

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

DEC 24 2015

FOR THE NINTH CIRCUIT

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

ROBERT MCDANIELS,

Petitioner - Appellant,

v.

RICHARD J. KIRKLAND, Warden,

Respondent - Appellee.

No. 09-17339

D.C. No. 4:05-cv-00904-PJH

Appeal from the United States District Court
for the Northern District of California
Phyllis J. Hamilton, Chief District Judge, Presiding

KEELON T. JENKINS,

Petitioner - Appellant,

v.

MICHAEL S. EVANS, Warden,

Respondent - Appellee.

No. 11-15030

D.C. No. 3:05-cv-02003-MHP

MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
Marilyn H. Patel, Senior District Judge, Presiding

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

Argued and Submitted En Banc
June 16, 2015—San Francisco, California

Before: THOMAS, Chief Judge and PREGERSON, McKEOWN, W. FLETCHER, BERZON, TALLMAN, CALLAHAN, IKUTA, CHRISTEN, HURWITZ and FRIEDLAND, Circuit Judges.

Robert McDaniels and Keelon Jenkins appeal from denials of their separate 28 U.S.C. § 2254 petitions for writs of habeas corpus. We address their *Batson* claims in a published opinion filed concurrently with this memorandum disposition. Here, we address their ineffective-assistance-of-counsel claims.

We affirm the district court’s denial of McDaniels’s habeas petition with respect to his ineffective-assistance-of-counsel claim. Fairminded jurists could disagree about whether McDaniels’s claim is meritorious, which precludes federal habeas relief. *See Harrington v. Richter*, 562 U.S. 86, 101-05 (2011).

Jenkins’s briefing on appeal addresses ineffective-assistance-of-counsel claims for which we did not previously grant a certificate of appealability (“COA”). We construe this briefing as a motion to expand the COA. *See* 9th Cir. R. 22-1(e). So construed, we grant the motion in part and deny it in part. We deny the motion with respect to Jenkins’s claim under *People v. Marsden*, 465 P.2d 44 (1970) (in bank), which we recognize as an ineffective-assistance-of-counsel claim for purposes of federal habeas, *see Robinson v. Kramer*, 588 F.3d

1212, 1216 (9th Cir. 2009). We grant the motion, however, with respect to Jenkins's other ineffective-assistance-of-counsel claim, which is based on his allegation that trial counsel attacked Jenkins's credibility at trial. Because this claim is "adequate to deserve encouragement to proceed further," *Slack v. McDaniel*, 529 U.S. 473, 484 (2000), we order the State to submit briefing in response to it. We return this claim to the three-judge panel for further proceedings consistent with this disposition.

No. 09-17339 AFFIRMED. Motion to expand the certificate of appealability GRANTED IN PART and DENIED IN PART in No. 11-15030; No. 11-15030 REMANDED IN PART to the three-judge panel.