ORIGINAL

03-8411

Mr. Aurelio Roger Montoya, E-35372
CSP-SQ 2-N-97
San Quentin, CA 94974
In Pro. Per.

Supreme Court, U.S.
FILED
JAN - 7 2004
OFFICE OF THE CLERK

UNITED STATES SUPREME COURT

JANUARY Term, January 7, 2004

In Re:

AURELIO ROGER MONTOYA
Petitioner,

-vs-

C. NEWLAND, Warden San Quentin State Prison; PEOPLE OF THE STATE OF CALIFORNIA
Respondent.

No.

PETITION FOR WRIT OF HABEAS CORPUS

ESSENTIAL QUESTION OF THE CLAIM BEFORE THIS COURT

Petitioner contends that the Ninth Circuit Court refused to compel the district court to render it determination in accordance with this courts rulings concerning questions of ineffective assistance of counsel. Williams v. Taylor, 146 LED 2nd 389. In deciding the question of ineffective assistance of counsel in this way, the Ninth Circuit Court of Appeals not only refuse to follow its own previous judgments Bland, supra, but refuse to follow the United State Supreme Court's determination in Taylor, supra. Accordingly Petitioner contends that habeas corpus is required in this case.

That the Court of Appeal consent to stand, a question which can only fairly be determined in the presence of an evidentiary hearing, and in doing so, disregards this court's judgment on how such matters must be resolved.

That the State, Federal District, and Appellate Courts circumvented the question here. This is not a question of who was right or wrong in the decision making process between Petitioner and his trial counsel, but who had the right to make the decisions in question. Equally, once a decision issue, what is trail counsel's responsibilities.

The two major premises controlling Petitioner's effective assistance of counsel claims here consist of 1) trial counsel's failure to maintain confidentiality between himself and Petitioner, and 2) trial counsel's refusal to accept Petitioner's decisions in areas in which Petitioner was wholly authorized and required to make decisions. Bland v. California Dep't of Corrections, 20 F. 3rd 1469 (9th Cir. 1994).

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JURISDICTIONAL STATEMENT

This petition is sought before this court following the order of Ninth Circuit Court of Appeals, denial of Petitioner's direct appeal from the order of the Federal District Court, Northern District of California, refusal to grant Petitioner's application for writ of habeas corpus. The court of appeal rendered its final judgement July 21, 2003.

EXCEPTIONAL CIRCUMSTANCES FOR THE WRIT

Petitioner seeks habeas corpus before this court, because he has no other plan, speedy or adequate remedy available, and the question of effective assistance of counsel lies outside the record for which no evidentiary hear was held.

PREVIOUS FORMA PAUPERIS GRANTS

In both courts, Petitioner is permitted to proceed in forma pauperis. As such Petitioner asserts and entitlement to proceed in this United States Supreme equally as authorized by The United States Supreme Court Rules 10 and 12(2).

STATEMENT OF CASE

On March 18, 1997, an information was filed in Alameda County Superior Court, charging Petitioner Aurelio Montoya with the following offenses: Court 1, burglary of the residence of Kathy Neal, in violation of California Penal Code § 459, and count 2, receiving stolen property in violation of California Penal Code § 496.

The information also alleged six prior felony convictions; five for burglary of an inhabited dwelling, and the sixth for receiving stolen property. The first, second, third and sixth prior convictions is alleged pursuant to California Penal Code §§ 667(a); 667(e)(2); and 1170.12(2)(A). The fifth prior is alleged pursuant to California Penal Code § 667.5(b) (CT 45-47).

On May 7, 1997, Petitioner filed a motion to suppress evidence pursuant to California Penal Code § 1528.5. On May 14, 1997, Petitioner filed a motion for discovery (CT 105-107; 118-128).[1]

Hearings on the motions were held on June 3, 1997, and June 4, 1997. The motion to suppress evidence is denied. An in camera hearing was held on the discovery motion and an oral motion to disclose the identity of the informant. Both motions were denied (CT 129, 131).

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[1] CT refers to Clerks transcript.

The case was assigned for jury trial in department 3 before the Honorable Joseph Hurley, Judge (CT 135).

On June 12, 1997, Petitioner's in limine motion is heard. A bifurcated trial is ordered on the prior convictions. (CT 136).

On June 16, 1997, a hearing was held on Petitioner's motion to exclude his statements because they were involuntary. Petitioner's exclusion motion is denied (CT 137-38; 222).

June 19, 1997, a jury is selected. Trial begins on June 23, 1997. Petitioner is removed for morning session. Jury deliberations begin July 24, 1997. June 26, 1997, the jury returns with verdicts of not guilty of burglary and guilty of receiving stolen property. Petitioner admitted the six alleged priors (CT 140; 147; 151; 204-07).

July 18, 1997, Petitioner is sentenced to state prison under the California Three-Strike Law to an indeterminate term of 25 years to life. All enhancements for prior prison terms were stayed (CT 210). Restitution is ordered in the amount of $19,177.00 and an restitution fine of $200.00 is ordered (CT 211).

The California Court of Appeal affirmed the judgment and the California Supreme Court refused Petitioner's application for review. Petitioner's final application for writ of habeas corpus before the California Supreme Court is denied April 26, 2000.

Petitioner filed a petition for writ of habeas corpus with the United States District Court for the Northern District of California, and an order to show cause is issued. August 8, 2001 the District Court denies Petitioner's application for writ of habeas corpus.

September 24, 2001 the District Court issued Appellant's request for certificate of appealability as to Petitioner's claim that the state trial court violated his Sixth Amendment rights in denying his motion to substitute counsel and rejected the application as to all other claims.

December 5, 2001, Petitioner filed motion with the Ninth Circuit Court of Appeal to argument the certificate of appealability to include additional claims. March 14, 2002, the court of appeal rejected Petitioner's request to argument.

April 25, 2002, Respondent filed their brief ahead of schedule, and Petitioner timely filed his opening and return briefs.

July 21, 2003, the Court of Appeals affirmed the judgment of the district court, and this petition for writ of Habeas corpus follows.

FILED

JUN 2 0 2003

CATHY A. CATTERSON
CLERK, U.S. COURT OF APPEAL

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

AURELIO ROGER MONTOYA, Petitioner-Appellant, v. A.C. NEWLAND, Warden, Respondent-Appellee.	No. 01-16953 D.C. No. CV-00-01812-CRB MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
Charles R. Breyer, District Judge, Presiding

Submitted June 9, 2003**

Before: RYMER, THOMAS, and SILVERMAN, Circuit Judges.

California state prisoner Aurelio Roger Montoya appeals pro se the district court's denial of his 28 U.S.C. § 2254 petition for writ of habeas corpus, challenging his conviction and sentence for receiving stolen property. We have

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

jurisdiction pursuant to 28 U.S.C. § 2253. We affirm.

Montoya contends that he was denied his Sixth-Amendment right to counsel by the trial court's denial of his motion for substitution of counsel pursuant to *People v. Marsden*, 2 Cal.3d 118, 84 Cal. Rptr. 156 (1970). We disagree.

During an evidentiary hearing the state trial court noted that appointed counsel actively represented Montoya and made tactical decisions on his behalf. Moreover, after reviewing the evidentiary hearing conducted by the state trial court, the state appellate court determined that any disagreement between Montoya and his appointed counsel did not signal a complete breakdown in the attorney-client relationship impeding an adequate defense. *See Schell v. Witek*, 218 F.3d 1017, 1026 (9th Cir. 2000) (en banc) (deciding that the ultimate question in reviewing a denial of a § 2254 petition was not whether the state trial court erred in handling a substitution motion, but rather whether any error actually resulted in a total lack of communication that, in turn, resulted in representation that fell short of Sixth-Amendment standards).

The district court correctly held that Montoya did not demonstrate by clear and convincing evidence that the state court's finding was incorrect, and that its factual determinations were "objectively unreasonable" in light of the record before the court. *Miller-El v. Cockrell*, 123 S. Ct. 1029, 1045 (2003) (stating

standard for securing habeas relief). Accordingly, the district court properly denied Montoya's petition. *See* 28 U.S.C. § 2254(d); *Woodford v. Visciotti*, --- U.S. ---, 123 S. Ct. 357, 361 (2002) (per curiam) (stating that the federal habeas scheme "authorizes federal-court intervention only when a state-court decision is objectively unreasonable"), *reh'g denied*, 123 S. Ct. 957 (2003).[1]

AFFIRMED.

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[1] To the extent Montoya contends that his 25-years-to-life sentence constitutes cruel and unusual punishment, we decline to address that issue because it is not encompassed in the certificate of appealability. *Hiivala v. Wood*, 195 F.3d 1098, 1103 (9th Cir. 1999) (per curiam). Moreover, we note that this contention is foreclosed by the Supreme Court's recent decisions in *Lockyer v. Andrade*, 123 S. Ct. 1166, 1175 (2003) (holding that a state court's affirmance of two consecutive 25-years-to-life sentences for petty theft was not contrary to, or an unreasonable application of, clearly established Federal law), and *Ewing v. California*, 123 S. Ct. 1179, 1190 (2003) (holding that petitioner's 25-years-to-life sentence under the California three-strikes law did not violate the Eighth Amendment's prohibition against cruel and unusual punishment).