

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

JAN 30 2009

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

ALBERTO RODRIGUEZ,

Petitioner - Appellant,

v.

C. A. TERHUNE,

Respondent - Appellee.

No. 06-55488

D.C. No. CV-05-06799-JFW

MEMORANDUM *

Appeal from the United States District Court
for the Central District of California
John F. Walter, District Judge, Presiding

Argued and Submitted January 12, 2009
Pasadena, California

Before: TROTT, KLEINFELD and IKUTA, Circuit Judges.

Alberto Rodriguez's petition for writ of habeas corpus is denied. The district court did not abuse its discretion when it determined that Rodriguez was not entitled to an evidentiary hearing regarding his claim that his trial counsel,

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

Lawrence Sperber, rendered ineffective assistance of counsel by failing to obtain and use materials discovered through earlier Pitchess hearings. “[I]f the record refutes the applicant's factual allegations or otherwise precludes habeas relief, a district court is not required to hold an evidentiary hearing.” Schriro v. Landrigan, 550 U.S. 465, ___, 127 S.Ct. 1933, 1940 (2007). Here, the state court held that the Pitchess material it received from the state trial court was the same as the Pitchess material originally provided to that court. Further, the state court found that the only Pitchess materials related to an officer who testified at trial consisted of one item Rodriguez could have used to impeach Detective Pelletier. These factual determinations are presumed correct and Rodriguez has not rebutted them with clear and convincing evidence. 28 U.S.C. § 2254(e)(1). Based on these facts, the state court determined, in a reasoned opinion, that Sperber’s error was not prejudicial. Because the unrebutted facts establish that Sperber’s error in failing to review the relevant Pitchess material was not “so serious as to deprive the defendant of a fair trial,” Strickland v. Washington, 466 U.S. 668, 687 (1984), the state court’s determination that there was no Strickland violation is not contrary to or an unreasonable application of federal law, as determined by the Supreme Court. 28 U.S.C. § 2254(d). Rodriguez’s “inability to make a showing of prejudice under

Strickland” bars potential habeas relief, and the need for an evidentiary hearing.

See Landrigan, 550 U.S. at ____, 127 S.Ct. at 1942.

The state court’s determination that Sperber’s failure to present the testimony of defense and private investigators to impeach key prosecution witness Tommy Merritt was not ineffective assistance of counsel, is not contrary to or an unreasonable application of federal law, as determined by the Supreme Court. 28 U.S.C. § 2254(d). Because the investigators’ testimony would not have been probative or would have been based on speculation, Sperber’s failure to call them was neither deficient nor prejudicial. Strickland, 466 U.S. at 687.

The district court did not err when it determined that Rodriguez failed to properly present his claim that his defense counsel at the third trial was ineffective because he failed to call two witnesses to testify or locate another witness. Rodriguez failed to raise these claims in his federal habeas petition and did not identify these claims until his objections to the magistrate’s report. Even if Rodriguez preserved the claims, the trial counsel’s decisions were within his broad discretion and did not constitute ineffective assistance of counsel. Id.

The government’s motion to strike the addendum to Rodriguez’s opening brief is granted. Because Rodriguez has not made “a substantial showing of the denial of a constitutional right,” 28 U.S.C. § 2253(c)(2), such that “reasonable jurists could debate whether . . . the petition should have been resolved in a different manner or that the issues presented were ‘adequate to deserve encouragement to proceed further,’” Miller-El v. Cockrell, 537 U.S. 322, 327 (2003) (quoting Slack v. McDaniel, 529 U.S. 473, 484 (2000)), we decline to expand the Certificate of Appealability to include these issues.

AFFIRMED.