UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

NOV 23 2020

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

JOSE LUIS MORALES,

Petitioner-Appellant,

v.

STUART SHERMAN, Warden,

Respondent-Appellee.

No. 19-56166

D.C. No. 5:16-cv-02679-DMG-GJS
Central District of California,
Riverside

ORDER

Before: IKUTA and MILLER, Circuit Judges.

The request for a certificate of appealability 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 DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JOSE LUIS MORALES,
Petitioner

v.

STUART SHERMAN,
Respondent.

Case No. 5:16-cv-02679-DMG (GJS)

**FINAL REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE**

This Final Report and Recommendation is submitted to United States District Judge Dolly M. Gee, pursuant to 28 U.S.C. § 636 and General Order No. 05-07 of the United States District Court for the Central District of California.

## INTRODUCTION

Petitioner filed a 28 U.S.C. § 2254 habeas petition [Dkt. 1, ("Petition")[1]] on September 24, 2016.[2] Respondent filed an Answer [Dkt. 16] and lodged relevant

[1] The Court refers to the page numbers in Document 1 of the Petition, as reflected in the CM/ECF system. [Dkt. 1.]

[2] Petitioner filed an application for leave to file a successive federal habeas petition in the United States Court of Appeals for the Ninth Circuit on September 24, 2016. [Petition at 1-8.] On

portions of the state record [Dkt. 17, ("LD")]. Petitioner then filed a Reply. [Dkt. 20.]

On May 30, 2019, the Court issued a Report and Recommendation, in which it recommended that the Petition be denied [Dkt. 22, "Report"]. On June 27, 2019, Petitioner filed Objections to the Report [Dkt. 23, "Objections"]. On July 12, 2019, the Court ordered Respondent to file a Reply directed to one of the arguments that Petitioner had made in the Objections [Dkt. 24]. Respondent requested, and was granted, an extension of time to file the Reply [Dkts. 26-27], and on July 24. 2019, filed a timely Reply [Dkt. 28]. On July 25, 2019, Petitioner submitted "Objections to Late Reply," which although nor permitted, the Court allowed to be filed [Dkt. 29].[3]

The Court has considered the Objections and addresses them below, but notes that none of them have changed the Court's original analysis and initial recommendation. For the reasons that follow, the Court continues to recommend that the District Judge deny the Petition.

## PRIOR STATE PROCEEDINGS

On August 12, 1999, Petitioner, who was represented by counsel, entered a plea of guilty to first degree murder (Cal. Penal Code § 187(a)) and admitted a firearm enhancement in exchange for an agreed upon term of 29 years to life. [LD 39, Supp. Clerk's Transcript ("SCT") 1-2; LD 40, Reporter's Transcript ("RT") 1-10.]

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May 26, 2017, the Ninth Circuit found that Petitioner did not need authorization to file the Petition because his claim of ineffective assistance of appellate counsel ripened after the District Court denied a previous federal habeas petition in 2010. [Dkt. 2.] The Ninth Circuit ordered that the instant Petition be deemed filed on September 24, 2016. [*Id.*]

[3] Petitioner's complaints about the Reply ordered by the Court – that it was "late" and "outside of the procedural parameters" – are factually and legally frivolous. The Reply was timely, and replies to objections are specifically permitted by Fed. R. Civ. P. 72(b)(2).

Instead, on November 30, 1999, Petitioner, who was represented by new counsel, filed a motion to withdraw the plea pursuant to California Penal Code § 1018.[4] [LD 38, Clerk's Transcript ("CT") 67-72.] Following a hearing, the trial court denied the motion and imposed the agreed upon sentence. [SCT 2; RT 11-27; LD 41.]

From 2004 through 2012, Petitioner filed at least 15 habeas petitions in the state courts. All were denied. [LD 1 to 30.]

In 2009, Petitioner filed two federal habeas petitions. The petitions were consolidated and later dismissed as untimely in 2010. [*See* Petition at 9-11.]

On April 15, 2013, Petitioner filed a motion in the Riverside County Superior Court to vacate the judgment entered on his guilty plea pursuant to California Penal Code § 1016.5(b),[5] contending that he was not adequately advised of the consequences of his immigration status before he entered his guilty plea. [CT 210-11.] That motion was denied. [CT 209.]

Petitioner appealed the trial court's denial of his motion to vacate the judgment and requested a certificate of probable cause. [CT 230-31.] After the request for certificate of probable cause was denied, Petitioner's appeal was dismissed and a remittitur issued. [CT 231, 235.] Petitioner then moved to recall the remittitur. [CT 235.] On June 30, 2015, the California Court of Appeal granted Petitioner's motion and reinstated Petitioner's appeal. [CT 235-36.]

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[4] At any time before judgment, a trial court may permit a defendant to withdraw a guilty plea for "good cause shown." Cal. Penal Code § 1018. "Mistake, ignorance or any other factor overcoming the exercise of free judgment is good cause for withdrawal of a guilty plea" under section 1018. *People v. Cruz*, 12 Cal. 3d 562, 566 (1974).

[5] Since 1977, California Penal Code § 1016.5 has required that, before accepting a plea of guilty or nolo contendere, the trial court must advise a defendant in an appropriate case that the plea may have immigration consequences. *People v. Castaneda*, 37 Cal. App. 4th 1612, 1615 (1995). If the court fails to give the advisement and if the defendant shows that his conviction may result in deportation, exclusion, or denial of naturalization, then "the court, on defendant's motion, shall vacate the judgment and permit the defendant to withdraw the plea of guilty or nolo contendere, and enter a plea of not guilty." Cal. Penal Code § 1016.5(b).

Petitioner was appointed appellate counsel, who thereafter filed briefs with the California Court of Appeal challenging the order denying his motion to vacate his conviction. [LD 35, LD 37.] On March 9, 2016, the California Court of Appeal affirmed in a reasoned decision. [LD 42.] Petitioner did not file a petition for review in the California Supreme Court.

Petitioner then filed a habeas petition in the California Court of Appeal, asserting the ineffective assistance of appellate counsel claimed alleged in the Petition. [LD 31.] That petition was summarily denied on May 17, 2016. [LD 32.]

Petitioner then filed a habeas petition in the California Supreme Court raising the same claim of ineffective assistance of appellate counsel as in the state appellate court. [LD 33.] On August 24, 2016, the California Supreme Court issued a silent denial of the petition. [LD 34.]

## FACTUAL BACKGROUND

The Petition raises a single claim challenging the effectiveness of appointed appellate counsel's performance in connection with the appeal of the denial of Petitioner's 2013 motion to vacate his 1999 conviction. The Court has reviewed the relevant record as well as the California Court of Appeal's reasoned decision on appeal. [LD 42 at 2-5.] The California Court of Appeal's statement of the case is consistent with the Court's own review of the record. Accordingly, the Court has quoted it below to provide an initial factual overview. The relevant portions of the trial record will be discussed further in connection with the Court's analysis of Petitioner's claim.

**Statement of the Case**

> On May 9, 1998, two groups of youths were "tagging" in a storm drain. The victim offered to sell [Petitioner] – a member of the other group – some marijuana, but [Petitioner] declined. Instead, he decided to take the marijuana from the victim by armed force.

[Petitioner] and one of his companions approached the victim and inquired about the marijuana. [Petitioner] then pointed his handgun (a 38-caliber revolver) at the victim and demanded the marijuana. When the victim refused, [Petitioner] fired a warning shot in the air and told the victim that if he did not comply by the count of three, [Petitioner] would kill him. The victim defied [Petitioner] and [Petitioner] shot him several times. He then pointed the gun at two of the victim's companions and appeared to attempt to fire it, but it did not discharge.

Although our record does not include an information, the felony complaint filed July 16, 1998, charged [Petitioner] with special circumstances murder ([Cal. Penal] Code, § 190.2, subd. (a)(17)(A) [in the course of robbery]) as well as personally discharging a firearm causing great bodily injury ([Cal. Penal Code] § 12022.53, subd. (d)). [Petitioner] was also charged with two counts of assault with a firearm with respect to having pointed his gun at the victim's friends. ([Cal. Penal Code] § 245, subd. (a)(2).) It is apparent that all of these charges were amply supported by the evidence at the preliminary hearing.

On August 12, 1999, [Petitioner] entered a plea of guilty to first degree murder and admitted an enhancement under section 12022.5, subdivision (a)(1). The agreed term was 29 years to life. The felony plea form does not contain an interpreter's statement -- that is, there is a space for such a statement of translation, but it is blank. The form also included the information that "If I am not a citizen of the United States, I understand that this conviction may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States." [Petitioner] initialed this space.

At the time of the plea, the trial court discussed with [Petitioner] the advantages of the plea, which allowed him to avoid the very real possibility of a sentence of life without possibility of parole. He then explained what the agreed sentence meant in terms of the time [Petitioner] would spend in prison and the factors which would bear on his chances for eventual release on parole.

This colloquy was conducted in English and [Petitioner] consistently responded appropriately with

"Yes, Your Honor," "Yes, sir," "No, sir," and the like. Similar appropriate responses were made during the actual taking of the plea; for example, when asked "how do you plead, sir?" [Petitioner] responded "Guilty, Your Honor." Counsel joined in the plea after confirming to the court that he was satisfied that it was in his client's best interest.

It did not take long for the enormity of his situation to sink in on [Petitioner], however, and in November of the same year, and prior to sentencing, [Petitioner], represented by new counsel, filed a motion to withdraw his plea. This motion was supported only by the declaration of counsel, who stated on information and belief that at the time of the plea [Petitioner] was fatigued, under "emotional duress," and depressed. Counsel also complained further that no Spanish interpreter was employed during the proceedings.

At the hearing on this motion, [Petitioner] was assisted by an interpreter. [Petitioner's] original attorney testified that all of his discussions with [Petitioner] were conducted in English and that [Petitioner] did not appear to have difficulty with the language. He testified that the issue of communicating in Spanish never came up. Counsel also told the court that his review of [Petitioner's] interviews with law enforcement personnel did not raise any concerns whatsoever about [Petitioner's] English fluency or comprehension. His last word was an emphatic "There was absolutely no reason for me to think that there was any problem with respect to Mr. Morales understanding me."

This motion was denied. The trial court went so far as to call the motion an apparent "fraud."

The next relevant filing by [Petitioner] occurred on April 15, 2013, when he filed the motion involved in the current case, another motion to vacate the judgment but based upon the requirement of section 1016.5 that defendants entering pleas of guilty must be advised of the potential immigration consequences of that decision. In this motion [Petitioner] asserted that he was "[r]ecently" notified that federal officials had a "hold" on him, and had been asked if he "would like to be deported to complete the sentence in Mexico." [Petitioner] asserted that he had been in the United States since he was a month old and would never have entered his plea had he known that he would be deported.

> The motion was denied without additional proceedings.

[LD 42 at 2-5 (footnotes omitted).]

## PETITIONER'S HABEAS CLAIM

Petitioner contends appellate counsel provided ineffective assistance in connection with the appeal of the denial of his motion to vacate the judgment by failing to raise the following claims: (1) trial counsel provided ineffective assistance by failing to investigate and advise Petitioner of the immigration consequences of his guilty plea; and (2) substitute counsel provided ineffective assistance by failing to assert a claim of ineffective assistance of trial counsel in support of Petitioner's motion to withdraw his guilty plea. [Petition at 7, 26-37, 41-45.]

## STANDARD OF REVIEW

Under the Antiterrorism and Effective Death Penalty Act of 1996, as amended ("AEDPA"), Petitioner is entitled to habeas relief only if the state court's decision on the merits "(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" 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); *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011); *see also Harrington v. Richter*, 562 U.S. 86, 102 (2011) ("By its terms § 2254(d) bars relitigation of any claim 'adjudicated on the merits' in state court, subject only to the exceptions in §§ 2254(d)(1) and (2)."). Petitioner's claim is governed by the Section 2254(d) standard of review, because as discussed below, the state high court resolved the claim on its merits.

For purposes of Section 2254(d)(1), the relevant "clearly established Federal

law" consists of Supreme Court holdings (not dicta), applied in the same context that Petitioner seeks to apply it, existing at the time of the relevant state court decision. *See Lopez v. Smith*, 574 U.S. 1, 135 S. Ct. 1, 2, 4 (2014); *Premo v. Moore*, 562 U.S. 115, 127 (2011); *see also Greene v. Fisher*, 565 U.S. 34, 37 (2011) (holding that "the 'clearly established Federal law' referred to in § 2254(d)(1) is the law at the time of the state-court adjudication on the merits."). A state court acts "contrary to" clearly established Federal law if it applies a rule contradicting the relevant holdings or reaches a different conclusion on materially indistinguishable facts. *Price v. Vincent*, 538 U.S. 634, 640 (2003). A state court "unreasonably applies" clearly established Federal law if it engages in an "objectively unreasonable" application of the correct governing legal rule to the facts at hand. *White v. Woodall*, 572 U.S. 415, 425-27 (2014). "And an 'unreasonable application of' [the Supreme Court's] holdings must be 'objectively unreasonable,' not merely wrong; 'even clear' error will not suffice." *Id.* at 419 (citation and some internal quotation marks omitted). "The question . . . is not whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable -- a substantially higher threshold." *Schriro v. Landrigan*, 550 U.S. 465, 473 (2007).

For purposes of section 2254(d)(2), a state court has made an "unreasonable determination of the facts" within the meaning of section 2254(d)(2) when either its findings were not supported by "substantial evidence" in the state court record or its fact-finding process was "deficient in some material way." *See Hibbler v. Benedetti*, 693 F.3d 1140, 1146 (9th Cir. 2012). However, a state court's "factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance." *Wood v. Allen*, 558 U.S. 290, 301 (2010). The petitioner must show that the state court's decision was based on factual findings that were not merely incorrect but "'objectively unreasonable.'" *Hibbler*, 693 F.3d at 1146 (citations omitted).

Habeas relief may not issue unless "there is no possibility fairminded jurists could disagree that the state court's decision conflicts with [the Supreme Court's] precedents." *Richter*, 562 U.S. at 102. To obtain habeas relief, a petitioner "must show that" the state decision "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. This standard is "difficult to meet," *Metrish v. Lancaster*, 569 U.S. 351, 358 (2013), as even a "strong case for relief does not mean the state court's contrary conclusion was unreasonable," *Richter*, 562 U.S. at 102. "[S]o long as 'fairminded jurists could disagree' on the correctness of the state court's decision," habeas relief is precluded by Section 2254(d). *Id.* at 101 (citation omitted). "AEDPA thus 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) (citations omitted).

Petitioner's ineffective assistance of appellate counsel claim was raised in his habeas corpus petitions filed in the California Court of Appeal and the California Supreme Court. [LD 31, 33.] The California Court of Appeal and the California Supreme Court reached the merits of Petitioner's claim when they denied the habeas corpus petitions summarily, without comment or citation to authority. [LD 32, 34.] *See Walker v. Martin*, 562 U.S. 307, 310, (2011) ("A spare order denying a petition without explanation or citation ordinarily ranks as a disposition on the merits."); *Richter*, 562 U.S. at 99 ("When a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary."). However, as there is no reasoned state court decision addressing the merits of the instant claim, this Court must conduct an "independent review of the record" to determine whether the California Supreme Court's decision to deny Petitioner's ineffective assistance claim was objectively unreasonable. *Murray v. Schriro*, 745 F.3d 984, 996-97 (9th Cir. 2014).

## DISCUSSION

Petitioner contends that his appellate counsel, Marilee Marshall, provided ineffective assistance by failing to raise in the appeal of the denial of the motion to vacate the judgment the following claims: (1) trial counsel, Christopher Fait, provided ineffective assistance during the plea proceedings by failing to investigate and advise Petitioner of the immigration consequences of his guilty plea; and (2) substitute counsel, Luis Aguilar, provided ineffective assistance by failing to assert a claim of ineffective assistance of trial counsel in support of Petitioner's motion to withdraw his guilty plea. [Petition at 7, 26-37, 41-45.]

### I. Applicable Law

To establish ineffective assistance of counsel, Petitioner must prove that: (1) counsel's representation fell below an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *See Strickland v. Washington*, 466 U.S. 668, 688, 694, 697 (1984). A reasonable probability of a different result "is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. The court may reject the claim upon finding either that counsel's performance was reasonable or the claimed error was not prejudicial. *See id.* at 697; *Rios v. Rocha*, 299 F.3d 796, 805 (9th Cir. 2002) ("Failure to satisfy either prong of the Strickland test obviates the need to consider the other.") (citation omitted).

Review of counsel's performance "must be highly deferential" and this Court must guard against "the distorting effects of hindsight" and evaluate the challenged conduct from counsel's perspective at the time in issue. *Strickland*, 466 U.S. at 689. There is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.*; *see also Pinholster*, 563 U.S. at 189. Petitioner bears the burden to show that "counsel made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth

Amendment." *Richter*, 562 U.S. at 104 (citation and internal quotations omitted); *see Strickland*, 466 U.S. at 687.

"In assessing prejudice under *Strickland*, the question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently." *Richter*, 562 U.S. at 111; *see Strickland*, 466 U.S. at 693. Rather, the issue is whether, in the absence of counsel's alleged error, it is "'reasonably likely'" that the result would have been different. *Id.* (quoting *Strickland*, 466 U.S. at 696). "The likelihood of a different result must be substantial, not just conceivable." *Richter*, 562 U.S. at 112.

"The standards created by *Strickland* and § 2254(d) are both 'highly deferential,' and when the two apply in tandem, review is 'doubly' so." *Richter*, 562 U.S. at 105 (citing *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009)). To succeed on an ineffective assistance of counsel claim governed by Section 2254(d), the petitioner must show that the state court "applied *Strickland* to the facts of his case in an objectively unreasonable manner." *Bell v. Cone*, 535 U.S. 685, 699 (2002); *see also Richter*, 562 U.S. at 105 (the "question is not whether counsel's actions were reasonable," but rather, "whether there is any reasonable argument that counsel satisfied *Strickland's* deferential standard"). "[B]ecause the *Strickland* standard is a general standard, a state court has even more latitude to reasonably determine that a defendant has not satisfied that standard." *Mirzayance*, 556 U.S. at 123.

The standards set forth in *Strickland* also govern claims of ineffective assistance of appellate counsel. *See Smith v. Robbins*, 528 U.S. 259, 285-86 (2000); *Smith v. Murray*, 477 U.S. 527, 535-36 (1986); *Miller v. Keeney*, 882 F.2d 1428, 1433 (9th Cir. 1989). Due process guarantees a criminal defendant the right to effective assistance of counsel on his "first appeal as of right." *Evitts v. Lucey*, 469 U.S. 387, 396-97 (1985); *Miller*, 882 F.2d at 1431. However, appellate counsel has

no constitutional obligation to raise every nonfrivolous issue requested by a defendant. *Jones v. Barnes*, 463 U.S. 745, 751 (1983) (Counsel "must be allowed to decide what issues are to be pressed"); *Pollard v. White*, 119 F.3d 1430, 1435 (9th Cir. 1997) ("A hallmark of effective appellate counsel is the ability to weed out claims that have no likelihood of success, instead of throwing in a kitchen sink full of arguments with the hope that some argument will persuade the court."); *see also Moormann v. Ryan*, 628 F.3d 1102, 1109 (9th Cir. 2010) (appellate counsel is not required to raise a meritless issue on appeal). To establish prejudice, a petitioner must show that a specific argument on appeal would have resulted in a "reasonable probability of reversal." *Miller*, 882 F.2d at 1434, n.9.

**II. The State Court Decision Is Entitled To Deference Under Section 2254.**

The foregoing Sixth Amendment right to the effective assistance of counsel applies only to a criminal defendant's first appeal of right and not to discretionary appeals. *See Wainwright v. Torna*, 455 U.S. 586, 587-88 (1982) (per curiam) ("a criminal defendant does not have a constitutional right to counsel to pursue discretionary state appeals" and as such, the defendant "could not be deprived of the effective assistance of counsel by his retained counsel's failure to file" a timely appeal to the state high court); *Ross v. Moffitt*, 417 U.S. 600, 610 (1974) (finding that state was not required to provide counsel to petitioner on his discretionary appeal to the state supreme court); *see also Smith v. Idaho*, 392 F.3d 350, 356-57 (9th Cir. 2004) (as amended) ("It is well-established that criminal defendants have no constitutional right to counsel beyond their first appeal as of right, and hence no right to counsel in a discretionary appeal"). The Supreme Court, to date, has declined to extend that Sixth Amendment right beyond the initial appeal of right from the conviction itself, and in fact, has expressly declined to extend that right to collateral attacks upon convictions. *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987) (so explicitly declining and stating: "We think that since a defendant has no

federal constitutional right to counsel when pursuing a discretionary appeal on direct review of his conviction, *a fortiori*, he has no such right when attacking a conviction that has long since become final upon exhaustion of the appellate process."); *see also Coleman v. Thompson*, 501 U.S. 722, 756 (1991) (confirming that the Supreme Court has declined to extend the Sixth Amendment right to the effective assistance of appellate counsel "beyond the first appeal of a criminal conviction").

Unquestionably, had Petitioner appealed his conviction in 1999, this would have constituted his first appeal of right and the Sixth Amendment right to the effective assistance of appellate counsel would have adhered to his initial appeal to the California Court of Appeal. Petitioner, however, waived his right to appeal the 1999 conviction when he entered into his 1999 plea agreement. (SCT1.) In connection with Petitioner's present federal habeas claim, the parties dispute whether or not the Sixth Amendment right to the effective assistance of appellate counsel on the "first appeal of right" applies to Petitioner's 2013 appeal of the denial of his California Penal Code § 1016.5(b) motion to vacate the conviction.

Petitioner argues that his appeal from the denial of that motion was his "first appeal of right" and was not discretionary, and thus, appellate counsel Marshall must be held subject to the foregoing Sixth Amendment standards of performance. He notes (correctly) that an order denying a Section 1016.5(b) motion is appealable by California statute.[6] He reasons that, because he had a state law statutory right to appeal that motion denial and had not directly appealed his conviction before, his 2013 appeal of the denial of his Section 1016.5(b) motion constituted his "first appeal of right" for Sixth Amendment purposes. (Objections at 2-3.) While Respondent concedes that Petitioner had a statutory right to appeal the denial of his Section 1016.5(b) post-conviction motion to vacate his conviction, Respondent argues that this appeal was not the "first appeal of right" contemplated by the

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[6] *See People v. Totari*, 28 Cal. 4th 876, 882-83 (2002) (finding that denial of Section 1016.5(b) motion is an appealable order pursuant to California Penal Code § 1237(b)).

foregoing Supreme Court decisions. Respondent further contends that "there is no clearly established Supreme Court precedent that holds a defendant has a Sixth Amendment right to counsel on appeal from the denial of a post-conviction motion to vacate a judgment." (Reply at 2.)

It appears to the Court that Petitioner is confusing a state law statutory right to appeal a particular type of order with the Sixth Amendment jurisprudential concept of a first appeal of right, to which Sixth Amendment protections adhere. It also appears to the Court that Respondent is correct that, for Section 2265(d)(1) purposes, there is no clearly established Supreme Court precedent holding that this Sixth Amendment right applies to the denial of a post-conviction motion such as the Section 1016.5(b) motion at issue here. Nonetheless, the Court need not, and *does not*, resolve the question of whether the foregoing Supreme Court Sixth Amendment jurisprudence actually does or does not govern Petitioner's present claim. Even if the Court assumes, *arguendo*, that Petitioner had a Sixth Amendment right to the effective assistance of counsel in connection with his appeal of the denial of his Section 1016.5(b) motion to vacate his conviction, it is clear that the state courts did not act unreasonably in denying him habeas relief based on this claim. Petitioner's ineffective assistance claim fails, because it was not objectively unreasonable to conclude that he had not satisfied the governing *Strickland* standards, namely, he had shown deficient performance or any resulting prejudice from Marshall's failure to raise a claim that trial counsel provided ineffective assistance on the appeal of the denial of his California Penal Code § 1016.5(b) motion to vacate his conviction.

Section 1016.5 "allows a court to vacate a conviction only if the *trial court* has failed to advise the defendant of potential adverse immigration consequences at the time of the plea." *People v. Chien*, 159 Cal. App. 4th 1283, 1285 (2008) (emphasis in original). Section 1016.5 "cannot be used to assert *defense counsel's* failure to provide adequate representation relating to immigration consequences" of a guilty plea. *Id.* (emphasis in original); *People v. Kim*, 45 Cal. 4th 1078, 1107, n.20

(2009) (claim that defense counsel was ineffective for failing to advise defendant of the immigration consequences of his plea "is not a wrong encompassed by" Section 1016.5); *People v. Arendtsz*, 247 Cal. App. 4th 613, 619 (2016) (a claim of defense attorney's ineffective assistance in failing to advise noncitizen client about the risk of deportation attendant to a guilty plea may not be raised under Section 1016.5). Thus, Petitioner's contentions regarding the asserted ineffective assistance of trial counsel Fait and Aguilar – including that Fait failed to investigate and advise Petitioner of the immigration consequences of his guilty plea, and that Aguilar failed to assert that Fait provided ineffective assistance – could not have provided any basis for relief in the context of a Section 1016.5(b) motion. *See Chien*, 159 Cal. App. 4th at 1285; *Kim*, 45 Cal. 4th at 1107, n.20. Consequently, Marshall did not provide deficient performance by failing to make such arguments in the appeal of the superior court's order denying Petitioner's motion to vacate. *See Rupe v. Wood*, 93 F.3d 1434, 1445 (9th Cir. 1996) ("the failure to take a futile action can never be deficient performance"); *Pollard*, 119 F.3d at 1435; *Moormann v. Ryan*, 628 F.3d at 1109.

Petitioner argues that the Court is "wrong" in finding that his ineffective assistance of trial counsel claims could not have been raised within his appeal from the denial of his Section 1016.5(b) motion, citing various California decisions. (Objections at 3.) Those cited decisions, however, all relate to the right to raise such a claim on state *habeas* review; none of them hold that such a claim can be raised within an appeal from the denial of a Section 1016.5(b) motion. *See, e.g., In re Resendiz*, 25 Cal. 4th 230, 241-42 (2001) (holding that the existence of the Section 1016.5 remedy does not foreclose habeas claims alleging that trial counsel provided ineffective assistance in connection with a guilty plea in connection with which a Section 1016.5 advisement was given), *abrogated on other grounds by Padilla v. Kentucky*, 559 U.S. 356 (2010).

Petitioner then argues that Marshall provided ineffective assistance because,

in conjunction with his Section 1016.5(b) motion to vacate his conviction, he submitted to the trial court a habeas petition raising his ineffective assistance of trial counsel claim. He contends that, due to the existence of that trial court habeas petition, Marshall was constitutionally obligated to file a habeas petition on his behalf with the California Court of Appeal raising that claim. (Objections at 3-4.) Petitioner is mistaken. Marshall was appointed to represent him solely in connection with his appeal of the trial court's denial of his Section 1016.5(b) motion; she was not appointed to pursue separate proceedings based on direct attacks on his conviction such as his ineffective assistance of trial counsel claim.

The state court's decision rejecting Petitioner's claim of ineffective assistance of appellate counsel was not objectively unreasonable, as the *Strickland* deficient performance prong is unsatisfied. Accordingly, Section 2254 forecloses federal habeas relief, and the Petition should be denied.

## RECOMMENDATION

For all of the foregoing reasons, IT IS RECOMMENDED that the Court issue an Order: (1) accepting this Final Report and Recommendation; (2) denying the Petition; and (3) directing that Judgment be entered dismissing this action with prejudice.

DATED: July 29, 2019

GAIL J. STANDISH
UNITED STATES MAGISTRATE JUDGE

## NOTICE

Reports and Recommendations are not appealable to the United States Court of Appeals for the Ninth Circuit, but may be subject to the right of any party to file objections as provided in the Local Civil Rules for the United States District Court

for the Central District of California and review by the United States 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 the District Court enters judgment.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JOSE LUIS MORALES,

Petitioner

v.

STUART SHERMAN,

Respondent.

Case No. 5:16-cv-02679-DMG (GJS)

**ORDER ACCEPTING FINDINGS AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE**

Pursuant to 28 U.S.C. § 636, the Court has reviewed the Petition, all pleadings and other documents filed in this action, the original Report and Recommendation of United States Magistrate Judge [Dkt. 22, "Report"], Petitioner's Objections to the Report [Dkt. 23], Respondent's Reply [Dkt. 28], Petitioner's Objections to the Reply [Dkt. 29], the Final Report and Recommendation of the Magistrate Judge [Dkt. 30, "Final Report"], and Petitioner's Objections to the Final Report [Dkt. 31]. Pursuant to 28 U.S.C. § 636(b)(1)(C) and Fed. R. Civ. P. 72(b), the Court has conducted a de novo review of those matters to which objections have been stated.

Having completed its review, the Court accepts the findings and recommendations set forth in the Final Report. Accordingly, **IT IS ORDERED**

that: (1) the Petition is DENIED; and (2) Judgment shall be entered dismissing this action with prejudice.

DATE: August 30, 2019

DOLLY M. GEE
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JOSE LUIS MORALES,
Petitioner

v.

STUART SHERMAN,
Respondent.

Case No. 5:16-cv-02679-DMG (GJS)

**JUDGMENT**

Pursuant to the Court's Order Accepting Findings and Recommendations of United States Magistrate Judge,

IT IS ADJUDGED THAT the above-captioned action is dismissed with prejudice.

DATED: August 30, 2019

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Case No. 5:16-cv-02679-DMG (GJS)

**ORDER DENYING CERTIFICATE OF APPEALABILTY**

By separate Order and Judgment filed concurrently, the Court has determined that habeas relief should be denied and this 28 U.S.C. § 2254 action should be dismissed with prejudice. Under 28 U.S.C. § 2253(c)(1)(A), an appeal may not be taken from a "final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a state court" unless the appellant first obtains a certificate of appealability ("COA"). Petitioner has not requested a COA and, accordingly, the Court now addresses the COA question *sua sponte* pursuant to Rule 11(a) of the Rules Governing Section 2254 Cases in the United States District Courts.

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"A certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). In *Slack v. McDaniel*, 529 U.S. 473 (2000), the Supreme Court clarified the showing required to satisfy Section 2253(c)(2) when, as here, a habeas petition has been denied on the merits:

> To obtain a COA under § 2253(c), a habeas prisoner must make a substantial showing of the denial of a constitutional right, a demonstration that, under *Barefoot* [*Barefoot v. Estelle*, 463 U.S. 880, 103 S. Ct. 3383 (1983)], includes showing that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that issues were "'adequate to deserve encouragement to proceed further.'" [cit. om.]
>
> Where a district court has rejected the constitutional claim on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong.

*Id.* at 483-84. *See also Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003) (a petitioner satisfies Section 2253(c)(2) "by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further").

In her Final Report and Recommendation, the Magistrate Judge concluded that federal habeas relief was not warranted based on the claims alleged in the Petition. After carefully considering the record, the Court has accepted the Magistrate Judge's findings and conclusions in a concurrently-filed Order. The Court has further concluded that: reasonable jurists would not find its resolution of the Petition to be "debatable or wrong"; and the issues raised by Petitioner are not

"adequate to deserve encouragement to proceed further." *Slack*, 529 U.S. at 484. Accordingly, issuance of a certificate of appealability is not warranted.

**IT IS SO ORDERED.**

DATED: August 30, 2019

DOLLY M. GEE
UNITED STATES DISTRICT JUDGE

NOT TO BE PUBLISHED IN OFFICIAL REPORTS



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

Court of Appeal
Fourth Appellate District
Division Two
ELECTRONICALLY FILED

*3:03 pm, Mar 09, 2016*

By: B. Gonzalez

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE LUIS MORALES,

Defendant and Appellant.

E058677

(Super.Ct.No. RIF081595)

OPINION

APPEAL from the Superior Court of Riverside County. Christian F. Thierbach, Judge. Affirmed.

Marilee Marshall, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Charles C. Ragland and Joy Utomi, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Jose Luis Morales appeals from an order denying his motion to vacate and/or withdraw his plea. We find no error and affirm.

I

STATEMENT OF THE CASE

On May 9, 1998, two groups of youths were "tagging" in a storm drain. The victim offered to sell defendant—a member of the other group—some marijuana, but defendant declined. Instead, he decided to take the marijuana from the victim by armed force.[1]

Defendant and one of his companions approached the victim and inquired about the marijuana. Defendant then pointed his handgun (a 38-caliber revolver) at the victim and demanded the marijuana. When the victim refused, defendant fired a warning shot in the air and told the victim that if he did not comply by the count of three, defendant would kill him. The victim defied defendant and defendant shot him several times. He then pointed the gun at two of the victim's companions and appeared to attempt to fire it, but it did not discharge.

Although our record does not include an information, the felony complaint filed July 16, 1998, charged defendant with special circumstances murder (Pen. Code, § 190.2, subd. (a)(17)(A)[2] [in the course of robbery]) as well as personally discharging a firearm causing great bodily injury (§ 12022.53, subd. (d)). Defendant was also charged with two

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[1] Our statement of the facts of the case comes from the preliminary hearing transcript and primarily reflects admissions and statements made by defendant himself to investigators.

[2] All subsequent statutory references are to the Penal Code.

counts of assault with a firearm with respect to having pointed his gun at the victim's friends. (§ 245, subd. (a)(2).) It is apparent that all of these charges were amply supported by the evidence at the preliminary hearing.

On August 12, 1999, defendant entered a plea of guilty to first degree murder and admitted an enhancement under section 12022.5, subdivision (a)(1).[3] The agreed term was 29 years to life. The felony plea form does not contain an interpreter's statement—that is, there is a space for such a statement of translation, but it is blank. The form also included the information that "If I am not a citizen of the United States, I understand that this conviction may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States." Defendant initialed this space.

At the time of the plea, the trial court discussed with defendant the advantages of the plea, which allowed him to avoid the very real possibility of a sentence of life without possibility of parole. He then explained what the agreed sentence meant in terms of the time defendant would spend in prison and the factors which would bear on his chances for eventual release on parole.

This colloquy was conducted in English and defendant consistently responded appropriately with "Yes, Your Honor," "Yes, sir," "No, sir," and the like. Similar appropriate responses were made during the actual taking of the plea; for example, when

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[3] The original designation of section 12022.53 was in error as the numbering had been changed.

asked "how do you plead, sir?" defendant responded "Guilty, Your Honor." Counsel joined in the plea after confirming to the court that he was satisfied that it was in his client's best interest.

It did not take long for the enormity of his situation to sink in on defendant, however, and in November of the same year, and prior to sentencing, defendant, represented by new counsel, filed a motion to withdraw his plea. This motion was supported only by the declaration of counsel, who stated on information and belief that at the time of the plea defendant was fatigued, under "emotional duress," and depressed. Counsel also complained further that no Spanish interpreter was employed during the proceedings.

At the hearing on this motion, defendant was assisted by an interpreter. Defendant's original attorney testified that all of his discussions with defendant were conducted in English and that defendant did not appear to have difficulty with the language. He testified that the issue of communicating in Spanish never came up.[4] Counsel also told the court that his review of defendant's interviews with law enforcement personnel did not raise any concerns whatsoever about defendant's English fluency or comprehension. His last word was an emphatic "There was absolutely no

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[4] When defendant was asked if he would waive the attorney-client privilege so that his previous attorney could testify, he evidently responded in Spanish. The trial court observed drily "It's the first time I have heard Mr. Morales say 'Si, Senor. . . .' It's interesting."

reason for me to think that there was any problem with respect to Mr. Morales understanding me."

This motion was denied. The trial court went so far as to call the motion an apparent "fraud."

The next relevant filing[5] by defendant occurred on April 15, 2013, when he filed the motion involved in the current case, another motion to vacate the judgment but based upon the requirement of section 1016.5 that defendants entering pleas of guilty must be advised of the potential immigration consequences of that decision. In this motion defendant asserted that he was "[r]ecently" notified that federal officials had a "hold" on him, and had been asked if he "would like to be deported to complete the sentence in Mexico." Defendant asserted that he had been in the United States since he was a month old and would never have entered his plea had he known that he would be deported.[6]

The motion was denied without additional proceedings. Defendant appeals.

II

DISCUSSION

If a defendant establishes (1) that the advisements required by section 1016.5 were not given, (2) that he or she is in fact subject to adverse immigration action, and

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[5] In the interim, defendant had made repeated challenges to the restitution fine imposed at sentencing.

[6] Defendant attached a Judicial Council habeas corpus form (Judicial Council Forms, form MC-275) which also raised issues of ineffective assistance of counsel, such as counsel's failure to discover that he was not a citizen and that he was "mentally ill" due to childhood trauma. These claims are not raised here.

(3) that he or she would not have entered the plea if the advisements had been given, section 1016.5 requires the court to permit withdrawal of the plea. (*People v. Arriaga* (2014) 58 Cal.4th 950, 957-958.) We review for abuse of discretion. (*People v. Limon* (2009) 179 Cal.App.4th 1514, 1517.)

As we have noted above, although the trial court did not refer to immigration consequences when it actually took the plea, the plea form signed by defendant *did* contain the required warnings, and defendant, by initialing the appropriate box, indicated that he understood that it might apply to him. Such a written provision of the advisements through a plea form is permissible. (*People v. Ramirez* (1999) 71 Cal.App.4th 519, 522.) Hence, defendant's basic premise clearly fails.

However, in his opening brief defendant (implicitly conceding that advisements *were* given) argues that he was inadequately advised *in Spanish* of the immigration consequences—that he needed an interpreter to understand the plea form.

The only reference to this specific issue in the motion actually filed by defendant in the trial court came in the context of defendant's complaint that his attorney(s) did not investigate his mental state and/or the ineffectiveness of previous counsel: "petitioner appeared with Aguilar [attorney number two] for the hearings where *the only allegations made on petitioner's behalf* were that Fait [attorney number one] had pressured petitioner to accept the plea *and that Fait never acquired an interpreter for petitioner for any of the*

*proceedings* . . . ." (Italics added.) We observe that this is *not* a claim that defendant did not understand the advisements given or provided in English.[7]

In fact we appreciate defendant's evident personal recognition of the fact that his 1999 motion to withdraw his plea was meretricious, and we have no difficulty in rejecting the attempt by appellate counsel to revive it. There is *no* evidence attached to the current motion to vacate which tends to establish that defendant was not competent in English at the time of his plea. In fact, there was virtually no such evidence in the record at the time of the 1999 motion to withdraw the plea and ample affirmative evidence that he *was* fluent in English. Defendant did not establish that the advisements were inadequate for linguistic reasons.

Defendant then relies on the assertion that he did not believe that the advisements applied to him. We note that defendant, in the motion he prepared, stated that he had lived in the United States since he was a month old. Nothing suggests that he believed he was born in this country or that he was a citizen not subject to deportation. In any event relief under section 1016.5 is tied to whether the proper information was provided, not whether the defendant correctly analyzes it.[8] (Cf. *In re Resendiz* (2001) 25 Cal.4th 230,

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[7] Indeed, the motion filed in the superior court sub silentio *abandons* any such claim because defendant repeatedly stresses that he informed his attorneys of certain facts and "explained" certain matters to them which they should have, but did not, investigate. Hence, he implicitly concedes that he was able to communicate with counsel in English.

[8] We note that nothing in the record indicates that defendant asked trial counsel about his immigration status, or that trial counsel was aware that he was not a native citizen. We express no view on what effect these factors might have in a proper case.

250 [defendant informed counsel that he was not a citizen and affirmatively asked about immigration consequences, receiving bad advice].)

We also briefly note that although the People were not asked to respond to the motion below and accordingly did not have the opportunity to rebut defendant's "had I but known" claim, such a claim, if tested, would almost surely fail. Defendant's deportability depends on the fact that he was convicted of an "aggravated felony," which under federal immigration law includes any "crime of violence," further defined as the use of physical force against the person or property of another. (18 U.S.C. § 16(a), 8 U.S.C. §§ 1101(a)(43)(F) & 1227(a)(2)(A)(iii).) There is really no scenario under which defendant would not have been convicted of such an offense had he gone to trial. (By the time of his effort to withdraw his plea in the trial court, his codefendant had been convicted of first degree murder although he was not the actual shooter.) The most detailed and specific advice which defendant could have received was "You have the choice of having a chance for parole which very well might be in Mexico,[9] or staying in the United States for the rest of your life . . . in prison." We expect that defendant would have chosen the former.

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[9] Counsel could reasonably have also commented that by the time defendant was eligible for parole in the fairly distant future, immigration laws might have changed.

III

DISPOSITION

The judgment is affirmed.

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McKINSTER
J.

We concur:

RAMIREZ
P. J.

MILLER
J.