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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA
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11 THOMAS GAFFNEY WALKER,) Case No. SACV 21-0626-SSS (JPR)
12)
13) Petitioner,)
14) REPORT AND RECOMMENDATION OF
15) v.) U.S. MAGISTRATE JUDGE
16)
17) PATRICK COVELLO, Warden,¹)
18)
19) Respondent.)
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17 This Report and Recommendation is submitted to the Honorable
18 Sunshine Suzanne Sykes, U.S. District Judge, under 28 U.S.C.
19 § 636 and General Order 05-07 of the U.S. District Court for the
20 Central District of California.
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23
24 ¹ Patrick Covello is substituted in under Federal Rule of
25 Civil Procedure 25(d) as the proper Respondent because he is the
26 warden of Mule Creek State Prison, where Petitioner is housed. See
27 Mule Creek State Prison, Cal. Dep't of Corr. & Rehab.,
28 <https://www.cdcr.ca.gov/facility-locator/mcsp/> (last visited June
26, 2024); (see also Not. Change Address at 2, ECF No. 13
(throughout, the Court uses the pagination generated by its Case
Management/Electronic Case Filing system except for citations to
the Clerk's and Reporter's transcripts)).

PROCEEDINGS

On March 30, 2021, Petitioner filed pro se a Petition for Writ of Habeas Corpus by a Person in State Custody, raising two claims challenging his 2017 convictions from two different trials for residential burglary, robbery, kidnapping, and sexual-assault offenses. On May 17, 2021, Respondent answered, and on June 16, Petitioner replied.

On October 6, 2022, the previously assigned Magistrate Judge issued a Report and Recommendation recommending that the Petition be granted on its claim that the trial court violated the Sixth Amendment by denying Petitioner's request to represent himself. (See R. & R. at 16-25, ECF No. 18; Pet. at 6-16, ECF No. 1.) The Report and Recommendation did not address the Petition's other claim, that trial counsel was constitutionally ineffective.

(See R. & R. at 5 n.10, ECF No. 18; Pet. at 17-20, ECF No. 1.)

On January 26, 2024, the District Judge declined to adopt the Magistrate Judge's Report and Recommendation, denied relief on the self-representation claim but granted a certificate of appealability for it, and recommitted the matter to the Magistrate Judge to consider the Petition's ineffective-assistance claim.² (See Order at 2, 10, ECF No. 26.) Three days later, Petitioner's case was reassigned to the undersigned after the previously assigned Magistrate Judge retired.

For the reasons discussed below, the Court recommends that

² The District Judge stayed the certificate of appealability until after the Magistrate Judge issued a report and recommendation on the ineffective-assistance claim. (See Order at 10, ECF No. 26.)

1 the remaining claim in the Petition be denied and this action be
2 dismissed with prejudice.

3 **PETITIONER'S REMAINING CLAIM**

4 Trial counsel was ineffective because he requested a "last
5 minute" continuance for DNA testing that could have been done
6 years earlier and failed to have DNA elimination samples taken
7 from potential suspects; didn't cross-examine three prosecution
8 witnesses; failed to call an expert to challenge the
9 prosecution's DNA evidence; and didn't "contest" the prosecution
10 DNA expert's methods or results. (Pet. at 17-20, ECF No. 1.)

11 **BACKGROUND**

12 In November 2017, an Orange County Superior Court jury
13 convicted Petitioner of first-degree residential burglary of an
14 inhabited dwelling, kidnapping, and second-degree robbery (see
15 Lodged Doc. 1, Case No. 13CF0710, 2 Clerk's Tr. at 349-52, ECF
16 No. 10-2) and another convicted him of forcible oral copulation,
17 assault with intent to commit a sexual offense, and burglary of
18 an inhabited dwelling with intent to commit a sexual offense (see
19 Lodged Doc. 4, Case No. 13WF2533, 2 Clerk's Tr. at 458-63, ECF
20 No. 10-7). He was found to have suffered several prior
21 convictions and to have served three prior prison terms. (See
22 id., 1 Clerk's Tr. at 78, ECF No. 10-6; Lodged Doc. 3, Case No.
23 13CF0710, 2 Rep.'s Tr. at 561, ECF No. 10-5.) In January 2018,
24 he was sentenced to 75 years to life plus 18 years. (See Lodged
25 Doc. 4, Case No. 13WF2533, 2 Clerk's Tr. at 508-09, ECF No. 10-7;
26 Lodged Doc. 1, Case No. 13CF0710, 2 Clerk's Tr. at 466-67, ECF
27 No. 10-2.)

28 Petitioner appealed (Lodged Doc. 8, ECF No. 10-14),

1 asserting the Petitioner's right-to-self-representation claim,
2 among others, and on January 7, 2020, the court of appeal ordered
3 the trial court to strike the prior-prison-term enhancements but
4 otherwise affirmed the judgments (see Lodged Doc. 11 at 18, ECF
5 No. 10-17).³ Thereafter, he filed a petition for rehearing (see
6 Lodged Doc. 12, ECF No. 10-18), which the court of appeal
7 summarily denied on January 29, 2020 (see Lodged Doc. 13, ECF No.
8 10-19). He then filed a petition for review in the state supreme
9 court (see Lodged Doc. 14, ECF No. 10-20), which denied it on
10 April 15, 2020 (see Lodged Doc. 15, ECF No. 10-21).

11 On October 14, 2020, Petitioner filed a habeas petition
12 asserting the Petitioner's ineffective-assistance claim in the
13 superior court (see Lodged Doc. 16, ECF No. 10-22),⁴ which denied
14 it in a reasoned decision on October 28 (see Lodged Doc. 17, ECF
15 No. 10-23). On December 17, 2020, he filed a habeas petition
16 asserting the same claim in the court of appeal (see Lodged Doc.
17 18, ECF No. 10-24), which summarily denied it on January 6, 2021
18 (see Lodged Doc. 19, ECF No. 10-25); the state supreme court did
19 likewise on March 10 (see Lodged Doc. 20, ECF No. 10-26; Lodged
20 Doc. 21, ECF No. 10-27).

21 SUMMARY OF THE EVIDENCE

22 The factual summary in a state appellate-court decision is
23 entitled to a presumption of correctness under 28 U.S.C.

24
25 ³ Petitioner's appeals from his two judgments were
26 consolidated. (See Lodged Doc. 11 at 2, ECF No. 10-17.)

27 ⁴ In his superior-court petition, Petitioner also alleged that
28 appellate counsel was ineffective. (See Lodged Doc. 16 at 8, ECF
No. 10-22.) He doesn't raise that claim in this action.

1 § 2254(e)(1). See Crittenden v. Chappell, 804 F.3d 998, 1010-11
2 (9th Cir. 2015); but see Murray v. Schriro, 745 F.3d 984, 1001
3 (9th Cir. 2014) (discussing “state of confusion” in circuit’s law
4 concerning interplay of § 2254(d)(2) and (e)(1)). Because
5 Petitioner does not challenge the sufficiency of the evidence,
6 the Court adopts the following statement of facts from the court
7 of appeal decision on direct appeal as a fair and accurate
8 summary of the evidence presented at trial. The Court has
9 nonetheless independently reviewed the state-court record.

10 On January 27 and February 13, 2013, [Petitioner]
11 entered two homes in Costa Mesa and committed sex
12 offenses. On February 25, [Petitioner] entered two homes
13 in Santa Ana and committed other crimes. The prosecution
14 filed two separate cases.⁵

15 The Costa Mesa Case (13WF2533)

16 On January 27, 2013, Patricia lived in a Costa Mesa
17 apartment with her four children. At about 10:00 p.m.,
18 she went to sleep. Patricia awoke in her bed to find
19 [Petitioner] lying behind her. [Petitioner] grabbed
20 Patricia’s hair and was trying to take off her shorts.
21 As Patricia struggled, [Petitioner] got on top of
22 Patricia and raped her. Patricia got away, ran into the
23 bathroom, and tried to close the door, but [Petitioner]
24 was able to get in. [Petitioner] sodomized Patricia in

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26 ⁵ Like the court of appeal (see Lodged Doc. 11 at 2-4, ECF No.
27 10-17), the Court refers to the cases as the Costa Mesa case and
28 the Santa Ana case, respectively. The bulk if not all of the
Petition’s allegations of attorney error concern the Costa Mesa
case. (See Pet. at 17-20, ECF No. 1.)

1 the bathroom. Patricia was able to get out of the
2 bathroom and call the police, but [Petitioner] ran away.

3 On February 13, 2013, Jenny lived in a Costa Mesa
4 home with her parents, brother, and sisters. That
5 evening, after changing into her pajamas, Jenny went
6 downstairs, entered the bathroom, and turned on the
7 lights. As she was closing the door, [Petitioner] turned
8 off the lights and told her to be quiet. [Petitioner]
9 held a knife to Jenny's throat. Jenny orally copulated
10 [Petitioner] as he pulled on her hair. After
11 [Petitioner] left, Jenny went upstairs and told her
12 parents what happened.

13 Fingerprint evidence linked [Petitioner] to
14 Patricia's home. DNA evidence linked [Petitioner] to
15 both Costa Mesa homes.

16 The Santa Ana Case (13CF0710)

17 On February 25, 2013, Ana lived with her family in
18 a Santa Ana apartment on Lyon Street. At about 6:30
19 a.m., Ana was getting ready for high school when she saw
20 [Petitioner] entering the living room. [Petitioner] had
21 a beer in his hand and appeared to be under the
22 influence. [Petitioner] came towards Ana, who walked
23 backwards. [Petitioner] got within a foot of Ana, put
24 his hands on her waist, and looked at her with an intense
25 stare. Ana was able to alert other family members.
26 [Petitioner] fled as the police were being called.

27 On February 25, 2013, Norma lived with her husband
28 and children in a Santa Ana apartment on Lyon Street. At

1 about 9:00 a.m., Norma was alone when she saw
2 [Petitioner] walking down the stairs within her
3 apartment. Norma tried to leave, but [Petitioner]
4 blocked her. [Petitioner] told Norma to keep quiet
5 because the police were outside. Hours later,
6 [Petitioner] eventually fled on a stolen bicycle.

7 Ana and Norma, as well as other percipient
8 witnesses, positively identified [Petitioner] as the
9 intruder in the Santa Ana homes.

10 (Lodged Doc. 11 at 2-4, ECF No. 10-17.)

11 **STANDARD OF REVIEW**

12 Under 28 U.S.C. § 2254(d), as amended by the Antiterrorism
13 and Effective Death Penalty Act of 1996:

14 An application for a writ of habeas corpus on behalf
15 of a person in custody pursuant to the judgment of a
16 State court shall not be granted with respect to any
17 claim that was adjudicated on the merits in State court
18 proceedings unless the adjudication of the claim – (1)
19 resulted in a decision that was contrary to, or involved
20 an unreasonable application of, clearly established
21 Federal law, as determined by the Supreme Court of the
22 United States; or (2) resulted in a decision that was
23 based on an unreasonable determination of the facts in
24 light of the evidence presented in the State court
25 proceeding.

26 Under AEDPA, the “clearly established Federal law” that
27 controls federal habeas review consists of holdings of Supreme
28 Court cases “as of the time of the relevant state-court

1 decision." Williams v. Taylor, 529 U.S. 362, 412 (2000). As the
2 Supreme Court has "repeatedly emphasized, . . . circuit precedent
3 does not constitute 'clearly established Federal law, as
4 determined by the Supreme Court.'" Glebe v. Frost, 574 U.S. 21,
5 24 (2014) (per curiam) (quoting § 2254(d)(1)). Further, circuit
6 precedent "cannot 'refine or sharpen a general principle of
7 Supreme Court jurisprudence into a specific legal rule that [the]
8 Court has not announced.'" Lopez v. Smith, 574 U.S. 1, 4 (2014)
9 (per curiam) (quoting Marshall v. Rodgers, 569 U.S. 58, 64 (2013)
10 (per curiam)).

11 Although a particular state-court decision may be both
12 "contrary to" and "an unreasonable application of" controlling
13 Supreme Court law, the two phrases have distinct meanings.
14 Williams, 529 U.S. at 412-13. A state-court decision is
15 "contrary to" clearly established federal law if it either
16 applies a rule that contradicts governing Supreme Court law or
17 reaches a result that differs from the result the Supreme Court
18 reached on "materially indistinguishable" facts. Early v.
19 Packer, 537 U.S. 3, 8 (2002) (per curiam) (citation omitted). A
20 state court need not cite or even be aware of the controlling
21 Supreme Court cases, "so long as neither the reasoning nor the
22 result of the state-court decision contradicts them." Id.

23 State-court decisions that are not "contrary to" Supreme
24 Court law may be set aside on federal habeas review only "if they
25 are not merely erroneous, but 'an unreasonable application' of
26 clearly established federal law, or based on 'an unreasonable
27 determination of the facts' (emphasis added)." Id. at 11
28 (quoting § 2254(d)). A state-court decision that correctly

1 identifies the governing legal rule may be rejected if it
2 unreasonably applies the rule to the facts of a particular case.
3 Williams, 529 U.S. at 407-08. To obtain federal habeas relief
4 for such an "unreasonable application," however, a petitioner
5 must show that the state court's application of Supreme Court law
6 was "objectively unreasonable." Id. at 409. In other words,
7 relief is warranted only if the state court's ruling was "so
8 lacking in justification that there was an error well understood
9 and comprehended in existing law beyond any possibility for
10 fairminded disagreement." Harrington v. Richter, 562 U.S. 86,
11 103 (2011). And even then, the error must have had a
12 "substantial and injurious effect" on the verdict. Brown v.
13 Davenport, 596 U.S. 118, 126, 133 (2022). "[E]ven clear error
14 will not suffice." Woods v. Donald, 575 U.S. 312, 316 (2015)
15 (per curiam) (citation omitted).

16 Here, Petitioner asserted the Petition's remaining claim in
17 the habeas petition he filed in the superior court (see Lodged
18 Doc. 16, ECF No. 10-22), which rejected it because he had "not
19 provided an adequate record" to allow for "a meaningful analysis"
20 (see Lodged Doc. 17 at 3, ECF No. 10-23 (citing People v. Duvall,
21 9 Cal. 4th 464, 474-75 (1995))). The court of appeal then
22 summarily denied his habeas petition raising the same claim (see
23 Lodged Doc. 18, ECF No. 10-24; Lodged Doc. 19, ECF No. 10-25),
24 and the supreme court thereafter did the same (see Lodged Doc.
25 20, ECF No. 10-26; Lodged Doc. 21, ECF No. 10-27).

26 A rebuttable presumption exists that a higher state court's
27 unexplained decision adopted the same reasoning as the last
28 reasoned state-court decision. See Wilson v. Sellers, 584 U.S.

1 122, 125 (2018) (“[F]ederal court should ‘look through’ the
2 unexplained decision to the last related state-court decision
3 that does provide a relevant rationale” and “presume that the
4 unexplained decision adopted the same reasoning.”). The parties
5 have not even attempted to rebut that presumption here, and the
6 Court therefore looks through the supreme court’s silent denial
7 to the superior court’s reasoned decision as the basis for the
8 state court’s judgment on the Petition’s remaining claim.

9 As related above, the superior court cited Duval in denying
10 that claim (see Lodged Doc. 17 at 3, ECF No. 10-23 (citing
11 Duval, 9 Cal. 4th at 474-75))), and Petitioner has not offered
12 any explanation for not providing the needed documentary evidence
13 to support it. Consequently, he has not fairly presented his
14 claim to the state courts, see § 2254(b) (prohibiting habeas
15 relief for prisoners in state custody unless they exhaust
16 available state-court remedies); Ybarra v. McDaniel, 656 F.3d
17 984, 991 (9th Cir. 2011) (explaining that exhaustion requires
18 petitioners to fairly present contentions to state courts), and
19 it is unexhausted, see Kim v. Villalobos, 799 F.2d 1317, 1319
20 (9th Cir. 1986); see also Gamez v. Curry, No. C 09-1229 PJH
21 (PR)., 2010 WL 330210, at *2 (N.D. Cal. Jan. 20, 2010)
22 (dismissing as unexhausted claim denied with citation to Duval
23 for failure to include reasonably available documentary
24 evidence).

25 Respondent has not, however, argued that the claim is
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1 unexhausted and thus has forfeited that argument.⁶ See Brown v.
2 Maass, 11 F.3d 914, 914 (9th Cir. 1993) (per curiam) (state
3 forfeited exhaustion by failing to assert it in district court
4 (citing Granberry v. Greer, 481 U.S. 129, 134 (1987))); Rodriguez
5 v. Koenig, No. 2:21-CV-05070 SVW (KES), 2022 WL 11348302, at *8
6 (C.D. Cal. Sept. 2, 2022) (respondent waived exhaustion when he
7 "did not oppose [claim] as unexhausted"), accepted by 2022 WL
8 11269273 (C.D. Cal. Oct. 19, 2022). Although federal courts
9 generally do not address the merits of unexhausted claims, the
10 Court does so here because as related below, the Petition's
11 remaining claim does not present a colorable basis for federal
12 habeas relief. See Cassett v. Stewart, 406 F.3d 614, 624 (9th
13 Cir. 2005) ("[A] federal court may deny an unexhausted petition
14 on the merits only when it is perfectly clear that the applicant
15 does not raise even a colorable federal claim."). Because no
16 state court has addressed the claim on its merits, the Court
17 reviews it de novo. See Cone v. Bell, 556 U.S. 449, 472 (2009)
18 (when state court did not reach federal constitutional issue and
19 claim is not otherwise barred, "the claim is reviewed de novo");
20 see also Berghuis v. Thompkins, 560 U.S. 370, 389 (2010)
21 (explaining that when claim fails under de novo review, it also
22 fails under AEDPA's deferential standard of review).

23 **DISCUSSION**

24 Petitioner contends that his trial counsel committed five
25 errors that deprived him of his right to effective assistance.
26

27 ⁶ Indeed, Respondent states that the Petition's "claims appear
28 to be exhausted." (Answer at 2, ECF No. 9.)

(See Pet. at 18-20, ECF No. 1.) First, he asserts that counsel was ineffective by requesting a "last minute" continuance over his objection in order to have DNA testing conducted on evidence "that was obtained approximately 3½ years" before trial. (Id. at 19.) Second, he faults counsel for failing to have "DNA elimination samples" taken from "P. Medina; E. Cordova; [and] R. Anguilar"⁷ to show that one of them was a contributor to DNA found on a pair of sunglasses recovered from Patricia's home. (Id. at 18-19.) Third, he claims counsel was ineffective by failing to cross-examine three prosecution witnesses. (See id. at 19.) Fourth, he faults counsel for failing to call an expert witness to "bring clarification and/or to refute the prosecutions [sic] DNA expert testimony." (Id. at 20.) Finally, he asserts that counsel didn't adequately contest the prosecution DNA expert's testing methods or results. (See id. at 18.)

I. Relevant Facts⁸

A. The Investigation into the Attacks on Patricia and Jenny

The man who attacked Patricia left a pair of sunglasses in her home. (See Lodged Doc. 5, Case No. 13WF2533, 2 Rep.'s Tr. at 272-73, ECF No. 10-9.) They were swabbed for DNA (see id. at

⁷ Petitioner does not provide any information concerning these three individuals other than alleging (with no evidentiary support) that one of them, Aguilar, whose name sometimes appears in the Petition as "Aguilar" or "Anguilar," "had a physical encounter with the suspect" the day Patricia was attacked. (Pet. at 19, ECF No. 1.) Nothing in the record sheds any light on any of the individuals or why having DNA elimination samples taken from them would have benefited Petitioner's defense.

⁸ The following facts concern only the Costa Mesa case.

1 297-98), and the swab showed DNA from two major contributors (see
2 id., 3 Rep.'s Tr. at 543, ECF No. 10-10). Based on their DNA
3 profiles, Patricia and Petitioner could not be excluded as the
4 first and second major contributors, respectively. (See id. at
5 545, 552-53.) The likelihood of anyone other than Petitioner
6 having the DNA profile of the second major contributor was "more
7 rare than one in 500 billion unrelated individuals."⁹ (Id. at
8 558-59.)

9 The man who attacked Jenny held a knife to her neck. (See
10 id., 2 Rep.'s Tr. at 404, ECF No. 10-9.) When he ordered her to
11 orally copulate him, she refused unless he gave her the knife,
12 which he did. (Id. at 414.) Her father later gave it to the
13 crime-scene specialist who processed Jenny's home. (See id., 3
14 Rep.'s Tr. at 480-81, ECF No. 10-10.) It was swabbed for DNA
15 (see id. at 493-95), and the swab showed a "three-person
16 mixture," with only two major contributors (see id. at 548).
17 Based on their DNA profiles, Jenny and Petitioner could not be
18 excluded as the first and second major contributors,
19 respectively. (See id. at 549, 559.) The likelihood of anyone
20 other than Petitioner having the DNA profile of the second major
21 contributor was "more rare than one in a trillion unrelated
22 individuals."¹⁰ (Id. at 561.)

24 ⁹ The prosecution's DNA expert testified that the world-
25 population estimate was then seven billion. (See Lodged Doc. 5,
Case No. 13WF2533, 3 Rep.'s Tr. at 558, ECF No. 10-10).

26 ¹⁰ The profile of the second major contributor to the DNA on
27 the knife was "full" (see Lodged Doc. 5, Case No. 13WF2533, 3
28 Rep.'s Tr. at 560, ECF No. 10-10), whereas the profile of the
second major contributor to the DNA on the sunglasses was only

1 **B. Trial Proceedings**

2 The trial in the Costa Mesa case was scheduled to begin on
3 October 2, 2017 (see id., 1 Rep.'s Tr. at 124-28, ECF No. 10-
4 8),¹¹ over three and a half years after the charged crimes
5 occurred (see id., 2 Rep.'s Tr. at 318, 396, ECF No. 10-9). That
6 day, the prosecutor notified the trial court that he had just
7 learned that remaining portions of DNA from the knife and the
8 sunglasses had not been tested. (See id., 1 Rep.'s Tr. at 171-
9 72.) He noted that trial counsel had "previously requested"
10 retesting of the DNA but had lacked any available samples to do
11 it. (Id.) The prosecutor pegged "the likelihood of obtaining a
12 [DNA] profile" from the untested portions at "very small" because
13 of "evaporation" and "preservative that was used" on the portions
14 that had already been tested. (Id.)

15 Trial counsel characterized the prosecutor's revelation as
16 "entirely new information." (Id. at 172.) He explained that he
17 had invested "a very significant amount of time" finding a lab
18 that could retest the DNA evidence but had lacked an available
19 sample to have the testing performed. (Id.) He further

20

21 "partial" (id. at 557).

22 ¹¹ The trial was originally scheduled for September 28, 2017.
23 (See Lodged Doc. 5, Case No. 13WF2533, 1 Rep.'s Tr. at 124-28, ECF
24 No. 10-8.) Shortly before then, however, the prosecutor informed
25 trial counsel of new discovery and DNA reports that would not be
26 ready for a few more days. (See id. at 124.) Accordingly, the
27 trial was continued to October 2. (See id. at 169.) Petitioner
28 not only opposed the five-day continuance but also unsuccessfully
 sought to represent himself (see id. at 125, 144-45.) None of his
 current allegations of attorney error concern this five-day
 continuance, and as related above, his claim that the trial court
 deprived him of his Sixth Amendment right to represent himself has
 already been denied. (See Order at 2, 10, ECF No. 26.)

1 maintained that there was "a reasonable possibility" that the
2 initial testing was inaccurate. (Id. at 173.) Accordingly, the
3 existence of the untested samples "significantly affect[ed] [his]
4 readiness for trial." (Id.) He explained that if any chance
5 existed that retesting might undermine the initial DNA results,
6 he had to "do it." (Id. at 175.) The trial court agreed that
7 the prosecutor's revelation was "obviously . . . new information"
8 and stated that counsel likely had to ask for a continuance.
9 (Id. at 175-76.)

10 During a brief recess, counsel told Petitioner that he
11 believed continuing the trial was warranted in order to "exhaust
12 every possibility," but Petitioner opposed any continuance. (Id.
13 at 178.) When the hearing resumed, counsel moved to continue the
14 trial over Petitioner's objection, explaining that he believed
15 Petitioner was "making a serious mistake in not giving [him] the
16 option" to have an expert test the newly available evidence.
17 (See id. at 178-79.) The trial court agreed that the proposed
18 retesting "could potentially be exonerating." (Id. at 181.)
19 Nevertheless, Petitioner continued to oppose any continuance.
20 (See id. at 181-86.) Ultimately, the court, over his objection,
21 continued the trial to November 9, 2017. (See id. at 186-87.)
22 In doing so, the court observed that "it would be [ineffective
23 assistance] . . . if [counsel] d[id] not explore the possibility
24 of retesting whatever sample [was] left, because that [was] the
25 only defense that the defense [had]." (Id. at 187.)

26 Trial began on November 9, 2017. (See id. at 192.)
27 Evidently, the testing of the previously untested DNA samples was
28 not beneficial to Petitioner's defense, as counsel presented no

1 testimony at trial concerning the results; Petitioner does not
2 claim otherwise.

3 Counsel did, however, cross-examine the prosecution's DNA
4 expert. (See id., 3 Rep.'s Tr. at 561-608, 622, ECF No. 10-10.)
5 Under counsel's cross-examination, the DNA expert testified that
6 "robots," which played a large role in the DNA-testing process,
7 "sometimes . . . d[idn't] function properly." (Id. at 564-67.)
8 She also conceded the existence of "a corrective action report"
9 from shortly before the charged crimes concerning "one of the
10 robots that was actually used in this case" and acknowledged that
11 further investigation revealed "two possible other incidents of
12 malfunction a month earlier." (Id. at 567-68.) When asked
13 whether that "mean[t] that those mistakes were kind of left in
14 place at least for a month," she conceded that that was possible.
15 (Id. at 569.) She also admitted that her lab had made "multiple"
16 mistakes in the past, identified various points in the testing
17 process at which mistakes could occur, and described numerous
18 errors at the lab that occurred "relatively close in time to this
19 case." (Id. at 559-607.) When asked if she could "only talk
20 about" the errors that "ha[d] been caught," as opposed to those
21 that were not, she answered, "correct." (Id. at 607.)

22 **II. Applicable Law**

23 A petitioner claiming ineffective assistance of counsel must
24 show that counsel's performance was deficient and that the
25 deficient performance prejudiced his defense. Strickland v.
26 Washington, 466 U.S. 668, 687 (1984). "Deficient performance"
27 means unreasonable representation falling below professional
28 norms prevailing at the time of trial. Id. at 687-89. The

1 petitioner must overcome a "strong presumption" that his lawyer
2 "rendered adequate assistance and made all significant decisions
3 in the exercise of reasonable professional judgment." Id. at
4 689-90. Further, the petitioner "must identify the acts or
5 omissions of counsel that are alleged not to have been the result
6 of reasonable professional judgment." Id. at 690.

7 Counsel "has a duty to make reasonable investigations or to
8 make a reasonable decision that makes particular investigations
9 unnecessary." Id. at 691. Counsel's "duty to investigate" is
10 not "limitless," however, and does not "necessarily require that
11 every conceivable witness be interviewed" or "every path"
12 pursued. Hamilton v. Ayers, 583 F.3d 1100, 1129 (9th Cir. 2009).
13 Further, "when a defendant has given counsel reason to believe
14 that pursuing certain investigations would be fruitless or even
15 harmful, counsel's failure to pursue those investigations may not
16 later be challenged as unreasonable." Strickland, 466 U.S. at
17 691.

18 To meet his burden of showing the distinctive kind of
19 "prejudice" required by Strickland, the petitioner must
20 affirmatively show that a reasonable probability exists that but
21 for counsel's unprofessional errors, the result of the proceeding
22 would have been different. Id. at 694. A reasonable probability
23 is a probability sufficient to undermine confidence in the
24 outcome. Id.; see also Richter, 562 U.S. at 111 ("In assessing
25 prejudice under Strickland, the question is not whether a court
26 can be certain counsel's performance had no effect on the outcome
27 or whether it is possible a reasonable doubt might have been
28 established if counsel acted differently."). To find prejudice

1 from counsel's failure to investigate, the reviewing court must
2 consider "whether the noninvestigated evidence was powerful
3 enough to establish a probability that a reasonable attorney
4 would decide to present it and a probability that such
5 presentation might undermine the jury verdict." Mickey v. Ayers,
6 606 F.3d 1223, 1236-37 (9th Cir. 2010).

7 **III. Analysis**

8 Petitioner's ineffective-assistance claim does not warrant
9 habeas relief. As an initial matter, it fails for lack of
10 evidence because it is not supported by a declaration from trial
11 counsel concerning his actions (or any evidence that Petitioner
12 unsuccessfully sought one),¹² and as related below, reasons
13 apparent from the record could explain counsel's decision not to
14 raise the challenges Petitioner has identified. See Dunn v.
15 Reeves, 594 U.S. 731, 743 (2021) (per curiam) (failure to submit
16 declaration or elicit testimony from trial counsel about his
17 actions defeated ineffective-assistance claim when record
18 suggested strategic reasons for challenged actions because
19 "silent record cannot discharge a petitioner's burden"); Gentry
20 v. Sinclair, 705 F.3d 884, 900 (9th Cir. 2013) (as amended)

21
22 ¹² Petitioner contends without any supporting evidence that he
23 wrote trial counsel "numerous letters" requesting his transcript
24 and other discovery from his trial and filed a complaint with the
25 California State Bar concerning counsel's refusal to provide him
26 with the requested materials. (Reply at 7, ECF No. 12.) Of
27 course, appellate counsel, not trial counsel, would have had
28 Petitioner's trial record in order to prepare his direct appeal.
What's more, the record shows that trial counsel provided
Petitioner with the relevant discovery. (See Lodged Doc. 5, Case
No. 13WF2533, 1 Rep.'s Tr. at 119, 121, ECF No. 10-8.) In any
event, Petitioner does not allege that he sought a declaration from
counsel concerning the Petition's allegations.

1 (state court was not unreasonable in concluding that trial
2 counsel's performance was not deficient as to particular
3 ineffective-assistance claim when petitioner presented counsel's
4 affidavit only to "support . . . other ineffective assistance
5 claims" and "had no evidence" to support first claim).

6 Putting that aside, Petitioner's allegations of attorney
7 error are meritless. First, counsel did not perform deficiently
8 in requesting a continuance to have DNA testing conducted on
9 evidence that was disclosed only the day trial was set to begin.
10 Although Petitioner contends that counsel could have had the
11 testing conducted at any point in the three and a half years
12 beforehand (see Pet. at 19, ECF No. 1), counsel did not have
13 access to the samples on which he wanted DNA testing done at any
14 point before he requested the continuance (see Lodged Doc. 5,
15 Case No. 13WF2533, 1 Rep.'s Tr. at 171-72, ECF No. 10-8). To the
16 contrary, he requested the continuance because the prosecution
17 had just produced "entirely new information" (id. at 172), and
18 the prosecutor acknowledged that the samples had not been
19 available before then (see id. at 171-72).

20 Moreover, counsel had good reason to seek a continuance to
21 test the newly available samples. Indeed, Petitioner himself
22 acknowledged before trial that the primary evidence against him
23 would be DNA evidence (see id. at 140 (Petitioner stating, "It's
24 a DNA case, your honor, basically.")), and the results of the
25 initial DNA testing irrefutably implicated him in the attacks on
26 Patricia and Jenny (see id. at 175, 181, 3 Rep.'s Tr. at 552-53,
27 558-61, ECF No. 10-10). Undermining those results was the only
28 viable defense, and as counsel explained in requesting the

1 continuance, testing the newly available samples potentially
2 could have done just that. (See id., 1 Rep.'s Tr. at 175, 181,
3 ECF No. 10-8.) Accordingly, counsel could not have performed
4 unreasonably in having the samples tested before proceeding to
5 trial. To the contrary, as the trial court observed, it could
6 have been ineffective assistance not to do so.¹³ (See id. at
7 187).

8 Second, Petitioner's claim that counsel erred in failing to
9 have "DNA elimination samples" taken from three people who might
10 have been major contributors to the DNA found on the sunglasses
11 from Patricia's home is meritless. (Pet. at 18, ECF No. 1.) As
12 an initial matter, it is purely speculative because he points to
13 no evidence suggesting that any of the three people he identifies
14 were contributors of the DNA. See James v. Borg, 24 F.3d 20, 26
15 (9th Cir. 1994) ("Conclusory allegations which are not supported
16 by a statement of specific facts do not warrant habeas relief.");
17 Jones v. Gomez, 66 F.3d 199, 205 (9th Cir. 1995) (habeas relief
18 not warranted when claims for relief are unsupported by facts).
19 Indeed, two of them – P. Medina and E. Cordova (see Pet. at 18-
20 19, ECF No. 1) – are not mentioned in the record, and Petitioner
21 offers no facts about how either was connected to the attack on
22

23
24 ¹³ Although Petitioner suggests that the continuance – which
25 delayed the trial by only five weeks (see Lodged Doc. 5, Case No.
26 13WF2533, 1 Rep.'s Tr. at 124, 192, ECF No. 10-8) – deprived him of
27 his right to a speedy trial (see Pet. at 19, ECF No. 1), he alleges
28 no facts showing how it resulted in any prejudice. See Doggett v.
United States, 505 U.S. 647, 651 (1992) (identifying "whether delay
before trial was uncommonly long" and whether accused "suffered
prejudice as the delay's result" as relevant factors in deciding
speedy-trial claim).

1 Patricia. Although R. Aguilar, the third person Petitioner
2 identifies (see id.), was mentioned in passing during defense
3 counsel's cross-examination of one of the investigating
4 detectives (see Lodged Doc. 5, Case No. 13WF2533, 2 Rep.'s Tr. at
5 303-04, ECF No. 10-9), the record contains no information about
6 him. And trial counsel's brief questioning revealed only that
7 the testifying detective did not recognize Aguilar's name and
8 that the request for DNA testing did not include him. (See id.)
9 What's more, nothing in Petitioner's allegations suggests that
10 Aguilar was ever in Patricia's home, let alone that he left
11 sunglasses there. Although Petitioner alleges that Aguilar "had
12 a physical encounter with the suspect" the day Patricia was
13 attacked (Pet. at 19, ECF No. 1), he identifies no evidence to
14 show that the encounter actually happened.¹⁴ And even taking his
15 unsupported assertion as fact, he does not allege that Aguilar
16 came into contact with "the suspect's" sunglasses. (See id.) In
17 short, Petitioner has not shown that counsel had any reason to
18 have DNA elimination samples taken of any of the people he
19 identifies.

20 In any event, Petitioner could not have suffered any
21 prejudice from counsel's failure to have the proposed DNA
22 elimination samples taken. Although he suggests that there were
23 many contributors to the DNA on the sunglasses (see Pet. at 18-
24 19, ECF No. 1), there were in fact only two, one of whom was
25 Patricia. (See Lodged Doc. 5, Case No. 13WF2533, 3 Rep.'s Tr. at
26

27 ¹⁴ Petitioner alleges that Aguilar "testified" to this fact.
28 (Pet. at 19, ECF No. 1.) Aguilar did not testify at either of
Petitioner's trials.

1 543, 545, 553, ECF No. 10-10). That left only one other, and the
2 likelihood of anyone other than Petitioner being that major
3 contributor was "more rare than one in 500 billion unrelated
4 individuals." (Id. at 558-59.) Given that fact, taking the
5 proposed DNA elimination samples would have been pointless. As
6 such, Petitioner cannot show that but for counsel's failure to do
7 so, the jury would have reached a more favorable verdict.

8 Third, Petitioner's claim that counsel was ineffective for
9 failing to cross-examine prosecution witnesses is meritless. He
10 faults counsel for not cross-examining Aguilar, E. Cordova, and
11 Stafford Ethers. (See Pet. at 19, ECF No. 1.) But none of them
12 testified at either of Petitioner's trials. As such, counsel
13 could not have cross-examined them.¹⁵ And to the extent
14 Petitioner claims that counsel erred in failing to cross-examine
15 any witness who actually testified at the Costa Mesa trial (see
16 Pet. at 19, ECF No. 1), that claim fails because he does not
17 identify which witness (or witnesses) counsel should have cross-
18 examined but didn't or explain why opting not to was unreasonable
19 or prejudicial.

20 In any event, none of the witnesses whom counsel elected not
21 to cross-examine in the Costa Mesa case provided any testimony
22

23
24 ¹⁵ Petitioner doesn't fault counsel for not calling any of the
25 identified individuals as defense witnesses. But even if he had,
26 the claim would fail for lack of evidence because he has provided
27 no declaration from any of them demonstrating a willingness to
28 testify and setting forth the facts to which they would have
testified. See Dows v. Wood, 211 F.3d 480, 486 (9th Cir. 2000)
(rejecting ineffective-assistance claim based on failure to call
witness when petitioner presented no affidavit from witness showing
witness was willing to provide testimony helpful to defense).

1 that implicated Petitioner in the charged crimes.¹⁶ Indeed, one
2 of the witnesses, Jenny's brother, testified only to what
3 occurred before and after she was attacked. (See Lodged Doc. 5,
4 Case No. 13WF2533, 4 Rep.'s Tr. at 663, 668, ECF No. 10-11.) He
5 did not see the attack or the attacker and did not even know she
6 had been attacked until she told him. (See id. at 672.) Counsel
7 likewise did not cross-examine Patricia's two roommates, but one
8 of them was not home when the attack occurred and the other did
9 not identify Petitioner as the attacker.¹⁷ (See id., 2 Rep.'s
10 Tr. at 379-80, 386-88, ECF No. 10-9.) Another witness whom
11 counsel did not cross-examine was the deputy sheriff who
12 fingerprinted Petitioner weeks after the second attack. (See id.
13 at 456.) But he testified only that he fingerprinted Petitioner
14 in accordance with standard procedure, as he had done in "[a] few
15 hundred" other cases. (Id. at 456-58.)

16 The only other witness counsel did not cross-examine was
17 Shauna Murry, the crime-scene specialist who processed Jenny's
18 home after the attack. (See id., Case No. 13WF2533, 3 Rep.'s Tr.
19 at 475-78, 480-92, ECF No. 10-10.) Although she photographed the
20 knife that was used in the attack, stored it, swabbed it for DNA,
21 and booked it into evidence (see id. at 480, 490-94), nothing in
22

23 ¹⁶ Defense counsel cross-examined every prosecution witness who
24 testified at the Santa Ana trial. (See Lodged Doc. 3, Case No.
25 13CF0710, 2 Rep.'s Tr. at 202-15, 233-39, 253-60, 264-65, 330-49,
359-60, 369-70, 382-85, ECF No. 10-5.)

26 ¹⁷ That roommate, Ricardo P., saw Jenny's attacker and chased
27 him out of their home. (Lodged Doc. 5, Case No. 13WF2533, 2 Rep.'s
28 Tr. at 388, ECF No. 10-9.) But he could not identify the attacker
other than to note that he was "an African-American person." (Id.
at 389.)

1 her testimony suggested that she failed to follow proper
2 protocols in doing so.¹⁸ To the contrary, she testified that she
3 followed them in processing Jenny's home and in swabbing and
4 storing the knife. (See id. at 481-82, 489-95.) Petitioner
5 identifies no line of questioning that counsel could have pursued
6 to undercut that aspect of her testimony or any other, and none
7 is apparent to the Court. Accordingly, he has not shown that
8 counsel erred in failing to cross-examine her or that he suffered
9 prejudice as a result.

10 Equally meritless is Petitioner's claim that counsel failed
11 to "adequately cross-examine[] prosecution witnesses who gave
12 inconsistent statements." (Reply at 6, ECF No. 12.) He does not
13 identify which witnesses counsel supposedly failed to adequately
14 cross-examine or even the trial at which the witnesses testified.
15 Nor does he identify the inconsistent answers about which counsel
16 should have asked questions or explain how further cross-
17 examination would have benefited his defense or affected the
18 jury's verdict. Instead, he conclusorily alleges that it would
19 have "created reasonable doubts" about the "reliability" of the
20 witnesses and the accuracy of their "testimony" (id.), which is
21 not enough to justify habeas relief. See Borg, 24 F.3d at 26;
22 Jones, 66 F.3d at 205.

23 Fourth, Petitioner's claim that counsel erred in failing to
24 call an expert witness to challenge the prosecution's DNA
25

26 ¹⁸ Murry also took photographs of Jenny's home, obtained DNA
27 elimination samples from its residents, and unsuccessfully
28 processed parts of it for fingerprints. (See Lodged Doc. 5, Case
No. 13WF2533, 3 Rep.'s Tr. at 484-85, 487-88, 495, ECF No. 10-10.)

1 evidence fails for lack of evidence. (See Pet. at 20, ECF No.
2 1.) Although he identifies Susan Ryan as a "forensic expert DNA
3 consultant and Advance Serologist" (id.), he provides no
4 declaration from her (or any other expert) demonstrating a
5 willingness to testify and setting forth the facts to which she
6 would have testified. See Dows v. Wood, 211 F.3d 480, 486 (9th
7 Cir. 2000) (rejecting ineffective-assistance claim based on
8 failure to call witness when petitioner presented no affidavit
9 from witness showing witness was willing to provide testimony
10 helpful to defense). Putting that aside, he does not allege how
11 Ryan's testimony – whatever it might have been – would have been
12 beneficial to his defense other than to conclusorily assert that
13 she could have "clarifi[ed]" and "refute[d]" the prosecution's
14 DNA expert witness. (Pet. at 20, ECF No. 1); see Borg, 24 F.3d
15 at 26; Jones, 66 F.3d at 205.

16 Fifth, Petitioner has not shown that counsel was ineffective
17 in contesting the reliability of the prosecution's DNA evidence.
18 (See Pet. at 18, ECF No. 1.) He cites no specific shortcoming in
19 counsel's performance and identifies no line of questioning
20 counsel could have pursued that would have swayed the jury in his
21 favor. Instead, he simply alleges that counsel was not
22 competent. (See id.) Such conclusory allegations do not warrant
23 habeas relief. See Borg, 24 F.3d at 26; Jones, 66 F.3d at 205.

24 Moreover, the record shows that counsel attempted, albeit
25 unsuccessfully, to cast doubt on the DNA evidence. Because the
26 results of the DNA testing pointed directly to Petitioner's
27 guilt, counsel designed his cross-examination of the
28 prosecution's DNA expert to undermine the process used to test

1 the DNA, as explained earlier. (Lodged Doc. 5, Case No.
2 13WF2533, 3 Rep.'s Tr. at 564-69, ECF No. 10-10.) Furthermore,
3 counsel's questioning of the prosecution's DNA expert showed that
4 he was well-versed in the process of DNA testing (see, e.g., id.
5 at 576-95), including how it had evolved over the years (see id.
6 at 595). Indeed, his questioning about that evolution implied
7 that DNA testing was far from an exact science and elicited the
8 expert's concession that people identified by DNA testing just a
9 few years prior would no longer be identified then (see id. at
10 595-97), thus calling all DNA testing into question.

11 More importantly, counsel got the expert to concede that her
12 lab -- through either human or machine error -- had made
13 "multiple" mistakes in the past. (Id. at 599.) The expert also
14 identified various points in the testing process at which
15 mistakes could occur. (See id. (explaining that mistakes "can
16 start from how we were receiving the evidence, to looking at the
17 evidence, to the instrumentation, to either report writing").)
18 And counsel followed that up by questioning her about several
19 documented mistakes at her lab that occurred "relatively close in
20 time to this case." (Id.) The expert conceded that numerous
21 errors had occurred and described them. (See, e.g., id. at 600
22 (discussing Oct. 2013 deviation "from typical sexual assault
23 screening procedure" and acknowledging that in May 2017 crime-lab
24 member's DNA "showed up in a sample"), 602 (same in Aug. 2013),
25 602-03 (conceding Mar. 2013 deviation in proper sequence of
26 testing for fingerprint analysis before conducting DNA testing
27 that "even the DNA supervisor missed"), 603-04 (characterizing
28 July 2012 incident when analyst "forgot to move the positive

control" as "another example of human error"), 604 (acknowledging that in Dec. 2013 "the bimonthly maintenance of one of our quantitative machines was not performed"), 605 (confirming that in Dec. 2013 "an analyst overlooked the fact that there were two pieces of swab in an extraction tube, and so the swab got stuck on the instrument"), 606 (confirming that in Oct. 2013 "DNA analyst switched six samples involving three separate cases in the DNA extraction breach," resulting in "incorrect results" in two cases), 606-07 (stating that in Oct. 2013 "the wrong plate was used to set up an identifier plus amp batch," which if left undetected would have been "a serious error"). And in answering counsel's questions about those many documented mistakes, the expert conceded that they could "only talk about things that ha[d] been caught" (*id.* at 607), leaving the unmistakable impression that some mistakes had gone undetected.

Put simply, counsel skillfully attempted to discredit the DNA evidence. And Petitioner identifies no line of questioning that counsel could have pursued but didn't that would have called the evidence into question.¹⁹

¹⁹ In the facts supporting his ineffective-assistance claim, Petitioner notes that counsel met with him in prison five times, declined his calls seeking to discuss "legal strategies and defense of the criminal charges," and argued with him about "defense strategies, tectics [sic], discovery, and filing certain motions and [counsel's] lack of preparation." (Pet. at 17-20, ECF No. 1.) He does not, however, allege that counsel was ineffective as a result. But even if he had, his claim would fail because he does not allege any facts suggesting that the number of prison visits (or the amount of time spent during those visits) was inadequate; identify any specific strategy, tactic, or defense that counsel failed to pursue; identify any specific motion counsel failed to file or discovery he failed to propound or obtain; or allege any

1 For all the foregoing reasons, Petitioner is not entitled to
2 habeas relief on his ineffective-assistance claim.²⁰

3 **RECOMMENDATION**

4 IT THEREFORE IS RECOMMENDED that the District Judge accept
5 this Report and Recommendation and direct that Judgment be
6 entered denying the Petition and dismissing this action with
7 prejudice.

8 DATED: June 27, 2024



9 JEAN ROSENBLUTH
10 U.S. MAGISTRATE JUDGE

11 actual facts suggesting that counsel's alleged shortcomings were
12 prejudicial. See Borg, 24 F.3d at 26; Jones, 66 F.3d at 205.

13 ²⁰ Petitioner urges the Court to conduct an evidentiary hearing
14 so that trial counsel may be questioned on his "legal defense
15 strategy as well as other matters that were off the court record
16 and some issues that were on the record." (Reply at 2, ECF No.
17 12.) When reviewing a habeas petition de novo, a district court
18 must conduct an evidentiary hearing to determine the validity of
19 the petition "[u]nless the motions and the files and records of the
20 case conclusively show that the prisoner is entitled to no relief."
21 United States v. Blaylock, 20 F.3d 1458, 1465 (9th Cir. 1994) (as
22 amended) (emphasis and citation omitted). Further, when the
23 petition "presents no more than conclusory allegations, unsupported
24 by facts and refuted by the record, an evidentiary hearing is not
25 required." United States v. Ouan, 789 F.2d 711, 715 (9th Cir.
26 1986). Here, as discussed above, several of Petitioner's
27 allegations of attorney error are conclusory: he fails to identify
28 any information concerning the individuals he claims DNA
elimination samples should have been taken from or point to any
actual deficiency in counsel's efforts to discredit the reliability
of the prosecution's DNA evidence. And the rest are flatly refuted
by the record: his claims that counsel erred in requesting a
continuance to have essential DNA testing done, failed to cross-
examine prosecution witnesses, and failed to adequately cross-
examine the prosecution's DNA expert. Accordingly, an evidentiary
hearing is not warranted. See United States v. Leonti, 326 F.3d
1111, 1121-22 (9th Cir. 2003) (petitioner was not entitled to
evidentiary hearing on claim challenging counsel's decision about
when to cooperate with law enforcement because tactical decision
was unreviewable and in any event resulted in no prejudice).