FILED

AUG 25 2022

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JEFF BAOLIANG ZHANG, Ph.D, Petitioner-Appellant, v. STUART SHERMAN, Warden, Respondent-Appellee.	No. 21-55493 D.C. No. 2:18-cv-09361-GW-PVC Central District of California, Los Angeles ORDER

Before: SILVERMAN and M. SMITH, Circuit Judges.

The request for a certificate of appealability (Docket Entry Nos. 8, 9, 10 and 11) 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.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JEFF BAOLIANG ZHANG, Petitioner, v. STU SHERMAN, Warden, Respondent.	Case No. CV 18-9361 GW (PVC) **ORDER ACCEPTING FINDINGS, CONCLUSIONS AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE**

Pursuant to 28 U.S.C. § 636, the Court has reviewed the Petition, all the records and files herein, the Report and Recommendation of the United States Magistrate Judge, and Petitioner's Objections. After having made a de novo determination of the portions of the Report and Recommendation to which Objections were directed, the Court concurs with and accepts the findings and conclusions of the Magistrate Judge.

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IT IS ORDERED that the Petition is denied and Judgment shall be entered dismissing this action with prejudice.

IT IS FURTHER ORDERED that the Clerk serve copies of this Order and the Judgment herein on Petitioner and on counsel for Respondent.

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED: January 11, 2021

GEORGE H. WU
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JEFF BAOLIANG ZHANG,

Petitioner,

v.

STU SHERMAN, Warden,

Respondent.

Case No. CV 18-9361 GW (SS)

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This Report and Recommendation is submitted to the Honorable George H. Wu, United States District Judge, pursuant to 28 U.S.C. § 636 and General Order 05-07 of the United States District Court for the Central District of California.

I.

INTRODUCTION

Effective October 23, 2018,[1] Jeff Baoliang Zhang ("Petitioner"), a California state prisoner proceeding pro se, constructively filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. (Dkt. No. 1). On December 17, 2018, Respondent filed a Motion to Dismiss the Petition as untimely with an accompanying Memorandum of Points and Authorities. (Dkt. No. 7). On January 16, 2019, Petitioner filed an Opposition to the Motion to Dismiss. (Dkt. No. 12).

On June 14, 2019, the Court denied the Motion to Dismiss without prejudice and ordered Respondent to file an Answer to the Petition. (Dkt. No. 20). On August 19, 2019, Respondent filed an Answer to the Petition with an accompanying Memorandum of Points and Authorities ("Ans. Mem."). (Dkt. No. 30). Respondent has also lodged relevant portions of the record from Petitioner's state court proceedings, including a one-volume copy of the Clerk's Transcript ("CT") and a two-volume copy of the Reporter's Transcript ("RT"). (Dkt. Nos. 8, 31). On September 16, 2019, Petitioner filed a Reply. (Dkt. No. 34).

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[1] "In determining when a pro se state or federal petition is filed, the 'mailbox' rule applies. A petition is considered to be filed on the date a prisoner hands the petition to prison officials for mailing[,]" Porter v. Ollison, 620 F.3d 952, 958 (9th Cir. 2010); Houston v. Lack, 487 U.S. 266, 276 (1988), which in this case occurred on October 23, 2018. (See Proof of Service by United States Mail attached to Dkt. No. 1).

For the reasons discussed below, it is recommended that the Petition be DENIED and this action be DISMISSED with prejudice.

II.

PRIOR PROCEEDINGS

On September 3, 2015, in Los Angeles County Superior Court, Petitioner: pled no contest to, and was convicted of, one count of assault with a semiautomatic firearm in violation of California Penal Code ("P.C.") § 245(b);[2] pled guilty to, and was convicted of, one count of shooting at an inhabited dwelling in violation of P.C. § 246; and admitted he personally used a firearm within the meaning of P.C. § 12022.5(a).[3] (CT 74-76; RT 1501-10). On October 8, 2015, the trial court sentenced Petitioner to nine years in state prison. (CT 90-93, 109-10; RT 2108-13).

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[2] Petitioner pled "no contest" to the assault with a semiautomatic firearm charge pursuant to People v. West, 3 Cal. 3d 595 (1970). (RT 1508-10). A West plea allows "a defendant both to deny committing a crime and to admit that there is sufficient evidence to convict him." Roe v. Flores-Ortega, 528 U.S. 470, 473 (2000); see also In re Alvernaz, 2 Cal. 4th 924, 932 (1992) (describing a West plea as "a plea of nolo contendere, not admitting a factual basis for the plea"). "In California, the legal effect of a no contest (or 'nolo contendere') plea to a felony offense is 'the same as that of a plea of guilty for all purposes.'" Hernandez-Cruz v. Holder, 651 F.3d 1094, 1097 n.3 (9th Cir. 2011) (quoting P.C. § 1016(3)).

[3] Petitioner rejected the prosecution's offer of a ten-year sentence and instead entered an "open" plea "without any guarantees as to what the Court [would] do at the time of sentencing." (RT 1501-10).

Petitioner appealed his convictions and sentence to the California Court of Appeal (2d App. Dist.), but abandoned the appeal on March 16, 2016. (CT 111-12; Lodgment 2).

Effective January 9, 2018, Petitioner filed a habeas corpus petition in Los Angeles County Superior Court. (Lodgment 3). On January 25, 2018, the Superior Court issued an order indicating it had partially granted the petition by providing Petitioner "an additional 100 days of actual credits[,]" and had taken the rest of the petition under submission. (Lodgment 4). On March 14, 2018, the Superior Court denied the remainder of the habeas petition. (Lodgment 5). Effective April 2, 2018, Petitioner filed a habeas corpus petition in the California Court of Appeal (2d App. Dist., Div. 4), which denied the petition on April 9, 2018 because "petitioner ha[d] not stated facts or provided evidence sufficient to demonstrate a *prima facie* case for relief." (Lodgments 6-7). Effective May 22, 2018, Petitioner filed a habeas corpus petition in the California Supreme Court, which denied the petition on September 26, 2018. (Lodgments 8-9).

III.

PETITIONER'S CLAIMS

The Petition raises five grounds for federal habeas relief. In Ground One, Petitioner contends there was no evidence he violated P.C. § 245(b). (Petition at 5, 10-13).[4] In Ground Two,

[4] For ease of reference the Court cites to the Petition as it is paginated on the Court's electronic docket. (See Dkt. No. 1).

Petitioner alleges he was "forced to take [a] plea bargain" because defense counsel "threatened [Petitioner] a few times when [he] wanted a trial."[5] (Id. at 5-6, 13-18). In Ground Three, Petitioner asserts that the "state courts willfully neglected" the allegations set forth in Grounds One and Two. (Id. at 6, 18-20). In Ground Four, Petitioner claims the state courts "did not observe the principle for habeas corpus" when they ignored his requests for a hearing. (Id. at 6, 20-23). In Ground Five, Petitioner complains the state courts "did not want to get" a "7-page open document" he submitted to the Los Angeles Police Department. (Id. at 6, 23-31).

IV.

STANDARD OF REVIEW

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") "bars relitigation of any claim 'adjudicated on the merits' in state court, subject only to the exceptions in §§ 2254(d)(1) and (d)(2)." Harrington v. Richter, 562 U.S. 86, 98 (2011). Under AEDPA's deferential standard, a federal court may grant habeas relief only if the state court adjudication was contrary to or an unreasonable application of clearly established federal law, as determined by the Supreme Court, or was based upon

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[5] The Los Angeles County Public Defender's office initially represented Petitioner, but was replaced by retained counsel (referred to as "defense counsel" throughout this Report and Recommendation) on December 15, 2014. (See CT 1-17; RT 301-04; Lodgment 12). It was retained counsel who represented Petitioner when he entered into the September 3, 2015 plea agreement he now challenges. (See CT 74-76; RT 1501-11).

an unreasonable determination of the facts. Id. at 100 (citing 28 U.S.C. § 2254(d)). "This is a difficult to meet and highly deferential standard for evaluating state-court rulings, which demands that state-court decisions be given the benefit of the doubt[.]" Cullen v. Pinholster, 563 U.S. 170, 181 (2011) (citations and internal quotation marks omitted).

Petitioner raised Ground Two in his habeas corpus petition to the California Supreme Court,[6] which denied the petition without comment or citation to authority.[7] (Lodgments 8-9). The Court "looks through" the California Supreme Court's silent denial to the last reasoned decision, which is presumed to be the basis for the California Supreme Court's decision. Wilson v. Sellers, 138 S. Ct. 1188, 1192 (2018); Ylst v. Nunnemaker, 501 U.S. 797, 803 (1991). That presumption has not been rebutted here. Therefore, in addressing Ground Two, the Court will consider the California Court of Appeal's opinion denying Petitioner's application for state habeas corpus relief.

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[6] As discussed below, Petitioner's plea agreement forecloses Ground One and Grounds Three through Five are not cognizable in this proceeding; therefore, the Court only addresses the standard of review applicable to Ground Two.

[7] The parties dispute the Petition's timeliness with Respondent contending the Petition is untimely and Petitioner arguing equitable tolling is appropriate. (See, e.g., Ans. Mem. at 3-10; Reply at 1, 5-7). The Court will not address this dispute, however, because it retains the discretion to deny claims on the merits even if the claims are alleged to be untimely. See Cooper v. Calderon, 274 F.3d 1270, 1275 n.3 (9th Cir. 2001) (per curiam) (denying petition on merits rather than remanding to consider equitable tolling); Van Buskirk v. Baldwin, 265 F.3d 1080, 1083 (9th Cir. 2001) (Court may properly deny petition on merits rather than reaching "the complex questions lurking in the time bar of the AEDPA.").

V.

DISCUSSION

A. Petitioner's Plea Agreement Forecloses Ground One

"When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea." Tollett v. Henderson, 411 U.S. 258, 267 (1973); United States v. Broce, 488 U.S. 563, 574 (1989). The principle behind this doctrine is that "a guilty plea represents a break in the chain of events which has preceded it in the criminal process." Tollett, 411 U.S. at 267; Haring v. Prosise, 462 U.S. 306, 321 (1983). A defendant who pleads guilty or no contest is convicted and sentenced according to his plea and not upon the evidence. Brady v. United States, 397 U.S. 742, 748 (1970). By his plea, the defendant admits he committed the charged offense, and all that remains for disposition of the case is imposition of the sentence and entry of the judgment. North Carolina v. Alford, 400 U.S. 25, 32 (1970); Broce, 488 U.S. at 570. Accordingly, almost the only pre-plea challenges to survive a guilty or no contest plea are whether the plea was voluntary, whether the defendant received ineffective assistance of counsel in deciding to enter his plea, and whether a jurisdictional defect precluded the Government's power to prosecute. See, e.g., Broce, 488 U.S. at 569; Hill v. Lockhart, 474 U.S. 52, 56 (1985); see also Bousley v. United States, 523 U.S. 614, 621 (1998) ("'It is well settled

that a voluntary and intelligent plea of guilty made by an accused person, who has been advised by competent counsel, may not be collaterally attacked.'" (citation omitted)).

In Ground One, Petitioner asserts he is entitled to habeas corpus relief because there was no evidence to support his conviction for assault with a semiautomatic firearm.[8] (Petition at 5, 10-13). Respondent disagrees, contending Tollett and its progeny bar Ground One. (Ans. Mem. at 12-13). Respondent is correct. Petitioner's no contest plea forecloses his insufficient evidence claim. Tollett, 411 U.S. at 267; see also Ortberg v. Moody, 961 F.2d 135, 137-38 (9th Cir. 1992) ("Petitioner's nolo contendere plea precludes him from challenging alleged constitutional violations that occurred prior to the entry of that plea."); Jackson v. Janda, 2013 WL 6284067, *3 (C.D. Cal. 2013) ("Petitioner's no contest plea . . . forecloses Petitioner's claim[] that his conviction was based on insufficient evidence[.]"); Turner v. Stainer, 2012 WL 5389762, *7 (C.D. Cal. 2012) ("To the extent Petitioner's second claim can be construed as challenging the sufficiency of the evidence to support his failure-to-register conviction, . . . it . . . fails because he pleaded guilty to the offense and therefore cannot claim that the

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[8] As noted, in entering a West plea to the assault with a semiautomatic firearm, Petitioner conceded "there [was] sufficient evidence to convict him." Flores-Ortega, 528 U.S. at 473. Moreover, the trial court found there was a factual basis for Petitioner's no contest plea (CT 75; RT 1510), and this finding is supported by evidence presented at the preliminary hearing. (See CT 1-18; Lodgment 12; see also CT 78-80).

prosecution's evidence was insufficient."); Salazar v. McEwen, 2012 WL 5381547, *10 (C.D. Cal.) ("[B]ecause petitioner's contention regarding the sufficiency of the evidence underlying the assault offense charged in Count 2 relates to matters other than the voluntariness of his plea, it is barred by the Tollett rule."), report and recommendation adopted by, 2012 WL 5381539 (C.D. Cal. 2012).

B. Petitioner Is Not Entitled To Relief On Ground Two

A guilty or no contest plea "operates as a waiver of important rights, and is valid only if done voluntarily, knowingly, and intelligently, 'with sufficient awareness of the relevant circumstances and likely consequences.'" Bradshaw v. Stumpf, 545 U.S. 175, 183 (2005) (quoting Brady, 397 U.S. at 748); Boykin v. Alabama, 395 U.S. 238, 242-44 (1969); see also Hill, 474 U.S. at 56 ("The longstanding test for determining the validity of a guilty plea is 'whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.'" (quoting Alford, 400 U.S. at 31)). "A habeas petitioner bears the burden of establishing that his guilty plea was not voluntary and knowing." Little v. Crawford, 449 F.3d 1075, 1080 (9th Cir. 2006) (citing Parke v. Raley, 506 U.S. 20, 31-34 (1992)).

In Ground Two, Petitioner alleges he was "forced to take [a] plea bargain" because defense counsel "threatened [Petitioner] a

few times when [he] wanted a trial."[9] (Petition at 5-6, 13-18). However, the California Court of Appeal denied Petitioner's claim because he had "not stated facts or provided evidence sufficient to demonstrate a prima facie case for relief." (Lodgment 7).

"It goes without saying that a plea must be voluntary to be constitutional." United States v. Kaczynski, 239 F.3d 1108, 1114 (9th Cir. 2001). A guilty or no contest plea, "if induced by promises or threats which deprive it of the character of a voluntary act, is void." Machibroda v. United States, 368 U.S. 487, 493 (1962); United States v. Seng Chen Yong, 926 F.3d 582, 590-91 (9th Cir. 2019); Doe v. Woodford, 508 F.3d 563, 570 (9th Cir. 2007); see also Brady, 397 U.S. at 750 ("[T]he agents of the State may not produce a plea by actual or threatened physical harm or by mental coercion overbearing the will of the defendant."). "Where . . . a defendant is represented by counsel during the plea process and enters his plea upon the advice of counsel, the voluntariness

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[9] The Court broadly construes Petitioner's allegations as a challenge to the voluntariness of his plea based on ineffective assistance of counsel. So construed, the Court rejects Respondent's argument that Tollett bars Ground Two. (See Ans. Mem. at 12-13); Tollett, 411 U.S. at 267; see also Mahrt v. Beard, 849 F.3d 1164, 1170 (9th Cir. 2017) ("Tollett, properly understood, provides that although freestanding constitutional claims are unavailable to habeas petitioners who plead guilty [or no contest], claims of pre-plea ineffective assistance of counsel are cognizable on federal habeas review when the action, or inaction, of counsel prevents petitioner from making an informed choice whether to plead."). However, Petitioner's complaints about the public defender (see Petition at 5, 15), who was replaced as Petitioner's counsel almost nine months before Petitioner entered his no contest/guilty plea, are Tollett-barred because they have no bearing on whether Petitioner made an informed choice to accept a plea agreement. Tollett, 411 U.S. at 267; Mahrt, 849 F.3d at 1170. Moreover, the complaints about the public defender are meritless.

of the plea depends of whether counsel's advice was 'within the range of competence demanded of attorneys in criminal cases.'"[10] Hill, 474 U.S. at 56 (quoting McMann v. Richardson, 397 U.S. 759, 771 (1970)); see also Tollett, 411 U.S. at 267 (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 standards set forth in McMann.").

To succeed on an ineffective assistance of counsel claim, Petitioner must demonstrate both that counsel's performance was deficient and that the deficient performance prejudiced the defense. Strickland v. Washington, 466 U.S. 668, 687 (1984); see also Lafler v. Cooper, 566 U.S. 156, 162-63 (2012) ("'[T]he two-part Strickland v. Washington test applies to challenges to guilty pleas based on ineffective assistance of counsel.'" (quoting Hill, 474 U.S. at 58)). "'To establish deficient performance, a person challenging a conviction must show that 'counsel's representation fell below an objective standard of reasonableness.'" Richter, 562 U.S. at 104 (citation omitted); Premo v. Moore, 562 U.S. 115, 121 (2011). In the guilty plea context, prejudice "focuses on

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[10] "The Sixth Amendment guarantees criminal defendants the effective assistance of counsel[,]" Yarborough v. Gentry, 540 U.S. 1, 4 (2003) (per curiam); see also Missouri v. Frye, 566 U.S. 134, 138 (2012) ("The right to counsel is the right to effective assistance of counsel."), and this guarantee "extends to the plea-bargaining process." Lafler v. Cooper, 566 U.S. 156, 162 (2012); see also Padilla v. Kentucky, 559 U.S. 356, 373 (2010) ("[T]he negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel." (citing Hill, 474 U.S. at 57)).

whether counsel's constitutionally ineffective performance affected the outcome of the plea process." Hill, 474 U.S. at 59; Turner v. Calderon, 281 F.3d 851, 879 (9th Cir. 2002). Thus, in cases such as this, "where a [petitioner] complains that ineffective assistance led him to accept a plea offer as opposed to proceeding to trial, the [petitioner must] show 'a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.'" Missouri v. Frye, 566 U.S. 134, 148 (2012) (quoting Hill, 474 U.S. at 59).

Here, Petitioner complains he was coerced into accepting a plea bargain when, on the day trial was set to start, defense counsel approached him, informed him of the prosecutor's ten-year plea offer, told him that he must quickly decide whether to accept the offer or go to trial, stated that a jury trial would be bad for Petitioner and if he went to trial and was convicted he could be sentenced to as many as nineteen years in prison. (Petition at 15-16). Petitioner also alleges that when he complained that ten years was too long, defense counsel again coerced Petitioner to enter a plea by telling him that counsel "would negotiate with the judge to release [Petitioner] soon." (Id. at 16). These allegations do not provide grounds for habeas relief.

A "'defendant has the right to make a reasonably informed decision whether to accept a plea offer[,]'" Turner, 281 F.3d at 880 (citation omitted), and to ensure the defendant is able to do so, it is "the critical obligation of counsel to advise the client

of 'the advantages and disadvantages of a plea agreement.'" Padilla v. Kentucky, 559 U.S. 356, 370 (2010) (quoting Libretti v. United States, 516 U.S. 29, 50-51 (1995)); see also Turner, 281 F.3d at 881 ("Counsel cannot be required to accurately predict what the jury or court might find, but he can be required to give the defendant the tools he needs to make an intelligent decision."); Iaea v. Sunn, 800 F.2d 861, 865 (9th Cir. 1986) ("Because 'an intelligent assessment of the relative advantages of pleading guilty is frequently impossible without the assistance of an attorney,' counsel have a duty to supply criminal defendants with necessary and accurate information." (quoting Brady, 397 U.S. at 748 n.6)). Defense counsel provided Petitioner with accurate information about the possible sentence he could receive if unsuccessful at trial (see CT 19, 82; RT 1503), and the provision of this information was necessary for Petitioner to understand the advantages and disadvantages of entering a plea agreement. Padilla, 559 U.S. at 370; Libretti, 516 U.S. at 50-51; see also United States v. Day, 969 F.2d 39, 43 (3d Cir. 1992) ("Knowledge of the comparative sentence exposure between standing trial and accepting a plea offer will often be crucial to the decision whether to plead guilty."). Clearly, defense counsel did not render ineffective assistance by providing Petitioner with such "necessary and accurate information." Iaea, 800 F.2d at 865; Turner, 281 F.3d at 881.

"Nor does defense counsel's blunt rendering of an honest but negative assessment of [Petitioner's] chances at trial, combined with advice to enter [a] plea, constitute improper behavior or

coercion that would suffice to invalidate a plea." United States v. Juncal, 245 F.3d 166, 172 (2d Cir. 2001); see also United States v. Crank, 438 F.2d 635, 637 (9th Cir. 1971) (defense counsel's "honest advice" that defendant "did not have 'a leg to stand on' and should enter a plea of guilty" did not constitute coercion); Thomas v. Lizarraga, 2015 WL 10079774, *15 (C.D. Cal. 2015) ("An attorney's negative assessment of the chances of prevailing at trial does not invalidate a subsequent guilty plea."), report and recommendation accepted by, 2016 WL 593425 (C.D. Cal. 2016); United States v. Beltran-Moreno, 2011 WL 6780842, *9 (D. Ariz. 2011) ("A frank assessment of a defendant's limited chances at trial does not amount to ineffective assistance or coercion."), report and recommendation accepted by, 2012 WL 160173 (D. Ariz. 2012). Indeed, while Petitioner might not have been happy with his options or defense counsel's opinion (see Petition at 16), "being forced to choose between unpleasant alternatives is not unconstitutional." Kaczynski, 239 F.3d at 1115-16; see also Doe, 508 F.3d at 572 ("We have no doubt that the decision to plead guilty is a difficult one for many defendants, but the fact that one struggles with the decision, and might later even come to regret it, does not render it coerced.").

Moreover, to the extent Petitioner alleges defense counsel coerced him into entering a plea by telling him he would negotiate with the judge to "release [Petitioner] soon[,]" (Petition at 16), the plea colloquy belies his claim. In particular, after waiving his constitutional rights and being informed of the consequences of his plea, Petitioner was asked if "anyone threatened [him] or

anyone close to [him] to get [him] to plead today" and Petitioner responded "No[.]" (RT 1503-05). Petitioner was then asked if "anyone made any promises to [him] other than what [the prosecutor] stated here in open court in order to get [him] to plead today[,]" Petitioner responded "No" and the Court added "There are no promises." (RT 1505-06). Petitioner was also asked if he was "pleading freely and voluntarily because [he] believe[d]" it was "in [his] best interests to do so[,]" and he answered "Yes." (RT 1506). Petitioner's "[s]olemn declarations in open court carry a strong presumption of verity" and constitute a "formidable barrier" to collateral attack that are not overcome by his vague and conclusory allegations. Blackledge v. Allison, 431 U.S. 63, 74 (1977); Womack v. Del Papa, 497 F.3d 998, 1003-04 (9th Cir. 2008).

Petitioner also vaguely and conclusorily complains he was required to quickly consider the prosecutor's plea offer and "decide right away" whether to accept it.[11] (Petition at 16-17). However, "the amount of time [Petitioner] had to consider the plea is only relevant if it somehow rendered his plea coerced, and therefore involuntary." Doe, 508 F.3d at 570. Petitioner has not shown this to be the case. To the contrary, in addition to stating he was entering a plea freely and voluntarily because it was in his best interest to do so, when Petitioner was questioned about whether he "had enough time to speak to [his] attorney about the consequences of [his] plea, the facts of this case, and any possible

[11] Petitioner asserts he was required to decide quickly because the prosecutor was going to attend a funeral, but also contradictorily asserts that trial was set to begin that day. (Petition at 16).

defenses [he] might have[,]" he responded "Yeah, he talked to me" and stated he was satisfied with the conversation with defense counsel. (RT 1506). Petitioner's vague and conclusory allegations are insufficient to overcome his solemn declarations in open court.[12] Allison, 431 U.S. at 74; see also Doe, 508 F.3d at 571-72 (rejecting claim that short period of time Doe had to consider plea offer undermined the voluntariness of his plea when "Doe participated in a thorough plea colloquy, in which he answered in the affirmative that his plea was voluntary under the circumstances and[] specifically answered in the affirmative when asked if he had had enough time to discuss the plea with his attorneys.").

Finally, Petitioner complains that when he was sentenced on October 8, 2015, the trial court offered him parole, but his defense counsel responded "'No parole! No parole! Never parole!'"[13] (Petition at 17-19). However, the sentencing hearing transcript contradicts this dubious allegation, which provides no basis for habeas corpus relief. See Dows v. Wood, 211 F.3d 480, 487 (9th Cir. 2000) ("Dows cannot prove deficient performance or prejudice based upon" an "argument [that] is without factual support.").

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[12] Moreover, Petitioner referenced the ten-year plea offer in a letter dated June 8, 2015 (CT 64), which suggests the plea offer was available for several months before Petitioner entered his plea. Cf. Doe, 508 F.3d at 572 ("Recall . . . that Doe was offered identical terms . . . more than a year before he pleaded guilty.").

[13] Petitioner is presumably referring to the possibility of probation rather than parole. However, the trial court denied Petitioner probation. (RT 2107-08).

Accordingly, the state court's rejection of Ground Two was not contrary to, or an unreasonable application of, clearly established federal law.

C. Grounds Three Through Five Are Not Cognizable On Habeas Review

In Grounds Three through Five, Petitioner challenges procedures used in the state habeas proceedings, complaining, inter alia, that the state habeas courts ignored evidence and did not provide him with an evidentiary hearing. (Petition at 6, 18-31). However, these claims are not cognizable because a "petition alleging errors in the state post-conviction review process is not addressable through habeas corpus proceedings."[14] Franzen v. Brinkman, 877 F.2d 26, 26 (9th Cir. 1989) (per curiam); see also Cooper v. Neven, 641 F.3d 322, 331-32 (9th Cir. 2011) (Claims based

[14] Petitioner also alleges in Ground Five that when he turned himself in on December 15, 2011, he provided authorities with a "7-page open document" explaining that "Chinese communist agents" were after him, but the Los Angeles Police Department "willfully put" this document "into oblivion." (Petition at 6, 23-24). Even if this vague and conclusory statement could be read to raise a due process destruction of evidence claim pursuant to California v. Trombetta, 467 U.S. 479 (1984), and its progeny, it would not benefit Petitioner since Tollett would bar such a claim. Tollett, 411 U.S. at 267; see also Jackson v. Swarthout, 2017 WL 8292976, *7 (C.D. Cal. 2017) ("When Petitioner pleaded no contest on September 15, 2011, he was fully aware of the circumstances of the loss of cell phone evidence. His claim that the state destroyed or failed to preserve exculpatory evidence is barred by Tollett."); Eleri v. Hartley, 2014 WL 3870381, *8 (C.D. Cal.) ("Petitioner's allegation that the State destroyed exculpatory evidence is foreclosed by Petitioner's no contest plea."), report and recommendation accepted by, 2014 WL 3888091 (C.D. Cal. 2014); Paleologus v. Lopez, 2013 WL 5818540, *5 (C.D. Cal. 2013) (Given petitioner's guilty plea, Tollett barred allegation that prosecutor destroyed material exculpatory evidence).

on "activities arising out of the state trial court's consideration of [the petitioner's] last state habeas petition" are not cognizable on federal habeas corpus review); Villafuerte v. Stewart, 111 F.3d 616, 632 n.7 (9th Cir. 1997) (allegations that a petitioner "was denied due process in his state habeas corpus proceedings . . . are not addressable in a [§] 2254 proceeding").

VI.

CONCLUSION

For the foregoing reasons, IT IS RECOMMENDED that the District Judge issue an Order: (1) accepting this Report and Recommendation, (2) denying the Petition for Writ of Habeas Corpus, and (3) directing that Judgment be entered dismissing this action with prejudice.

DATED: October 11, 2019

/S/
SUZANNE H. SEGAL
UNITED STATES MAGISTRATE JUDGE

NOTICE

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

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