

UNITED STATES COURT OF APPEALS

**FILED**

FOR THE NINTH CIRCUIT

SEP 29 2022

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

MARIO TORRES,

Petitioner-Appellant,

v.

SCOTT KERNAN,

Respondent-Appellee.

No. 22-16080

D.C. No. 4:20-cv-03159-PJH  
Northern District of California,  
Oakland

ORDER

Before: CLIFTON and VANDYKE, 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  
NORTHERN DISTRICT OF CALIFORNIA

MARIO TORRES,  
Petitioner,

v.

SCOTT KERNAN,  
Respondent.

Case No. 20-cv-03159-PJH

**JUDGMENT**

The court having entered a ruling today denying the petition for a writ of habeas corpus, judgment is entered in favor of respondent and against petitioner.

**IT IS SO ORDERED.**

Dated: June 23, 2022

/s/ Phyllis J. Hamilton  
PHYLLIS J. HAMILTON  
United States District Judge

United States District Court  
Northern District of California

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

MARIO TORRES,  
Petitioner,

v.

SCOTT KERNAN,  
Respondent.

Case No. 20-cv-03159-PJH

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

This is a habeas corpus case filed pro se by a former state prisoner pursuant to 28 U.S.C. § 2254. The court ordered respondent to show cause why the writ should not be granted. Respondent filed an answer and lodged exhibits with the court and petitioner filed a reply. For the reasons set out below, the petition is denied.

**BACKGROUND**

The facts of the underlying convictions are not relevant to this petition; however, a detailed description of the procedural history of petitioner's cases and federal habeas petitions is required.

On June 3, 2013, an information was filed accusing petitioner of battery causing serious bodily injury, in case no. 05-131090-3 ("Case One"). Answer Ex. 1 at 1-2. On July 3, 2013, an information was filed accusing petitioner of inflicting corporal injury on a spouse or cohabitant, in case no. 05-131416-0 ("Case Two"). *Id.* Ex. 2 at 53-58. On July 17, 2013, a complaint was filed accusing petitioner of misdemeanor being under the influence of methamphetamine, in case no. 01-163572-1 ("Case Three"). *Id.* Ex. 3 at 123. On August 26, 2013, a complaint was filed accusing petitioner of misdemeanor possession of a controlled substance, in case no. 01-163919-4 ("Case Four"). *Id.* Ex. 4.

1           Petitioner was found guilty at a jury trial in Case One and sentenced to six years in  
2           prison, but the California Court of Appeal reversed the conviction and remanded for a  
3           retrial. *Id.* Ex. 2 at 83-97. On February 5, 2015, all of the above cases were resolved  
4           pursuant to a plea agreement. *Id.* Ex. 5 at 8-10. Petitioner pled guilty to various counts  
5           in Case One, Case Two and Case Three. *Id.* He was sentenced to six years in state  
6           prison in Case One, with concurrent terms in the remaining cases. *Id.* at 10-12. The  
7           prosecutor dismissed all the remaining counts and Case Four in its entirety. *Id.* at 12-13.  
8           However, the abstract of judgment in Case Two erroneously indicated that the prison  
9           terms were to be served consecutively instead of concurrently. *Id.* Ex. 2 at 61. This error  
10          gives rise to the claims in this petition.

11          Petitioner did not appeal his conviction, but he filed several state habeas petitions.  
12          See *Torres v. Hatton*, Case No. 17-4332 PJH, Docket No. 42 at 2-3. On July 31, 2017,  
13          petitioner filed a previous federal habeas petition in this court. Case No. 17-4332, Docket  
14          No. 1. Petitioner raised many claims in *Torres v. Hatton*, Case No. 17-4332 PJH,  
15          including several claims in the instant petition. Case No. 17-4332, Docket No. 42. This  
16          court stayed the petition so that petitioner could exhaust his claims. Case No. 17-4332,  
17          Docket No. 18. Petitioner filed a petition in the California Supreme Court on February 2,  
18          2018, which was denied on May 9, 2018. Case No. 17-4332, Docket No. 42 at 3.

19          While the petition to the California Supreme Court was pending, the California  
20          Department of Corrections and Rehabilitation wrote a letter to the superior court  
21          requesting clarification regarding whether petitioner's sentences were to be served  
22          concurrently or consecutively because he was nearing his release date. Answer Ex. 1 at  
23          10. On April 3, 2018, the superior court repeated its earlier error and mistakenly issued  
24          amended abstracts and a letter stating the sentences were to be served consecutively.  
25          *Id.* Ex. 1 at 3-5; Ex. 2 at 59.

26          On July 30, 2018, this court lifted the stay in *Torres v. Hatton*, Case No. 17-4332  
27          PJH, and ordered respondent to show cause. Case No. 17-4332, Docket No. 28. On  
28          September 12, 2018, petitioner filed a habeas petition in the superior court. Docket No.

1 14-2 at 16. On October 3, 2018, the superior court issued a correct amended abstract  
2 showing that the prison term in Case Two was to be served concurrently to the term for  
3 Case One. Answer Ex. 6. Petitioner was released from prison on November 14, 2018.  
4 *Id.* Ex. 7.

5 On October 24, 2018, a different department of the superior court issued an order  
6 to show cause on petitioner's claim that his sentence was modified in violation of the plea  
7 agreement. Docket No. 14-2 at 15-18. On October 31, 2018, the prosecution filed a  
8 response indicating that the abstract of judgment had been correctly amended on  
9 October 3, 2018. *Id.* at 20-21. The superior court concluded that the petition was  
10 therefore moot. *Id.* at 22.

11 This court denied the previous federal habeas petition in *Torres v. Hatton*, Case  
12 No. 17-4332 PJH, on the merits on March 8, 2019. Case No. 17-4332, Docket No. 42.  
13 The Ninth Circuit denied a certificate of appealability on September 13, 2019, and the  
14 United States Supreme Court denied a petition for writ of certiorari on February 24, 2020.  
15 Case No. 17-4332, Docket Nos. 57, 59.

16 This instant federal petition was filed on May 11, 2020. Docket No. 1. This court  
17 stayed the petition for petitioner to exhaust the claims and the California Supreme Court  
18 later denied the petition for review. Docket No. 10; Answer, Ex. 9.

19 On April 2, 2021, petitioner filed another habeas petition in this court, *Torres. v.*  
20 *Allison*, Case No. 21-2406 YGR, and respondent was later ordered to show cause.

21 On February 25, 2022, the court in the instant case denied the petition and  
22 entered judgment. On that same day, respondent filed a motion to relate *Torres. v.*  
23 *Allison*, Case No. 21-2406 YGR, and the instant case. On March 1, 2022, the court  
24 reopened the instant case, vacated the judgment, related the cases and construed the  
25 petition in *Torres. v. Allison*, Case No. 21-2406 YGR, as an amended petition and  
26 ordered respondent to file a response to the additional claims. Respondent filed an  
27 answer and petitioner filed a reply.  
28

## STANDARD OF REVIEW

A district court may not grant a petition challenging a state conviction or sentence 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; 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). The first prong applies both to questions of law and to mixed questions of law and fact, see *Williams (Terry) v. Taylor*, 529 U.S. 362, 407-09 (2000), while the second prong applies to decisions based on factual determinations, see *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003).

A state court decision is "contrary to" Supreme Court authority, that is, falls under the first clause of § 2254(d)(1), only if "the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts." *Williams (Terry)*, 529 U.S. at 412-13. A state court decision is an "unreasonable application of" Supreme Court authority, falling under the second clause of § 2254(d)(1), if it correctly identifies the 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. The federal court on habeas review 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." *Id.* at 411. Rather, the application must be "objectively unreasonable" to support granting the writ. *Id.* at 409.

Under 28 U.S.C. § 2254(d)(2), a state court decision "based on a factual determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state-court proceeding." See *Miller-El*, 537 U.S. at 340; see also *Torres v. Prunty*, 223 F.3d 1103, 1107 (9th Cir. 2000).

1 The state court decision to which § 2254(d) applies is the “last reasoned decision”  
2 of the state court. See *Ylst v. Nunnemaker*, 501 U.S. 797, 803-04 (1991); *Barker v.*  
3 *Fleming*, 423 F.3d 1085, 1091-92 (9th Cir. 2005). When there is no reasoned opinion  
4 from the highest state court to consider the petitioner’s claims, the court looks to the last  
5 reasoned opinion. See *Nunnemaker* at 801-06; *Shackleford v. Hubbard*, 234 F.3d 1072,  
6 1079 n.2 (9th Cir. 2000).

7 The standard of review under AEDPA is somewhat different where the state court  
8 gives no reasoned explanation of its decision on a petitioner’s federal claim and there is  
9 no reasoned lower court decision on the claim. In such a case, as with all claims in this  
10 petition, a review of the record is the only means of deciding whether the state court’s  
11 decision was objectively reasonable. *Himes v. Thompson*, 336 F.3d 848, 853 (9th Cir.  
12 2003); *Delgado v. Lewis*, 223 F.3d 976, 981-82 (9th Cir. 2000). When confronted with  
13 such a decision, a federal court should conduct an independent review of the record to  
14 determine whether the state court’s decision was an objectively unreasonable application  
15 of clearly established federal law. *Himes*, 336 F.3d at 853; *Delgado*, 223 F.3d at 982.

## 16 DISCUSSION

17 As grounds for federal habeas relief, petitioner asserts that: (1) his plea agreement  
18 was violated, and he was improperly resentenced when the abstract of judgment was  
19 corrected; (2) restitution was improperly instituted when the abstract of judgment was  
20 corrected; (3) he received ineffective assistance of counsel; and (4) there were violations  
21 under *Brady v. Maryland*, 373 U.S. 83 (1963).

### 22 I. PLEA AGREEMENT

#### 23 LEGAL STANDARD

24 “[W]hen a plea rests in any significant degree on a promise or agreement of the  
25 prosecutor, so that it can be said to be a part of the inducement or consideration, such  
26 promise must be fulfilled.” *Santobello v. New York*, 404 U.S. 257, 262 (1971). Plea  
27 agreements are contractual in nature and subject to contract law standards of  
28 interpretation. *In re Ellis*, 356 F.3d 1198, 1207 (9th Cir. 2004). The construction of a

1 state court plea agreement is governed by state contract law, and the federal court  
2 should not disturb a reasonable state court interpretation. *Ricketts v. Adamson*, 483 U.S.  
3 1, 6 n.3 (1987); *Buckley v. Terhune*, 441 F.3d 688, 695 (9th Cir. 2006) (en banc) (quoting  
4 *Ricketts* at 6 n.3) (“the construction and interpretation of state court plea agreements ‘and  
5 the concomitant obligations flowing therefrom are, within broad bounds of  
6 reasonableness, matters of state law’”).

7 If a plea agreement has been violated, relief is warranted even when the violation  
8 was inadvertent. *Santobello*, 404 U.S. at 262. *Santobello* clearly establishes that the  
9 remedy for violation of a plea agreement is either specific performance or permitting the  
10 petitioner to withdraw his plea, i.e., rescission of the plea agreement. *Id.* at 263. “In  
11 *Santobello v. New York*, the Supreme Court held that the remedies for a breach of plea  
12 agreement were either specific performance of the agreement or rescission of the entire  
13 agreement and withdrawal of the guilty plea, to be determined by the state court based  
14 on what ‘the circumstances of [the] case require.’” *Fox v. Johnson*, 832 F.3d 978, 987-88  
15 (9th Cir. 2016) (quoting *Santobello*).

### 16 ANALYSIS

17 Petitioner argues that his plea agreement was violated because the abstract of  
18 judgment erroneously stated that his terms of imprisonment were to be served  
19 consecutively instead of concurrently. Petitioner raised this same claim in *Torres v.*  
20 *Hatton*, Case No. 17-4332 PJH, which the court denied. While petitioner can raise this  
21 same claim again because an amended judgment was issued after the commencement  
22 of *Torres v. Hatton*, Case No. 17-4332 PJH, his claim still lacks merit for the same  
23 reasons noted before.<sup>1</sup> In addition, the Ninth Circuit denied a certificate of appealability

24  
25 <sup>1</sup> “[A] petition is *not* second or successive if it is based on an intervening state court  
26 judgment – e.g. a new sentencing determination – notwithstanding that the same *claim*  
27 challenging a conviction (or even the new sentence) could have been brought in the first  
28 petition.” *Brown v. Muniz*, 889 F.3d 661, 667 (9th Cir. 2018) (emphases in original)  
(citing *Magwood v. Patterson*, 561 U.S. 320, 331-36 (2010)). Nor is such a petition  
second or successive where it brings a claim that was raised and ruled upon in a federal  
petition prior to the intervening state court judgment. *Morales v. Sherman*, 949 F.3d 474,  
475-76 (9th Cir. 2020) (per curiam).



1 with respect to the prior habeas petition and the Supreme Court denied review.

2 The court denies the claim for the same reasons as set forth in the prior order.  
3 Furthermore, the plea agreement was initially violated due to the error in the abstract of  
4 judgment; however, it was later corrected to reflect that the sentences were to be served  
5 concurrently. Petitioner received specific performance of the plea agreement which is a  
6 proper remedy as set forth by the Supreme Court. Therefore, the state court's denial of  
7 this claim was not objectively unreasonable, and petitioner is not entitled to habeas relief.

8 Petitioner also argues that when the abstract of judgment was corrected, and the  
9 plea agreement was properly executed he was not informed or present, which violated  
10 his due process rights. Petitioner has failed to show that the state court's denial of this  
11 claim was an unreasonable application of Supreme Court authority.

12 The Supreme Court established that the remedy for violation of a plea agreement  
13 is either specific performance or permitting the petitioner to withdraw his plea. In this  
14 case petitioner was provided with specific performance of the plea agreement. The  
15 Supreme Court has not established the required procedures for deciding which remedy is  
16 appropriate or how to specifically provide either remedy. The Supreme Court has held  
17 that the construction of state court plea agreement is governed by state contract law, and  
18 the federal court should not disturb a reasonable state court interpretation. *Ricketts*, 483  
19 U.S. at 6 n.3. The California Supreme Court denied this claim and found that petitioner's  
20 rights were not violated due to not being informed and due to his absence when the  
21 abstract of judgment was corrected. Petitioner has failed to demonstrate that this  
22 decision was unreasonable. This claim is denied.

## 23 II. RESTITUTION

### 24 LEGAL STANDARD

25 The court is empowered to "entertain an application for a writ of habeas corpus in  
26 behalf of a person *in custody* pursuant to the judgment of a State court . . . on the ground  
27 that he is in custody in violation of the laws of the Constitution or laws or treaties of the  
28 United States." 28 U.S.C. § 2254(a) (emphasis added). Accordingly, to state a habeas

1 claim, the petitioner must challenge the validity of the fact or duration of his confinement.  
2 *See Muhammad v. Close*, 540 U.S. 749, 750 (2004) (per curiam) (“Challenges to the  
3 validity of any confinement or to particulars affecting its duration are the province of  
4 habeas corpus . . . .”) (citing *Preiser v. Rodriguez*, 411 U.S. 475, 500 (1973)); *Wilkinson*  
5 *v. Dotson*, 544 U.S. 74, 79 (2005) (habeas is the proper vehicle where the prisoner  
6 “seeks either immediate release from prison, or the shortening of his term of  
7 confinement”). However, claims that “would not necessarily lead to [a prisoner’s]  
8 immediate or earlier release from confinement” do not fall within “the core of habeas  
9 corpus” and fail to confer habeas jurisdiction on the court. *Nettles v. Grounds*, 830 F.3d  
10 922, 935 (9th Cir. 2016) (en banc).

#### 11 ANALYSIS

12 Petitioner next argues that the restitution order in the amended abstract of  
13 judgment violated his due process rights and constituted cruel and unusual punishment.

14 The Ninth Circuit has held that “§ 2254(a) does not confer jurisdiction over a  
15 habeas corpus petition raising an in-custody challenge to a restitution order.” *Bailey v.*  
16 *Hill*, 599 F.3d 976, 984 (9th Cir. 2010) (footnote omitted). “[T]he remedy that [Petitioner]  
17 seeks, the elimination or alteration of a money judgment, does not directly impact—and is  
18 not directed at the source of the restraint on—his liberty.” *Id.* at 981. A federal court, then,  
19 lacks jurisdiction to hear claims that challenge the money portion of a state judgment,  
20 such as a restitution order, which does not affect the duration of custody. *Id.* at 982. A  
21 restitution claim does not challenge the legality of a person’s custody, even when paired  
22 with a custody claim, and therefore does not provide grounds for relief. *See Id.* at 978,  
23 984.

24 Thus, the court does not have jurisdiction to review this claim. Assuming that the  
25 court did have jurisdiction, when petitioner entered his plea, he confirmed that he  
26 understood he would be required to pay appropriate restitution. Answer Ex. 3 at 131.  
27 This claim is denied.  
28

### III. REMAINING CLAIMS

The remaining claims regarding ineffective assistance of counsel and *Brady* violations were also dismissed on the merits in *Torres v. Hatton*, Case No. 17-4332 PJH. In addition, the Ninth Circuit denied a certificate of appealability and the Supreme Court denied review. The Supreme Court has noted that where a petitioner raises arguments that were previously rejected in an earlier federal habeas petition, “[i]t will not take a court long to dispose of such claims where the court has already analyzed the legal issues.” See *Magwood v. Peterson*, 561 U.S. 320, 340 n.15 (2010). For the same reasons as set forth in *Torres v. Hatton*, Case No. 17-4332 PJH, the court again denies these claims and no further analysis is warranted.

### APPEALABILITY

The federal rules governing habeas cases brought by state prisoners require a district court that denies a habeas petition to grant or deny a certificate of appealability (“COA”) in the ruling. See Rule 11(a), Rules Governing § 2254 Cases, 28 U.S.C. foll. § 2254 (effective December 1, 2009).

To obtain a COA, petitioner must make “a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). “Where a district court has rejected the constitutional claims 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.” See *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Section 2253(c)(3) requires a court granting a COA to indicate which issues satisfy the COA standard. Here, the court finds that none of the claims meet the above standard and accordingly DENIES a COA. See generally *Miller-El*, 537 U.S. at 327.

### CONCLUSION

1. The prior order in this case denying the petition (Docket No. 19) is **VACATED**. The petition for writ of habeas corpus is **DENIED** on the merits and this order adjudicates all of petitioner’s claims. A certificate of appealability is **DENIED**. See Rule 11(a) of the

Rules Governing Section 2254 Cases.

2. The clerk shall close the file.

**IT IS SO ORDERED.**

Dated: June 23, 2022

/s/ Phyllis J. Hamilton

PHYLLIS J. HAMILTON  
United States District Judge

United States District Court  
Northern District of California

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