filed on July 14, 2011). Resp't Exs. 20, 21.

On July 14, 2011, the state appellate court dismissed the appeal and issued a remittitur. Resp't Ex. 21.

On March 12, 2012, Petitioner filed a petition for writ of habeas corpus in the Santa Clara County Superior Court case number CC591335/CC629776, which was denied on June 4, 2012. Resp't Exs. 22, 23.

On June 25, 2012, Petitioner filed a petition for writ of habeas corpus in California Court of Appeal case number H038465, which was denied on July 20, 2012. Resp't Exs. 24, 25.

On August 5, 2012, Petitioner filed a petition for writ of habeas corpus in California Supreme Court case number S204744, which was denied on October 17, 2012, with a citation to *People v. Duvall*, 9 Cal. 4th 464, 474 (1995). Resp't Exs. 26, 27.

On November 29, 2012, Petitioner filed the original petition for writ of habeas corpus in this Court. Dkt. 1. In his original petition, Petitioner raised the following three ineffective assistance of counsel claims, namely for: (1) failing to object to "over enhancements which led to an illegal sentence"; (2) failing to object to blood alcohol evidence; and (3) advising him that if he pled no contest, he "would receive a sentence of 6-16 years" at a *Romero* hearing, and then failing to comply with Petitioner's request to withdraw his plea before the *Romero* hearing. *Id.* at 6.

On January 30, 2013, the Court issued an order directing Respondent to show cause why the petition should not be granted. Dkt. 5.

On June 19, 2013, after being granted an extension of time to do so, Respondent filed an answer. Dkts. 11, 11-1, 12. On August 23, 2013, Petitioner filed a traverse. Dkt. 16.

On or about April 11, 2014, Petitioner filed a petition for writ of habeas corpus in Santa Clara County Superior Court case number CC591335/CC629776, "[i]n regards to the [T]here Strikes Law [R]eform [A]ct of 2012." Dkt. 42 at 2. In his petition, Petitioner argued "that his strike priors d[id] not constitute . . . a serious or violent felony as a strike prior and should be stricken." *Id.* On April 30, 2014, the state superior court denied the petition. *Id.*

On June 18, 2014, Petitioner appealed the superior court's denial of his habeas petition to the California Court of Appeal in case number H041112, and was appointed counsel on appeal. *Id.* at 2-3; Resp't Ex. 28. On May 28, 2015, after the case was fully briefed, Petitioner filed a motion requesting that the appeal be dismissed. Resp't Ex. 28. On June 2, 2015, the state appellate court granted Petitioner's request and dismissed the case. *Id.*

On November 14, 2014, Petitioner filed a motion in this Court requesting a stay and abeyance while he exhausted his state court remedies with respect to new sentencing claims. Dkt. 42. On July 1, 2015, the Court granted Petitioner's motion for a stay and abeyance. Dkt. 45.

On November 25, 2014, Petitioner filed a petition for writ of habeas corpus in Santa Clara County Superior Court case number CC591335/CC629776, challenging a prior strike conviction pursuant to *Descamps v. United States*, 133 S. Ct. 2276 (2013). Resp't Ex. 29 at 7; *see also id.*, Exhibit F. On September 8, 2015, the state superior court denied the petition. Resp't Ex. 29 at 7; *see also id.*

On September 30, 2015, Petitioner filed a petition for writ of habeas corpus in California Court of Appeal case number H042817. Exs. 29, 30. On October 20, 2015, the court denied the petition. Resp't Ex. 30.

On October 29, 2015, Petitioner filed a petition for review in California Supreme Court case number S230271, challenging the court of appeal's denial of his petition writ of habeas corpus. Resp't Exs. 31, 32. On January 13, 2016, the state supreme court denied the petition for review. Resp't Exs. 32, 33.

On February 8, 2016, Petitioner filed a petition for writ of certiorari in United States Supreme Court case number 15-8138. Resp't Ex. 34. On April 18, 2016, the Supreme Court denied the petition. *Id.*

On March 18, 2016, Petitioner filed a motion in this Court requesting leave to file an amended petition for writ of habeas corpus. Dkt. 51. And, on May 20, 2016, Petitioner filed a second motion requesting leave to file an amended petition for writ of habeas corpus. Dkt. 55. In his amended petition dated May 13, 2016, Petitioner raises the same three claims from his original petition as well as the following six additional claims, namely: (4) his prior conviction for brandishing a weapon was not categorically a strike, and therefore was improperly used to enhance his sentence to a life term; (5) he is entitled to the relief requested in claim 4 despite admitting the strike prior; (6) prosecutorial misconduct for knowingly pleading false enhancements and strikes that were not categorically strikes; (7) denial of prison conduct credits violates the Due Process Clause; (8) his prison gang validation violates the Due Process Clause, the Ex Post Facto Clause, and the Double Jeopardy Clause; and (9) ineffective assistance of counsel for failing to advise him that a "gang enhancement prior criminal conviction" would lead to validation as

> a prison gang associate and deprivation of prison conduct credits. Dkt. 59 at 6-8.
>
> On June 17, 2016, the Court lifted the stay, granted Petitioner's request to file the amended petition attached to his May 20, 2016 motion, and ordered Respondent to file a supplemental answer addressing the newly-exhausted claims contained in the amended petition. Dkt. 58.

Dkt. 74 at 2-6 (footnotes omitted).

As mentioned above, on October 13, 2016, Respondent filed a motion to dismiss the six new claims (claims 6-9) as untimely. Dkt. 65. On May 10, 2017, the Court granted Respondent's motion to dismiss and indicated that it would resolve the remaining timely claims (claims 1-3) in a separate written Order. Dkt. 74.

On August 7, 2017, the Court noted that Respondent's Answer relating to claims 1-3 was filed prior to this matter being stayed in 2015. *See* Dkt. 83 at 1. Thus, the Court informed parties that it would entertain supplemental briefing to allow for any necessary updates to the authorities cited and/or the supporting law in their previously-filed briefs relating to claims 1-3. *See id.* The Court directed both parties to file simultaneous briefs, and it set a briefing schedule. *See id.* at 1-2.

On August 31, 2017, Respondent filed a Supplemental Answer. Dkt. 89. Thereafter, Petitioner filed a Supplemental Traverse and an Amended Supplemental Traverse. Dkts. 92, 93. The matter is now fully briefed.

C. California's Three Strikes Law

Before addressing the merits of Petitioner's claims, it is helpful to briefly review California's Three Strikes statute, which provides that "[w]hen a defendant is convicted of a felony, and he has previously been convicted of one or more prior felonies defined as 'serious' or 'violent' in Cal. Penal Code Ann. §§ 667.5 and 1192."[3] *Ewing v. California*, 538 U.S. 11, 15 (2003). If a defendant convicted of any new felony has suffered one prior conviction of a serious felony, then "the determinate term or minimum term for an indeterminate term shall be twice the term otherwise provided as punishment for the current felony conviction." Cal. Penal Code

[3] California voters approved Proposition 36 in November 2012 substantially amending the Three Strikes law, but because Petitioner was sentenced prior to these amendments, the 1994 law was applied. Therefore, in this Order, the Court refers to the text of the Three Strikes law prior to the November 2012 amendment.

§ 667(e)(1).

A "third strike" defendant (i.e., a person with two or more prior felony convictions) receives an indeterminate term of life imprisonment, which includes a minimum term. The minimum term for a third strike defendant is the greatest of (i) "[t]hree times the term otherwise provided as punishment for each current felony conviction subsequent to the two or more prior felony convictions," (ii) twenty-five years imprisonment in the state prison, or (iii) "[t]he term determined by the court pursuant to section 1170 for the underlying conviction," including any applicable enhancements. Cal. Penal Code § 667(e)(2)(A). These provisions apply in addition to any other enhancements or punishment provisions which may apply. *Id.* § 667(e).

II. LEGAL STANDARD

A petition for a writ of habeas corpus is governed by AEDPA. The Court may entertain such a writ petition "in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). A district court may not grant a petition challenging a state conviction on the basis of a claim that was reviewed on the merits in state court unless the state court's 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, 28 U.S.C. § 2254(d)(1); 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," *id.* § 2254(d)(2).

To determine whether a state court ruling was "contrary to" or involved an "unreasonable application" of federal law under subsection (d)(1), the Court must first identify the "clearly established Federal law," if any, that governs the sufficiency of the claims on habeas review. "[C]learly established" federal law consists of the holdings of the United States Supreme Court that existed at the time the petitioner's state court conviction became final. *Williams v. Taylor*, 529 U.S. 362, 412 (2000); *Harrington v. Richter*, 562 U.S. 86, 102 (2011). A state court decision is "contrary to" clearly established Supreme Court precedent if it "applies a rule that contradicts the governing law set forth in [the Supreme Court's] cases," or if it "confronts a set of facts that

are materially indistinguishable from a decision of [the Supreme] Court and nevertheless arrives at a result different from [its] precedent." *Williams*, 529 U.S. at 405-06. "Under the 'unreasonable application' clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 413. "[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." *Id.* at 411.

On federal habeas review, AEDPA "imposes a highly deferential standard for evaluating state-court rulings" and "demands that state-court decisions be given the benefit of the doubt." *Renico v. Lett*, 559 U.S. 766, 773 (2010) (internal quotation marks omitted). In applying the above standards on habeas review, this Court reviews the "last reasoned decision" by the state court. *See Robinson v. Ignacio*, 360 F.3d 1044, 1055 (9th Cir. 2004). Where the state court reaches a decision on the merits but provides no reasoning to support its conclusion, a federal habeas court independently reviews the record to determine whether habeas corpus relief is available under section 2254(d). *Stanley v. Cullen*, 633 F.3d 852, 860 (9th Cir. 2011). Here, Petitioner presented all his federal claims to the California Supreme Court in a state habeas petition, which the California Supreme Court summarily denied. *See* Resp't Ex. 27. Specifically, Petitioner has now re-submitted the three ineffective assistance of counsel ("IAC") claims he raised in his state habeas petitions. As such, Petitioner's claims may be reviewed independently by this Court to determine whether that decision was an objectively unreasonable application of clearly established federal law. *Plascencia v. Alameida*, 467 F.3d 1190, 1197-98 (9th Cir. 2006) ("Because there is no reasoned state court decision denying this claim, we 'perform an independent review of the record to ascertain whether the state court decision was objectively unreasonable.'") (citation omitted); *see Himes v. Thompson*, 336 F.3d 848, 853 (9th Cir. 2003) ("Independent review of the record is not de novo review of the constitutional issue, but rather, the only method by which we can determine whether a silent state court decision is objectively unreasonable."). "[W]here a state court's decision is unaccompanied by an explanation, the

habeas petitioner's burden still must be met by showing there was no reasonable basis for the state court to deny relief." *Harrington*, 562 U.S. at 98.

If constitutional error is found, habeas relief is warranted only if the error had a "substantial and injurious effect or influence in determining the jury's verdict." *Penry v. Johnson*, 532 U.S. 782, 795 (2001) (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 638 (1993)).

III. INEFFECTIVE ASSISTANCE OF COUNSEL ("IAC") CLAIMS

Petitioner raises IAC claims as to his trial counsel, Eric Geffon, Esq. Dkt. 59 at 6. Specifically, Petitioner raises the following three IAC claims, namely for Attorney Geffon: (1) failing to object to "over enhancements which led to an illegal sentence"; (2) failing to object to blood alcohol evidence; and (3) advising Petitioner that if he pled no contest, he "would receive a sentence of 6-16 years" at a *Romero* hearing, and then failing to comply with Petitioner's request to withdraw his plea before the *Romero* hearing. *Id.* at 6.

Petitioner raised his IAC claims in his state habeas petition before the California Supreme Court. Resp't Ex. 26. Under the "Supporting Facts" section in his state habeas petition, he raised all three aforementioned IAC claims as follows:

> Counsel had advised me that if I had plead no contest to case # CC591335/CC629776 that I would receive a sentence of 6-16 years for both cases on a *Romero*[.] I had advised counsel prior to sentencing to withdraw my plea. If not for counsel[']s incompetence of advise [sic] I would not have plead no contest and would have insisted on proceeding to trial. Also counsel failing to object to error le[]d to over enhancements thus an illegal sentence. Counsel also failed to object to Evidence which le[]d to my DUI conviction when my blood alcohol level was below the legal limit . . . my blood alcohol level was 0.06 yet I plead to "V.C. 23152(B) which states it is unlawful for any person who has 0.08 percent or more by weight of alcohol in his/her blood to drive a vehicle[.]" Counsel fail[ed] to object to evidence when my blood alcohol level was 0.06 below the legal limit of V.C. 23152(B).

Id. at 3.

The state supreme court rejected the IAC claims, finding that Petitioner had failed to satisfy his burden of pleading sufficient grounds for relief, citing *People v. Duvall*, 9 Cal. 4th 464, 474 (1995).[4] Resp't Ex. 27.

[4] The state superior and appellate courts also rejected the IAC claims, but neither court

As there is no reasoned state decision addressing these IAC claims, the Court will conduct "an independent review of the record" to determine whether the state courts' rejection (including the California Supreme Court's summary denial[5]) of these claims was an objectively unreasonable application of clearly established federal law. *Plascencia*, 467 F.3d at 1197-98; *Himes*, 336 F.3d at 853.

A claim of ineffective assistance of counsel is cognizable as a claim of denial of the Sixth Amendment right to counsel, which guarantees not only assistance, but effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686 (1984). There is a two-prong test applicable to claims for ineffective assistance of counsel. *Id.* at 688. First, the defendant must show "that counsel's representation fell below an objective standard of reasonableness." *Id.*; *see also Hasan v. Galaza*, 254 F.3d 1150, 1154 (9th Cir. 2001). The defendant must overcome a strong presumption that counsel's conduct falls within a wide range of reasonable professional assistance which, under the circumstances, might be considered sound trial strategy. *Harrington v. Richter*, 131 S. Ct. 770, 787 (2011); *United States v. Molina*, 934 F.2d 1440, 1447 (9th Cir. 1991). "This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687.

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discussed the specific IAC claims in its decision. *See* Resp't Exs. 23, 24. At most, the state superior court decision stated, "The facts alleged in the petition, if true, fail to establish . . . a prima facie case for the relief requested, because no Petitioner has failed to demonstrate that but for counsel's alleged ineffectiveness, a more favorable result would have [been] obtained. (*Strickland v. Washington* (1984) 466 U.S. 668, 687)." Resp't Ex. 23 at 1.

[5] The state-court decision to which Section 2254(d) applies is the "last reasoned decision" of the state court. *See Ylst v. Nunnemaker*, 501 U.S. 797, 803 (1991). Where the rationale of that decision is unexplained, courts employ the "look through" doctrine, looking to the previous state court judgment on the same claim. *Id.* at 804. In this case, the California Supreme Court issued a summary denial of Petitioner's habeas petition. Resp't Ex. 27. "Post-card" denials such as these are generally presumed to be adjudications on the merits, absent some indication that another reason for the state court's decision is more likely. *See Harrington*, 562 U.S. at 99-100. The California Supreme Court's denial cited *Duvall*, 9 Cal. 4th at 474, which discusses procedural and substantive requirements for habeas petitioners. *See Seeboth v. Allenby*, 789 F.3d 1099, 1103 (9th Cir. 2015). In both his Answer and Supplemental Answer, Respondent urges that the California Supreme Court's citation to *Duvall* should be construed as a ruling on the merits, which would preclude application of the procedural default rule and allow this Court to reach the merits of Petitioner's claims. Dkt. 11-1 at 9, 12, 15; Dkt. 89 at 1-3. This Court agrees with Respondent and will resolve the merits of Petitioner's IAC claims below.

To satisfy the second prong, the petitioner must establish that he was also prejudiced by counsel's substandard performance. *See Gonzalez v. Knowles*, 515 F.3d 1006, 1014 (9th Cir. 2008) (citing *Strickland*, 466 U.S. at 694). Under *Strickland*, "[o]ne is prejudiced if there is a reasonable probability that but-for counsel's objectively unreasonable performance, the outcome of the proceeding would have been different." *Id.* "The likelihood of a different result must be substantial, not just conceivable." *Richter*, 131 S. Ct. at 792 (citing *Strickland*, 466 U.S. at 693). Judicial scrutiny of counsel's performance is "highly deferential." *Strickland*, 466 U.S. at 689. A claim for ineffective assistance of counsel fails if either one of the prongs is not satisfied. *Strickland*, 466 U.S. at 697.

Under AEDPA, a federal court's review of a state court's decision on an IAC claim is "doubly deferential." *Cullen v. Pinholster*, 563 U.S. 170, 190 (2011). The question is not whether counsel's actions were reasonable; rather, the question is whether "there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard." *Harrington*, 562 U.S. at 105; *Bemore v. Chappell*, 788 F.3d 1151, 1162 (9th Cir. 2015) (same). "The pivotal question is whether the state court's application of the *Strickland* standard was unreasonable. This is different from asking whether defense counsel's performance fell below *Strickland*'s standard." *Griffin v. Harrington*, 727 F.3d 940, 945 (9th Cir. 2013) (quoting *Harrington*, 562 U.S. at 101).

The only challenges left open in federal habeas corpus after a guilty plea are to the voluntary and intelligent character of the plea and the nature of the advice of counsel to plead. *See Hill v. Lockhart*, 474 U.S. 52, 56-57 (1985); *Tollett v. Henderson*, 411 U.S. 258, 267 (1973). A defendant who pleads guilty upon the advice of counsel may only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel was not within the range of competence demanded of attorneys in criminal cases. *Hill*, 474 U.S. at 56. In order to establish prejudice, he must show there is a reasonable probability that, but for counsel's unprofessional errors, he would not have pleaded guilty and would have insisted on going to trial. *See id.* at 57-59; *Iaea v. Sunn*, 800 F.2d 861, 864-65 (9th Cir. 1986).

It is unnecessary for a federal court considering a habeas ineffective assistance of counsel claim to address the prejudice prong of the *Strickland* test if the petitioner cannot even establish

incompetence, sufficient to constitute deficient performance, under the first prong. *See Siripongs v. Calderon*, 133 F.3d 732, 737 (9th Cir. 1998). Likewise, a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as the result of the alleged deficiencies. *See Strickland*, 466 U.S. at 697; *Williams v. Calderon*, 52 F.3d 1465, 1470 & n.3 (9th Cir. 1995) (applauding district court's refusal to consider whether counsel's conduct was deficient after determining that Petitioner could not establish prejudice), *cert. denied*, 516 U.S. 1124 (1996).

A. Failure to Object to Sentence

Petitioner contends that Attorney Geffon "failed to object to over enhancements which led to an illegal sentence and a remitter [sic] to be resentenced on the over enhanced sentence on 4-9-11[6]." Dkt. 59 at 6. In support of this IAC claim, Petitioner attached to his original petition a copy of his reply brief from his state habeas proceeding before the state superior court. *See* Dkt. 1, Ex. 1; Dkt. 1 at 9-14. He also submitted the same document in support of his state habeas petition before the state supreme court. *See* Resp't Ex. 26. In explaining why he was delayed in filing his state habeas petition, Petitioner asserted that he had previously raised the issue in his 2008 motion to recall the sentence in the trial court, which was denied. Dkt. 1 at 10. He claimed that he "waited until [his] appeal was final and the Court of Appeal affirmed the over enhanced sentence" before he raised his claim in a state habeas petition. *Id.* Petitioner also referred to "error in the over enhanced ten years on [the] sentence." *Id.* at 12.

According to Respondent, it seems that Petitioner was referring to his 2008 pro per filings he made in the trial court after being sentenced, copies of which have been provided by Respondent to this Court. Dkt. 11-1 at 10; Resp't Ex. 14 (Appellate Court Case No. H033406 Clerk's Transcript ("CT [H033406]") 1-41).

As mentioned above, Petitioner was originally sentenced on December 18, 2007 in both cases to state prison for a total determinate term of 36 years and eight months, with a consecutive

[6] Petitioner may have made a typographical error as the correct date of his sentencing hearing was April 5, 2011. *See* Resp't Ex. 16.

indeterminate term of 25 years to life. Resp't Ex. 2A (Appellate Court Case No. H032441 Clerk's Transcript ("CT [H032441]") 134-137); 3RT [H032441] 87-89. The trial court imposed restitution fines and suspended parole fines totaling $14,800. CT [H032441] 134-137.

On February 28, 2008, Petitioner filed a document entitled, "Declaration in Support of Request to Recall Sentence." CT [H033406] 1. In his declaration, Petitioner asked that all fines and fees be suspended, and that "a lesser sentence" be imposed "under P.C. sec. 5079."[7] *Id.*

On August 14, 2008, Petitioner filed another document entitled, "Motion for Modification of Sentence." CT [H033406] 3-15. In that motion, Petitioner requested the trial court to either "strike[] the restitution fine or reduce[] said fine to $200.00." CT [H033406] 15. On August 25, 2008, the trial court denied Petitioner's motion. CT [H033406] 19, 22.

On September 12, 2008, Petitioner filed a pro per notice of appeal from the trial court's denial of his motion. CT [H033406] 21.

On October 29, 2008, Petitioner's appellate counsel filed a brief pursuant to *People v. Wende*, 25 Cal. 3d 436, which meant that counsel could find no arguable issues for appeal. Resp't Ex. 15.

On February 18, 2009, the state appellate court struck one of the serious prior felony convictions in case number CC591335, thereby reducing the sentence in that case to seven years and eight months; struck one of the five-year serious prior felony convictions in case number CC629776, thereby reducing the determinate sentence in that case to 19 years; and reduced the restitution and parole revocation fines in both cases to $10,000 each. *See Torres*, 2009 WL 389994, *8. The state appellate court otherwise affirmed the judgments. *Id.*

On April 5, 2011, the trial court resentenced Petitioner in accordance with the opinion of the California Court of Appeal. Resp't Ex. 19. Petitioner was sentenced to state prison for a total determinate term of 26 years and eight months (which was 10 years less than the original sentence), with a consecutive indeterminate term of 25 years to life. *Id.*

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[7] The Court notes that California Penal Code § 5079 is entitled, "Psychiatric and diagnostic clinic; facilities and personnel; administration; duties; recommendations," and it concerns administration of the state prison mental health clinic system. *See* Cal. Penal Code § 5079. Therefore, Petitioner's citation appears to be in error.

Respondent argues that based on the allegations submitted by Petitioner in support of his claim, his claim of error is unclear. Dkt. 11-1 at 11. Specifically, Respondent argues as follows:

> His federal petition and state habeas reply brief attached as an exhibit thereto contain no factual summary of what sentencing error he believes counsel failed to object to, and he only vaguely asserts that counsel "failed to object to over enhancements which led to an illegal sentence and a remitter [sic] to be resentenced on the over enhanced sentence on 4-9-11." Pet. at 6. From this statement it appears that petitioner is complaining about trial counsel's failure to object to one or more of the enhancements imposed at the initial sentencing hearing. His reply brief from his state habeas case referred to "error in the over enhanced ten years on [the] sentence." However, petitioner does not identify those enhancements, nor does he offer any legal basis upon which counsel should have objected to such enhancements.

Id. (citing *Strickland,* 466 U.S. at 690 (a petitioner "must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment")). The Court agrees with Respondent that Petitioner displays a lack of specificity regarding counsel's alleged deficient performance. Therefore, the state courts' rejection of his first IAC claim was an objectively reasonable application of clearly established federal law. *See James v. Borg*, 24 F.3d 20, 26 (9th Cir. 1994) ("Conclusory allegations which are not supported by a statement of specific facts do not warrant habeas relief.").

Assuming arguendo that Petitioner sufficiently provided specifics as to his counsel's alleged deficient performance, the Court finds that Petitioner would still not be entitled to federal habeas relief. Respondent points out that if Petitioner's claim was given the most plausible interpretation suggested by the underlying state proceedings, Respondent assumes Petitioner "meant to challenge counsel's failure to object to the priors forfeited the issue on appeal." Dkt. 11-1 at 11 (citing Resp't Ex. 4.) Again, based on these underlying state proceedings, Respondent assumes Petitioner is challenging counsel's failure to object to those same two prior enhancements. *Id.* The Court considers such a reading of Petitioner's claim, and finds that the state appellate court expressly found no forfeiture based on counsel's failure to object and granted the relief requested, i.e., by striking one of the serious prior felony convictions in case number CC591335, thereby reducing the sentence in that case to seven years and eight months; struck one of the five-year serious prior felony convictions in case number CC629776, thereby reducing the

determinate sentence in that case to 19 years. *See Torres*, 2009 WL 389994, *8. Thus, Petitioner cannot show that he suffered any prejudice as a result of counsel's omission.

Accordingly, the state courts' rejection of Petitioner's first IAC claim was not an objectively unreasonable application of clearly established federal law. Therefore, this claim is DENIED.

B. Failure to Object to Blood Alcohol Evidence

Petitioner contends that Attorney Geffon failed "to object to evidence in D.U.I. conviction when evidence show[ed] [his] blood alcohol level was below the legal limit." Dkt. 59 at 6.

1. **Factual Background**

As mentioned above, in case number CC591335, Petitioner was charged with, among other things, misdemeanor driving with a blood alcohol level of .08 or more. CT [H032441] 37. At the January 13, 2006 preliminary hearing, the arresting officer, San Jose Police Officer Robert Pasquale, testified that Petitioner's breath smelled of alcohol when he was arrested, and that he appeared to be under the influence of alcohol. CT [H032441] 10. Petitioner had a blood test "[a]pproximately an hour and a half" after Officer Pasquale observed Petitioner driving in his car. CT [H032441] 10. The parties stipulated that Petitioner's blood alcohol level was .06 percent at the time it was tested. CT [H032441] 10-11. The trial court found sufficient evidence based on Petitioner's behavior during the incident and his blood alcohol level to hold him over for trial on the charge. CT [H032441] at 30-31. Attorney Geffon did not challenge the trial court's finding as to that charge. *See* CT [H032441] 67-76.[8]

According to his "Confidential Psychological Report," Petitioner was interviewed by a clinical psychologist in August 2006, and he admitted that on May 6, 2005 he had been drinking alcohol before he was pulled over. 2CT [H032441] 354. Petitioner explained that he ran from the officer because "he had been drinking alcohol and knew he would be in trouble for violating the

[8] The record shows that Attorney Geffon challenged another charge and requested that the trial court dismiss Count 3 of the Information, claiming that the "prosecution ha[d] failed to demonstrate that [Petitioner's] driving, while attempting to elude the police officer, constituted a willful or wanton disregard for the safety of persons as required by Vehicle Code § 2800.2(a)." CT [H032441] 75.

conditions of his parole." 2CT [H032441] 354. In addition, during an interview with a probation officer, Petitioner admitted that "[h]e had had several beers" before driving. 2CT [H032441] 383. Finally, in a letter to the trial court, Petitioner admitted to suffering from "alcoholism" and blamed alcohol for his problems with the law. 2CT [H032441] 410.

Petitioner eventually pleaded no contest to the charge of driving with a blood alcohol level of .08 or more. Resp't Ex. 3A Augmented Reporter's Transcript ("Augmented RT") 16. Counsel stipulated that there was a "factual basis for all the pleas and admissions." Augmented RT 20.

During the December 13, 2007 *Romero* hearing, Attorney Geffon called Licensed Clinical Psychologist Erin Ferma as an expert witness in forensic psychology to offer her opinion that Petitioner's addiction to alcohol was one of the primary causes of his criminal behavior, and that his prognosis was good if he received treatment for his addiction. Resp't Ex. 2B, RT [Dec. 13, 2007] 26-38. On redirect examination, the following exchange took place:

> [ATTORNEY GEFFON:] AND YOU'RE AWARE THAT IF A BLOOD ALCOHOL LEVEL IS TAKEN AT A CERTAIN TIME AND YOU WANT TO KNOW WHAT SOMEONE'S BLOOD ALCOHOL LEVEL WAS EARLIER, THAT YOU HAVE TO EXTRAPOLATE BACK TO ESSENTIALLY A HIGHER NUMBER IF THAT PERSON HAS NOT BEEN DRINKING IN THE INTERIM?
>
> [MS. FERMA:] THAT'S CORRECT. YES.

RT [Dec. 13, 2007] 51.

2. **Analysis**

In support of his second IAC claim, Petitioner again relies on his reply brief from his state habeas proceeding before the state superior court. *See* Dkt. 1, Ex. 1; Dkt. 1 at 9-14. In this brief, Petitioner asserted as follows:

> the fact that [he] plead[ed] [no contest] to over enhancements and [to driving with] a blood alcohol level of 0.08 [percent] or more when it was clear [the] evidence show[ed] [he] was below the legal limit yet [he] plead[ed] to 0.08 [percent] or more when [the] evidence show[ed] it at 0.06 [percent] that clearly shows I was misadvised in some sense.

Dkt. 1 at 11.

Respondent argues that Petitioner's second IAC claim is unclear because Petitioner neither

challenges the *accuracy* of the blood alcohol evidence nor does he delineate "when, or on what basis, counsel should have objected to such evidence." Dkt. 11-1 at 13 (citing *Strickland*, 466 U.S. at 690). The Court agrees with Respondent that Petitioner again displays a lack of specificity regarding counsel's alleged deficient performance. Therefore, because such conclusory allegations unsupported by a statement of specific facts do not warrant habeas relief, the state courts' rejection of his second IAC claim was an objectively reasonable application of clearly established federal law. *See James*, 24 F.3d at 26.

Assuming arguendo, Petitioner sufficiently provided specifics as to his counsel's alleged deficient performance, the Court finds that Petitioner would still not be entitled to federal habeas relief. Based on these underlying state proceedings, Respondent interprets Petitioner's second IAC claim as a challenge to Attorney Geffon's "failure to object to the blood alcohol evidence at either the preliminary hearing or at the plea hearing, on grounds that the evidence was insufficient to hold Petitioner over for trial or to support a factual basis for the plea." Dkt. 11-1 at 14. The Court considers such a reading of Petitioner's claim, and it finds that such a claim is not cognizable because, as mentioned above, the only challenges left open in federal habeas corpus after a guilty plea (or, in this case, a no contest plea) are to the voluntary and intelligent character of the plea and the nature of the advice of counsel to plead. *See Hill*, 474 U.S. at 56-57; *Tollett*, 411 U.S. at 267.

In any event, had such a claim been cognizable, it would still fail. Respondent points out that Attorney Geffon's questioning of the psychologist at the *Romero* hearing indicates that counsel knew that a blood alcohol level of 0.06 percent taken one and a half hours after driving was in fact sufficient to support a charge of driving with a blood alcohol level of 0.08 percent or more. Dkt. 11-1 at 14. The Court agrees. Although Petitioner's blood alcohol level had degraded to 0.06 percent by the time he was tested, Attorney Geffon knew that an expert witness could extrapolate from that number a blood alcohol level over the legal limit at the time Petitioner was actually driving his car. Specifically, as shown above, the record shows that Attorney Geffon had called Ms. Ferma as an expert witness in forensic psychology, and during redirect examination, Attorney Geffon asked whether she was "aware that if a blood alcohol level is taken at a certain

time and you want to know what someone's blood alcohol level was earlier, that you have to extrapolate back to essentially a higher number if that person has not been drinking in the interim." RT [Dec. 13, 2007] 51. Ms. Ferma replied, "That's correct. Yes." RT [Dec. 13, 2007] 51. Therefore, Attorney Geffon could have reasonably concluded he had no legal basis for challenging the evidence and thus, Petitioner fails to show deficient performance. *See Rupe v. Wood*, 93 F.3d 1434, 1445 (9th Cir. 1996) ("[T]he failure to take a futile action can never be deficient performance.").

Even if Petitioner could show deficient performance, he cannot establish prejudice. In order to establish prejudice from failure to file a motion (i.e., challenging the blood alcohol evidence on grounds that the evidence was insufficient), Petitioner must show that (1) had his counsel filed the motion, it is reasonable that the trial court would have granted it as meritorious, and (2) had the motion been granted, it is reasonable that there would have been an outcome more favorable to him. *See Wilson v. Henry*, 185 F.3d 986, 990 (9th Cir. 1999). Here, Petitioner has made no showing that such a challenge to the blood alcohol evidence would have been successful if raised before the trial court. Again, as the aforementioned exchange between Attorney Geffon and the psychologist shows, the prosecution could have easily overcome such a challenge by making an offer of proof that expert testimony would support a 0.08 percent blood alcohol finding. Therefore, no prejudice is shown.

Accordingly, because there is no basis for concluding that the state courts' rejection of Petitioner's second IAC claim was an objectively unreasonable application of clearly established federal law, relief on this claim is DENIED.

C. For Failing To Properly Advise Him And For Failing To Withdraw His No Contest Plea

In his third and final IAC claim, Petitioner contends that Attorney Geffon was ineffective in: (1) advising him during that if he pleaded no contest he "would receive a sentence of 6-16 years for case # CC591335/CC629776"; and (2) failing to comply with Petitioner's request to withdraw his plea prior to the *Romero* hearing. Dkt. 59 at 6. Again, Petitioner relies on his state habeas reply brief to support his claim, in which he states as follows:

> [C]ounsel advised me that if I plead[ed] [no contest] I would receive 6-16 years off the record[.] [E]ven then I had advised counsel months prior to my *Romero* motion hearing to withdraw my plea. Mr. Geffon did not make a statement in his declaration regarding me . . . advis[ing] him prior to my *Romero* hearing to withdraw my plea. [T]he fact of the matter is I thought I would receive 6-16 years and even then I had advised my attorney to withdraw my plea[.]

Dkt. 1 at 11.[9] In essence, Petitioner claims that Attorney Geffon incorrectly advised him regarding the sentencing exposure he faced prior to entering his no contest plea. *Id.* at 11-12. Petitioner alleges that had he been adequately advised regarding his sentencing exposure, he would have proceeded to trial. *Id.* at 13.

The record before this Court is the same one that was before the state courts, which includes the transcripts of the plea colloquy and sentencing. Upon due consideration, this Court reaches the same conclusion the state courts did and rejects this IAC claim. As will be seen below, the transcripts clearly showing there was no promise regarding the sentence.

1. **Factual Background**

Petitioner's plea was taken at the same time the trial court took the pleas of two others, William Bracamonte and Deanne Rose.[10] Augmented RT 3. The following colloquy took place at the change-of-plea hearing:

> THE COURT: MR. GEFFON ON THE RECORD IN PEOPLE VERSUS JUAN TORRES, WILLIAM BRACAMONTE AND DEANNE ROSE.
>
> COUNSELS APPEARANCE PLEASE?
>
> MR. GEFFON: ERIC GEFFON ON BEHALF OF MR. TORRES.

[9] Respondent claims that "[i]t is unclear from [Petitioner's] pleading whether Petitioner is alleging that counsel advised him he would receive a six to 16 year reduction in his sentence, or a total sentence of six to 16 years." Dkt. 11-1 at 11, fn. 3. However, based on his allegations quoted above, the Court assumes Petitioner claims that counsel misadvised him that he would receive the latter, a *total* sentence of 6 to 16 years for both Santa Clara County Superior Court case numbers CC591335/CC629776. *See* Dkt. 59 at 6; Dkt. 1 at 11.

[10] In his traverse, Petitioner claims that "none of those individuals [present at the change-of-plea hearing] were [his] co-defendant[s]." Dkt. 16 at 9. The record indicates that the trial court indicated that Petitioner "ha[d] a co-defendant in one case." Augmented RT 5. The trial court did not specify the name of this co-defendant. Augmented RT 5. However, it matters not whether they were his co-defendants. In order to quote the transcript completely, the Court includes the full colloquy involving Petitioner and the two others present at the change-of-plea hearing.

MR. MOORE: [DEPUTY DISTRICT ATTORNEY] TIMOTHY MOORE AS TO TORRES.

MR. ESPINOLA: JOE ESPINOLA AS TO ROSE AND BRACAMONTE DOCKET ENDING IN 282.

MR. CHANG: PAUL CHANG ON BEHALF OF MR. BRACAMONTE WHO IS PRESENT.

MR. MCMAHON: ROSS MCMAHON FROM THE PUBLIC DEFENDER'S OFFICE ON BEHALF OF MISS ROSE SEATED TO MY RIGHT.

THE COURT: MY UNDERSTANDING [IS] THAT TORRES WOULD BE PLEADING AS CHARGED TO BOTH CASES [WITH] NO CONDITIONS.

AND MR. BRACAMONTE WOULD PLEAD AS CHARGED, 32 MONTHS TOP/BOTTOM.

AND M[S]. ROSE AS CHARGED FOR A TWO YEAR TOP.

COUNSEL HAVE YOU DISCUSSED WITH YOUR CLIENT THE ELEMENTS OF THE OFFENSES, POSSIBLE DEFENSES, THE CONSEQUENCES OF THE PLEAS AND ADMISSIONS THEY ARE ABOUT TO ENTER; AND ARE YOU SATISFIED WITH THOSE DISCUSSIONS, WAIVER OF RIGHTS, AND PLEAS AND ADMISSIONS THAT YOUR CLIENT IS ABOUT TO ENTER?

MR. GEFFON?

MR. GEFFON: I HAVE.

THE COURT: AND MR. CHANG.

MR. CHANG: YES.

THE COURT: AND MR. MCMAHON.

MR. MCMAHON: YES YOUR HONOR.

THE COURT: AND ARE YOU LIKEWISE SATISFIED WITH THE DISCUSSIONS YOU HAVE HAD WITH YOUR ATTORNEY MR. TORRES?

MR. TORRES: YES.

THE COURT: AND MR. BRACAMONTE?

MR. BRACAMONTE: YES.

THE COURT: AND MISS ROSE?

MS. ROSE: YES.

THE COURT: AND AT THIS TIME ARE YOU UNDER THE INFLUENCE OF ANY DRUG, ALCOHOL OR NARCOTIC THAT WOULD INTERFERE WITH YOUR ABILITY TO UNDERSTAND THESE PROCEEDINGS MR. TORRES?

MR. TORRES: NO, SIR.

THE COURT: AND MR. BRACAMONTE?

MR. BRACAMONTE: NO, SIR.

THE COURT: AND MISS ROSE?

MS. ROSE: NO.

THE COURT: AND HAS ANYONE THREATENED YOU OR ANY ONE CLOSE TO YOU IN ORDER TO COERCE YOU TO ENTER THE PLEAS? MR. TORRES?

MR. TORRES: NO, SIR.

THE COURT: AND MR. BRACAMONTE?

MR. BRACAMONTE: NO.

THE COURT: AND MISS ROSE?

MS. ROSE: NO.

THE COURT: AND HAS ANYONE MADE PROMISES TO YOU OTHER THAN WHAT WE HAVE JUST STATED ON THE RECORD IN ORDER TO GET YOU TO ENTER THE PLEA? MR. TORRES.

MR. TORRES: NO, SIR.

THE COURT: AND MR. BRACAMONTE?

MR. BRACAMONTE: NO.

THE COURT: AND MISS ROSE?

MS. ROSE: NO.

THE COURT: AND EACH OF YOU THEN ARE ENTERING THE PLEAS FREELY AND VOLUNTARILY; IS THAT RIGHT? MR. TORRES?

MR. TORRES: YEAH YOUR HONOR.

THE COURT: AND MR. BRACAMONTE?

MR. BRACAMONTE: YES.

THE COURT: AND MISS ROSE?

MS. ROSE: YES.

THE COURT: AND MR. TORRES ON ONE CASE YOU HAVE A CO-DEFENDANT.

MR. GEFFON: HE DOES.

MR. MOORE: [HE] DOES YOUR HONOR.

THE COURT: AND MR. TORRES SINCE YOU HAVE A CO-DEFENDANT IN THE ONE CASE CAN I ASSUME YOU ARE ENTERING THE PLEA ON YOUR OWN BEHALF AND NOT OUT OF ANY DESIRE TO BENEFIT THE CO-DEFENDANT?

MR. TORRES: YES.

THE COURT: AND THE SAME WITH MR. BRACAMONTE?

MR. BRACAMONTE: YES.

THE COURT: AND MISS ROSE?

MS. ROSE: YES

THE COURT: AND IN THESE YOU EACH HAVE THE RIGHT TO A JURY TRIAL ON THE QUESTION OF YOUR GUILT OR INNOCENCE AND THE TRUTH [OF] ANY . . . ENHANCEMENTS. IF YOU AND THE DISTRICT ATTORNEY WERE TO GIVE UP THAT RIGHT, COULD HAVE BUT DON'T HAVE THE RIGHT TO A COURT TRIAL.

MR. TORRES: YES.

THE COURT: AND DO YOU GIVE UP THAT RIGHT.

MR. TORRES: YES, SIR.

THE COURT: AND MR. BRACAMONTE DO YOU UNDERSTAND YOUR RIGHT TO A JURY TRIAL?

MR. BRACAMONTE: YES.

THE COURT: AND DO YOU GIVE UP THAT RIGHT.

MR. BRACAMONTE: YES.

THE COURT: AND MISS ROSE DO YOU UNDERSTAND YOUR RIGHT TO A JURY TRIAL?

MS. ROSE: YES

THE COURT: AND DO YOU GIVE UP THAT RIGHT?

MS. ROSE: YES

THE COURT: AND AT ANY OF THOSE HEARINGS OR TRIALS YOU HAVE THE FOLLOWING THREE RIGHTS. ONE THROUGH YOUR ATTORNEY TO SEE, HEAR CONFRONT AND CROSS EXAMINE THE WITNESSES AGAINST YOU.

MR. TORRES DO YOU UNDERSTAND THAT RIGHT?

MR. TORRES: YES.

THE COURT: AND FOR YOUR COURT OR JURY TRIAL DO YOU GIVE UP THAT RIGHT?

MR. TORRES: YES.

THE COURT: AND MR. BRACAMONTE DO YOU UNDERSTAND THAT RIGHT?

MR. BRACAMONTE: YES.

THE COURT: AND FOR THE COURT OR JURY TRIAL DO YOU GIVE UP THAT [RIGHT]?

MR. BRACAMONTE: YES.

THE COURT: AND MISS ROSE, DO YOU UNDERSTAND THAT RIGHT.

MS. ROSE: YES.

THE COURT: AND FOR YOUR COURT OR JURY TRIAL DO YOU GIVE UP THAT RIGHT?

MS. ROSE: YES.

Augmented RT 3-9.

Thereafter, the trial court clarified the specifics of Petitioner's no contest plea to charges in both case numbers, which Petitioner assured the court that he understood as follows:

THE COURT: AND MR. TORRES IN YOUR CASE YOU ARE PLEADING TO CHARGES TO BOTH CASES. AND YOU ARE PLEADING WITHOUT CONDITIONS. AND YOU UNDERSTAND THAT THE MAXIMUM TERMS FOR THESE CASES WOULD BE A HUNDRED YEARS TO LIFE CONSECUTIVE TO 25 YEARS IN PRISON.

DO YOU UNDERSTAND THAT?

MR. TORRES: YES.

THE COURT: AND YOUR ATTORNEY WILL BRING A *ROMERO* MOTION WHICH WILL ASK THE COURT TO STRIKE ONE OF THE TWO STRIKES THAT YOU HAVE.

AND IF THAT MOTION WERE TO BE GRANTED AND THE COURT WERE TO STRIKE ONE OF THE STRIKES YOU WOULD THEN BE LOOKING AT A PRISON TERM OF NOT LESS THAN 16 YEARS EIGHT MONTHS, NO MORE THAN 30 YEARS. DO YOU UNDERSTAND THAT?

MR. TORRES: YES.

THE COURT: AND DO YOU UNDERSTAND EITHER SCENARIO BECAUSE OF THE NATURE OF THE OFFENSE YOU WOULD RECEIVE 85 PERCENT OF THE TOTAL TIME IN WHICH YOU WERE SENTENCED. DO YOU UNDERSTAND THAT?

MR. TORRES: YES.

THE COURT: AND THESE OFFENSES ALSO ON DOCKET ENDING IN 335, CONTAIN TWO MORE STRIKES AND DOCKET ENDING IN 776, CONTAIN TWO MORE STRIKES, SUCH THAT AFTER YOUR PLEA AND CONDITIONS IN THIS MATTER YOU THEN HAVE A TOTAL OF SIX STRIKES AND ANY FUTURE FELONY WOULD RESULT IN A 25 TO LIFE [SENTENCE] UNDER THE CURRENT LAW. DO YOU UNDERSTAND THAT?

MR. TORRES: YES.

THE COURT: AND WITH RESPECT TO THE 2800.1, AND THE DUI CHARGES THOSE WILL ADD POINTS AGAINST YOUR DRIVING. THE DEPARTMENT OF MOTOR VEHICLES WILL TAKE ACTION AGAINST YOUR DRIVING PRIVILEGE. AND THE 23512 IS A PRIORABLE OFFENSE. IF YOU ARE AGAIN CHARGED WITH IT THE DISTRICT ATTORNEY CAN CHARGE IT TO ENHANCE PUNISHMENT.

DO YOU UNDERSTAND THAT?

MR. TORRES: YES.

THE COURT: AND ALSO I AM REQUIRED TO ADVISE YOU THAT ON A DUI PLEA THAT DRIVING UNDER THE INFLUENCE OF ALCOHOL, DRUGS OR BOTH, IS INHERENTLY DANGEROUS TO HUMAN LIFE. IF YOU CONTINUE TO DRIVE UNDER THE INFLUENCE OF ALCOHOL OR DRUGS OR BOTH AS A RESULT OF THAT DRIVING SOMEONE COULD BE KILLED AND YOU COULD BE CHARGED WITH MURDER.

DO YOU UNDERSTAND THAT?

MR. TORRES: YES.

THE COURT: YOU WOULD THEN AFTER YOU ARE RELEASED FROM PRISON ON THESE MATTERS, WOULD BE RELEASED ON PAROLE FOR UP TO FIVE YEARS AND COULD BE RETURNED TO PRISON FOR ONE YEAR FOR

EACH VIOLATION[.] DO YOU UNDERSTAND?

MR. TORRES: YES.

Augmented RT 10-11.

2. **Analysis**

a. Misadvisement as to Sentencing Exposure

i. First Prong Under *Strickland* Standard

As mentioned above, Petitioner claims that Attorney Geffon told him he would "receive 6-16 years *off the record[]*." Dkt. 1 at 11 (emphasis added). Specifically, Petitioner states in his traverse that "[d]uring the time of the plea agreements [he] was told by [his] attorney that if [he] plead [he] would receive between 6-16 years in prison." Dkt. 16 at 6. Petitioner again adds that his attorney "told [him] this *off the record* . . . ." *Id.* (emphasis added). However, Petitioner has not submitted a declaration from Attorney Geffon to support such a claim. Instead, as shown above, the record does not support Petitioner's contention that Attorney Geffon provided him with erroneous advice regarding his sentencing exposure. Specifically, the trial court began the proceedings by confirming with counsel that Petitioner was pleading *without* an agreement as to his sentence. Augmented RT 3. The trial court also confirmed with Petitioner that he was "satisfied" with his discussions with Attorney Geffon about the plea, and that Petitioner denied any other promises had been made to him with respect to the plea. Augmented RT 4-5. The trial court then specified and Petitioner agreed that he could be sentenced to a maximum term of "A HUNDRED YEARS TO LIFE CONSECUTIVE TO 25 YEARS IN PRISON." Augmented RT 10. The trial court specifically alerted Petitioner to the fact that although his attorney would "BRING A *ROMERO* MOTION" to persuade the judge to dismiss Petitioner's prior "strike" convictions, the judge made no promises that he would do so. Augmented RT 10. The foregoing demonstrates that the life sentence imposed was no greater than that to which Petitioner had agreed when he pleaded no contest. Thus, the aforementioned record of the plea proceeding therefore rebuts Petitioner's claim that Attorney Geffon misadvised him about the sentence he would receive if he pleaded no contest to the charges. Petitioner does not reconcile his own testimony at the plea colloquy with his present claim that he was misadvised by Attorney Geffon.

Petitioner does not explain why he agreed to the plea and told the trial court that no promises had been made if he was promised the aforementioned sentence of "6-16 years." Petitioner also spoke at his *Romero* hearing—which, again, is the hearing to determine whether any prior "strike" conviction would be dismissed—and did not suggest that any promises had been made. RT [Dec. 13, 2007] 58-59.

The Court finds that Petitioner was not misled concerning the terms of the no contest plea. Petitioner offers no persuasive evidence that supports his assertions that he was misled by counsel. Petitioner's conclusory claims that he was advised that he "would receive a sentence of 6-16 years" are insufficient to rebut the "strong presumption of verity" afforded his solemn declarations in open court. *See Blackledge v. Allison*, 431 U.S. 63, 73-74 (1977); *see also Ramos v. Rogers*, 170 F.3d 560, 566 (6th Cir 1999) (finding habeas petitioner's alleged "subjective" impressions insufficient to undermine his own statements at the plea colloquy); *Slevin v. United States*, 71 F. Supp. 2d 348, 356-58 (S.D.N.Y. 1999) (requiring some "objective evidence" to support petitioner's self-serving allegations because convicted prisoner faces tremendous incentives to fabricate allegations of misconduct in an attempt to avoid incarceration). The record shows that Petitioner was accurately informed of the maximum sentence of 100 years to life consecutive to 25 years in prison that the trial court could impose. Petitioner's own statements in court show he understood he could receive a 100 years to life sentence. When he pled no contest, Petitioner acknowledged that he faced up to a life sentence and that there were no side promises or threats prompting him to plead no contest. He now provides no explanation for the discrepancy between the record and his allegations. A "disappointed hope for leniency does not, without more, render a guilty plea invalid." *Conley v. United States*, 407 F.2d 45, 47 (9th. Cir. 1969). Thus, the Court finds that Petitioner has failed to satisfy the first prong under the *Strickland* standard. Therefore, the state courts were objectively reasonable to conclude that Attorney Geffon's performance under the Sixth Amendment was not unreasonable in light of the circumstances.

ii. Second Prong Under *Strickland* Standard

Assuming arguendo that Attorney Geffon did misadvise Petitioner about his sentence, Petitioner cannot satisfy the second prong under the *Strickland* standard for IAC—i.e., he fails to

establish that he was prejudiced. When a defendant contends that incompetent advice led to his pleading guilty (or, in this case, no contest), he must establish not only incompetent performance by counsel, but also a reasonable probability that, but for counsel's incompetence, the defendant would not have taken a plea and would have insisted on proceeding to trial. *Hill*, 474 U.S. at 57-59; *Strickland*, 466 U.S. at 691-92. "[A]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Id.*

Here, Petitioner has failed to show that he was prejudiced. As mentioned above, the trial court advised Petitioner that he was pleading *without* conditions, and that he faced a maximum term of 100-years-to-life consecutive to 25 years on both of his criminal cases. Augmented RT 10. Further, the trial court advised Petitioner that Attorney Geffon would bring a *Romero* motion, and that "if that motion were to be granted and the court were to strike one of the strikes" he "would then be looking at a prison term of not less than 16 years eight months, no more than 30 years." Augmented RT 10. The trial court clearly explained that Petitioner was facing a life sentence and that a lesser sentence was dependent on the trial court's granting a *Romero* motion, which could not be guaranteed. Augmented RT 10. Petitioner indicated that he understood the trial court, and did not ask any questions or express any confusion or surprise at the court's advisements. Augmented RT 10. Thus, it seems that Petitioner pleaded no contest to all charges in both cases based on the hope that he would receive a *reduced* sentence at a *Romero* hearing, even though there were no guarantees that he would receive such a reduced sentence. While Petitioner may not have been satisfied with the result of his *Romero* hearing, his decision to plead no contest must be viewed in light of the facts then known to Petitioner. Out of all the charges he faced, Petitioner seemed to challenge the fact that he pleaded no contest to "V.C. 23152(B)" when his "blood [] alcohol level was 0.06 below the legal limit." Dkt. 1 at 12. The risks of going to trial simply to challenge a single misdemeanor blood alcohol offense were far greater than any potential benefits. Even if there were a possibility of acquittal on the misdemeanor charge, it would have had no meaningful impact on Petitioner's overall sentence. Under these circumstances, Petitioner cannot show that, had he been properly advised that a reduced sentence

was *no guarantee*, there was a reasonable probability he would have risked his chances for leniency at a *Romero* hearing simply to challenge a single misdemeanor offense. Moreover, Petitioner cannot show prejudice from his attorney's alleged misadvisement, where he was clearly informed by the judge's statements at the time of the plea that he could receive a life sentence.

Therefore, the state courts' rejection of Petitioner's IAC claim relating to Attorney Geffon's alleged misadvisement regarding the sentencing exposure was an objectively reasonable application of clearly established federal law.

b. Failure to Withdraw Plea

Petitioner also contends Attorney Geffon was deficient for failing to file a motion to withdraw the plea as Petitioner requested. Dkt. 59 at 6. Petitioner contends that he asked counsel to withdraw his plea before the *Romero* hearing because Petitioner believed that he erroneously pleaded to "over enhancements and a blood alcohol level of 0.08 or more when it was clear [the] evidence show[ed] [he] was below the legal limit . . . ." Dkt. 1 at 11. However, because the blood alcohol evidence did in fact support the blood alcohol charge, there was no legal basis for asking the trial court to withdraw the plea. *See Rupe v. Wood*, 93 F.3d at 1445 (the failure to take a futile action is not deficient performance). Further, because Petitioner cannot show that such motion would have been granted as meritorious, he cannot establish that he was prejudiced by counsel's alleged deficient performance. *See Wilson*, 185 F.3d at 990. Meanwhile, as for Petitioner's challenge to "over enhancements," the Court notes that he does not specify which "over enhancements" he believes should have been the subject of a motion to withdraw his plea. *See Strickland*, 466 U.S. F.3d at 690. Assuming that Petitioner is referring to the two five-year enhancements stricken on appeal, the state appellate court's striking of those enhancements removed any prejudice Petitioner might have suffered as the result of counsel's failure to move to withdraw his plea as to the enhancements. Given that Petitioner suffered no prejudice as a result of Attorney Geffon's failure to move to withdraw his plea as to either the blood alcohol charge or the alleged "over enhancements," the state courts' rejection of the claim was an objectively reasonable application of clearly established federal law.

In his traverse, Petitioner claims that he "wanted to withdraw [his] plea and proceed on to

trial" on both cases because "[he] had witnesses in both cases that would have lead towards my innocents [sic] or at the very least mitigated charges which was reasonably available to my attorney to call on such witnesses." Dkt. 16 at 7. The Court construes such an allegation as a claim relating to Attorney Geffon's ineffectiveness for his failure to call certain witnesses, and it finds that such a claim is not cognizable because, as mentioned above, the only challenges left open in federal habeas corpus after a guilty plea (or, in this case, a no contest plea) are to the voluntary and intelligent character of the plea and the nature of the advice of counsel to plead. *See Hill*, 474 U.S. at 56-57; *Tollett*, 411 U.S. at 267. As such, the state courts' rejection of Petitioner's IAC claim relating to Attorney Geffon's failure to move to withdraw his plea was an objectively reasonable application of clearly established federal law.

c. Summation

In sum, Petitioner has not shown deficient performance by Attorney Geffon, and the Court finds that even assuming Petitioner had shown deficient performance, no prejudice resulted. Having made an independent review of the record, this Court concludes that the state courts' rejection of Petitioner's third IAC claim was not an unreasonable application of clearly established federal law. Accordingly, Petitioner is not entitled to habeas relief on this claim, and it is DENIED.

IV. REQUEST FOR EVIDENTIARY HEARING

In his traverse, Petitioner requested an evidentiary hearing on his claims. Dkt. 16 at 14. The Court concludes that no additional factual supplementation is necessary, and that an evidentiary hearing is unwarranted with respect to the claims raised in the instant petition.

For the reasons described above, the facts alleged in support of these claims, even if established at an evidentiary hearing, would not entitle Petitioner to federal habeas relief. Further, Petitioner has not identified any concrete and material factual conflict that would require the Court to hold an evidentiary hearing in order to resolve. *See Cullen v. Pinholster*, 563 U.S. 170 (2011). Therefore, Petitioner's request for an evidentiary hearing is DENIED.

V. CERTIFICATE OF APPEALABILITY

No certificate of appealability is warranted in this case. For the reasons set out above, jurists of reason would not find this Court's denial of Petitioner's IAC claims debatable or wrong. *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Petitioner may not appeal the denial of a Certificate of Appealability in this Court but may seek a certificate from the Ninth Circuit under Rule 22 of the Federal Rules of Appellate Procedure. *See* Rule 11(a) of the Rules Governing Section 2254 Cases.

VI. CONCLUSION

For the reasons outlined above, the Court orders as follows:

1. All remaining claims from the Amended Petition are DENIED, and a COA will not issue. Petitioner's request for an evidentiary hearing is DENIED. Petitioner may seek a COA from the Ninth Circuit Court of Appeals.

2. The Clerk of the Court shall terminate any pending motions and close the file.

IT IS SO ORDERED.

Dated: March 30, 2018

YVONNE GONZALEZ ROGERS
United States District Judge

United States District Court
Northern District of California

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

JUAN MATIAS TORRES,

Plaintiff,

v.

RALPH M. DIAZ,

Defendant.

Case No. 12-cv-06224-YGR

CERTIFICATE OF SERVICE

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

That on 3/30/2018, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Juan Matias Torres T-72354
CSP - Solano
P.O. box 4000
Vacaville, CA 95696-4000

Dated: 3/30/2018

Susan Y. Soong
Clerk, United States District Court

By: D. Merry
Doug Merry, Deputy Clerk to the
Honorable YVONNE GONZALEZ ROGERS

United States District Court
Northern District of California