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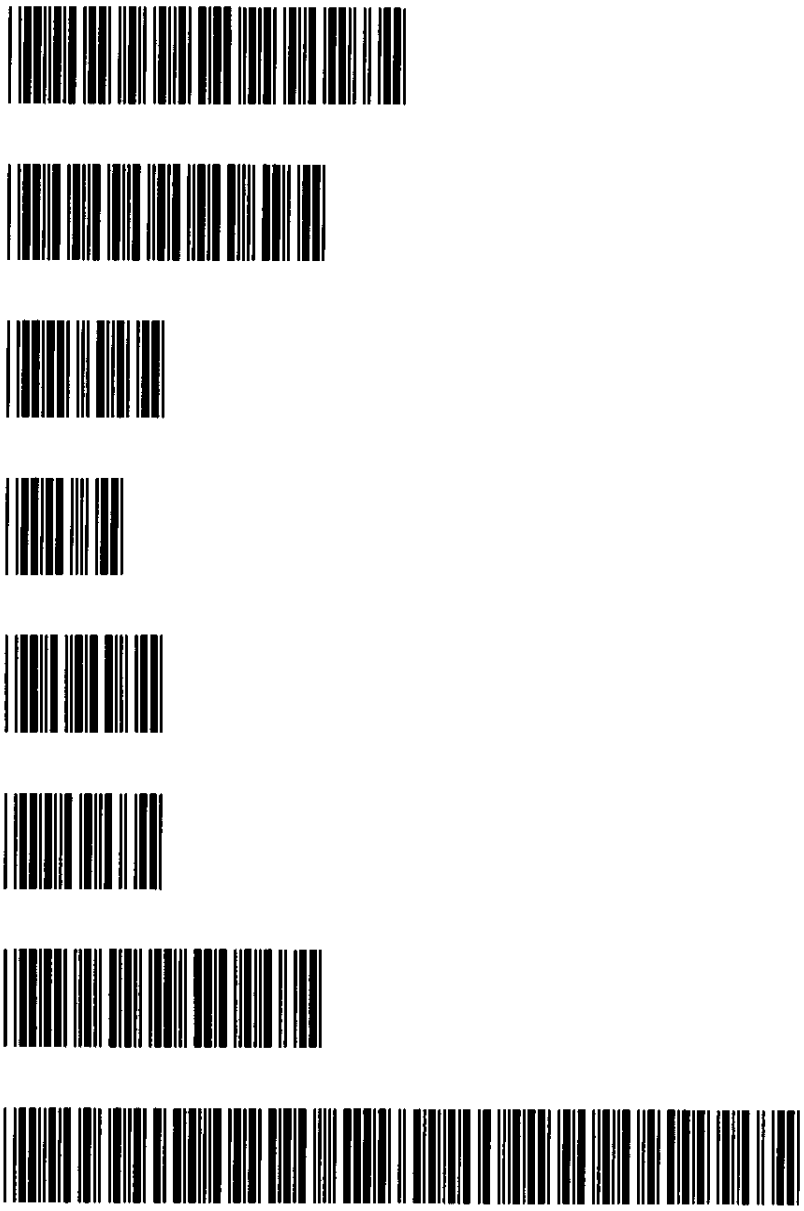

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

DARREN D. CHAKER, Petitioner, v. ALAN CROGAN, CHIEF PROBATION OFFICER, Respondent.	Civil No. 99-2260-BTM(AJB) Report and Recommendation

Petitioner, a former state prisoner proceeding pro se, has filed a petition for writ of habeas corpus under 28 U.S.C. § 2254 challenging the voluntary nature of his plea of nolo contendre to a charge of invasion of privacy under Cal. Penal Code § 647(k) in San Diego Municipal Court Case No. M738266. Initially, Respondent filed a motion to dismiss arguing that Petitioner had failed to exhaust his state remedies, that Petitioner's claims were procedurally defaulted, and that at least some of the claims should be dismissed under Rule 9 of the Rules Governing Section 2254 Cases. By order filed March 7, 2000, the Court preliminarily denied without prejudice Respondent's motion to dismiss and ordered Respondent to file an answer addressing the merits of Petitioner's claims. The answer has been filed, and Petitioner has filed a traverse.[1]

[1]Petitioner's traverse was filed in response to the motion to dismiss, prior to the filing of Respondent's answer. Petitioner was granted an extension of time to file an additional traverse, but did not file one. Petitioner's traverse filed on March 10, 2000 did address the merits of the petition in addition to the procedural arguments raised by Respondent in the motion to dismiss.

Procedural History

Petitioner was charged with the misdemeanor of intentional invasion of privacy based under Cal. Penal Code § 647(k) upon a complaint by the victim that Petitioner had looked over the interior wall of a tanning booth where the victim was laying nude on the tanning bed. [Resp. Exh. 2, at 6] Trial was commenced on the charge against Petitioner on September 9, 1997. [Resp. Exh. 5, at 4] On September 10, 1997, at the conclusion of the prosecution's case and prior to the presentation of any evidence by the defense, Petitioner moved for a mistrial based upon a break down of communications between himself and his appointed counsel, Ray Keramati. [Resp. Exh. 20, at 4] Petitioner agreed that the mistrial was entered with his consent, and was advised that the case could be retried and that he had no right to claim double jeopardy. [Id.] Upon the declaration of mistrial, the People moved to revoke Petitioner's own recognizance status, arguing that Petitioner presented a potential threat to the public. [Id.] The court granted the motion, set bail at $50,000, and remanded Petitioner to custody. [Id. at 4-5]

New counsel, William Burgener, was appointed for Petitioner. With the advice of counsel, on September 30, 1997, Petitioner entered a plea of nolo contendre to the charges under Penal Code § 647(k). [Resp. Exh. 1 & 2] As a part of the plea, Petitioner did not contest the underlying facts alleged by the prosecution. [Resp. Exh. 2, at 6] Petitioner signed and initialed the change of plea form, indicating he had been advised of his constitutional rights and was waiving those rights, and that he had been advised of the consequences of the plea he was entering. [Resp. Exh. 1] Petitioner confirmed his waiver of rights and desire to enter a plea of no contest in open court. [Resp. Exh. 2, at 3-7] Petitioner was immediately released from custody on his own recognizance upon entry of the plea, but was ordered to stay away from the victim, two witnesses, a clerk from the prosecutor's office, and two tanning salons. [Resp. Exh. 2, at 10-11]

Three and a half months later, on January 12, 1998, Petitioner by and through new appointed counsel, Brian Funk, filed a motion to withdraw his plea, arguing that his plea was not voluntary because (1) he was in fear for his safety being in custody as a former under cover agent who was not put into protective custody; (2) he was never told what the term "sentence to court" meant and he was under the impression it meant he would receive informal probation; and (3) his trial counsel failed to investigate and advise him of a defense based upon the fact he was under the influence of Vicodin and

Motrin at the time of the offense, negating the specific intent requirement of Penal Code § 647(k). [Resp. Exh. 3, ¶ 11] On February 3, 1998, an evidentiary hearing was held with regard to Petitioner's motion. [Resp. Exh. 22] After hearing testimony from Petitioner and his trial counsel, the court denied the motion to withdraw the plea of no contest. [Id. at 49-50] On February 17, 1998, Petitioner was sentenced to summary probation with sentence suspended for three years. [Resp. Exh. 4] Petitioner was sentenced to the 31 days of custody already served, and a $200 fine, a $100 restitution fine, and a $35 administrative fee. [Id.] Petitioner was further ordered to violate no laws during the three years, to stay away from the tanning salon where the offense occurred as well all other tanning salons, to carry a photo identification with him at all times with his true name, to use his true name at all times, to have no contact with the victim, and to pay for all therapy expenses incurred by the victim. [Id.]

On or about August 3, 1998, Petitioner, by and through yet another appointed counsel, Charles Guthrie, filed an appeal of the conviction in the Appellate Division of the San Diego County Superior Court, claiming (1) the trial court lacked jurisdiction to receive the plea of nolo contendre because Petitioner had already been put once in jeopardy; (2) that Petitioner's plea was rendered involuntary because Petitioner was not advised by trial counsel of the potential he would have to register as a sex offender; (3) Petitioner's plea was rendered involuntary because Petitioner was not advised by trial counsel that a defense of lack of specific intent could be presented based upon Petitioner's taking of the prescription drug Vicodin; and (4) Petitioner's plea was rendered involuntary because of the totality of circumstances surrounding its entry. [Resp. Exh. 5] The judgment of the Municipal Court was unanimously affirmed on October 16, 1998. [Resp. Exh. 9] A petition for rehearing or certification of an appeal was filed on or about April 18, 1998. [Resp. Exh. 10] This petition was denied on November 23, 1998. [Resp. Exh. 11]

Petitioner, proceeding pro se, filed a petition for writ of habeas corpus with the San Diego County Superior Court, which was denied on January 26, 1999. [Resp. Exh. 13] Petitioner then filed a petition for writ of habeas corpus with the California Court of Appeal on May 6, 1999, claiming (1) double jeopardy barred the entry of his no contest plea; (2) his arrest was invalid; (3) his plea was involuntary due to his counsel's failure to investigate a "Vicodin defense"; (4) his plea was involuntary due to his counsel's failure to inform him of potential consequences of that plea; (5) the three month

delay in charging Petitioner violated his right to due process; (6) he was deprived of the effective assistance of counsel due to his counsel's failure to move for dismissal based upon double jeopardy, failure to investigate the "Vicodin defense", and failure to advise him of potential consequences of the plea; and (7) the plea was entered involuntarily because Petitioner was under oppression, fear, and misconceptions. [Resp. Exh. 14] This petition was denied on June 2, 1999. [Resp. Exh. 15]

Petitioner filed a petition for writ of habeas corpus with the California Supreme Court on June 11, 1999, attaching the verbatim points and authorities submitted to the Court of Appeal. [Resp. Exh. 16] On or about September 9, 1999, Petitioner submitted a supplemental memorandum of points and authorities to the California Supreme Court regarding his double jeopardy claim. [Resp. Exh. 17] This petition was denied on September 29, 1999 by citation to In re Waltreus, 62 Cal. 2d 218, 225 (1965) and In re Dixon, 41 Cal. 2d 756, 769 (1953).

The First Amended Petition in this case was filed on December 1, 1999. The First Amended Petition raises the following grounds for relief: (1) that double jeopardy stripped the trial court of jurisdiction to accept Petitioner's no contest plea; (2) that Petitioner was denied the effective assistance of trial counsel when counsel failed to move for dismissal based upon double jeopardy, failed to investigate his "Vicodin defense," and failed to advise Petitioner of the possible consequence of his plea; (3) that Petitioner's right to due process was violated by the three month delay in charging Petitioner; (4) that the plea was involuntary because it was entered under fear, oppression, and misconception; and (5) that his arrest was invalid due to a violation of the stale misdemeanor rule.

Respondent's Motion to Dismiss

As an initial matter, Respondent argues once again in its answer that the Petition should be dismissed as it includes an unexhausted claim. In addition, Respondent argues that the entire petition, or alternatively several of Petitioner's claims, must be dismissed based upon the doctrine of abuse of the writ. Finally, Respondent argues that review of Petitioner's claims is foreclosed by his nolo contendre plea. Respondent's motion to dismiss raising these issues was found to be without merit and was

preliminarily denied.[2] The Court will again address these issues prior to a discussion of the merits of Petitioner's claims.

1. Exhaustion of State Remedies

Respondent first argues that Petitioner's claims of ineffective assistance of counsel based upon his trial counsel's failure to formulate and inform him of a "Vicodin defense" and failure to explain the potential consequences of his nolo contendre plea were not raised before the state courts. Instead, Respondent argues that Petitioner only claimed before the state courts that he was deprived of effective assistance of counsel based upon trial counsel's failure to seek dismissal based upon double jeopardy.

Respondent's argument is without merit. In the petition for writ of habeas corpus filed in the California Supreme Court, Petitioner claimed he was denied the effective assistance of counsel based upon counsel's failure to move to dismiss based upon double jeopardy, counsel's failure to investigate a defense based on the fact Petitioner was taking Vicodin at the time of the incident, and counsel's failure to inform him of potential consequences of the plea. [Resp. Exh. 16, at pp. 27-28] These are identical to the claims raised in the present petition. Therefore, Respondent's motion to dismiss the ineffective assistance of counsel claims based upon lack of exhaustion should be DENIED.

2. Abuse of the Writ

Respondent also argues that the entire petition, or at least all claims raised in the present petition which were not raised in the previous habeas corpus petition, should be dismissed as an abuse of the writ. Rule 9(b) of the Rules Governing Section 2254 cases places stringent requirements upon a Petitioner seeking to file a "second or successive petition." That Rule incorporates the Supreme Court's prior decisions regarding the doctrines of abuse of the writ and successive petitions. Slack v. McDaniel, ___ U.S. ___, 120 S. Ct. 1595, 1605 (2000). Abuse of the writ bars a habeas petitioner from pursing a *second* petition for writ of habeas corpus, raising claims which were dropped from an earlier petition because they were unexhausted. McCleskey, 499 U.S. at 520. However, in order for the doctrine of

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[2]In its motion to dismiss, Respondent also argued that the claims raised in the present petition were procedurally barred by the California Supreme Court's citations to In re Waltreus and In re Dixon. As pointed out in the Court's March 7, 2000 order, a citation by the California Supreme Court to In re Waltreus, 62 Cal.2d 218, 225 (1965) does not bar federal review of constitutional claims. Calderon v. United States District Court (Bean), 96 F.3d 1126, 1131 (9th Cir. 1996). In addition, because there is no basis upon which to determine which claims were barred by citation to which cases, the citation to In re Dixon is likewise not a procedural bar. Id. Respondent has not raised this argument again in its answer.

abuse of the writ to apply to bar claims from federal habeas adjudication, the previous petition must have been dismissed on the merits. Slack, 120 S. Ct. at 1605-06. "A petition filed after a mixed petition has been dismissed under Rose v. Lundy before the district court adjudicated any claims is to be treated as 'any other first petition' and is not a second or successive petition." Id. at 1605.

Here, the prior habeas corpus petition filed in this Court was dismissed without prejudice because the claims presented therein had not been fairly presented to the state courts. Following exhaustion of those claims, the present petition was filed. There has been no prior decision on the merits of Petitioner's claims. Therefore, the doctrine of abuse of the writ does not apply. Id. Respondent's motion to dismiss based upon Rule 9(b) and the doctrine of abuse of the writ should be DENIED.

3. Claims Following Nolo Contendre Plea

Lastly, Respondent argues that Petitioner's claims are foreclosed from federal review because of the nolo contendre plea entered by Petitioner. Under California Penal Code section 1016, "a plea of nolo contendre shall be considered the same as a plea of guilty and . . . upon a plea of nolo contendre, the court shall find the defendant guilty . . . ." Ordinarily, a petitioner in a habeas corpus proceeding may not independently raise claims of constitutional error which precede a guilty plea. Tollett v. Henderson, 411 U.S. 258, 266-267 (1973).

> 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. He 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 [of competence demanded of criminal defense counsel]."

Id. at 267. An exception to this rule exists, however, where the underlying constitutional claim is one which goes to the state's power to hail the defendant into court to answer the charges against him. Journigan v. Duffy, 552 F.2d 283, 288 (9th Cir. 1977) (citing Blackledge v. Perry, 417 U.S. 21, 30-31 (1974)). Such claims may be raised even following a guilty plea.

Here, Petitioner raises five claims. Petitioner's second and fourth claims regarding ineffective assistance of trial counsel and the effect of oppression upon the voluntariness of his guilty plea are properly addressed on their merits under because Petitioner is challenging "the voluntary and intelligent character of the guilty plea." Tollett, 411 U.S. at 267. In addition, Petitioner's claim that double jeopardy

stripped the trial court of jurisdiction to accept the no contest plea is properly considered on its merits because such claim challenges the underlying ability of the court to charge Petitioner with criminal conduct. Blackledge, 417 U.S. at 31 (effect of double jeopardy bar is to prevent a trial from taking place at all, such that guilty plea does not foreclose habeas review); Journigan, 552 F.2d at 288 (same). Respondent's motion to dismiss these claims should be DENIED.

Petitioner's remaining claims that his right to due process was violated by the delay in charging him and that his arrest was invalid due to a violation of the stale misdemeanor rule, however, are not cognizable in this habeas petition. As a general matter, the illegality of an arrest does not, in and of itself, void any later proceedings or form the basis for habeas relief. Stevenson v. Mathews, 529 F.2d 61, 63 (9th Cir. 1976). Issues regarding the illegality of arrest certainly do not form the basis of habeas relief following a guilty plea. Id.; see also Parker v. North Carolina, 397 U.S. 790 (1970) (claims of coercive interrogation and confession are not cognizable on habeas corpus following entry of guilty plea where there was ample opportunity to raise issues prior to plea and defendant indicated that plea was entered into freely and voluntarily). These are not the type of "antecedent constitutional violations" which may be raised following a guilty plea. Tollett, 411 U.S. at 267. Therefore, Respondent's motion to dismiss these claims should be GRANTED.

Discussion of the Merits of Petitioner's Claims

Petitioner's remaining claims regarding double jeopardy, ineffective assistance of counsel, and involuntary plea shall be addressed on their merits.

1. Standard of Review

Review of this petition is governed by the provisions of 28 U.S.C. § 2254(d), as amended by the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"). Section 2254(d) provides, in relevant part, as follows:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the 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 . . . .
>
> (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.

In interpreting the provisions of section 2254(d)(1), the Supreme Court has held that the terms "contrary to" and "unreasonable application of" have distinct meanings. A state court's decision is "contrary to" clearly established Federal law under either of two overlapping scenarios: (1) where "the state court applies a rule that contradicts the governing law set forth in [Supreme Court] cases", or (2) where "the state court confronts a set of facts that are materially indistinguishable from a decision of [the Supreme Court] and nevertheless arrives at a result different from our precedent." Williams v. Taylor, 120 S. Ct. 1495, 1519-20 (2000). In short, in order for a petitioner to prevail under a claim that the state court's decision was "contrary to" Federal law, the state court's finding must have been "diametrically different," "opposite in character or nature," or "mutually opposed" to clearly established Federal law. Id. at 1519.

Alternatively, habeas relief may be granted where the state court's decision "involved an unreasonable application of" Federal law. In Williams, the Supreme Court rejected the standard previously applied by several circuits under section 2254(d)(1) of whether the state court has applied Federal law "in a manner that reasonable jurists would all agree is reasonable." Id. at 1521 (quoting Green v. French, 143 F.3d 865 (4th Cir. 1998), *cert. denied* 525 U.S. 1090 (1999)). Instead, the "unreasonable application" inquiry is an objective determination. Williams, 120 S. Ct. at 1521. A habeas court reviewing a petition under section 2254, therefore, "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 1522. Instead, there must be a determination that the underlying state court decision was not only wrong, but was also unreasonable. Id.

Although it rejected the "reasonable jurist" standard applied by several Courts of Appeal, the Supreme Court did not go beyond the general statement that an "unreasonable application of" federal law is one where the state court "unreasonably applies" the correct legal principles to the facts of the case before it. Id. at 1523. The Ninth Circuit, however, has concluded that an appropriate standard of reference for the "unreasonable application" prong of section 2254 is the "clear error" doctrine. This doctrine, as applied to the habeas context, would require issuance of the writ under section 2254(d)(1) not simply when the court believes the state court's decision was incorrect choice between two reasonable arguments. Instead, habeas relief would be appropriate only where the federal court, upon

independent review of the question presented, is left with a "definite and firm conviction" that an error has been committed. Van Tran v. Lindsey, 2000 WL 622070, *6-7 (May 16, 2000). Before the court can determine whether there has been an "unreasonable application" of federal law, the court must first determine whether the state court erred. Van Tran, 2000 WL 622070 at *8. Only if the court determines that the state decision was in error, must it then determine whether such error amounted to an "unreasonable application of" federal law. Id.

2. Double Jeopardy

Petitioner argues that the trial court was without jurisdiction to accept his plea because double jeopardy barred him from being retried on the charge against him. Trial was commenced on the charge against Petitioner on September 9, 1997. [Resp. Exh. 5, at 4] On September 10, 1997, at the conclusion of the prosecution's case and prior to the presentation of any evidence by the defense, Petitioner moved for a mistrial based upon a break down of communications between himself and his appointed counsel, Ray Keramati. [Resp. Exh. 20, at 4] Petitioner agreed that the mistrial was entered with his consent, and was advised that the case could be retried and that he had no right to claim double jeopardy. [Id.] Petitioner argues that the trial court should have appointed him new counsel prior to asking him to consent to a mistrial, and that his right to double jeopardy was violated, barring entry of the plea of nolo contendre. There is no reasoned state court opinion regarding Petitioner's double jeopardy claim. Therefore, this Court will undertake an independent review of such claim in light of the facts and clearly established federal law. Delgado v. Lewis, 181 F.3d 1087, 1091 (9th Cir. 1999) *judgment vacated on other grounds* Lewis v. Delgado, 120 S. Ct. 1002 (2000).

> The Double Jeopardy Clause of the Fifth Amendment protects a person from being "twice put in jeopardy of life of limb" for the same offense. The Supreme Court has enumerated several purposes for this protection: (1) to ensure the finality of judgments in criminal cases; (2) to avoid compelling a defendant to live in a constant state of anxiety and insecurity attendant with successive prosecutions for the same offense; (3) to avoid giving the prosecution an unfair opportunity to retry the defendant using information gained from the first trial concerning the strengths and weaknesses of the State's case; (4) to ensure that the defendant's right to have his fate decided by the first jury empaneled is protected; and (5) to avoid the imposition of multiple punishments for the same offense. . . . For these reasons, upon declaration of a mistrial, retrial will only be permitted if the defendant consented to the mistrial or if the mistrial was caused by "manifest necessity."

Weston v. Kernan, 50 F.3d 633, 636 (9th Cir. 1995) (quoting Arizona v. Washington, 434 U.S. 497, 505 (1978)) (other citations omitted). Here, Petitioner not only consented to the mistrial, but he moved for

mistrial based upon the breakdown in communications between himself and his counsel. [Resp. Exh. 20, at 4] As such, there is no basis for a claim that double jeopardy barred him from being retried on the charges.

In addition, it is clear that even if a mistrial had not been requested by or consented to by Petitioner, the trial court would have been obligated to declare a mistrial as a matter of manifest necessity. Thomas v. Municipal Court, 878 F.2d 285, 287-288 (9th Cir. 1989). Petitioner and his counsel had a break down in communication, which caused Petitioner to request a mistrial and the appointment of new counsel. Had the trial court ignored Petitioner's request and forced Petitioner's trial to continue, Petitioner certainly would have had grounds for reversal of any conviction under the Sixth Amendment right to counsel. Id. at 290. Under such circumstances Double Jeopardy does not bar retrial, and did not deprive the trial court of jurisdiction to accept Petitioner's no contest plea. It cannot be said that the state court's denial of Petitioner's claim for relief based upon his double jeopardy claim "was contrary to, or involved an unreasonable application of, clearly established Federal law" such that this Court is left with a "'definite and firm conviction' that an error has been made." Van Tran, 2000 WL at * 6; 28 U.S.C. § 2254(d). Petitioner's claim should be DENIED.

3. Ineffective Assistance of Counsel

As pointed out above, Petitioner's claim of ineffective assistance of counsel survives his guilty plea only insofar as he claims that counsel's performance was so deficient that it rendered his plea involuntary under constitutional standards. Tollett, 411 U.S. at 264. In determining whether Petitioner's counsel performed at a level which deprived Petitioner of his constitutional rights, the two-part test from Strickland v. Washington, 466 U.S. 668 (1984) is applied. Under Strickland, in order to prevail on his claim of ineffective assistance of trial counsel, Petitioner must show (1) that counsel's performance was deficient and (2) that the deficient performance was to Petitioner's prejudice. Strickland, 466 U.S. at 687. Petitioner must "overcome a strong presumption that counsel 'rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment,' and establish that [counsel's] performance was 'outside the wide range of professionally competent assistance'." Clabourne v. Lewis, 64 F.3d 1373, 1377 (9th Cir. 1995) (quoting Strickland, 466 U.S. at 690). In this context, prejudice means that Petitioner must demonstrate a "reasonable probability that, but for

counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694.

When claiming ineffective assistance of counsel in the entry of a guilty plea, Petitioner must show that counsel's performance was so deficient that the "consensual character of the plea is called into question." Mabry v. Johnson, 467 U.S. 504, 509 (1984); see also Hill v. Lockhart, 474 U.S. 52, 56-57 ("[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."). In the context of a claim that counsel's ineffective performance rendered a guilty plea involuntary, the "prejudice" requirement of Strickland requires a showing by the petitioner that "but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Hill, 474 U.S. at 59. Where the claimed deficiency is a failure to fully investigate and discover exculpatory evidence, the "prejudice" determination will center on "the likelihood that discovery of the evidence would have led counsel to change his recommendation as to the plea. This assessment, in turn, will depend in large part on a prediction whether the evidence likely would have changed the outcome of a trial." Id. Similarly, where the claimed deficiency is a failure to advise of a potentially meritorious defense, "the resolution of the 'prejudice' inquiry will depend largely on whether the affirmative defense likely would have succeeded at trial." Id.

Petitioner raises three factual bases for his ineffective assistance of counsel claim. First, Petitioner argues that his trial counsel should have moved to dismiss the charge against him based upon double jeopardy. Second, Petitioner argues that his trial counsel failed to investigate a potential defense based upon the fact Petitioner was taking Motrin and Vicodin at the time the offense took place. Finally, Petitioner argues his trial counsel failed to advise him of potential (but unrealized) consequences of his plea. Each of these claims were raised before the trial court on Petitioner's motion to withdraw his guilty plea. [Resp. Exh. 3 & 22]. Following an evidentiary hearing at which Petitioner and his trial counsel both testified, the trial court found "that the evidence shows, by clear and convincing evidence, as well as proof beyond a reasonable doubt, the Defendant's plea was voluntary and knowingly made, that he knew what he was doing." [Resp. Exh. 22, at p. 49]

A. Failure to Move to Dismiss Charge

Petitioner's claim that his counsel should have moved to dismiss the charge against him based upon Double Jeopardy is without merit as more fully explained above in section 2. Petitioner requested and consented to the entry of a mistrial because of the break down in communications between himself and his trial counsel. There was no meritorious basis for a motion to dismiss, and Petitioner cannot show prejudice flowing from his counsel's failure to make such a motion. It cannot be said that the state court's denial of Petitioner's claim for relief based upon his trial counsel's failure to move to dismiss based upon double jeopardy "was contrary to, or involved an unreasonable application of, clearly established Federal law" such that this Court is left with a "'definite and firm conviction' that an error has been made." Van Tran, 2000 WL at * 6; 28 U.S.C. § 2254(d). Petitioner's claim of ineffective assistance of counsel based upon the failure to move for dismissal should be DENIED.

B. Failure to Investigate Vicodin Defense

Petitioner's claim that his counsel should have investigated a defense based upon his taking of the prescription medication Vicodin is also without merit. Following his guilty plea, Petitioner must show not only that his counsel should have investigated such a defense, but also that if he had been advised of such a defense he would not have entered his no contest plea. Hill, 474 U.S. at 59. In addition, Petitioner must show that "the affirmative defense likely would have succeeded at trial." Id.

Beyond claiming that he was taking Vicodin and Motrin at the time of the underlying offense, the record is absolutely silent on the factual basis for Petitioner's claim. Vicodin is a narcotic painkiller which is used for the relief of moderate to moderately severe pain. Vicodin, (visited May 31, 2000) <http://www. healthsquare.com/rx/vicodin/htm> Common side effects include dizziness, light-headedness, nausea, sedation, and vomiting, and less common and rare side effects include decreased mental and physical capability, drowsiness, mental clouding, and mood changes. Id. Although an evidentiary hearing was held in the Municipal Court upon Petitioner's motion to withdraw his plea, no evidence was presented regarding the amount of Vicodin and Motrin taken by Petitioner on the date of the offense, or side effects suffered by Petitioner as a result of that medication.[3]

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[3]Petitioner is not entitled to an evidentiary hearing before this Court. "Federal courts sitting in habeas are not an alternative forum for trying facts and issues which a prisoner made insufficient effort to pursue in state proceedings." Williams v. Taylor, 120 S. Ct. 1479, 1491 (2000). Petitioner knew of the

More importantly, there is no claim that Petitioner was unaware that he was taking the medications or the potential for raising a defense based upon those medications. In order to show that his counsel's performance was so deficient as to justify habeas relief, Petitioner must show that if he had been advised of the existence of a defense based upon his taking of Vicodin, he would not have entered his no contest plea. Hill, 474 U.S. at 59. In his declaration in support of the motion to withdraw his guilty plea, Petitioner specifically states that he requested that his attorneys raise this defense. [Resp. Exh. 3, at ¶ 11C] Petitioner cannot show that his plea was involuntary based upon his lack of knowledge of a potentially viable defense, or that he would not have entered his no contest plea, but instead would have insisted on going to trial, if his counsel had informed him of the potential defense based upon his taking of the prescription medicine Vicodin. In addition, Petitioner has not shown that such a defense likely would have succeeded at trial.

It cannot be said that the state court's denial of Petitioner's claim for relief based upon his trial counsel's failure to advise him of a potential defense based upon his taking of the prescription medication Vicodin "was contrary to, or involved an unreasonable application of, clearly established Federal law" such that this Court is left with a "'definite and firm conviction' that an error has been made." Van Tran, 2000 WL at * 6; 28 U.S.C. § 2254(d). As such, Petitioner's claim of ineffective assistance of counsel based upon the failure to formulate and advise Petitioner of such a defense should be DENIED.

C. Potential Consequences

Petitioner faults his trial counsel for failing to advise him of potential (but unrealized) consequences of a no contest plea. For instance, Petitioner points to the unrealized potential that his rights to

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existence of facts to support his claim that his counsel should have advised him of a potential defense based upon his taking of the prescription drug Vicodin at the time of the hearing on his motion to withdraw his no contest plea. Petitioner submitted a declaration in support of his motion to withdraw his plea indicating he was under the influence of Vicodin and Motrin and that this defense was not explored by his attorneys prior to the entry of his plea. [Resp. Exh. 3, at ¶ 11C] However, no further facts were developed explaining how the taking of those drugs could form the basis of a meritorious defense, or regarding counsel's advice to Petitioner regarding such a defense. Because Petitioner failed to develop the factual basis for his ineffective assistance of counsel claim before the state court, Petitioner is entitled to an evidentiary hearing in this Court only if he can satisfy the stringent requirements of 28 U.S.C. § 2254(e)(2). Here, Petitioner cannot show that his ineffective assistance of counsel claim is based upon new law or new facts, or that "the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the [Petitioner] guilty of the underlying offense." 28 U.S.C. § 2254(e)(2)(B). Therefore, no evidentiary hearing should be held.

bear arms and travel at will could have been restricted. Additionally, Petitioner complains that the trial court could have imposed a Fourth Amendment waiver and required him to register as a sex offender. Petitioner argues that these potential consequences should have been explained to him prior to counsel allowing him to enter his no contest plea. The trial court rejected this argument with regard to the motion to withdraw the no contest plea. [Resp. Exh. 22, at pp. 49-50]

Although a defendant is entitled to be informed of the direct consequences of a plea, due process does not require that he be informed of all possible collateral consequences. Torrey v. Estelle, 842 F.2d 234, 235 (9th Cir. 1988). A plea is not rendered involuntary by the failure to advise a defendant of the potential for collateral consequences. Id. at 236. Here, the potential consequences Petitioner argues his counsel should have advised him of were speculative at best. Petitioner's trial counsel did not fall below constitutional standards in failing to advise Petitioner of these potential consequences. In addition, Petitioner has not shown that but for counsel's failure to advise him of the potential (but unrealized) collateral consequences of his plea he would not have entered his no contest plea but instead would have insisted upon going to trial again on the charge against him.

It cannot be said that the state court's denial of Petitioner's claim for relief based upon his trial counsel's failure to advise him of a potential (but unrealized) consequences of his no contest plea "was contrary to, or involved an unreasonable application of, clearly established Federal law" such that this Court is left with a "'definite and firm conviction' that an error has been made." Van Tran, 2000 WL at * 6; 28 U.S.C. § 2254(d). As such, Petitioner's claim of ineffective assistance of counsel based upon the failure to advise Petitioner of the potential consequences of his plea should be DENIED.

4. Voluntariness of Nolo Contendre Plea

Finally, Petitioner argues that his nolo contendre plea was not voluntary because he was in custody, was unable to privately consult with his counsel, was not in protective custody, and had been told that if he wanted to go to trial a second time it could take a couple more months. Petitioner argues that he was told by his counsel that if he entered a guilty plea, he would be released that day on his own recognizance. Petitioner argues that he was given "no choice at all -- insist on a second trial and stay in jail on $50,000 bond for a few months or plead guilty and go free in a few hours." First Amended Petition, at supplemental page 3.

Prior to accepting a guilty plea, the trial court must determine, on the record, that the defendant knows of his federal constitutional rights to confront his accusers, to have a jury trial, and to avoid compulsory self-incrimination, and voluntarily waives such rights. Moran v. Godinez, 57 F.3d 690, 699 (9th Cir. 1995) (citing Boykin v. Alabama, 395 U.S. 238, 242-43 (1969). "A plea is 'involuntary' if it is the product of threats, improper promises, or other forms of wrongful coercion . . . and is 'unintelligent' if the defendant is without the information necessary to assess intelligently 'the advantages and disadvantages of a trial as compared with those attending a plea of guilty'." United States v. Hernandez, 203 F.3d 614, 618-19 (9th Cir. 2000) (quoting Brady v. United States, 397 U.S. 742, 754-55 (1970) and Hill v. Lockhart, 474 U.S. 52, 56 (1985)).

The record in this case reflects Petitioner was advised of his rights, and that he knowingly and voluntarily waived those rights. [Resp. Exh. 1; Resp. Exh. 2, at 4-5] The factual basis for the plea was agreed to by Petitioner, and Petitioner acknowledged that he had received the advice of counsel and agreed to the entry of a nolo contendre plea. Petitioner has not shown that his plea was the result of any threats, improper promises, or other coercion. Rather, Petitioner was fully informed of the advantages and disadvantages of the choices before him, and based upon an evaluation of those advantages and disadvantages chose to enter a no contest plea. The fact that the disadvantages of insisting on going to trial were more unpleasant than the advantages gained by entering a plea of nolo contendre does not make the plea "involuntary."

After hearing all of Petitioner's arguments, the trial court denied Petitioner's motion to withdraw his plea, finding that "there has been shown by a clear and convincing evidence, as well as proof beyond a reasonable doubt, Defendant's plea was in fact voluntarily, knowingly made." It cannot be said that the state court's denial of Petitioner's claim for relief based upon his claim that his plea was in fact involuntary "was contrary to, or involved an unreasonable application of, clearly established Federal law" such that this Court is left with a "'definite and firm conviction' that an error has been made." Van Tran, 2000 WL at * 6; 28 U.S.C. § 2254(d). As such, Petitioner's claim that his plea was involuntary should be DENIED.

Conclusion

For the reasons set forth herein, Respondent's motion to dismiss Petitioner's claims based upon a lack of exhaustion and abuse of the writ should be DENIED. Respondent's motion to dismiss Petitioner's claims regarding the delay in charging him and invalidity of his arrest should be GRANTED as such claims are barred by Petitioner's nolo contendre plea, but Petitioner's claims of double jeopardy, ineffective assistance of counsel, and involuntariness of his plea on the same basis should be DENIED. Upon review of the merits of Petitioner's remaining claims of double jeopardy, ineffective assistance of counsel, and involuntariness of his plea, such claims should be DISMISSED as Petitioner has not shown he is entitled to relief pursuant to the provisions of 28 U.S.C. § 2254(d).

This report and recommendation will be submitted to the United States District Judge assigned to this case, pursuant to the provisions of 28 U.S.C. §636 (b)(1) (1988). Any party may file written objections with the court and serve a copy on all parties by ***July 5, 2000***. The document should be captioned "Objections to Report and Recommendation." Any reply to the objections shall be served and filed by ***July 19, 2000***. The parties are advised that failure to file objections within the specified time may waive the right to raise those objections on appeal of the Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

Dated: 6/2/00

ANTHONY J. BATTAGLIA
United States Magistrate Judge

cc: Judge Moskowitz
All Counsel of Record