UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

JAN 28 2019

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

MAXCIUM HERRING, Petitioner-Appellant, v. L. S. McEWEN, Warden, Respondent-Appellee.	No. 18-56298 D.C. No. 8:11-cv-00781-DMG Central District of California, Santa Ana ORDER

Before: CANBY and GRABER, Circuit Judges.

The motion for reconsideration (Docket Entry No. 7) is denied. *See* 9th Cir. R. 27-10.

No further filings will be entertained in this closed case.

UNITED STATES COURT OF APPEALS

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U.S. COURT OF APPEALS

MAXCIUM HERRING,

Petitioner-Appellant,

v.

L. S. McEWEN, Warden,

Respondent-Appellee.

No. 18-56298

D.C. No. 8:11-cv-00781-DMG
Central District of California,
Santa Ana

ORDER

Before: CALLAHAN and MURGUIA, Circuit Judges.

The request for a certificate of appealability (Docket Entry No. 2) is denied because appellant has not shown that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also* 28 U.S.C. § 2253(c)(2); *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012); *Gonzalez v. Crosby*, 545 U.S. 524, 530-31 (2005); *Ortiz v. Stewart*, 195 F.3d 520, 520-21 (9th Cir. 1999).

Any pending motions are denied as moot.

DENIED.

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

MAXCIUM HERRING, Petitioner, v. LELAND McEWEN, Warden, Respondent.	Case No. SA CV 11-781 DMG (MRW) ORDER DENYING MOTION TO REOPEN CASE FRCP 60

1. Petitioner Herring seeks to reopen his long-closed habeas action challenging his state court robbery convictions. (Docket # 73.)

2. This Court denied habeas relief in 2012 after considering Petitioner's petition and amended petition, his reply to the California Attorney General's answer to the petition, the Magistrate Judge's report and recommendation, and Petitioner's objections. (Docket # 1, 14, 22, 24, 25, 26.) The Court denied a certificate of appealability. (Docket # 28.) So too did the Ninth Circuit Court of Appeals. (Docket # 34.)

3. Since then, Petitioner attempted to reopen or seek reconsideration of his habeas case in this district court and in the appellate court. He received limited relief for consideration of a late appeal. (Docket # 38-67.) As to the merits of his post-denial claims, however, the Ninth Circuit again denied a certificate of appealability in 2016. (Docket # 72.)

* * *

4. A district court may relieve a habeas petitioner from a final judgment under Rule 60(b). Circumstances warranting Rule 60 relief "occur rarely in the habeas context" and should be found "sparingly as an equitable remedy to prevent manifest injustice." Hall v. Haws, 861 F.3d 977, 987 (9th Cir. 2017). The rule is ordinarily "to be utilized only where extraordinary circumstances prevented a party from taking timely action to prevent or correct an erroneous judgment." United States v. Alpine Land & Reservoir Co., 984 F.2d 1047, 1049 (9th Cir. 1993).

5. A district court's evaluation of a Rule 60(b) motion is reviewed on appeal for abuse of discretion. Hall, 861 F.3d at 984.

6. Petitioner's lengthy, current (2018) motion to reopen his case seeks to relitigate numerous issues regarding his original (2006) trial. The motion offers no explanation, however, why he is entitled to consideration of these claims so many years after his conviction became final and the conclusion of his habeas action in federal court.

7. Petitioner has had ample opportunities to present his claims in the district court with the Magistrate Judge, in his objections to the report, and in his various presentations to the federal appeals court. Petitioner fails to demonstrate any "extraordinary circumstances" that prevented him from pursuing this relief in a timely manner. The Court exercises its discretion to deny the request to reopen the case. Hall, 861 F.3d at 984. The motion is DENIED.

IT IS SO ORDERED.

Dated: August 28, 2018

DOLLY M. GEE
UNITED STATES DISTRICT JUDGE

Presented by:

HON. MICHAEL R. WILNER
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MAXCIUM HERRING, Petitioner, v. LELAND MCEWEN, Warden, Respondent.	Case No. SA CV 11-781 DMG (MRW) REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This Report and Recommendation is submitted to the Honorable Dolly M. Gee, United States District Judge, pursuant to 28 U.S.C. § 636 and General Order 05-07 of the United States District Court for the Central District of California.

I. SUMMARY OF RECOMMENDATION

This is a state habeas action. Petitioner was convicted of committing a series of robberies. Petitioner fired his attorney and represented himself at trial. On habeas review, he asserts numerous claims related to the conduct of that trial, including a challenge to the sufficiency of the evidence and a claim of juror misconduct. The state court decisions denying these claims were neither contrary to, nor an unreasonable application of, federal law. The Court therefore recommends that the petition be denied.

II. FACTS AND PROCEDURAL HISTORY[1]

Petitioner committed a series of robberies at retail stores and fast food restaurants in Orange County in 2006. Each robbery was committed with a similar modus operandi. Petitioner entered the stores, held employees captive with a weapon (a gun or crowbar), "zip-tied" their hands together, and stole cash.

The evidence against Petitioner at trial included DNA analysis linking Petitioner to the zip-ties recovered from the victims, eyewitness identifications from the crime scenes, and a bag seized from the car of Petitioner's accomplice containing spare zip-ties, a gun, and items associated with Petitioner.

Petitioner fired two attorneys and represented himself at trial. The jury convicted him of robbery and false imprisonment charges and a firearms enhancement related to three of the store robberies. However, the jury acquitted Petitioner as to another robbery, did not return a street gang enhancement, and deadlocked on other charges. At sentencing, Petitioner received a term of over 33 years in prison.

On direct appeal, Petitioner's sole claim involved an allegation of juror misconduct. The Court of Appeal issued a reasoned opinion denying the claim. (Lodgment # 4.) The state supreme court denied review.

Petitioner subsequently filed a habeas action. The superior court denied six of Petitioner's claims on procedural grounds because he failed to raise them in his direct appeal (citing In re Walker, 10 Cal.3d 764, 773 (1974)). Petitioner also asserted ineffective assistance of counsel (IAC) claims as to his appellate attorney's failure to raise these claims on direct appeal. The superior court denied Petitioner's IAC claims on the merits. (Lodgment # 8.) The state court of appeal

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[1] The state court decisions on direct appeal and habeas did not summarize the facts of Petitioner's criminal case. The factual summary provided in this report is based on the trial record and the parties' habeas briefs.

and supreme court subsequently denied review. This federal habeas action followed.

III. DISCUSSION

A. Standard of Review of Federal Habeas Petitions Under AEDPA

Petitioner's claims are subject to the provisions of the Antiterrorism and Effective Death Penalty Act (AEDPA). Under AEDPA, federal courts may grant habeas relief to a state prisoner "with respect to any claim that was adjudicated on the merits in State court proceedings" only if that adjudication:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

In a habeas action, this Court reviews the state court's last reasoned decision. Maxwell v. Roe, 628 F.3d 486, 495 (9th Cir. 2010). Here, the California Court of Appeal and Superior Court opinions (Lodgment # 4, 8) stand as the last reasoned decisions on Petitioner's claims.[2] Ylst v. Nunnemaker, 501 U.S. 797, 803-04 (1991).

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[2] On federal habeas review, Respondent contends that Petitioner's substantive claims (other than the fully exhausted juror misconduct and ineffective assistance of counsel grounds) are unexhausted and procedurally defaulted. Nevertheless, the Court may consider Petitioner's claims on the merits even though they were denied on procedural grounds in the state courts. See Cassett v. Stewart, 406 F.3d 614, 623-24 (9th Cir. 2005) (court may deny unexhausted claim on the merits under 28 U.S.C. § 2254(b)(2) where it is "perfectly clear" there is no colorable federal claim); Lacy v. Nooth, 2011 WL 2601333, at *1 (9th Cir. July 1, 2011) (same).

Overall, Section 2254(d) presents "a difficult to meet [ ] and highly deferential standard for evaluating state-court rulings, which demands that state-court decisions be given the benefit of the doubt." Cullen v. Pinholster, ___ U.S.___, 131 S. Ct. 1388, 1398 (2011) (quotations omitted). On habeas review, AEDPA places on Petitioner the burden to show that the state court's decision "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." Harrington v. Richter, ___ U.S. ___, 131 S. Ct. 770, 786-87 (2011). Put another way, a state court determination that a claim lacks merit "precludes federal habeas relief so long as fairminded jurists could disagree" on the correctness of that ruling. Richter, 131 S. Ct. at 786.

B. Insufficiency of Evidence and Inadequacy of DNA Evidence (Grounds 2, 5, and 6)

Petitioner claims that the evidence against him was insufficient to support his convictions and the firearm sentencing enhancement. He also challenges the admission of DNA evidence and expert testimony against him.

1. Facts

The evidence against Petitioner at trial was substantial. Police recovered zip-ties from the victims of the first two robberies that contained Petitioner's DNA. Victims from those robberies identified Petitioner from a police photographic array, even though the perpetrator partially covered his face during the robberies. As to the third robbery, police arrested Petitioner hiding near the scene. They also recovered a bag from the car of Petitioner's accomplice that contained a gun, additional zip-ties matching those used in the robberies, a bank pouch stolen from a victim, and a parking ticket with Petitioner's name on it. Additionally, several witnesses testified at trial that Petitioner threatened them at gunpoint. (Lodgment # 17 at 1023-1025.)

The prosecution offered the DNA evidence through a crime lab employee who testified as an expert witness. The witness explained her professional background and the techniques used to extract and test the DNA evidence. Although Petitioner conducted an extensive cross-examination, he did not object to the expert's qualifications or her testimony on foundational or methodology grounds.

2. Applicable Federal Law

The Due Process Clause guarantees that a criminal defendant may be convicted only by proof beyond a reasonable doubt of every fact necessary to constitute the charged crime. Jackson v. Virginia, 443 U.S. 307, 315-16 (1979). Under the Jackson standard, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson, 443 U.S. at 319 (emphasis in original); see also Cavazos v. Smith, ___ U.S. ___, 132 S. Ct. 2, 4 (2011) (quoting Jackson).

A federal habeas petitioner "faces a heavy burden when challenging the sufficiency of the evidence used to obtain a state conviction on federal due process grounds." Juan H. v. Allen, 408 F.3d 1262, 1274 (9th Cir. 2005). Under AEDPA, federal courts must "apply the standards of Jackson with an additional layer of deference." Juan H., 408 F.3d at 1274; Smith v. Mitchell, 624 F.3d 1235, 1239 (9th Cir. 2010) (observing that AEDPA combined with Jackson standard requires "double layer of deference").

Challenges to a state trial court's evidentiary rulings are not cognizable on federal habeas review unless the admission or exclusion of evidence violated a prisoner's due process right to a fair trial. Estelle v. McGuire, 502 U.S. 62, 70 (1991). The due process inquiry in federal habeas cases is limited to whether the admission of evidence rendered the trial fundamentally unfair. Walters v. Maass,

45 F.3d 1355, 1357 (9th Cir. 1995). The admission of evidence may violate a petitioner's due process rights only if there were no permissible inferences that the jury could draw from the evidence. Jammal v. Van de Kamp, 926 F.2d 918, 920 (9th Cir. 1991). There is no clearly-established United States Supreme Court law that distinguishes rulings regarding expert testimony from evidentiary rulings in general. See Moses v. Payne, 555 F.3d 742, 758 (9th Cir. 2009).

3. Analysis

Petitioner argues that the evidence against him was insufficient because the witness identifications and DNA evidence lacked reliability. Petitioner claims that the identifications were not reliable because they were made solely based on the shape of the assailant's eyes, and because the victims did not identify Petitioner in court at trial. He also claims that the DNA evidence lacked foundation and did not abide by best procedures.

On deferential habeas review, this Court finds no constitutional error. Petitioner essentially waived any challenge to the adequacy of the scientific evidence by failing to challenge it at trial. Moreover, to the extent that the evidence was deficient from a scientific perspective, Petitioner was able to (and, to an extent, did) critique it during the testimony and in closing argument. However, Petitioner provides no reasonable basis to suggest that the samples analyzed or the methodologies employed were flawed. The Court cannot conclude that his trial was fundamentally unfair based on the unremarkable presentation of the procedures used to collect and test the DNA evidence.

There was certainly no constitutional error in the state courts' conclusion that sufficient evidence supported Petitioner's convictions. Petitioner presses his factual interpretation of the sufficiency of the DNA and photo identification evidence, which he believes falls short of the reasonable doubt standard. However, when viewed in the light most favorable to the prosecution – and with deference

given to the state court evaluation under AEDPA – there was more than ample evidence for the jury to conclude that Petitioner committed these crimes. Additionally, the evidence supporting the firearms enhancement (testimony that the robber used a gun) was conclusive. The Court notes that the jury clearly evaluated the case closely; it acquitted Petitioner of several serious counts and rejected certain sentencing enhancements. The trier of fact demonstrated that it acted rationally in evaluating the evidence here. On habeas review, it is not for this Court to independently reweigh the trial evidence. As a result, the state courts' determinations must be affirmed.

C. Right to Self-Representation (Ground 1)

Petitioner argues that the trial court infringed on his constitutional rights when it told him to stop making objections during his own testimony.

1. Facts

Before trial, Petitioner moved to represent himself. After advising Petitioner of the risks associated with doing so (Faretta v. California, 422 U.S. 806 (1975)), the Court allowed Petitioner to proceed pro se. (Lodgment # 17 at 45-48.)

Petitioner testified in his own defense. Petitioner presented his direct testimony in narrative form. (Id. at 921.) During cross-examination, Petitioner objected to several of the prosecution's questions, and gave evasive and non-responsive answers. (Lodgment # 17 at 943, 947, 949-950, 956-57.) The trial court allowed Petitioner to object, but also instructed Petitioner that he was required to answer the prosecution's questions. After another series of nonsensical and evasive responses that Petitioner presented as "objections," the trial court stated "You can't object, you're now a witness. You're no longer an attorney. Just answer the questions." (Id. at 950.) Thereafter, Petitioner continued to provide non-responsive answers to several cross-examination questions, and on at least one occasion asserted an objection that the trial court sustained.

2. Analysis

Petitioner claims that the trial court denied him his right to self-representation by barring him from objecting to the prosecutor's questions on cross-examination. This argument is frivolous and raises no constitutional question on habeas review. Petitioner adequately and at his own request represented himself at trial before, during, and after his testimony. The trial court attempted (perhaps inartfully) to maintain order during the contentious and difficult testimony of a pro se litigant. As the Court reviews the record of the trial, that did not infringe Petitioner's right to self-representation.

Moreover, Petitioner points to no clear prejudice that resulted from the trial court's sensible efforts to advance the questioning of the witness. Rather, Petitioner was asked a simple question to which he made a nonsensical objection. Under the circumstances, the trial court's admonishment did not amount to a constitutional violation.[3]

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[3] The Court further finds no violation under the Due Process Clause from the trial judge's actions here. Challenges to a state trial court's evidentiary rulings are not cognizable on federal habeas review unless the admission or exclusion of evidence violated a petitioner's right to a fair trial. Estelle v. McGuire, 502 U.S. 62, 70 (1991). The due process inquiry in federal habeas cases is limited to whether the evidentiary presentation rendered the trial fundamentally unfair. Walters v. Maass, 45 F.3d 1355, 1357 (9th Cir. 1995). The trial court's instruction to Petitioner when he refused to respond directly while on cross-examination was not fundamentally unfair.

D. Failure to Disclose Exculpatory Evidence (Ground 3)

Petitioner claims that the prosecution committed Brady error by failing to disclose information related to fingerprint and DNA evidence.

1. Facts

The police attempted to take fingerprints and obtain DNA evidence from a variety of items seized during the investigation. The fingerprints on certain items were unusable for analysis, and several of the DNA swabs were not submitted for testing. The prosecution informed the trial court that no test results regarding these materials existed. Petitioner argues that this constituted Brady error.

2. Federal Law

A prosecutor's suppression of evidence favorable to the accused "violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Brady v. Maryland, 373 U.S. 83, 87 (1963). Favorable evidence is "material" if there is a reasonable probability that the result of the proceeding would have been different had the evidence been disclosed to the defense. Id. at 682. "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A 'reasonable probability' of a different result is accordingly shown when the government's evidentiary suppression 'undermines confidence in the outcome of the trial.'" Kyles v. Whitley, 514 U.S. 419, 434 (1995) (citations omitted).

3. **Analysis**

Petitioner's speculative Brady claim must fail. The evidence at issue here – inconclusive or incomplete fingerprint and DNA evidence – neither implicated Petitioner in the charged crimes nor exculpated him. It therefore cannot have been material under Brady. Additionally, because the prosecution did not even submit

some of the materials for testing, there were no reports for production to the defense. The prosecution therefore did not "suppress" any evidence for the simple reason that those reports did not exist.

Moreover, even assuming that the untested items somehow supported Petitioner's claim of innocence, Petitioner has not shown any resulting prejudice. His DNA was identified on items associated with the robberies. The absence of DNA evidence on other items does not undermine the fairness of his trial or the jury's verdicts based on the evidence presented.

E. Right to Speedy Trial (Ground 4)

Petitioner complains that the his trial was improperly delayed, resulting in a denial of Petitioner's right to a speedy trial.

1. Facts

Petitioner was arrested and charged for the robberies in 2006. The charges were apparently dismissed in November 2006 and subsequently refiled. (Docket # 22.) Petitioner was re-arraigned in January 2007. The trial commenced in September 2007. In the intervening time, Petitioner fired two of his appointed attorneys. (Docket # 12 at 43.)

2. Federal Law

To establish a violation of the Sixth Amendment's speedy trial right, a court must weigh four factors: (1) whether there was an "uncommonly long" delay in the trial; (2) whether the prosecution or the defendant was responsible for the delay; (3) whether defendant asserted his or her speedy trial right; and (4) whether defendant suffered prejudice as a result of the delay. Doggett v. United States, 505 U.S. 647, 651 (1992). A post-accusation delay approaching one year generally is found to be "presumptively prejudicial." Id. at 652. However, there is no constitutionally-mandated bright line rule regarding violative conduct. United States v. Beamon, 992 F.2d 1009, 1014 (9th Cir. 1993) (17-month and

20-month delays between indictment and arrest were not "great"). To determine whether a defendant suffered prejudice, courts compare the particularized prejudice (pretrial incarceration, impairment of a defense, and general anxiety of the accused) with the level of government misconduct (if any) leading to delay. Id. at 1014-15.

3. Analysis

Petitioner's speedy trial claim under the federal constitution fails. The trial began approximately nine months after Petitioner's arraignment on the charges. During that period, Petitioner caused several weeks of delay by refusing to cooperate with, and ultimately terminating, his attorneys. As a result, there was no "presumptively prejudicial" delay.

Petitioner also shows no actual prejudice here. There is no basis to conclude that the prosecution acted improperly or deliberately delayed moving the case forward, especially given that the delays were attributable to Petitioner's previous attorneys or Petitioner's request to fire them. Additionally, there is no showing that the defense case suffered in any way due to the unintended delay in trial. Petitioner does not assert that any witnesses refused to testify for the defense or that exculpatory evidence was lost as a result of any delay in bringing the case to trial. There was no federal constitutional violation here.

F. Juror Misconduct (Ground 7)

Petitioner claims that the trial court failed to properly investigate alleged juror misconduct.

1. Facts and Opinion Below

On the second day of deliberations, the jury sent a note indicating that one juror felt that another juror "will not give the defense fair consideration." (Lodgment # 4 at 2.) The trial judge re-instructed the jury about the jury's duties during deliberation. Three days later, the jury returned verdicts convicting

Petitioner on most counts, and acquitting him or deadlocking on the remaining charges.

After the trial, the court appointed an investigator to assist Petitioner with post-trial motions. The court denied a request for the jurors' address and telephone information. In doing so, the court: cited state law generally prohibiting release of such information; noted the detailed verdicts that the jury returned after it continued deliberations; and found no evidence of misconduct by any juror. The court concluded that Petitioner's speculative motion did not justify an intrusion into the jury's right to privacy, nor did it warrant a new trial. (Lodgment # 17 at 1268-70.)

The California Court of Appeal found that the trial court did not abuse its discretion in denying the request for juror contact information. The appellate court concluded that the jury note was "ambiguous and relatively innocuous," and that "little good could have come" from delving into the substance of the jury deliberations at that stage or later. (Lodgment # 4 at 6.)

2. Federal Law

The Constitution "does not require a new trial every time a juror has been placed in a potentially compromising situation." Smith v. Phillips, 455 U.S. 209, 217 (1982). "Due process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen." Id. When faced with allegations of juror impartiality, "the remedy [is a] post-trial hearing in which the defendant has the opportunity to prove bias." Tinsley v. Borg, 895 F.2d 520, 524 (9th Cir. 1990). A state court's findings in such a hearing are entitled to a presumption of correctness on federal habeas review. Id.

3. **Analysis**

The California Court of Appeal's decision denying Petitioner's appeal was not contrary to federal law. After receiving the jury note early in deliberations, the trial judge conducted a hearing on the issue and re-instructed the jury on its duty to deliberate collegially. The jury then deliberated substantively and rendered verdicts both in favor of and against Petitioner. The appellate court found no evidence of any actual juror misconduct. Those findings are entitled to a presumption of correctness under federal law. The Court notes that the trial court gave adequate consideration to the issue, both at the time of the original jury note and in post-trial consideration. Under AEDPA, the Court concludes that there was no due process violation. Petitioner's claim does not warrant habeas relief.

G. Ineffective Assistance of Counsel

Petitioner contends that his appellate attorney provided ineffective assistance of counsel by failing to raise most of his claims on direct appeal.

To establish an IAC claim under Strickland v. Washington, 466 U.S. 668 (1984), "a defendant must show both deficient performance by counsel and prejudice." Knowles v. Mirzayance, ___ U.S. ___, 129 S. Ct. 1411, 1419 (2009). Deficient performance is defined as representation that falls below an objective standard of reasonableness. Strickland, 466 U. S. at 688. As to prejudice, a challenger must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Padilla v. Kentucky, ___ U. S. ___, 130 S. Ct. 1473, 1482 (2010) (quotation omitted). "Failure to satisfy either prong of the Strickland test obviates the need to consider the other." Rios v. Rocha, 299 F.3d 796, 805 (9th Cir. 2002).

Ineffective assistance by an appellate lawyer is measured by the same Strickland criteria discussed above. Turner v. Calderon, 281 F.3d 851, 872 (9th Cir. 2002). An appellate attorney is not required to raise "every colorable" or

"nonfrivolous issue" on appeal. Jones v. Barnes, 463 U.S. 745, 750, 752 (1983). Rather, the "weeding out of weaker issues is widely recognized as one of the hallmarks of effective appellate advocacy." Miller v. Keeney, 882 F.2d 1428, 1434 (9th Cir. 1989).

"Surmounting Strickland's high bar is never an easy task." Padilla, 130 S. Ct. at 1485. Establishing that a state court's application of Strickland was unreasonable under AEDPA "is all the more difficult." Richter, 131 S. Ct. at 778. The standards created by Strickland and Section 2254(d) are both "highly deferential"; when the two apply in tandem, "review is doubly so." Richter, 131 S. Ct. at 788 (quotation omitted). Under such a review, a habeas court must determine "what arguments or theories supported or, as here, could have supported, the state court's decision" to reject the ineffective assistance claim, even in the absence of a reasoned opinion from that court. Id. at 786 (emphasis added).

Petitioner raised his IAC claims on habeas review in the superior court. The superior court analyzed Petitioner's claim under the state analogue to Strickland. The court determined that Petitioner had not shown that appellate counsel failed to raise any arguable issues on appeal, and that Petitioner suffered no prejudice as a result of counsel's allegedly deficient performance. This Court agrees. As discussed above, Petitioner's substantive claims – insufficiency of the evidence, Brady violations, juror misconduct, etc. – are meritless and likely would not have led to reversal of his conviction. On this Court's doubly-deferential review, there is no basis to conclude that the appellate lawyer provided ineffective assistance or that the state court clearly erred in rejecting this claim on habeas.

IV. RECOMMENDATION

IT IS THEREFORE RECOMMENDED that the District Judge issue an order: (1) accepting the findings and recommendations in this Report; (2) directing that judgment be entered denying the Petition; and (3) dismissing the action with prejudice.

DATED: January 10, 2012

MICHAEL R. WILNER
UNITED STATES MAGISTRATE JUDGE