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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

<p>THE PEOPLE, Plaintiff and Respondent, v. STEVEN GILL, Defendant and Appellant.</p>	<p>A137249 (Contra Costa County Super. Ct. Nos. 51201243, 416937503)</p>
<p>In re STEVEN GILL, on Habeas Corpus.</p>	<p>A140283</p>

Defendant Steven Gill appeals from a final judgment and sentence imposed on his open guilty plea to first degree residential robbery and burglary, receiving stolen property, and dissuading a witness. He contends the court should have stayed his sentence on the counts of burglary and dissuading a witness because the robbery and burglary were part of an indivisible course of conduct, and the dissuading count was premised on the same act as the robbery. In a related petition for writ of habeas corpus, Gill asserts his counsel’s assistance during plea negotiations was constitutionally ineffective.

Gill’s sentencing argument is correct, and the two terms he identifies as imposing multiple punishment in violation of Penal Code section 654¹ must be stayed. However, defendant has not shown a prima facie case for a writ of habeas corpus. We therefore

¹Further statutory citations are to the Penal Code.

modify the judgment, affirm it as so modified, and deny the petition for writ of habeas corpus.

BACKGROUND

According to the evidence from the preliminary hearing, on May 4, 2010, Gill and Jonathan Bottorff entered the home of Laura Zeltser using a garage door opener stolen from Zeltser's car. Zeltser arrived home with her six-year-old son to find her garage door was open. When she heard footsteps upstairs she called 911 and shouted that she was home. Bottorff and Gill came downstairs carrying some of Zeltser's jewelry. Zeltser told Gill to drop the jewelry and tried to put him in a headlock, saying she would "let it go" if he dropped her valuables. Gill struck Zeltser on the head a couple of times and fled to a Ford Explorer parked in front of the house. Zeltser pursued him, and grabbed a duffel bag from the passenger side of the Explorer in order to have something to identify the perpetrators, and took down the license plate number. Police apprehended Gill and Bottorff shortly thereafter.

Gill was charged with first degree residential robbery, first degree residential burglary with a special allegation that a nonparticipant was present in the residence during the commission of the offense, receiving stolen property (Zeltser's garage door opener), and dissuading a witness (count four) with a prior conviction for the same offense. The information also alleged an on-bail enhancement, a prior strike conviction, and three prison priors.² A separate complaint filed on December 7, 2009, charged Gill with a single count of receiving stolen property, a prior strike conviction, and two prison priors.

On July 27, 2012, Gill pleaded guilty to all counts and admitted all allegations in both cases. Through counsel, Gill confirmed he was "pleading to the sheet" and that his maximum possible exposure was 27 years and 4 months in prison. The court clarified that "this is not a negotiated disposition" and that a sentencing hearing would follow. The court explained: "You understand what's happening here is you're pleading open,

²The information was amended at sentencing to strike two additional priors that had been alleged in error.

which means you're pleading to all the charges, you're admitting all the enhancements, and the maximum exposure in this case is 27 years, four months. [¶] We will have a hearing—a sentencing hearing at which you'll be able to present any information you would like me to consider, and the district attorney will have me consider—she'll be able to present any information that she would like me to consider, and I will sentence you as appears appropriate under the law and based on the facts. In no event will it be more than that, but I could sentence you up to and including that amount; do you understand that?" Gill responded that he did, and when the court stated it would only take the plea if Gill pleaded to everything, affirmed that he understood. The court found there was a factual basis for Gill's plea and found him guilty as charged.

Sentencing was held October 5, 2012. Gill moved unsuccessfully to withdraw his plea, primarily on the ground that acute anxiety and emotional distress had prevented him from understanding the ramifications of an open plea and that he had not understood what he was pleading to. The prosecutor sought the maximum sentence. Defense counsel urged the court to suspend Gill's sentence on the condition that he complete a year-long drug program. The court sentenced Gill to a prison term of 19 years and 8 months, composed of the six-year upper term on the robbery count, a consecutive one-year, four month term on the burglary count, and a concurrent three-year term on the dissuading a witness count. The court imposed the two-year midterm for receiving stolen property but stayed it under section 654, doubled the seven-year, four-month total under sections 667, subdivision (a) and 1170.12, and added five years for the section 667, subdivision (a) enhancement.

The court stated: "So the total is 19 years, eight months which as you probably have gathered is significantly less than the maximum exposure. I'm doing that in the hopes that maybe you'll grow up, you'll get some programming in prison and you'll have some opportunity to try to rehabilitate yourself but not until you're of an age that maybe will bring you a little bit of wisdom." Gill appealed and filed a petition for writ of habeas corpus, which we ordered consolidated.

DISCUSSION

I. The Appeal Does Not Require a Certificate of Probable Cause

Preliminarily, we address and reject the People's assertion that Gill's claims on appeal are procedurally barred by his failure to obtain a certificate of probable cause. With certain exceptions, a defendant who wishes to appeal a conviction based upon a guilty plea must obtain a certificate of probable cause from the trial court. (§ 1237.5; *People v. Johnson* (2009) 47 Cal.4th 668, 676 (*Johnson*)). One exception to this requirement, which applies here, is where a defendant " 'is not attempting to challenge the validity of his plea of guilty but is asserting only that errors occurred in the subsequent adversary hearings conducted by the trial court for the purpose of determining the degree of the crime and the penalty to be imposed.' " (*Johnson, supra*, 47 Cal.4th at p. 677.) As *Johnson* explains, "When a defendant has entered a plea of guilty or no contest, the bases for an appeal from the resulting conviction are limited and section 1237.5 serves to prevent frivolous appeals. 'There is no justification, however, for applying the section to the altogether distinct procedures followed where a defendant asserts that errors occurred in the hearing held, *after* his plea was entered, on the degree of the crime and the penalty to be imposed. So far as we have been able to determine, the right of an aggrieved defendant to appeal from a court's determination on these issues has never been questioned . . . albeit the right to challenge a guilty plea on appeal has always been circumscribed.' [Citation.] 'The primary purpose of [section 1237.5], to prevent the taking of frivolous appeals based on the asserted invalidity of pleas of guilty, must not be confused with the entirely separate and settled procedure relating to the determination of asserted errors occurring in subsequent hearings to ascertain the degree of a crime and the penalty to be imposed.' " (*Id.* at pp. 677–678.)

Here, Gill entered an open plea to all charges with no promises or agreement as to his sentence, and his sentence was independently determined by the court at a subsequent hearing. His current assertion that the sentence imposed at that hearing violates section 654 does not challenge the validity of his plea, so it does not require a certificate of probable cause.

The People’s reliance on *People v. Shelton* (2006) 37 Cal.4th 759 (*Shelton*) and *People v. Cuevas* (2008) 44 Cal.4th 374 (*Cuevas*) is misplaced. In *Shelton*, the defendant agreed to a plea bargain that included a sentence lid³ in exchange for the dismissal of three additional counts. The Court held his attempt to appeal, on section 654 grounds, from the trial court’s subsequent imposition of the sentence lid was barred by his failure to secure a certificate of probable cause because it challenged an integral aspect of the negotiated plea agreement. (*Shelton*, at pp. 766–769.) “Because the plea agreement was based on a mutual understanding (as determined according to principles of contract interpretation) that the court had authority to impose the lid sentence, defendant’s contention that the lid sentence violated the multiple punishment prohibition of Penal Code section 654 was in substance a challenge to the plea’s validity and thus required a certificate of probable cause, which defendant failed to secure.” (*Id.* at p. 769.)

Shortly thereafter, the Court held in *Cuevas* that a certificate of probable cause was required to appeal a sentence the defendant was advised was the maximum possible sentence for the charges that remained after additional charges were dismissed pursuant to a negotiated plea agreement. Although the maximum term under *Cuevas*’s plea bargain was no less than the maximum allowable for the surviving charges, the Court held that, as in *Shelton*, the defendant’s attempted section 654 challenge was barred because “the maximum possible sentence defendant faced was ‘part and parcel of the plea agreement he negotiated with the People.’ ” His appeal, therefore, was in substance an attack on the validity of his plea. (*Cuevas, supra*, 44 Cal.4th at pp. 381–382, citing *People v. Panizzon* (1996) 13 Cal.4th 68, 78.)

This case is different. The People say this was a negotiated agreement through which Gill received a reduced sentence in exchange for his guilty plea, but it was not. Rather, as the trial court clearly stated, Gill entered an open plea to all of the charges. “An open plea is one under which the defendant is not offered any promises. [Citation.]

³A sentence lid constrains the maximum sentence a trial court may impose pursuant to a negotiated plea agreement but is less than the maximum exposure the defendant would face absent the negotiated plea. (*Cuevas, supra*, 44 Cal.4th at p. 376.)

In other words, the defendant ‘plead[s] unconditionally, admitting all charges and exposing himself to the maximum possible sentence if the court later chose to impose it.’ ” (*Cuevas, supra*, 44 Cal.4th at p. 381, fn. 4.) That is what Gill did here. It is true, as the People observe, that after Gill entered his plea the prosecutor, at the court’s suggestion and “in the interest of justice and based on the disposition,” dismissed a separate misdemeanor charge of being under the influence of a controlled substance. But the record contains no indication that this dismissal was negotiated as part of a plea agreement. No deal was placed on the record and no bargaining was chronicled in any way. Indeed, the court could not have been clearer that this was not a negotiated disposition. We are persuaded that Gill “ ‘is not attempting to challenge the validity of his plea of guilty but is asserting only that errors occurred in the subsequent adversary hearings conducted by the trial court for the purpose of determining the degree of the crime and the penalty to be imposed.’ ” (*Johnson, supra*, 47 Cal.4th at p. 677.) Accordingly, no certificate of probable cause was required.

The People’s further contention that Gill waived his claim of section 654 error by failing to raise it at the sentencing hearing is also meritless. “Errors in the applicability of section 654 are corrected on appeal regardless of whether the point was raised by objection in the trial court or assigned as error on appeal.” (*People v. Perez* (1979) 23 Cal.3d 545, 549–550, fn. 3.)

II. Multiple Punishment

A. Burglary and Robbery

Pursuant to section 654, “[a]n act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision.” (§ 654, subd. (a).) Gill contends the trial court should have stayed his one-year, four-month sentence on the burglary count under section 654 because the burglary and the robbery were committed with the single objective of stealing goods from Zeltser’s home. The People argue that Gill’s intent in committing the robbery was to harm Zeltser, to escape from her house, and to avoid capture by

police. These objectives, they contend, “had no essential connection to the burglary which had already been completed by the time Zeltser had arrived home.” We conclude section 654 requires a stay of the consecutive term imposed for robbery.

People v. Perry (2007) 154 Cal.App.4th 1521 (*Perry*) states the applicable law. “Section 654 prohibits punishment for two crimes arising from a single indivisible course of conduct. [Citation.] If all of the crimes were merely incidental to, or were the means of accomplishing or facilitating one objective, a defendant may be punished only once. [Citation.] If, however, a defendant had several independent criminal objectives, he may be punished for each crime committed in pursuit of each objective, even though the crimes shared common acts or were parts of an otherwise indivisible course of conduct. [Citation.] The defendant’s intent and objective are factual questions for the trial court, and we will uphold its ruling on these matters if it is supported by substantial evidence.” (*Id.* at p. 1525; see also *People v. Jones* (2012) 54 Cal.4th 350, 362 [Werdegar, J., concurring [“the ‘act or omission’ referenced in [§654] could be *a course of conduct* that includes several acts indivisible in time if pursued according to a single objective or intent”].) We review the evidence in the light most favorable to the People and presume in support of the judgment the existence of every fact the trier could reasonably deduce from it. (*People v. McGuire* (1993) 14 Cal.App.4th 687, 698.)

In *Perry, supra*, 154 Cal.App.4th 1521, the victim gave chase after the defendant jumped from the victim’s parked car holding his car stereo in one hand and a screwdriver or ice pick in the other. The defendant stopped several times and assumed a “fighting stance” as the victim pursued him before the victim managed to tackle him. (*Id.* at pp. 1523–1524.) The *Perry* court concluded section 654 barred the imposition of prison terms for both burglary and robbery because the defendant’s objective in committing both crimes was to steal the victim’s car stereo. The court explained: “if property is taken during a burglary and a robbery pertaining to the same property is committed during the escape, the objective is still essentially to steal the property. Admittedly, an additional objective of preventing the victim or another person from taking back the property

generally will exist, but may be incidental to, rather than independent of, the objective of stealing the property.” (*Id.* at pp. 1526–1527.)

Perry noted that “[t]he application of Penal Code section 654 appears somewhat inconsistent in cases in which property is taken in a burglary and ensuing efforts to thwart the theft are met with violence, forceful resistance, or threats of violence. There nonetheless appears to be a general distinction between cases addressing convictions of burglary and robbery and cases addressing burglary and assault convictions.” (*Perry, supra*, 154 Cal.App.4th at p. 1526.) Thus, for example, in *People v. Guzman* (1996) 45 Cal.App.4th 1023, 1027–1028 (*Guzman*), the court held that section 654 barred punishment for both burglary, in which a motorcycle was stolen from a garage, and robbery, in which the thieves used force to thwart pursuit by the motorcycle’s owner. *People v. Vidaurri* (1980) 103 Cal.App.3d 450 (*Vidaurri*), in contrast, held that multiple punishment was permissible for the burglary of goods from a store followed by numerous assaults on bystanders and store employees who attempted to prevent the defendant from escaping with the stolen goods.

The distinction, the court explained, lies in “the difference between the intent necessarily reflected in convictions of robbery and assault.” (*Perry, supra*, 154 Cal.App.4th at p. 1526.) “Assault reflects an intent to perform an act that, by its nature, will probably and directly result in the application of physical force to another person. [Citation.] Robbery, while involving the use of force or fear, reflects an intent to deprive the victim of property. Accordingly, a conviction of assault committed during an escape with property taken during a burglary reflects, in essence, an intent to apply, attempt to apply, or threaten to apply force to a person, rather [than] an intent to steal property. The objective of such an assault generally will be to deter, interrupt or put a stop to a pursuit or other effort to capture the defendant and any property taken during the burglary. *However, if property is taken during a burglary and a robbery pertaining to the same property is committed during the escape, the objective is still essentially to steal the property.*” (*Ibid.*, italics added; see also *Guzman, supra*, 45 Cal.App.4th at p. 1028; *People v. Le* (2006) 136 Cal.App.4th 925 [section 654 barred punishment for both

burglary and robbery where the defendant used force against store employees attempting to stop him from leaving with stolen goods].)

This case cannot plausibly be distinguished from *Perry, Guzman* and *Le*. *Perry* recognizes that at some point the degree of force or violence used in a robbery “may evince ‘a different and a more sinister goal than mere successful commission of the original crime,’ i.e., an independent objective warranting multiple punishment,” but the People have not cited, and we have not found, any authority that persuades us the two blows Gill inflicted on Zeltser as she tried to detain him in a headlock evidence an objective beyond that of escaping with her jewelry. (*Perry, supra*, 154 Cal.App.4th at p. 1527; *cf. People v. Nguyen* (1988) 204 Cal.App.3d 181, 191–193 [separate acts of violence against unresisting victim or witness may be found not incidental to robbery if crimes have different intents and motives].) Instead, the People rely on cases that address section 654’s application to burglary and assault (*People v. Vidaurri, supra*, 103 Cal.App.3d 450, petty theft and assault (*People v. Hooker* (1967) 254 Cal.App.2d 878), and robbery and rape (*In re Ward* (1966) 64 Cal.2d 672, 678). As *Perry* explains, these are not instructive when, as here, the offenses are burglary and robbery. In such cases, section 654 precludes double punishment for the two crimes unless there is evidence that the defendant harbored a separate intent when committing the robbery.

The People’s point that the burglary was completed before Gill committed the robbery is also unpersuasive. The critical question for purposes of section 654 is whether Gill had different intents and motives for the crimes, not the precise moment at which he completed all of the elements of one of them. (*Perry, supra*, 154 Cal.App.4th at p. 1527; *People v. Nguyen, supra*, 204 Cal.App.3d at p. 193.) As there is no evidence in this case that Gill had an objective other than to steal goods from Zeltser’s home, section 654 requires that the sentence imposed on the burglary count be stayed.

B. Robbery and Dissuading a Witness

In a supplemental brief, Gill further asserts that section 654 also precludes the imposition of multiple (albeit concurrent) terms for robbery and dissuading a witness because both charges were predicated on defendant’s struggle with Zeltser as he

attempted to flee the house.⁴ The People concede that both counts are based on this same act, but maintain, as with their burglary argument, that multiple punishment is nonetheless appropriate despite section 654 because Gill “harbored several distinctive [*sic*] intents when he committed that act of violence against Zeltser.” Again, we disagree. Where multiple criminal charges are premised on a single act, the “intent and objective” test employed to assess the legality of multiple punishment for charges related to a course of conduct does not apply. (*People v. Jones, supra*, 54 Cal.4th at p. 359–360.) This case, both sides agree, involves but a single act—Gill’s use of force in struggling with Zeltser. “Some section 654 cases indisputably involve a physically indivisible single act that is punishable in different ways by different provisions of law. In such cases, multiple punishment is prohibited by the plain language of section 654.” (*People v. Jones, supra*, 54 Cal.4th at p. 370 [conc. opn. of Liu, J.]; *Id.* at p. 359–360.) This is such a case. Although it may make little difference for practical purposes, the concurrent term imposed on the dissuading a witness count must be stayed pursuant to section 654.

III. Petition For Writ of Habeas Corpus

Gill contends in a petition for writ of habeas corpus that he was deprived of his right to effective assistance of counsel during plea negotiations from the time of the preliminary hearing up until he entered his plea on the day the case was assigned for trial. The petition does not establish a *prima facie* case for relief, so we summarily deny it. (See *People v. Duvall* (1995) 9 Cal.4th 464, 475.)

Background

The following is from the evidence in support of Gill’s petition. On October 14, 2011, the prosecutor offered defendant a nine-year prison sentence in exchange for guilty pleas. Defense counsel John Stringer advised Gill not to take the offer and counter

⁴Section 136.1 makes it a felony for any person with a prior conviction for violation of that section to attempt to prevent or dissuade a victim or witness to a crime from “[a]rresting or causing or seeking the arrest of any person in connection with that victimization.” (§ 136.1, subs. (b), (c).)

offered a six-year suspended sentence with the condition that Gill complete a drug treatment program. The prosecutor rejected the counteroffer.

In April and again in June, 2012, Stringer approached the prosecutor with an offer of a nine-year suspended sentence and a residential drug program. Both times the prosecutor rejected the offer. During a pretrial conference on June 20 the prosecutor revoked the nine-year offer, made a new offer of 13 years, and said defendant was “never getting a drug program.” Stringer communicated this offer to Gill, but did not advise him as to whether to take it because Gill was being led out of the courtroom. Although the prosecutor did not say so, Stringer believed this was a “drop dead” offer, i.e., that it would be withdrawn if not accepted that day. But Stringer apparently never communicated that belief to Gill. Instead, sometime between June 20 and June 29 he discussed the offer with Gill and advised him not to take it. Stringer believed the prosecutor would want to avoid trial, that he would prevail on a pending motion to suppress evidence or dismiss charges, and that the robbery count was defensible. He also thought the trial court would offer Gill a “fair and appropriate” deal if none was reached with the prosecutor.

Trial was scheduled for July 9. On June 29, Stringer approached the prosecutor about presenting a new plea offer. The prosecutor responded that he was authorized to negotiate with defense counsel and that Stringer “may also wish to contact Senior Deputy District [Attorney] Doug MacMaster once the case is called in master calendar on the 9th.” Stringer then made a third counteroffer of a 13-year suspended sentence with a residential drug treatment program, coupled with an offer to help law enforcement close a handful of other cases and waive time credits.

Various delays followed. On July 11, MacMaster replied that “[r]ight now the People are disinclined to put the 13 years back on the table” and were hoping to try the case, but that it was “possible we’ll revisit the issue of a negotiated disposition as we approach the last day” On July 15 Stringer reiterated his offer. MacMaster responded that his office was “disinclined to accept your offer right now, but anything could happen. Let’s see where we are tomorrow, and where we are as we approach the

last day.” Stringer thereafter continued to pursue his 13-year suspended sentence proposal until the case was assigned to a trial court on July 27. On that date Gill told Stringer he wanted to accept the 13-year prison offer, but it had been withdrawn.

Analysis

Gill asserts his counsel’s representation fell below constitutional standards because he failed to properly advise him to accept the 13-year prison sentence. Specifically, he contends his attorney “failed to bargain reasonably” by negotiating for probation and a drug program in lieu of prison after the prosecutor told him no such disposition would be offered; when he misled Gill into thinking he could get a drug program; when he failed to properly advise Gill the 13-year offer could be withdrawn if he waited until trial; when he gave Gill an overly optimistic assessment of his motion to dismiss charges or suppress evidence and of the overall strength of his case; and when he relied on his erroneous belief that the trial court could offer Gill a plea if no deal was reached with the district attorney. Gill asserts he was prejudiced because he “would have accepted the deal before it was too late” had he known it might be withdrawn.

In advising a defendant as to the decision whether to reject an offered plea bargain, “defense counsel must communicate accurately to a defendant the terms of any offer made by the prosecution, and inform the defendant of the consequences of rejecting it, including the maximum and minimum sentences which may be imposed in the event of a conviction. [Citations.] We caution that a defense attorney’s simple misjudgment as to the strength of the prosecution’s case, the chances of acquittal, or the sentence a defendant is likely to receive upon conviction, among other matters involving the exercise of counsel’s judgment, will not, without more, give rise to a claim of ineffective assistance of counsel. [Citations.] Such claim ‘depends as an initial matter, not on whether a court would retrospectively consider counsel’s advice to be right or wrong, but on whether that advice was within the range of competence demanded of attorneys in criminal cases.’” (*In re Alvernaz* (1992) 2 Cal.4th 924, 937 (*Alvernaz*).)

Here, however, we need not decide whether counsel’s advice fell within the range of competence because Gill has not shown a reasonable probability that he would have

obtained a more favorable result but for his attorney’s alleged failings. (See *Strickland v. Washington* (1984) 466 U.S. 668, 697 “[A] court need not determine whether counsel’s performance was deficient before examining the prejudice suffered by the defendant as a result If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.”); *Alvernaz, supra*, 2 Cal.4th at pp. 936–937, 924, 945.) “To establish prejudice, a defendant must prove there is a reasonable probability that, but for counsel’s deficient performance, the defendant would have accepted the proffered plea bargain and that in turn it would have been approved by the trial court.” (*Alvernaz*, at p. 937; *Lafler v. Cooper* (2012) ___ U.S. ___, 132 S.Ct. 1376, 1385.) Critically here, “*a defendant’s self-serving statement—after trial, conviction, and sentence—that with competent advice he or she would have accepted a proffered plea bargain, is insufficient in and of itself to sustain the defendant’s burden of proof as to prejudice, and must be corroborated independently by objective evidence. A contrary holding would lead to an unchecked flow of easily fabricated claims.*” (*Alvernaz*, at p. 938, italics added; cf. *In re Vargas* (2000) 83 Cal.App.4th 1125, 1140–1141.) Because such claims are easily fabricated and may be difficult to refute, courts “should scrutinize closely whether a defendant has established a reasonable probability that, with effective representation, he or she would have accepted the proffered plea bargain.” (*Alvernaz*, at p. 938.)

Gill has shown no reasonable probability he would have accepted the proffered plea. Although his declaration generally recounts that Stringer advised him to wait for a better offer and expressed confidence about his prospects at trial, his actual claim of prejudice is that he would have accepted 13-years in prison “before it was too late” had he known the offer could be withdrawn. Gill says Stringer advised him the offer would remain available “until the trial actually started,” but no evidence corroborates this assertion; nor is there corroboration for Gill’s claim that he would have accepted the offer had he known there was a risk it would not remain open. And while Stringer says he mistakenly believed the trial court would offer a “fair and appropriate” deal if negotiations with the prosecutor fell through, there is no evidence that he communicated

this belief to Gill or that it in any way influenced Gill’s refusal to accept the 13-year offer while it was on the table. Moreover, it is not established in this record that the offer of a 13-year prison sentence was withdrawn with finality, or that its acceptance was rejected by the district attorney as untimely when the case was called for trial on July 27. As late as July 15, Gill’s lawyer was seeking a suspended sentence. The district attorney rejected Gill’s request in an e-mail saying, “We’re disinclined to accept your offer right now, but anything can happen. Let’s see where we are tomorrow, and where we are as we approach the last day.” Although Gill’s counsel declares that Gill wanted to accept 13 years in prison when the case was called for trial on July 27, there is nothing in this record that suggests an attempted acceptance was presented to the district attorney and rejected as untimely because the offer had expired. The record reflects that Gill’s objective in plea negotiations was to avoid serving a prison sentence, and there is no independent corroboration of his claim that he would have accepted an offer of 13 years in state prison if he had known the offer could expire. Under *Alvernaz*, then, Gill’s showing is insufficient as a matter of law to establish prejudice. (*Alvernaz, supra*, 2 Cal.4th at p. 945; *Strickland v. Washington, supra*, 466 U.S. at p. 687.)⁵

DISPOSITION

The petition for writ of habeas corpus does not state a prima facie case for relief based on ineffective assistance of counsel, and is therefore denied. (See *People v. Duvall* (1995) 9 Cal.4th 464, 474–475; *People v. Pope* (1979) 23 Cal.3d 412, 425; *Strickland v. Washington, supra*, 466 U.S. at pp. 693–694.) Execution of the sentences imposed on the burglary and dissuading a witness counts is stayed, with those stays to become permanent upon Gill’s completion of the terms imposed on the remaining counts, and the case is remanded to the trial court with directions to recalculate the base term and total sentence. With those modifications, the judgment is affirmed.

⁵We therefore do not resolve the People’s assertion that section 1237.5 bars defendant from raising this claim in a petition for habeas corpus. (But see *People v. Cotton* (1991) 230 Cal.App.3d 1072, 1083 [certificate requirement does not apply to matters raised on habeas petition that do not appear in trial court record].)

Siggins, J.

We concur:

McGuinness, P.J.

Pollak, J.