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APPENDIX

A

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Ninth Circuit Court Of Appeals Order Denying COA

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

NOV 5 2018

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

RALPH NICHOLAS CANETE, Petitioner-Appellant, v. W. L. MONTGOMERY, Acting Warden, Respondent-Appellee.	No. 18-55640 D.C. No. 2:15-cv-00316-RGK-JCG Central District of California, Los Angeles ORDER

Before: TROTT and WARDLAW, Circuit Judges.

The request for a certificate of appealability (Docket Entry No. 5) 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

B

3 pages

District Court Judgment And Order

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

RALPH NICOLAS CANETE, Petitioner, v. W.L. MONTGOMERY, Respondent.	CASE NO. CV 15-316-RGK (JCG) 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: May 1, 2018

R. GARY KLAUSNER
UNITED STATES DISTRICT JUDGE

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

RALPH NICHOLAS CANETE, Petitioner, v. W.L. MONTGOMERY, Respondent.	CASE NO. CV 15-316-RGK (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: May 1, 2018

Gary Klausner

R. GARY KLAUSNER
UNITED STATES DISTRICT JUDGE

APPENDIX

C

14 Pages

Magistrate Judge Findings And Recommendations

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

RALPH NICHOLAS CANETE, Petitioner, v. W.L. MONTGOMERY, *Warden*, Respondent.	Case No. LA CV 15-0316 RGK (JCG) **REPORT AND RECOMMENDATION TO DENY PETITION FOR WRIT OF HABEAS CORPUS**

Before the Court is a Petition for Writ of Habeas Corpus ("Petition") by Ralph Nicholas Canete ("Petitioner"). For the reasons detailed below, the Court recommends denial of the Petition and dismissal of this action with prejudice.

I.

BACKGROUND

On March 3, 2011, a jury convicted Petitioner of second degree robbery and access card theft. (Lodg. No. 1, Clerk's Transcript ("CT") at 700-05.) The trial court found true a prior serious felony strike conviction and sentenced Petitioner to state prison for a term of 18 years for the robbery, and 16 months for the access card theft. (*Id.* at 705-06.)

Petitioner appealed to the California Court of Appeal ("Court of Appeal") challenging only his sentence. (Lodg. Nos. 4, 8, 9.) On March 25, 2013, the Court of Appeal concluded that the trial court erred by sentencing on more than one underlying offense because the two offenses were committed in the same transaction, and with the same criminal objective. (Lodg. No. 9); *People v. Canete*, 2013 WL 1191898, at *2-3 (Cal. Ct. App. Mar. 25, 2013). Accordingly, the Court of Appeal remanded for resentencing, but affirmed the judgment in all other respects. *Canete*, 2013 WL 1191898 at *3. On June 4, 2013, the trial court struck the consecutive term for the access card conviction, and imposed but stayed sentence for that conviction, with the stay to become permanent upon Petitioner's completion of the 18-year robbery term. (Lodg. No. 10); [Dkt. No. 1 at 3].

Petitioner then filed a state habeas petition in the Court of Appeal. (Lodg. No. 11.) On June 27, 2014, the Court of Appeal denied the petition because Petitioner: (1) raised issues that could have been raised on direct appeal, citing *In re Clark*, 5 Cal. 4th 750, 765-66 (1993); and (2) "failed on the merits to present facts or evidence sufficient to demonstrate entitlement to relief," citing *In re Resendiz*, 25 Cal. 4th 230, 239 (2001), *reversed on other grounds by Padilla v. Kentucky*, 559 U.S. 356, 370-71 (2010). (Lodg. No. 12); [Dkt. No. 1-1 at 123]. On August 14, 2014, Petitioner filed another state habeas petition in the California Supreme Court, which was denied, without explanation or citation, on December 17, 2014. (Lodg. Nos. 13, 14.)

On January 15, 2015, Petitioner filed the instant Petition. [Dkt. No. 1.]

The Court has independently reviewed the record, and the factual background is well-summarized in the Court of Appeal's decision on direct review. *See Canete*, 2013 WL 1191898 at *1; 28 U.S.C. § 2254(e)(1) ("[A] determination of a factual issue made by a State court shall be presumed to be correct.").

Petitioner raised Grounds One through Four on habeas review before the Court of Appeal, but neither the language of the order, nor the cite to *Resendiz*[1], provide any specific reasoning for the Court of Appeal's merits denial order.[2] Similarly, Petitioner raised Grounds One through Five before the California Supreme Court, but the court did not provide a reasoned opinion when it denied his state habeas petition on the merits. (Lodg. Nos. 12, 14); [Dkt. No. 1-1 at 123]; *see Walker v. Martin*, 562 U.S. 307, 310 (2011) ("A spare order denying a petition without explanation or citation ordinarily ranks as a disposition on the merits."). Because the state courts have not explained the basis for their conclusion that Petitioner's claims are meritless, this Court must therefore "perform an independent review of the record to ascertain whether the state court decision was objectively unreasonable." *Haney v. Adams*, 641 F.3d 1168, 1171 (9th Cir. 2011); *Jimenez v. McEwen*, 2014 WL 4104800, at *5 (C.D. Cal. Apr. 30, 2014) (independently reviewing nearly identical state appellate court's merits denial order). "This is not *de novo* review of the constitutional issue, but only a means to determine whether the state court decision is objectively unreasonable." *Id.*

II.

DISCUSSION

Under the Antiterrorism and Effective Death Penalty Act of 1996, federal courts may grant habeas relief only where a state court's decision was contrary to, or an unreasonable application of, clearly established Supreme Court authority, or was based

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[1] The Court of Appeal's pin citation simply recites the standard under *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984) for reviewing ineffective-assistance-of-counsel claims. [*See* Dkt. No. 1-1 at 123]; *Resendiz*, 25 Cal. 4th at 239.

[2] Respondent is likely correct that some of Petitioner's claims are procedurally defaulted under the alternative basis for denial provided by the Court of Appeal. [Dkt. No. 12 at 14-18.] The Supreme Court recently upheld California's procedural bar of claims raised for the first time on state collateral review that could have been raised on direct appeal. *See Johnson v. Lee*, 136 S. Ct. 1802, 1804 (2016). However, because this Court necessarily reviews the underlying merits of the claims in its assessment of Petitioner's derivative ineffective assistance of counsel claims, the Court declines to invoke procedural default here. *See Lambrix v. Singletary*, 520 U.S. 518, 525 (1997) (finding that the district court may address the merits of a habeas petition without reaching procedural issues where the interests of judicial economy are best served by doing so).

on an unreasonable determination of the facts in light of the evidence presented. 28 U.S.C. § 2254(d). It is a highly deferential standard that is difficult to meet. *Harrington v. Richter*, 562 U.S. 86, 102, 105 (2011).

Petitioner asserts five grounds for relief, all of which fail on this record. *See* 28 U.S.C. § 2254(d); *Harrington*, 562 U.S. at 101-02.

A. Ground One: Failure to Preserve Evidence

First, Petitioner contends that the police failed to preserve 911 call recordings, thereby depriving him of a material witness and violating his federal constitutional right to a fair trial. [Dkt. No. 1 at 5; Dkt. No. 2 at 16-18.]

By way of background, Petitioner's claim is based on a "Detail Call For Service Report" created by the police department on May 2, 2009, the day of the crimes. [Dkt. No. 1 at 15-21.] The face of the report lists "SPENCER, GE" as a reporting party and an accompanying a phone number, but does not list an address. The report also shows an initial police personnel entry from a 911 call at 10:04:41 p.m., which states: "VICT[IM] WITH HEAD INJURY UNABLE TO GIVE INFO." [*Id.* at 15.] At 10:15:50, the police received a report that a robbery occurred five minutes before. A description of the suspect is listed for that call, but the report does not identify the source of that description. [*Id.*] Later, log entries at 10:04:54 and 10:05:02 added to, and updated, the report to include the name "SPENCER, GE" and the same phone number. [*Id.* at 17.]

Petitioner attaches an April 8, 2010 affidavit from the police department's custodian of records. The custodian states that records Petitioner requested could not be located because records of radio and telephone transmissions are destroyed and recycled after six months. Because the incident occurred in May 2009, the relevant tapes had been recycled. [*Id.* at 13.]

As a rule, a law enforcement agency has an obligation to preserve evidence that is exculpatory of a defendant and apparent at the time of its loss or destruction. *California v. Trombetta*, 467 U.S. 479 (1984); *United States v. Sivilla*, 714 F.3d 1168,

1172 (9th Cir. 2013). However, a defendant must demonstrate that law enforcement acted in bad faith by failing to preserve the materials. *Arizona v. Youngblood*, 488 U.S. 51, 58 (1988).

Here, Petitioner's claim fails for two reasons:

- No Apparent Exculpatory Value: First, Petitioner has failed to show that there was apparent exculpatory value to the recordings. The call report does not establish that G.E. Spencer personally witnessed the crimes. Moreover, Petitioner's private investigator, and the prosecutor's investigating officer, both attempted to contact Spencer at the number in the report, but they discovered (1) the number belonged to a woman named Pat Garrett; and (2) no one by the name of G.E. Spencer was associated with that number. [Dkt. No. 1 at 23; Dkt. No. 26-1 at 117-18, 120, 131-32]; (CT at 551, 553); s*ee Trombetta*, 467 U.S. at 489 (holding that the evidence must "possess an exculpatory value that was apparent before [it]was destroyed"); *United States v. Drake*, 543 F.3d 1080, 1090 (9th Cir. 2008) ("The exculpatory value of an item of evidence is not 'apparent' when the evidence merely '*could have*' exculpated the defendant." (citation omitted) (emphasis in original)).

- No Showing of Bad Faith: Second, outside of a blanket assertion of "intentional non-preservation" of the tapes, Petitioner wholly fails to show bad faith on behalf of the police. [Dkt. No. 1 at 5; Dkt. No. 2 at 17-18]; *Youngblood*, 488 U.S. at 58 (holding that bad faith is shown where "the police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant."); *Blackledge v. Allison*, 431 U.S. 63, 75 n.7 (1977) ("[T]he petition is expected to state facts that point to a real possibility of constitutional error." (internal quotation marks omitted)). Instead, Petitioner's supporting documentation reveals that the tapes were recycled as part of the department's routine "records management program." [Dkt. No. 1 at 13]; *see United States v. Heffington*, 952 F.2d 275, 281 (9th Cir. 1991) (finding that compliance with departmental procedure indicates disposal of evidence was not in bad faith); *Mitchell v. Goldsmith*, 878 F.2d 319, 322 (9th Cir. 1989) (observing, in the course of enumerating reasons for not finding bad faith, that "the police were acting in accord with their normal practices").

Accordingly, Petitioner is not entitled to federal habeas relief on this claim.

B. Suggestive Identification

In Ground Two, Petitioner contends that he was denied due process by the admission of an unduly suggestive pretrial lineup. [Dkt. No. 1 at 5; Dkt. No. 2 at 19-27.]

By way of background, the victim testified at trial about her identification of the robbery suspects from two "six-pack" photo arrays shown to her a few days after the crimes occurred. One six-pack contained photographs of males, and the other consisted of females.[3] [Dkt. No. 1 at 64.] Before viewing the photographs, the victim read an admonition concerning the nature of the six-packs, and informing her not to assume that the robber's photograph would be included. [*Id.* at 64-65.] In viewing the male six-pack, she eliminated all photographs except the one in the fifth position.[4] [Dkt. No. 26-1 at 197-99.] As to that photo, she wrote, "maybe?" and noted, "style of facial hair, facial features similarity." [Dkt. No. 1 at 65; Dkt. No. 26-2 at 1-2]; (Lodg. No. 2, Reporter's Transcript ("RT") at 416). She testified that Petitioner "looks like" the person in the photograph based on his facial features, including the shape of his nose and style of his facial hair. (RT at 417-18.) When shown the six-pack of females, she said that none of them looked familiar. (*Id.* at 432-33.)

A detective testified that photograph placement was determined randomly by a program. (*Id.* at 556-59.) Defense counsel asked about the presence of two sets of markings under the fifth photograph position: "ID:194418" and "Name:09-6012." (*Id.* at 560-61); [Dkt. No. 1 at 66; Dkt. No. 26-2 at 11-12]. The detective explained that those were identification numbers for police use, which were automatically generated in that position when the six-packs were created. [Dkt. No. 26-2 at 12]; (RT at 561-62). He testified he did not put them there to draw attention to the fifth photograph. (RT at 562.) Further, the photograph of Patricia Rodriguez was placed in the fourth

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[3] The female six-pack contained a photograph of Patricia Rodriguez, who was arrested with Petitioner. [Dkt. No. 1 at 64.]

[4] This corresponded to the middle position on the bottom row of photographs.

position of the female-only six-pack. That six-pack had similar internal-identification markings under the fifth-photograph position, but the victim did not identify anyone. (*Id.* at 545, 564-68); [Dkt. No. 1at 64; Dkt. No. 1-1 at 59-60].

Petitioner alleged before the trial court that the pretrial identification was unduly suggestive. The court explained that it reviewed the six-pack, and found the photos were sufficiently similar in race and facial characteristics, and that the six-pack was not impermissibly suggestive. (RT at 919); [Dkt. No. 1-1 at 58]. The court also specifically addressed the identifying markings at the bottom-center of the six-packs and concluded they were not impermissibly suggestive because: (1) the male and female six-packs both had the same markings in the same position, which showed that the investigator who prepared the six-packs did not intend to suggest a photograph in that position should be chosen; and (2) the victim was properly admonished before viewing the six-packs. (RT at 919-22); [Dkt. No. 1-1 at 59-61]. The trial court also concluded that Petitioner was not prejudiced by the identification because: (1) the victim was never testified she was "100 percent sure"; (2) physical evidence corroborated his participation in the robbery; and (3) Petitioner testified as to his version of the events, which the jury did not believe. (RT at 933); [Dkt. No. 1-1 at 69].

As a rule, courts employ a two-part analysis to evaluate whether an identification has been irreparably tainted by an impermissibly suggestive pretrial identification procedure. The first step is to determine whether the pretrial identification procedure was unduly suggestive. *See Simmons v. United States*, 390 U.S. 377, 384 (1968). In a photographic identification procedure, this may occur when the procedure "emphasize[s] the focus upon a single individual," thereby increasing the likelihood of misidentification. *United States v. Bagley*, 772 F.2d 482, 493 (9th Cir. 1985). If the court finds that the challenged identification procedure is not unduly suggestive, then the due process inquiry ends. *Id.* at 492. If the court finds that the identification procedure is unduly suggestive, then the second step examines "whether

under the 'totality of the circumstances' the identification is reliable." *Neil v. Biggers*, 409 U.S. 188, 199 (1972).

Here, Petitioner's claim fails for three reasons:

- State Court Factual Determinations Entitled To Deference: First, the trial court's factual findings that the photographs appear similar in race and facial characteristics, including having goatees similar to Petitioner's, are entitled to deference. (RT at 919, 923); [Dkt. No. 1 at 66; Dkt. No. 1-1 at 58]; 28 U.S.C. § 2254 (e)(1); *see also Stanley v. Cullen*, 633 F.3d 852, 861 (9th Cir. 2011); *Vardanyan v. Montgomery*, 2016 WL 4180972, at *13 (C.D. Cal. Mar. 9, 2016) (stating that state court factual finding that other men in photo array could be of same nationality as petitioner, and that they appeared similar in looks to petitioner, was entitled to deference on federal habeas review).

- Procedure Not Unduly Suggestive: Second, even without factual deference, (1) the men in the six-pack share very similar physical characteristics with Petitioner [Dkt. No. 1 at 66]; and (2) both the male and female six-packs had the same internal identification markings in the same position, but the victim did not make an identification from the female six-pack, showing (a) the markings had no influence on her choice, and (b) there was no suggestive intent in the preparation of the six-packs. (RT at 545, 556-62, 564-68, 919-22); [Dkt. No. 1 at 64, 66; Dkt. No. 1-1 at 59-61; Dkt. No. 26-2 at 11-12]; *see Foster v. California*, 394 U.S. 440, 443 (1969) (holding that an identification procedure is impermissibly suggestive when it "[i]n effect. . . sa[ys] to the witness, 'This is the man'"); *Vardanyan*, 2016 WL 4180972, at *13 (concluding that identification was not unduly suggestive because men in photo array shared physical characteristics with petitioner, including similar skin color and facial hair, and there appeared nothing about petitioner's photograph that said "this is the guy" (citing *Foster*)).

- Inquiry Ends; Identification For Jury to Evaluate: Third, because the identification procedure was not unduly suggestive, the due process inquiry ends, *Bagley*, 772 F.2d at 492, and the jury was entitled to weigh the victim's identification. *See Foster*, 394 U.S. at 443 n. 2 (holding that if the flaws in identification procedures are not so suggestive as to violate due process, "the reliability of properly admitted eyewitness identification, like the credibility of the other parts of the prosecution's case[,] is a matter for the jury"); *Manson v. Brathwaite*, 432 U.S. 98, 116 (1977) ("Juries are not so

susceptible that they cannot measure intelligently the weight of identification testimony that has some questionable feature.").

Accordingly, Petitioner is not entitled to federal habeas relief on this claim.

C. Grounds Three, Four, and Five: Ineffective Assistance of Counsel

Finally, Petitioner raises several claims of ineffective assistance of counsel. In Ground Four, he alleges that Richard Mendez provided ineffective assistance by failing to: (1) request a line-up prior to the preliminary hearing; and (2) obtain the 911 call recordings. [Dkt. No. 1 at 6, 143-54; Dkt. No. 2 at 55-56.] In Ground Three, he alleges that Alan Ross provided ineffective assistance by failing to call his mother, Rosa Canete, and her friend, Amanda Mohr, to testify at trial. [Dkt. No. 1 at 5, 159, 162; Dkt. No. 2 at 29-34.] In Ground Five, Petitioner contends that Elizabeth Missakian provided ineffective assistance of appellate counsel by failing to raise issues corresponding to Grounds One and Two of the instant petition. [Dkt. 1 at 6, 95-105; Dkt. No. 2 at 57-61.]

To establish ineffective assistance of trial counsel, Petitioner must show that: (1) counsel's representation was deficient such that it "fell below an objective standard of reasonableness," *and* (2) counsel's deficient performance prejudiced Petitioner such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 687-88, 694. Counsel "is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* at 690.

Claims of ineffective assistance of appellate counsel are similarly evaluated under *Strickland*. *See Smith v. Robbins*, 528 U.S. 259, 285 (2000). Thus, Petitioner must demonstrate that appellate counsel's performance was "objectively unreasonable," and also "must show a reasonable probability that, but for his counsel's [deficient performance], he would have prevailed on his appeal." *See id.* Importantly, appellate counsel "need not (and should not) raise every nonfrivolous claim," but

rather may select from among potential claims "in order to maximize the likelihood of success on appeal." *Id.* at 288.

1. Preliminary Hearing Counsel

Here, counsel's alleged acts of ineffective assistance at the preliminary hearing did not violate Petitioner's federal constitutional rights for three reasons:

- No Federal Constitutional Right to Preliminary Hearing[5]: First, Petitioner had no federal constitutional right to the preliminary hearing. *See Gerstein v. Pugh*, 420 U.S. 103, 118-26 (1975); *Hines v. Enomoto*, 658 F.2d 667, 677 (9th Cir. 1981) (citing *Ramirez v. Arizona*, 437 F.2d 119 (9th Cir. 1971)) (abrogated on other grounds by *Ross v. Oklahoma*, 487 U.S. 81 (1988)); *Ingram v. Cate*, 2014 WL 3672921, at *15 (C.D. Cal. June 12, 2014) (denying claim of ineffective assistance of counsel at the preliminary hearing, in part, because petitioner had no constitutional right to a preliminary hearing in the first place).

- No Bar to Conviction Based on Deprivation of Rights Before Trial: Second, Petitioner's claim alleging a deprivation of rights before trial broke the chain of events. *See Rose v. Mitchell*, 443 U.S. 545, 576 (1979) ("It is well settled that deprivations of constitutional rights that occur before trial are no bar to conviction unless there has been an impact upon the trial itself. A conviction after trial, like a guilty plea, represents a break in the chain of events which has preceded it in the criminal process." (internal quotations marks omitted) (citation omitted).); *Ingram*, 2014 WL 3672921 at 15 (denying claim because, under *Rose*, petitioner could not show that any alleged ineffectiveness of counsel at the preliminary hearing had a prejudicial impact on his trial).

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[5] For this reason, Respondent contends that Ground Four is barred by *Teague v. Lane*, 489 U.S. 288, 301 (1989). [Dkt. No. 12 at 36-38.] However, because the Court does not recommend granting habeas relief, it is not necessary to address the *Teague* argument. *See Leavitt v. Arave*, 383 F.3d 809, 816 (9th Cir. 2004) ("If a state properly argues that the district court *granted* a habeas petition on the basis of a new rule of constitutional law that is *Teague*-barred, we must address the *Teague* issue first." (citing *Horn v. Banks*, 536 U.S. 266, 267 (2002)) (emphasis added)); *Prestegui v. Madden*, 2017 WL 3738385, at *6 (C.D. Cal. July 31, 2017) (declining to address *Teague* argument under same reasoning).

- No Showing That Result of Preliminary Hearing, or Trial, Would Be Different: Even assuming counsel should have requested a line-up before the preliminary hearing, Petitioner has failed to show that "but for" this error the result of the proceedings would have been different. Specifically, Petitioner cannot show the trial court would have dismissed the charges at the early stage of proceedings, or that the jury would not have ultimately convicted him, considering the evidence that connected him to the crime, including: (1) surveillance video from a fast food restaurant near the crime scene showed Petitioner using the victim's access card to purchase food shortly after the robbery occurred; (2) police found the victim's key, wallet, and purse when they pulled Petitioner over; and (3) police found the victim's camera in Petitioner's home. *See Canete*, 2013 WL 1191898 at *1; *Strickland*, 466 U.S. at 697 ("If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed.").

2. Trial Counsel

Petitioner's ineffective assistance of trial counsel claim is based on counsel's failure to call Petitioner's mother and her friend to testify. [Dkt. No. 1 at 5; Dkt. No. 2 at 29-34.] Their declarations state that on May 5, 2009[6], Rodriguez took the victim's blue camera from her purse and gave it to Petitioner's mother. [Dkt. No. 1 at 5, 159, 162.] This would have corroborated Petitioner's testimony that the camera found by the police on the dining room table was an item that Rodriguez had given to his mother. [*Id.* at 193.]

Petitioner raised this claim in a new trial motion. The trial court found that counsel's decision appeared to be a reasonable tactical choice to which Petitioner acceded to at trial. In any event, the trial court ultimately found that there was "a lot of corroboration in this case," and, therefore, the failure to call the witnesses did not affect the verdict. [Dkt. No. 1-1 at 71-76.]

Here, counsel's alleged act of ineffective assistance at trial did not violate Petitioner's federal constitutional rights for two reasons:

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[6] This was days after the robbery, and two days before police arrested Petitioner and searched his residence.

- Witnesses Likely to Face Serious Credibility Problems. First, it would have been reasonable for counsel to conclude that testimony from his mom and her friend would likely have faced serious credibility problems, and there is not a reasonable probability the outcome would have been different, due to their close relationship with Petitioner. *See Gonzalez v. Wong*, 667 F.3d 965, 988 (9th Cir. 2011) (holding that failure to present witnesses did not constitute ineffective assistance where witnesses were "family or close friends" whose testimony was therefore "suspect based on their close relationship with [petitioner]"); *Bergmann v. McCaughtry*, 65 F.3d 1372, 1380 (7th Cir. 1995) (holding that counsel was not ineffective by failing to call family member who would easily have been impeached for bias); *Wilson v. Kemna*, 12 F.3d 145, 147 (8th Cir. 1994) (finding no prejudice in part because witness's testimony "would have been questionable considering she was married to the defendant").

- No Prejudice in Light of Other Evidence: Second, the camera was just one of aspect of the evidence connecting Petitioner to the crime, as discussed in Part C.1, above. Petitioner does not effectively refute the video surveillance, or the other items found in his car that belonged to the victim. Moreover, even if Rodriguez had possession of the camera two days after the robbery, that does not undercut any inference that Petitioner possessed it at the time of the robbery, or the fact that it was later found in his house. Further, the declarations do nothing to refute the victim's identification of Petitioner, however tentative it may have been. *Strickland*, 466 U.S. at 697; *cf. United States v. McClendon*, 782 F.2d 785, 790 (9th Cir. 1986) (holding that testimony of one eyewitness, even where inconsistent with other evidence, may support a conviction); *United States v. Smith*, 563 F.2d 1361, 1363 (9th Cir. 1977) (concluding that eyewitness statement that defendant "look[ed] like" the robber was sufficient to prove identity).[7]

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[7] In a separate memorandum, filed the same day as the Petition, Petitioner lists a series of other alleged shortcomings by trial counsel. [Dkt. No. 34-54.] The Court recommends summary denial of these claims because (1) many are simply in list form with little or no supporting facts or analysis; and/or (2) they simply rehash arguments made elsewhere in the Petition. *See Blackledge*, 431 U.S. at 75 n.7; *Greenway v. Schiro*, 653 F.3d 790, 804 (9th Cir. 2011) (rejecting habeas claim as "cursory and vague"); *Jones v. Gomez*, 66 F.3d 199, 205 (9th Cir. 1995) (petitioner's "conclusory suggestions that his trial . . . counsel provided ineffective assistance fall far short of stating a valid claim of constitutional violation"). Moreover, even if properly pled, Petitioner fails to establish prejudice in light of the evidence against him, as discussed in Parts C.1 & C.2. *See Strickland*, 466 U.S. at 697.

3. Appellate Counsel

Here, Petitioner's appellate counsel cannot be faulted for failing to raise issues corresponding to Grounds One and Two. As explained in Parts A. and B., those claims lack merit, and habeas relief does not lie for an attorney's failure to raise meritless or futile claims. *See Robbins*, 528 U.S. at 285, 288; *Jones v. Barnes*, 463 U.S. 745, 751-54 (1983) (finding that appellate counsel's failure to raise meritless claim does not constitute ineffective assistance); *Rupe v. Wood*, 93 F.3d 1434, 1445 (9th Cir. 1996) ("[T]he failure to take a futile action can never be deficient performance . . . .").

Accordingly, Petitioner is not entitled to federal habeas relief on this claim.[8]

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[8] To the extent Petitioner claims cumulative ineffective assistance of counsel in his memorandum and reply [Dkt. No. 2 at 53-54; Dkt. No. 33 at 35], the contention fails under similar reasoning. Because none of Petitioner's separate ineffective-assistance-of-counsel arguments is meritorious, his cumulative error claim fails as well. *See Cain v. Chappell*, 870 F.3d 1003, 1024-25 (9th Cir. 2017) (finding that petitioner is not entitled to relief on theory of cumulative error based on a litany of trial errors and ineffective assistance of counsel because he was not "denied . . . a trial in accord with traditional and fundamental standards of due process" (citation omitted)); *Detrich v. Ryan*, 740 F.3d 1237, 1273 (9th Cir. 2013) (holding that ineffective assistance claim failed where "[t]aken cumulatively, [the attorney's errors] still are not substantial").

III.

RECOMMENDATION

In accordance with the foregoing, IT IS RECOMMENDED that the Court issue an Order: (1) approving and accepting this Report and Recommendation; (2) directing that Judgment be entered dismissing this action with prejudice; and (3) denying a certificate of appealability. *See* 28 U.S.C. § 2253; Fed. R. App. P. 22(b); *Cullen v. Pinholster*, 563 U.S. 170, 181-82 (2011); *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003).

DATED: March 21, 2018

Hon. Jay C. Gandhi
United States Magistrate Judge

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This Report and Recommendation is not intended for publication. Nor is it intended to be included or submitted to any online service such as Westlaw or Lexis.

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