

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

SEP 8 2017

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

MARCUS DESHONNE HAYS,

Petitioner-Appellant,

v.

J. SOTO, Warden,

Respondent-Appellee.

No. 16-56912

D.C. No. 2:15-cv-09589-FMO-JC
Central District of California,
Los Angeles

ORDER

Before: CALLAHAN and M. SMITH, Circuit Judges.

The motion for reconsideration and petition for panel rehearing and rehearing en banc (Docket Entry No. 8) is construed as a motion for reconsideration or reconsideration en banc. So construed, the motion for reconsideration is denied and the motion for reconsideration en banc is denied on behalf of the court. *See* 9th Cir. R. 27-10; 9th Cir. Gen. Ord. 6.11.

Any other motions are denied as moot.

No further filings will be entertained in this closed case.

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No. 16-56912

D.C. No. 2:15-cv-09589-FMO-JC
Central District of California,
Los Angeles

ORDER

Before: KOZINSKI and HAWKINS, Circuit Judges.

The request for a certificate of appealability (Docket Entry No. 5) is denied because appellant has not made a “substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2); *see also Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Any pending motions are denied as moot.

DENIED.

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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA
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11 MARCUS DESHONNE HAYS,

12 Petitioner,

13 v.

14 J. SOTO,

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16 Respondent.
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Case No. CV 15-9589 SJO(JC)

ORDER DENYING A
CERTIFICATE OF
APPEALABILITY

18 An appeal may not be taken from the denial by a United States District
19 Judge of an application for a writ of habeas corpus in which the detention
20 complained of arises from process issued by a state court "unless a circuit justice or
21 a circuit or district judge issues a certificate of appealability under 28 U.S.C.
22 § 2253(c)." Fed. R. App. P. 22(b).

23 Pursuant to Rule 11(a) of the Rules Governing Section 2254 Cases in the
24 United States District Courts, the District Court "must issue or deny a certificate of
25 appealability when it enters a final order adverse to applicant."

26 "A certificate of appealability may issue . . . only if the applicant has made a
27 substantial showing of the denial of a constitutional right." 28 U.S.C.

28 § 2253(c)(2). A "substantial showing . . . includes showing that reasonable jurists

1 could debate whether (or, for that matter, agree that) the petition should have been
2 resolved in a different manner or that the issues presented were 'adequate to
3 deserve encouragement to proceed further.'" Slack v. McDaniel, 529 U.S. 473,
4 484 (2000) (citation omitted); see also Sassounian v. Roe, 230 F.3d 1097, 1101
5 (9th Cir. 2000). Thus, "[w]here a district court has rejected the constitutional
6 claims on the merits, . . . [t]he petitioner must demonstrate that reasonable jurists
7 would find the district court's assessment of the constitutional claims debatable or
8 wrong." Slack, 529 U.S. at 484.

9 Concurrently with the issuance of this Order, the Court has denied the
10 Petition for Writ of Habeas Corpus ("Petition") on its merits and has directed that a
11 final judgment adverse to the petitioner be entered.

12 In accordance with 28 U.S.C. § 2253(c)(2), the Court finds that petitioner
13 has not made the requisite substantial showing of a denial of a constitutional right
14 with respect to any of the grounds for relief set forth in the Petition.

15 THEREFORE, pursuant to 28 U.S.C. § 2253, a certificate of appealability is
16 denied.

17 DATED: November 29, 2016

18
19 /s/
20 HONORABLE FERNANDO M. OLGUIN
21 UNITED STATES DISTRICT JUDGE
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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MARCUS DESHONNE HAYS,

Petitioner,

V.

J. SOTO,

Respondent.

Case No. CV 15-9589 FMO(JC)

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

Pursuant to 28 U.S.C. § 636, the Court has reviewed the Petition for Writ of Habeas Corpus (“Petition”) and all of the records herein, including the attached Report and Recommendation of United States Magistrate Judge (“Report and Recommendation”), and petitioner’s objections to the Report and Recommendation (“Objections”). The Court has further made a *de novo* determination of those portions of the Report and Recommendation to which objection is made. The Court concurs with and accepts the findings, conclusions, and recommendations of the United States Magistrate Judge and overrules the Objections.

///

1 IT IS ORDERED that the Petition is denied on its merits, that this action is
2 dismissed with prejudice, and that Judgment be entered accordingly.

3 IT IS FURTHER ORDERED that the Clerk serve copies of this Order, the
4 Report and Recommendation, and the Judgment herein on petitioner and counsel
5 for respondent.

6 IT IS SO ORDERED.

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8 DATED: November 29, 2016

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10 _____/s/_____
11 HONORABLE FERNANDO M. OLGUIN
12 UNITED STATES DISTRICT JUDGE
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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA
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11 MARCUS DESHONNE HAYS,
12 Petitioner,
13 v.
14 J. SOTO,
15 Respondent.
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Case No. CV 15-9589 FMO(JC)

REPORT AND RECOMMENDATION
OF UNITED STATES MAGISTRATE
JUDGE

17 This Report and Recommendation is submitted to the Honorable
18 Fernando M. Olguin, United States District Judge, pursuant to the provisions of
19 28 U.S.C. § 636 and General Order 05-07 of the United States District Court for
20 the Central District of California.

21 **I. SUMMARY**

22 On December 11, 2015, Marcus Deshonne Hays (“petitioner”), a state
23 prisoner proceeding *pro se*, filed a Petition for Writ of Habeas Corpus by a Person
24 in State Custody with multiple attachments and exhibits (“Petition”), challenging a
25 judgment in Los Angeles County Superior Court. (Petition at 2).¹ Petitioner
26

27
28 ¹As the pages of the Petition are not consecutively numbered, the Court cites to the pages
as they appear on the electronically scanned version on the docket.

1 asserts a single ground for relief – that his trial counsel’s failure to call a DNA
2 expert to refute the State’s DNA evidence deprived him of his equitable and
3 constitutional right to the effective assistance of counsel and constituted a breach
4 of his counsel’s contractual obligation to present favorable witnesses on his
5 behalf. (Petition at 5).

6 On April 19, 2016, respondent filed an Answer and a supporting
7 memorandum (“Answer”) and lodged multiple documents (“Lodged Doc.”),
8 including the Clerk’s Transcript (“CT”), the Reporter’s Transcript (“RT”), and the
9 post-remand Clerk’s Transcript, *i.e.*, the Clerk’s Transcript following a remand by
10 the California Court of Appeal (“PRCT”). On June 24, 2016, petitioner filed a
11 Traverse.

12 For the reasons explained below, the Petition should be denied, and this
13 action should be dismissed with prejudice.

14 **II. PROCEDURAL HISTORY**

15 On July 28, 2011, a Los Angeles County Superior Court jury found
16 petitioner guilty of two counts of kidnapping (Cal. Penal Code § 207(a)) and two
17 counts of second degree robbery (Cal. Penal Code § 211) and found true
18 allegations that petitioner personally used a handgun in committing the offenses
19 (Cal. Penal Code § 12022.53(b)). (CT 272-25, 278-80). In a bifurcated
20 proceeding, the trial court found that petitioner had suffered two prior convictions
21 in Georgia which qualified as serious felonies under California’s Three Strikes law
22 (Cal. Penal Code §§ 667(b)-(i), 1170.12(a)-(d)) and California Penal Code section
23 667(a)(1) (“Section 667(a)(1)”), and that petitioner had served a prior prison term
24 as defined in California Penal Code section 667.5(b) (“Section 667.5(b)"). (CT
25 321-22). On September 21, 2011, the court sentenced petitioner to a total of sixty-
26 nine years, four months to life in state prison. (CT 318-25).

27 On April 18, 2013, the California Court of Appeal reversed the trial court’s
28 findings that one of petitioner’s two Georgia convictions qualified as a serious

1 felony within the meaning of California's Three Strikes law and Section 667(a)(1),
2 vacated the sentence, and remanded for further proceedings consistent therewith.
3 (Lodged Doc. 7). The California Court of Appeal affirmed the judgment in all
4 other respects. (Lodged Doc. 7).

5 On November 26, 2013, following the remand, the trial court resentenced
6 petitioner to thirty-eight years, eight months in state prison. (PRCT 11-16).

7 Petitioner appealed his resentencing on the ground that the trial court
8 improperly imposed a one-year sentence enhancement under Section 667.5(b).
9 (Lodged Doc. 12). Respondent conceded the error. (Lodged Doc. 13). On
10 January 14, 2015, the California Court of Appeal modified the judgment to strike
11 the Section 667.5(b) enhancement. (Lodged Doc. 14). On April 30, 2015, the Los
12 Angeles County Superior Court filed an amended abstract of judgment reflecting
13 such modification and a state prison sentence of thirty-seven years, eight months.
14 (Lodged Doc. 15).

15 Petitioner also repeatedly sought, but was denied collateral and other forms
16 of relief relative to the judgment in issue in state court. (Lodged Doc. 1 at 30-31;
17 Lodged Docs. 9-11, 16-21).

18 **III. FACTS**

19 **A. The Prosecution's Case-in-Chief**

20 **1. The Robbery**

21 On January 15, 2010, at approximately 9:00 a.m., Zahn Wang and Ting Mo,
22 a married couple, arrived at their check-cashing business in Inglewood. At first,
23 nothing seemed out of the ordinary. They entered the store, and proceeded to the
24 back employee area, which was separated from the front of the store by a
25 bulletproof door. (RT 605-07, 634-36, 646-47). Wang carried a Bank of America
26 bag containing approximately \$17,000. He removed the money from the bag and
27 placed it in the drawers for business that day. Meanwhile, Mo worked on a laptop
28 computer. (RT 605-09, 645-47, 669).

1 After Wang put the money away, he walked over to where Mo was working
2 on the computer. (RT 611, 669). Suddenly, a robber rushed in, grabbed Wang
3 from behind, and pointed a gun at his head. (RT 611-14, 628, 670-71). A second
4 robber grabbed Mo. (RT 614, 671). The first robber wore a green and orange
5 construction worker's jacket and a wool cap. (RT 612-13, 909, 917). The second
6 robber wore dark clothes and a wool hat. (RT 907-10). Wang and Mo could not
7 see the robbers' faces. (RT 613, 671).

8 The robbers pushed Wang and Mo down the hallway and into a storage
9 room at the back of the store. They forced them to lie on the ground and tied their
10 hands behind their backs. (RT 615-17, 671-72, 919). One of the robbers stayed in
11 the back room and watched over Wang and Mo. The other took Wang's keys and
12 returned to the front of the store, where he began searching through the drawers.
13 (RT 620-22, 909).

14 Around this time, Wang's father and a man named Quan Hua Li were
15 outside the check-cashing store, and they noticed that something did not seem
16 right. (RT 639-40, 1219-20). The two men and Edwin Ordenana, an employee at
17 a nearby motel, approached the store. (RT 1219-21). Ordenana looked through
18 the glass doors and saw two men inside. The men were wearing construction
19 worker's uniforms, including helmets and an orange vest. (RT 1220-22). One of
20 the men had a backpack and a gun. (RT 1285). Ordenana could also see Wang
21 and Mo, and they appeared frightened. (RT 1224-25). Ordenana left, and Li
22 called 911. (RT 1225).

23 Inside the store, Wang and Mo heard the robber at the front of the store tell
24 someone that the business was closed for an "FBI inspection." Shortly thereafter,
25 the robber at the front of the store shouted to the robber who was watching Wang
26 and Mo that someone was making a phone call and they needed to leave. The
27 robber who was watching the couple grabbed a red tool, told them not to move,
28 and left. (RT 621-23, 910-11).

1 Ordenana saw the two men leave the store and walk away in different
2 directions. They were still wearing construction worker's uniforms. One of the
3 men carried a bag, and the other had a small computer. (RT 1226-28, 1230-32,
4 1286-87). One of the men discarded his helmet. (RT 1288). Ordenana later
5 found the computer on the street and returned it to Wang. (RT 1231-32).

6 Meanwhile, after waiting a couple of minutes to make sure the robbers had
7 left, Wang and Mo got up from the ground and tried to untie themselves. Then,
8 the police arrived. (RT 623-24, 912). Wang discovered that approximately
9 \$17,000 had been removed from the store's drawers and that Mo's laptop had been
10 moved. A white construction helmet was left next to the laptop. (RT 624-27, 913,
11 1015). Later, Wang discovered a hole in the roof with a rope hanging down from
12 it. The hole had not been there prior to the robbery. Wang believed that the
13 robbers must have entered the store from the rooftop. (RT 626-29, 654-55).

14 Wang described the first robber who held a gun to his head as a black man,
15 approximately five feet seven inches tall. (RT 648-49). Neither Wang nor Mo
16 could identify the robbers in a field show-up given shortly after the robbery. (RT
17 657-58, 920).

18 **2. Post-Robbery Events**

19 On the morning of January 15, 2010, Ema Koppelman was at her home, near
20 the check-cashing store. She saw a black man walking down the street. He was
21 "stocky" and approximately five feet ten inches to six feet tall. He was wearing a
22 "service repair" worker's uniform and carrying a black bag. She stepped outside
23 and asked him, "What's going on?" She made eye contact with him, but he did
24 not respond. She then noticed another black man running towards her neighbor's
25 back yard. The first man began to run in the same direction. She continued to
26 watch them until they were out of sight, and then she called 911. (RT 1048-54).
27 An audio recording of the call was played for the jury. (RT 1054; CT 223-24).

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1 Carmen Paredes also lived nearby and was at home on the morning of
2 January 15, 2010. She looked through her window and saw a black man wearing a
3 construction worker's hat running very fast through her yard. Subsequently, she
4 found a brown beanie cap and a red crowbar in her yard. These items did not
5 belong to her. She called the police. (RT 1040-43, 1045-46). An audio recording
6 of Paredes's 911 call was played for the jury. (RT 1045; CT 220-22).

7 That same morning, at approximately 9:30 a.m., Charles Gonzalez was
8 driving to pick up his paycheck from his place of business when, all of a sudden,
9 petitioner ran into the middle of the street and forced him to stop the car.
10 Petitioner was wearing a white tank top and grey sweatpants. He offered to pay
11 Gonzalez \$20 to drive him to the Metro station, which was two blocks away.
12 Gonzalez agreed, and petitioner got into the front passenger seat. Suddenly, a
13 second man, wearing a black sport's shirt, appeared "out of nowhere" and jumped
14 into the back seat of the car. Petitioner told Gonzalez that this man was his friend,
15 and that petitioner would pay Gonzalez money to drive them. (RT 929-36, 945).

16 On the way to the Metro station, Gonzalez tried to strike up conversation
17 with the two men. However, petitioner was acting very nervous and kept looking
18 around. Petitioner asked the other man, "Where's the money?" The other man did
19 not reply. Gonzalez grew suspicious and wanted the two men out of his car. He
20 dropped them at the Metro station and told them that he did not want their money.
21 (RT 935-37, 943-47).

22 Gonzalez then drove to his workplace to pick up his check. On his way
23 home, he saw police helicopters. When his wife informed him what had
24 happened, Gonzalez contacted the police and reported his encounter with the two
25 men. At that point, approximately fifteen to twenty-five minutes had passed since
26 Gonzalez had dropped petitioner off. (RT 938, 952-53). Approximately fifteen
27 minutes after his report to the police, Gonzalez was brought to a field show-up,
28 and he identified petitioner as the man who approached his car in the white tank

1 top and grey sweat pants. (RT 939). Gonzalez also identified petitioner in court.
2 (RT 936-37).

3 Taiwan Washington, a gardener for the Department of Water and Power
4 ("DWP") was working near the check-cashing store on the morning of the
5 robbery. As Washington was preparing to load garden trimmings into his DWP
6 van, which was parked on the street, he noticed petitioner sitting in the front
7 passenger seat. Petitioner was wearing Washington's extra DWP uniform shirt.
8 (RT 960-66, 975).

9 When petitioner saw Washington, he jumped out of the van. He told
10 Washington that he was "being chased by Mexicans." Washington pulled his shirt
11 off of petitioner. He felt scared and tried to hit petitioner. Petitioner tried to run
12 away, but Washington grabbed his t-shirt and ripped it. Washington chased after
13 petitioner but stopped when he reached the other side of the street. (RT 966, 975-
14 78).

15 Subsequently, Washington flagged down a passing police car and reported
16 the incident. He pointed the police in the direction that petitioner went. (RT 969,
17 978). Later that day, Washington identified petitioner in a field show-up. (RT
18 970, 979). On August 12, 2010, Washington identified petitioner from a live line-
19 up. (RT 972-73, 979-81). Washington also identified petitioner at trial. (RT
20 964).

21 3. Police Investigation

22 Los Angeles County Sheriff's Detective John Silverstein responded to the
23 check-cashing store sometime after 9:00 a.m. (RT 985-86). He discovered a hole
24 in the roof and a rope tied to one of the building's wood beams. (RT 991-92).
25 Detective Silverstein believed that this was the robbers' point of entry. (RT 989-
26 90, 1027).

27 Detective Silverstein found a construction worker's hard hat left inside the
28 check-cashing store. (RT 1015). In an alley next to a nearby home, he found

1 another hard hat with a greenish-yellow reflective vest inside. He also found a
2 crowbar. (RT 995-97, 1016, 1019). In the backyard of that home, he found a
3 brown beanie cap, a blue button down shirt, and some latex gloves. (AR 999-
4 1002).

5 In the backyard of another nearby home, Detective Silverstein found more
6 latex gloves and a pair of paint-splattered denim jeans with a prepaid cell phone
7 inside one of its pockets. (RT 1003-06, 1028). In the side yard of the house, he
8 recovered a pair of black gloves with latex gloves inside. He also recovered two
9 bags, one containing a loaded handgun and a large sum of money, and the other
10 containing tools. (RT 1006-10). Police officers returned the money to Wang and
11 Mo. (RT 637, 1202-06).

12 Next to the bags, Detective Silverstein found another construction worker's
13 shirt and a reflective vest. (RT 1011). In the front yard, he found a black
14 flashlight and a ripped pair of denim jeans with a set of keys in the pocket. (RT
15 1012-13, 1021). On top of the fence separating the side yard and the front yard, he
16 found a small piece of denim that matched the rip in the jeans. (RT 1014, 1020).
17 Across the street of the house, he found a black beanie cap. (RT 1013-14).

18 Deputies Sonia Quezada and Fred Jimenez responded to the crime scene on
19 the morning of the robbery. They were flagged down by Washington, who gave
20 them a description of petitioner and pointed them in the direction that he went.
21 Based on that information, Deputy Quezada went to look for petitioner. She found
22 him making a phone call in the parking lot of a liquor store. He was wearing a
23 torn white tank top and grey sweat pants. He repeatedly stated that he was
24 homeless. He did not say anything else. Deputy Quezada identified petitioner at
25 trial. (RT 1208-10, 1215-16).

26 Following his arrest, petitioner provided an address on 76th Street, in the
27 City of Inglewood, as his place of residence. Detective Silverstein took the keys
28 that were found inside the jeans to that address, which was "miles away" from the

1 crime scene. The house key did not work at the residence, but the people who
2 lived there knew petitioner. They told Detective Silverstein that petitioner lived
3 across the street. The car key opened a Chevy truck parked nearby. Inside the
4 truck, he found a blue worker's shirt similar to the ones found near the crime
5 scene, and paperwork reflecting petitioner's name, booking number and bail
6 information. The truck was registered to Wilbur Jones. (RT 1022-23, 1031-34).

7 **4. DNA Evidence**

8 Flynn Lamas, a senior criminalist for the Los Angeles County Sheriff's
9 Department, testified as an expert for the prosecution. Lamas conducted DNA
10 analysis. (RT 1236-38). He was provided a sample of petitioner's DNA, and he
11 compared petitioner's profile to the DNA taken from evidence collected in this
12 case. (RT 1244-45, 1248-49).

13 Lamas tested the brown beanie hat for DNA. He concluded that at least two
14 people contributed to the DNA found on that hat. Petitioner's profile matched that
15 of the major contributor. (RT 1252). Lamas testified that the probability that
16 another person in the population would share the same DNA (the "random match
17 probability") was one in 414 quintillion for the Caucasian population, one in 443
18 quintillion for the Black population, and one in 5.16 sextillion for the Hispanic
19 population. (RT 1259-60).

20 Lamas also tested two gloves. One glove had insufficient DNA to be tested.
21 (RT 1517). As for the other glove, Lamas was only able to obtain a partial profile.
22 Petitioner was included as a possible source for this profile. (RT 1267). The
23 probability of such a match was one in 18,960 for the Caucasian population, one
24 in 7,299 for the Black population and one in 6,954 for the Hispanic population.
25 (RT 1268).

26 Finally, Lamas tested two hard hats for DNA. One of them had insufficient
27 DNA to be tested. (RT 1509). The other hard hat had DNA which was consistent
28 with a mixture of at least three people, and petitioner was included as a possible

1 contributor. (RT 1261, 1509-10). The combined probability of inclusion was
2 calculated as 1 in 6.97 million for the Caucasian population, one in 2.02 million
3 for the Black population, and one in 33.8 million for the Hispanic population. (RT
4 1264-65).

5 **B. Defense Evidence**

6 **1. Petitioner's Testimony**

7 Petitioner testified on his own behalf to the following:

8 On the morning of the robbery, he walked from 5257 Morley Avenue,
9 where he lived with his cousin, to the Snappy Liquor Store on Imperial Highway
10 in order to get a "Joose" drink, a hard-to-find alcoholic beverage that he knew the
11 store carried. (RT 1565-68, 1609, 1611, 1807, 1812). When he arrived at the
12 store, he realized that his money must have fallen out of his pocket, so he went to a
13 pay phone to call his cousin and ask him to bring money. (RT 1566-69, 1571).

14 Petitioner was making a call when deputies approached and ordered him to
15 hang up the phone. They asked petitioner if he had any weapons and instructed
16 him to lift up his shirt. Petitioner removed his t-shirt and placed it on top of the
17 phone booth. He was wearing a white tank underneath. The deputies then forced
18 him to the ground, ripping his tank top in the process. (RT 1572-75, 1626-29).

19 Petitioner had no involvement in the robbery of the check-cashing store. He
20 had never been in the check-cashing store and was not familiar with the store or
21 the practices of its owner. He did not have access to construction worker's
22 clothing and did not own a gun. He never got a ride from Gonzalez. He never got
23 into a fight with Washington, and Washington did not rip his t-shirt. He had never
24 seen either Gonzalez or Washington prior to the trial. He never told the arresting
25 police officers that he was homeless. (RT 1579-83, 1588-90, 1635-37, 1640-41).

26 When he was booked, petitioner provided Detective Silverstein with an
27 address on 76th Street in Inglewood as his residence. He split his time between
28 the 76th Street residence and 5257 Morley Avenue. He kept his Saab and his

1 clothes at 76th Street and received his mail there. He did not own a truck and did
2 not know a Wilbur Jones. He did not know how his booking paperwork and
3 phone number were found inside the Chevy truck. He did not own a black beanie
4 with a star on it, but did own brown, black and grey beanies. (RT 1584-87, 1589,
5 1815-16).

6 During his interview with Detective Silverstein, petitioner did not say
7 anything about the robbery. He did not give several versions of his whereabouts
8 on the day of the incident. (RT 1590-91, 1818). Although petitioner stated on his
9 booking sheet that his occupation was "sales," he was actually a student. (RT
10 1620-22).

11 Petitioner posted bail and was released from jail, after which he went to the
12 76th Street address. His aunt informed him that deputies had come to the house
13 while he was gone. (RT 1644-45). Petitioner noticed that some of his documents
14 were missing, along with brown, grey, and black beanies and some t-shirts. (RT
15 1588-99, 1641-43, 1803).

16 On May 18, 1998, in the State of Georgia, petitioner pleaded guilty to a
17 felony involving moral turpitude. (RT 1591, 1601). He was sentenced to twenty
18 years in state prison, and received another ten years suspended sentence. He
19 worked at a camp facility, and served eight years. (RT 1591-92, 1601-02). On
20 November 7, 2005, petitioner was convicted of felony possession of marijuana.
21 (RT 1592-94).

22 2. Other Defense Witnesses

23 Los Angeles Sheriff's Deputy Carl Lumpkin was called by the defense as a
24 witness. He testified that he interviewed Mo on the day of the robbery and she
25 never mentioned that either of the robbers was wearing a brown beanie. (RT
26 1550). She said that the robbers wore dark clothes, yellow-green construction
27 vests, and masks covering the lower part of their faces. (RT 1552).

28 ///

1 Detective Silverstein was also called by the defense as a witness. He
2 testified that only Gonzalez's fingerprints were found in Gonzalez's car. (RT
3 1556). Further, one of the keys that was found near the crime scene belonged to a
4 postal box. Detective Silverstein never obtained the name of the person who had
5 rented the postal box. (RT 1558). Finally, Detective Silverstein testified that he
6 personally obtained the DNA sample from petitioner, and that he stored it in an
7 unsealed box. (RT 1560).

8 **C. Prosecution's Rebuttal Case**

9 The prosecution called Detective Silverstein in its rebuttal case. He testified
10 to the following:

11 On January 17, 2010, Detective Silverstein interviewed petitioner.
12 Silverstein thought he had recorded the interview, but he discovered later that the
13 recording device had malfunctioned. Petitioner told Detective Silverstein that he
14 believed he was in jail because he stole a truck. Petitioner stated that, on the day
15 of the robbery, Washington had driven past him and asked him to buy alcohol. He
16 said he found clothes in the garbage nearby and went to Washington's truck to
17 change into them. (RT 1828-32).

18 Petitioner's story changed several times during the course of the interview.
19 At one point, petitioner told Detective Silverstein that he had not been involved in
20 any altercation with Washington, but, at another point, he said he asked to borrow
21 Washington's phone and Washington had thrown a punch at him. He also said
22 that he had been with two white men and that they walked to the liquor store,
23 where they stayed all day. (RT 1831-32).

24 When Detective Silverstein confronted petitioner with several pieces of
25 evidence from the check-cashing store, petitioner stated, "Well, then I guess I'm
26 guilty, then." Petitioner would not answer any further questions. He was released

27 ///

28 ///

1 from jail the next day. Silverstein did not seize any items from the 76th Street
2 residence. (RT 1833-34).²

3 **IV. STANDARD OF REVIEW**

4 This Court may entertain a petition for writ of habeas corpus on “behalf of a
5 person in custody pursuant to the judgment of a State court only on the ground that
6 he is in custody in violation of the Constitution or laws or treaties of the United
7 States.” 28 U.S.C. § 2254(a). A federal court may not grant an application for
8 writ of habeas corpus on behalf of a person in state custody with respect to any
9 claim that was adjudicated on the merits in state court proceedings unless the
10 adjudication of the claim: (1) “resulted in a decision that was contrary to, or
11 involved an unreasonable application of, clearly established Federal law, as
12 determined by the Supreme Court of the United States”; or (2) “resulted in a
13 decision that was based on an unreasonable determination of the facts in light of
14 the evidence presented in the State court proceeding.” 28 U.S.C. § 2254(d).³

15 In applying the foregoing standards, federal courts look to the last reasoned
16 state court decision. See Smith v. Hedgpeth, 706 F.3d 1099, 1102 (9th Cir.), cert.
17 denied, 133 S. Ct. 1831 (2013). Where there has been one reasoned state
18 judgment rejecting a federal claim, later unexplained orders upholding that
19 judgment or rejecting the same claim are presumed to rest upon the same ground.
20 Ylst v. Nunnemaker, 501 U.S. 797, 803 (1991); Cannedy v. Adams, 706 F.3d
21 1148, 1158 (9th Cir. 2013) (it remains Ninth Circuit practice to “look through”
22

23 ²Petitioner disputes this fact and contends that Detective Silverstein did seize items from
24 such residence. (Traverse at 5; Traverse Appendix B).

25 ³When a federal claim has been presented to a state court and the state court has denied
26 relief, it may be presumed that the state court adjudicated the claim on the merits in the absence
27 of any indication or state-law procedural principles to the contrary. Harrington v. Richter, 562
28 U.S. 86, 99 (2011); see also Johnson v. Williams, 133 S. Ct. 1088, 1094-96 (2013) (extending
Richter presumption to situations in which state court opinion addresses some, but not all of
defendant’s claims).

1 summary denials of discretionary review to the last reasoned state-court decision),
2 as amended on denial of rehearing, 733 F.3d 794 (9th Cir. 2013), cert. denied, 134
3 S. Ct. 1001 (2014); but see Kernan v. Hinojosa, 136 S. Ct. 1603, 1606 (2016) (Ylst
4 presumption is rebuttable; strong evidence can refute it).

5 However, to the extent no such reasoned opinion exists, courts must conduct
6 an independent review of the record to determine whether the state court clearly
7 erred in its application of controlling federal law, and consequently, whether the
8 state court's decision was objectively unreasonable. Delgado v. Lewis, 223 F.3d
9 976, 982 (9th Cir. 2000), abrogated on other grounds, Lockyer v. Andrade, 538
10 U.S. 63, 75-76 (2003); see also Harrington v. Richter, 562 U.S. 86, 98 (2011)
11 ("Where a state court's decision is unaccompanied by an explanation, the habeas
12 petitioner's burden still must be met by showing there was no reasonable basis for
13 the state court to deny relief."); Cullen v. Pinholster, 563 U.S. 170, 187 (2011)
14 ("Section 2254(d) applies even where there has been a summary denial.") (citation
15 omitted).

16 When it is unclear whether deference under the foregoing standards applies,
17 federal habeas courts can deny writs of habeas corpus under Section 2254 by
18 engaging in a *de novo* review. Berghuis v. Thompkins, 560 U.S. 370, 390 (2010).
19 When it is clear that the state court has not decided an issue on the merits, or when
20 a state court's adjudication of a claim on the merits results in a decision contrary
21 to or involving an unreasonable application of clearly established federal law or is
22 based on an unreasonable determination of the facts, review is also *de novo*. See
23 Cone v. Bell, 556 U.S. 449, 472 (2009); Panetti v. Quarterman, 551 U.S. 930, 953
24 (2007); Hurles v. Ryan, 752 F.3d 768, 778 (9th Cir.), cert. denied, 135 S. Ct. 710
25 (2014).

26 When a claim presented in a federal habeas petition is unexhausted, a
27 federal habeas court may deny relief when it is perfectly clear that the applicant

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1 does not raise even a colorable federal claim. See Cassett v. Stewart, 406 F.3d
2 614, 623-24 (9th Cir. 2005), cert. denied, 546 U.S. 1172 (2006).

3 In this case, for reasons discussed below, the Court has conducted a *de novo*
4 review of petitioner's claim. See infra note 5.

5 **V. DISCUSSION⁴**

6 In his sole claim for relief, petitioner essentially contends that his trial
7 counsel was contractually obligated to present favorable witnesses, that she
8 breached such contract by failing to call a DNA expert to refute the State's DNA
9 evidence, and that such failure deprived petitioner of his equitable and
10 constitutional rights to the effective assistance of counsel. (Petition at 5, 11, 18-
11 28). Although petitioner bristles at the notion that he is effectively asserting an
12 ineffective assistance of counsel claim predicated upon his counsel's failure to call
13 a DNA expert to refute the State's DNA evidence (see, e.g., Traverse at 9, 18), the
14 Court construes his claim as such because the claim is otherwise not cognizable on
15 federal habeas review. See 28 U.S.C. § 2254(a) (court may entertain a petition for
16 writ of habeas corpus on behalf of person in custody pursuant to the judgment of
17 State court only on the ground that he is in custody in violation of the Constitution
18 or laws or treaties of the United States). Petitioner is not entitled to federal habeas
19 relief on this claim.⁵

21 ⁴The Court has read, considered and rejected on the merits all of petitioner's contentions.
22 The Court discusses petitioner's principal contentions herein.

23 ⁵Respondent argues that petitioner's sole claim is unexhausted because, although
24 petitioner argued to the California Supreme Court that the Superior Court should be compelled to
25 grant petitions containing petitioner's instant claim, petitioner did not fairly present the
26 underlying claim itself to the California Supreme Court. (Answer at 14-15) (citing Lodged Docs.
27 18 & 20). Respondent also argues that the claim is procedurally defaulted because the Los
28 Angeles County Superior Court – the last state court to issue a reasoned decision addressing it –
rejected the claim on procedural grounds. (Answer at 13-17) (citing Lodged Doc. 1 at 30-31 &
Lodged Doc. 9). The Court need not and has not resolved such procedural matters because, even
(continued...)

1 **A. Pertinent Law**

2 The Sixth Amendment guarantees the effective assistance of counsel at trial.
3 See Strickland v. Washington, 466 U.S. 668, 686 (1984). To warrant habeas relief
4 on an ineffective assistance of counsel claim, a petitioner must demonstrate both
5 that: (1) counsel's performance was deficient; and (2) the deficient performance
6 prejudiced his defense. Id. at 668, 687-93, 697. As both prongs of the Strickland
7 test must be satisfied to establish a constitutional violation, failure to satisfy either
8 prong requires that an ineffective assistance claim be denied. Id. at 697.

9 Counsel's representation is "deficient" if it "fell below an objective standard
10 of reasonableness." Id. at 688; Harrington v. Richter, 562 U.S. at 104, 111.
11 Courts must apply a "strong presumption" that an attorney's performance was
12 within "the wide range of reasonable professional assistance." Richter, 562 U.S.
13 at 104 (citation omitted). A petitioner can overcome the presumption only by
14 showing that, when viewed from counsel's perspective at the time, the challenged
15 errors were so egregious that counsel's representation "amounted to incompetence
16 under 'prevailing professional norms.'" Id. at 105 (citation omitted).

17 Deficient performance is prejudicial if "there is a reasonable probability
18 that, but for counsel's unprofessional errors, the result of the proceeding would
19 have been different." Strickland, 466 U.S. at 694. A reasonable probability is one
20 that is "sufficient to undermine confidence in the outcome" of the trial. Id. The
21

22 ⁵(...continued)

23 assuming respondent is correct, it would not affect the outcome of this matter as the Court
24 concludes, based upon a *de novo* review, that petitioner's claim is not colorable. See Cassett,
25 406 F.3d at 623-24; see also Franklin v. Johnson, 290 F.3d 1223, 1232 (9th Cir. 2002) ("appeals
26 courts are empowered to, and in some cases should, reach the merits of habeas petitions if they
27 are, on their face and without regard to any facts that could be developed below, clearly not
28 meritorious despite an asserted procedural bar") (citing Lambrix v. Singletary, 520 U.S. 518, 525
 (1997)); Barrett v. Acevedo, 169 F.3d 1155, 1162 (8th Cir.) ("judicial economy sometimes
 dictates reaching the merits if the merits are easily resolvable against a petitioner while the
 procedural bar issues are complicated"), cert. denied, 528 U.S. 846 (1999).

1 likelihood that a verdict would have been different “must be substantial, not just
2 conceivable.” Richter, 562 U.S. at 112 (citation omitted).

3 **B. Analysis**

4 Petitioner fails to overcome the strong presumption that his trial counsel’s
5 decision not to call a DNA expert was sound trial strategy under the
6 circumstances. Strickland, 466 U.S. at 689. In general, an attorney’s decision not
7 to call a witness constitutes a matter of trial tactics which this court should not
8 second-guess. See, e.g., United States v. Harden, 846 F.2d 1229, 1232 (9th Cir.)
9 (decision not to call witness to testify not unreasonable), cert. denied, 488 U.S.
10 910 (1988); see also Murray v. Maggio, 736 F.2d 279, 282 (5th Cir. 1994)
11 (counsel’s decision not to call a particular witness generally is “within the realm of
12 trial strategy”); United States v. Long, 674 F.2d 848, 855 (11th Cir. 1982) (“This
13 Court will not second-guess tactical decisions of counsel in deciding whether to
14 call certain witnesses.”).

15 In this case, the record reveals that petitioner’s trial counsel did in fact
16 obtain an expert, Sam Leonard, and consulted with him prior to cross-examining
17 the prosecution’s expert Flynn Lamas. (RT 1234; Lodged Doc. 16 at Ex. C). It
18 can therefore be inferred that counsel made a strategic decision not to call Leonard
19 as a witness and instead decided that the most effective way to challenge the
20 prosecution’s DNA expert was through cross-examination after consultation with
21 Leonard, and that any benefit of calling Leonard was likely outweighed by the risk
22 of exposing him to potentially damaging cross-examination by the prosecutor.
23 This was a reasonable method of proceeding. See Richter, 562 U.S. at 111
24 (“Strickland does not enact Newton’s third law for the presentation of evidence,
25 requiring for every prosecution expert an equal and opposite expert from the
26 defense. In many instances, cross-examination will be sufficient to expose defects
27 in an expert’s presentation.”); Bonin v. Calderon, 59 F.3d 815, 834 (9th Cir. 1995)
28 (“while the Constitution requires that a criminal defendant receive effective

1 assistance of counsel, the presentation of expert testimony is not necessarily an
2 essential ingredient of a reasonably competent defense.”), cert. denied, 516 U.S.
3 1051 (1996).

4 Indeed, counsel’s cross-examination of Lamas was thorough and competent.
5 In response to counsel’s questioning, Lamas acknowledged that the DNA evidence
6 did not conclusively establish that petitioner’s DNA was on the hard hat. (See RT
7 1510). He also made the following concessions: the amount of DNA obtained
8 from one of the latex gloves – 0.3 nanograms – was much less than the optimal
9 amount used for testing; none of the evidence items were serologically tested to
10 determine the biological source of the DNA (*e.g.*, saliva, sweat, etc.); it was not
11 possible to determine how or when the DNA was deposited on the evidence items;
12 and he was unsure about the chain of custody of the evidence items and how many
13 people had access to them prior to his analysis. (RT 1506, 1512-13, 1517-19).
14 Based on these concessions, petitioner’s counsel was able to challenge the State’s
15 DNA evidence by arguing in her closing that petitioner’s DNA may have been
16 planted on the tested evidence items. (RT 2034-36).

17 Furthermore, petitioner has not shown that his case was prejudiced as a
18 result of his counsel’s failure to call a DNA expert to testify. See Strickland, 466
19 U.S. at 694. Petitioner speculates that a defense DNA expert would have testified
20 regarding the reliability of DNA testing in general, specifically, that no DNA
21 testing method can conclusively show that sampled DNA belongs to a specific
22 individual. (See *Traverse* at 19-20). Such speculation is insufficient to establish
23 prejudice. See Wildman v. Johnson, 261 F.3d 832, 839 (9th Cir. 2001) (plaintiff
24 failed to establish that his case was prejudiced as a result of not retaining an arson
25 expert where he “offered no evidence that an arson expert would have testified on
26 his behalf at trial” and “merely speculate[d] that such an expert could be found.”);
27 see also Dows v. Wood, 211 F.3d 480, 486 (9th Cir.) (rejecting claim of
28 ineffective assistance for failure to call witness based upon lack of affidavit from

1 witness regarding substance of testimony), cert. denied, 531 U.S. 908 (2000);
2 Grisby v. Blodgett, 130 F.3d 365, 373 (9th Cir. 1997) (“Speculation about what an
3 expert could have said is not enough to establish prejudice.”); Harden, 846 F.2d at
4 1231-32 (counsel not ineffective for failing to call witness where defendant made
5 no showing that witness was willing to testify).

6 Finally, even if a defense DNA expert had been called to testify, there is not
7 a reasonable probability that the result of the proceeding would have been
8 different because the evidence of petitioner’s guilt, albeit largely circumstantial,
9 was overwhelming. See Strickland, 466 U.S. at 694. Petitioner was apprehended
10 near the crime scene. (RT 1209). Gonzalez identified him as the man in the
11 white tank top and grey sweat pants to whom he gave a ride on the morning of the
12 robbery. (RT 936-37, 939). Washington identified him as the man with whom he
13 fought and whose shirt he ripped (RT 964, 970, 972-73, 979-81), and consistent
14 with Washington’s version of events, petitioner had a rip in his tank top when he
15 was arrested. (RT 940).

16 Additionally, a set of keys was found inside one of the pairs of jeans that the
17 robbers had discarded near the crime scene. (RT 1012-13, 1021). One of those
18 keys opened a Chevy truck that was parked near petitioner’s residence on 76th
19 Street. According to Detective Silverstein, the 76th Street residence was “miles
20 away” from the check-cashing store. Inside the truck, the police found a blue
21 worker’s shirt similar to the ones found near the crime scene, and paperwork with
22 petitioner’s name, booking number and bail information on it. (RT 1022-23,
23 1031-34).

24 There were also numerous inconsistencies in petitioner’s account of what
25 happened on the morning of the robbery. Petitioner claims that he was living with
26 his cousin at 5257 Morley Avenue, but he told the arresting officers that he was
27 homeless, and he later provided the 76th Street address as his residence. (RT
28 1022, 1210, 1564). Further, he testified at trial that he had never seen Gonzalez or

1 Washington before, and that, on the morning of the robbery, he was by himself at
 2 the liquor store. (RT 1564-69, 1582-83). During his interview with Detective
 3 Silverstein, however, he stated that Washington had asked him to buy alcohol on
 4 the day of the robbery. In fact, petitioner's story changed several times during the
 5 course of his interview with Detective Silverstein. At one point, petitioner told
 6 Detective Silverstein that he had not been involved in any altercation with
 7 Washington, but, at another point, he said he had asked to borrow Washington's
 8 phone and that Washington had thrown a punch at him. He also said that he had
 9 been with two white men and that they walked to the liquor store, where they
 10 stayed all day. (RT 1831-32). Finally, when Detective Silverstein confronted
 11 petitioner with several pieces of evidence from the check-cashing store, petitioner
 12 stated, "Well, then I guess I'm guilty, then." (RT 1833).

13 In sum, petitioner has failed to demonstrate that his counsel's failure to call
 14 a DNA expert to testify constituted deficient performance or that he was
 15 prejudiced by such omission. Accordingly, petitioner is not entitled to federal
 16 habeas relief.⁶

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22 ⁶Petitioner's request for an evidentiary hearing (Traverse at 2-3) should be denied because
 23 he has not alleged any material fact which he did not have a full and fair opportunity to develop
 24 in state court and which, if proved, would show his entitlement to habeas relief. See Cullen v.
 25 Pinholster, 563 U.S. 170, 180-81 (2011) (scope of record for 28 U.S.C. § 2254(d)(1) inquiry
 26 limited to record that was before state court that adjudicated claim on the merits); Schriro v.
 27 Landrigan, 550 U.S. 465, 474 (2007) (if record refutes applicant's factual allegations or
 28 otherwise precludes habeas relief, court not required to hold evidentiary hearing); Gandarela v.
Johnson, 286 F.3d 1080, 1087 (9th Cir. 2002) (evidentiary hearing properly denied where the
 petitioner "failed to show what more an evidentiary hearing might reveal of material import"),
cert. denied, 537 U.S. 1117 (2003).

1 **VI. RECOMMENDATION**

2 IT IS THEREFORE RECOMMENDED that the District Judge issue an
3 Order: (1) approving and accepting this Report and Recommendation; and
4 (2) directing that Judgment be entered denying the Petition and dismissing this
5 action with prejudice.

6 DATED: October 27, 2016

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8 /s/

9 Honorable Jacqueline Chooljian
10 UNITED STATES MAGISTRATE JUDGE
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**Additional material
from this filing is
available in the
Clerk's Office.**