

APPENDIX A

Ninth Circuit's Memorandum Opinion (No. 15-55652)

filed: October 17, 2017

FILED

OCT 17 2017

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS**NOT FOR PUBLICATION****UNITED STATES COURT OF APPEALS****FOR THE NINTH CIRCUIT****JOSEPH ALFONSO DURAN,****Petitioner-Appellant,****v.****JEFFREY A. BEARD,****Respondent-Appellee.**

No. 15-55652

D.C. No.

3:08-cv-00430-WQH-RBB

MEMORANDUM*

Appeal from the United States District Court
for the Southern District of California
William Q. Hayes, District Judge, Presiding

Submitted October 4, 2017**
Pasadena, California

Before: KLEINFELD, GRABER, and CHRISTEN, Circuit Judges.

Petitioner Joseph Alfonso Duran appeals the district court's denial of his petition for a writ of habeas corpus, brought pursuant to 28 U.S.C. § 2254.

Reviewing de novo the district court's decision, Robinson v. Schriro, 595 F.3d 1086, 1099 (9th Cir. 2010), we affirm.

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

** The panel unanimously concludes that this case is suitable for decision without oral argument. Fed. R. App. P. 34(a)(2).

1. The state court's decision concerning Petitioner's Faretta waiver was neither contrary to nor an unreasonable application of clearly established federal law. Lockyer v. Andrade, 538 U.S. 63, 71 (2003). Petitioner argues that the trial court was required to inform him, at his Faretta hearing, of the possible penalties he could face if the charges against him were later amended. No Supreme Court case requires that the court advise a petitioner of the penalties associated with potential future amended charges. Wright v. Van Patten, 552 U.S. 120, 125 (1980) (per curiam).

Moreover, no clearly established federal law required the trial court to reaffirm Petitioner's waiver of counsel after the charges against him were amended to include a second strike. Therefore, the trial court did not act unreasonably. Moses v. Payne, 555 F.3d 742, 754 (9th Cir. 2009).

2. Petitioner's claim that he received ineffective assistance of counsel during plea bargaining is procedurally barred. The California Superior Court found that this claim was procedurally barred because of California's timeliness rule, which is an independent and adequate state ground for denying review here. Walker v. Martin, 562 U.S. 307, 315 (2011). Petitioner has not shown cause, prejudice, or a miscarriage of justice. Coleman v. Thompson, 501 U.S. 722, 749–50 (1991).

AFFIRMED.

United States District Court
SOUTHERN DISTRICT OF CALIFORNIA

Joseph Alfonso Duran

V.

JUDGMENT IN A CIVIL CASE

Matthew Cate

CASE NUMBER: 08cv430-WQH-RBB

☐

Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

The Report and Recommendation is adopted in its entirety. The First Amended Petition for Writ of Habeas Corpus is conditionally granted as to the claim that Petitioner did not knowingly and voluntarily waive his right to counsel under the Sixth Amendment and *Faretta*. The First Amended Petition is denied as to all remaining claims. Petitioner's request for an evidentiary hearing is denied. A certificate of appealability is granted as to each of the denied claims in grounds one, two and three of the First Amended Petition.

March 10, 2011

Date

W. Samuel Hamrick, Jr.

Clerk

s/M. Cruz

(By) M. Cruz, Deputy Clerk

ENTERED ON March 10, 2011

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

JOSEPH ALFONSO DURAN,

Petitioner,

vs.

JEFFERY BEARD, Secretary of the
California Department of Corrections
and Rehabilitation,

Respondent,

CASE NO. 8cv430-WQH (RBB)

ORDER

HAYES, Judge:

The matter before the Court is the review of the Report and Recommendation (ECF No. 118) issued by United States Magistrate Judge Ruben B. Brooks, denying Petitioner Joseph Alfonso Duran's request for an evidentiary hearing (ECF No. 43) and recommending that this Court deny Petitioner's Amended Petition for Writ of Habeas Corpus (ECF No. 15).

BACKGROUND

In 2004, Petitioner was charged in San Diego County Superior Court with carjacking, robbery, the unlawful taking and driving of a vehicle, and buying, receiving, concealing, selling, or withholding a stolen vehicle. During the pendency of his case, Petitioner sought to represent himself. At a hearing on October 28, 2004, the trial court asked Petitioner to fill out an "Acknowledgment Concerning Right to

1 Self-Representation” form pursuant to *People v. Lopez*, 71 Cal. App. 3d 568 (1977).¹
 2 (Lodgment No. 1 at 19). Paragraph two of the form identifies “[t]he maximum
 3 punishment(s) that can be imposed upon conviction for the offense(s).” *Id.* The first
 4 figure that appeared in paragraph two of the form was “9y.” *Id.* The “9y” was crossed
 5 out and replaced with “18 years.” *Id.* The “18” was crossed out and replaced with
 6 “20.” *Id.* The final version, which Petitioner and the trial court signed, stated “20
 7 years.” *Id.*

8 On January 13, 2005, the prosecutor filed an amended information. On January
 9 14, 2005, Petitioner was arraigned on the amended information. The prosecutor stated
 10 that he “discovered that Mr. Duran is not a second striker but a third striker.”
 11 (Lodgment No. 24 at 2). The prosecutor also stated that Petitioner facing “perhaps 25
 12 years to life on this case.” *Id.* at 6.

13 Petitioner represented himself at trial. On February 4, 2005, the jury convicted
 14 Duran of carjacking, robbery, and the unlawful taking and driving of a vehicle. The
 15 jury found him not guilty of buying, receiving, concealing, selling, or withholding a
 16 stolen vehicle.

17 Petitioner admitted to convictions for assault with a deadly weapon on May 26,
 18 1999, and theft of a firearm on March 1, 1991. Petitioner admitted to two strikes and
 19 two prison priors, including one violent prison prior. The trial court sentenced
 20 Petitioner to thirty-five years to life in state prison.

21 Petitioner appealed his conviction to the California Court of Appeal. On January
 22 16, 2007, the Court of Appeal affirmed Petitioner’s conviction. Petitioner filed a
 23 petition for review in the California Supreme Court. On March 30, 2007, the California
 24 Supreme Court summarily denied his petition.

25 On February 26, 2008, Petitioner filed a petition for writ of habeas corpus in the
 26

27 ¹ In *Lopez*, the California Court of Appeal “explore[d] the responsibilities of the
 28 trial court in making an adequate record that a criminal defendant ‘voluntarily and
 intelligently’ elects to represent himself under *Faretta v. California*, 422 U.S. 806
 (1975).” *Lopez*, 71 Cal. App. 3d at 570.

1 California Supreme Court. On October 16, 2008, the petition was summarily denied.

2 On March 6, 2008, Petitioner filed a Petition for Writ of Habeas Corpus in this
3 Court pursuant to 28 U.S.C. section 2254. (ECF No. 1).

4 On December 9, 2008, Petitioner filed the First Amended Petition. (ECF No. 15).
5 Petitioner asserts four grounds for relief. In ground one, Petitioner contended the
6 prosecutor failed to disclose material, exculpatory evidence in violation of his discovery
7 obligations, and the trial judge abused his discretion by denying Petitioner's motion for
8 a new trial. In ground two, Petitioner contended that (a) the trial judge abused his
9 discretion by failing to order a competency hearing or otherwise evaluate Petitioner's
10 competency, and (b) Petitioner's waiver of the assistance of counsel was not knowing
11 and voluntary because he was not informed of the maximum penalties he faced. In
12 ground three, Petitioner contended that he received ineffective assistance of counsel
13 prior to, and after, his self-representation, and that the trial court erred by failing to
14 address his claim of ineffective assistance of counsel raised in his motion for a new
15 trial. In ground four, Petitioner contended that the trial court improperly admitted
16 evidence regarding the use of a firearm, after that allegation had previously been
17 dismissed from counts one and two.

18 On March 25, 2009, Respondent filed an Answer. (ECF No. 24). On November
19 24, 2009, Petitioner filed a Traverse. (ECF No. 43). In the Traverse, Petitioner
20 requested an evidentiary hearing.

21 On October 22, 2010, the Magistrate Judge issued a Report and
22 Recommendation. (ECF No. 48). The Magistrate Judge recommended that (1) the First
23 Amended Petition should be granted as to the claim that Petitioner did not knowingly
24 and voluntarily waive his right to counsel under *Faretta v. California*, 422 U.S. 806
25 (1975); (2) the First Amended Petition should be denied as to all other claims; and (3)
26 Petitioner's request for an evidentiary hearing should be denied.

27 On March 9, 2011, this Court adopted the Report and Recommendation (ECF No.
28 48) in its entirety. (ECF No. 53).

1 On April 4, 2011, Respondent Matthew Cate filed an appeal in the Court of
 2 Appeals for the Ninth Circuit. (ECF No. 55). On November 29, 2012, the Ninth
 3 Circuit issued an order vacating this Court's Order granting habeas relief and remanding
 4 the case for reconsideration of Petitioner's amended petition in light of arguments
 5 presented by Respondent for the first time at oral argument. (ECF No. 75).
 6 Specifically, the Ninth Circuit directed the Court to:

7 (1) consider "the state's new position that the state trial judge correctly
 8 advised Duran of his maximum punishment (20 years) at the time of the
 October 28, 2008 *Faretta* waiver";

9 (2) review "state court records regarding Duran's January 14, 2005
 10 arraignment on the amended information";

11 (3) "make factual findings on the full extent of the advice that the state
 12 trial judge gave Duran regarding his rights during the January 14, 2005
 arraignment, including (1) . . . the maximum punishment he faced upon
 13 conviction and (2) whether Duran was advised of his Sixth Amendment
 right to counsel"; and

14 (4) "issue a ruling on all of the claims in Duran's amended habeas petition,
 including Duran's *Faretta* claim."

15 *Id.*

16 On January 22, 2013, Respondent and Petitioner filed supplemental briefs. (ECF
 17 Nos. 76, 77).

18 On March 27, 2013, Respondent submitted a Second Supplemental Lodgment
 19 (ECF No. 86). On September 9, 2013, Petitioner filed Briefing in Response to
 20 Supplemental Lodging and Respondent's Brief re Further Proceedings. (ECF No. 99).
 21 On October 18, 2013, Respondent filed a Response Brief to Second Supplemental
 22 Lodgment and Further Proceedings. (ECF No. 103). On January 27, 2014, Petitioner
 23 filed a Reply to Respondent's Brief. (ECF No. 110). On February 10, 2014, the Court
 24 requested additional briefing from Respondent addressing the merits of the ineffective
 25 assistance of counsel claim raised by Petitioner (ECF No. 112). On February 25, 2014,
 26 Respondent Beard filed a response. (ECF No. 113). On March 8, 2014, Petitioner filed
 27 a reply. (ECF No. 116).

28 On October 29, 2014, United States Magistrate Judge Ruben B. Brooks, issued

1 a Report and Recommendation. (ECF No. 118). The Magistrate Judge made factual
2 findings that (1) Petitioner was informed at the January 14, 2005 arraignment that a
3 second strike had been alleged and that he was facing at least twenty-five years to life
4 in prison; (2) the state judge did not re-advise Petitioner of his right to counsel at the
5 January 14, 2005 arraignment; and (3) the state trial judge urged Petitioner on multiple
6 occasions to speak to his defense counsel in another criminal case and consider the
7 cumulative effects of the choices he was making. The Magistrate Judge recommends
8 that the Court deny Petitioner's first ground for habeas relief because there was no
9 constitutional violation, and the state court correctly applied the Supreme Court law.
10 The Magistrate Judge recommends that the Court deny Petitioner's second ground for
11 habeas relief:

12 Viewing the record as a whole, the state court's denial of Petitioner's
13 claim that his October 28, 2004 waiver of counsel was not knowing and
14 intelligent was neither contrary to, nor an unreasonable application of,
15 clearly established law. Moreover, nothing that occurred at the January
16 14, 2005 arraignment or during subsequent proceedings altered the validity
17 of Duran's *Faretta* waiver. The state court's denial of Duran's claim that
his October 28, 2004 *Faretta* waiver was invalid was neither contrary to,
nor an unreasonable application of, clearly established law. Additionally,
because there is no clearly established Supreme Court law that a
substantial change in circumstances invalidates a *Faretta* waiver that was
valid when given, this subclaim also fails.

18 (ECF No. 118 at 50). The Magistrate Judge recommends that the Court deny
19 Petitioner's third ground for habeas relief because Petitioner's subclaim of ineffective
20 assistance of trial counsel related to plea bargaining was not presented in Petitioner's
21 Amended Petition and therefore not subject to consideration on remand from Court of
22 Appeals for the Ninth Circuit. The Magistrate Judge further concluded that even if the
23 claim is properly before the court and technically exhausted, the claim is procedurally
24 defaulted. The Magistrate Judge recommends that the Court deny Petitioner's fourth
25 ground for habeas relief because the admission of evidence that Petitioner was armed
26 was not contrary to, or an unreasonable application of, clearly established federal law.
27 The Magistrate Judge denied Petitioner's request for an evidentiary hearing.

28 On January 30, 2015, Petitioner filed an Objection to the Report and

1 Recommendation. (ECF No. 122). Petitioner has three specific objections:

2 (1) Petitioner objects to the Magistrate's finding that the trial court had, on
3 "multiple occasions" urged Petitioner to consult with his El Cajon
attorney, appointed in a separate case in a different courthouse.

4 (2) Petitioner objects to the Magistrate Judge's conclusion that the state
5 court did not violate *Faretta* because this conclusion rests on the
application of the wrong standard.

6 (3) Petitioner objects to the Magistrate's assessment of his IAC claims.

7 *Id.* at 2-3.

8 On February 18, 2015, Respondent Beard filed a reply to Petitioner's Objections
9 to the Report and Recommendation. (ECF No. 124).

10 LEGAL STANDARD

11 The duties of the district court in connection with a report and recommendation
12 of a Magistrate Judge are set forth in Federal Rule of Civil Procedure 72(b) and 28
13 U.S.C. section 636(b)(1). When a party objects to a report and recommendation, the
14 district court must "make a de novo determination of those portions of the report ... to
15 which objection is made," and "may accept, reject, or modify, in whole or in part, the
16 findings or recommendations made by the magistrate." 28 U.S.C. §636(b)(1).

17 DISCUSSION

18 Petitioner's First Objection

19 Petitioner agrees that on January 14, 2005 the state trial court advised Petitioner
20 that a second strike had been added and he was facing a 25 to Life sentence under the
21 three strikes law. Petitioner further agrees that the state trial judge failed to re-offer to
22 appoint counsel or re-advise Petitioner of his right to counsel under *Faretta*. However,
23 Petitioner objects to the finding that the state trial judge urged Petitioner to speak to his
24 El Cajon attorney "on multiple occasions." Petitioner contends that the finding should
25 be stricken as non-responsive to the Ninth Circuit's order.

26 Respondent Beard contends that the Magistrate Judge's factual finding that the
27 state trial court encouraged Petitioner to consider discussing his case with his El Cajon
28 attorney multiple times during the January 14, 2005 arraignment is responsive to the

1 Ninth Circuit's order for "factual findings on the full extent of the advice that the state
2 trial judge gave Duran regarding his rights during the January 14, 2005 arraignment...."
3 (ECF No. 124 at 2).

4 The Ninth Circuit's order directed the Court to "make factual findings on the full
5 extent of the advice that the state trial judge gave Duran regarding his rights during the
6 January 14, 2005 arraignment, including (1) . . . the maximum punishment he faced
7 upon conviction and (2) whether Duran was advised of his Sixth Amendment right to
8 counsel." (ECF No. 75). The Magistrate's Judge's factual finding that the state trial
9 judge urged Petitioner to speak with his defense counsel in the El Cajon case and
10 consider the cumulative effects of the choices he was making is responsive to the Ninth
11 Circuit's order because it relates to the advice that the state trial judge gave Petitioner
12 regarding his rights during the January 14, 2005 arraignment. Petitioner's first
13 objection is overruled.

14 **Petitioner's Second Objection**

15 Petitioner objects to the Magistrate Judge's recommendation that the Court deny
16 ground two of the Petition, based on a violation of *Faretta*. Petitioner contends that the
17 Magistrate Judge's analysis applies the wrong standard because it focuses "on what the
18 trial court said" and "not on what [Petitioner] understood." (ECF No. 122 at 5).
19 Petitioner contends that there is no evidence that the state court judge sought to clarify
20 Petitioner's understanding, re-offered counsel, asked Petitioner if he had changed his
21 mind, or asked Petitioner if he wanted to retract his *Faretta* waiver. Petitioner contends
22 that the state trial judge gave every indication that Petitioner was irrevocably stuck in
23 his *pro per* status, making his waiver of counsel coerced.

24 Respondent contends that this objection was sufficiently addressed in
25 Respondent's Response Brief to Second Supplemental Lodgment and Further
26 Proceedings (ECF No. 103) and in the Report and Recommendation (ECF No. 118).

1 **I. Proper standard**

2 “[W]hen the state court reaches a decision on the merits but provides no
3 reasoning to support its conclusion[,] ... [the federal habeas court] independently
4 review[s] the record to determine whether the state court clearly erred in its application
5 of Supreme Court law.” *Pirtle v. Morgan*, 313 F.3d 1160, 1167 (9th Cir. 2002) (citing
6 *Delgado v. Lewis*, 223 F.3d 976, 982 (9th Cir.2000) (“Federal habeas review is not de
7 novo when the state court does not supply reasoning for its decision, but an independent
8 review of the record is required to determine whether the state court clearly erred in its
9 application of controlling federal law.”). 28 U.S.C. section 2254 states:

10 An application for a writ of habeas corpus on behalf of a person in custody
11 pursuant to the judgment of a State court shall not be granted with respect
12 to any claim that was adjudicated on the merits in State court proceedings
unless the adjudication of the claim –

13 (1) resulted in a decision that was contrary to, or involved an
unreasonable application of, clearly established Federal law,
14 as determined by the Supreme Court of the United States; or

15 (2) resulted in a decision that was based on an unreasonable
determination of the facts in light of the evidence presented
16 in the State court proceeding.

17 28 U.S.C. § 2254(d). “A state court decision may not be overturned on habeas review,
18 for example, because of a conflict with Ninth Circuit-based law, but rather a writ may
19 issue only when the state court decision is ‘contrary to, or involved an unreasonable
20 application of,’ an authoritative decision of the Supreme Court.” *Moore v. Calderon*,
21 108 F.3d 261, 264 (9th Cir. 1997) (quoting 28 U.S.C. § 2254(d)), abrogated on other
22 grounds by *Williams v. Taylor*, 529 U.S. 362 (2000).

23 **A. Whether the *Faretta* waiver was knowing and voluntary**

24 “[*Faretta*] mandated no specific litany or formula to ensure that waiver of
25 counsel are knowing and intelligent.” *Lopez v. Thompson*, 202, F.3d 1110, 1119 (9th
26 Cir. 2000). Instead, the court examines the record as a whole to determine if the trial
27 court made the defendant “‘aware of the dangers and disadvantages of self-
28 representation.’” *Id.* at 1117 (quoting *Faretta v. California*. 422 U.S. 806, 835 (1975)).
In *Lopez* the court noted that, while not mandated, the suggested procedure for federal

1 district court accepting a waiver of the assistance of counsel was to discuss with the
 2 defendant “whether the waiver was knowingly and intelligently made, with an
 3 understanding of the charges, the possible penalties and the dangers of self-
 4 representation.” *Lopez*, 202 F.3d at 1117 (citing *United States v. Harris*, 683 F.2d 322,
 5 324 (9th Cir. 1982); *United States v. Balough*, 820 F.2d 1485, 1488 (9th Cir. 1987)).
 6 *Lopez* was brought under Section 2254; there, the court construed *Faretta* as a rule of
 7 general application requiring it to examine the “record as a whole.” *Lopez*, 202 F.3d
 8 at 1118.

9 The Magistrate Judge correctly stated the standard applicable when the state court
 10 reaches a decision on the merits but the state court does not provide any reasoning to
 11 support its conclusion. The Magistrate Judge correctly applied the established standard
 12 and found that “[t]here is no clearly established law requiring the court to advise a
 13 defendant of all possible future consequences,” and “the advice provided to [Petitioner]
 14 at the *Faretta* hearing more than satisfied the constitutional requirement. (ECF No. 118
 15 at 44). The Magistrate Judge correctly concluded that that “[c]onsidering the record
 16 as a whole, the state court’s conclusion that [Petitioner’s] October 28, 2004
 17 *Faretta* waiver was knowing and voluntary was neither contrary to, nor an unreasonable
 18 application of, clearly established Supreme Court precedent.”

19 **B. Whether the change in circumstances invalidated the *Faretta* waiver**

20 There is no Supreme Court law requiring the re-advisement of a right to counsel
 21 following a substantial change in circumstances once a valid *Faretta* waiver has been
 22 made. *Becker v. Martel*, 472 Fed. App’x 823, 824 (9th Cir. 2012). In *Becker*, the Ninth
 23 Circuit concluded that “[b]ecause the Supreme Court has not squarely established that,
 24 after a valid *Faretta* waiver, criminal defendants must be re-advised of the right to
 25 counsel following the addition of new charges against them, the California Court’s
 26 [denial of the claim] was not unreasonable.” *Id.*

27 The Magistrate Judge correctly concluded that “because there is no clearly
 28 established Supreme Court law that a substantial change in circumstances invalidates

1 a *Faretta* waiver that was valid when given, this subclaim ... fails. (ECF No. 118 at 44,
2 50). Petitioner's second objection is overruled.

3 **Petitioner's Third Objection**

4 Petitioner objects to the Magistrate Judge's conclusion that "the issue of
5 ineffective counsel during plea negotiations was not included in the Amended Petition"
6 and "because this issue was not raised there, the Court declines to address it on
7 remand." (ECF No. 118 at 63). Petitioner contends that to plead a claim, he need only
8 state the operative facts and legal theory. Petitioner contends that he cited the relevant
9 federal legal authority and stated the operative facts. Petitioner contends that he also
10 attached relevant portions of the record to his handwritten claim which indicated that
11 at the time he was misadvised, he had a plea offer of "stip 15." Petitioner contends that
12 having been advised that he was only facing a maximum of twenty years, Petitioner
13 rejected the offer of "stip 15," and insisted on representing himself and ended up with
14 a more severe sentence of forty years to life.

15 Petitioner further objects to the Magistrate Judge's finding that the IAC claim
16 was not exhausted because it was not sufficiently pled in the petition filed with the
17 California Supreme Court. Petitioner contends that he stated the operative facts and the
18 legal standard in his petition to the California Supreme Court. Petitioner contends that
19 "[c]onstruing his state petition leniently, as we must, it exhausted the IAC argument and
20 he can now raise the claim that the IAC of his counsel prejudiced him by preventing
21 him from assessing the true benefit of the plea offer of 'stip fifteen' and the later offer
22 of eight years." (ECF No. 122 at 20).

23 Respondent contends that "as was addressed in Respondent's Response Brief to
24 Second Supplemental Lodgment and Further Proceedings (ECF No. 103 at 18-19), and
25 in Respondent's Brief (ECF No. 113), this claim is unexhausted and, in any event,
26 meritless. The Report and Recommendation (ECF No. 118) is correct on this issue."
27 (ECF No. 124 at 3).

28 **I. Petitioner's contention that the IAC claim was sufficiently pled in the federal
petition and should be addressed by this court**

1 “To be afforded a hearing in a [section] 2254 proceeding, the petitioner is
 2 required to allege facts with sufficient specificity to support his claim for relief.” *Wacht*
 3 *v. Cardwell*, 604 F.2d 1245, 1246 (9th Cir. 1979). “The ‘Rules Governing Section 2254
 4 Cases’ provide that the petition ‘ . . . shall specify all the grounds for relief which are
 5 available to the petitioner and of which he has or by the exercise of reasonable diligence
 6 should have knowledge and shall set forth in summary form the facts supporting each
 7 of the grounds thus specified.’” *Wacht*, 604 F.2d at 1247 (quoting Rule 2(c), 28 U.S.C.
 8 foll. § 2254).

9 The record indicates and the Magistrate Judge correctly found that “[n]either
 10 [Petitioner’s Amended Petition, nor Petitioner’s Traverse] refers to plea negotiations or
 11 advice from defense counsel about possible plea bargains.” ECF No. 118 at 62; *see also*
 12 ECF No. 15-2; ECF No. 43-1. The Magistrate Judge correctly concluded that “the issue
 13 of ineffective counsel during plea negotiations was not included in the Amended
 14 Petition,” and “[b]ecause this issue was not raised there, the Court declines to address
 15 it on remand.” *Id.* at 63. To the extent Petitioner’s third objection to the assessment of
 16 his IAC claims is based on the contention that the IAC claim was sufficiently pled in
 17 the federal petition, Petitioner’s objection is overruled.

18 **II. Petitioner’s contention that the IAC claim was fairly presented in the state**
 19 **petition, and therefore, it was exhausted**

20 28 U.S.C. section 2254(b)(1) states:

21 (b)(1) An application for a writ of habeas corpus on behalf of a person in
 22 custody pursuant to the judgment of a State court shall not be granted
 unless it appears that—

23 (A) the applicant has exhausted the remedies available in the courts of the
 State; or

24 (B)(i) there is an absence of available State corrective process; or

25 (ii) circumstances exist that render such process ineffective to protect the
 26 rights of the applicant.

27 28 U.S.C. § 2254(b)(1). “[E]xhaustion of state remedies requires that petitioners fairly
 28 presen[t] federal claims to the state courts in order to give the State the opportunity to
 pass upon and correct alleged violations of its prisoners federal rights.” *Duncan v.*

1 *Henry*, 513 U.S. 364, 365 (1995) (citing *Picard v. Connor*, 404 U.S. 270, 275 (1971))
 2 (internal quotation omitted). “[P]etitioners must plead their claims with considerable
 3 specificity before the state courts in order to satisfy the exhaustion requirement.” *Rose*
 4 *v. Palmateer*, 395 F.3d 1108, 1111 (9th Cir. 2005). “A habeas petitioner ... meets the
 5 technical requirements for exhaustion[] [if] there are no state remedies any longer
 6 ‘available’ to him.” *Coleman v. Thompson*, 501 U.S. 722, 732 (1991).

7 The record indicates and the Magistrate Judge correctly found that “[t]he state
 8 petition does not mention any plea negotiations or plea offers that were considered or
 9 rejected” and “Petitioner failed to allege the claim of ineffective assistance of counsel
 10 during plea negotiations in his petition to the California Supreme Court.” (ECF No. 118
 11 at 64-65). However, the Magistrate Judge correctly concluded that “based on
 12 California’s rule barring untimely petition for post-conviction relief ... Petitioner no
 13 longer has state court remedies available with respect to this claim,” and, therefore,
 14 Petitioner’s claim for ineffective assistance of counsel during plea negotiations is
 15 “technically exhausted.” *Id.* at 66.

16 The Court of Appeals for the Ninth Circuit has held that claims which are
 17 “technically exhausted” are procedurally defaulted if the procedural rule that would be
 18 imposed is independent and adequate. *Cooper v. Neven*, 641 F.3d 322, 327 (9th Cir.
 19 2011). The Magistrate Judge correctly found that “[t]he Supreme Court has concluded
 20 that California’s untimeliness rule is an independent and adequate state procedural rule.
 21 Accordingly, Petitioner’s ‘technically exhausted’ claim is procedurally defaulted.” *Id.*
 22 at 67 (citing *Walker v. Martin*, 562 U.S. ___, 131 S. Ct. 1120, 1128-30 (2011)).

23 To the extent Petitioner’s third objection to the assessment of his IAC claims is
 24 based on the contention that the IAC claim was exhausted, Petitioner’s objection is
 25 overruled.

26 27 CERTIFICATE OF APPEALABILITY

28 A certificate of appealability must be obtained by a petitioner in order to pursue

1 an appeal from a final order in a section 2254 habeas corpus proceeding. *See* 28 U.S.C.
2 § 2253(c)(1)(A); Fed R. App. P. 22(b). Pursuant to Rule 11 of the Federal Rules
3 Governing Section 2254 Cases, “[t]he district court must issue or deny a certificate of
4 appealability when it enters a final order adverse to the applicant.”

5 A certificate of appealability should be issued only where the petition presents
6 “a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2).
7 It must appear that reasonable jurists could find the district court’s assessment of the
8 petitioner’s constitutional claims debatable or wrong. *Slack v. McDaniel*, 529 U.S. 473,
9 484 (2000). The Court finds that Petitioner has raised colorable, nonfrivolous
10 arguments. The Court grants a certificate of appealability.

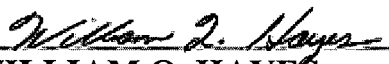
11 **CONCLUSION**

12 IT IS HEREBY ORDERED that the Report and Recommendation (ECF No. 118)
13 is ADOPTED in its entirety. The Amended Petition for Writ of Habeas Corpus (ECF
14 No. 15) is DENIED.

15 IT IS FURTHER ORDERED that Petitioner’s request for an evidentiary hearing
16 is DENIED.

17 IT IS FURTHER ORDERED that a certificate of appealability is GRANTED.

18 DATED: April 21, 2015

19 
20 **WILLIAM Q. HAYES**
21 United States District Judge
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