

UNITED STATES COURT OF APPEALS

FILED

FOR THE NINTH CIRCUIT

JUN 12 2017

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

CURTIS CLIFFORD INGRAM,

No. 16-55317

Petitioner-Appellant,

D.C. No. 2:12-cv-07881-DOC-KK

v.

Central District of California,

Los Angeles

MATTHEW CATE,

ORDER

Respondent-Appellee.

Before: SILVERMAN and WATFORD, Circuit Judges.

The motion for reconsideration (Docket Entry No. 4) 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.

No further filings will be entertained in this closed case.

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CURTIS CLIFFORD INGRAM,

Petitioner-Appellant,

v.

No. 16-55317

D.C. No. 2:12-cv-07881-DOC-KK
Central District of California,
Los Angeles

MATTHEW CATE,

Respondent-Appellee.

ORDER

Before: RAWLINSON and NGUYEN, Circuit Judges.

The district court's judgment was entered on January 20, 2016, granting the applicant's Federal Rule of Civil Procedure 60(b) motion and denying the motion for leave to amend. Appellant's notice of appeal, deposited for mailing in the prison's internal mailing system on February 18, 2016, was timely filed. *See* Fed. R. App. P. 4(a)(1) & (c).

The request for a certificate of appealability 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).

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 CURTIS CLIFFORD INGRAM,

12 Petitioner,

13 v.

14 MATTHEW CATES,

15 Respondent.
16 _____

Case No. CV 12-7881-DOC (KK)

ORDER DENYING A CERTIFICATE OF
APPEALABILITY

17
18 Rule 11 of the Rules Governing Section 2254 Cases in the United States District
19 Courts reads as follows:

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

1 appeal.

2 (b) **Time to Appeal.** Federal Rule of Appellate Procedure 4(a)
3 governs the time to appeal an order entered under these rules. A timely
4 notice of appeal must be filed even if the district court issues a certificate
5 of appealability.

6 Under 28 U.S.C. § 2253(c)(2), a Certificate of Appealability may issue “only if
7 the applicant has made a substantial showing of the denial of a constitutional right.”
8 The Supreme Court has held that this standard means a showing that “reasonable
9 jurists could debate whether (or, for that matter, agree that) the petition should have
10 been resolved in a different manner or that the issues presented were adequate to
11 deserve encouragement to proceed further.” *Slack v. McDaniel*, 529 U.S. 473, 483-84,
12 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000) (internal citation and quotation marks
13 omitted).

14 Here, after duly considering Petitioner’s contentions in support of the claims
15 alleged in the Motion for Leave to Amend the Petition, the Court finds and concludes
16 that Petitioner has not made the requisite showing with respect to any of those claims.

17 Accordingly, a Certificate of Appealability is denied in this case.

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19 Dated: 01/19/2016

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21 _____
22 HONORABLE DAVID O. CARTER
23 UNITED STATES DISTRICT JUDGE

24 Presented by:

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27 Kenly Kiya Kato
28 United States Magistrate Judge

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8 **UNITED STATES DISTRICT COURT**
9 **CENTRAL DISTRICT OF CALIFORNIA**
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11 CURTIS CLIFFORD INGRAM,

12 Petitioner,

13 v.

14 MATTHEW CATES,

15 Respondent.
16

Case No. CV 12-7881-DOC (KK)

**ORDER ACCEPTING FINDINGS
AND RECOMMENDATION OF
UNITED STATES MAGISTRATE
JUDGE**

17 Pursuant to 28 U.S.C. § 636, the Court has reviewed the Motion for the Court to
18 Set Aside the Judgment pursuant to Federal Rule of Civil Procedure 60(b) ("Motion"),
19 the records on file, and the Report and Recommendation of the United States
20 Magistrate Judge. The Court has engaged in a *de novo* review of those portions of the
21 Report to which Petitioner has objected. The Court accepts the findings and
22 recommendation of the Magistrate Judge.

23 In his objections to the Report, Petitioner also requests an evidentiary hearing.
24 However, in habeas proceedings, "an evidentiary hearing is not required on issues that
25 can be resolved by reference to the state court record." Totten v. Merkle, 137 F.3d
26 1172, 1176 (9th Cir. 1998); see also Earp v. Ornoski, 431 F.3d 1158, 1173 (9th Cir.
27 2005). "It is axiomatic that when issues can be resolved with reference to the state
28 court record, an evidentiary hearing becomes nothing more than a futile exercise."

1 Totten, 137 F.3d at 1176. Here, the Magistrate Judge concluded all of Petitioner's
2 claims could be resolved by reference to the state court record. Accordingly, the Court
3 denies Petitioner's request for an evidentiary hearing.

4 IT IS THEREFORE ORDERED that (1) Petitioner's Motion is granted for the
5 limited purpose of reconsidering Petitioner's Motion for Leave to Amend (dkt. 55).

6 IT IS FURTHER ORDERED that (1) Petitioner's Motion for Leave to Amend is
7 Denied; and (2) Judgment shall be entered dismissing this action with prejudice.
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10 Dated: 01/19/2016

David O. Carter

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12 HONORABLE DAVID O. CARTER
13 UNITED STATES DISTRICT JUDGE
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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA
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11 CURTIS CLIFFORD INGRAM,) Case No. CV 12-7881-DOC (KK)
12 Petitioner,)
13 v.) REPORT AND RECOMMENDATION
14 MATTHEW CATES,) OF UNITED STATES MAGISTRATE
15 Respondent.) JUDGE
16

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

20 I.

21 **SUMMARY OF RECOMMENDATION**

22 On July 14, 2015, Petitioner Curtis Clifford Ingram ("Petitioner"),
23 proceeding pro se, filed a Motion for the Court to Set Aside the Judgment
24 ("Motion"), pursuant to Federal Rule of Civil Procedure 60(b). While not entirely
25 clear, the Motion appears to seek relief from the Court's July 19, 2014 Judgment
26 and Order Accepting Findings, Conclusions and Recommendations of United
27 States Magistrate Judge. For the reasons set forth below, the Court recommends
28 (1) granting Petitioner's Rule 60(b) Motion for the limited purpose of

1 reconsidering Petitioner's Motion for Leave to Amend; (2) denying Petitioner's
 2 Motion for Leave to Amend the Petition; and (3) dismissing the action with
 3 prejudice.

4 II.

5 PROCEDURAL SUMMARY

6 A. State Criminal Proceedings

7 On July 8, 2010, Petitioner was convicted after a jury trial in the Los
 8 Angeles County Superior Court of two counts of forcible rape in violation of Cal.
 9 Penal Code § 261(a)(2); one count of oral copulation by force or fear in violation
 10 of Cal. Penal Code § 288a(c)(2); and one count of assault with a deadly weapon in
 11 violation of Cal. Penal Code § 245(a)(1). Lodgement No. ("Lodg.") at 307-10,
 12 342.¹ The jury also found true (1) Petitioner had suffered a prior serious or violent
 13 strike conviction under the Three Strikes Law (Cal. Penal Code §§ 667(b)-(i),
 14 1170.12(a-d)); (2) Petitioner had a prior serious felony conviction under Penal
 15 Code § 667(a)(1); and (3) Petitioner had served four prior prison terms (*id.* §
 16 667.5(b)). On July 29, 2010,² Petitioner was sentenced to a total state prison term
 17 of thirty-nine years. *Id.* at 338-42.

18 Petitioner appealed to the California Court of Appeal. Lodg. 1. On
 19 November 28, 2011, the court of appeal affirmed the judgment. Lodg. 6.

21 ¹ The Court's citations to Lodgments refer to the documents lodged by
 22 Respondent in support of his Return to the Petition and re-lodged in support of his
 23 Notice of Limited Non-Opposition. Dkt. 95, 96. Lodgment 40 is a copy of the
 24 Reporter's Transcript from Petitioner's trial court proceedings. Any further
 25 citations to Lodgment 40 will be abbreviated as "RT." Lodgment 41 is a copy of
 26 the Clerk's Transcript of Petitioner's trial court proceedings. Any further citations
 27 to Lodgment 41 will be abbreviated as "CT."

28 ² The abstract of judgment indicates that Petitioner was convicted and
 sentenced on July 29, 2010. CT at 342. However, it is clear from the record that
 Petitioner was convicted on July 8, 2010, and sentenced on July 29, 2010.

1 **B. State Habeas Proceedings**

2 Meanwhile, on March 10, 2011, Petitioner filed a habeas corpus petition in
3 the California Court of Appeal. Lodg. 15. On March 29, 2011, the court of
4 appeal denied the petition. Lodg. 16.

5 On April 14, 2011, Petitioner filed a petition for review of the appellate
6 court's denial of habeas relief in the California Supreme Court. Lodg. 17. On May
7 18, 2011, the ~~supreme court denied the petition.~~ Lodg. 18.

8 On June 26, 2011, Petitioner filed a second habeas corpus petition in the
9 California Court of Appeal. Lodg. 19. On June 28, 2011, the court of
10 appeal denied the petition. Lodg. 20.

11 On January 17, 2012, Petitioner filed a habeas corpus petition in the
12 California Supreme Court, case number S199442. Lodg. 22-24. On May 9,
13 2012, the supreme court denied the petition. Lodg. 25.

14 On June 14, 2012, Petitioner filed a second habeas corpus petition in the
15 California Supreme Court, case number S203337. Lodg. 31-34. On
16 October 10, 2012, the supreme court denied the petition with a citation to In re
17 Clark, 5 Cal. 4th 750, 767-69 (1993). Lodg. 35.

18 On June 21, 2012, Petitioner filed a habeas corpus petition in the Los
19 Angeles County Superior Court. Lodg. 36. On June 21, 2012, the superior
20 court denied the petition as impermissibly vague. Lodg. 37.

21 On July 6, 2012, Petitioner filed a third habeas corpus petition in the
22 California Court of Appeal. Lodg. 38. On October 24, 2012, the court of
23 appeal denied the petition. Lodg. 39.

24 **C. Federal Habeas Proceedings**

25 On September 13, 2012, Petitioner filed a Petition for a Writ of Habeas
26 Corpus ("Petition") with this Court, pursuant to 28 U.S.C. § 2254, challenging his
27 July 2010 conviction. ECF Docket No. ("dkt.") 1. The Petition set forth the
28 following claims for habeas relief: (1) police illegally obtained and tested

1 Petitioner's DNA; (2) Petitioner's confession was involuntary and violated his
2 rights under Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694
3 (1966); (3) Petitioner, a pro se defendant, was denied compulsory process; (4)
4 Petitioner was denied his speedy trial rights; and (5) Petitioner was denied his right
5 to the effective assistance of counsel during the preliminary hearing. Id.

6 On February 13, 2013, Respondent filed a Return to the Petition. Dkt. 24.
7 On March 15, 2013, Petitioner filed Reply to Respondent's Return. Dkt. 29.

8 On August 1, 2013, the assigned U.S. Magistrate Judge ("Magistrate Judge")
9 requested supplemental briefing addressing an additional unexhausted miscarriage
10 of justice claim. Dkt. 35. On September 27, 2013, Respondent filed a
11 Supplemental Return. Dkt. 46. On October 18, 2013, Petitioner filed a
12 Supplemental Reply. Dkt. 48, 49.

13 On April 11, 2014, Petitioner filed a Motion for Leave to Amend the Petition
14 to add additional claims; the proposed amended petition, thus, presented the
15 following twenty claims: (1) illegal search and seizure for purpose of conducting a
16 nonconsensual examination; (2) illegal arrest, transportation, and detention; (3)
17 involuntary confession; (4) Miranda violation; (5) illegal detention/McLaughlin
18 violation; (6) speedy trial violation; (7) illegal search and seizure of DNA
19 evidence; (8) denial of compulsory process; (9) judicial bias; (10) unconstitutional
20 use of prior convictions to enhance sentence; (11) ineffective assistance of trial
21 counsel; (12) Petitioner was improperly denied Court transcripts; (13) trial court
22 unreasonably omitted relevant defense evidence; (14) denial of right to submit
23 prosecution's case to adversarial testing; (15) vindictive prosecution based on
24 collusive efforts; (16) due process violated by collusion and altering of court
25 minutes; (17) ineffective assistance of appellate counsel; (18) actual innocence;
26 (19) denial of right to self-representation; and (20) miscarriage of justice. Dkt. 55,
27 Attach. No. 1, Proposed First Amended Petition ("FAP").

28 On June 12, 2014, the Magistrate Judge issued a Report and

1 Recommendation that the Petition be denied on the merits. Dkt. 60. Also on June
 2 12, 2014, the Magistrate Judge issued an Order denying Petitioner leave to amend
 3 the Petition due to undue delay and prejudice to the Respondent. Dkt. 58.

4 On June 25, 2014, Petitioner filed Objections to the Order denying leave to
 5 amend and the Report and Recommendation. Dkt. 61. On July 7, 2014,³ Petitioner
 6 filed an Application for Leave to file an Addendum to his Objections to the Report
 7 ~~and Recommendation, which was granted and the Addendum was ordered filed.~~

8 Dkt. 64, 67.

9 On July 19, 2014, the Court issued an Order accepting the Report and
 10 Recommendation. Dkt. 68. On that same day, the Court entered Judgment
 11 denying the Petition and denying a certificate of appealability. Dkt. 69, 70.

12 On August 6, 2014, Petitioner filed a Notice of Appeal to the Ninth Circuit.
 13 Dkt. 74. On March 20, 2015, the Ninth Circuit Court of Appeal denied Petitioner's
 14 request for a certificate of appealability. Dkt. 80.

15 On July 14, 2015, Petitioner filed the instant Motion, pursuant to Federal
 16 Rule of Civil Procedure 60(b), to set aside the Judgment. Dkt. 82. On July 24,
 17 2015, Respondent was directed to file an opposition or non-opposition. Dkt. 83.
 18 On October 6, 2015, Respondent filed a Notice of Limited Non-Opposition. Dkt.
 19 90. On December 1, 2015, Petitioner filed a Reply and evidence in support
 20 thereof.⁴ Dkt. 100. The matter thus stands submitted.

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 23 ³ On July 1, 2014, this action was reassigned to the undersigned U.S.
 24 Magistrate Judge. Dkt. 62.

25 ⁴ Petitioner argues, based on the Court's October 8, 2015 Order that
 26 Respondent re-lodge the state court documents (see dkt. 92), the Magistrate Judge
 27 did not have the state court record available when ruling on the Petition or
 28 Petitioner's Motion to Amend the Petition. Dkt. 100 at 6. Petitioner appears to
 have misinterpreted the Court's October 8, 2015 Order. Respondent lodged
 (continued...)

1 **III.**

2 **RELIEF IS APPROPRIATE UNDER FED. R. CIV. P. 60**

3 Construed liberally, Petitioner contends he is entitled to relief under Federal
4 Rules of Civil Procedure, Rule 60(b)(1), (3), (4), and (6). As explained below,
5 Petitioner is entitled to limited relief only under subsection (b)(4).

6 **A. Petitioner Is Not Entitled To Relief Under Fed. R. Civ. P. 60(b)(1)**

7 Federal Rule of Civil Procedure 60(b)(1) states the court may relieve a party
8 of a final judgment or order by reason of “mistake, inadvertence, surprise, or
9 excusable neglect.” Fed. R. Civ. P. 60(b)(1). “Excusable neglect is an equitable
10 concept that takes account of factors such as ‘prejudice, the length of the delay and
11 impact on judicial proceedings, the reason for the delay, including whether it was
12 within the reasonable control of the movant, and whether the movant acted in good
13 faith.’” Franchise Holding II, LLC v. Huntington Restaurants Grp., Inc., 375 F.3d
14 922, 927 (9th Cir. 2004) (affirming denial of Rule 60(b)(1) motion to set aside
15 default judgment); see also Engleson v. Burlington N. R.R. Co., 972 F.2d 1038,
16 1043 (9th Cir.1992) (articulating that “[t]o qualify for equitable relief under Rule
17 60(b)(1), the movant *must demonstrate* ... excusable neglect” and noting “[n]either
18 ignorance nor carelessness on the part of the litigant or his attorney provide
19 grounds for relief under Rule 60(b)(1)”) (citation and internal quotation marks
20 omitted) (emphasis added).

21 _____
22 (...continued)

23 documents in support of the Return. Dkt. 25. When Petitioner appealed the
24 Judgment, the District Court forwarded the lodged documents to the Court of
25 Appeal on August 18, 2014 and August 26, 2014, and the Court of Appeal
26 acknowledged receipt thereof. Dkt. 76-79. After the Ninth Circuit denied
27 Petitioner’s request for a certificate of appealability, the Court of Appeal returned
28 the lodged documents to the District Court. Dkt. 81. Thereafter, the Court did not
retain the documents. See dkt. 92. Thus, the Court docket establishes the
Magistrate Judge had available all relevant records when ruling on the Petition.

1 Here, construing the Motion liberally, Petitioner argues the Magistrate Judge
2 committed a mistake in omitting several search and seizure claims from the June
3 12, 2014 Report and Recommendation. Mot. at 10, 23. A review of the record
4 shows there is no mistake. The Magistrate Judge denied Petitioner leave to amend
5 the Petition to include the allegedly omitted search and seizure claims. June 12,
6 2014 Order at 3-4. Hence, the Report and Recommendation did not address
7 Petitioner's additional search and seizure claims.

8 Petitioner also alleges he inadvertently failed to timely file all of his habeas
9 claims resulting in the denial of his motion for leave to amend. Mot. at 20.
10 Petitioner admits he became aware of his failure to file all timely exhausted claims
11 upon Respondent's filing of its Return on February 13, 2013, but in no event was
12 later than the Court's August 1, 2013 Order requesting supplemental briefing. Id.
13 at 20, 22. Petitioner did not move for leave to amend the Petition until April 11,
14 2014. Dkt. 55. Without addressing Petitioner's alleged mistake in failing to
15 include the claims in his initial Petition, Petitioner fails to provide any explanation
16 for the eight-month delay between his actual notice of the deficiency and his
17 request for relief. Accordingly, relief is not available under Rule 60(b)(1) because
18 Petitioner has failed to provide any reason for the delay which was exclusively
19 within his control. Franchise Holding II, LLC., 375 F.3d at 927.

20 **B. Petitioner Is Not Entitled To Relief Under Fed. R. Civ. P. 60(b)(3)**

21 Federal Rule of Civil Procedure 60(b)(3) states the court may relieve a party
22 of a final judgment or order by reason of "fraud . . ., misrepresentation, or
23 misconduct by an opposing party." Fed. R. Civ. P. 60(b)(3). To prevail under
24 Rule 60(b)(3), "the moving party must establish that a judgment was obtained by
25 fraud, misrepresentation, or misconduct, and that the conduct complained of
26 prevented the moving party from fully and fairly presenting the case." In re M/V
27 Peacock on Complaint of Edwards, 809 F.2d 1403, 1404-05 (9th Cir. 1987). "The
28 rule is aimed at judgments which were unfairly obtained, not at those which are

1 factually incorrect.” Id.

2 In the instant Motion, Petitioner claims the Magistrate Judge committed
3 fraud by (1) adjudicating “Petition for Writ of Mandamus proceedings seeking
4 relief from his adjudication,” and (2) omitting three search and seizure claims from
5 the June 12, 2014 Report and Recommendation. Mot. at 23. Petitioner fails to
6 establish the Court’s July 19, 2014 Judgment denying the Petition was procured by
7 fraud, misconduct, or misrepresentation *by an adverse party*, as required for under
8 Federal Rule of Civil Procedure 60(b)(3). See Fed. R. Civ. P. 60(b)(3) (emphasis
9 added). Hence, Petitioner is not entitled to relief under Rule 60(b)(3). See In re
10 M/V Peacock on Complaint of Edwards, 809 F.2d at 1404-05.

11 **C. Petitioner Is Entitled To Limited Relief Under Fed. R. Civ. P. 60(b)(4)**

12 Federal Rule of Civil Procedure 60(b)(4) states the court may relieve a party
13 of a final judgment or order when the judgment is void. Fed. R. Civ. P. 60(b)(4).
14 A magistrate judge exceeds his authority by issuing an final order on a dispositive
15 matter. Hunt v. Pliler, 384 F.3d 1118, 1123 (9th Cir. 2004) (“[W]ith respect to
16 dispositive matters, a magistrate is only permitted to make recommendations for
17 final disposition by an Article III judge who reviews his findings and
18 recommendation, if objected to, de novo.”); Bastidas v. Chappell, 791 F.3d 1155,
19 1159 (9th Cir. 2015).

20 However, “[w]hen a magistrate judge exceeds his authority, any defect can
21 be cured by the district court’s de novo review of the original order.” United States
22 v. Rivera-Guerrero, 377 F.3d 1064, 1071 (9th Cir. 2004) (remanding case to allow
23 district court to conduct de novo review) (citing United States v. Weissberger, 951
24 F.2d 392, 398 (D.C. Cir. 1991)). The district court has the authority and obligation
25 to ignore the form of the decision and treat it as a Report and Recommendation.
26 See Florence v. E.R. Stanback, 607 F. Supp. 2d 1119, 1122 (C.D. Cal. 2009)
27 (holding a district court “has the authority and obligation to apply the appropriate
28 standard of review of whatever decision is issued by” a magistrate judge).

1 Here, Petitioner alleges the Magistrate Judge abused his discretion and
 2 exceeded his authority in denying Petitioner's Motion for Leave to Amend the
 3 Petition. Mot. at 8-10. On June 12, 2014, the Magistrate Judge issued an Order
 4 denying Petitioner's Motion for Leave to Amend the Petition. Dkt. 58. On June
 5 25, 2014, Petitioner filed Objections to the Order denying leave to amend and the
 6 Report and Recommendation. Dkt. 61. It does not appear the June 12, 2014 Order
 7 was ever presented to the District Court for review.

8 Therefore, relief is warranted for the limited purpose of permitting the
 9 District Judge to review Petitioner's Motion for Leave to Amend de novo.⁵

10 **D. Petitioner Is Not Entitled To Relief Under Fed. R. Civ. P. 60(b)(6)**

11 Federal Rule of Civil Procedure 60(b)(6) states the court may relieve a party
 12 of a final judgment or order by reason of "any other reason that justifies relief."
 13 Fed. R. Civ. P. 60(b)(6). Rule 60(b)(6) is used "sparingly and as an equitable
 14 remedy to prevent manifest injustice." Hamilton v. Newland, 374 F.3d 822, 825
 15 (9th Cir. 2004) (internal citation omitted). "A party is entitled to relief under Rule
 16 60(b)(6) where 'extraordinary circumstances prevented [him] from taking timely
 17 action to prevent or correct an erroneous judgment.'" Id. (citation omitted)
 18 (affirming denial of habeas petitioner's Rule 60(b) motion, finding inattention or
 19 inexperience do not constitute an "'extraordinary circumstance' that justifies Rule
 20 60(b) relief"). Here, Petitioner has not established any "extraordinary
 21 circumstances" that justify relief under Rule 60(b)(6).

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27 ⁵ In Respondent's Statement of Limited Non-Opposition, Respondent does not
 28 object to this limited relief.

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IV.**PETITIONER'S MOTION FOR****LEAVE TO AMEND WAS PROPERLY DENIED**

The Magistrate Judge's June 12, 2014 Order properly denied Petitioner's Motion for Leave to Amend the Petition. Dkt. 58. The Magistrate Judge correctly determined leave of court was required to grant Petitioner's Motion pursuant to Rule 15 and evaluated Petitioner's Motion by applying the five factors set forth in Bonin v. Calderon, 59 F.3d 815, 845 (9th Cir. 1995): (1) bad faith, (2) undue delay, (3) prejudice to the opposing party, (4) futility of the amendment, and (5) whether the party has previously amended his pleadings. As discussed below, consideration of these factors supports the denial of the Motion to Amend.

A. Delay

First, the Court finds the two year delay in seeking to amend the Petition constituted undue delay. Petitioner claims he was not aware he had only presented 6 of his 20 claims until Respondent filed his Return on February 13, 2013, but in no event later than the Court's August 1, 2013 Order requesting supplemental briefing. Dkt. 55 at 20, 22. Assuming arguendo Petitioner was not aware he had omitted 14 of his 20 claims, Petitioner did not move for leave to amend the Petition until eight months later on April 11, 2014. See Dkt. 55. Petitioner fails to provide any explanation in the instant Motion or in his Motion for Leave to Amend to explain the eight-month delay between his actual notice of the deficiency and his request for relief.

B. Prejudice

Second, in the June 12, 2014 Order, the Magistrate Judge reasoned, "given the procedural posture of these proceedings, the Court finds that Respondent would be prejudiced by having to address the merits of sixteen [sic] additional claims that Petitioner was aware of at the time and easily could have included in the original Petition." Dkt. 58. Having reviewed Petitioner's objections filed on June 25, 2014

(dkt. 61), the Court finds this factor weighs in favor of Respondent.

C. Futility

Third, while it does not appear that the Magistrate Judge analyzed the futility of the amendment in the June 12, 2014 Order, it is apparent amendment would be futile. An amended claim is futile if the claim cannot lead to habeas relief.

Gamba-Oluwa v. Koenig, 942 F.2d 791 (9th Cir. 1991) (holding leave to amend need not be given if a petition, as amended, is subject to dismissal); Apelt v. Ryan, 2001 WL 1377015, *2 (D.Ariz. Apr. 12, 2011) (where proposed habeas claims are “untimely, unexhausted, or otherwise fail as a matter of law, amendment should be denied as futile”). “Futility of amendment can, by itself, justify the denial of a motion for leave to amend.” Bonin, 59 F.3d at 845.

1. Factual Background

For a summary of the facts, this Court relies on the California Court of Appeal’s reasoned decision affirming Petitioner’s conviction on direct appeal. Petitioner is referred to as “appellant”:⁶

Monique B., who was 19 years old, was working alone early in the morning at a coffee house in Long Beach. While setting up tables and chairs outside the shop, she was approached by appellant who asked if they were hiring. She told him they were not but would accept resumes. Monique told appellant he could stand inside the shop. He came inside and stood by some couches, staring at her.

This made her uncomfortable as she continued to set up. Appellant

⁶ Because this factual summary is drawn from the California Court of Appeal’s opinion, “it is afforded a presumption of correctness that may be rebutted only by clear and convincing evidence.” Moses v. Payne, 555 F.3d 742, 746 n.1 (9th Cir. 2008) (citations omitted). Petitioner has not challenged the accuracy of this summary. Moreover, this Court has independently reviewed the trial record and finds the summary accurate.

1 shut the front door and asked for a free drink. Monique refused.
 2 Because she was nervous and felt the need to have something with
 3 which to defend herself, Monique got a kitchen knife and began
 4 cutting peppers. Appellant came to a doorway and continued to stare
 5 at her. He asked if he could ask her a question. When Monique
 6 looked up, he punched her in the left side of her face. A fight ensued
 7 and appellant cut Monique. She told him he could do what he wanted
 8 but begged him not to kill her. Appellant raped her twice and orally
 9 copulated her.

10 Monique called 911. She suffered a broken nose and a cut to
 11 her hand requiring five stitches. After police arrived, appellant
 12 returned and was identified by Monique as her assailant. When
 13 interviewed by police, appellant admitted hitting Monique, orally
 14 copulating her and raping her.

15 Lodg. 6 at 2-3.

16 **2. Standard of Review**

17 Under the Antiterrorism and Effective Death Penalty Act of 1996
 18 (“AEDPA”), a federal court may not grant habeas relief on a claim adjudicated on
 19 its merits in state court unless the adjudication:

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

26 28 U.S.C. § 2254(d).

27 “[C]learly established Federal law’ for purposes of § 2254(d)(1) includes
 28 only ‘the holdings, as opposed to the dicta, of th[e] [U.S. Supreme] Court’s

1 decisions” in existence at the time of the state court adjudication. White v.
 2 Woodall, ___ U.S. ___, 134 S. Ct. 1697, 1702, 1706, 188 L. Ed. 2d 698 (2014).
 3 However, “circuit court precedent may be ‘persuasive’ in demonstrating what law
 4 is ‘clearly established’ and whether a state court applied that law unreasonably.”
 5 Maxwell v. Roe, 628 F.3d 486, 494 (9th Cir. 2010).

6 Overall, AEDPA presents “a formidable barrier to federal habeas relief for
 7 prisoners whose claims ~~have been~~ adjudicated in state court.” Burt v. Titlow, ___
 8 U.S. ___, 134 S. Ct. 10, 16, 187 L. Ed. 2d 348 (2013). The federal statute presents
 9 “a difficult to meet . . . and highly deferential standard for evaluating state-court
 10 rulings, which demands that state-court decisions be given the benefit of the
 11 doubt.” Cullen v. Pinholster, 563 U.S. 170, 131 S. Ct. 1388, 1398, 179 L. Ed. 2d
 12 557 (2011) (internal citation and quotation marks omitted). On habeas review,
 13 AEDPA places the burden on petitioners to show the state court’s decision “was so
 14 lacking in justification that there was an error well understood and comprehended
 15 in existing law beyond any possibility for fairminded disagreement.” Harrington v.
 16 Richter, 562 U.S. 86, 103, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011). Put another
 17 way, a state court determination that a claim lacks merit “precludes federal habeas
 18 relief so long as fairminded jurists could disagree” on the correctness of that ruling.
 19 Id. at 102. Federal habeas corpus review therefore serves as “a guard against
 20 extreme malfunctions in the state criminal justice systems, not a substitute for
 21 ordinary error correction through appeal.” Id. at 102-03 (internal citation and
 22 quotation marks omitted).

23 When a state court “does not supply reasoning for its decision [on a
 24 petitioner’s claims],” the court must “engage in an ‘independent review of the
 25 record’ and ascertain whether the state court’s decision was ‘objectively
 26 unreasonable.’” Walker v. Martel, 709 F.3d 925, 939 (9th Cir. 2013) (quoting
 27 Delgado v. Lewis, 223 F.3d 976, 982 (9th Cir. 2000)). Notably, this does not
 28 operate as “de novo review.” Id. (quoting Himes v. Thompson, 336 F.3d 848, 853

(9th Cir. 2003)). That is, it “remains the petitioner’s burden to demonstrate that ‘there was no reasonable basis for the state court to deny relief.’” Id. (quoting Richter, 562 U.S. at 102).

Here, Petitioner raised each of the proposed claims on habeas corpus review to the California Supreme Court. Lodg. 22, 31. The California Supreme Court denied the claims without comment or with citation to In re Clark. Lodg. 25, 35. Where, as here, the state courts supply no reasoned decision, the Court must “engage in an ‘independent review of the record’” to determine whether the California Supreme Court’s summary denial of Petitioner’s claims were “objectively unreasonable.” Walker, 709 F.3d at 939 (quoting Delgado, 223 F.3d at 982).

3. Discussion

a. Proposed Claims One, Two, Three, Four, Six, Seven, Eight, Eleven and Twenty are the Same As Claims Raised in the Petition; Therefore Amendment Would Be Futile

Proposed Claims One, Two and Seven, alleging illegal arrest, search and seizure of Petitioner’s DNA, are duplicative of existing Claim One. FAP at 8, 10; Pet. at 5. The Court dismissed existing Claim One because it was barred by Stone v. Powell, 428 U.S. 465, 494, 96 S. Ct. 3037, 3041, 49 L. Ed. 2d 1067 (1976) (holding where “the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted habeas corpus relief on the ground that the evidence obtained in an unconstitutional search or seizure was introduced at trial”). Dkt. 60 at 8-9.

Proposed Claims Three and Four, alleging Petitioner’s confession was not voluntary and violated his rights under Miranda, are duplicative of existing Claim Two. FAP at 9; Pet. at 5. The Court dismissed existing Claim Two because there was no evidence the confession was involuntary and any error in admitting Petitioner’s confession was harmless. Dkt. 60 at 11-15.

1 Proposed Claim Six, alleging a speedy trial violation, is duplicative of
 2 existing Claim Four. FAP at 10; Pet. at 6. The Court dismissed existing Claim
 3 Four because the state court's determination there was no speedy trial violation
 4 was not unreasonable. Dkt. 60 at 25.

5 Proposed Claim Eight, alleging Petitioner was denied an expert witness and
 6 compulsory process to obtain the expert's presence at trial, is duplicative of
 7 existing Claim Three. FAP at 10; Pet. at 5-6. The Court dismissed existing Claim
 8 Three because there is no clearly established Federal law establishing a
 9 constitutional right to appointment of forensic experts and Petitioner has not
 10 established how the testimony of the proposed expert would have benefitted his
 11 defense. Dkt. 60 at 19-20.

12 Proposed Claim Eleven, alleging ineffective assistance of trial counsel, is
 13 duplicative of existing Claim Five. FAP at 11; Pet. at 6. The Court dismissed
 14 existing Claim Five because there is no constitutional right to a preliminary hearing
 15 and Petitioner failed to establish prejudice. Dkt. 60 at 26-27.

16 Proposed Claim Twenty, alleging miscarriage of justice, is duplicative of
 17 existing Claim Six. FAP at 14; Pet. at 6. The Court dismissed existing Claim Six
 18 because Petitioner failed to demonstrate his due process rights were violated. Dkt.
 19 60 at 32-33.

20 Because Proposed Claims One, Two, Three, Four, Six, Seven, Eight, Eleven
 21 and Twenty were previously held to be meritless, amendment to include them in
 22 the FAP would be futile.

23 **b. Proposed Claim Five is Meritless - Illegal**
 24 **Detention/McLaughlin Violation**

25 In Proposed Claim Five, Petitioner alleges he was detained in violation of
 26 Cnty. of Riverside v. McLaughlin, 500 U.S. 44, 111 S. Ct. 1661, 1665, 114 L. Ed.
 27 2d 49 (1991), because he was not arraigned on August 26, 2009 as stated in the
 28 Minute Order of that date, but rather on August 28, 2009 – 96 hours after his arrest.

1 FAP at 9. Because McLaughlin claims arise out of an alleged Fourth Amendment
 2 violation and Petitioner had an opportunity for full and fair litigation of the claim
 3 in state court, Proposed Claim Five would be barred by Powell, 428 U.S. at 494.
 4 See also Anderson v. Calderon, 232 F.3d 1053, 1068 (9th Cir. 2000) (noting
 5 McLaughlin claims are barred by Powell where petitioner had a full and fair
 6 opportunity to litigate the claim in state court). Petitioner argues he did not have a
 7 full and fair opportunity to litigate the issue because he was pro se. However, as
 8 discussed below in section IV.C.3.1, Petitioner knowingly and intelligently chose to
 9 represent himself. Moreover, whether or not Petitioner “did in fact litigate this
 10 fourth amendment claim in state court, he did have the opportunity to do so,”
 11 because “[u]nder California law, a defendant can move to suppress evidence on the
 12 basis that it was obtained in violation of the fourth amendment.” Gordon v. Duran,
 13 895 F.2d 610, 613 (9th Cir. 1990) (citing Cal. Penal Code § 1538.5). Accordingly,
 14 because the Court’s “independent review of the record” does not show “the state
 15 court’s decision was objectively unreasonable,” Proposed Claim Five is meritless.
 16 Walker, 709 F.3d at 939 (internal quotation marks and citations omitted).

17 **c. Proposed Claim Nine is Meritless - Judicial Bias**

18 In Proposed Claim Nine, Petitioner alleges the trial court’s “adjudication and
 19 decision of numerous proceeding(s) was contrary to and an unreasonable
 20 application of clearly established law.” FAP at 11. Petitioner argues (1) the court
 21 admitted insufficient evidence (citing the March 24, 2010 minute order denying
 22 Petitioner’s motions to exclude statements and to “suppress statement as product of
 23 4th Amendment violation” (FAP at 143)), (2) omitted relevant evidence showing
 24 Petitioner’s course of conduct, (3) denied Petitioner’s Marsden motions on
 25 November 6, 2009 and January 21, 2010 “though a[n] apparent conflict existed,”
 26 and (4) “manufactured 10/15/2009 proceeding to conceal excessive force incident.”
 27 Id.

28 “[T]he Due Process Clause . . . requires a ‘fair trial in a fair tribunal,’

[citation], before a judge with no actual bias against the defendant or interest in the outcome of his particular case.” Bracy v. Gramley, 520 U.S. 899, 904-05, 117 S. Ct. 1793, 1797, 138 L. Ed. 2d 97 (1997) (internal citation omitted). However, a petitioner is only entitled to habeas relief when “the state trial judge’s behavior rendered the trial so fundamentally unfair as to violate federal due process under the United States Constitution.” Duckett v. Godinez, 67 F.3d 734, 740 (9th Cir. 1995). Further, “judicial rulings alone almost never constitute a valid basis for a bias or partiality motion.” Liteky v. United States, 510 U.S. 540, 555, 114 S. Ct. 1147, 127 L. Ed. 2d 747 (1994).

Here, the first three instances of alleged judicial misconduct are merely rulings against Petitioner. There is no indication these rulings were influenced by any extra-judicial source. Nor do they “reveal such a high degree of favoritism or antagonism as to make fair judgment impossible.” Liteky, 510 U.S. at 555. Second, the Court already found Petitioner’s miscarriage of justice claim regarding his absence at the October 15, 2009 hearing was meritless. See Dkt. 60 at 32-34.

Accordingly, because the Court’s “independent review of the record” does not show evidence of judicial bias, the state court’s decision was not “objectively unreasonable.” Walker, 709 F.3d at 939 (internal quotation marks and citations omitted). Hence, Proposed Claim Nine is meritless.

**d. Proposed Claim Ten is Meritless - Unconstitutional Priors
Used in Sentencing**

In Proposed Claim Ten, Petitioner alleges the prior convictions used to enhance his sentence stem from an unlawful and unconstitutional prior that should not have been used to enhance his current sentence. FAP at 12. It is well settled that once a prior state conviction is no longer open to direct or collateral attack a petitioner may not challenge the current enhanced sentence on the ground the prior conviction was unconstitutionally obtained. Lackawanna Cnty. Dist. Attorney v. Coss, 532 U.S. 394, 403-04, 121 S. Ct. 1567, 1574, 149 L. Ed. 2d 608 (2001).

1 Petitioner appears to argue his April 18, 1994 conviction for kidnapping in case
 2 number NA018762 was constitutionally invalid because he was denied effective
 3 assistance of counsel. FAP at 174-191. Petitioner does not present any evidence
 4 he ever appealed this conviction. Hence, Petitioner's conviction became final well
 5 before his July 2010 conviction and sentencing when he failed to timely appeal his
 6 conviction and it was no longer open to direct or collateral attack. Accordingly,
 7 because the Court's "independent review of the record" does not show "the state
 8 court's decision was objectively unreasonable," Proposed Claim Ten is meritless.
 9 Walker, 709 F.3d at 939 (internal quotation marks and citations omitted).

10 **e. Proposed Claim Twelve is Meritless - Denied Transcripts**

11 In Proposed Claim Twelve, Petitioner alleges he was denied copies of
 12 transcripts of court hearings. FAP at 12. Notably, Petitioner does not identify
 13 what transcripts he was denied nor does he explain how they would have assisted
 14 his defense. Id.

15 The Supreme Court has held a state "must, as a matter of equal protection,
 16 provide indigent prisoners with the basic tools of an adequate defense or appeal,
 17 when those tools are available for a price to other prisoners." Britt v. North
 18 Carolina, 404 U.S. 226, 227, 92 S. Ct. 431, 433, 30 L. Ed. 2d 400 (1971).
 19 However, the denial of transcripts is subject to harmless error review. United
 20 States v. Rosales-Lopez, 617 F.2d 1349, 1356 (9th Cir. 1980) aff'd, 451 U.S. 182,
 21 101 S. Ct. 1629, 68 L. Ed. 2d 22 (1981); see also United States v. Kirk, 844 F.2d
 22 660, 662 (9th Cir. 1988) (finding denial of request for transcripts was harmless
 23 where overwhelming evidence supports conviction).

24 Even assuming Petitioner was erroneously denied copies of transcripts, a
 25 reasonable jurist could find any possible error was harmless in light of the
 26 overwhelming evidence of Petitioner's guilt. See Brecht v. Abrahamson, 507 U.S.
 27 619, 637-38, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1993). The victim identified
 28 Petitioner when he returned to the coffee shop shortly after the attack. 3 RT 338-

39; 4 RT 621. DNA evidence linked Petitioner to the sexual assault. 4 RT 686-87. The results of the victim's physical examination were consistent with her report of the attack. 3 RT 390-97. Finally, a tape recording was played for the jury of Petitioner's police interview, in which he admitted striking the victim and having sexual contact with her. Lodg. 4, Ex. B at 6-13. Accordingly, because the Court's "independent review of the record" does not show "the state court's decision was objectively unreasonable," Proposed Claim Twelve is meritless. Walker, 709 F.3d at 939 (internal quotation marks and citations omitted).

f. Proposed Claim Thirteen is Meritless - Excluded Defense Evidence

In Proposed Claim Thirteen, Petitioner alleges the trial court unreasonably excluded defense evidence, including hospital records, college class schedule, contents of Petitioner's book bag, cellphone, and wallet. FAP at 12. Petitioner also alleges he was denied testing on fingerprint exemplars. Id. Petitioner argues this "evidence was needed to present [his] defense." Id.

The Sixth Amendment right to present a defense is a fundamental rule that may be violated by the erroneous exclusion of defense evidence. DePetrís v. Kuykendall, 239 F.3d 1057, 1062 (9th Cir. 2001) (citing Chambers v. Mississippi, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973) and Washington v. Texas, 388 U.S. 14, 19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967)). However, the right to present a defense is not absolute, and it generally requires "unusually compelling circumstances . . . to outweigh the strong state interest in administration of its trials." Perry v. Rushen, 713 F.2d 1447, 1452 (9th Cir. 1983). "[S]tate and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials." United States v. Scheffer, 523 U.S. 303, 308, 118 S. Ct. 1261, 140 L. Ed. 2d 413 (1998). "While the Constitution . . . prohibits the exclusion of defense evidence under rules that serve no legitimate purpose or that are disproportionate to the ends that they are asserted

1 to promote, well-established rules of evidence permit trial judges to exclude
 2 evidence if its probative value is outweighed by certain other factors such as unfair
 3 prejudice, confusion of the issues, or potential to mislead the jury.” Holmes v.
 4 South Carolina, 547 U.S. 319, 320, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006).
 5 Moreover, a petitioner is not entitled to habeas relief on a claim a state court
 6 violated due process unless such error had a “substantial and injurious effect or
 7 influence in determining the jury’s verdict.” See Brecht, 507 U.S. at 637-38.

8 Petitioner has not explained how the evidence he says was erroneously
 9 excluded would have made it possible for him to “defend against witness
 10 allegations.” FAP at 12. Therefore, Petitioner has not established the state court
 11 erred in excluding the evidence or that any error violated due process. See
 12 Holmes, 547 U.S. at 320. Moreover, a reasonable jurist could find any error was
 13 harmless in light of the overwhelming evidence of Petitioner’s guilt discussed in
 14 Section IV.D.3.e. See Brecht, 507 U.S. at 637-38.

15 Accordingly, because the Court’s “independent review of the record” does
 16 not show “the state court’s decision was objectively unreasonable,” Proposed
 17 Claim Thirteen is meritless. Walker, 709 F.3d at 939 (internal quotation marks and
 18 citations omitted).

19 **g. Proposed Claim Fourteen is Meritless - Adversarial Testing**
 20 **of Prosecution Case**

21 Petitioner claims he was “denied the right to submit [the] prosecution[’]s
 22 case to adversarial testing.” FAP at 12. He argues the “cumulative result stems
 23 from [1] collusion, [2] concealment of errors, [3] manufactured proceedings, [4]
 24 altered court minutes, [5] admission of insufficient evidence, and [6] omission of
 25 relevant defense evidence at trial.” Id. This claim appears to be a claim of
 26 cumulative error based on a number of the proposed claims discussed above.
 27 “Cumulative error applies where, although no single trial error examined in
 28 isolation is sufficiently prejudicial to warrant reversal, the cumulative effect of

multiple errors may still prejudice a defendant.” Mancuso v. Olivarez, 292 F.3d 939, 957 (9th Cir. 2002) (citing United States v. Frederick, 78 F.3d 1370, 1381 (9th Cir. 1996)).

Here, as discussed previously, the Court finds none of the alleged errors individually constituted error or prejudiced Petitioner. See Mancuso, 292 F.3d at 957; Detrich v. Ryan, 740 F.3d 1237, 1273 (9th Cir. 2013) (cumulative effect of counsel’s alleged errors did not amount to ineffectiveness because most of petitioner’s claims relied on misleading characterizations of the factual record that, even if true, would not establish significant prejudice, and even “[t]aken cumulatively, they still are not substantial”), cert. denied, 134 S. Ct. 2662 (2014). Accordingly, a reasonable jurist could find Petitioner did not suffer any cumulative error that deprived him of due process.

Moreover, to the extent Petitioner seeks to present “new” claims that were not presented individually, Petitioner does not explain how these claims affected his ability to cross-examine witnesses at trial or present his case. Second, a reasonable jurist could find any error in suppressing or omitting evidence was harmless in light of the overwhelming evidence of Petitioner’s guilt discussed in Section IV.D.3.e. See Brecht, 507 U.S. at 637-38.

Accordingly, because the Court’s “independent review of the record” does not show “the state court’s decision was objectively unreasonable,” Proposed Claim Fourteen is meritless. Walker, 709 F.3d at 939 (internal quotation marks and citations omitted).

h. Proposed Claim Fifteen is Meritless - Prosecutorial Misconduct

In Proposed Claim Fifteen, Petitioner appears to allege prosecutorial misconduct. FAP at 13. Petitioner alleges the prosecution colluded with law enforcement to convict him, and cites: “[1] unlawful arrest, [2] illegal transport, [3] unlawful detention, [4] delayed arrest, [5] 48 hr. McLaughlin violation, [6] illegal

1 search & seizure by way of S.A.R.T. examination, [7] excessive force while
 2 detainee, [8] manufactured Doubt Declared on Competency proceeding to conceal
 3 excessive force, [9] speedy trial violation, [10] amending complaint w/o Defense
 4 present, [and] [11] altered minutes contributed to conviction.” Id.

5 A habeas petition alleging prosecutorial misconduct will be granted only
 6 when the misconduct did “so infect the trial with unfairness as to make the
 7 resulting conviction a denial of due process.” Greer v. Miller, 483 U.S. 756, 765,
 8 107 S. Ct. 3102, 97 L. Ed. 2d 618 (1987) (quoting Donnelly v. DeChristoforo, 416
 9 U.S. 637, 643, 94 S. Ct. 1868, 40 L. Ed. 2d 431 (1974)); see also Darden v.
 10 Wainwright, 477 U.S. 168, 181, 106 S. Ct. 2464, 91 L. Ed. 2d 144 (1986). “[T]he
 11 touchstone of due process analysis in cases of alleged prosecutorial misconduct is
 12 the fairness of the trial, not the culpability of the prosecutor.” Smith v. Phillips,
 13 455 U.S. 209, 219, 102 S. Ct. 940, 71 L. Ed. 2d 78 (1982).

14 To grant habeas relief on the basis of prosecutorial misconduct, the
 15 misconduct must have been prejudicial, that is, it must have “had substantial and
 16 injurious effect or influence in determining the jury’s verdict.” Brecht, 507 U.S. at
 17 623. See Karis v. Calderon, 283 F.3d 1117, 1128 (9th Cir. 2002) (holding a claim
 18 of prosecutorial misconduct is analyzed under the prejudice standard set forth in
 19 Brecht). Under Brecht, a reviewing court must grant relief if “in grave doubt as to
 20 the harmlessness of the error.” O’Neal v. McAninch, 513 U.S. 432, 436, 115 S. Ct.
 21 992, 130 L. Ed. 2d 947 (1995). In assessing prejudice, the court looks at the
 22 alleged misconduct in the context of the whole trial, including the strength of the
 23 evidence of petitioner’s guilt, to determine whether an error “seriously affected the
 24 fairness of the trial.” United States v. Young, 470 U.S. 1, 20, 105 S. Ct. 1038,
 25 1049, 84 L. Ed. 2d 1 (1985).

26 As discussed above, the first eight alleged instances of misconduct are
 27 barred by Powell, 428 U.S. at 494. The alleged speedy trial violation claim is
 28 duplicative of existing Claim Four. Pet. at 6. The Court dismissed existing Claim

Four because the state court's determination there was no speedy trial violation was not unreasonable. Dkt. 60 at 25. The Court's review of the record does not reveal the Information or Complaint was ever amended. Moreover, in light of the overwhelming evidence of Petitioner's guilt discussed in Section IV.D.3.e., a reasonable jurist could find any error was harmless. See Brecht, 507 U.S. at 637-38.

Accordingly, because the Court's "independent review of the record" does not show "the state court's decision was objectively unreasonable," Proposed Claim Fifteen is meritless. Walker, 709 F.3d at 939 (internal quotation marks and citations omitted).

i. Proposed Claim Sixteen is Meritless - Due Process

In Proposed Claim Sixteen, Petitioner alleges various violations of due process "from arrest through to sentencing," including "arrest, transport, detention, and testing, upon being accused, but prior to being charged or booked is contrary to established law, where court proceeding(s) continued to administer unethical conclusions of proceedings and/or alter and manufactured proceedings, for the sole purpose of the 'appearance' of proper adjudication, while substantial rights were violated." FAP at 13.

It is unclear exactly what Petitioner's claim is aside from the cumulative effect of multiple alleged due process violations. However, because none of the alleged violations has merit, as discussed above, the Court's "independent review of the record" does not show "the state court's decision was objectively unreasonable." Walker, 709 F.3d at 939 (internal quotation marks and citations omitted). Therefore, Proposed Claim Sixteen is meritless.

j. Proposed Claim Seventeen is Meritless - Ineffective Assistance of Appellate Counsel

In Proposed Claim Seventeen, Petitioner alleges his appellate counsel was ineffective by refusing to raise "any of the viable issues presented" in his FAP on

1 direct appeal. FAP at 13.

2 **i. Applicable Law**

3 For Petitioner to prevail on his ineffective assistance of counsel claim, he
4 must satisfy a two-prong test: (1) counsel's performance was deficient, and (2)
5 prejudiced resulted from the deficient performance. Strickland v. Washington, 466
6 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). A court evaluating an
7 ineffective assistance of counsel claim does not need to address both components
8 of the test if a petitioner cannot sufficiently prove one of them. Id. at 697; see also
9 Thomas v. Borg, 159 F.3d 1147, 1152 (9th Cir. 1998).

10 To prove deficient performance, a petitioner must show counsel's
11 representation fell below an objective standard of reasonableness. Strickland, 466
12 U.S. at 687-88. However, establishing counsel's deficient performance does not
13 warrant setting aside the judgment if the error had no effect on the judgment.
14 Strickland, 466 U.S. at 691; see also Seidel v. Merkle, 146 F.3d 750, 757 (9th Cir.
15 1998). Thus, a petitioner must also show prejudice, such that there is a reasonable
16 probability that, but for counsel's unprofessional errors, the result of the
17 proceeding would have been different. Strickland, 466 U.S. at 694.

18 Moreover, a habeas court's review of a claim under the Strickland standard
19 is "doubly deferential." Knowles v. Mirzayance, 556 U.S. 111, 123, 129 S. Ct.
20 1411, 173 L. Ed. 2d 251 (2009). The relevant question "is not whether a federal
21 court believes the state court's determination under the Strickland standard was
22 incorrect but whether that determination was unreasonable – a substantially higher
23 threshold." Id. (citations omitted).

24 The Strickland standard also applies to claims of ineffective assistance of
25 appellate counsel based on the failure of counsel to raise particular claims on
26 appeal. Smith v. Robbins, 528 U.S. 259, 285, 120 S. Ct. 746, 145 L. Ed. 2d 756
27 (2000). A habeas petitioner must show, but for appellate counsel's failure to raise
28 the omitted claim, there is a reasonable probability the petitioner would have

1 prevailed on appeal. In the absence of such a showing, neither Strickland prong is
 2 satisfied. See Pollard v. White, 119 F.3d 1430, 1435-37 (9th Cir. 1997); Miller v.
 3 Keeney, 882 F.2d 1428, 1434-35 (9th Cir. 1989).

4 **ii. Analysis**

5 As explained herein, each of Petitioner's proposed claims lack merit. Thus,
 6 the claims would not have resulted in a more favorable result on appeal and do not
 7 support Petitioner's claim of ineffective assistance of appellate counsel. Jones v.
 8 Ryan, 691 F.3d 1093, 1101 (9th Cir. 2012) (failure of appellate counsel to raise
 9 meritless argument cannot be prejudicial); Wildman v. Johnson, 261 F.3d 832, 840
 10 (9th Cir. 2001) (holding that "appellate counsel's failure to raise issues on direct
 11 appeal does not constitute ineffective assistance when appeal would not have
 12 provided grounds for reversal"). Accordingly, because the Court's "independent
 13 review of the record" does not show "the state court's decision was objectively
 14 unreasonable," Proposed Claim Seventeen is meritless. Walker, 709 F.3d at 939
 15 (internal quotation marks and citations omitted).

16 **k. Proposed Claim Eighteen is Meritless - Actual Innocence**

17 In Proposed Claim Eighteen, Petitioner alleges he "is 'factually' and
 18 'procedurally'" innocent, because his conviction was "the result of collusion" and
 19 multiple errors and "the circumstances of [his] conviction were misconstrued."
 20 FAP at 14.

21 As an initial matter, there is no clearly established U.S. Supreme Court
 22 precedent allowing for habeas relief based on a freestanding claim of actual
 23 innocence. McQuiggin v. Perkins, ___ U.S. ___, 133 S. Ct. 1924, 1931, 185 L. Ed.
 24 2d 1019 (2013) (citing Herrera v. Collins, 506 U.S. 390, 404-05, 113 S. Ct. 853,
 25 122 L. Ed. 2d 203 (1993)).

26 Second, "[a] petitioner does not meet the threshold requirement [of proving
 27 actual innocence] unless he persuades the district court that, in light of the new
 28 evidence, *no juror, acting reasonably*, would have voted to find him guilty beyond

1 a reasonable doubt.” Perkins, 133 S. Ct. at 1928 (emphasis added). A valid claim
 2 of actual innocence requires that a petitioner set forth “new reliable evidence,” (e.g.
 3 exculpatory scientific evidence, trustworthy eyewitness accounts, or critical
 4 physical evidence) that demonstrates “it is more likely than not that no reasonable
 5 juror would have convicted him in the light of the new evidence.” Schlup v. Delo,
 6 513 U.S. 298, 324, 327-28, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995); Lee v.
 7 Lampert, 653 F.3d 929, 938 (9th Cir. 2011). “This exacting standard sets an
 8 extremely high hurdle” that is met “only in the extraordinary case.” Stewart v.
 9 Cate, 757 F.3d 929, 938 (9th Cir. 2014) (citations and internal quotation marks
 10 omitted).

11 Here, Petitioner’s actual innocence claim is meritless. As discussed
 12 previously in Section IV.D.3.e., there was overwhelming evidence of Petitioner’s
 13 guilt presented at trial. Moreover, Petitioner has not submitted any evidence, let
 14 alone new and reliable evidence that would lead the Court to conclude “it is more
 15 likely than not that no reasonable juror would have convicted him in the light of
 16 the new evidence.” Schlup, 513 U.S. at 327-28. Thus, Petitioner fails to
 17 demonstrate actual innocence. Stewart, 757 F.3d at 938.

18 Accordingly, because the Court’s “independent review of the record” does
 19 not show “the state court’s decision was objectively unreasonable,” Proposed
 20 Claim Eighteen is meritless. Walker, 709 F.3d at 939 (internal quotation marks
 21 and citations omitted).

22 **I. Proposed Claim Nineteen is Meritless - Self-Representation**

23 In Proposed Claim Nineteen, Petitioner alleges his “self-representation rights
 24 [were] violated.” FAP at 14. Petitioner alleges he was forced to choose between
 25 appointed counsel who had a conflict of interest and proceeding pro per. Id.

26 The Sixth Amendment guarantees a defendant in a criminal case the right to
 27 represent himself at trial. Faretta v. California, 422 U.S. 806, 95 S. Ct. 2525, 45 L.
 28 Ed. 2d 562 (1975). So long as the request to proceed pro se is timely and

1 unequivocal, a court must grant the request after determining the defendant has
 2 “knowingly and intelligently” waived the right to counsel. Id. at 835-36.
 3 Petitioner was granted pro per status at the hearing on January 21, 2010, well in
 4 advance of his March 24, 2010 trial date. RT A1-A24. Petitioner does not argue
 5 his waiver was not knowing and intelligent, and the record reflects it was knowing
 6 and intelligent. Id. When Petitioner requested to represent himself, the court
 7 informed him of the difficulties and dangers associated with pro per status. RT
 8 A2-A11. Petitioner explained he didn’t feel he had any choice and that he had to
 9 represent himself because “[u]nless I can put in a Marsden hearing and get other
 10 representation[,] I don’t – really don’t feel like I’m being represented.” RT A10.
 11 The court, therefore, held a Marsden hearing, but found appointed counsel did not
 12 have a conflict of interest and declined to appoint a different attorney. RT A12-
 13 A18. After further colloquy regarding the potential maximum sentence Petitioner
 14 faced and reviewing the waiver form signed by Petitioner, the court granted
 15 Petitioner’s request to represent himself. RT A22. A reasonable jurist could find
 16 the trial court conducted a proper inquiry into Petitioner’s claim of appointed
 17 counsel’s conflict and permitted Petitioner to proceed pro per following his
 18 knowing and intelligent waiver of counsel.

19 Accordingly, because the Court’s “independent review of the record” does
 20 not show “the state court’s decision was objectively unreasonable,” Proposed
 21 Claim Nineteen is meritless. Walker, 709 F.3d at 939 (internal quotation marks
 22 and citations omitted).⁷

24 ⁷ Petitioner also appears to argue as part of Proposed Claim Nineteen that the
 25 prior eighteen proposed claims show ineffective assistance of counsel. Id.
 26 However, it is unclear from the FAP what specific conduct by Petitioner’s trial
 27 counsel, that was not included in Claim Five of the original Petition, was deficient.
 28 James v. Borg, 24 F.3d 20, 26 (9th Cir. 1994) (“Conclusory allegations which are
 (continued...)”)

Based on Petitioner's undue delay in seeking to amend the Petition and because amendment would prejudice Respondent and be futile, the Court properly denied Petitioner's Motion to Amend the Petition. Bonin, 59 F.3d at 845.

V.

RECOMMENDATION

IT IS THEREFORE RECOMMENDED that the District Court issue an order: (1) accepting the findings and recommendations in this Report; (2) granting Petitioner's Rule 60(b) Motion for the limited purpose of reconsidering Petitioner's Motion for Leave to Amend; (3) denying Petitioner's Motion for Leave to Amend the Petition; and (4) dismissing the action with prejudice.

DATED: December 9, 2015



HON. KENLY KIYA KATO
UNITED STATES MAGISTRATE JUDGE

(...continued)

not supported by a statement of specific facts do not warrant habeas relief.”). Further, establishing counsel's deficient performance does not warrant setting aside the judgment if the error had no effect on the judgment. Strickland, 466 U.S. at 691; see also Seidel v. Merkle, 146 F.3d 750, 757 (9th Cir. 1998). Petitioner has not explained how, in light of the overwhelming evidence of his guilt, but for counsel's unprofessional errors, the result of the proceeding would have been different. Strickland, 466 U.S. at 694.

**Additional material
from this filing is
available in the
Clerk's Office.**