# APPENDIX A

U S Court of Appeals Nith Cir.

Denial on Petition For Rehearing En-Banc

May 15 2020

Case # 19-55 304

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

MAY 15 2020

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

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| PAUL EDWARD DURAN,<br><br>Petitioner-Appellant,<br><br>v.<br><br>MATTHEW CATE, Sec. of Corr.,<br><br>Respondent-Appellee. | No. 19-55304<br><br>D.C. No. 2:16-cv-02666-AG-FFM<br>Central District of California,<br>Los Angeles<br><br>ORDER |

Before: CANBY and CALLAHAN, Circuit Judges.

Appellant's petition for rehearing en banc (Docket Entry No. 13) is construed as a motion for reconsideration with suggestion for rehearing en banc. So construed, the motion is denied. *See* 9th Cir. R. 27-10; Gen. Ord. § 6.11.

No further filings shall be entertained in this closed case.

Appendix B...
Ninth circuits
denial given Feb 11, 2020
to Application For COA
Case # 19-55304

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT



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| PAUL EDWARD DURAN,<br><br>Petitioner-Appellant,<br><br>v.<br><br>MATTHEW CATE, Sec. of Corr.,<br><br>Respondent-Appellee. | No. 19-55304<br><br>D.C. No. 2:16-cv-02666-AG-FFM<br>Central District of California,<br>Los Angeles<br><br>ORDER |

Before: LEAVY and MILLER, Circuit Judges.

The request for a certificate of appealability (Docket Entry Nos. 5 and 6) 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); *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Any pending motions are denied as moot.

**DENIED.**

Appendix C

Ninth Circuts

order granting prose Motion For Extention of time to file Petition For reconcideration "Rehearing En Banc" given March 20 2020

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

MAR 20 2020

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

PAUL EDWARD DURAN,

Petitioner-Appellant,

v.

MATTHEW CATE, Sec. of Corr.,

Respondent-Appellee.

No. 19-55304

D.C. No. 2:16-cv-02666-AG-FFM
Central District of California,
Los Angeles

ORDER

Before: CLIFTON and NGUYEN, Circuit Judges.

Appellant's motion for an extension of time to file a motion for reconsideration (Docket Entry No. 10) is granted. Any motion for reconsideration is due by April 20, 2020.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

PAUL EDWARD DURAN,

Petitioner,

v.

MATTHEW CATE,

Respondent.

Case No. CV 16-2666 AG (FFM)

ORDER ACCEPTING FINDINGS, CONCLUSIONS AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE

Pursuant to 28 U.S.C. § 636, the Court has reviewed the entire record in this action, the Report and Recommendation of United States Magistrate Judge ("Report") (Docket No. 68), and the objections to the Report. Good cause appearing, the Court concurs with and accepts the findings of fact, conclusions of law, and recommendations contained in the Report after having made a de novo determination of the portions to which objections were directed.

IT IS ORDERED that judgment be entered dismissing the Petition with prejudice.

DATED: February 28, 2019

ANDREW J. GUILFORD
United States District Judge

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

PAUL EDWARD DURAN,

Petitioner,

v.

MATTHEW CATE,

Respondent.

No. CV 16-2666 AG (FFM)

ORDER DENYING CERTIFICATE OF APPEALABILITY

Rule 11(a) of the Rules Governing § 2254 Actions provides:

> (a) Certificate of Appealability. The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant. Before entering the final order, the court may direct the parties to submit arguments on whether a certificate should issue. If the court issues a certificate, the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. § 2253(c)(2). If the court denies a certificate, the parties may not appeal the denial but may seek a certificate from the court of appeals under Federal Rule of Appellate Procedure 22. A motion to reconsider a denial does not extend the time to appeal.

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Here, given the Court's ruling on settled legal issues, the Court does not require any arguments from the parties on whether a certificate of appealability ("COA") should issue.

Under 28 U.S.C. § 2253(c)(2), a COA may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." Here, the Court dismissed the petition on the merits. Thus, the Court's determination of whether a COA should issue here is governed by *Slack v. McDaniel*, 529 U.S. 473, 120 S.Ct. 1595, 146 L. Ed. 2d 542 (2000), where the Supreme Court held that the showing required to satisfy section 2253(c) after a habeas petition is denied on the merits is as follows:

> The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong.

529 U.S. at 484.

Here, the Court finds that reasonable jurists would not find the district court's decision debatable or wrong.

Accordingly, a COA is not appropriate with respect to the judgment entered herein and is DENIED.

Dated: February 28, 2019

ANDREW J. GUILFORD
United States District Judge

Presented by:

/S/ FREDERICK F. MUMM
FREDERICK F. MUMM
United States Magistrate Judge

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

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| PAUL EDWARD DURAN,<br><br>Petitioner,<br><br>v.<br><br>MATTHEW CATE,<br><br>Respondent. | No. CV 16-2666-AG (FFM)<br><br>REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE |

This Report and Recommendation is submitted to the Honorable Andrew J. Guilford, 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. For the reasons discussed below, it is recommended that the First Amended Petition be denied and the action be dismissed with prejudice.

## I. PROCEEDINGS

Petitioner, Paul Edward Duran, a state prisoner in the custody of the California Department of Corrections, filed a Petition for Writ of Habeas Corpus by a Person in State Custody pursuant to 28 U.S.C. § 2254 on April 19, 2016. On August 8, 2016, Respondent filed an answer to the Petition. That same date,

Petitioner sought leave to amend the Petition by adding one exhausted claim and seven unexhausted claims. The undersigned determined that Petitioner was entitled to amend his Petition as a matter of course and permitted Petitioner to file a First Amended Petition ("FAP").

Petitioner subsequently requested that the undersigned stay these proceedings under *Rhines v. Weber*, 544 U.S. 269, 274-75, 125 S. Ct. 1528, 161 L. Ed. 2d 440 (2005), and sought to add a ninth claim. Because Respondent did not oppose Petitioner's request to stay, the undersigned granted that request. The undersigned, however, denied Petitioner's request to amend the FAP because the proposed ninth claim was "indisputably frivolous and without merit," and, thus, amendment would have been futile. (Docket No. 21.)

Petitioner then returned to state court to exhaust the seven unexhausted claims that he asserted in his FAP. He eventually notified the undersigned that he had, in fact, exhausted his previously unexhausted claims, and the undersigned, therefore, lifted the stay in this matter.[1] Petitioner subsequently filed a motion for leave to amend the FAP. The motion, however, was denied because Petitioner engaged in an unjustified, undue delay in asserting each of the proposed new grounds for relief and because amendment would have been futile, as each of the proposed new grounds for relief was meritless.

Thereafter, on September 11, 2018, Respondent filed a return to the FAP. On October 22, 2018, Petitioner filed a traverse,

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[1] Respondent contends that the majority of the grounds for relief that Petitioner asserts in his FAP remain unexhausted. The undersigned, however, need not reach that argument because, as explained herein, each of the allegedly unexhausted grounds for relief clearly fails on its merits. *See Cassett v. Stewart*, 406 F.3d 614, 623-24 (9th Cir. 2005) (district court may dismiss unexhausted ground for relief where it is "perfectly clear" that petitioner has not raised colorable federal ground for relief).

The matter, thus, stands submitted and ready for decision.

## II. PROCEDURAL HISTORY

A Los Angeles County Superior Court jury convicted Petitioner of carjacking, attempted carjacking, and attempted second degree robbery. The trial court, subsequently, found that Petitioner had suffered a prior strike conviction. Petitioner, thereafter, was sentenced to a state prison term of twenty-one years.

Petitioner appealed his conviction. On June 10, 2015, the California Court of Appeal filed an unpublished opinion in which it affirmed the judgment. Petitioner then filed a petition for review in the California Supreme Court, which denied the petition without comment on August 26, 2015.

Petitioner then initiated this action. After obtaining an order staying this action (*see supra*), Petitioner filed a series of state-court collateral attacks to his conviction and sentence, the last of which was denied on June 21, 2017.

## III. FACTUAL BACKGROUND

The following facts were taken verbatim from the California Court of Appeal's opinion affirming Petitioner's conviction:

On the afternoon of July 21, 2013, as Melinda McLeod was parking her car near her home, [Petitioner] approached her from behind, punched her in the back, took her car keys and got into her vehicle and drove off. After [Petitioner] was apprehended later that evening, McLeod identified him at a field show-up and also identified him at trial.[FN] She testified that when he assaulted her, [Petitioner] had been "kind of greasy and sweaty," and his long hair (pulled back during trial) was "down and sweaty." McLeod also noticed [Petitioner] had "blocks of dark tattoos" on his forehead. She could not identify them at the time because [Petitioner] was dirty and sweaty, and she was afraid. She reported the incident to the police. Later that day, [Petitioner] led police on a pursuit weaving in and

out of traffic and into oncoming traffic. The officers ultimately abandoned the vehicle pursuit, deeming it too dangerous in light of the amount of pedestrian traffic. One officer involved in that pursuit testified he saw "666" tattooed across [Petitioner's] forehead, although he did not call that information in nor include it in a report.

FN McLeod testified that, on a scale of 1-to-10, her degree of certainty that [Petitioner] was the man who assaulted her was a "10."

At about 8:00 p.m. on July 21, 2013, Glenda Cerrato had just parked her car. She left the front driver's side door open and opened the rear door to get her four year old out of the car. Just then, [Petitioner] drove toward Cerrato at a high rate of speed, parked the vehicle and got out. He sat in the driver's seat of Cerrato's car screaming at her to give him her keys. Cerrato grabbed her child and ran inside her home. [Petitioner] ran away. At trial, Cerrato identified [Petitioner] as the man who tried to take her keys. Cerrato testified that at the time he tried to take her keys, [Petitioner's] face was dirty and sweaty, his hair was all over his face, and he had "something big" tattooed on his forehead. Cerrato identified [Petitioner] later that evening during a field show-up.

Next, [Petitioner] approached Benjamin Hakimfar and demanded the keys as Hakimfar approached his car. Hakimfar made up a story, telling [Petitioner] the car was not his, but that he lived across the street and would bring his own car over. [Petitioner] agreed; Hakimfar called 911 as he left the scene. Hakimfar, who testified at trial that he was "positive" [Petitioner] had been the man he encountered, described him at the time of their July 21, 2103, encounter as having long dirty hair and "a lot of tattoos" on his face. He could not specify what the tattoos were.

Later on the evening of July 21, 2013, [Petitioner] approached Ramon Orozco as Orozco was removing an item from the trunk of his car. [Petitioner] tried to take Orozco's keys, slapped Orozco's face and ran off. Orozco ran after

[Petitioner], signaling [Petitioner's] location to a helicopter overhead. As Orozco rounded the corner, [Petitioner] punched him in the face. When the police arrived at the scene they found [Petitioner] -- very sweaty and dirty, with long greasy hair -- hiding in the bushes. One of the apprehending officers testified that [Petitioner] had tattoos on his face but that he could not make out the details of the tattoos at first because [Petitioner] was so dirty. Orozco testified that he saw tattoos on [Petitioner's] forehead, and that his long hair was loose at the time of their encounter. Orozco identified [Petitioner] both at the scene and in court as the man who struck him and tried to take his keys. [Petitioner's] defense, explored by cross-examining prosecution witnesses, was that this was a case of mistaken identity and he was not the person who committed the crimes alleged against him. This contention was based on the fact that [Petitioner] has the digits "666" prominently tattooed on his forehead and no complaining witness included that information in his or her description to the police. After he was apprehended and given his *Miranda* rights, [Petitioner] told one officer: "I took the car. I took the car from the old lady."

(Lodged Doc. No. 7 at 3-4 (footnote omitted).)

## IV. PETITIONER'S CLAIMS

1. The trial court violated Petitioner's rights under the Fourth Amendment by refusing to suppress evidence obtained as the result of an illegal search and seizure.

2. Petitioner did not voluntarily, knowingly, and intelligently waive his right to counsel at trial because the trial court did not re-advise him of the dangers of representing himself after the prosecution amended the information in a manner that increased Petitioner's criminal exposure.

3. Petitioner was incompetent at trial and lacked the mental capacity to exercise his right to self-representation.

4. The prosecutor violated Petitioner's right to due process and a fair trial by withholding exculpatory evidence.

5. Trial counsel deprived Petitioner of his Sixth Amendment right to effective assistance of counsel by failing to challenge the pre-trial identifications of Petitioner.

6. Petitioner was deprived of his right to effective assistance of counsel on appeal because his appellate counsel failed to assert several meritorious arguments on appeal and, instead, filed a no-merits brief, pursuant to *People v. Wende*, 25 Cal. 3d 436, 441-42, 158 Cal. Rptr. 839, 600 P.2d 1071 (1979).

7. The prosecution violated Petitioner's constitutional rights under clearly established Supreme Court authority by failing to arraign him within forty-eight hours of his arrest.

8. The trial judge engaged in judicial misconduct by quashing Petitioner's subpoena duces tecum that was directed at uncovering information that would have been beneficial to Petitioner's defense and appeal.

## V. STANDARD OF REVIEW

The standard of review applicable to Petitioner's claims herein is set forth in 28 U.S.C. § 2254(d), as amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") (Pub. L. No. 104-132, 110 Stat. 1214 (1996)). *See* 28 U.S.C. § 2254(d); *see also Lindh v. Murphy*, 521 U.S. 320, 336, 117 S. Ct. 2059, 138 L. Ed. 2d 481 (1997). Under AEDPA, a federal court may not grant habeas relief on a claim adjudicated on its merits in state court unless that adjudication "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 "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in

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the State court proceeding."[2] 28 U.S.C. § 2254(d); *see Williams v. Taylor*, 529 U.S. 362, 402, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000).

The phrase "clearly established Federal law" means "the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision."[3] *Lockyer v. Andrade*, 538 U.S. 63, 71-72, 123 S. Ct. 1166, 155 L. Ed. 2d 144 (2003). However, a state court need not cite the controlling Supreme Court cases in its own decision, "so long as neither the reasoning nor the result of the state-court decision contradicts" relevant Supreme Court precedent which may pertain to a particular claim for relief. *Early v. Packer*, 537 U.S. 3, 8, 123 S. Ct. 362, 154 L. Ed. 2d 263 (2002) (*per curiam*).

A state court decision is "contrary to" clearly established federal law if the decision applies a rule that contradicts the governing Supreme Court law or reaches a result that differs from a result the Supreme Court reached on "materially indistinguishable" facts. *Williams*, 529 U.S. at 405-06. A decision involves an "unreasonable application" of federal law if "the state court identifies the correct governing legal principle from [Supreme Court] decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 413. A federal habeas court may not overrule a state court decision based on the federal court's independent determination that the state court's application of

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[2] In addition, under 28 U.S.C. § 2254(e)(1), factual determinations by a state court "shall be presumed to be correct" unless the petitioner rebuts the presumption "by clear and convincing evidence."

[3] Under AEDPA, the only definitive source of clearly established federal law is set forth in a holding (as opposed to dicta) of the Supreme Court. *See Williams*, 529 U.S. at 412; *see also Yarborough v. Alvarado*, 541 U.S. 652, 660-61, 124 S. Ct. 2140, 158 L. Ed. 2d 938 (2004). Thus, while circuit law may be "persuasive authority" in analyzing whether a state court decision was an unreasonable application of Supreme Court law, "only the Supreme Court's holdings are binding on the state courts and only those holdings need be reasonably applied." *Clark v. Murphy*, 331 F.3d 1062, 1069 (9th Cir. 2003).

governing law was incorrect, erroneous, or even "clear error." *Lockyer*, 538 U.S. at 75. Rather, a decision may be rejected only if the state court's application of Supreme Court law was "objectively unreasonable." *Id.*

The standard of unreasonableness that applies in determining the "unreasonable application" of federal law under Section 2254(d)(1) also applies in determining the "unreasonable determination of facts in light of the evidence" under Section 2254(d)(2). *Taylor v. Maddox*, 366 F.3d 992, 999 (9th Cir. 2004). Accordingly, "a federal court may not second-guess a state court's fact-finding process unless, after review of the state-court record, it determines that the state court was not merely wrong, but actually unreasonable." *Id.*

Where more than one state court has adjudicated the petitioner's claims, the federal habeas court analyzes the last reasoned decision. *Barker v. Fleming*, 423 F.3d 1085, 1091 (9th Cir. 2005) (citing *Ylst v. Nunnemaker*, 501 U.S. 797, 803, 111 S. Ct. 2590, 115 L. Ed. 2d 706 (1991) for presumption that later unexplained orders, upholding judgment or rejecting same claim, rest upon same ground as the prior order). Thus, a federal habeas court looks through ambiguous or unexplained state court decisions to the last reasoned decision in order to determine whether that decision was contrary to or an unreasonable application of clearly established federal law. *Bailey v. Rae*, 339 F.3d 1107, 1112-13 (9th Cir. 2003).

## VI. DISCUSSION

### A. The Fourth Amendment Claims

Petitioner raises two separate grounds for relief that implicate his rights under the Fourth Amendment. First, he contends that the trial court violated his rights under the Fourth Amendment by refusing to suppress evidence obtained as the result of an illegal search and seizure. Specifically, he appears to contend that some or all of the evidence gathered against him should have been excluded

because that evidence was obtained as a result of, and tainted by, an unduly suggestive photographic line-up that police used to secure an eyewitness's positive identification of Petitioner. According to Petitioner, law enforcement somehow violated his Fourth Amendment rights by using the photographic line-up to obtain the positive identification. As such, any evidence derived from that purported Fourth Amendment violation should have been excluded, just as the trial court excluded the sole pre-trial identification obtained through use of the photographic line-up. Second, Petitioner contends that the prosecution violated clearly established Supreme Court authority by failing to arraign him within forty-eight hours of his arrest. As explained below, Petitioner's Fourth Amendment claims are not cognizable on federal habeas review.

A state prisoner may not invoke a Fourth Amendment ground for relief on federal habeas review if the prisoner had the opportunity for "full and fair" consideration of the claim in state court. *Stone v. Powell*, 428 U.S. 465, 494, 96 S. Ct. 3037, 49 L. Ed. 2d 1067 (1976). "The relevant inquiry is whether petitioner had the opportunity to litigate his claim, not whether he did in fact do so or even whether the claim was correctly decided." *Ortiz-Sandoval v. Gomez*, 81 F.3d 891, 899 (9th Cir. 1996). The Ninth Circuit has stated that even if the state court's determination of the Fourth Amendment issues results in an incorrect decision, federal habeas corpus actions shall not provide a remedy so long as the petitioner was afforded a full and fair opportunity to litigate the issues in state court. *See Locks v. Summer*, 703 F.2d 403, 408 (9th Cir. 1983).

California provides criminal defendants with a full and fair opportunity to litigate Fourth Amendment claims through the procedures of California Penal Code section 1538.5. Section 1538.5 permits a defendant to move to suppress evidence on the ground that it was obtained in violation of the Fourth Amendment. *See Gordon v. Duran*, 895 F.2d 610, 613-14 (9th Cir. 1990); *see also Locks*, 703 F.2d at 408 (9th Cir. 1983); *Mack v. Cupp*, 564 F.2d 898, 901

(9th Cir. 1977). Petitioner had the opportunity in state court to assert any supposed Fourth Amendment violation arising from law enforcement's use of the photographic line-up and the purported delay in his arraignment.[4] Accordingly, he cannot maintain any Fourth Amendment challenge in this Court.[5]

Regardless, no Fourth Amendment violation occurred. Although Petitioner maintains that the photographic line-up in some way violated his Fourth Amendment rights, the admission of a witness's pre-trial identification obtained by using an impermissibly suggestive identification procedure violates the accused's Fifth Amendment right to due process. *Simmons v. United States*, 390 U.S. 377, 384, 88 S. Ct. 967, 19 L. Ed. 2d 1247 (1968).

Moreover, even assuming that the use of the photographic line-up somehow violated Petitioner's rights under the Fourth Amendment, Petitioner

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[4] Petitioner's claim of pre-arraignment delay implicates the Fourth Amendment, which requires a determination of probable cause before or promptly after a defendant's arrest. *Gerstein v. Pugh*, 420 U.S. 103, 124-25, 95 S. Ct. 854, 43 L. Ed. 2d 54 (1975); *see also County of Riverside v. McLaughlin*, 500 U.S. 44, 56, 111 S. Ct. 1661, 114 L. Ed. 2d 49 (1991) (holding in civil rights action that Fourth Amendment requires judicial probable cause determinations to be made within forty-eight hours of warrantless arrest, absent extraordinary circumstances).

[5] Moreover, in his proposed claim, Petitioner appears to contend that he had a constitutional right to have any and all evidence derived from the purported Fourth Amendment violation excluded. But, as the Supreme Court has made clear, the Constitution provides for no such right. *See United States v. Calandra*, 414 U.S. 338, 348, 94 S. Ct. 613, 620, 38 L. Ed. 2d 561 (1974) (explaining that exclusionary rule is "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved"); *see also Bretz v. Crist*, 546 F.2d 1336, 1341 (9th Cir. 1976) (noting that *Stone*'s holding barring Fourth Amendment challenges on federal habeas review where petitioner had full and fair opportunity to contest admission of illegally obtained evidence in state court "confirms that the exclusionary rule, while constitutionally inspired, is not constitutionally required").

points to no evidence that was admitted at trial that could be considered fruit of the purportedly improper photographic line-up. The photographic line-up was excluded from trial, and the witness who viewed the photographic line-up (a witness who was not one of Petitioner's victims) did not testify. Although each of Petitioner's victims identified him as the culprit, the victims did not identify him from a photographic line-up. Rather, they identified him at various field show-ups. The photographic line-up had no impact on those identifications or on any other evidence that was admitted against Petitioner.

Petitioner's claim that a Fourth Amendment violation occurred in connection with his arraignment is equally meritless. As the superior court noted in rejecting this claim, Petitioner was arrested on December 3, 2013 and was arraigned the next day, on December 4, 2013. In other words, he was arraigned well-within forty-eight hours of his arrest.

Accordingly, Petitioner is not entitled to habeas relief with respect to either of his Fourth Amendment claims.

**B. The *Faretta*[6] Claims**

Petitioner asserts two separate grounds for relief in relation to his decision to waive his right to counsel and, instead, represent himself at trial. First, he contends that the trial court erred in failing to re-advise him of his right to counsel after the prosecution amended the information against him to add an allegation that he had suffered a prior strike conviction. Noting that this amendment increased his criminal exposure, Petitioner maintains that he would have opted to have counsel represent him if, in the face of the amendment, the trial court had re-advised him of the dangers of representing himself.

Second, Petitioner contends that his initial waiver of his right to counsel was involuntary because he was incompetent to stand trial and lacked the

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[6] *Faretta v. California*, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975).

requisite mental capacity to exercise his right to self-representation. In support of this contention, Petitioner asserts that, in 2004, he was diagnosed with schizophrenia and that, in 2010, he suffered a head injury. Consequently, according to Petitioner, he was not competent in 2014 to waive his right to counsel.

Petitioner raised both of these claims before the Los Angeles County Superior Court. The superior court rejected both claims on their respective merits. First, the superior court noted that no authority existed for the proposition that the prosecution's amending of the information obligated the trial court to re-advise Petitioner of his right to counsel. Further, the superior court observed that, in fact, the trial court advised Petitioner about the amended information and its consequences, and Petitioner unequivocally stated that he understood those consequences and wanted to proceed to trial. Citing these facts, the superior court concluded that Petitioner's contention that the trial court somehow failed to inform Petitioner regarding the sentencing enhancement was "wholly without merit." (Lodged Doc. No. 11 at 7.)

Second, the superior court found that there was no evidence to support Petitioner's contention that he lacked the requisite mental capacity to waive his right to counsel. In doing so, the superior court noted that Petitioner never informed the trial court about his purported mental health history. Rather, he signed a *Faretta* form setting forth his education (which included college) and stating that he understood the charges against him, as well as the *mens rea* requirements to prove the charged crimes. The superior court also recounted that Petitioner had conducted himself "appropriately during the trial" and that he had successfully moved to suppress a victim's pre-trial identification of Petitioner as the culprit of the charged crimes. (*Id.* at 8.) Finally, the superior court cited the lack of any evidence to substantiate Petitioner's claim that he was mentally incompetent when he waived his right to counsel. As explained below, the

superior court did not commit constitutional error in rejecting either of Petitioner's *Faretta* claims.

**1. Factual Background**

The Los Angeles Superior Court set forth the relevant facts underlying Petitioner's waiver of his right to counsel:

> [Petitioner] made his *Faretta* motion on March 6, 2014, before the Honorable Dennis J. Landin. [Petitioner] completed a four-page form that advised him of his rights and detailed the "dangers and disadvantages to self-representation." [Petitioner] initialed each box on the form. One box said, "I understand that it is the advice and recommendation of this Court that I do not represent myself and that I accept court-appointed counsel." After [Petitioner] initialed and signed the form, Judge Landin read the form to [Petitioner] in its entirety. Among other warnings, Judge Landin told [Petitioner] that, if he wished to represent himself, he would not be able later to claim that he made a mistake or that he received ineffective assistance of counsel.
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> . . .
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> Judge Mader [told] [Petitioner] about his increased exposure when the People filed the amended information on March 19, 2014. [Petitioner] insisted he wanted to go to trial nevertheless. The transcript is attached to this memorandum opinion. Judge Mader told [Petitioner], "Mr. [Petitioner], what they have done is they have added a strike at the end of the information. It's a strike that apparently occurred out of state in New Mexico in 2000." The court then arraigned [Petitioner] on the amended information. Judge Mader then asked [Petitioner] if there was "anything [he] want[ed] to say about the new information." [Petitioner] answered, "No, your honor." He then made a motion to dismiss the case under Penal Code section 1385 for "lack of evidence." Judge Mader denied that motion, then offered to bifurcate [Petitioner's] trial on the allegation of the prior strike. The court then told [Petitioner], "Now, I want you to understand that by adding a prior conviction it changes what your maximum exposure is in going to trial." Judge Mader asked the prosecutor, "What, Ms. Sumabat-Graff, is his maximum exposure?" The prosecutor answered that, after the addition of the strike allegation, [Petitioner's] possible exposure was about 23 to 27 years. Judge Mader told [Petitioner], "So that's what the exposure is, sir. The People yesterday offered you five years." [Petitioner] responded, "Your honor, there's a constitutional violation involved in this case." The court said, "Sir, I don't think you're really grasping

> what's going on here." [Petitioner] responded, "I understand exactly what's going on. That doesn't -- we're proceeding with the trial, your honor. I'm ready to pick a jury." The district attorney then said, "For the record, your honor, I did the calculations. Actually, 32 years] is his exposure right now." Judge Mader told [Petitioner]: "So the maximum is 32 years, sir. You understand that, and you still want to go to trial?" [Petitioner] answered, "Yes, your honor, I do."

(Lodged Doc. No. 11 at 4-7.)

**2. Federal Legal Standard and Analysis**

**(a) Re-advisement of Right to Counsel**

If Petitioner merely claims that the trial court erred in applying California law regarding whether he had a right to be re-advised of his right to counsel, that claim is not cognizable on federal habeas review. *See Estelle v. McGuire*, 502 U.S. 62, 68, 112 S. Ct. 475, 480, 116 L. Ed. 2d 385 (1991) ("In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws or treaties of the United States.").

To the extent that Petitioner has alleged a Sixth Amendment violation, that claim, likewise, fails. A defendant in a criminal action has a constitutional right to be represented by counsel. *Faretta v. California*, 422 U.S. 806, 807, 95 S. Ct. 2525, 2527, 45 L. Ed. 2d 562 (1975). "[T]he Supreme Court has also recognized that a defendant has the reciprocal constitutional right to 'proceed without counsel when he voluntarily and intelligently elects to do so." *John-Charles v. California*, 646 F.3d 1243, 1248 (9th Cir. 2011) (quoting *Faretta*, 422 U.S. at 807).

The United States Supreme Court, however, has never held that a defendant who is advised of his right to counsel and waives that right is entitled to subsequently be re-advised of the right to counsel. Indeed, the Ninth Circuit has observed the lack of Supreme Court precedent on that precise issue. *See Becker v. Martel*, 472 F. App'x. 823, 824 (9th Cir. April 30, 2012) (noting that Supreme Court "has not squarely addressed whether a substantial change in circumstances

requires re-advisal of the right to counsel"); *see also John-Charles*, 646 F.3d at 1248-50 (noting lack of "clearly established Supreme Court precedent governing a self-represented defendant's request for reappointment of counsel after the defendant has made a valid *Faretta* waiver of the right to counsel"). Consequently, the Los Angeles County Superior Court's rejection of Petitioner's claim could neither have been contrary to, nor an unreasonable application of, clearly established federal law as determined by the Supreme Court. *See Lopez v. Smith*, __ U.S. __, 135 S. Ct. 1, 4, 190 L. Ed. 2d 1 (2014); *Carey v. Musladin*, 549 U.S. 70, 77, 127 S. Ct. 649, 166 L. Ed. 2d 482 (2006) (where Supreme Court precedent gives no clear answer to question presented, "it cannot be said that the state court 'unreasonab[ly] appli[ed] clearly established Federal law'").

Moreover, even under the *de novo* standard of review, Petitioner is not entitled to relief. In the Ninth Circuit, "[a] competent election by the defendant to represent himself and to decline the assistance of counsel once made before the court carries forward through all further proceedings in that case unless appointment of counsel for subsequent proceedings is expressly requested by the defendant or there are circumstances which suggest that the waiver was limited to a particular stage of the proceedings." *United States v. Springer*, 51 F.3d 861, 864-65 (9th Cir. 1995). "[A] properly conducted *Faretta* colloquy need not be renewed in subsequent proceedings unless intervening events substantially change the circumstances existing at the time of the initial colloquy." *United States v. Hantzis*, 625 F.3d 575, 580-81 (9th Cir. 2010) (citing *Springer*, 51 F.3d at 864-65); *see also White v. United States*, 354 F.2d 22, 23 (9th Cir. 1965) (no Sixth Amendment violation where defendant was not advised of right to counsel at re-sentencing after obtaining habeas relief where defendant previously had provided valid *Faretta* waiver and did not indicate at re-sentencing that he wished to withdraw that waiver).

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This precedent forecloses Petitioner's challenge to the trial court's failure to re-advise him of his right to counsel. Although the prosecutor filed an amended information after Petitioner opted to represent himself, that amendment did not substantially change the circumstances existing at the time that Petitioner exercised his right to represent himself. On the contrary, the only difference between the original information and the amended information was that the amended information alleged that Petitioner had suffered a prior serious felony conviction within the meaning of the Three Strikes law, whereas the original information contained no such allegation. As such, even under the Ninth Circuit's standard, Petitioner was not entitled at any point after opting to represent himself to be re-advised of his right to counsel.

Regardless, there is no reason to believe that Petitioner would have elected to invoke his right to counsel had he been re-advised of that right after the prosecution amended the information. The record is clear that the trial court advised Petitioner about the amended information and explained that, as a result of the amendment, Petitioner faced a greater prison sentence than he did under the original information. When the trial court asked Petitioner if he wished to say anything about the amended information, Petitioner responded that he did not. What is more, when the trial court expressed concern that Petitioner had not grasped the disparity between his maximum potential sentence (which was thirty-two years) and his potential sentence if he pleaded guilty (which was five years), Petitioner cut off the trial court, insisting that he "understood exactly what [was] going on" and announced that he wished to "proceed[] with trial." Given these facts, there is no reason to believe that Petitioner would have relinquished his *pro per* status if the trial court had attempted to re-advise him about the pitfalls of representing himself at trial.

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**(b) Petitioner's Competency**

The mental competency standard for a criminal defendant waiving the right to counsel is the same standard applicable for a criminal defendant's competency to stand trial and plead guilty. *Moran v. Godinez*, 509 U.S. 389, 399, 113 S. Ct. 2680, 125 L. Ed. 2d 321 (1993). For each, the standard for competence is whether a defendant has a reasonable degree of rational understanding and has a rational as well as factual understanding of the proceedings against him. *Id.*

Determining whether a criminal defendant is competent to waive his right to counsel does not require inquiry into the defendant's "technical legal knowledge." *Id.* Rather, as the Supreme Court has recognized, "the competence that is required of a defendant seeking to waive his right to counsel is the competence to waive the right, not the competence to represent himself." *Id.*

Here, as the state superior court noted, there is no evidence in the record to suggest that Petitioner was mentally incompetent to waive his right to counsel. Aside from the fact that Petitioner failed to inform the trial court of his mental health history, the mental health history that exists is limited to a 2004 diagnosis and a head injury in 2010. However, "[n]ot all people who have a mental problem are rendered by it legally incompetent." *Bouchillon v. Collins*, 907 F.2d 589, 593 (5th Cir. 1990) ("We venture to guess that if every accused were to be adjudged incompetent who was rendered depressed or apathetic at finding himself incarcerated and indicted on felony charges, few would ever be tried"). Moreover, Petitioner's 2004 diagnosis fails to show that Petitioner was experiencing any particular symptoms approximately ten years later. The same is true regarding his 2010 head injury. The undersigned further notes that Petitioner, when pressed by his appellate counsel on the issue of Petitioner's competence to waive counsel, was unable to provide any evidence suggesting that he was incompetent to waive his right to counsel during the relevant time period. (*See* Lodged Doc. 11 at 8 n.9.)

For the foregoing reasons, the state superior court's rejection of this claim was neither an unreasonable application of, nor contrary to, clearly established federal law as determined by the Supreme Court. The undersigned also notes that, even under a *de novo* standard of review, Petitioner's claim would fail because, as discussed above, he has provided no evidence to show that he was mentally incompetent to waive his right to counsel. Accordingly, he is not entitled to habeas relief with repect to either of his *Faretta* claims.

**C. The Prosecutor's Discovery Obligations**

In his third ground for relief, Petitioner contends that the prosecutor violated Petitioner's right to due process and a fair trial by withholding exculpatory evidence. Although the nature of Petitioner's claim is somewhat unclear, he appears to seek information regarding why criminal charges were not filed against him when he was first arrested. Accordingly, some factual background is required. Petitioner was arrested on July 23, 2013, in connection with the crimes underlying his conviction; however, he was not charged. Instead, he was released the same day. Subsequently, on August 23, 2013, the district attorney filed a felony complaint against Petitioner, and a superior court judge signed a warrant for Petitioner's arrest. He was arrested several months later on December 3, 2013, and arraigned the next day.

In this action, Petitioner faults the prosecution for withholding information regarding why the district attorney's office issued a "district attorney's reject on July 24, 2013." (FAP at 22.) According to Petitioner, the purportedly withheld information would have shown that the witnesses who identified Petitioner were unsure about their identifications and gave conflicting accounts regarding whether Petitioner was the culprit. The Los Angeles County Superior Court rejected this claim on the merits. As explained below, the superior court did not commit constitutional error in doing so.

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The Due Process Clause requires the prosecution to disclose any evidence that is material either to guilt or to punishment. *Pennsylvania v. Ritchie*, 480 U.S. 39, 57, 107 S. Ct. 989, 94 L. Ed. 2d 40 (1987); *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). A *Brady* violation occurs when the prosecution fails to disclose evidence that is "favorable to an accused" and "material either to guilt or punishment." *Brady*, 373 U.S. at 87. The due process clause obligates the prosecution to disclose material exculpatory evidence on its own motion regardless of whether there is a defense request. *Kyles v. Whitley*, 514 U.S. 419, 433, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995).

Evidence is "favorable" if it is either exculpatory or impeachment evidence. *United States v. Bagley*, 473 U.S. 667, 676, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985). Evidence is "material" "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Id.* at 682 (observing a "reasonable probability" is a probability sufficient to undermine confidence in the outcome of the case); *see Kyles*, 514 U.S. at 436 (finding that, once error has been established, the error necessarily had "substantial and injurious effect or influence in determining the jury's verdict") (citing *Brecht v. Abrahamson*, 507 U.S. 619, 623, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1993).

Here, Petitioner's *Brady* claim fails for a variety of reasons. As an initial matter, there is no reason to believe that a "district attorney reject" exists. To be sure, charges were not filed against Petitioner for approximately one month after his initial arrest. But that fact does not dictate that the district attorney's office issued some kind of memorandum "rejecting" filing charges against Petitioner when he was first arrested.

Moreover, even assuming such a "district attorney reject" exists, there is no reason to believe that it contained information that was exculpatory to Petitioner. Although Petitioner asserts that the supposed "district attorney reject" would

undermine the witness identifications of Petitioner, he provides no evidence whatsoever to substantiate that assertion. *See James v. Borg*, 24 F.3d 20, 26 (9th Cir. 1994) ("Conclusory allegations which are not supported by a statement of specific facts do not warrant habeas relief."); *Jones v. Gomez*, 66 F.3d 199, 205 (9th Cir. 1995) (habeas relief not warranted where claims for relief are unsupported by facts). What is more, there is no reason to believe that any such evidence exists. On the contrary, each of the victims positively identified Petitioner as the culprit. And, all of the victims were certain of their respective identifications. Further, after Petitioner was arrested, he corroborated at least one of the victim's accounts by stating, "I took the car. I took the car from the old lady." (Lodged Doc. No. 7 at 4.)

Accordingly, the state superior court's rejection of this ground for relief was neither an unreasonable application of, nor contrary to, clearly established federal law as determined by the Supreme Court.[7, 8]

**D. The Performance of Trial Counsel and Appellate Counsel**

Petitioner contends that both his trial counsel and his appellate counsel failed to provide him with the effective assistance of counsel guaranteed by the Fifth and Sixth Amendments. First, Petitioner faults his trial counsel for failing to challenge several pre-trial witness identifications of Petitioner. Specifically, Petitioner believes that counsel should have challenged McLeod's identification

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[7] The undersigned also notes that Petitioner's *Brady* claim would fail under the *de novo* standard of review for the reasons explained above.

[8] In a separate ground for relief, Petitioner contends that his appellate counsel erred by failing to assert on appeal that the prosecution committed misconduct by withholding information regarding the purported July 24, 2013 district attorney reject. And, in yet another ground for relief, Petitioner asserts that the trial court committed misconduct by quashing a subpoena directed at obtaining information about the supposed district attorney reject. Those claims fail for the reasons stated above.

of Petitioner because she identified Petitioner in a field show-up. That procedure, according to Petitioner, was flawed because McLeod's description of the culprit did not match Petitioner, who bears a prominent tattoo on his forehead. Thus, by using a field show-up, where Petitioner was the only possible suspect, law enforcement effectively ensured that McLeod would identify Petitioner, even though his appearance did not match her description of the culprit.

Petitioner also faults trial counsel for failing at the preliminary hearing to challenge the procedure that law enforcement used to obtain positive identifications of Petitioner from third party witnesses to Petitioner's crimes. According to Petitioner, law enforcement used an impermissibly suggestive photographic line-up in obtaining those identifications. Citing the fact that he, himself, successfully moved to exclude the identifications resulting from the photographic line-ups at trial, Petitioner concludes that counsel, likewise, should have moved to exclude the identifications.

Petitioner, furthermore, contends that he was deprived of his right to effective assistance of counsel on appeal because his appellate counsel failed to assert several meritorious arguments on appeal and, instead, filed a no-merits brief, pursuant to *People v. Wende*, 25 Cal. 3d 436, 441-42, 158 Cal. Rptr. 839, 600 P.2d 1071 (1979). According to Petitioner, appellate counsel should have asserted the following claims of error of appeal: (1) Petitioner's waiver of counsel was invalid because, when he waived counsel, he did not know that the prosecution would amend its information to add a prior strike allegation;[9] (2) Petitioner was deprived of his right to present oral argument in support of his motion for new trial; (3) the bench warrant for Petitioner's arrest was invalid

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[9] Petitioner also maintains that appellate counsel should have raised a claim of prosecutorial misconduct based on the prosecution's purported breach of an agreement not to seek a prison sentence of more than eleven years and four months.

because it was based on inadmissible identification evidence;[10] and (4) trial counsel erred in failing to challenge several pre-trial witness identifications of Petitioner.

The Los Angeles County Superior Court rejected each of the foregoing allegations of attorney error. As explained below, the superior court did not commit constitutional error in doing so.

The standards for assessing the performance of trial and appellate counsel are the same. *Evitts v. Lucey*, 469 U.S. 387, 395-99, 105 S. Ct. 830, 83 L. Ed. 2d 821 (1985); *Cockett v. Ray*, 333 F.3d 938, 944 (9th Cir. 2003). As to each allegation of error, petitioner bears the burden of establishing both components of the standard set forth in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Under the first prong of that test, the petitioner must prove that his attorney's representation fell below an objective standard of reasonableness. *Id.* at 687-88. To establish deficient performance, the petitioner must show his counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 687; *Williams v. Taylor*, 529 U.S. 362, 391, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000). In reviewing trial counsel's performance, however, courts "strongly presume[] [that counsel] rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Strickland*, 466 U.S. at 690; *Yarborough v. Gentry*, 540 U.S. 1, 8, 124 S. Ct. 1, 157 L. Ed. 2d 1 (2003). Only if counsel's acts and omissions, examined within the context of all the surrounding circumstances, were outside the "wide range" of professionally competent assistance, will petitioner meet this initial burden. *Kimmelman v.*

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[10] Petitioner also faults appellate counsel for failing to argue that the prosecution committed misconduct by relying on impermissible eyewitness identification procedures in obtaining the bench warrant and admitting certain witness identification testimony at trial.

*Morrison*, 477 U.S. 365, 386, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986); *Strickland*, 466 U.S. at 690.

Under the second part of *Strickland*'s two-prong test, the petitioner must show that he was prejudiced by demonstrating a reasonable probability that, but for his counsel's errors, the result would have been different. 466 U.S. at 694. The errors must not merely undermine confidence in the outcome of the trial or the appeal, but must result in a proceeding that was fundamentally unfair. *Williams*, 529 U.S. at 393 n.17; *Lockhart*, 506 U.S. at 369. The petitioner must prove both deficient performance and prejudice. A court need not, however, determine whether counsel's performance was deficient before determining whether the petitioner suffered prejudice as the result of the alleged deficiencies. *Strickland*, 466 U.S. at 697.

**1. Trial Counsel**

Petitioner cannot satisfy either prong of the *Strickland* test with regards to his allegations of trial counsel error. First, there was nothing improper about law enforcement's use of a field show-up to obtain McLeod's positive identification of Petitioner. Courts have routinely refused to find anything impermissibly suggestive when police have used procedures similar to those used in Petitioner's case. *See United States v. Meyer*, 359 F.3d 820, 824-25 (6th Cir. 2004) (witness's pre-trial identifications of defendant as man who robbed him were not impermissibly suggestive, as would require suppression of witness's in-court identification, even though witness was shown single photograph of defendant); *Herrera v. Collins*, 904 F.2d 944, 947-48 & 947 n.2 (5th Cir. 1990) (holding that pretrial identification based on single photograph of defendant was admissible where no substantial likelihood of misidentification existed).

Indeed, both the Supreme Court and the Ninth Circuit have recognized that one person field show-ups, without more, do not violate due process. *Neil v. Biggers*, 409 U.S. 188, 198-99, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972) (stating

that results of one-person field show-up identification was admissible, even though police did not exhaust available avenues to secure multi-person line-up before presenting defendant at field line-up); *Stovall v. Denno*, 388 U.S. 293, 302, 87 S. Ct. 1967, 18 L. Ed. 2d 1199 (1967), *overr'd on other grounds by Griffith v. Kentucky*, 479 U.S. 314, 107 S. Ct. 708, 93 L. Ed. 2d 649 (1987); *United States v. Kessler*, 692 F.2d 584, 585 (9th Cir. 1982) ("[S]how-ups are not objectionable unless the procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification."); *United States v. Kessler*, 692 F.2d 584, 585-86 (9th Cir. 1982) (stating that "show-up is a permissible means of identification without requiring a showing of exigency").

Moreover, even if the field show-up at issue, here, was unduly suggestive, the resulting identification evidence would not have been excluded. *See Manson v. Brathwaite*, 432 U.S. 98, 113-14, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977); *Biggers*, 409 U.S. at 199-200. In determining whether an identification obtained by an unduly suggestive procedure is admissible, courts consider the following factors: (1) the witness's opportunity to observe the individual at the time of the crime; (2) the degree of attention focused on the individual by the witness; (3) the accuracy of the witness's description of the individual prior to the challenged procedure; (4) the level of certainty demonstrated by the witness during the challenged procedure; and (5) the elapsed time between the crime and the identification procedure. *Biggers*, 409 U.S. at 199-200.

Here, the relevant factors favored admission of McLeod's identification. McLeod was positive that Petitioner was the person who punched her and stole her car. Although she did not identify the precise nature of Petitioner's tattoo on his forehead, she nevertheless noticed that he had "blocks of dark tattoos" on his forehead. And, she immediately identified Petitioner at the field show-up. What is more, she identified Petitioner on the same day on which the crime occurred. More importantly, Petitioner effectively confessed to stealing McLeod's car.

Indeed, when he was arrested, he stated, "I took the car. I took the car from the old lady."[11] Thus, there was no basis to challenge McLeod's identification and, consequently, counsel could not have performed unreasonably in failing to do so. *See Kimmelman v. Morrison*, 477 U.S. 365, 375, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986); *Boag v. Raines*, 769 F.2d 1341, 1344 (9th Cir. 1985) (counsel's failure to raise meritless argument does not constitute ineffective assistance).

Second, assuming counsel erred in failing to challenge the identifications obtained through law enforcement's use of photographic six-packs, Petitioner can show no resulting prejudice. Representing himself, Petitioner successfully moved the trial court to exclude the identifications obtained through use of the photographic six-packs. Thus, they had no impact on the trial proceedings or the jury's verdict.

Accordingly, Petitioner is not entitled to habeas relief with respect to either of his allegations of trial counsel error.[12]

**2. Appellate Counsel**

None of Petitioner's allegations of error on appellate counsel's part warrants habeas relief. First, as explained above, there was no basis upon which to challenge Petitioner's competence to waive his right to counsel, and, moreover, he was not entitled to be re-advised of his right to counsel after the prosecution amended the information to add a prior strike allegation. (*See supra.*) Further,

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[11] When sentencing Petitioner, the trial court noted that McLeod was an "elderly woman." (Lodged Doc. No. 11 at 3 n.5.)

[12] Petitioner also contends that his appellate counsel erred in failing to assert on appeal a claim that trial counsel erred in failing to challenge the pre-trial witness identifications of Petitioner. In addition, Petitioner maintains that appellate counsel erred in failing to argue that the prosecution committed misconduct by relying on impermissibly suggestive identification eyewitness procedures to introduce certain witness identification testimony at trial. Those claims fails for the reasons stated above.

contrary to Petitioner's allegations, the prosecution did not breach any agreement not to amend the information to seek a longer prison sentence than that set forth in the original information because no such agreement existed.

Second, Petitioner suffered no prejudice from counsel's failure to assert that Petitioner was deprived of his right to present oral argument in support of his motion for new trial. The Supreme Court has never recognized a constitutional right to present oral arguments in connection with a new trial motion. Indeed, other than the right to orally deliver final argument or summation, the Supreme Court has declined to imply the existence of "a constitutional right to oral argument at any stage of the trial or appellate process." *Herring v. New York*, 422 U.S. 853, 863 n.13, 95 S. Ct. 2550, 45 L. Ed. 2d 593 (1974). Further, Petitioner does not identify any argument he would have made orally that would have persuaded the trial court to grant his motion for new trial. As such, his claim fails as wholly conclusory. *See Borg*, 24 F.3d at 26; *Jones*, 66 F.3d at 205 (*supra*).

Third, there is no merit to Petitioner's claim that the bench warrant for his arrest was invalid. All three victims identified Petitioner as the person who carjacked, or attempted to carjack, them. Moreover, Petitioner confessed to stealing one of the victim's car. Thus, irrespective of the identifications that were excluded due to the purportedly impermissibly suggestive photographic line-ups, there was ample probable cause to support Petitioner's arrest.[13]

In short, Petitioner's allegations of attorney error are meritless. Consequently, the superior court's rejection of Petitioner's allegations of attorney

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[13] In addition, Petitioner maintains that appellate counsel erred in failing to argue that the prosecution committed misconduct by relying on impermissibly suggestive eyewitness identification procedures in obtaining the bench warrant against him. That claim fails for the reasons stated above.

error was neither an unreasonable application of, nor contrary to, clearly established federal law as determined by the Supreme Court.[14]

## VII. RECOMMENDATION

The Magistrate Judge therefore recommends that the Court issue an order: (1) approving and adopting this Report and Recommendation; and (2) directing that judgment be entered denying the First Amended Petition on the merits with prejudice.

DATED: January 25, 2019

/S/ FREDERICK F. MUMM
FREDERICK F. MUMM
United States Magistrate Judge

[14] The undersigned also notes that Petitioner's allegations of attorney error would fail under the *de novo* standard of review for the reasons explained above.

**NOTICE**

Reports and Recommendations are not appealable to the Court of Appeals, but are subject to the right of any party to timely file Objections as provided in the Local Rules Governing the Duties of the Magistrate Judges, and review by the District Judge whose initials appear in the docket number. No Notice of Appeal pursuant to the Federal Rules of Appellate Procedure should be filed until entry of the Judgment of the District Court.