APPENDIX A

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WILLIAM NATHANIEL WASHINGTON, Petitioner, v. ERIC ARNOLD, WARDEN, Respondent.	CASE NO. CV 16-8312-VAP (PJW) REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This Report and Recommendation is submitted to the Hon. Virginia A. Phillips, United States District Judge, pursuant to 28 U.S.C. § 636 and General Order 05-07 of the United States District Court for the Central District of California. For the reasons discussed below, it is recommended that the Petition be denied and the action be dismissed with prejudice.[1]

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[1] On January 2, 2018, Petitioner appealed the Court's order denying his request for appointment of counsel. (Doc. No. 49.) Though, generally speaking, a notice of appeal strips a district court of jurisdiction over a case, an order denying appointment of counsel in a habeas case is not immediately appealable and, therefore, the Court has elected to address the merits of the case. *See Weygandt v. Look*, 718 F.2d 952, 954 (9th Cir. 1983).

I.

SUMMARY OF PROCEEDINGS

A. State Court Proceedings

In 2013, a jury in Los Angeles County Superior Court found Petitioner guilty of grand theft, possession of a controlled substance, eight counts of second degree burglary, and eight counts of identity theft. (Clerk's Transcript ("CT") 389-407.) The jury also found that he had one prior "strike" under California's Three Strikes law and had served a prior prison term. (CT 408-10, 470.) He was sentenced to 24 years and eight months in prison. (CT 470-73.)

Prior to the start of his trial, Petitioner filed a habeas petition in the Los Angeles County Superior Court, which was denied on procedural grounds. (*See* Lodged Document No. 21 at 2-3.) Following his conviction, he filed a habeas corpus petition in the California Court of Appeal, which was denied with a notation that Petitioner had a "remedy by way of appeal." (Lodged Document Nos. 22-23.) Petitioner then filed a habeas petition in the California Supreme Court, which was summarily denied. (Lodged Document Nos. 14-15.)

Petitioner subsequently appealed to the California Court of Appeal, which remanded the case to the trial court to correct sentencing errors but otherwise affirmed the judgment in a written decision. (Lodged Document Nos. 2-5.) Petitioner then sought review in the California Supreme Court, which was summarily denied. (Lodged Document Nos. 6-7.) Thereafter, Petitioner filed a second round of habeas corpus petitions in the Los Angeles County Superior Court, the California Court of Appeal, and the California Supreme Court, which were denied. (Lodged Document Nos. 16, 17, 21, 26, and 27.)

B. Federal Court Proceedings

On October 30, 2016, Petitioner, proceeding pro se, filed a Petition for Writ of Habeas Corpus in this court, containing both exhausted and unexhausted claims. (Docket Nos. 1, 3.) On November 29, 2016, he filed a First Amended Petition ("Petition"), raising nine grounds for relief:

1. Petitioner was denied his right to present a defense because he was framed by the police.
2. Petitioner was denied his due process rights when the police fabricated evidence and committed perjury at trial.
3. Petitioner has been compelled to seek protective custody in prison because of repeated attempts by the police to kill him.
4. The prosecution committed misconduct by knowingly using perjured testimony and fabricated evidence to obtain a conviction.
5. Petitioner's constitutional rights under *Devereaux v. Abbey*, 263 F.3d 1070, 1076 (9th Cir. 2001) have been violated.
6. The trial court violated Petitioner's right to present a defense by not allowing defense witnesses to testify.
7. Petitioner's trial counsel was ineffective and aided and abetted the falsification of evidence to frame Petitioner.
8. The police violated Petitioner's due process rights by failing to collect exculpatory evidence.
9. The trial court illegally enhanced Petitioner's sentence by failing to require that the jury find that Petitioner

committed a prior strike under California's Three Strikes law.

(Petition at 4-17.[2])

II.

FACTUAL SUMMARY

The following statement of facts was taken verbatim from the California Court of Appeal's opinion affirming Petitioner's conviction:

A. *The Crimes and the Charges*

The People charged [Petitioner] with 21 counts arising from incidents occurring on six separate dates. In each of the first five incidents, [Petitioner] entered a 24 Hour Fitness gym, stole credit cards and other personal effects from lockers, then used the stolen credit cards to make purchases at various retailers. The sixth incident involved a search of [Petitioner's] motel room, in which police discovered cocaine and stolen property.

1. *January 13, 2012 (Counts 1-5)*

Video surveillance tapes showed [Petitioner] entering the 24 Hour Fitness club in North Hollywood at 3:12 p.m. on January 13, 2012, with a black bag over his shoulder. He left 13 minutes later. Later that day, Doniyorbek Tohirov, who had worked out at the North Hollywood 24 Hour Fitness location that afternoon, called police to report that after

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[2] Ground Three was dismissed by the Court because it was a civil rights, not a habeas, claim. (Docket No. 11.) Ground Nine was voluntarily dismissed by Petitioner because it was unexhausted. (Docket Nos. 33-34.)

his workout he found his locker open and his house and car keys, cell phone, and wallet containing his credit cards missing. He also reported that someone had broken into his apartment and stolen his television, laptop, watch, cash, and other items. Tohirov told police that at 4:03 p.m. someone had attempted to use one of his credit cards at a Target store in North Hollywood, but the register declined the transaction. At 4:06 p.m., however, someone had used another of Tohirov's credit cards, and successfully purchased a frozen drink and a pretzel. Video surveillance tapes showed two men, one of whom was [Petitioner], purchasing items at the Target food court at the same time a purchase was made on Tohirov's card.

In connection with the January 13, 2012 incidents, the People charged [Petitioner] with second degree burglary (counts 1 and 2), possession of personal identifying information with the intent to defraud and with a prior conviction (count 3), theft of an access card (count 4), and first degree burglary (count 5).

2. *January 18, 2012 (Counts 6-9)*

Video surveillance tapes showed [Petitioner] entering the 24 Hour Fitness club in Sherman Oaks at 10:30 a.m. on January 18, 2012, carrying a tan shoulder bag. The tapes showed him near the locker room at 11:11 a.m.

That same morning Nicholas Cady and Dino Vlachos worked out at the Sherman Oaks 24 Hour Fitness location. When they returned to their lockers they found their cell phones and wallets missing. Someone used one of Cady's credit cards to

make a purchase at a Ralphs grocery store the same day. When Vlachos called his credit card companies to cancel his cards, he learned that they already had been used at nearby Ralphs and Target stores and to pay for cab fare. Receipts from the Target store in Van Nuys showed that someone attempted to charge $172.44 on Cady's and Vlacho's credit cards at 12:28 p.m. on January 18, 2012, but the cashier declined or voided both transactions.

In connection with the January 18, 2012 incidents, the People charged [Petitioner] with two counts of second degree burglary (counts 6 and 7), and two counts of possession of personal identifying information with the intent to defraud and with a prior conviction (counts 8 and 9).

3. *January 19-20, 2012 (Counts 10-12)*

Video surveillance tapes showed [Petitioner] entering a 24 Hour Fitness club in Sherman Oaks near the Sherman Oaks Galleria at 8:18 p.m. on January 19, 2012, carrying a tan bag, and leaving at 11:41 p.m. That night, Jaime Guerrero worked out at that location, and upon returning to his locker he discovered his lock and wallet were missing. He later learned someone had used his credit card at a Ralphs store and to pay for cab fare.

The operations manager of United Independent Taxi confirmed that a credit card with the same last four digits as Guerrero's was used at 12:37 a.m. on January 20, 2012 to pay for a cab ride originating near the Sherman Oaks Galleria. At 12:51 a.m., GPS signals placed the cab in a Ralphs parking lot on Ventura Boulevard.

Photographs from a surveillance video camera showed [Petitioner] at a register inside the Ralphs store on Ventura Boulevard at 12:41 a.m. on January 20, 2012. A receipt for a transaction from that register at that time showed that a credit card with the same last four digits as Guerrero's was used to purchase two $50 Visa gift cards.

In connection with the January 19 and 20, 2012 incidents, the People charged [Petitioner] with one count of second degree burglary (count 11), and two counts of possession of personal identifying information with the intent to defraud and with a prior conviction (counts 10 and 12).

4. *January 22, 2012 (Counts 13-16)*

Mohammad Heydarpour worked out at the 24 Hour Fitness club in West Hills on the afternoon of January 22, 2012. After exercising, he returned to the locker room and discovered that someone had broken the lock off his locker and had taken his wallet, cell phone, and keys. Items had also been removed from his car. The next day Heydarpour learned that someone had made multiple purchases on his Macy's card. Sales receipts from the Macy's store in Woodland Hills show eight purchases totaling over $2,300 charged to Heydarpour's card between 5:53 p.m. and 6:36 p.m. on January 22, 2012.

[Petitioner], who testified at trial, admitted going to the 24 Hour Fitness club in West Hills on January 22, 2012 with his friend Jeremy Noriega. He stated that he went to the locker room, put his bag inside a locker, worked out for

15 minutes, and left the facility. He also testified that he went to Macy's with Noriega, where Noriega purchased clothes and a watch with a credit card.

In connection with the January 22, 2012 incidents, the People charged [Petitioner] with two counts of second degree burglary (counts 13 and 14), one count of using another's personal identifying information to obtain goods or services (count 15), and one count of using an access card for the purpose of obtaining goods or services (count 16).

5. *January 24, 2012 (Counts 17-19)*

Video surveillance tapes showed [Petitioner] entering the 24 Hour Fitness club in West Hills at 8:17 p.m. on January 24, 2012, and leaving 20 minutes later. That night, Alejandro Bernal, Charles Brickman, and Ali Sheikh worked out at that location, and upon returning to their lockers after exercising they discovered various items missing, including their wallets, keys, and cell phones. Someone also had rummaged through Brickman's car. After calling credit card companies to cancel their cards, Bernal learned that someone had tried to make a large purchase on his card at a nearby Target store, and Sheikh learned that one of his cards had been used at a Ralphs store in Canoga Park and at a Target store in Woodland Hills.

Transaction receipts from the Target store in West Hills confirmed that someone tried to make a $385 purchase on Bernal's credit card on January 24, 2012 at approximately 8:05 p.m., but the register declined the transaction. After voiding an item from the purchase and reducing the amount to

$280, another attempt was made to charge Bernal's card, but the transaction was again declined. At 9:47 p.m., at the same Target store, someone purchased two $100 gift cards using Sheikh's credit card. Five minutes later someone attempted to make an additional $291 purchase on Sheikh's credit card, but that transaction was declined.

In connection with the January 24, 2012 incidents, the People charged [Petitioner] with one count of second degree burglary (count 17), and two counts of possession of personal identifying information with the intent to defraud and with a prior conviction (counts 18 and 19).

6. *January 26, 2012 (Counts 20-21)*

Police tracked [Petitioner] to a motel in Sherman Oaks. On January 26, 2012 officers entered his motel room and found [Petitioner] sitting on a bed with various items, including laptop computers, California drivers' licenses, numerous credit cards, wallets, and cash. Officers also found a plastic bag containing cocaine. In connection with the recovery of this evidence, the People charged [Petitioner] with one count of receipt of stolen property (count 20), and one count of possession of a controlled substance (count 21). The People also alleged [Petitioner] had a prior conviction for violating [California] Health and Safety Code section 11350.

(Lodged Document No. 5 at 3-7 (internal citations and footnote omitted).)

III.

STANDARD OF REVIEW

The standard of review in this case is set forth in 28 U.S.C. § 2254:

> 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--
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> (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; or
>
> (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.

28 U.S.C. § 2254(d).

A state court decision is "contrary to" clearly established federal law if it applies a rule that contradicts Supreme Court case law or if it reaches a conclusion different from the Supreme Court's in a case that involves facts that are materially indistinguishable. *Bell v. Cone*, 535 U.S. 685, 694 (2002). To establish that the state court unreasonably applied federal law, a petitioner must show that the state court's application of Supreme Court precedent to the facts of his case was not only incorrect but objectively unreasonable. *Renico v. Lett*, 559 U.S. 766, 773 (2010). Where no decision of the Supreme Court has squarely decided an issue, a state court's adjudication of that issue cannot result in a decision that is

contrary to, or involves an unreasonable application of, clearly established Supreme Court precedent. *See Harrington v. Richter*, 562 U.S. 86, 101 (2011).

The claims raised in Grounds One, Four, Five, Six, and Seven were raised before the California Supreme Court, but neither that court nor the other state courts that considered them explained their reasons for denying them. (Lodged Document No. 15.) Absent such explanation, the Court will review the record to determine whether there was *any* reasonable basis for the state courts to deny relief. *Richter*, 562 U.S. at 98; *see also Hein v. Sullivan*, 601 F.3d 897, 905 (9th Cir. 2010).

The California Supreme Court denied Grounds Two and Eight on procedural grounds. (Lodged Document No. 17.) Generally speaking, the state supreme court's rejection of claims on procedural grounds bars this Court from addressing the claims on the merits. *See, e.g., Johnson v. Lee*, 136 S.Ct. 1802, 1805-06 (2016); *Walker v. Martin*, 562 U.S. 307, 317-21 (2011). The Court, however, has the discretion to overlook the procedural bar and reach the merits where, as here, the procedural claims are more cumbersome to resolve than the merits of the claims. *See Lambrix v. Singletary*, 520 U.S. 518, 524-25 (1997) ("We do not mean to suggest that the procedural-bar issue must invariably be resolved first . . . ."); *see also Franklin v. Johnson*, 290 F.3d 1223, 1232 (9th Cir. 2002) ("Procedural bar issues are not infrequently more complex than the merits issues presented by the [habeas petition], so it may well make sense in some instances to proceed to the merits if the result will be the same."). In doing so, the Court will conduct a *de novo* review of the record to determine whether the claims are meritorious. *See Cone v. Bell*, 556 U.S. 449,

472 (2009) ("Because the [state] courts did not reach the merits of [Petitioner's] claim, federal habeas review is not subject to the deferential standard that applies under AEDPA . . . . Instead, the claim is reviewed *de novo*."); *Stanley v. Schriro*, 598 F.3d 612, 622 (9th Cir. 2010).[3]

IV.

DISCUSSION

At the preliminary hearing, the prosecution presented testimony and evidence primarily from police that established that Petitioner went into the locker rooms at 24-Hour Fitness facilities in Los Angeles and cut the locks off the lockers and stole credit cards, watches, keys, and jewelry. The prosecution also showed that Petitioner used the keys he took from the lockers to get into the victims' cars in the parking lots of the fitness centers and steal things from the cars. And the prosecution proved that sometimes Petitioner would use the house keys he stole from the lockers to enter the victims' homes and steal property from the homes. After stealing the credit cards, Petitioner hurried to nearby stores and used the cards to buy things before the victims learned that their credit cards had been stolen and tried to cancel them. Police testified that Petitioner was eventually caught in a hotel room he had rented surrounded by some of the stolen property and some of the stolen credit cards. They also found a bolt cutter in his room. (CT 10-14, 16-20, 24-28, 31-33, 37-41.)

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[3] Respondent claims that Ground Six is also procedurally defaulted because the California Court of Appeal's order rejecting it provided that Petitioner had a "remedy by way of appeal." (*See* Answer at 14-15.) Here again, however, because it is easier and more efficient to address this claim on the merits, the Court will bypass the procedural arguments raised by Respondent.

After Petitioner was arrested, he initially declined to speak to police and told them that he wanted to speak to a lawyer. Detective Marc Diamond testified at the preliminary hearing that Petitioner later asked to speak with him about the case. According to Diamond, Petitioner signed a *Miranda* waiver and, thereafter, admitted to Diamond that he had broken into the lockers and stolen the property. (CT 45-49, 157.)

Petitioner, who represented himself at the preliminary hearing, contended that Diamond was lying when he testified that Petitioner had signed the *Miranda* waiver and confessed to the crimes. (CT 52.) He claimed that Diamond had forged his signature on the *Miranda* waiver and called a handwriting expert to support this claim. (CT 55-59, 156-59.)

At the conclusion of the preliminary hearing, Petitioner was held to answer on all charges. (CT 138-40.) He asked the court to "make a finding of fact" that the signature on the *Miranda* waiver form was not his. (CT 142.) The court refused, noting that the circumstantial evidence suggested that Petitioner had varied his signature depending on the documents he signed and found that Detective Diamond was believable when he testified that Petitioner had signed the form "in front of him." (CT 142.)

Prior to trial, Petitioner filed a motion to dismiss the charges on the ground that Detective Diamond had forged his signature on the *Miranda* waiver in violation of Petitioner's right to due process. (CT 145-49.) The motion was denied. (Reporter's Transcript ("RT") A12-A13.)

At trial, Detective Diamond testified about his role in the investigation but did not testify about Petitioner's alleged

confession. (RT 1249-67.) Petitioner's counsel requested permission to introduce evidence establishing that Petitioner's purported signature on the *Miranda* waiver was a forgery. (RT 1276-77.) Counsel wanted to raise the issue with Detective Diamond on cross-examination and then call a handwriting expert (not the same one who testified at the preliminary hearing) to testify that the signature on the waiver form was a forgery. (RT 1284-85.) The court denied the request, finding that the issue was irrelevant since Diamond had not testified about the purported waiver or the confession:

> Nobody is seeking to introduce any of the statements that [Petitioner] made after the [*Miranda*] waivers were taken. So far as I could tell right now, nobody is contesting that [Petitioner] didn't give a waiver. The only thing that's being contested here, being suggested here, is that the police somehow forced or doctored a signature on a waiver form and that that is an indication of some police misconduct, which in turn might be evidence of other police misdeeds such as arguably planting evidence or doing something else to somehow frame [Petitioner].
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> The basis for this conclusion is [the expert] looking--taking a look at facsimiles of original signature which, in and of itself, is a lousy way to do signature comparisons. It also involves him taking a look at exemplars that he didn't supervise.
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> The probative value, if that's the only indication of--if that's the only relevance, that's the offer of proof, that's--that's a stretch. Moreover, the basis for the expert opinion right now--not to mention the fact we're

getting this mid trial--the basis of the expert opinion is pretty slender. My inclination would be to keep it out under [California Evidence Code §] 352.[4] It's just simply not that probative a piece of evidence . . . .

(RT 1285-86.)

Despite defense counsel's arguments to the contrary, the court ruled that any testimony about the allegedly forged signature was a collateral matter that would consume an undue amount of time and was, therefore, properly excluded under state rules of evidence. (RT 1287-94.) Later, the court clarified that Petitioner's handwriting expert was excluded because his testimony would not be relevant in the absence of any evidence of police misconduct. (RT 1502.)

Petitioner testified in his own defense. (RT 1345-1582.) Throughout his testimony, he denied stealing anything or knowingly using stolen credit cards to buy things. He claimed that his friend, co-defendant Jeremy Noriega, was the one who had stolen the cards and that, on occasion, i.e., when Petitioner was captured on surveillance cameras using the stolen cards, he had unwittingly used the stolen cards at the behest of Noriega. (RT 1346-50, 1354-65, 1506-17, 1569, 1581-82.) He also testified that the stolen property and cocaine found by the police in his hotel room were all brought there by Noriega without Petitioner's consent. (RT 1527-30.)

Thereafter, defense counsel again attempted to call the handwriting expert to testify about the allegedly forged signature and

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[4] California Evidence Code § 352 allows a trial court to exclude evidence if it determines that its "probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." *See* Cal. Evid. Code § 352.

the court again denied the request, finding the signature was irrelevant:

> I'm just not seeing the relevance, especially now that [Petitioner] has said that the stolen property, et cetera, was brought to the room not by the police the night before, but by Mr. Noriega. Since there's no allegation of some police conspiracy to plant evidence or somehow otherwise frame [Petitioner], the fact that a waiver form may or may not have been forged becomes irrelevant.

(RT 1546-47.)

A. Denial of the Right to Present a Defense

In Grounds One and Six, Petitioner claims that the trial court violated his right to present a defense by excluding the evidence that would have proved that Detective Diamond had framed him. (Petition at 4-5, 13.) He argues that the state's "deliberate suppression" of the "fabricated" police report "single handedly" prevented him from proving he had been framed by Detective Diamond. (Petition at 4-5.) Petitioner contends that, had his handwriting expert been allowed to testify that the signature on the *Miranda* waiver was forged, Petitioner would have been acquitted. (Petition at 13.) There is no merit to this claim.

It is well established that the Due Process Clause guarantees a criminal defendant a meaningful opportunity to present a complete defense. *See Chambers v. Mississippi*, 410 U.S. 284, 294 (1973). That right is violated when critical defense evidence is excluded from trial. *DePetris v. Kuykendall*, 239 F.3d 1057, 1062 (9th Cir. 2001). But an accused does not have a right to offer testimony that is not admissible under the rules of evidence. *Taylor v. Illinois*, 484 U.S.

400, 410 (1988); *see also United States v. Scheffer*, 523 U.S. 303, 308 (1998) ("A defendant's right to present relevant evidence is not unlimited, but rather is subject to reasonable restrictions."); *Moses v. Payne*, 555 F.3d 742, 757 (9th Cir. 2009) (explaining defendant's right to present relevant evidence is subject to reasonable restrictions, "such as evidentiary and procedural rules").

Petitioner argues that the trial court erred when it refused to allow him to try to prove that the signature on the waiver form was forged by police. He has not demonstrated, however, how this evidence was relevant to his defense. As the trial court noted when it denied his request to introduce this evidence, Petitioner did not present *any* evidence at trial that the police framed him (or had motive to do so). Rather, Petitioner claimed that he had not broken into the lockers and had not stolen the credit cards. He contended that he may have used the stolen credit cards but that they were given to him by Noriega and he never looked to see whose name was on the cards. He claimed too that Noriega brought the stolen property and the cocaine into Petitioner's hotel room without Petitioner's permission.

Petitioner's alleged confession after purportedly signing a *Miranda* waiver was never part of the prosecution's or the Petitioner's case. Thus, it was irrelevant. In fact, to make it relevant, Petitioner would have had to introduce his confession and the waiver and then argue that he had not signed the waiver and had not confessed. There is little conceivable upside to such a strategy and considerable downside.

For these reasons, the Court concludes that the trial court's decision to exclude Petitioner's request to cross-examine Detective Diamond about the *Miranda* waiver and call a handwriting expert to

testify that the signature was a forgery did not impinge upon Petitioner's constitutional right to present a defense. *See Montana v. Egelhoff*, 518 U.S. 37, 42 (1996) (holding due process does not guarantee a defendant the right to present all evidence, regardless of how marginal its relevance); *Wood v. Alaska*, 957 F.2d 1544, 1549 (9th Cir. 1992) (holding trial courts have "wide latitude" to exclude unreliable or marginally relevant evidence); *see also Moses*, 555 F.3d at 758 (noting the Supreme Court has never held a trial court's "exercise of discretion to exclude expert testimony violates a criminal defendant's constitutional right to present relevant evidence"). Nor can it be said that the exclusion of this evidence resulted in a denial of Petitioner's right to due process.

Furthermore, even if it could be said that the trial court erred in excluding the evidence, Petitioner is not entitled to relief because any error did not have a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993); *see DePetris*, 239 F.3d at 1063 (applying harmless error test to claim of the denial of right to present a defense). The evidence against Petitioner was overwhelming. Surveillance video captured him going into and out of the fitness centers at the times the thefts occurred and then using the stolen credit cards to buy (or attempt to buy) merchandise and services at nearby stores. Petitioner was later apprehended in his hotel room, surrounded by some of the stolen property as well the bolt cutters he used to cut the locks off the lockers at the gyms. Though he claimed to have been an unwitting victim of his friend Noriega, his testimony that was simply not believable. Not surprisingly, it was rejected by the jury. In light of the marginal relevance of the purported

"forgery" of his signature on the waiver form that led to his alleged confession, neither of which were introduced at trial (and obviously played no role in his conviction), there is no reasonable likelihood that had this evidence been introduced Petitioner would not have been convicted. Accordingly, Petitioner's claims here do not warrant relief.

B. Prosecutorial Misconduct for the Presentation of False Evidence

In Ground Two, Petitioner claims that Detective Diamond committed perjury by falsely claiming that Petitioner waived his *Miranda* rights and confessed to the crimes. (Petition at 5-7.) In Ground Four, Petitioner contends that the prosecutor committed willful misconduct by allowing the detective's false evidence to go "uncorrected." (Petition at 10-11.) These claims are also without merit.

A conviction obtained by the knowing use of false evidence or perjured testimony is fundamentally unfair and violates a defendant's constitutional rights. *United States v. Agurs*, 427 U.S. 97, 103 (1976); *see also Napue v. Illinois*, 360 U.S. 264, 269-70 (1959) ("A lie is a lie, no matter what its subject, and, if it is in any way relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth." (internal quotation marks omitted)). To merit habeas relief, a petitioner must show that the testimony was actually false, that the prosecutor knew or should have known that it was false, and that the falsehood was material to the case. *Jackson v. Brown*, 513 F.3d 1057, 1071-72 (9th Cir. 2008). A *Napue* violation is material if there is any reasonable likelihood that the false testimony could have affected the jury's decision. *Libberton v. Ryan*, 583 F.3d 1147, 1164 (9th Cir. 2009).

Petitioner's claims of prosecutorial misconduct fail for several reasons. First, despite Petitioner's protestations, he has not proven that Detective Diamond forged his signature on the form and lied about it under oath. *See United States v. Zuno-Arce*, 339 F.3d 886, 889 (9th Cir. 2003); *see also Schad v. Ryan*, 671 F.3d 708, 717 (9th Cir. 2011) (per curiam) (finding no prosecutorial misconduct where it was "not entirely clear" that prosecution witness had lied), *overruled on other grounds by McKinney v. Ryan*, 813 F.3d 798 (9th Cir. 2015). Although a handwriting expert opined at Petitioner's preliminary hearing that the signature was not Petitioner's, the judge hearing this testimony discounted it because the expert conceded that Petitioner appeared to vary his signature at times and because the expert had not seen Petitioner make any of the exemplars that she used for comparison.[5] (CT 58-59, 64-67, 142.)

Second, even assuming that Detective Diamond's testimony at the preliminary hearing that Petitioner had signed the waiver and confessed to the crimes was false, Petitioner has not shown that the prosecutor knew it. *See Murtishaw v. Woodford*, 255 F.3d 926, 959 (9th Cir. 2001) (rejecting prosecutorial misconduct claim because, even assuming testimony was false, petitioner presented no evidence the prosecution knew it was false); *see also United States v. Sherlock*, 962 F.2d 1349, 1364 (9th Cir. 1992) (holding prosecutor who presented witnesses with contradictory stories did not necessarily present perjured testimony because defendant failed to show prosecutor knew which story was true). In fact, the evidence suggests the opposite is

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[5] The trial court found that the proffered testimony from another handwriting expert was "weak" because he, too, had not seen Petitioner sign the exemplars he used to formulate his opinion. (RT 1552-53.)

true as, after Petitioner questioned the authenticity of the signature on the waiver form at the preliminary hearing, the prosecutor did not use the waiver form or the alleged confession at trial.

Finally, because the alleged false testimony was not used at trial, it was not material to the verdict and, therefore, could not constitute a *Napue* violation. *See, e.g., Libberton,* 583 F.3d at 1164 (explaining *Napue* violation requires a showing that the false testimony could have affected the verdict).

For all these reasons, Petitioner's claims of perjury and false evidence are denied.

C. Insufficient Evidence at Preliminary Hearing

In Ground Five, Petitioner claims that he should not have been held to answer at his preliminary hearing because it was based on "deliberately fabricated evidence," namely the allegedly forged signature on the waiver form and the confession that followed. (Petition at 12.) The Court has discussed at length Petitioner's claim that his signature on the document was forged and concluded that Petitioner has failed to prove it, let alone that it prejudiced his case. Nevertheless, even if Petitioner could prove that Detective Diamond forged his signature and lied about it and Petitioner's alleged confession at the preliminary hearing, that would not support relief because there is no federal constitutional right to a preliminary hearing. *See Gerstein v. Pugh,* 420 U.S. 103, 119-20 (1975). As such, alleged errors occurring at the preliminary hearing cannot form the basis of a federal habeas corpus claim. *See Gilmore v. California,* 364 F.2d 916, 918 n.5 (9th Cir. 1966) (noting defendant "filled his papers with factual assertions and legal citations that present no issue cognizable in habeas corpus, such as the sufficiency,

credibility, and admissibility of testimony given at the preliminary hearing"); *see also Vargas v. Yarborough*, 2010 WL 5559766, at *27 (C.D. Cal. Nov. 8, 2010) ("Petitioner is in custody as a result of his conviction after a trial. Any improprieties in [the officer's] testimony at the preliminary hearing cannot provide a basis for habeas relief from Petitioner's post-conviction custody."). Accordingly, this claim is not cognizable on federal habeas corpus review.[6]

D. Ineffective Assistance of Counsel

In Ground Seven, Petitioner claims that trial counsel was ineffective for failing to introduce evidence related to the waiver and for failing to prove that Petitioner was "framed" by Detective Diamond. (Petition at 14-15.) In fact, he goes so far as to accuse counsel of "aiding and abetting" the police in falsely convicting him of the crimes. There is no merit to this claim.

The Sixth Amendment right to counsel guarantees not only assistance, but effective assistance, of counsel. *See Strickland v. Washington*, 466 U.S. 668 (1984). In order to prevail on a claim of ineffective assistance of counsel, Petitioner has to establish that counsel's performance fell below an "objective standard of reasonableness" under prevailing professional norms and that the deficient performance prejudiced Petitioner, i.e., "there is a reasonable probability that, but for counsel's unprofessional errors,

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[6] Petitioner supports his claim with a citation to *Devereaux v. Abbey*, 263 F.3d 1070 (9th Cir. 2001). That case, which held that defendants enjoy a constitutional right to be free from prosecution based on deliberately fabricated evidence, was a civil rights action, not a habeas case. *Id.* at 1076. As such, it does not apply. In any event, Petitioner has not demonstrated that his prosecution stemmed from deliberately fabricated evidence by the police.

the result of the proceeding would have been different." *Id.* at 687-88, 694.

At the preliminary hearing, Petitioner called a handwriting expert, who testified that the signature on the waiver form was forged. Petitioner later asked the trial court to find that the signature was forged. (CT 142.) The court refused. At trial, Petitioner's counsel attempted to call a second handwriting expert to testify that the signature was forged, but the court denied the request because it found that the expert's testimony was irrelevant (in light of the fact that the prosecution did not introduce the waiver or the confession that followed). (RT 1546-47.) This Court has concluded that the trial court did not err in doing so. Petitioner has failed to show what further actions a reasonably competent attorney could have taken that would have altered this outcome. Further, even assuming that counsel was deficient, in light of the overwhelming evidence of Petitioner's guilt, any error by counsel could not have resulted in prejudice to Petitioner, as that term is defined under *Strickland*. For these reasons, Petitioner's claim is denied.

E. Government's Failure to Preserve Exculpatory Evidence

Petitioner claims in Ground Eight that that the police failed to collect video surveillance from the hotel where he was arrested which would have shown that police helped Jeremy Noriega plant the evidence in Petitioner's hotel room. (Petition at 15-16.) This claim is meritless.

When acting in bad faith, the government's destruction of, or failure to preserve, potentially exculpatory evidence violates the Due Process Clause. *Arizona v. Youngblood*, 488 U.S. 51, 58 (1988). Here,

however, Petitioner offers nothing other than his word that any evidence was planted in his room, that Noriega or the police framed him, or that a videotape ever existed containing such footage. Because this claim is based entirely on speculation and is contrary to the evidence, it does not merit habeas relief. *See, e.g., Williams v. Swarthout*, 2013 WL 3935755, at *16 (C.D. Cal. Jul. 29, 2013) (rejecting *Youngblood* claim "because petitioner has not demonstrated that any exculpatory evidence existed").

V.

RECOMMENDATION

For these reasons, IT IS RECOMMENDED that the Court issue an Order (1) accepting this Report and Recommendation and (2) directing that Judgment be entered denying the Petition and dismissing the case with prejudice.[7]

DATED: February 14, 2018.

Patrick J. Walsh

PATRICK J. WALSH
UNITED STATES MAGISTRATE JUDGE

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[7] The Court is not inclined to issue a certificate of appealability in this case. *See* Rule 11, Federal Rules Governing Section 2254 Cases ("The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant."). If Petitioner believes a certificate should issue, he should explain why in his Objections.

APPENDIX B

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WILLIAM NATHANIEL WASHINGTON, Petitioner, v. ERIC ARNOLD, WARDEN, Respondent.	CASE NO. CV 16-8312-VAP (PJW) ORDER ACCEPTING REPORT AND ADOPTING FINDINGS, CONCLUSIONS, AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE, AND DENYING CERTIFICATE OF APPEALABILITY

Pursuant to 28 U.S.C. Section 636, the Court has reviewed the Petition, records on file, and the Report and Recommendation of the United States Magistrate Judge. Further, the Court has engaged in a *de novo* review of those portions of the Report to which Petitioner has objected. The Court accepts the Report and adopts the findings, conclusions, and recommendations of the Magistrate Judge.

Further, for the reasons stated in the Report and Recommendation, the Court finds that Petitioner has not made a substantial showing of the denial of a constitutional right and, therefore, a certificate of appealability is denied. *See* 28 U.S.C.

§ 2253(c)(2); Fed. R. App. P. 22(b); *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003).

DATED: March 23, 2018.

Virginia A. Phillips

VIRGINIA A. PHILLIPS
UNITED STATES DISTRICT JUDGE

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WILLIAM NATHANIEL WASHINGTON, Petitioner, v. ERIC ARNOLD, WARDEN, Respondent.	CASE NO. CV 16-8312-VAP (PJW) J U D G M E N T

Pursuant to the Order Accepting Report and Adopting Findings, Conclusions, and Recommendations of United States Magistrate Judge,

IT IS ADJUDGED that the Petition is denied and this action is dismissed with prejudice.

DATED: March 23, 2018

Virginia A. Phillips

VIRGINIA A. PHILLIPS
UNITED STATES DISTRICT JUDGE

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APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

MAY 7 2018

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

WILLIAM NATHANIEL WASHINGTON, Petitioner-Appellant, v. ERIC ARNOLD, Acting Warden, Respondent-Appellee.	No. 18-55491 D.C. No. 2:16-cv-08312-VAP-PJW Central District of California, Los Angeles ORDER

Before: BYBEE and BEA, Circuit Judges.

The request for a certificate of appealability is denied because appellant has not made a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see also Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Any pending motions are denied as moot.

DENIED.

APPENDIX D

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

JUN 1 2018

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

WILLIAM NATHANIEL WASHINGTON, Petitioner-Appellant, v. ERIC ARNOLD, Acting Warden, Respondent-Appellee.	No. 18-55491 D.C. No. 2:16-cv-08312-VAP-PJW Central District of California, Los Angeles ORDER

Before: W. FLETCHER and WATFORD, Circuit Judges.

The motion for reconsideration en banc (Docket Entry No. 3) is denied on behalf of the court. *See* 9th Cir. R. 27-10; 9th Cir. Gen. Ord. 6.11. The request for judicial notice (Docket Entry No. 3) is denied.

No further filings will be entertained in this closed case.

Additional material from this filing is available in the Clerk's Office.