UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

JUL 12 2018

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

PATRICK K. GIBSON, Petitioner-Appellant, v. RONALD HAYNES, Superintendent, Respondent-Appellee.	No. 18-35174 D.C. No. 3:17-cv-05015-BHS Western District of Washington, Tacoma ORDER

Before: HAWKINS and SILVERMAN, Circuit Judges.

Appellant's motion for reconsideration en banc (Docket Entry No. 8) is denied on behalf of the court. *See* 9th Cir. R. 27-10; 9th Cir. Gen. Ord. 6.11.

No further filings will be entertained in this closed case.

APPENDIX D

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

JUN 1 2018

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

PATRICK K. GIBSON, Petitioner-Appellant, v. RONALD HAYNES, Superintendent, Respondent-Appellee.	No. 18-35174 D.C. No. 3:17-cv-05015-BHS Western District of Washington, Tacoma ORDER

Before: W. FLETCHER and WATFORD, 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 A

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

PATRICK K. GIBSON,

Petitioner,

v.

RONALD HAYNES,

Respondent.

CASE NO. C17-5015 BHS

ORDER ADOPTING REPORT AND RECOMMENDATION

This matter comes before the Court on the Report and Recommendation ("R&R") of the Honorable J. Richard Creatura, United States Magistrate Judge (Dkt. 23), and Petitioner's objections to the R&R (Dkt. 25). The procedural and factual history of this case is set forth in the R&R, which was filed on December 15, 2017. Dkt. 23. On December 25, 2017, Petitioner filed his objections. Dkt. 25.

The district judge must determine de novo any part of the magistrate judge's disposition that has been properly objected to. The district judge may accept, reject, or modify the recommended disposition; receive further evidence; or return the matter to the magistrate judge with instructions. Fed. R. Civ. P. 72(b)(3).

APPENDIX B

Petitioner raised six grounds for relief in his petition. Dkt. 4. The R&R recommends the dismissal of all of them. Dkt. 23. Petitioner objects to the dismissal of grounds 1–5 while conceding ground 6 without objection. Dkt. 25 at 2. Petitioner raises eight objections to the R&R, although his arguments on some of these issues overlap.

A. Exculpatory Evidence

Petitioner first argues that the R&R and decisions from state courts have mistakenly required that he show bad faith to establish a constitutional error in the failure of police to preserve a fingerprint and white hairs as evidence. *See* Dkt. 25 at 2–8. He further argues that the destroyed evidence was apparently exculpatory prior to its destruction and the unique nature of the evidence left him unable to obtain comparable evidence through other means. *Id.*

"The failure of a state to preserve evidence 'of which no more can be said than it could have been subjected to tests, the results of which might have exonerated the defendant,' is not a denial of due process of the law 'unless a criminal defendant can show bad faith on the part of the police.'" *Dickey v. Davis*, 231 F. Supp. 3d 634, 766 (E.D. Cal. 2017). Contrary to Petitioner's argument, the forensic evidence described above falls under this category of "potentially exculpatory" evidence. Petitioner's argument focuses on the likelihood that the above-described evidence would have exculpated Petitioner had it been tested and subsequently found to match evidence found at the Spokane crime scene. *See* Dkt. 4 at 29. Further, the information that Petitioner's claims were materially exculpatory, such as the fact that the hair and fingerprints did not match him, was in fact admitted at trial and relied upon by Petitioner's counsel. Because

Petitioner has failed to show bad faith on the part of police, his claim based on the State's failure to preserve this evidence must fail.

B. Altered Evidence

Petitioner next argues that the R&R misinterpreted his argument regarding a portion of the fake beard fibers that were provided to Idaho law enforcement authorities to help with their investigation into the Coeur D'Alene bank robbery. Dkt. 25 at 8–9. Specifically, he states that the R&R construed his argument as one regarding the failure to preserve or disclose evidence as opposed to an argument on the admissibility of altered evidence. *Id.* However, the R&R gave Petitioner the benefit of the doubt by addressing his petition under both arguments. *See* Dkt. 23 at 26. Because Petitioner's evidentiary argument regarding the fake beard fibers was in fact addressed by the R&R, this objection fails, and the Court adopts the analysis set forth in the R&R.

C. Prosecutorial Misconduct, Ineffective Assistance of Counsel, Cumulative Error, Abuse of Discretion, and Sufficiency of the Evidence

Petitioner next objects to the R&R's conclusions that there was no prosecutorial misconduct in his trial and that he did not suffer from ineffective assistance of counsel. Dkt. 25 at 9–25. Petitioner's objections on these grounds are simply a restatement of his arguments before Judge Creatura. The Court agrees with the R&R. Contrary to Petitioner's arguments, the record does not contain any indication of perjury, and aside from his unsupported allegations of perjury, Petitioner's arguments asserting misconduct consist of speculation about the weight of or the proper inferences to be drawn from certain evidence. Furthermore, even if the statements of the prosecutor could be

construed as misrepresentations, there is no evidence that such statements had any actual injurious effect on the finder of fact. Also, the Court agrees with the R&R's resolution of Petitioner's ineffective assistance of counsel arguments—Petitioner's counsel acted effectively and, at the very least, Petitioner has failed to establish that any of the alleged errors resulted in prejudice.

Plaintiff further argues that misconduct by the prosecutor combined with the ineffective assistance of counsel to result in cumulative error. However, the Court has already rejected Petitioner's arguments regarding prosecutorial misconduct and even if the Court were to construe his allegations about his counsel as errors, which the Court has already declined to do, the combined effect of those alleged errors would not "infect the trial with unfairness or render [Petitioner's] defense far less persuasive than it might otherwise have been." *Ybarra v. McDaniel*, 656 F.3d 984, 1001 (9th Cir. 2011).

Plaintiff's objections regarding "abuse of discretion" and insufficient evidence are similarly a mere restatement of the arguments advanced in his petition. Dkt. 25–30. The Court agrees with the R&R's conclusions that there was sufficient evidence to sustain Petitioner's conviction and that Petitioner has failed to establish any "abuse of discretion" by the state courts that constituted an unreasonable determination of the facts in light of the evidence before it.

D. Evidence Not Presented at Trial

Finally, Petitioner argues that the R&R failed to consider his argument regarding new evidence not presented at trial. Dkt. 25 at 30–32. However, this argument was in fact addressed by the R&R. *See* Dkt. 23 at 13–16. The Court agrees with the R&R that

Petitioner's arguments fail because he has failed to provide any evidence showing what information the FBI notes he sought in a FOIA request contain or how he knows them to be exculpatory. Accordingly, Petitioner has failed to offer any new evidence that is sufficient to undermine confidence in his conviction.

E. Certificate of Appealability

The Court declines to issue a certificate of appealability. "A certificate of appealability may issue . . . only if the [petitioner] has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The Court does not believe that any jurists of reason could disagree with the R&R's evaluation of Petitioner's claims adopted by this order. *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). Petitioner's arguments do not present any close questions or novel claims. Accordingly, the petition does not merit encouragement to proceed any further.

F. Conclusion

The Court having considered the R&R, Plaintiff's objections, and the remaining record, does hereby find and order as follows:

(1) The R&R is **ADOPTED**; and

(2) This action is **DISMISSED**.

The Clerk shall enter JUDGMENT and close the case.

Dated this 9th day of February, 2018.

BENJAMIN H. SETTLE
United States District Judge

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF WASHINGTON
AT TACOMA

PATRICK K GIBSON,

Petitioner,

v.

RONALD HAYNES,

Respondent.

JUDGMENT IN A CIVIL CASE

CASE NUMBER: C17-5015 BHS

☐ **Jury Verdict**. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ **Decision by Court**. This action came to consideration before the Court. The issues have been considered and a decision has been rendered.

The Court does hereby find and order as follows:

1) The R&R is **ADOPTED**;

2) This action is **DISMISSED.**

The Clerk shall enter JUDGMENT and close this case.

Dated this 16th day of February, 2018.

William M. McCool
Clerk

s/Gayle M. Riekena
Deputy Clerk

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

PATRICK K. GIBSON,

Petitioner,

v.

RONALD HAYNES,

Respondent.

CASE NO. 3:17-cv-05015-BHS-JRC

REPORT AND RECOMMENDATION

NOTED FOR: JANUARY 12, 2018

The District Court has referred this petition for a writ of habeas corpus to United States Magistrate Judge J. Richard Creatura. The Court's authority for the referral is 28 U.S.C. § 636(b)(1)(A) and (B), and local Magistrate Judge Rules MJR3 and MJR4. Petitioner filed the petition pursuant to 28 U.S.C. § 2254.

Petitioner Patrick K. Gibson challenges his 2012 conviction for first degree murder. Dkt. 4. He claims six grounds for relief, alleging, amongst other claims, that the State withheld exculpatory evidence, that it committed prosecutorial misconduct, that he had ineffective assistance of counsel, and that the trial court abused its discretion when it made its findings of

APPENDIX C

fact. However, petitioner has not shown that the state courts unreasonably applied clearly established federal law when they denied his direct appeal and his personal restraint petition. He has not demonstrated that the state courts erred, and therefore he has no recourse in this habeas proceeding. This Court recommends that the petition be denied.

PETITIONER'S CLAIMS IN THIS HABEAS PETITION

Petitioner filed this habeas petition on January 8, 2017. Dkt. 1. He filed attachments to the original complaint on January 15, 2017. Dkt. 3. In his petition, petitioner raises six grounds for relief, each containing several sub-claims:

1. Ground 1 – The State failed to preserve and disclose exculpatory evidence, including a fingerprint, two white fibers, and a small portion of fake beard.
2. Ground 2 – The State committed prosecutorial misconduct, including intentionally eliciting perjured testimony, misrepresenting facts, and presenting facts not in evidence.
3. Ground 3 – Petitioner received ineffective assistance of trial counsel, including failure to object to prosecutorial misconduct and failure to impeach witnesses presenting perjured testimony.
4. Ground 4 – The trial court abused its discretion and convicted petitioner based on insufficient evidence.
5. Ground 5 – The F.B.I. failed to preserve and disclose exculpatory evidence.
6. Ground 6 – The state courts failed to address a violation of Washington Rule of Appellate Procedure 10.10.

BASIS FOR CUSTODY AND FACTS

Petitioner was convicted of a first degree felony murder committed on November 2, 1992. Dkt. 8, Ex. 1. He was sentenced to 493 months in prison, the maximum in the standard range. *Id.* The Washington State Court of Appeals stated the facts of petitioner's case as follows:

> On November 7, 1992, two robberies occurred within three hours committed by a man wearing a black baseball cap that read "Solid Gold," sunglasses, and a fake beard (the disguise). The robber employed the same method of operation described below. The first occurred at 5:00 p.m. in Coeur d'Alene, Idaho. The second, the subject of this murder case, occurred around 8:00 p.m. in Spokane. The disguise, method of operation, and timing linked the two crimes but it was not until years later that DNA linked Mr. Gibson as a suspect. The court at a later bench trial learned, and generally found, the following facts.
>
> In Coeur d'Alene, Teresa Benner was closing Kid's Fair, the store she owned with her husband, Steve Benner, when a man wearing the disguise briskly walked through the doors, displayed a small, silver handgun, and said, "You are being robbed." The man ordered Ms. Benner and employee Kathy Ward, to the backroom where he found Mr. Benner and the Benners' two young children. The man ordered Ms. Ward to handcuff Mr. Benner and zip tie herself to Ms. Benner, then demanded cash, credit cards, and, unsuccessfully, personal identification number (PIN) numbers. They gave the man approximately $100 in cash. Before leaving, the man unsuccessfully tried to remove the handcuffs from Mr. Benner. When police arrived, the victims described the man and his disguise, describing the beard as "Amish-style." Police recovered a fingerprint from the handcuffs but it did not match Mr. Gibson. The robber was not then apprehended.
>
> In Spokane, a man wearing the disguise entered Cole's Furniture and stated, "This is a stickup." He displayed a small, silver handgun and demanded cash, credit cards, and PIN numbers. Michele Cole retrieved $18 from her purse and handed it to her husband, Brian Cole, who handed it to the robber. The robber ordered the Coles to the back of the store. Ms. Cole suffers from multiple sclerosis and drove her scooter toward the back. Mr. Cole then asked, "You wouldn't hurt a handicapped lady, would you?" The robber responded, "I might." Before reaching the back of the store, Ms. Cole heard a ruckus and a gunshot. When she turned around, she saw her husband and the intruder struggling and crashing into furniture. Blood stained Mr. Cole's back. The intruder fired a second shot, hitting Mr. Cole in the head and fled. The Coles called 911. Mr. Cole died due to his injuries.
>
> At the crime scene, police found the robber's sunglasses, the black baseball cap, and a clump of fibers from the fake beard. Ms. Cole described the robber as "clean-shaven with a fake beard and a thin face, 5'8", thin, about 30 years old." By chance, Heather Bender stopped her car at a well lit intersection directly in front of Cole's

and saw a man wearing the disguise pass about 10 feet in front of her car and make a "beeline" toward Cole's. She described the man as 30–35 years old, about 5'11" and "not heavy, not slim."

In late 1993, the lead detective Mark Henderson showed Ms. Cole a photomontage. Ms. Cole was 85 to 90 percent certain the intruder was number four, Hugh Knuttgen. The same day, Detective Henderson showed the same photomontage to the Benners and Kathy Ward. Both Benners tentatively and separately identified number four, Mr. Knuttgen, as the robber. Kathy Ward was unable to positively identify anyone. Police later cleared Mr. Knuttgen of involvement.

Also in 1993, Detective Henderson took the black hat to Washington, D.C. The television show, "America's Most Wanted," used the hat to reenact the robbery. Three people handled the hat: Detective Henderson, producer John Walsh, and actor, Trevor St. John, each unintentionally causing DNA contamination.

In April 2004, Detective Henderson submitted the hat, along with the sunglasses found at the scene, to the Washington State Patrol Crime Lab (WSPCL). The crime lab forensic specialist James Currie analyzed the hat for DNA. Specialist Currie inconclusively found DNA from at least three people.

In 2007, Spokane County Detective Lyle Johnston assumed responsibility for the Cole murder case. In December 2010, he submitted the clump of fibers from the fake beard to the WSPCL. The lab found DNA from one individual on the clump of fibers, and ran it through the Combined DNA Index System (CODIS). CODIS reported the DNA match to Mr. Gibson. The lab concluded a one in 3.1 trillion chance existed the DNA on the clump of fake beard does not belong to Mr. Gibson. When Detective Johnston learned the DNA on the beard belonged to Mr. Gibson, he asked the crime lab to analyze the hat collected from Cole's Furniture. The lab found Mr. Gibson potentially contributed his DNA to the hat. But, because the hat contained at least three DNA contributors, without more, one out of every two people in the United States could have contributed DNA to the hat.

Detective Johnston reviewed Mr. Gibson's file and learned he had not previously been contacted nor considered a suspect. Detective Johnston checked the National Crime Information Center (NCIC) records. The NCIC reported that the Federal Bureau of Investigation (FBI) had arrested Mr. Gibson in 1994 for bank robbery. The FBI briefed Detective Johnston on Mr. Gibson's bank robbing operation. His usual bank robbing method, according to Special Agent Frank Harrill, included wearing a hat, beard, and trench coat as a disguise.

In April 2011, Detective Johnston prepared a photomontage of six photos, including Mr. Gibson's 1994 driver's license photo. The bottom of the photomontage admonished the suspect's photograph may or may not be among those in the lineup, and specified the witness was not obligated to make an identification. Detective Johnston presented the photomontage to witnesses of both

the Coeur d'Alene and Spokane robberies. From the photomontage, Ms. Cole identified Mr. Gibson as her husband's murderer. Mr. Benner identified Mr. Gibson as the man who robbed his store. Ms. Benner and Ms. Ward could not positively identify anyone. Ms. Bender was not contacted. Detective Johnston did not follow the Spokane County Sheriff's office policy manual explaining the best practices for using photos to identify suspects by being involved in the investigation and not presenting the photos sequentially.

On May 4, 2011, authorities arrested Mr. Gibson who was charged with first-degree murder. At a May 17, 2012 pretrial hearing, the State sought to admit evidence from the similar Coeur d'Alene robbery, arguing the evidence was relevant as res gestae or, alternatively, under ER 404(b) exceptions for common scheme, plan, and identity. The court reserved ruling until the State presented evidence about both robberies. Then, the court admitted the Coeur d'Alene robbery evidence because it showed a common scheme, plan, and identity. And, the court stated it would admit the evidence as res gestae.

At the May 17, 2012 pretrial hearing, the State informed the court it was conducting DNA analysis on two pieces of evidence recovered from the scene of Mr. Cole's murder, two white hairs extracted from the baseball cap and fluid found on sun glasses. The crime lab, however, would not complete the testing until the 12th day of trial. The court lectured this could require a lengthy continuance, explaining, "It doesn't work that way. So either we stop this right now and reset it, or you know that we're going to go through this trial and if you don't get it in time, you're not going to get it in time. . . . I can't bifurcate a murder trial." After a recess, the State informed the court the DNA analysis would be ready by June 11, 2012. The State and Mr. Gibson agreed to go forward, without knowing what the DNA results would show.

At a bench trial on May 29, Mr. Benner, Ms. Benner, and Ms. Cole identified Mr. Gibson, in court, as the person who robbed them in 1992. The defense unsuccessfully objected that the identifications were tainted by suggestive photo identification procedures and faulty memories.

At the end of court on May 31, 2012, the State informed the defense it had sought DNA samples from Detective Henderson, Mr. Walsh, and Mr. St. John. With those samples, the State intended to link Mr. Gibson to the hat found at Cole's Furniture. The State theorized if forensic analysts matched their DNA to the DNA found on the hat, their DNA could be excluded, allowing the crime lab to conclude with greater probability that Mr. Gibson contributed his DNA to the hat.

On June 1, 2012, the fourth day of trial, Mr. Gibson moved to suppress the additional DNA analysis results, arguing the State's analysis was untimely and prejudicial. Mr. Gibson emphasized his expert witness would not have time to retest the samples and the tests would impugn his alibi defense that he was on a fishing trip the weekend of the robberies. Further, Mr. Gibson conceded he wore the fake

> beard in the past, but claimed one of his bank robbing accomplices must have used the fake beard during the November 7 robberies. The court initially decided not to admit the results of the DNA comparison, unless the defense argued the hat was contaminated.
>
> On June 7, 2012, the State successfully asked the court to reconsider its ruling. The court reasoned its prior ruling was based on a misunderstanding, explaining, "I looked at it purely as a contamination issue. That's not the issue. It's an exclusion issue and there is a huge difference." The issue is whether an analyst can isolate the DNA on the hat prior to contamination by excluding the "three people who purportedly touched the hat." Because the DNA results would be relevant and probative, the court admitted the evidence. Mr. Gibson argued "trial by surprise." In response, the court granted Mr. Gibson a 30–day recess and permitted him to call and recall any witness he desired to assuage any prejudice he suffered relying on the court's previous decision. After the recess, Mr. Gibson recalled witnesses and a DNA expert contesting the WSPCL's methods.
>
> After entering extensive findings of fact and conclusions of law, the trial court found Mr. Gibson guilty as charged. He appealed.

Dkt. 8, Ex. 2; *State v. Gibson*, No. 31077-9-III, 2014 WL 197769 at *1-4 (Wash Ct. App. Jan. 16, 2014) (unpublished opinion) (citations to record omitted).

PROCEDURAL HISTORY

On direct appeal to the Washington Court of Appeals, petitioner's counsel claimed that the trial court: 1) abused its discretion when it allowed unreliable in-court identification of petitioner, 2) abused its discretion under Washington Rule of Evidence 404(b) when it allowed evidence of the Idaho robber, 3) erred when it denied the defense's motion to suppress DNA samples submitted for testing after trial began, and 4) erred because there was insufficient evidence to sustain the conviction. Dkt. 8, Ex. 3. Petitioner's Statement of Additional Grounds also claimed: 1) the trial court abused its discretion by conducting the trial in an unorthodox manner, and 2) the prosecutor engaged in gross misconduct throughout trial. *Id.*, Ex. 4. The Court of Appeals affirmed petitioner's judgment and sentence. Dkt. 8, Ex. 2; *Gibson*, 2014 WL 197769.

Petitioner then filed a pro se a motion for reconsideration, claiming that: 1) the State unlawfully destroyed exculpatory evidence, 2) the State failed to preserve and disclose exculpatory evidence, 3) the Court of Appeals erred in finding no prosecutorial misconduct, and 4) the Court of Appeals erred in finding that the trial court had not abused its discretion. *Id.*, Ex. 7. The Court of Appeals denied his motion. *Id.*, Ex. 8.

Petitioner then filed a petition for discretionary review with the Washington Supreme Court, claiming that the Court of Appeals: 1) erred in not finding the State had failed to preserve and disclose exculpatory evidence, 2) erred in not finding prosecutorial misconduct, and 3) erred in not finding an abuse of discretion or insufficient evidence for conviction. *Id.*, Ex. 9. The Supreme Court declined to review petitioner's appeal. *Id.*, Ex. 10.

Petitioner next filed a personal restraint petition with the Court of Appeals. *Id.*, Ex. 12. He claimed: 1) the State unlawfully failed to preserve and disclose exculpatory evidence, 2) the FBI unlawfully failed to disclose exculpatory evidence, 3) prosecutorial misconduct, 4) ineffective assistance of counsel because his attorney did not object to the alleged prosecutorial misconduct, and 5) abuse of discretion by the trial court. *Id.*, Ex. 13. The State refuted these claims (*Id.*, Ex. 14) and the Court of Appeals dismissed the petition (*Id.*, Ex. 18).

Petitioner subsequently filed a petition for review with the Washington Supreme Court. *Id.*, Ex. 19. He argued identical claims, adding that both the trial court and the Court of Appeals erred in finding sufficient evidence to uphold his conviction. *Id.* The Commissioner of the Supreme Court denied the petition. *Id.*, Ex. 20. Petitioner moved to modify the Commissioner's ruling, noting nine alleged errors. *Id.*, Ex. 21. The Washington Supreme Court denied his motion. *Id.*, Ex. 22.

Petitioner filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Dkt. 4. It appears petitioner properly exhausted his state remedies before filing his petition and has filed in a timely manner pursuant to 28 U.S.C. § 2254. In August of 2017, this Court ordered respondent to supplement the record and provided leave to file supplemental briefing. Dkt. 16. Respondent filed a supplemental answer to the petition (Dkt. 19) as well as copies of the transcripts from petitioner's trial (Dkts. 19, 21). After receiving an extension to file his own pleadings (Dkt. 20), petitioner filed his supplemental traverse (Dkt. 22).

STANDARD OF REVIEW

Under the Anti-Terrorism and Effective Death Penalty Act (AEDPA), a habeas corpus petition may be granted with respect to any claim adjudicated on the merits in state court only if the state court's decision was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court, or if the decision was based on an unreasonable determination of the facts in light of the evidence presented. 28 U.S.C. § 2254(d).

Under the "contrary to" clause, a federal habeas court may grant the writ only if the state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law, or if the state court decides a case differently than the Supreme Court has on a set of materially indistinguishable facts. *See Williams v. Taylor*, 529 U.S. 362 (2000). Under the "unreasonable application" clause, a federal habeas court may grant the writ only if the state court identifies the correct governing legal principle from the Supreme Court's decisions but unreasonably applies that principle to the facts of the prisoner's case. *Id.* The Supreme Court has made clear that a state court's decision may be overturned only if the application is "objectively unreasonable." *Lockyer v. Andrade*, 538 U.S. 63, 69 (2003). AEDPA requires federal habeas courts to presume the correctness of state courts' factual findings unless applicants rebut this presumption with

"clear and convincing evidence." 28 U.S.C. § 2254(e)(1). In addition, review of state court decisions under 28 U.S.C. § 2254(d)(1) is "limited to the record that was before the state court that adjudicated the claim on the merits." *Cullen v. Pinholster*, 563 U.S. 170, 181-82 (2011).

EVIDENTIARY HEARING

The decision to hold a hearing is committed to the Court's discretion. *Schriro v. Landrigan*, 550 U.S. 465, 473 (2007). "[A] federal court must consider whether such a hearing could enable an applicant to prove the petition's factual allegations, which, if true, would entitle the applicant to federal habeas relief." *Landrigan*, 550 U.S. at 474. In determining whether relief is available under 28 U.S.C. § 2254(d)(1), the Court's review is limited to the record before the state court. *Cullen*, 131 S.Ct. at 1388. A hearing is not required if the allegations would not entitle petitioner to relief under 28 U.S.C. § 2254(d). *Landrigan,* 550 U.S. at 474. "It follows that if the record refutes the applicant's factual allegations or otherwise precludes habeas relief, a district court is not required to hold an evidentiary hearing." *Id.*; *see also Cullen,* 131 S. Ct. 1388 (2011).

Here, petitioner's claims rely on established rules of constitutional law. There are no factual issues that could not have been previously discovered by due diligence. Finally, the facts underlying petitioner's claims are sufficient to establish that a rational fact finder would have found him guilty of the crime. Therefore, the Court concludes that an evidentiary hearing is not necessary to decide this case and petitioner's claims may be resolved on the existing state record.

DISCUSSION

I. Failure to Preserve and Disclose Exculpatory Evidence

In claims 1, 2, and 5, petitioner alleges that the State acted improperly in failing to preserve and disclose several items of exculpatory evidence. He further alleges the state appellate

courts erred when they did not recognize this impropriety. However, petitioner provides nothing to show that the state courts unreasonably applied clearly established federal law in rejecting these claims. Therefore, this Court declines to find that the state courts erred in their findings about the handling of exculpatory evidence.

a. Fingerprint, White Hairs, and False Beard Fibers (Ground 1)

In ground one, petitioner claims the state courts erred when they found no constitutional violation of the State's handling of several pieces of evidence. The Constitution requires disclosure of evidence that is "both favorable to the accused and 'material either to guilt or punishment.'" *United States v. Bagley*, 473 U.S. 667, 674 (1985) (citing *Brady v. Maryland*, 373 U.S. 83, 87 (1963)). However, "the Constitution is not violated every time the government fails or chooses not to disclose evidence that might prove helpful to the defense." *Kyles v. Whitley*, 514 U.S. 419, 436-37 (1995) (citing *Bagley*, 473 U.S. at 675).

Petitioner must show three elements when claiming the State improperly failed to preserve evidence. Petitioner must prove first that the State acted in bad faith. *Arizona v. Youngblood*, 488 U.S. 51, 58 (1988). He must then demonstrate that the evidence had apparent exculpatory value before destruction, and that it is of such a nature that he will be unable to obtain comparable evidence by other means. *United States v. Cooper*, 983 F.2d 928, 931 (9th Cir. 1993) (citing *California v. Trombetta*, 467 U.S. 479, 489 (1984).

Petitioner first alleges that the State improperly failed to preserve and disclose a fingerprint found at the Idaho crime scene that did not match petitioner's. Dkt. 4 at 17-29. He claims that, because the fingerprint did not match his own and was found on handcuffs used by the Idaho robber, it was obviously exculpatory and the State erred when it allowed the police to destroy it. The Washington Supreme Court addressed this claim as follows:

> The fingerprint and white hair or fiber issues were argued at trial and on direct appeal. The fingerprint evidence was destroyed after the Idaho statute of limitations had lapsed, but prior to that time the fingerprint was entered into the National Crime Information Center database and did not return any match. There was no dispute that the fingerprint did not belong to Mr. Gibson. In fact, defense counsel used the nonmatching fingerprint as a point favoring Mr. Gibson in closing argument. Even if Mr. Gibson is not precluded from raising these issues in the context of a claim of a *Brady* violation, such a claim fails. At most, Mr. Gibson alleges that the fingerprint and the samples were potentially useful evidence and that he might have been exonerated if the evidence had been preserved rather than destroyed based on another state's evidence retention policy or lost. But these allegations are inadequate to demonstrate a *Brady* violation.

Dkt. 8, Ex. 20 at 3-4.

As noted above, to prove the State improperly failed to preserve evidence, petitioner must show that the evidence appeared exculpatory, that he is unable to develop similar evidence, and that the State acted in bad faith. *Youngblood*, 488 U.S. at 58; *Cooper*, 983 F.2d at 931. A fingerprint found at a crime scene that does not match the suspect is obviously exculpatory, and it is unique enough that petitioner could not reasonably acquire similar evidence. However, petitioner has not shown how destruction of the fingerprint was in bad faith. *Youngblood*, 488 U.S. at 58. As noted by the Washington Supreme Court, the evidence was destroyed after the Idaho statute of limitations expired. Dkt. 8, Ex. 20 at 4. Before destroying it, the fingerprint was subjected to testing that proved it was not petitioner's. Dkt. 19, Ex. 26 at 297. Further, the trial court accepted this evidence and defense counsel discussed it in closing argument. *Id.*; Dkt. 19, Ex. 33 at 1339-40. Contrary to petitioner's assertions, this does not indicate that the State acted in bad faith when it allowed Idaho law enforcement to destroy the handcuffs and the fingerprint. The decision of the state court on this issue was neither contrary to, nor an unreasonable application of, clearly established Supreme Court precedent.

Petitioner next argues in ground one that the State erred when it lost or destroyed two white hairs that were found at the Spokane crime scene. Dkt. 4 at 24. As noted above, the

Washington Supreme Court concluded that the loss of the white hairs, like the loss of the fingerprint, was nothing more than "potentially useful evidence," and that petitioner "might have been exonerated if the evidence had been preserved rather than . . . lost." Dkt. 20 at 4. Again, petitioner has not established that the State acted in bad faith when it lost the white fibers. Therefore, the state courts did not unreasonably apply clearly established federal law when they made the same finding.

Petitioner further argues that the State improperly lost or destroyed a small portion of the fake beard fibers sent to Idaho for testing. Dkt. 4 at 30-31. He claims there is a reasonable likelihood that DNA other than petitioner's was in the sample sent to Idaho, and that the State committed constitutional error when it either lost or destroyed the evidence. Respondent notes that "[petitioner] cannot show the prosecution failed to preserve and disclose potentially exculpatory evidence where the evidence was disclosed, used at trial, and proved [petitioner's] guilt." Dkt. 7 at 17. However, petitioner's claim is that there is additional material the State lost before any evidence presented at trial.

Nonetheless, petitioner has not proved the State acted in bad faith. Even if the State did send a small sample of the beard to Idaho law enforcement, it retained the remainder, tested it, disclosed its test, and presented the evidence at trial. *See* Dkt. 19, Ex. 32 at 1349-54. The loss or destruction of a small portion of a sample when the majority was fully disclosed, tested, and provided inculpatory rather than exculpatory evidence does not demonstrate an act of bad faith by the State. *See Illinois v. Fisher*, 540 U.S. 544, 548 (2004) (holding that it was not bad faith when the State destroyed a sample of cocaine pursuant to its standard policy, thereby depriving defendant of the ability to retest it); *Mitchell v. Goldsmith*, 878 F.2d 319, 322-23 (9th Cir. 1989) (finding the loss of a photo lineup was merely negligent and that defendant failed to provide facts

supporting a finding of bad faith); *see also Taylor v. Kirkegard*, No. CV 14–52–GF–DLC–JTJ2016, WL 7076992 at *6 (D. Montana, October 17, 2016) (failure to preserve fingernail scrapings with no proof the scrapings were exculpatory was not bad faith); *Redden v. Mades*, No. Civ.A MJG–01–29182002, WL 32734283 at *2 (D. Maryland, Jan. 14, 2002) (a blanket containing DNA samples was not tested; destruction of the blanket post-conviction, depriving defendant of the ability to test the blanket, did not amount to bad faith). Therefore, the state courts did not misapply clearly established federal law.

Petitioner has not demonstrated that the State destroyed evidence in bad faith. The Idaho police disposed of the fingerprint pursuant to their standard policy. It is unclear when the white hairs went missing, but neither petitioner nor the record provide evidence that they were disposed of in bad faith. Finally, the loss of a small portion of the false beard when the remainder was retained, tested, and provided inculpatory evidence does not demonstrate bad faith. Because of this, the Court recommends that petitioner's first ground be denied.

b. Information Withheld by the F.B.I.

Petitioner's also alleges in his fifth ground for relief that the F.B.I. improperly failed to disclose exculpatory evidence, and that the F.B.I. failed to do so during trial as well. As noted above, it is not always constitutional error for the State to fail to disclose or choose not to disclose evidence. *Whitley*, 514 U.S. at 436-37. To prove the State acted improperly when it failed to disclose, rather than destroyed, exculpatory evidence, the petitioner must show three elements. First, he must show that the evidence is favorable to the defense, either for exculpatory or impeachment purposes. *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999). Second, the petitioner must demonstrate that he did not raise the evidence at trial because it was in possession of and being hidden by the State. *Id.* at 282. Finally, the petitioner must prove prejudice by

showing that, had the evidence been disclosed, there is a reasonable probability that the result of the proceeding would have been different. *Id.*; *Bagley*, 473 U.S. at 682.

In its decision denying plaintiff's personal restraint petition, the Court of Appeals addressed petitioner's claims as follows:

> Mr. Gibson [ ] asserts that he has obtained new evidence through a Freedom of Information Act request that proves the FBI is withholding critical exculpatory evidence in his case. He claims that FBI agents questioned him in 1994 about Mr. Cole's murder while questioning him about a string of bank robberies that occurred between 1992 and 1994. Mr. Gibson asserts that he informed his defense attorneys about this investigation, but that they refused to contact the FBI investigators or subpoena them for trial. As proof of the FBI conspiracy against him, Mr. Gibson attaches a letter from the U.S. Department of Justice (DOJ) explaining why certain records were exempt from disclosure. He argues that this letter makes it clear that the FBI and DOJ are "withholding critical evidence that likely includes photo montages shown by the FBI in 1994, to the witnesses of both the Spokane and Idaho crimes, that contained petitioner's picture." Petitioner's Brief at 18. He claims that if the FBI had any evidence linking him to the murder of Mr. Cole, it would have turned over the evidence in 1994. Mr. Gibson believes that this information would have changed the outcome of the trial.
>
> If a petition is based on matters outside the appellate record, a petitioner must show that he has "competent, admissible evidence" to support his arguments. *In re Pers. Restraint of Rice*, 118 Wn.2d 876, 886, 828 P.2d 1086 (1992). The documents attached to Mr. Gibson's PRP in support of his claim fail to establish the existence of the alleged exculpatory evidence. The attached documents show that the FBI was investigating Mr. Gibson for a series of robberies that occurred during the 1990s, not Mr. Cole's murder. Nothing in these documents is remotely exculpatory or suggests that the FBI is hiding evidence favorable to the defense. Mr. Gibson fails to explain how this new evidence impacts the overwhelming evidence of guilt based on the eyewitness testimony of the victims and the DNA evidence. His bare allegation of prejudice is insufficient to grant relief.

Dkt. 8, Ex. 18 at 5-6.

The Washington Supreme Court agreed with the Court of Appeals when it denied review of his personal restraint petition, analyzing the issue as an actual innocence claim:

> Mr. Gibson mainly makes speculative arguments that information allegedly in the hands of the FBI that he has thus far been unable to obtain, and evidence he claims was lost, altered, or suppressed, will exclude him as a suspect. But the FBI was not involved in the investigation of the 1992 murder. When the case was revived nearly

> a decade later, the State obtained information from the FBI concerning Mr. Gibson's involvement in California and Oregon robberies during the 1990s. . . . Mr. Gibson thus fails to show any prospect of demonstrating actual innocence.

Dkt. 8, Ex. 20 at 3.

As noted above, the first thing petitioner must prove is that any undisclosed evidence supports the defense. *Greene*, 527 U.S. at 281-82. Here, petitioner argues that there is no reason to refuse to disclose documents "unless those documents are helpful to petitioner, and prejudicial to the prosecution." Dkt. 4 at 68. Petitioner filed a Freedom of Information Act request with the F.B.I. asking for documents related to the F.B.I.'s 1994 investigation into his bank robberies. *Id.* at 67. He alleges he received a response stating that his requested documents were not subject to public disclosure, and alleges further that he received notice that the F.B.I. was removing files from his record. *Id.* at 67-68. He believes there is no reason to admit to the existence of these documents and then begin removing them other than to hide exculpatory evidence.

The Court finds plaintiff's argument unpersuasive. Plaintiff has provided no proof of what the F.B.I. notes contain or how he knows them to be exculpatory. His argument that they must be because there is no other reason to refuse disclosure is speculative at best. Because plaintiff has not proven that the documents he seeks are supportive of his defense, we need not determine whether it was being hidden by the state or whether it prejudiced plaintiff at trial. *Greene*, 527 U.S. at 282. The state courts did not unreasonably apply clearly established federal law.

As noted above, petitioner has not demonstrated that the State acted in bad faith when it lost of destroyed the fingerprint, the white fibers, or the portion of the fake beard. In addition, he has not shown that the documents in possession of the F.B.I. are exculpatory, nor that the F.B.I. improperly failed to disclose them. Petitioner has not provided evidence that the State acted

improperly in preserving or disclosing evidence. Therefore, the Courts finds that the state courts did not unreasonably apply clearly established federal law when they made their findings.

II. Prosecutorial Misconduct

Next, in his second ground, Petitioner alleges 19 instances of prosecutorial misconduct. He claims the prosecutor elicited perjured testimony nine times, lied to the trial court about evidence four times, misrepresented the facts in closing argument five times, and personally vouched for the credibility of a witness once.

When analyzing prosecutorial misconduct, the relevant inquiry is whether the prosecutor's conduct "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Darden v. Wainwright*, 477 U.S. 168, 181 (1986) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 642 (1974)). A trial error is presumed to be harmless unless the error had "substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993). It is the petitioner's burden to state facts that point to a real possibility of constitutional error in this regard. *See O'Bremski v. Maass*, 915 F.2d 418, 420 (9th Cir.1990).

In addition, to succeed on a claim that the prosecutor improperly presented perjured testimony, petitioner must show there was a "reasonable likelihood that the false evidence could have affected the judgment of the [finder of fact]." *Bagley*, 473 U.S. at 679-80 (quoting *United States v. Agurs*, 427 U.S. 97, 103 (1976). Without proof of this reasonable likelihood, "the government's knowing use of perjured testimony does not warrant relief." *United States v. Rewald*, 889 F.2d 836, 860 (9th Cir. 1989), *modified*, 902 F.2d 18 (9th Cir. 1990). Perjury only occurs when a witness knowingly and intentionally presents false testimony, "rather than as a result of confusion, mistake, or faulty memory." *United States v. Dunnigan*, 507 U.S. 87, 94

(1993). Mere inconsistencies do not show perjury. *See United States v. Sherlock*, 962 F.2d 1349, 1364 (9th Cir. 1989).

On direct appeal, the Court of Appeals stated:

> . . . Mr. Gibson believes the prosecutor lied to the court about the DNA on the hat, conspired with witnesses to evoke perjury, and that transcripts have been edited to remove incriminating remarks. He offers no evidence to support his speculation. The court reporter's declaration contradicts his assertion that the transcripts have been edited. Nothing in the record suggests the prosecutor lied to the court.

Dkt. 8, Ex. 2 at 18; *Gibson*, 2014 WL 197769 at *9.

The Washington Supreme Court made similar findings when denying review of petitioner's personal restraint petition:

> [Mr. Gibson] alleges that the prosecutor (1) lied to the court at a pre-trail hearing about having located the white strands of hair from the baseball cap, (2) allowed state's witnesses to give false testimony, and (3) misrepresented facts during closing argument. Mr. Gibson parses the testimony of numerous witnesses, pointing out what he sees as contradictions and false statements relating to their recollections of the 1992 robberies. He contends the prosecutor knew many witnesses were committing perjury, but refused to correct their testimony in order to bolster their credibility. Mr. Gibson contends this perjured testimony prejudiced him because the trial court used this testimony to support numerous findings of fact.
>
> Apart from the claim that the prosecutor lied during closing argument, Mr. Gibson's prosecutorial misconduct claims mirror the arguments we rejected in his SAG as follows: "Mr. Gibson believed the prosecutor lied to the court about the DNA on the hat, conspired with witnesses to evoke perjury, and that transcripts have been edited . . . . Nothing in the records suggests the prosecutor lied to the court." We declined to address his new claim that the prosecutor committed misconduct by lying during closing argument. As stated above, a petitioner may not renew a claim by presenting different factual allegations. Gibson provides no justification for readdressing the issue.

Dkt. 8, Ex. 18 at 6-7 (internal citations omitted).

The state courts did not err in denying petitioner relief for his prosecutorial misconduct allegations. In his petition, petitioner makes numerous accusations, claiming that the prosecutor knowingly allowed witnesses to present perjured testimony, lied about the location of the two

white hairs, wrongfully alluded to facts not in evidence, and misrepresented the facts in the prosecutor's closing argument. Dkt. 4 at 32-44. However, petitioner does not present evidence proving these allegations or demonstrating that they could have reasonably affected the trier of fact's decision. He claims that the prosecutor aided in the commitment of perjury because several witnesses made statements that either contradicted or amended their original police statements. However, petitioner offers nothing that demonstrates these inconsistencies were intentional falsehoods rather than confused or mistaken statements. *Dunnigan*, 507 U.S. at 94. Because of this, petitioner cannot show that there was a reasonable likelihood perjured testimony affected the finder of fact. *Bagley*, 473 U.S. at 679-80. Therefore, the state courts did not unreasonably apply clearly established federal law when they denied plaintiff relief for the alleged perjured testimony.

Similarly, the state courts did not err in denying petitioner's other claims of prosecutorial misconduct. Beyond his allegations of perjury, petitioner also claims the State lied to the trial court, misrepresented evidence in its closing, and misrepresented evidence during trial. These claims include misstating trial testimony, emphasizing nonexistent DNA evidence, and mentioning a weapon that was never recovered. Dkt. 4 at 40-44. However, like his perjury claims, petitioner does not demonstrate how this alleged misconduct improperly influenced the trial court's verdict. As noted above, a trial error stemming from prosecutorial misconduct is presumed harmless unless the petitioner can show it had a substantial and injurious effect on the finder of fact. *Brecht*, 507 U.S. at 623. Petitioner's allegations are largely speculation about the weight of certain evidence or disagreements about the proper inferences to be made from the evidence. Even if the speculation is true and the prosecutor committed misconduct, there is no evidence that it had either a substantial or an injurious effect on the trial court. Petitioner has not

demonstrated that any prosecutorial misconduct materially affected the outcome of his trial. Because of this, the Court finds that the state courts did not unreasonably apply clearly established federal law.

Petitioner has not shown prosecutorial misconduct. He has not shown that any alleged misconduct could reasonably affect the finder of fact. Further, his allegations about the trial court's findings of fact appear to be disagreements with the inferences raised from the evidence of trial, not misconduct. Petitioner has not demonstrated that the State's actions constitute prosecutorial misconduct. Therefore, the Court finds that the state courts did not unreasonably apply clearly established federal law and recommends that the petitioner's claim on this ground be denied, as well.

III. Ineffective Assistance of Counsel

In his third ground, petitioner claims nine counts of ineffective assistance of counsel. He alleges his counsel failed to impeach three witnesses perjuring themselves, failed to object twice, misrepresented evidence, failed to offer additional evidence, and failed to subpoena several F.B.I. agents. The primary question when reviewing a claim of ineffective assistance of counsel under the AEDPA is not whether counsel's representation was deficient, or whether the state court erred in analyzing the claim, but whether the state court adjudication of the claim was unreasonable. *Landrigan*, 550 U.S. at 472-473. Because counsel has wide latitude in deciding how best to represent a client, review of counsel's representation is highly deferential and is "doubly deferential when it is conducted through the lens of federal habeas." *Yarborough v. Gentry*, 540 U.S. 1, 5-6 (2003).

To show ineffective assistance of counsel, a petitioner must demonstrate two things. First, the petitioner must show counsel's performance was so deficient that it "fell below an

objective standard of reasonableness." *Strickland v. Washington*, 466 U.S. 668, 686 (1984). Second, the petitioner must show the deficient performance prejudiced the defense so "as to deprive the defendant of a fair trial, a trial whose result is unreasonable." *Id.*

Petitioner must specifically show "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687. The proper measure of attorney conduct remains reasonableness under prevailing professional norms. *Wiggins v. Smith*, 539 U.S. 510, 521 (2003). To avoid the temptation to second-guess counsel's decisions, counsel is "'strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.'" *Pinholster*, 131 S. Ct. at 1403 (quoting *Strickland*, 466 U.S. at 690). The courts must "begin with the premise that 'under the circumstances, the challenged action[s] might be considered sound trial strategy.'" *Id.* at 1404 (quoting *Strickland*, 466 U.S. at 689).

Next, petitioner must prove prejudice from counsel's representation. *Pinholster*, 563 U.S. at 189. It is not enough that counsel's errors had "some conceivable effect on the outcome of the proceeding." *Strickland*, 466 U.S. at 693. Rather, the petitioner must show that, "but for counsel's unprofessional errors, the result would have been different." *Strickland*, 466 U.S. at 693-94. "That requires a 'substantial,' not just 'conceivable,' likelihood of a different result." *Pinholster*, 563 U.S. at 189 (quoting *Harrington v. Richter*, 562 U.S. 86, 112 (2011)).

Applying *Strickland* to petitioner's personal restraint petition, the Court of Appeals stated:

> Applying these standards, Mr. Gibson's claims fail. His claim that defense counsel was ineffective for failing to object to the prosecutor's misconduct is tied to his prosecutorial misconduct claims, which we have already rejected. Because we have concluded the prosecutor did not commit misconduct, defense counsel's failure to object to the alleged misconduct does not amount to deficient performance. We do

not address both prongs of the ineffective test if the defendant's showing on one prong is insufficient. *Strickland*, 466 U.S. at 697.

Mr. Gibson's claim that trial counsel was ineffective for failing to challenge a WSCL report also fails. He argues that the state should have produced a buccal swab DNA sample taken from John Walsh that was referenced in the WSCL report, and that defense counsel was deficient for ailing to object to this failure. He argues that due to a broken chain of custody, the "DNA sample could have come from anyone, it could have come from a person that was not even born when this crime happened." He argues the uncertainty regarding the source of the DNA on the swab invalidates the WSCL's conclusion that Mr. Gibson's DNA was on the cap. He also maintains that "counsel lied to petitioner about the lost/destroyed evidence issues, advising that the missing evidence goes to the weight of the evidence only." He claims that if his attorneys had done "basic research", they would have filed a motion to dismiss the murder charges based on the missing evidence.

Mr. Gibson fails to show deficient performance or prejudice. Contrary to Mr. Gibson's contention, the record shows that trial counsel did challenge the WSCL report regarding the DNA evidence from the baseball cap. The defense called its own DNA expert, Dr. Ruth Ballard, who challenged the lab's method of analysis. In her opinion, it was not possible to analyze the complex mixture of DNA on the cap. Moreover, the court ultimately accorded little weight to the WSCL's analysis of the DNA evidence from the cap. In its detailed findings, the court explicitly noted Dr. Ballard's testimony, but ultimately found that the uncontroverted existence of Mr. Gibson's DNA on the beard was the more compelling DNA evidence.

This court also notes that the "missing evidence" (Mr. Walsh's buccal swab) was of little, if any, evidentiary significance as the WSCL had excluded Mr. Walsh as a contributor to the DNA on the cap. In view of the WSCL's conclusion that the there [sic] was a one in 3.1 million chance[1] that the DNA on the clump of beard did not belong to Mr. Gibson – a conclusion shared by the defense expert – Mr. Gibson also fails the prejudice prong.

Finally, Mr. Gibson contends that defense counsel was ineffective for failing to respond to his requests to provide him with the result of the FBI investigation. He maintains that none of the witnesses in the 1994 investigation identified him from a photo montage. He claims that if defense counsel had obtained the FBI documents, "it would have resulted in the trail court concluding that the witness identification of petitioner in 2011 and at trial was unreliable." He also asserts that his defense attorney should have subpoenaed FBI agents Ronald Stankye and Carry Vanderberry, who he claims were investigating him for the murder of Mr. Cole. Mr. Gibson argues he was prejudiced by these failures because "had the FBI been forced to testify about their 1994 investigation of petitioner as related to this case

[1] It appears the Court of Appeals miswrote the evidence. There was actually a one in 3.1 trillion chance that plaintiff's DNA was not the DNA found on the beard fibers. Dkt. 19, Ex. 32 at 1054. [footnote by this Court].

> and their conclusions that petitioner was not involved, the verdict likely would have been different."
>
> It is well established that a defense attorney has wide latitude in choice of trial strategy and tactics. *State v. Griere*, 171 Wn.2d 17, 30-31, 246 P.3d 1260 (2011). Generally, an attorney's decision not to call a witness to testify is a matter of trial tactics. *State v. Byrd*, 30 Wn. App. 794, 799, 638 P.2d 601 (1981). Here, Mr. Gibson makes the bare assertion that the verdict would have been different if trial counsel had called the FBI agents to testify, but fails to provide any evidence to support his assertion. In fact, a review of a Spokane County Sheriff's report attached to Mr. Gibson's petitions shows that FBI Agent Stankye's 1994 investigation was limited to determining whether Mr. Gibson was involved in a series of robberies in California and Oregon, not whether he was involved in Mr. Cole's murder. And contrary to Mr. Gibson's assertion that witnesses were unable to identify him, at least two witnesses identified Mr. Gibson from a photo lineup during the 1994 investigation. In view of the foregoing, Mr. Gibson fails to meet his burden of showing that defense counsel's failure to call the FBI agents was not a matter of legitimate trial strategy. Given all, Mr. Gibson fails to show he was denied effective assistance of counsel.

Dkt. 8, Ex. 18 at 8-11 (citations to the record omitted).

The Washington Supreme Court agreed with the Court of Appeals when it denied review:

> Mr. Gibson generally must show both deficient performance and resulting prejudice. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Counsel's performance is viewed in light of the entire record. *Id.* at 335. Decisions based on reasonable tactical and strategic reasons do not reflect deficient performance. *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011). Counsel is presumed competent; therefore, Mr. Gibson must show there were no conceivable legitimate strategic or tactical reasons for the challenged performance. *Id.* at 42.
>
> He fails to show existence of errors that counsel should have corrected, or that there is a reasonable probability that had counsel performed better the result would have been different. He claims counsel should have subpoenaed FBI agents who investigated him in connection with California and Oregon robberies, but he fails to show that doing so would have yielded evidence that may have helped him. To the contrary, defense counsel would have been justified in not calling the FBI agents as witnesses in light of the potential for additional ER 404(b) evidence.
>
> Also unpersuasive is Mr. Gibson's argument that counsel was ineffective in relation to an allegedly missing buccal DNA sample from one of the contributors to the DNA on the hat, since the crime lab was able to exclude that person in any event. Furthermore, defense counsel obtained an expert to challenge the State's analysis of the DNA found on the hat. And as the chief judge correctly noted, the far more critical evidence was the DNA matching Mr. Gibson to the beard.

Dkt. 8, Ex. 20 at 5.

Here, the petitioner fails to show that the state adjudication was unreasonable. The state courts reasonably applied the *Strickland* test when they found that defense counsel had not acted deficiently. On review, the Court of Appeals noted that defense counsel challenged the WSCL DNA report by calling its own expert witness. Dkt. 8, Ex. 18 at 9. The witness challenged the State's methodology and "accorded little weight to the WSCL's analysis of the DNA evidence from the cap." *Id.*; Dtk. 19, Ex. 32 at 1106-85 (testimony of petitioner's expert). The Washington Supreme Court agreed, noting that the DNA from the false beard was the "far more critical" evidence. Dkt. 8, Ex. 20 at 5; Dkt. 19, Ex. 34, 1397-98, 1400. The Court of Appeals reasonably concluded that defense counsel was competent in challenging the DNA evidence. Further, the Court of Appeals noted that the WSCL concluded there was a "one in 3.1 million chance" [2] that the DNA on the beard fibers did not belong to petitioner. *Id.* The state courts did not err in their findings that petitioner's counsel did not provide ineffective assistance.

The state courts also reasonably concluded that, because they found no prosecutorial misconduct, it was not deficient performance when defense counsel did not object to the alleged misconduct. Dkt. 9, Ex. 18 at 8. The Court of Appeals found there was no prosecutorial misconduct and that, because there was no misconduct, "failure to object to the alleged misconduct does not amount to deficient performance." *Id.* Because the court found no misconduct, it would be reasonable that defense counsel did not object to it and the state court did not err.

[2] As noted above, it appears the Court of Appeals miswrote the evidence. There was actually a one in 3.1 trillion chance that plaintiff's DNA was not the DNA found on the beard fibers. Dkt. 19, Ex. 32 at 1054. This mistake is harmless.

Finally, the state courts reasonably concluded that defense counsel did not act deficiently in choosing not to call the FBI agents to the stand. As noted above, petitioner has not demonstrated that the F.B.I. testimony has any exculpatory value. As the Court of Appeals noted, there is no evidence that declining to call the agents was anything more than trial strategy. Dkt. 8, Ex. 18 at 9-11. As the Washington Supreme Court noted, "defense counsel would have been justified in not calling the FBI agents as witnesses in light of the potential for additional ER 404(b) evidence." Dkt. 8, Ex. 20 at 5. It is not misconduct to decline calling a witness whose testimony will not necessarily provide exculpatory evidence. The state courts reasonably concluded that petitioner's counsel acted effectively and was not so deficient as to cause prejudice. Because of this, the state courts did not unreasonably apply clearly established federal law.

IV. Abuse of Discretion

Petitioner's fourth ground includes ten claims alleging that the trial court abused its discretion and that he was convicted based on insufficient evidence. He claims that the trial court abused its discretion when it allegedly was consistently confused by the evidence, fabricated findings of fact, and erred in admitting certain pieces of evidence. Dkt. 4 at 58-63.

A federal district court may grant relief for a state court abuse of discretion if the abuse of discretion violated the petitioner's constitutional rights. *See, e.g., Schell v. Witek*, 218 F.3d 1017, 1026 (9th Cir. 2000). However, it is "not the province of a federal habeas court to reexamine state-court determinations on state-law questions." *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991). It is "only noncompliance with *federal* law that renders a State's criminal judgment susceptible to collateral attack in the federal courts." *Wilson v. Corcoran*, 562 U.S. 1, 5 (2010)

(emphasis in original). This Court reviews the decisions of state courts only to determine if the state courts misapplied federal law when they made their decisions. 28 U.S.C. § 2254.

In analyzing petitioner's personal restraint petition claim for abuse of discretion, the Court of Appeals referenced its own findings on direct appeal:

> Mr. Gibson broadly characterizes his last ground for review as "Abuse of Discretion." He asserts that the trial court abused its discretion by fabricating multiple findings of fact and that the court misunderstood, ignored, or was confused by the evidence at trial. He argues that the court only considered evidence favorable to the state and ignored the majority of the evidence, which points to someone other than Mr. Gibson as Mr. Cole's murderer.
>
> Mr. Gibson again renews the arguments raised in his SAG. In ruling on his SAG, we stated:
>
> > Mr. Gibson disagrees with the trial court's findings of fact and claims the court misunderstood the evidence or fabricated certain findings. But credibility determinations are left to the trier of fact and are not subject to review. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). In sum, the court found the State's witnesses credible and not Mr. Gibson's witnesses.
>
> *Gibson*, 2014 WL 197769 at *[1]8. Mr. Gibson fails to show that the ends of justice would be served by reexamining these grounds.

Dkt. 8, Ex. 18 at 11 (citations to the record omitted).

The Washington Supreme Court agreed when it declined to review plaintiff's personal restraint petition:

> . . . Mr. Gibson claims "abuse of discretion," which seems to be a global claim encompassing the issues discussed above, together with a claim that the trial court's findings of fact were infected throughout with error, resulting in the conviction of an innocent man. But as the chief judge aptly observed, Mr. Gibson cannot challenge the trial court's assessment of credibility and weighing of the evidence. *See State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) (appellate court does not reweigh evidence or make credibility determinations).
>
> In sum, Mr. Gibson fails to identify any basis justifying further review in this court.

Dkt. 8, Ex. 20 at 5-6.

Here, petitioner has not shown the state courts erred when they found no abuse of discretion by the trial court. To the extent he challenges the trial court's decisions to accept or reject evidence, those actions are governed by state evidentiary rules. The state courts have already upheld them, and it is not the job of this Court to reexamine state court decisions governed solely by state law. *Estelle*, 502 U.S. at 67-68. Further, petitioner does not provide any proof that the trial court fabricated findings of fact or improperly quoted witnesses. *See* Dkt. 19, Ex. 34 at 1381-1400 (trial court's findings of fact and explanation of trial procedure). Rather, as the Washington Supreme Court noted, the trial court merely disagreed with plaintiff's witnesses and agreed with the State's witnesses. Plaintiff's disagreement with the trial court's description of the facts does not amount to a constitutional violation. Because of this, the state courts did not unreasonably apply clearly established federal law.

V. Sufficiency of Evidence

In addition to his abuse of discretion claims, petitioner's fourth ground includes a claim that the trial court convicted him without sufficient evidence. Dkt. 4 at 64. When evaluating a claim of insufficiency of the evidence to support a conviction, the question is not whether the Court itself believes the evidence establishes guilt. "Instead, the relevant question is whether . . . any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (emphasis in original); *Wright v. West*, 505 U.S. 277, 284 (1992). The Court must "view the record as a whole in the light most favorable to the prosecution." *Gordon v. Duran*, 895 F.2d 610, 612 (9th Cir.), *cert. denied*, 489 U.S. 1077 (1990). The constitutional sufficiency of evidence review is sharply limited. *Wright*, 505 U.S. at 296. The finder of fact is entitled to believe the State's evidence and disbelieve the defense's evidence. *Id.* In addition, "[a]n additional layer of deference is added to this standard

of review by 28 U.S.C. § 2254(d), which obliges the petitioner . . . to demonstrate that the state court's adjudication entailed an unreasonable application of the *Jackson* standard." *Emery v. Clark*, 604 F.3d 1102, 1111 n.7 (9th Cir. 2010) (citing *Juan H. v. Allen*, 408 F.3d 1262, 1274 (9th Cir. 2005)).

On direct review, the Court of Appeals analyzed petitioner's sufficiency claim:

> To convict Mr. Gibson of first-degree murder, the State had to prove beyond a reasonable doubt he committed an armed robbery, and in the course of the robbery he caused the death of another. RCW 9A.32.030(1)(c). Mr. Gibson does not contest the Idaho and Spokane robbery events, but he denies his involvement. We reason substantial evidence supports the trial court's findings.
>
> At trial, the Benners testified a man wearing the disguise robbed their store, Kid's Fair. The man displayed a small, silver handgun and demanded cash, credit cards, and PIN numbers. Ms. Cole testified that three hours after Kid's Fair was robbed, a man wearing the same disguise robbed her store. The man displayed a small, silver handgun and demanded cash, credit cards, and PIN numbers. Ms. Bender testified she saw a man outside the Cole's Furniture around 8:00 the night of the robbery wearing the same disguise. From this evidence a rational trier of fact could conclude beyond a reasonable doubt that the same man robbed both Kid's Fair and Cole's Furniture.
>
> DNA evidence on a piece of fake beard recovered at Cole's Furniture matched Mr. Gibson's DNA. Based on the analysis of the WSPCL, a one in 3.1 trillion chance exists the DNA on the clump of fake beard does not belong to Mr. Gibson. In addition, after the WSPCL excluded the DNA of three other contributors, the lab concluded the DNA on the hat matched Mr. Gibson by an exclusion factor of one in 10 million.
>
> Given all, substantial evidence sufficiently supports Mr. Gibson's conviction.

Dkt. 20, Ex. 2 at 17-18; *Gibson*, 2014 WL 197769 at *17-18 (citations to the record omitted).

The Court of Appeals did not unreasonably find that the trial court received sufficient evidence. The trial court heard from Steve Benner, Teresa Benner, and Kathy Ward that a man, wearing a disguise consisting of a hat, sunglasses, and a false beard robbed the Benners' store. Dkt. 19, Ex. 25, 99-100, 210; Ex. 26 at 252. They testified that he had a small, chrome handgun when he committed the robbery and specifically asked for cash and PIN numbers. *Id.*, Ex. 25 at

101, 106, 210, 214; Ex. 26 at 252, 254. Michele Cole testified that she and her husband were also robbed by a man wearing a disguise consisting of a hat and a false beard, carrying sunglasses in his pocket. *Id.*, Ex. 25 at 163. He also had a small chrome handgun and demanded cash and PIN numbers. *Id.* at 65. After getting in an altercation with Cole's husband, the gun fired, twice striking Cole's husband and resulting in his death. *Id.* at 69-173. The assailant fled, but left behind a small piece of hair-like fibers from his false beard and his hat, matching the description provided by the Benners. *Id.* at 175; Ex. 27 at 290-296. These items were eventually swabbed for DNA and the hair-like fibers came back with a positive match for plaintiff in the Combined DNA Index System ("CODIS"). *Id.*, Ex. 27 at 508. When tested against a fresh DNA sample from plaintiff, it again came back positive with a 1 in 3.1 trillion chance of the hair-like fiber DNA belonging to someone else. *Id.*, Ex. 32 at 1051, 1054. The hat, which had multiple DNA contributors, was tested and came back with a 1 in 10 million chance it was somebody other than plaintiff. *Id.* at 1065-66. From this evidence, a reasonable finder of fact could conclude that the same man robbed both stores and that the man was plaintiff. The Court of Appeals did not misapply its *Jackson* analysis. *Emery*, 604 F.3d at 1111 n.7. Therefore, plaintiff has not shown that the state court unreasonably applied a clearly established rule of federal law.

VI. Violation of RAP 10.10

Petitioner finally challenges the Court of Appeals application of RAP 10.10, barring review of issues brought in a personal restraint petition that have already been adjudicated on direct review. As noted above, it is "not the province of a federal habeas court to reexamine state-court determinations on state-law questions." *Estelle*, 502 U.S. at 67-68. It is "only noncompliance with *federal* law that renders a State's criminal judgment susceptible to collateral attack in the federal courts." *Wilson*, 562 U.S. at 5 (2010) (emphasis in original). In addition,

federal district courts will not review a challenge that is a de facto appeal from a final state court decision. *Kougasian v. TMSL, Inc.*, 359 F.3d 1136, 1139 (9th Cir. 2004); *see also Gonzalez v. Gov. of Wash.*, 2012 WL 2904235 at *2 (W.D. Wash. 2012).

Here, petitioner asks that this Court remand this issue to the Washington Court of Appeals for consideration. Dkt. 4 at 71. However, as noted above, federal district courts are not vehicles to appeal a final decision by a state court. In as much as petitioner asks this Court to review the Washington Supreme Court's decision not to review his RAP 10.10 issue, this Court has no jurisdiction to do so. *Kougasian*, 359 F.3d at 1139. Further, this court will only review issues that have federal application and will not review final state court decisions on questions of state law. Petitioner has not explained why the state court violated federal law when it made its decision not to address the issue. Therefore, this Court will not review that decision.

CERTIFICATE OF APPEALABILITY

Petitioner seeking post-conviction relief under 28 U.S.C. § 2254 may appeal a district court's dismissal of the federal habeas petition only after obtaining a certificate of appealability (COA) from a district or circuit judge. A certificate of appealability may issue only if petitioner has made "a substantial showing of the denial of a constitutional right." *See* 28 U.S.C. § 2253(c)(2). Petitioner satisfies this standard "by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003) (*citing Slack v. McDaniel*, 529 U.S. 473, 484 (2000)). Pursuant to this standard, this Court concludes that petitioner is not entitled to a certificate of appealability with respect to this petition.

CONCLUSION

As explained above, petitioner pleads six grounds for habeas relief, none of which are persuasive. He has not demonstrated that the state court decisions are contrary to or unreasonably applied clearly established federal law as required by 28 U.S.C. § 2254. Because of this, the Court recommends that petitioner's habeas petition be denied.

Pursuant to 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b), the parties shall have fourteen (14) days from service of this Report to file written objections. *See also* Fed. R. Civ. P. 6. Failure to file objections will result in a waiver of those objections for purposes of *de novo* review by the district judge, *see* 28 U.S.C. § 636(b)(1)(C), and can result in a result in a waiver of those objections for purposes of appeal. *See Thomas v. Arn*, 474 U.S. 140 (1985); *Miranda v. Anchondo*, 684 F.3d 844, 848 (9th Cir. 2012) (citations omitted). Accommodating the time limit imposed by Fed. R. Civ. P. 72(b), the clerk is directed to set the matter for consideration on **January 12, 2018**, as noted in the caption.

Dated this 15th day of December, 2017.

J. Richard Creatura
United States Magistrate Judge