APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROBERT A. WAGNER, Petitioner-Appellant, v. JEFF PREMO, Superintendent, Respondent-Appellee.	No. 18-35904 D.C. No. 6:15-cv-01612-YY District of Oregon, Eugene ORDER

Before: CANBY and WARDLAW, 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.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

ROBERT WAGNER,

Petitioner,

v.

JEFF PREMO,

Respondent.

No. 6:15-cv-01612-YY

JUDGMENT

HERNANDEZ, District Judge:

Based on the record, IT IS ORDERED AND ADJUDGED that this action is dismissed, with prejudice. Because Petitioner fails to make a substantial showing of the denial of a constitutional right, I deny a Certificate of Appealability. 28 U.S.C. § 2253(c)(2).

DATED this 24 day of Oct, 2018.

Marco Hernández

MARCO A. HERNANDEZ
United States District Judge

1 - JUDGMENT

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

ROBERT WAGNER,

Petitioner,

v.

JEFF PREMO,

Respondent.

No. 6:15-cv-01612-YY

ORDER

HERNANDEZ, District Judge:

Magistrate Judge You issued a Findings & Recommendation (#63) on October 3, 2018, in which she recommends the Court deny Petitioner's petition for writ of habeas corpus and deny a certificate of appealability. Petitioner has timely filed objections to the Findings & Recommendation. The matter is now before me pursuant to 28 U.S.C. § 636(b)(1) and Federal Rule of Civil Procedure 72(b).

When any party objects to any portion of the Magistrate Judge's Findings & Recommendation, the district court must make a *de novo* determination of that portion of the

Magistrate Judge's report. 28 U.S.C. § 636(b)(1); *Dawson v. Marshall*, 561 F.3d 930, 932 (9th Cir. 2009); *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003) (en banc).

I have carefully considered Petitioner's objections and conclude there is no basis to modify the Findings & Recommendation. I have also reviewed the pertinent portions of the record *de novo* and find no other errors in the Magistrate Judge's Findings & Recommendation except for one mistaken reference to Matthews instead of Robinson at page 4, in the second sentence of the second full paragraph. There, Judge You stated that "Matthews heard the man say, 'What's up cuz?' and recognized the voice as Petitioner's." F&R at 4. The record, however, makes clear that it was Robinson who heard the statement, not Matthews. ECF 20-1 at 210-11.

CONCLUSION

The Court ADOPTS Magistrate Judge You's Findings & Recommendation [63], and therefore, Petitioner's petition for writ of habeas corpus [1] is denied. Because Petitioner fails to make a substantial showing of the denial of a constitutional right, I deny a certificate of appealability.

IT IS SO ORDERED.

DATED this 24 day of Oct, 2018.

Marco Hernandez

MARCO A. HERNANDEZ
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

EUGENE DIVISION

ROBERT A. WAGNER,

Petitioner,

v.

JEFF PREMO,

Respondent.

Civil No. 6:15-cv-01612-YY

FINDINGS AND RECOMMENDATION

YOU, Magistrate Judge.

Petitioner, an inmate at the Oregon State Penitentiary, brings this habeas corpus action pursuant to 28 U.S.C. § 2254. For the reasons that follow, the Petition for Writ of Habeas Corpus (ECF No. 1) should be DENIED.

PROCEDURAL BACKGROUND

On May 12, 2004, a Multnomah County Circuit Court grand jury indicted Petitioner on one count of Murder with a Firearm for the March 24, 2004 shooting of Lavelle Anthony Matthews. The case was tried to a jury, which found Petitioner guilty. The trial judge sentenced Petitioner to life imprisonment with a mandatory minimum sentence of 300 months of incarceration.

Petitioner filed a direct appeal, but the Oregon Court of Appeals affirmed the trial court's judgment without opinion and the Oregon Supreme Court denied review. *State v. Wagner*, 218 Or. App. 736, 180 P.3d 764, *rev. denied*, 345 Or. 95, 189 P.3d 750. Petitioner then sought state

post-conviction relief ("PCR"). Following an evidentiary hearing, the PCR trial judge denied relief. Petitioner appealed, and again the Oregon Court of Appeals affirmed without opinion and the Oregon Supreme Court denied review. *Wagner v. Coursey*, 261 Or. App. 866, 326 P.3d 1289, *rev. denied*, 356 Or. 398, 337 P.3d 128 (2014).

On August 24, 2015, Petitioner filed a *pro se* Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 in this court. The Petition alleges four grounds for relief, two of which have multiple sub-parts. The claims alleged in Grounds One and Two both assert that Petitioner's trial attorney was constitutionally ineffective in a number of respects. In Ground Three, Petitioner alleges that his PCR trial attorney was ineffective, and in Ground Four he alleges that the PCR trial court's judgment fails to comply with Oregon's statutory requirements.

This court subsequently appointed counsel to represent Petitioner. In his Brief in Support of his Petition for Writ of Habeas Corpus, Petitioner addresses two claims of ineffective assistance of trial counsel: (1) trial counsel failed to call an expert on eyewitness identification to testify at trial; and (2) trial counsel failed to call forensic pathologist Raymond Grimsbo, M.D., as a witness at trial. Respondent argues that both claims were denied by the state PCR court in a decision that was not objectively unreasonable, and that Petitioner is not entitled to habeas corpus relief on the remaining claims alleged in the Petition.

SUMMARY OF RELEVANT FACTS

At the jury trial, Michael Vinson testified that in the early morning hours of March 24, 2004, he heard a gunshot outside his home in Northeast Portland near the corner of N.E. Alberta and Albina Streets. Tr. 141. About 45 minutes after he heard the gunshot, Vinson stepped outside to smoke a cigarette and saw a man's body on the street in front of his driveway. Tr.

141-42. Portland Police Bureau Detective Kevin Warren testified that this area was a "high vice, high drug trafficking area." Tr. 149.

Earlier in the evening, the victim, Matthews, had been at the Paragon Club, a nearby bar. Tr. 406. Petitioner was also at the Paragon Club that night. Tr. 383-84. Matthews and Petitioner had grown up together, and their families were good friends. Tr. 788-89. The bartender testified that Petitioner was wearing a white jacket and had braided hair. Tr. 411. Both the bartender and the club DJ saw Petitioner and Matthews together, and the bartender remembered that, after "last call" for drinks, Matthews tried to purchase one more drink for Petitioner. Tr. 383-84, 408, 413. The bartender testified that Matthews left the club by himself before Petitioner did. Tr. 414.

That same night, the state's main witness, Richard Robertson, had been playing video poker at a tavern a few blocks from the Paragon Club. Tr. 192-93. Around 1:00 a.m., police arrested Robertson, cited him for being in a "drug-free zone," from which he had previously been excluded, and released him.[1] Tr. 222, 247-48. Robinson used crack cocaine for most of the preceding 20 years, and had a long history of drug-related convictions. Tr. 186-87. In fact, he had used crack cocaine earlier that day, but testified that the effects had worn off by 2:00 a.m., when he arrived at the Paragon Club just prior to closing time. Tr. 193, 242.

When Robinson arrived at the Paragon Club, he saw Matthews and Matthews's girlfriend, Che-riee Mercer, coming out of the club. Tr. 194. Robinson also saw Petitioner. Tr. 197, 214-5. Robinson had been friends with Matthews for 20 years, and had known Petitioner for 10 or 12 years. Tr. 195. Robinson testified that Petitioner's hair was braided, and that he

[1] Robinson testified that he was often detained, cited, and released two or three times per night for violation of this exclusion order. Tr. 246.

was wearing a white jacket with a dragon embroidered on it. Tr. 199. Robinson had previously seen Petitioner wearing that distinctive coat "hundreds of times." *Id.*

Robinson testified that a woman known to Robinson as a "weekend" drug user pulled up outside the Paragon Club in a Cadillac, and that he pointed her out to Petitioner as someone who wanted to buy drugs. Tr. 199. Petitioner got in the woman's car and they drove off, making a loop around several blocks. Tr. 199-200. A short time later, Robinson, Matthews, and Mercer began walking south on Alberta Street toward where the Cadillac had gone. Tr. 205.

They walked several blocks and as they approached Webster Street, Matthews told Robinson and Mercer to "just wait here," and walked away from them and up to a man who was leaning against a van parked on the street. Tr. 207-10. Matthews heard the man say, "What's up cuz?" and recognized the voice as Petitioner's. Tr. 211. Robinson observed that Matthews and Petitioner were "real close" to one another when Robinson heard a gunshot and saw Matthews fall to the ground. Tr. 211. From the sound of the gunshot, Robinson knew Matthews had been shot by a large gun, such as a .45, a .357, or a .44 Magnum. Tr. 276.

Robinson then saw Petitioner bend down over Matthews' body. Tr. 211. He was unsure whether Petitioner intended to render aid to Matthews, to shoot him again, or to steal from him. Tr. 878. As Petitioner bent over Matthews, Robinson saw Petitioner's face illuminated by light shining from across the street, and saw Petitioner's braided hair and white jacket. Tr. 216-19. Robinson immediately ran from the area, leaving Mercer there by herself. Tr. 220.

At trial, Robinson identified the location from which he witnessed the shooting. Tr. 209. A defense investigator measured the distance between where Robinson was standing and where the shooting took place as approximately 100 feet. The investigator testified that from his vantage point, Robinson's view of the crime scene would have been somewhat obstructed by

trees. Tr. 1068; Pet. Exs. 2, 3. Webster Street, where the shooting occurred, was very dark at night, and the only street lamp near the scene was on the other side of Albina Street. Tr. 1065. Due to a delay before detectives arrived at the scene that night, it was never established whether any porch lights were on at the time of the shooting. Tr. 32, 429, 885, 1062.

Some days later, the police interviewed Robinson about the murder. At first, he denied any knowledge because he did not want to get involved. Tr. 225-27. Ultimately, however, he told police that Petitioner was the shooter, and that Petitioner was wearing a white jacket with a dragon on the back at the time. Tr. 227-28. Robinson then identified Petitioner from a photo throw-down. Tr. 230.

About five weeks after the murder, Portland Police Detective Kanzler interviewed Petitioner in Las Vegas, where a tipster had told police he could be found. Tr. 889. After Detective Kanzler advised Petitioner of his *Miranda* rights, he claimed surprise at being questioned in association with the crime and said it was a case of mistaken identity. Petitioner explained that "lots of people" in Las Vegas looked "exactly like him."[2] Petitioner then said he thought he had been in Las Vegas on the night of the murder because he and his girlfriend had driven there from Portland to help his sister move. Tr. 892. Later, Petitioner changed his story and told the detective, "Maybe I was in Portland. Me and my girlfriend [were] at the club, she took the car[.] I took a cab home." Tr. 893.

The prosecution also relied on testimony from three informants, Barry Sanders, Adonis Thompson, and Marvin Holiday, who all testified that Petitioner made incriminating statements

[2] When Detective Kanzler pointed out to Petitioner that he had a light complexion, wore his hair in braids, had a moustache and goatee, and had a small chip in his front tooth, Petitioner "sat back in his chair and smiled" at her. Tr. 891.

to them. All three witnesses had entered into cooperation agreements with the State, reducing their previously existing sentences in exchange for their testimony.

Barry Sanders personally knew Petitioner, Matthews, and Matthews's girlfriend Mercer. Tr. 504-05. He is a recovering crack cocaine addict who has spent most of his adult life in prison. Tr. 502-06. Sanders testified that while he was in jail with Petitioner, they spoke several times right before or after attending Islamic prayer meetings. Tr. 508. Petitioner told Sanders that Robinson and Mercer were going to testify against him. Tr. 510. Right before Sanders was to be released from jail, Petitioner asked him to contact Mercer and "persuade" her "by any means necessary" not to come to court. Tr. 515. Petitioner instructed Sanders to contact Petitioner's mother, who would "take care of it" financially. Tr. 515. Sanders testified that Petitioner did not ask him to do anything about Robinson, but said that Robinson was a "dead man walking" and was "going to be taken care of" by someone else. Tr. 511-12. Sanders testified that Petitioner also spoke to him about Marvin Holiday, a career criminal both men knew. Tr. 514. Petitioner told Sanders that Holiday was planning to testify against him, but that Holiday would not make it out of jail. Tr. 548-50.

After Sanders was released from jail, he contacted Mercer, but was unable to talk to her because she had a house full of people. Tr. 517. Within a few weeks, Sanders was back in jail and spoke with Petitioner again. Tr. 518. He told Petitioner that he expected to be released soon and that he would go back and talk to Mercer. Tr. 518. Petitioner once again told Sanders, "Go talk to her. Make sure she don't come to court." Tr. 519.

Upon his re-release from jail, Sanders contacted Mercer. Tr. 564-65. Sanders and Mercer used crack cocaine together and went to Mercer's house. Tr. 537. When the two were alone, Sanders told Mercer that he had spoken to Petitioner, she should not testify against

Petitioner, and he was there to stop her from testifying. Tr. 521. He told Mercer that a "contract" for $5,000 had been put out on her and Robinson. Tr. 521-22. After first apologizing, Sanders then began kicking, hitting, and punching Mercer. Tr. 522-3. The assault was interrupted when someone knocked on Mercer's window, and Sanders fled. Tr. 532. Sanders testified that he interpreted Petitioner's request to "take care of" Mercer to include physical assault to prevent her from testifying, and that he expected financial payment for his actions. Tr. 539, 542.

Sanders's testimony was corroborated by photographs of Mercer's injuries and the disarray in her home after the assault, as well as the testimony of Mercer's neighbor. Tr. 528, 540, 734. The neighbor testified that on the night of the assault he heard screaming coming from Mercer's house, and that he rushed to the window where he could see a man hitting Mercer. Tr. 734. The neighbor banged on the window, and the man ran out. Tr. 735-36. The neighbor called the police. Mercer came outside, thanked the neighbor, and said that the man was trying to kill her. Tr. 736.[3]

Adonis Thompson is Petitioner's step-brother and was also in jail with Petitioner before trial. Tr. 670, 680. Thompson testified that he spoke with Petitioner while they were in jail, and also on the phone during a 21-day period when Thompson was out of jail. Tr. 678-81. In jail, Petitioner told Thompson he was concerned that Robinson was "telling on him." Tr. 685. Later, on the phone, Petitioner admitted that he shot Matthews and then fled to Las Vegas. Tr. 686-87. Petitioner said that he shot Matthews "over some work and some money," and that Matthews owed him $100 for crack cocaine. Tr. 687-88, 694. Thompson also testified that he saw

[3] Mercer was called to testify as a state's witness, but she was too frightened to provide any meaningful testimony. Tr. 372-74, 844.

Petitioner in possession of a steel blue .357 Magnum revolver a few weeks before the shooting. Tr. 691.

Thompson's testimony was corroborated by Deputy Nordstrom, who testified that Thompson and Petitioner were housed in adjoining jail units for nearly one month. Tr. 905-06. However, although Thompson testified that Petitioner telephoned him from the jail, no record of the call was found by the prosecution. Tr. 817. State witnesses did testify to the ways prisoners could avoid having their calls recorded or identified. Tr. 804-09.

Marvin Holiday was Petitioner's cell-mate for a period of time. Tr. 739. Holiday testified that Petitioner first told him that he was in Las Vegas at the time of the shooting, and that he had a bus ticket to support that alibi. Tr. 745-46, 751. Petitioner later claimed that could not have killed Matthews because he was partying with a girl that night. Tr. 748.

Petitioner and Holiday "brain-stormed" about legal strategy and what defense would work in court. Tr. 763-64. They discussed the evidence that established Petitioner was at the Paragon Club shortly before the shooting, and Petitioner told Holiday that he possibly left for Las Vegas soon afterward. Tr. 767. Petitioner expressed concern about his jacket, which linked him to the shooting, as well as concern that another relative, Orrin Bachelor, might be pressured into testifying. Tr. 753, 770.

Holiday testified that Petitioner began having nightmares in jail about Matthews. Tr. 749-50. After one nightmare, when Holiday asked Petitioner what was troubling him, Petitioner replied "I didn't meant to do it," and asked Holiday if he thought Petitioner could be forgiven for his past actions. Tr. 749-50.

Holiday testified that he and Petitioner talked about Robinson, and that Petitioner wanted Robinson "whacked." Tr. 757-58. Holiday offered to talk to Robinson when he was released

from jail. Petitioner accepted the offer and agreed to pay Holiday with money and drugs if Holiday killed Robinson. Tr. 757-59. Petitioner told Holiday that he had "connections," i.e., family members, outside jail, who could supply Holiday with guns and money to get rid of Robinson. Tr. 760-61.

The defense theory was that Robinson was mistaken in his identification and Petitioner did not shoot Matthews. That theory was supported through cross-examination of Robinson and other witnesses, expert testimony, and testimony by a defense investigator about conditions at the crime scene. As to Robinson's testimony and identification of Petitioner, an expert witness testified about the effects of long-term crack cocaine use on memory and perception. Tr. 976-82. The defense investigator testified regarding the general lighting conditions on the street and his limited ability to see the site of the crime from where Robinson testified he had been standing. Tr. 1064-66, 1069-71. A videotape that the defense investigator made of the scene was also admitted into evidence. Tr. 1061.

To discredit Robinson's statement that the shooter and Matthews were "real close," the defense relied on the cross-examination of the State's medical examiner, Karen Gunson, M.D. On cross-examination, Dr. Gunson stated that upon examining Matthews's clothing, she found no evidence of gunpowder residue or stippling. Tr. 304. She described "stippling" as "where burned and unburnt grains of powder strike the skin and cause little red dots in the skin," which is "an indication of how far the gun is from the surface of the body when it's fired." Tr. 304. She identified a gunshot wound that has stippling as "an intermediate-range gunshot wound; that is, the muzzle-to-target distance would be from about six to 30 inches." Tr. 306. She went on to explain that "gun powder residue is seen when the muzzle to target distance is from zero to six inches" and is "just burnt powder which is—appears as a gray haze either on the clothing or

around the skin at the entrance wound." Tr. 304. Dr. Gunson testified that if the shooter had been three feet away and stretched his arm out to shoot, the shooter may have been in the range for gunpowder or residue or stippling to appear on Matthews. Tr. 306.

DISCUSSION

I. Ineffective Assistance of Trial Counsel for Failure to Call Expert on Eyewitness Identification and Failure to Call Dr. Grimsbo

A. Legal Standards on Deference to State Court Decisions on Ineffective Assistance of Trial Counsel Claims

An application for writ of habeas corpus shall not be granted unless adjudication of the claim in state court resulted in a decision that was: (1) "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or (2) "based on an unreasonable determination of the facts in light of the evidence presented in the State Court proceeding." 28 U.S.C. § 2254(d). A state court's findings of fact are presumed correct, and a habeas petitioner bears the burden of rebutting the presumption of correctness by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

A state court decision is "contrary to . . . clearly established precedent if the state court applies a rule that contradicts the governing law set forth in [the Supreme Court's] cases" or "if the state court confronts a set of facts that are materially distinguishable from a decision of [the Supreme] Court and nevertheless arrives at a result different from [that] precedent." *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000). Under the "unreasonable application" clause, a federal habeas court may grant relief only "if the state court identifies the correct legal principle from [the Supreme Court's] decisions, but unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 413. The "unreasonable application" clause requires the state court

decision to be more than incorrect or erroneous. *Id.* at 410. The state court's application of clearly established law must be objectively unreasonable. *Id.* at 409.

"Determining whether a state court's decision resulted from an unreasonable legal or factual conclusion does not require that there be an opinion from the state court explaining the state court's reasoning." *Harrington v. Richter*, 562 U.S. 86, 98 (2011). Where a state court's decision is not accompanied by an explanation, "the habeas petitioner's burden still must be met by showing there was no reasonable basis for the state court to deny relief." *Id.* Where, however, the highest state court decision on the merits does not come accompanied with reasons for its decision but a lower state court's decision does so, a federal habeas court should "look through" the unexplained decision to the last related state-court decision that does provide a relevant rationale, and should then presume that the unexplained decision adopted the same reasoning. *Wilson v. Sellers*, 138 S. Ct. 1188, 1192 (2018).

The Supreme Court has established a two-part test for determining whether a petitioner has received ineffective assistance of counsel. First, the petitioner must show that his lawyer's performance fell below an objective standard of reasonableness. *Strickland v. Washington*, 466 U.S. 668, 686-87 (1984). Due to the difficulties in evaluating counsel's performance, courts must indulge a strong presumption that the conduct falls within the "wide range of reasonable professional assistance." *Id.* at 689. Otherwise stated, "*Strickland*'s first prong sets a high bar . . . . It is only when the lawyer's errors were 'so serious that counsel was not functioning as the 'counsel' guaranteed . . . by the Sixth Amendment' that *Strickland*'s first prong is satisfied." *Buck v. Davis*, 137 S. Ct. 759, 776 (2017).

Second, the petitioner must show that his lawyer's performance prejudiced the defense. The appropriate test for prejudice is whether the petitioner can show "that there is a reasonable

probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. A reasonable probability is one which is sufficient to undermine confidence in the outcome of the trial. *Id.* at 696.

Under the Anti-Terrorism and Effective Death Penalty Act of 1996's deferential standard of review, the key question in analyzing an ineffective assistance of counsel claim brought by a state prisoner is whether the state court's application of *Strickland* was unreasonable. *Harrington*, 562 U.S. at 785. "This is different from asking whether defense counsel's performance fell below *Strickland*'s standard . . . . A state court must be granted a deference and latitude that are not in operation when the case involves review under the *Strickland* standard itself." *Id.* "When § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard." *Id.* at 105. Thus, "[w]hen the claim at issue is one for ineffective assistance of counsel . . . AEDPA review is 'doubly deferential,' because counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Woods v. Etherton*, 136 S. Ct. 1149, 1151 (2016) (citations and internal quotations omitted). "In such circumstances, federal courts are to afford both the state court and the defense attorney the benefit of the doubt." *Id.* (citation and internal quotation omitted).

B. Analysis

1. Failure to Call Expert on Eyewitness Identification

Petitioner contends trial counsel failed to provide effective assistance because he did not call an expert to testify about eyewitness observation and identification. In the state PCR proceeding, Petitioner submitted the affidavit of Daniel Reisberg, Ph.D., a psychologist whose

work "focused on the completeness and accuracy of human perception and memory." Resp. Ex. 142, at 1. Dr. Reisberg's affidavit states:

> 4. If I had been asked to testify I would have testified that, based upon several studies, including *Loftus, Geoffrey R. & Harley, Erin M. (2004) - Why is it easier to identify someone close than far away? Psychonomic Bulleting Review, 12, 43-65*, we can estimate the risk of error for viewers trying to recognize familiar faces at a particular distance. In [Petitioner's] case, efforts at reconstructing the crime scene suggest that the witness (Richard Robinson) was 75-100 feet from the shooting. If we hold other factors to the side, the scientific data suggest that, at this distance, the risk of error in making an identification is at least 75%, and;
>
> 5. The risk of error could be elevated by other factors (including poor lighting, vision issues brought on by drug use, and obstacles between Mr. Robinson and the site of the shooting); likewise, the risk of error could be diminished by other factors (e.g., if the witness were trying to identify someone who was highly distinctive in his appearance).

Id. at 2.

At the PCR evidentiary hearing, Petitioner also presented the testimony of Richard Wolf, a criminal defense attorney who specializes in aggravated murder and murder cases in Oregon. Wolf testified that, under the circumstances of Petitioner's case, he would have consulted with and presented testimony of an expert on eyewitness identification. Resp. Ex. 159, at 39-44. On cross-examination, however, Wolf agreed that an important factor in this case was that the eyewitness Robinson testified that he recognized a highly familiar face, which is vastly different from a case in which a witness has no prior experience with the perpetrator, sees the perpetrator only for the brief duration of the crime, and then makes an identification later solely on that basis. *Id.* at 56. Wolf also agreed that the fact Robinson was not only able to recognize Petitioner's face at the scene but also was able to see the distinctive braids and white jacket were important factors, as well as the fact that Robinson heard and recognized Petitioner's voice. *Id.* at 57. Wolf further agreed that certain aspects of Dr. Reisberg's expert testimony would not

have been helpful to Petitioner, and that sometimes a criminal defense attorney has to make a strategic decision on whether or not to call a witness to testify, based upon balancing whether or not the testimony is going to be helpful or not. *Id.* at 58-59.

The State submitted a Declaration from Petitioner's trial counsel addressing the eyewitness identification expert. Counsel explained his decision not to call an expert as follows:

> I have educated myself on the issue of eyewitness identification, and I am familiar with the testimony that such a witness could offer. I made a decision not to call an expert on eyewitness identification. I presented evidence at trial through my investigator regarding the crime scene, including distances and poor lighting in order to cast doubt on State witness Robinson's testimony regarding identifying [Petitioner] as the shooter. Mr. Robinson was the State's eye witness. He had known [Petitioner] for some years prior to the incident. On the night of the incident, Mr. Robinson stated that he had observed [Petitioner] leave a nightclub, and that he had observed [Petitioner's] hair braid, his face and a distinctive jacket. Robison [sic] testified that he also recognized [Petitioner's] voice. I called an expert, Dr. Larsen, to cast doubt on Robinson's identification, given his long history of drug use, specifically cocaine. Because Robinson had known [Petitioner] for many years and described the distinct jacket and braids [Petitioner] was known to wear, I felt that the best way to attack his identification was to suggest that Mr. Robinson's chronic use of crack-cocaine had impaired his ability to perceive events and to form accurate memories. I felt that this was a stronger strategy than hiring an expert because, again, our goal was to undermine Robinson's credibility in terms specific to his situation and history. I did have my investigator Mr. Lapp take a video of the crime scene, which was admitted into evidence, and Mr. Lapp took some measurements, which he testified to at trial. He also testified to our re-enactment (similar to the one Detective Kanzler had done), to rebut the State's claim of the lighting conditions. The evidence regarding the lighting conditions, the weather, the distance, and Robinson's potential impairment of perceptions due to drug use were presented at trial. A witness on eye witness identification would likely have testified that due to Mr. Robinson's familiarity with [Petitioner], and with his voice, and because of [Petitioner's] distinctive braids and jacket, his recognition of [Petitioner] would likely have been more accurate than someone who was not familiar with [Petitioner]. Such testimony would not have assisted [Petitioner].

Resp. Ex. 158, at 4-5.

The PCR trial judge considered the failure to consult an expert on eyewitness identification the "most interesting issue" before him. Resp. Ex. 159, at 76. The judge had

reviewed Dr. Reisberg's affidavit, and concluded that "[w]hat I read in this thing is all he's doing, you know, is trying to quantify common sense," and that the jurors "had their common sense to know it was dark, it was blah, blah, blah, it was on a street corner or they were away, but there's also the voice and facial recog—all that sort of stuff." *Id.* The judge further concluded "I just don't see that if this is what an expert would have testified to, and that's what we have here being offered as Reisberg saying that, I can't for the life of me see how that was an error that—you know, that shows that trial counsel didn't meet the standard." *Id.*

Petitioner argues the PCR trial judge's decision was both factually and legally unreasonable. This court disagrees. The eyewitness, Robinson, had known Petitioner for 10 to 12 years, and was familiar with his appearance, voice, and distinctive leather jacket. Moreover, trial counsel went to some lengths to cast doubt on Robinson's identification through other means. Finally, as the PCR judge noted, eyewitness testimony was not the only evidence against Petitioner; if Petitioner's case were one without the "jailhouse snitches and other testimony," the court "may have been more amenable to some of the arguments" about experts, but the case was not "tried in a vacuum, this wasn't the only thing." Resp. Ex. 159, at 74-5. As such, it was not objectively unreasonable for the PCR trial judge to conclude that Petitioner failed to prove either deficient performance or prejudice based on trial counsel's decision not to consult with an eyewitness identification expert. Accordingly, Petitioner is not entitled to habeas corpus relief on this claim.

2. Failure to Call Dr. Grimsbo

Petitioner also contends trial counsel provided ineffective assistance by failing to call Raymond Grimsbo, M.D., as an expert witness on the matters of gunshot residue and stippling. Counsel did consult Dr. Grimsbo, a ballistics expert, who reviewed the pertinent evidence and opined as follows:

> If the shooter and [Matthews] were three feet apart, gunshot residue from a pistol loaded with .38 special or .357 ammunition in the form of stippling, fouling, and singeing should have been present on the clothing and the body of [Matthews]. No gunshot residue was found on the clothing or [Matthews's] body.
>
> I would expect to find gunshot residue in the form of stippling, fouling, and singing on Matthews's clothing and body if the parties were three feet apart, the shooter raised a pistol loaded with .38 special or .357 caliber ammunition and with an outstretched arm, shot Matthews.

Resp. Ex. 143, at 2. Petitioner argues this expert opinion directly contradicted Robinson's account of the shooting that Petitioner stood close to Matthews, raised his arm, and shot Matthews point-blank.

In his declaration submitted to the PCR trial court, Petitioner's attorney explained his decision not to call Dr. Grimsbo as an expert witness at trial as follows:

> My investigator Randy Lapp and I did meet with Dr. Grimsbo several times to discuss the presence and absence of stippling and gunshot residue. . . . I did not call Dr. Grimsbo to testify because the State agreed that there was no stippling or gunpowder residue on Matthews's clothing. I felt our case was strong after Dr. Gunson (the State's witness) admitted that she would expect to see gunpowder residue if the shooter and victim were three feet apart with the shooter's arm outstretched. Dr. Grimsbo informed me that he would have testified to the lack of gun powder residue and stippling on Matthews. I did not believe that Dr. Grimsbo's testimony would have added any benefit to our case.

Resp. Ex. 158, at 3-4.

At the PCR evidentiary hearing, expert attorney Wolf testified that Dr. Grimsbo's testimony would have been significant because it would have supported the testimony of an

eyewitness identification expert, i.e., if the shooting had actually occurred as Robinson described it, there would have been gunpowder residue and stippling, so Robinson's eyewitness account of the events must have been incorrect. Resp. Ex. 159, at 46. Wolf testified that Dr. Gunson's testimony on cross-examination was insufficient because she is not a ballistics expert, and Dr. Grimsbo's testimony would have provided additional information beyond Dr. Gunson's expertise. *Id.* On cross-examination, however, Wolf admitted that Dr. Gunson testified there was a lack of gunpowder residue and stippling, which is what Dr. Grimsbo would have testified to as well. *Id.* at 63.

The PCR trial judge rejected Petitioner's claim that trial counsel was ineffective for failing to call Dr. Grimsbo as an expert witness, concluding that as to "particularly Grimsbo, frankly, Mr. Wolf makes an intricate argument about the interplay between Grimsbo and the coroner and Reisberg, and you know, again, I go back to I'm sorry, but I just don't see that failure to call Grimsbo under those circumstances was any kind of substantial default either." Resp. Ex. 159, at 75. Again, this conclusion was prefaced by the judge's statement that if this had been a case without the "jailhouse snitches" and other testimony and evidence against Petitioner, the judge would have been more amenable to Petitioner's arguments. *Id.* at 68.

The PCR judge's decision was not objectively unreasonable. It was not ineffective for Petitioner's trial attorney to decline to call Dr. Grimsbo about a matter that the State's expert had conceded. Dr. Grimsbo's testimony also would not have enhanced the testimony of an eyewitness expert; as discussed above, eyewitness expert testimony would not have been helpful, given Robinson's familiarity with Petitioner's face, voice, braiding, and jacket. Accordingly, Petitioner is not entitled to habeas corpus relief on this claim.

II. Claims Not Addressed in Petitioner's Brief

As noted, Petitioner does not address the remaining grounds for relief in his Brief in Support of the Petition. Accordingly, Petitioner has failed to sustain his burden of demonstrating why he is entitled to relief on his unargued claims. *See Lampert v. Blodgett*, 393 F.3d 943, 970 n.16 (9th Cir. 2004) (petitioner bears burden of proving his case); *Davis v. Woodford*, 384 F.3d 628, 638 (9th Cir. 2003) (same). Nevertheless, the Court has reviewed Petitioner's unargued claims and is satisfied that Petitioner is not entitled to relief on them.

RECOMMENDATION

For these reasons, the Petition for Writ of Habeas Corpus (ECF No. 1) should be DENIED and a judgment of DISMISSAL should be entered. Because Petitioner has not made a substantial showing of the denial of a constitutional right, a certificate of appealability should be DENIED. *See* 28 U.S.C. § 2253(c)(2).

SCHEDULING ORDER

These Findings and Recommendation will be referred to a district judge. Objections, if any, are due within 14 days. If no objections are filed, then the Findings and Recommendation will go under advisement on that date.

If objections are filed, then a response is due within 14 days after being served with a copy of the objections. When the response is due or filed, whichever date is earlier, the Findings and Recommendations will go under advisement.

DATED this 18th day of September, 2018.

/s/ Youlee Yim You

Youlee Yim You
United States Magistrate Judge