APPENDIX A

OPINION OF THE UNITED STATES COURT OF APPEALS

NOT FOR PUBLICATION

FILED

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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ANASTACIO G. RAMIREZ, Petitioner-Appellant, v. MARTIN GAMBOA, Respondent-Appellee.	No. 21-55770 D.C. No. 2:18-cv-03628-PSG-ADS MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Philip S. Gutierrez, District Judge, Presiding

Argued and Submitted July 15, 2024
Pasadena, California

Before: PAEZ and SANCHEZ, Circuit Judges, and LYNN,** Senior District Judge.

Anastacio Ramirez appeals the district court's denial of his petition for a writ of habeas corpus under 28 U.S.C. § 2254. The certified issue on appeal is whether the magistrate judge exceeded her authority in determining that Ramirez's

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable Barbara M. G. Lynn, United States Senior District Judge for the Northern District of Texas, sitting by designation.

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Filed	Document Description	Page	Docket Text
07/31/2024	50		FILED MEMORANDUM DISPOSITION (RICHARD A. PAEZ, GABRIEL P. SANCHEZ and BARBARA M. G. LYNN) AFFIRMED. FILED AND ENTERED JUDGMENT. [12899638] (AH)
	50 Memorandum Disposition	2	
	50 Post Judgment Form **DOCUMENT COULD NOT BE RETRIEVED!**		

April 30, 2018, petition was a mixed petition, subject to dismissal under *Rose v. Lundy*, 455 U.S. 509 (1982), which resulted in Ramirez's voluntary dismissal of two of his claims. We have jurisdiction to review the appeal under 28 U.S.C. §§ 1291 and 2253. We affirm.

Ramirez was convicted by a jury in California state court of two counts of unlawful acts with a child 10 years old and younger, and one count of continuous sexual abuse. On April 30, 2018, Ramirez, acting *pro se*, filed a Petition for Writ of Habeas Corpus, under 28 U.S.C. § 2254, in the Central District of California, seeking relief on four grounds: (1) ineffective assistance of trial counsel, arguing that the victim recanted and that Ramirez had been tricked into admitting guilt; (2) trial and appellate counsel's failure to take certain actions, (3) appellate counsel's failure to file a timely notice of appeal; and (4) a violation of Ramirez's rights under the Confrontation Clause of the Sixth Amendment.

The case was referred to a magistrate judge for pretrial matters. On June 4, 2018, Respondent Scott Frauenheim,[1] Warden of Pleasant Valley State Prison, appeared and move to dismiss the Petition as mixed or to strike Grounds One and Four as unexhausted. The next day, the magistrate judge issued an order in which she preliminarily found that Grounds One and Four of the Petition were

[1] On November 16, 2022, Martina Gamboa, Acting Warden of Avenal State Prison, was substituted as Appellee–Respondent following a change in the place of Ramirez's incarceration.

unexhausted. She also told Ramirez that if he believed the Petition to be fully exhausted, he was to provide "any additional argument and documents supporting [his] claim of exhaustion."

In addition to affording him the opportunity to establish exhaustion, the magistrate judge gave Ramirez the following options: (1) voluntarily dismiss the Petition without prejudice to exhaust Grounds One and Four; (2) dismiss Grounds One and Four and proceed with the remaining exhausted claims; (3) seek a stay of the case pursuant to *Rhines v. Weber*, 544 U.S. 269, 275–77 (2005); or (4) seek a stay of the case pursuant to *Kelly v. Small*, 315 F.3d 1063 (9th Cir. 2003). The magistrate judge instructed Ramirez to file a response indicating his selection, along with any argument as to whether the Petition was mixed. In response, Ramirez voluntarily dismissed Grounds One and Four, and the magistrate judge denied Respondent's motion to dismiss as moot. The magistrate judge subsequently entered a report, recommending that Ramirez's Petition be denied, which the district court accepted.

A petition filed under § 2254 shall not be granted unless the petitioner has "exhausted the remedies available in the courts of the State," and "fairly present[ed]" the federal claims in state court. 28 U.S.C. § 2254(b)(1)(A); *Duncan v. Henry*, 513 U.S. 364, 365 (1995) (per curiam). In *Rose v. Lundy*, 455 U.S.at 510, 522, the Supreme Court imposed a "total exhaustion" requirement, such that

district courts are required to dismiss without prejudice "mixed" petitions that contain both exhausted and unexhausted claims.

On appeal, Ramirez argues that, in deciding the exhaustion issue and issuing the "options order" offering Ramirez various choices, the magistrate judge exceeded her authority. The authority of magistrate judges "is a question of law subject to *de novo* review." *Bastidas v. Chappell*, 791 F.3d 1155, 1159 (9th Cir. 2015) (quoting *United States v. Carr*, 18 F.3d 738, 740 (9th Cir. 1994)).

The power of federal magistrate judges is limited by 28 U.S.C. § 636. *See Mitchell v. Valenzuela*, 791 F.3d 1166, 1168 (9th Cir. 2015). Under § 636, a district judge "may designate a magistrate judge to hear and determine any pretrial matter pending before the court," except for certain motions enumerated under § 636(b)(1)(A) and other analogous dispositive judicial functions. 28 U.S.C. § 636(b)(1)(A); *Flam v. Flam*, 788 F.3d 1043, 1046 (9th Cir. 2015). To determine whether a motion is dispositive, we employ a "functional approach," which looks "to the effect of the motion, in order to determine whether it is properly characterized as 'dispositive or non-dispositive of a claim or defense of a party.'" *Flam v. Flam*, 788 F.3d at 1046 (quoting *United States v. Rivera–Guerrero*, 377 F.3d 1064, 1068 (9th Cir. 2004)).

Preliminarily identifying a claim as "unexhausted" is not a dispositive matter. The magistrate judge's preliminary view that the Petition contained

unexhausted claims did not constitute a ruling on Respondent's motion to dismiss, so as to trigger an obligation to submit a report and recommendation to the district court for review under § 636(b)(1)(A). The options order did not dispose of a claim or defense of a party, or preclude the ultimate relief sought. *See id.* Instead, the order offered options, including inviting Ramirez to demonstrate exhaustion or seek a stay to be able to return to state court and perfect exhaustion. The inclusion of these non-dispositive options distinguishes this case from this Circuit's precedent in *Hunt v. Pliler*, 384 F.3d 1118, 1124 (9th Cir. 2004), in which both options presented to the petitioner in that case required the dismissal of at least some claims. Thus, because the magistrate judge's order giving Ramirez options did not resolve or decide Respondent's motion to dismiss, it was not a dispositive order requiring a report and recommendation under § 636(b)(1)(A).

AFFIRMED.

APPENDIX B

OPINION OF THE UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ANASTACIO G. RAMIREZ, Petitioner, v. SCOTT FRAUENHEIM, Respondent.	Case No. 2:18-03628 PSG (ADS) ORDER ACCEPTING REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE AND DISMISSING CASE

Pursuant to 28 U.S.C. § 636, the Court has reviewed the Petition, Respondent's Answer, Petitioner's Traverse, and all related filings, along with the Report and Recommendation of the assigned United States Magistrate Judge dated May 20, 2021 [Dkt. No. 25], and Petitioner's Objection to Magistrate's Report and Recommendation ("Objection") [Dkt. No. 27]. Further, the Court has engaged in a de novo review of those portions of the Report and Recommendation to which objections have been made.

Petitioner's objections are overruled. In addition, in his Objection, Petitioner argues that an evidentiary hearing is necessary to resolve his claims. [Id., p. 3].

However, Petitioner fails to demonstrate the state record received and reviewed by the Court is insufficient to resolve his claims. Cullen v. Pinholster, 563 U.S. 170 (2011) (federal court's habeas review ordinarily "is limited to the record that was before the state court that adjudicated the claim on the merits"); Schriro v. Landrigan, 550 U.S. 465, 474 (2007).

Accordingly, IT IS HEREBY ORDERED:

1. The United States Magistrate Judge's Report and Recommendation [Dkt. No. 25] is accepted;
2. The request for an evidentiary hearing [Dkt. No. 27, p. 3] is denied;
3. The Petition is denied and this action dismissed with prejudice; and
4. Judgment is to be entered accordingly.

DATED: 6/30/2021

THE HONORABLE PHILIP S. GUTIERREZ
United States District Judge

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ANASTACIO G. RAMIREZ, Petitioner, v. SCOTT FRAUENHEIM, Warden, Respondent.	Case No. 2:18-03628 PSG (ADS) REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This Report and Recommendation is submitted to the Honorable Philip S. Gutierrez, 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. For the reasons discussed below, the Magistrate Judge recommends that the Petition for Writ of Habeas Corpus be denied and the action dismissed with prejudice.

I. INTRODUCTION

On April 30, 2018, Anastacio G. Ramirez ("Petitioner"), a California state prisoner proceeding pro se, filed a Petition for Writ of Habeas Corpus pursuant to 28

U.S.C. § 2254 ("Petition"), challenging his criminal convictions. [Dkt. No. 1]. On March 13, 2019, Respondent filed an Answer to the Petition and a supporting memorandum ("Answer"), arguing that the Petition should be denied on its merits. [Dkt. No. 15]. On August 9, 2019, Petitioner filed a Traverse. [Dkt. No. 22]. The matter is ready for decision.[1]

II. PROCEDURAL BACKGROUND

In 2015, Petitioner was convicted of two counts of an unlawful act with a child ten years old and under, and one count of continuous sexual abuse, following a jury trial in Ventura County Superior Court. [Dkt. No. 16-1, pp. 187-189].[2] The Superior Court sentenced Petitioner to two consecutive terms of twenty-five years to life plus a determinate term of twelve years in state prison. [Id., pp. 204-06].

On December 6, 2016, Petitioner filed an application for relief due to the late filing of his notice of appeal with the California Court of Appeal. California Appellate Courts Case Information, 2nd Appellate District, https://appellatecases.courtinfo.ca.gov (Case No. B279359). The Court of Appeal granted Petitioner's application for relief from late filing. [Dkt. No. 16-1, p. 207].

Petitioner appealed his conviction to the California Court of Appeal. [Id., p. 208]. On July 25, 2017, the California Court of Appeal affirmed the judgment of conviction. [Dkt. No. 7-2, Lodged Document ("LD") 2]. Petitioner did not seek review of the Court

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[1] On June 15, 2018, the case was transferred to the docket of the undersigned United States Magistrate Judge. [Dkt. No. 10].

[2] All citations to electronically-filed documents are to the CM/ECF pagination.

of Appeal's opinion. See California Appellate Courts Case Information, 2nd Appellate District, https://appellatecases.courtinfo.ca.gov (Case No. B279359).

On August 10, 2017, Petitioner filed a Petition for Writ of Habeas Corpus in the California Supreme Court. [Dkt. No. 7-3, LD 3]. The California Supreme Court denied the petition without comment on October 11, 2017. [Dkt. No. 7-4, LD 4].

On April 23, 2018, Petitioner constructively filed the instant Petition for Writ of Habeas Corpus by a Person in State Custody, asserting four grounds for relief. [Dkt. No. 1]. On June 4, 2018, Respondent filed a Motion to Dismiss, arguing Grounds One and Four were unexhausted. [Dkt. No. 6]. Petitioner voluntarily dismissed Grounds One and Four on July 13, 2018. [Dkt. No. 11]. Thereafter, Respondent filed an Answer to the Petition and a supporting memorandum ("Answer"). [Dkt. No. 15]. Petitioner filed a Traverse. [Dkt. No. 22].

III. PETITIONER'S GROUNDS FOR RELIEF

The Petition raises the following remaining two grounds for relief:

1. Original Ground 2: Petitioner received ineffective assistance of counsel when his trial attorney (a) failed to file a motion to suppress pretextual telephone calls; (b) failed to discover and introduce exculpatory evidence; (c) failed to properly prepare to cross-examine witness C.N.; and (d) failed to diligently pursue a plea bargain on Petitioner's behalf; and

2. Original Ground 3: Petitioner received ineffective assistance of counsel when his trial attorney failed to file a timely notice of appeal.

[Dkt. No. 1, pp. 5-6].

IV. STANDARD OF REVIEW

Because this Petition was filed after the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") the Court applies AEDPA in its review of this action. See Lindh v. Murphy, 521 U.S. 320, 336 (1997) (holding that AEDPA applies to all federal habeas petitions filed after April 24, 1996). Under AEDPA, a federal court may grant habeas relief to a state prisoner "with respect to any claim that was adjudicated on the merits in State court proceedings" only if that adjudication:

> (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). Overall, AEDPA presents "a formidable barrier to federal habeas relief for prisoners whose claims have been adjudicated in state court." Burt v. Titlow, 571 U.S. 12, 19 (2013). AEDPA imposes 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) (internal citations omitted).

The petitioner bears the burden to show that the state court's decision "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." Harrington v. Richter, 562 U.S. 86, 103 (2011). In other words, "[a] state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness" of that ruling. Id. at 101 (quoting Yarborough v. Alvarado, 541 U.S. 652, 664 (2004)). Federal habeas corpus review therefore serves as a "guard

against extreme malfunctions in the state criminal justice systems, not a substitute for ordinary error correction through appeal." Richter, 562 U.S. at 102-03 (internal quotations omitted).

In applying the foregoing AEDPA standards, federal courts look to the last reasoned state court decision and evaluate it based upon an independent review of the record. Nasby v. McDaniel, 853 F.3d 1049, 1055 (9th Cir. 2017). "Where there has been one reasoned state judgment rejecting a federal claim, later unexplained orders upholding that judgment or rejecting the same claim rest upon the same ground." Ylst v. Nunnemaker, 501 U.S. 797, 803 (1991).

Here, all of Petitioner's claims were denied on direct appeal in a reasoned opinion by the California Court of Appeal. [Dkt. No. 7-2, LD 2]. Thereafter, the California Supreme Court summarily denied review. [Dkt. No. 7-4, LD 4]. Accordingly, the Court looks through the California Supreme Court's silent denial and applies the AEDPA standard to the California Court of Appeal's reasoned decision denying the claims. See Ylst, 501 U.S at 803; see also Bonner v. Carey, 425 F.3d 1145, 1148 n.13 (9th Cir. 2005) (applying the Ylst look-through doctrine to superior court's denial of habeas petition when California Court of Appeal and California Supreme Court summarily denied subsequent petitions).

Although the California Court of Appeal decision is not accompanied by detailed explanations, Petitioner still has the burden to show that "there was no reasonable basis for the state court to deny relief." Richter, 562 U.S. at 98; Staten v. Davis, 962 F.3d 487, 494 (9th Cir. 2020). Under this circumstance, AEDPA requires the Court to perform an "independent review of the record" to determine "whether the state court's decision was objectively unreasonable." Richter, 562 U.S. at 98. A federal habeas court "must

determine what arguments or theories [ ] could have supported the state court's decision" in evaluating its reasonableness. Id. at 102 (emphasis added); Rowland v. Chappell, 876 F.3d 1174, 1181 (9th Cir. 2017) ("Independent review of the record is not de novo review of the constitutional issue, but rather, the only method by which we can determine whether a silent state court decision is objectively unreasonable.") (quotation omitted).

V. DISCUSSION

A. Ineffective Assistance of Counsel (Grounds Two and Three)

In Original Ground Two, Petitioner claims that his trial counsel rendered ineffective assistance by (a) failing to file a motion to suppress pretextual telephone calls; (b) failing to discover and introduce exculpatory evidence; (c) failing to properly prepare to cross-examine witness C.N.; and (d) failing to diligently pursue a plea bargain on Petitioner's behalf. [Dkt. No. 1, pp. 5-6]. In Original Ground Three, Petitioner claims he received ineffective assistance of counsel when his trial attorney failed to file a timely notice of appeal. [Id.]. None of these grounds merit habeas relief.

1. State Court Opinion

On direct appeal, the California Court of Appeal denied each of these grounds, stating, in relevant part,

> With respect to the ineffective assistance of counsel claims, only one has demonstrable merit based on the record before us. Trial counsel did fail to file a timely notice of appeal, but the error is non-prejudicial in that we allowed the late-filed appeal. As for the other claims, it is well established that if the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged, the claim on appeal must be rejected. (People v. Mendoza Tello (1997) 15 Cal.4th 264, 266; see People v. Lucas (1995) 12 Cal.4th 415, 436-437 [defendant carries a heavy burden when a claim of ineffective assistance of counsel is made on direct appeal].)

[Dkt. No. 7-2, LD 2, p. 5].

2. Federal Law

The Sixth Amendment of the Constitution guarantees a criminal defendant the right to effective assistance of a lawyer. Strickland v. Washington, 466 U.S. 668 (1984). To establish ineffective assistance under Strickland, "a defendant must show both deficient performance by counsel and prejudice." Knowles v. Mirzayance, 556 U.S. 111, 122 (2009). A criminal defendant "bears the burden of overcoming the strong presumption" that a lawyer provided adequate representation. Cheney v. Washington, 614 F.3d 987, 995 (9th Cir. 2010). "Failure to satisfy either prong of the Strickland test obviates the need to consider the other." Rios v. Rocha, 299 F.3d 796, 805 (9th Cir. 2002).

Deficient performance is defined as representation that falls below an objective standard of reasonableness. Strickland, 466 U.S. at 688. However, a trial lawyer is "strongly presumed to have rendered adequate assistance," and should not have a reviewing court "second-guess counsel's assistance." Pinholster, 563 U.S. at 189. As to prejudice, a challenger must demonstrate that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Padilla v. Kentucky, 559 U.S. 356, 366 (2010) (quotation omitted). Put another way, a litigant must show that there was a "substantial likelihood of a different result, as opposed to a mere conceivable possibility," based on the lawyer's performance that is "sufficient to undermine confidence in the outcome" of the trial. Boyer v. Chappell, 793 F.3d 1092, 1104 (9th Cir. 2015) (quotation omitted).

"Surmounting Strickland's high bar is never an easy task." Padilla, 559 U.S. at 371. Establishing that a state court's application of Strickland was unreasonable under AEDPA "is all the more difficult." Richter, 562 U.S. 86, 105. The standards created by

Strickland and Section 2254(d) are both "highly deferential;" when the two apply in tandem, "review is doubly so." Id. (quotation omitted).

3. Prejudice

Preliminarily, the Court concludes that Petitioner has failed to establish prejudice as to any of his ineffective assistance of counsel claims. See Strickland, 466 U.S. at 697 ("If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed."); Rios, 299 F.3d at 805; Profitt v. Lake Cty. Prob. Dep't, 2020 WL 228036, at *8 (N.D. Cal. Jan. 15, 2020) (failure to establish either element is enough to bar a Strickland claim). This is especially true considering the highly deferential standard of review the Court must apply to Strickland claims, even under de novo review, and the doubly-deferential standard for claims rejected by a state court on the merits. See Richter, 562 U.S. at 105; Mirzayance, 556 U.S. at 123; Demirdjian v. Gipson, 832 F.3d 1060, 1066 (9th Cir. 2016) ("[e]ven on de novo review, the standard for showing ineffective assistance is highly deferential" (internal quotation marks omitted)).

Here, Petitioner fails to show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Padilla v. Kentucky, 559 U.S. 356, 366 (2010). In his Traverse, Petitioner argues only, "When violations of the United States Constitution has occurred and the Amendment have not been applied, prejudice is presumed, as violation of the 4th, 5th, 6th, 8th, and 14th Amendments." [Dkt. No. 22, p. 12]. Petitioner does not cite to any legal authority to support this argument or provide any factual basis for it. Petitioner has not shown that any of counsels' alleged shortcomings would have changed the result of his trial. Accordingly, his ineffective-assistance-of counsel claims must fail because he has not

demonstrated prejudice. See Strickland, 466 U.S. at 697; Padilla, 559 U.S. at 366; Boyer, 793 F.3d at 1104.

4. Supporting Evidence

In addition to failing to show prejudice as to his ineffective-assistance-of-counsel claims, Petitioner did not provide a declaration from trial counsel explaining the reasons, if any, counsel gave regarding the various decisions Petitioner challenges. See Garcia v. Asuncion, 726 F. App'x 652, 653 (9th Cir. 2018) ("Successful ineffective assistance claims are generally accompanied by evidence in some form, often a declaration by defense counsel or an explanation of why a declaration was unavailable."); Womack v. Del Papa, 497 F.3d 998, 1004 (9th Cir. 2007) (finding self-serving and conclusory statements insufficient to show ineffective assistance without corroborating evidence); Virag v. Diaz, 2015 WL 5092686, at *8 (C.D. Cal. Aug. 26, 2015) (ineffective-assistance claim lacked sufficient evidentiary support because petitioner provided no declaration from counsel). Accordingly, Petitioner has not supported his claims against trial counsel with sufficient supporting evidence.

5. Individual Claims

In addition to the lack of prejudice and supporting evidence, Petitioner's individual claims fail for the following additional reasons.

(a) Failure to File a Motion to Suppress (Ground 2(a))

In Ground 2(a), Petitioner claims that trial counsel rendered ineffective assistance by failing to file a motion to suppress pretextual telephone calls that were used as evidence. [Dkt. No. 1, p. 5]. During two calls between Petitioner and his wife, Petitioner admitted to certain facts underlying the criminal charges against him. [Dkt. No. 7-2, LD 2, pp. 2-3]. These calls were recorded by the Ventura County Sheriff's

Office. [Id.]. Petitioner asserts the "seizure" of the pretextual phone calls violated the Fourth Amendment protection against unreasonable searches and seizures. [Dkt. No. 22, pp. 8-11].

However, trial counsel's "failure to take a futile action can never be deficient performance." Rupe v. Wood, 93 F.3d 1434, 1445 (9th Cir. 1996). During a pretrial hearing, Petitioner's attorney objected to the admission of the pretextual telephone calls. [Dkt. No. 16-2, pp. 16-17]. The trial court overruled the objection, stating, "there's nothing present in the law prohibiting the use of the[] pretextural [sic] calls as violative of [Petitioner's] right to counsel or any other constitutional right that I'm aware of." [Id., p. 18]. As such, a further motion to suppress the calls would have been futile. With no evidence of deficient performance, it cannot be said that the State Court's denial of this ground is objectively unreasonable. Therefore, Petitioner's Ground 2(a) fails and he is not entitled to relief for that claim.

(b) Failure to Discover and Introduce Exculpatory Evidence (Ground 2(b))

In Ground 2(b), Petitioner claims that trial counsel rendered ineffective assistance by failing to discover and introduce exculpatory evidence. [Dkt. No. 1, pp. 5-6]. Petitioner alleges he advised his trial counsel of "longstanding strains and ill feeling between [him] and his wife" and that "both witness[es] were biased," but that counsel failed to investigate these facts. [Id., pp. 75-76]. Petitioner does not, however, identify what exculpatory evidence his attorney should have discovered and introduced that would have altered the results at trial. Without identifying such information, Petitioner's Ground 2(c) is conclusory, fails to establish deficient performance, and does not warrant habeas relief. See James v. Borg, 24 F.3d 20, 26 (9th Cir. 1994)

("Conclusory allegations which are not supported by a statement of specific facts do not warrant habeas relief."; see also Jones v. Gomez, 66 F.3d 204-05 (9th Cir. 1995) (finding "bald assertions of ineffective assistance" did not merit relief).

(c) Remaining Ineffective Assistance of Counsel Claims (Grounds 2(c)-(d))

In Grounds 2(c) and (d), Petitioner asserts trial counsel was ineffective because he failed to properly prepare to cross-examine witness C.N., and failed to diligently pursue a plea bargain on Petitioner's behalf. When asserting these claims, Petitioner presents little to no argument with no explanation, cites to California case law without explanation, and fails to identify with sufficient particularity the factual bases of the claims. See [Dkt. No. 1, pp. 76-77]. For these reasons, the Court is not able to determine the bases of these claims in order to evaluate them. A petition for federal habeas relief must "state facts that point to a real possibility of constitutional error." Blackledge v. Allison, 431 U.S. 63, 75 n.7 (1977). Accordingly, these claims are summarily denied for failing to adequately plead facts pointing to a basis of constitutional error that may be reviewed in federal habeas proceedings. See Greenway v. Schiro, 653 F.3d 790, 804 (9th Cir. 2011) (rejecting habeas claim as "cursory and vague"); United States v. Taylor, 802 F.2d 1108, 1119 (9th Cir. 1986) (vague and speculative assertions that trial counsel lacked professional competence fail to meet the burden set forth in Strickland).

(d) Failure to File a Timely Notice of Appeal (Ground 3)

In Ground 3, Petitioner claims that trial counsel rendered ineffective assistance by failing to file a timely notice of appeal. [Dkt. No. 1, p. 6]. Although Petitioner is correct that a timely notice of appeal was not filed, the California Court of Appeal

granted Petitioner's application for relief due to the late notice filing. [Dkt. No. 16-1, p. 207]. Because the late-filed appeal was ultimately permitted, Petitioner fails to show "there was no reasonable basis for the state court to deny relief." Harrington v. Richter, 562 U.S. 86, 98 (2011); Staten v. Davis, 962 F.3d 487, 494 (9th Cir. 2020). Therefore, Petitioner is not entitled to habeas relief for Ground 3.

VI. CERTIFICATE OF APPEALABILITY

For the reasons stated above, the Court finds that Petitioner has not shown that "jurists of reason would find it debatable whether": (1) "the petition states a valid claim of the denial of a constitutional right"; and (2) "the district court was correct in its procedural ruling." See Slack v. McDaniel, 529 U.S. 473, 484 (2000). Thus, it is recommended that a certificate of appealability be denied.

VII. RECOMMENDATION

Therefore, it is recommended that the District Judge issue an Order, as follows: (1) accepting this Report and Recommendation; (2) denying the habeas petition and dismissing this action with prejudice; (3) directing that Judgment be entered accordingly; and (4) denying a Certificate of Appealability.

Dated: May 20, 2021

/s/ Autumn D. Spaeth
THE HONORABLE AUTUMN D. SPAETH
United States Magistrate Judge

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