

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

OCT 9 2018

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

WILLIAM NATHANIEL WASHINGTON,

No. 18-56220

Petitioner-Appellant,

D.C. No. 2:16-cv-08312-VAP-PJW
Central District of California,
Los Angeles

v.

SCOTT FRAUENHEIM, Warden,

ORDER

Respondent-Appellee.

Before: BERZON and IKUTA, Circuit Judges.

The request for a certificate of appealability is denied because appellant has not shown that “jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.”

Slack v. McDaniel, 529 U.S. 473, 484 (2000); *see also* 28 U.S.C. § 2253(c)(2);

Gonzalez v. Thaler, 565 U.S. 134, 140-41 (2012); *Gonzalez v. Crosby*, 545 U.S. 524, 530-31 (2005); *Ortiz v. Stewart*, 195 F.3d 520, 520-21 (9th Cir. 1999).

Any pending motions are denied as moot.

DENIED.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

10 WILLIAM NATHANIEL WASHINGTON,) CASE NO. CV 16-8312-VAP (PJW)
11 Petitioner,)
12 v.) ORDER DENYING RULE 60(b) MOTION
13 STUART SHERMAN, WARDEN,) FOR RELIEF FROM JUDGMENT
14 Respondent.)
15

16 Before the Court is Petitioner's motion for relief from judgment
17 under Federal Rule of Civil Procedure 60(b). For the following
18 reasons, the motion is denied.

19 In November 2016, Petitioner filed a petition for writ of habeas
20 corpus, challenging his August 2013 state convictions and sentence.

21 All but one of the grounds of error centered on Petitioner's claim
22 that Los Angeles Police Detective Marc Diamond had forged Petitioner's
23 signature on a *Miranda* waiver form and falsely claimed that Petitioner
24 had confessed to the thefts he was charged with. In March 2018, the
25 Court denied the Petition, finding that, even if Diamond had forged
26 Petitioner's signature on the waiver form and lied about Petitioner's
27 alleged confession, Petitioner was not entitled to habeas relief
28 because the waiver form and the alleged confession were not introduced

1 at Petitioner's trial. Petitioner sought review in the Ninth Circuit
2 but that court denied his application for a certificate of
3 appealability. (*Washington v. Arnold*, CCA No. 18-55491, May 7, 2018
4 Order.)

5 While Petitioner's habeas case was pending, in January 2017, he
6 filed a civil rights action, claiming, among other things, that
7 Diamond had forged his signature on the *Miranda* waiver form and
8 falsely claimed that he had confessed to the crimes. (*Washington v.*
9 *Diamond*, CV 17-666-VAP (PJW), January 27, 2018 Complaint.) In
10 September 2017, Diamond moved to dismiss the Complaint on the ground
11 that the claims were *Heck* barred. In June 2018, the Court denied the
12 motion to dismiss, ruling that a finding in the civil case that
13 Diamond had forged Petitioner's signature and lied about the
14 confession would not undermine the integrity of Petitioner's
15 conviction because the waiver form and the confession were not
16 introduced at trial. (See *Washington v. Diamond*, CV 17-666-VAP (PJW),
17 May 3, 2018 Final Report and Recommendation at 3-7.)

18 In July 2018, Petitioner filed the instant motion, seeking to
19 reopen his habeas case on the ground that the Court's denial of
20 Diamond's motion to dismiss the civil rights case established that
21 Diamond forged Petitioner's signature and lied about the confession,
22 proving that the state had deprived Petitioner of his constitutional
23 rights under the Sixth and Fourteenth Amendments. (Motion at 5-7.)

24 The Court's denial of Diamond's motion to dismiss Petitioner's
25 civil rights action did not establish that Diamond committed the
26 misconduct alleged by Petitioner, let alone that Petitioner's
27 constitutional rights were violated as a result. The Court's decision
28 established only that, accepting as true Petitioner's claim that

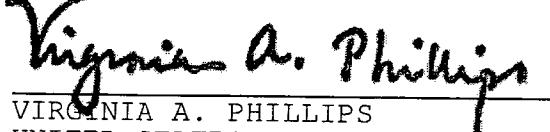
1 Diamond had forged the waiver form and lied about Petitioner's alleged
2 confession, Petitioner's conviction was not undermined because the
3 waiver and confession were not used to convict him. As such,
4 Petitioner's argument that the Court should reinstate his habeas case
5 in light of its ruling in his civil rights case is rejected.

6 Petitioner also seeks reconsideration of his claim that he was
7 denied a jury trial in a prior case. (Motion at 7-13.) This claim
8 does not merit reconsideration, either. The Court dismissed that
9 claim because, in response to Respondent's motion to dismiss the
10 entire petition because the claim was unexhausted, Petitioner asked
11 the Court to strike it, which the Court did. Petitioner's attempt to
12 resurrect this claim through a Rule 60(b) motion is denied.

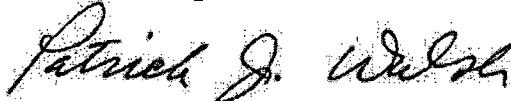
13 Finally, the Court finds that Petitioner has not made a
14 substantial showing of the denial of a constitutional right or that
15 the court erred in its procedural ruling and, therefore, a certificate
16 of appealability is not warranted. See 28 U.S.C. § 2253(c)(2); Fed.
17 R. App. P. 22(b); *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003);
18 *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

19 IT IS SO ORDERED

20 DATED: August 20, 2018

21 
22 Virginia A. Phillips
23 VIRGINIA A. PHILLIPS
UNITED STATES DISTRICT JUDGE

24
25 Presented by:

26 
27 PATRICK J. WALSH
28 UNITED STATES MAGISTRATE JUDGE

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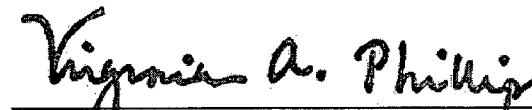
UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

10 WILLIAM NATHANIEL WASHINGTON,) CASE NO. CV 16-8312-VAP (PJW)
11)
12 Petitioner,) JUDGMENT
13 v.)
14 ERIC ARNOLD, WARDEN,)
15 Respondent.)
16

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

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23 
24 VIRGINIA A. PHILLIPS
25 UNITED STATES DISTRICT JUDGE
26
27

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

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

1 § 2253(c)(2); Fed. R. App. P. 22(b); *Miller-El v. Cockrell*, 537 U.S.
2 322, 336 (2003).

4 || 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

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

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

25 ¹ On January 2, 2018, Petitioner appealed the Court's order
26 denying his request for appointment of counsel. (Doc. No. 49.)
27 Though, generally speaking, a notice of appeal strips a district court
28 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).

1 I.
2

3 SUMMARY OF PROCEEDINGS

4 A. State Court Proceedings

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

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

18 Petitioner then filed a habeas petition in the California Supreme
19 Court, which was summarily denied. (Lodged Document Nos. 14-15.)

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

1 B. Federal Court Proceedings

2 On October 30, 2016, Petitioner, proceeding pro se, filed a
3 Petition for Writ of Habeas Corpus in this court, containing both
4 exhausted and unexhausted claims. (Docket Nos. 1, 3.) On November
5 29, 2016, he filed a First Amended Petition ("Petition"), raising nine
6 grounds for relief:

- 7 1. Petitioner was denied his right to present a defense because
8 he was framed by the police.
- 9 2. Petitioner was denied his due process rights when the police
10 fabricated evidence and committed perjury at trial.
- 11 3. Petitioner has been compelled to seek protective custody in
12 prison because of repeated attempts by the police to kill
13 him.
- 14 4. The prosecution committed misconduct by knowingly using
15 perjured testimony and fabricated evidence to obtain a
16 conviction.
- 17 5. Petitioner's constitutional rights under *Devereaux v. Abbey*,
18 263 F.3d 1070, 1076 (9th Cir. 2001) have been violated.
- 19 6. The trial court violated Petitioner's right to present a
20 defense by not allowing defense witnesses to testify.
- 21 7. Petitioner's trial counsel was ineffective and aided and
22 abetted the falsification of evidence to frame Petitioner.
- 23 8. The police violated Petitioner's due process rights by
24 failing to collect exculpatory evidence.
- 25 9. The trial court illegally enhanced Petitioner's sentence by
26 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

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.)

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

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

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

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

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

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

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

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

15 Video surveillance tapes showed [Petitioner] entering a
16 24 Hour Fitness club in Sherman Oaks near the Sherman Oaks
17 Galleria at 8:18 p.m. on January 19, 2012, carrying a tan
18 bag, and leaving at 11:41 p.m. That night, Jaime Guerrero
19 worked out at that location, and upon returning to his
20 locker he discovered his lock and wallet were missing. He
21 later learned someone had used his credit card at a Ralphs
22 store and to pay for cab fare.

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

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

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

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

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

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

1 15 minutes, and left the facility. He also testified that
2 he went to Macy's with Noriega, where Noriega purchased
3 clothes and a watch with a credit card.

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

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

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

24 Transaction receipts from the Target store in West
25 Hills confirmed that someone tried to make a \$385 purchase
26 on Bernal's credit card on January 24, 2012 at approximately
27 8:05 p.m., but the register declined the transaction. After
28 voiding an item from the purchase and reducing the amount to

1 \$280, another attempt was made to charge Bernal's card, but
2 the transaction was again declined. At 9:47 p.m., at the
3 same Target store, someone purchased two \$100 gift cards
4 using Sheikh's credit card. Five minutes later someone
5 attempted to make an additional \$291 purchase on Sheikh's
6 credit card, but that transaction was declined.

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

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

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

25 (Lodged Document No. 5 at 3-7 (internal citations and footnote
26 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--

(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

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

4 The claims raised in Grounds One, Four, Five, Six, and Seven were
5 raised before the California Supreme Court, but neither that court nor
6 the other state courts that considered them explained their reasons
7 for denying them. (Lodged Document No. 15.) Absent such explanation,
8 the Court will review the record to determine whether there was *any*
9 reasonable basis for the state courts to deny relief. *Richter*, 562
10 U.S. at 98; see also *Hein v. Sullivan*, 601 F.3d 897, 905 (9th Cir.
11 2010).

12 The California Supreme Court denied Grounds Two and Eight on
13 procedural grounds. (Lodged Document No. 17.) Generally speaking,
14 the state supreme court's rejection of claims on procedural grounds
15 bars this Court from addressing the claims on the merits. See, e.g.,
16 *Johnson v. Lee*, 136 S.Ct. 1802, 1805-06 (2016); *Walker v. Martin*, 562
17 U.S. 307, 317-21 (2011). The Court, however, has the discretion to
18 overlook the procedural bar and reach the merits where, as here, the
19 procedural claims are more cumbersome to resolve than the merits of
20 the claims. See *Lambrix v. Singletary*, 520 U.S. 518, 524-25 (1997)
21 ("We do not mean to suggest that the procedural-bar issue must
22 invariably be resolved first"); see also *Franklin v. Johnson*,
23 290 F.3d 1223, 1232 (9th Cir. 2002) ("Procedural bar issues are not
24 infrequently more complex than the merits issues presented by the
25 [habeas petition], so it may well make sense in some instances to
26 proceed to the merits if the result will be the same."). In doing so,
27 the Court will conduct a *de novo* review of the record to determine
28 whether the claims are meritorious. See *Cone v. Bell*, 556 U.S. 449,

1 472 (2009) ("Because the [state] courts did not reach the merits of
2 [Petitioner's] claim, federal habeas review is not subject to the
3 deferential standard that applies under AEDPA Instead, the
4 claim is reviewed *de novo*."); *Stanley v. Schriro*, 598 F.3d 612, 622
5 (9th Cir. 2010).³

6 IV.

7 DISCUSSION

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

25
26 ³ Respondent claims that Ground Six is also procedurally
27 defaulted because the California Court of Appeal's order rejecting it
28 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.

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

8 Petitioner, who represented himself at the preliminary hearing,
9 contended that Diamond was lying when he testified that Petitioner had
10 signed the *Miranda* waiver and confessed to the crimes. (CT 52.) He
11 claimed that Diamond had forged his signature on the *Miranda* waiver
12 and called a handwriting expert to support this claim. (CT 55-59,
13 156-59.)

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

22 Prior to trial, Petitioner filed a motion to dismiss the charges
23 on the ground that Detective Diamond had forged his signature on the
24 *Miranda* waiver in violation of Petitioner's right to due process. (CT
25 145-49.) The motion was denied. (Reporter's Transcript ("RT") A12-
26 A13.)

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

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

10 Nobody is seeking to introduce any of the statements
11 that [Petitioner] made after the [*Miranda*] waivers were
12 taken. So far as I could tell right now, nobody is
13 contesting that [Petitioner] didn't give a waiver. The only
14 thing that's being contested here, being suggested here, is
15 that the police somehow forced or doctored a signature on a
16 waiver form and that that is an indication of some police
17 misconduct, which in turn might be evidence of other police
18 misdeeds such as arguably planting evidence or doing
19 something else to somehow frame [Petitioner].

20 The basis for this conclusion is [the expert] looking--
21 taking a look at facsimiles of original signature which, in
22 and of itself, is a lousy way to do signature comparisons.
23 It also involves him taking a look at exemplars that he
24 didn't supervise.

25 The probative value, if that's the only indication of--
26 if that's the only relevance, that's the offer of proof,
27 that's--that's a stretch. Moreover, the basis for the
28 expert opinion right now--not to mention the fact we're

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

5 (RT 1285-86.)

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

13 Petitioner testified in his own defense. (RT 1345-1582.)

14 Throughout his testimony, he denied stealing anything or knowingly
15 using stolen credit cards to buy things. He claimed that his friend,
16 co-defendant Jeremy Noriega, was the one who had stolen the cards and
17 that, on occasion, i.e., when Petitioner was captured on surveillance
18 cameras using the stolen cards, he had unwittingly used the stolen
19 cards at the behest of Noriega. (RT 1346-50, 1354-65, 1506-17, 1569,
20 1581-82.) He also testified that the stolen property and cocaine
21 found by the police in his hotel room were all brought there by
22 Noriega without Petitioner's consent. (RT 1527-30.)

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

25
26 ⁴ California Evidence Code § 352 allows a trial court to exclude
27 evidence if it determines that its "probative value is substantially
28 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.

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

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

10 (RT 1546-47.)

11 A. Denial of the Right to Present a Defense

12 In Grounds One and Six, Petitioner claims that the trial court
13 violated his right to present a defense by excluding the evidence that
14 would have proved that Detective Diamond had framed him. (Petition at
15 4-5, 13.) He argues that the state's "deliberate suppression" of the
16 "fabricated" police report "single handedly" prevented him from
17 proving he had been framed by Detective Diamond. (Petition at 4-5.)
18 Petitioner contends that, had his handwriting expert been allowed to
19 testify that the signature on the *Miranda* waiver was forged,
20 Petitioner would have been acquitted. (Petition at 13.) There is no
21 merit to this claim.

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

1 400, 410 (1988); *see also United States v. Scheffer*, 523 U.S. 303, 308
2 (1998) ("A defendant's right to present relevant evidence is not
3 unlimited, but rather is subject to reasonable restrictions."); *Moses*
4 *v. Payne*, 555 F.3d 742, 757 (9th Cir. 2009) (explaining defendant's
5 right to present relevant evidence is subject to reasonable
6 restrictions, "such as evidentiary and procedural rules").

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

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

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

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

13 Furthermore, even if it could be said that the trial court erred
14 in excluding the evidence, Petitioner is not entitled to relief
15 because any error did not have a "substantial and injurious effect or
16 influence in determining the jury's verdict." *Brecht v. Abrahamson*,
17 507 U.S. 619, 623 (1993); see *DePetris*, 239 F.3d at 1063 (applying
18 harmless error test to claim of the denial of right to present a
19 defense). The evidence against Petitioner was overwhelming.
20 Surveillance video captured him going into and out of the fitness
21 centers at the times the thefts occurred and then using the stolen
22 credit cards to buy (or attempt to buy) merchandise and services at
23 nearby stores. Petitioner was later apprehended in his hotel room,
24 surrounded by some of the stolen property as well the bolt cutters he
25 used to cut the locks off the lockers at the gyms. Though he claimed
26 to have been an unwitting victim of his friend Noriega, his testimony
27 that was simply not believable. Not surprisingly, it was rejected by
28 the jury. In light of the marginal relevance of the purported

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

7 B. Prosecutorial Misconduct for the Presentation of False Evidence

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

14 A conviction obtained by the knowing use of false evidence or
15 perjured testimony is fundamentally unfair and violates a defendant's
16 constitutional rights. *United States v. Agurs*, 427 U.S. 97, 103
17 (1976); see also *Napue v. Illinois*, 360 U.S. 264, 269-70 (1959) ("A
18 lie is a lie, no matter what its subject, and, if it is in any way
19 relevant to the case, the district attorney has the responsibility and
20 duty to correct what he knows to be false and elicit the truth."
21 (internal quotation marks omitted)). To merit habeas relief, a
22 petitioner must show that the testimony was actually false, that the
23 prosecutor knew or should have known that it was false, and that the
24 falsehood was material to the case. *Jackson v. Brown*, 513 F.3d 1057,
25 1071-72 (9th Cir. 2008). A *Napue* violation is material if there is
26 any reasonable likelihood that the false testimony could have affected
27 the jury's decision. *Libberton v. Ryan*, 583 F.3d 1147, 1164 (9th Cir.
28 2009).

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

15 Second, even assuming that Detective Diamond's testimony at the
16 preliminary hearing that Petitioner had signed the waiver and
17 confessed to the crimes was false, Petitioner has not shown that the
18 prosecutor knew it. See *Murtishaw v. Woodford*, 255 F.3d 926, 959 (9th
19 Cir. 2001) (rejecting prosecutorial misconduct claim because, even
20 assuming testimony was false, petitioner presented no evidence the
21 prosecution knew it was false); see also *United States v. Sherlock*,
22 962 F.2d 1349, 1364 (9th Cir. 1992) (holding prosecutor who presented
23 witnesses with contradictory stories did not necessarily present
24 perjured testimony because defendant failed to show prosecutor knew
25 which story was true). In fact, the evidence suggests the opposite is

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

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

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

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

11 C. Insufficient Evidence at Preliminary Hearing

12 In Ground Five, Petitioner claims that he should not have been
13 held to answer at his preliminary hearing because it was based on
14 "deliberately fabricated evidence," namely the allegedly forged
15 signature on the waiver form and the confession that followed.
16 (Petition at 12.) The Court has discussed at length Petitioner's
17 claim that his signature on the document was forged and concluded that
18 Petitioner has failed to prove it, let alone that it prejudiced his
19 case. Nevertheless, even if Petitioner could prove that Detective
20 Diamond forged his signature and lied about it and Petitioner's
21 alleged confession at the preliminary hearing, that would not support
22 relief because there is no federal constitutional right to a
23 preliminary hearing. See *Gerstein v. Pugh*, 420 U.S. 103, 119-20
24 (1975). As such, alleged errors occurring at the preliminary hearing
25 cannot form the basis of a federal habeas corpus claim. See *Gilmore*
26 v. *California*, 364 F.2d 916, 918 n.5 (9th Cir. 1966) (noting defendant
27 "filled his papers with factual assertions and legal citations that
28 present no issue cognizable in habeas corpus, such as the sufficiency,

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

8 D. Ineffective Assistance of Counsel

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

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

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24

25 ⁶ Petitioner supports his claim with a citation to *Devereaux v.*
26 *Abbey*, 263 F.3d 1070 (9th Cir. 2001). That case, which held that
27 defendants enjoy a constitutional right to be free from prosecution
28 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.

1 the result of the proceeding would have been different." *Id.* at
2 687-88, 694.

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

20 E. Government's Failure to Preserve Exculpatory Evidence

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

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

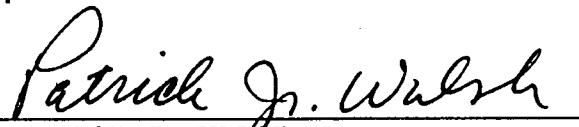
1 however, Petitioner offers nothing other than his word that any
2 evidence was planted in his room, that Noriega or the police framed
3 him, or that a videotape ever existed containing such footage.
4 Because this claim is based entirely on speculation and is contrary to
5 the evidence, it does not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

9 V.

10 RECOMMENDATION

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

15 DATED: February 16, 2018.

16 
17 PATRICK J. WALSH
18 UNITED STATES MAGISTRATE JUDGE

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26 ⁷ The Court is not inclined to issue a certificate of
27 appealability in this case. See Rule 11, Federal Rules Governing
28 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.

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