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**UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA**

VURNELL DOMINGO POLLARD,	)	Case No. CV 15-9487-JPR
	)	
Petitioner,	)	
	)	MEMORANDUM DECISION AND ORDER
v.	)	DENYING PETITION FOR WRIT OF
	)	HABEAS CORPUS
RAYMOND MADDEN,	)	
	)	
Respondent.	)	
_____	)	

**PROCEEDINGS**

On December 8, 2015, Petitioner filed a Petition for Writ of Habeas Corpus by a Person in State Custody and a separate memorandum of points and authorities. Petitioner consented to having the assigned U.S. Magistrate Judge conduct all further proceedings in his case, including entering final judgment. On April 26, 2016, Respondent filed an Answer and a memorandum of points and authorities; he also consented to proceed before the Magistrate Judge. On July 5, 2016, Petitioner filed a Reply to Respondent's Answer.

For the reasons discussed below, the Court denies the Petition and dismisses this action with prejudice.

1 **BACKGROUND**

2 On September 8, 2011, Petitioner was held to answer in Los  
3 Angeles County Superior Court on charges that late on the night  
4 of January 30, he burglarized the home of Robert Guerrero in San  
5 Gabriel and, a little over an hour later, on the morning of  
6 January 31, used a gun to rob and burglarize Hung Tran at his  
7 home nearby. (See Lodged Doc. 1, Clerk's Tr. at 95-96.)

8 Petitioner was also held to answer on charges of leading police  
9 on a high-speed chase as he fled Tran's home. (See id.)

10 An Amended Information was filed on October 6, 2011,  
11 alleging that Petitioner had used a firearm in connection with  
12 the robbery and burglary at Tran's home, had suffered one prior  
13 "strike" conviction within the meaning of California's Three  
14 Strikes Law, and was out on bail pending sentencing in another  
15 case when he allegedly committed the charged offenses. (See id.  
16 at 105-11.) The Amended Information also alleged that some of  
17 the charges were serious, violent felonies. (See id. at 109.)

18 As discussed more fully below, on September 13, 2012, at a  
19 pretrial telephonic conference, the trial court briefly discussed  
20 the status of plea negotiations with Petitioner's counsel and the  
21 prosecutor, outside of Petitioner's presence. (See Lodged  
22 Doc. 2, 2 Rep.'s Tr. at 605, 608-10.)

23 The next day, the court and all parties, including  
24 Petitioner, discussed a plea bargain. (See id. at 901-22.) They  
25 discussed the maximum sentence Petitioner might be exposed to if  
26 he was convicted on all charges, which would be as high as  
27 34 years and four months. (See id. at 1212-13.) Petitioner  
28 eventually accepted a plea deal, pleading no contest to the

1 robbery of Tran with the firearm allegation and the burglary of  
2 Guerrero's home and admitting his prior-strike conviction in  
3 exchange for a total sentence of 23 years and eight months, for  
4 both this case and the 2009 conviction for which he had been out  
5 on bail. (See id. at 1215-18; Lodged Doc. 1, Clerk's Tr. at 219-  
6 20; Lodged Doc. 3 at 2.)

7 On November 16, 2012, before sentencing, Petitioner moved  
8 under Faretta v. California, 422 U.S. 806 (1975), to represent  
9 himself, asking that his retained counsel be relieved. (See  
10 Lodged Doc. 2, 2 Rep.'s Tr. at 1803.) Petitioner also informed  
11 the court that he wished to file a motion to withdraw his plea.  
12 (See id. at 1806.) The court granted Petitioner's Faretta  
13 motion, finding that it was "knowingly, intelligently,  
14 voluntarily, and freely" made, and he began representing himself.  
15 (See id.) The court appointed an investigator and an audio/video  
16 expert to assist Petitioner with a planned challenge to the  
17 surveillance videos introduced at the preliminary hearing. (See  
18 id. at 1810-11, 2106.) The court continued the hearing to allow  
19 Petitioner more time to prepare his withdrawal motion. (Id. at  
20 1808-09.)

21 On January 28, 2013, Petitioner filed his "Motion to  
22 Withdraw Plea." (Lodged Doc. 1, Clerk's Tr. at 157-66.) The  
23 motion arguably raised three claims: (1) the prosecution violated  
24 Brady v. Maryland, 373 U.S. 83 (1963), effectively rendering  
25 Petitioner's plea uninformed; (2) police officers used "coercive  
26 and abusive" investigative techniques that resulted in "false  
27 information"; and (3) former defense counsel was ineffective for  
28 failing to investigate exculpatory evidence in a timely manner,

1 which allegedly put Petitioner under "extreme duress" before he  
2 pleaded no contest. (See Lodged Doc. 1, Clerk's Tr. at 157-66.)  
3 On February 15, 2013, Petitioner filed a supplement to his  
4 motion, in which he argued that ineffective assistance of counsel  
5 and an "illusory promise" – that is, that "personal" property  
6 seized from his car after his arrest would be returned to him –  
7 also contributed to coercing his plea. (See id. at 167-77.)

8 On March 1, 2013, the trial court held a hearing and took  
9 the Motion to Withdraw Plea under submission. (See Lodged  
10 Doc. 2, 2 Rep.'s Tr. at 2701-52.) On April 2, 2013, the court  
11 issued a minute order discussing the procedural history of  
12 Petitioner's plea bargain and his efforts to withdraw his plea  
13 and requesting further briefing on sentencing issues.

14 (See Lodged Doc. 1, Clerk's Tr. at 191-92.) On April 10, 2013,  
15 Petitioner filed a second "Motion to Withdraw Guilty Plea." (Id.  
16 at 196-204.) On April 15, 2013, the trial court issued a  
17 tentative ruling denying Petitioner's motion and finding that he  
18 could properly be sentenced to the bargained-for 23 years and  
19 eight months. (See id. at 213-14.)

20 Later that same day, the trial court held another hearing on  
21 Petitioner's motion and on probation and sentencing matters,  
22 including whether the court was "duty-bound" to sentence  
23 Petitioner "to a consecutive sentence." (See Lodged Doc. 2,  
24 2 Rep.'s Tr. at 3301-24.) The court eventually stated, "I am now  
25 going to deny your motion to withdraw for the reasons stated in  
26 the . . . Minute Order that I filed today." (Id. at 3318.) The  
27 court then sentenced Petitioner to 23 years and eight months.  
28 (See id. at 3321-22.)

1 On April 29, 2013, the court held an evidentiary hearing on  
2 Petitioner's motion for the return of his "personal" property and  
3 took the matter under submission. (See id. at 3601, 3639; see  
4 also Lodged Doc. 1, Clerk's Tr. at 225-27.) It eventually  
5 granted the motion as to some items and denied it as to others.  
6 (Lodged Doc. 1, Clerk's Tr. at 221-22.)

7 On May 3, 2013, Petitioner filed an application for a  
8 Certificate of Probable Cause, seeking permission to challenge  
9 his guilty plea on appeal. (See Pet. at 24.)<sup>1</sup> On May 23, 2013,  
10 the trial court denied the application in a reasoned, eight-page  
11 order. (See id. at 24-31.) On June 7, 2013, Petitioner filed a  
12 notice of appeal, expressly acknowledging that he would only  
13 challenge "other matters . . . that do not affect validity of the  
14 plea." (Lodged Doc. 1, Clerk's Tr. at 228.)

15 On October 8, 2013, Petitioner's appellate counsel filed a  
16 brief under People v. Wende, 25 Cal. 3d 436 (1979), raising no  
17 issues but asking the court to conduct an independent review of  
18 the record on appeal. (See Lodged Doc. 3 at 8.) On November 13,  
19 2013, Petitioner filed a supplemental brief in the court of  
20 appeal, arguing that (1) the trial court erroneously denied him a  
21 continuance at an unspecified time, (2) the trial court erred in  
22 considering whether his sentence in the unrelated case should run  
23 concurrently or consecutively, and (3) he should be allowed to  
24 withdraw his guilty plea because of counsel's ineffective  
25 assistance. (See Lodged Doc. 4.)

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27 <sup>1</sup> For all filed as opposed to lodged documents, the Court  
28 uses the pagination provided by its Case Management/Electronic  
Case Filing system.

1 On March 27, 2014, the court of appeal issued a reasoned,  
2 four-page decision, noting in pertinent part that Petitioner had  
3 not obtained a certificate of probable cause before filing his  
4 appeal. (See Lodged Doc. 5 at 3.) Without one, he could not  
5 challenge the validity of his plea or any related matters, such  
6 as his sentence, the denial of his motion to withdraw the plea,  
7 or his counsel's alleged ineffective assistance during the plea-  
8 bargaining process. (See id.) The court of appeal went on to  
9 state,

10 We have reviewed the whole record under People v. Kelly  
11 (2006) 40 Cal. 4th 106. No arguable issues for appeal  
12 exist. . . . The judgment is affirmed.  
13 (Id. at 3-4.)

14 In the meantime, on November 18, 2013, Petitioner filed a  
15 Petition for Writ of Mandate in the court of appeal, arguing that  
16 "[t]he trial court erroneously denied the application for  
17 certificate of probable cause." (Lodged Doc. 8.) On December  
18 20, 2013, the court of appeal denied the petition on the ground  
19 that Petitioner "has failed to state facts and evidence  
20 sufficient to demonstrate entitlement to relief." (Lodged Doc.  
21 9.)

22 On May 9, 2014, Petitioner filed a petition for review in  
23 the California Supreme Court, arguing that the trial court  
24 wrongly denied an unspecified "continuance" and that that denial  
25 violated Petitioner's right to effective assistance of counsel.  
26 (See Lodged Doc. 6 at 5.) On June 18, 2014, the supreme court  
27 summarily denied the petition for review. (Lodged Doc. 7.)

28 On October 31, 2014, Petitioner filed a Petition for Writ of

1 Habeas Corpus in the California Court of Appeal. (See Lodged  
2 Doc. 10 at 6.) That petition argued that (1) Petitioner's  
3 appellate counsel was ineffective for filing a Wende brief; (2)  
4 Petitioner's trial counsel was ineffective for "failure to  
5 investigate," among other things, the surveillance video from the  
6 Guerrero robbery, which Petitioner claimed showed a white or  
7 Caucasian person; and (3) the trial judge improperly participated  
8 in plea discussions. (See Lodged Doc. 10.) On November 20,  
9 2014, the court of appeal denied the petition, stating that it  
10 "has been read and considered and is denied on the ground  
11 petitioner has not stated facts or provided evidence sufficient  
12 to demonstrate entitlement to relief." (Lodged Doc. 11.)

13 On January 20, 2015, Petitioner filed a habeas petition in  
14 the California Supreme Court, raising the same three arguments he  
15 had just raised in the court of appeal. (Lodged Doc. 12.) On  
16 April 1, 2015, the supreme court denied the petition with  
17 citations to People v. Duvall, 9 Cal. 4th 464, 474 (1995), and In  
18 re Swain, 34 Cal. 2d 300, 304 (1949).<sup>6</sup> (Lodged Doc. 13.)

19 On August 10, 2015, Petitioner filed another habeas petition  
20 in the California Supreme Court. (Lodged Doc. 14.) That  
21 petition argued that the "[t]rial judge improperly participated  
22 in plea negotiations, violating Federal Rule of Criminal  
23 Procedure rule 11(c)(1)," and "[t]rial counsel's failure to  
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25 <sup>6</sup> Citations to Swain and Duvall indicate that the claims  
26 were not alleged with sufficient particularity and that the  
27 petitioner could attempt to raise them again. See King v. Roe,  
28 340 F.3d 821, 823 (9th Cir. 2003) (per curiam), abrogation on  
other grounds recognized by Waldrip v. Hall, 548 F.3d 729 (9th  
Cir. 2008).

1 investigate violated the right to effective assistance of counsel  
2 as guaranteed by the Sixth Amendment of the U.S. and California  
3 Constitutions." (See Lodged Doc. 14 at 3-4.) On November 10,  
4 2015, the California Supreme Court denied the petition with a  
5 citation to In re Miller, 17 Cal. 2d 734, 735 (1941).<sup>7</sup> (Lodged  
6 Doc. 15.)

#### 7 PETITIONER'S CLAIMS

8 Construing the Petition liberally, the Court finds that it  
9 presents the following claims:

10 1. The trial court violated Petitioner's rights when it  
11 (1) improperly inserted itself into plea negotiations, in  
12 violation of Federal Rule of Criminal Procedure 11; (2)  
13 influenced or coerced Petitioner to accept a plea bargain, in  
14 particular by misrepresenting Petitioner's eligibility for a work  
15 program and what Petitioner's sentence would be, rendering his  
16 plea involuntary; and (3) refused to allow Petitioner to withdraw  
17 his plea.

18 2. Petitioner's counsel provided ineffective assistance by  
19 failing to investigate the surveillance video from the robbery at  
20 Guerrero's home, in particular by not hiring an expert to analyze  
21 whether the video showed Petitioner or another person, perhaps a  
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23  
24 <sup>7</sup> Miller holds that a habeas claim in a previously denied  
25 petition must again be denied when there has been no change in  
26 the facts or law substantially affecting the petitioner's rights.  
27 See 17 Cal. 2d at 735. Thus, the California Supreme Court's  
28 citation of Miller indicated that its denial of Petitioner's  
claims rested on the same ground as its dismissal of the claims  
in Petitioner's first habeas petition, namely, failure to raise  
them with sufficient particularity. See King, 340 F.3d at 823;  
Kim v. Villalobos, 799 F.2d 1317, 1319 n.1 (9th Cir. 1986).



1 white Caucasian suspect, and by failing to adequately challenge  
2 the prosecution's DNA evidence linking Petitioner to the crimes.

3 **SUMMARY OF PERTINENT FACTS**

4 This Court's review of the state-court record reveals the  
5 following facts:

6 **I. Preliminary-Hearing Record**

7 As noted, a preliminary hearing was held on September 8,  
8 2011. (See Lodged Doc. 1, Clerk's Tr. at 1-B.)

9 A. Incident on January 30, 2011, at Guerrero's Home

10 Guerrero testified that on the night of January 30, 2011, he  
11 was asleep in his house in San Gabriel when, around 11:53 p.m.,  
12 he was awoken by noise in the back of his house. (Lodged Doc. 1,  
13 Clerk's Tr. at 5.) He went to the kitchen and saw someone on the  
14 other side of the sliding glass door, trying to enter the house;  
15 Guerrero flipped on a light and saw a man about two or three feet  
16 away from him. (Id. at 6-7.) Guerrero described the man as  
17 "husky," with a "big body build" and wearing a white-gray sweater  
18 and a black ski mask that covered his whole head. (Id. at 6-8.)  
19 Guerrero said the sliding glass door was locked and the man was  
20 trying to open it. (Id. at 8.) After he turned on the kitchen  
21 light, he ran up to the sliding door and banged on the glass, and  
22 that scared the man away. (Id. at 9.) Guerrero said the  
23 incident "happened really quick," in a matter of "just seconds."  
24 (Id. at 6, 9.)

25 Guerrero called the police. (Id. at 10.) Before they  
26 arrived, Guerrero noticed some damage to the sliding glass door  
27 and some "pry marks." (Id. at 11-12.) The kitchen had two  
28 windows. (Id. at 12-13.) Before the incident both windows had

1 screens over them, but afterward Guerrero noticed that one of the  
2 windows was missing a screen. (See id.) Guerrero found the  
3 missing screen right below the window; he noticed "pry marks" on  
4 it, too. (Id. at 13-14.)

5 Guerrero testified that he had operable surveillance cameras  
6 outside of his home the night of the incident. (Id. at 14.) The  
7 prosecutor stated that there were "four clips" from the  
8 surveillance cameras and played two of those clips at the  
9 preliminary hearing. (Id. at 14-16.) Guerrero confirmed that  
10 the two clips were taken from the surveillance cameras at his  
11 home on the night of the incident; both showed the suspect he saw  
12 outside the sliding glass door. (Id. at 16.) Guerrero stated  
13 that he had not been able to see the suspect's face because he  
14 was wearing the ski mask. (Id. at 17.)

15 B. Incident on January 31, 2011, at Tran's Home

16 Tran also testified at the preliminary hearing. (See id. at  
17 21.) He testified that on January 31, 2011, he was sleeping in  
18 his house in San Gabriel when, at around 1:10 a.m., he woke to  
19 find someone wearing a black ski mask standing in his bedroom,  
20 holding a flashlight and pointing a gun in his face. (See id. at  
21 21-23.) Tran said the suspect was a man, "heavy-set," about  
22 "five-five, five-six." (Id. at 23.) The man was wearing a white  
23 shirt or sweatshirt. (See id. at 24, 36-37.) Tran said the  
24 suspect pointed the gun at his face from about a foot away. (Id.  
25 at 25.)

26 Tran testified that the suspect said that "somebody told  
27 him" Tran "got money in the house." (Id.) Tran told the suspect  
28 that "I have no money in the house" but "what you want, you can

1 take it." (Id.) Tran got his wallet, and he gave the suspect  
2 what he thought were "two hundred-dollar bills and a couple  
3 twenties and a couple five [sic] and ones," and the suspect put  
4 the money in his pants pocket. (Id. at 26.) The suspect also  
5 took Tran's Rolex watch. (Id. at 26-27.) Tran said the suspect  
6 pointed the gun at him throughout the incident. (Id. at 28-29.)  
7 After the suspect left, Tran called the police "right away."  
8 (Id. at 29.)

9 Tran said he had working surveillance cameras at his house  
10 that night. (Id.) The prosecutor played one video clip from  
11 Tran's surveillance cameras, and Tran said he recognized the  
12 footage, which showed the side of Tran's house the night of the  
13 incident. (Id. at 30-31.) Tran confirmed that the video showed  
14 the suspect in the ski mask. (Id.) Tran said he saw only the  
15 suspect's eyes because he was wearing the ski mask. (Id. at 31.)

#### 16 C. Other Testimony

17 San Gabriel Police Officer Nhat Huynh testified that he was  
18 on duty on January 31, 2011, when, at about 1:10 a.m., he  
19 received a radio call to respond to Tran's home about a robbery  
20 home invasion. (Id. at 40-43.) Because he was nearby, he got to  
21 Tran's home in "literally less than 10 seconds." (Id. at 40.)  
22 Upon his arrival, Officer Huynh saw a red Toyota Corolla speeding  
23 away. (Id. at 41.)

24 Officer Huynh switched on his lights and sirens and pursued  
25 the Toyota, but the vehicle "sped up even more" and ran a couple  
26 of stop signs. (Id. at 42-44.) Huynh pursued the vehicle over  
27 surface streets, and during the pursuit he saw the driver throw  
28 "a hat or beanie" out the car window. (Id. at 45.) The vehicle

1 drove through a road-closure barricade, got on the freeway, and  
2 began traveling at speeds of "over 100 miles an hour." (Id. at  
3 44-46.) The vehicle eventually exited the freeway. (Id. at 46.)  
4 Officer Huynh said that as it did so, the suspect threw  
5 "numerous" other objects out of the car; at one point he "saw a  
6 white shirt being tossed out the window." (Id. at 47-48.)  
7 Officer Huynh testified that after a pursuit that "zigzagged" on  
8 surface streets "all over that portion of Los Angeles," the  
9 vehicle finally yielded, and the driver stepped out of the car.  
10 (Id. at 48-49.) Officer Huynh identified Petitioner as the  
11 driver whom police apprehended at the scene. (Id. at 49.)

12 A subsequent search of the car recovered "numerous items,"  
13 including "Chanel, Gucci, [and] Louis Vuitton purses." (Id.)  
14 Another officer searched Petitioner and recovered money that "was  
15 a mixture of hundreds, twenties, tens, and fives." (Id. at 50-  
16 51.) Police also found a "black gun bag" in the car, but they  
17 did not recover a gun. (Id. at 51.) On cross-examination,  
18 Officer Huynh testified that police reports did not reflect that  
19 police recovered a gun, a Rolex watch, or any gloves from the  
20 car. (Id. at 52-53.)

21 A criminalist from the Los Angeles County Sheriff's Crime  
22 Lab, Sean Yoshii, testified that he performed DNA testing on a  
23 black ski mask recovered following the vehicle pursuit and on an  
24 "oral reference sample" taken from Petitioner. (See id. at 57-  
25 62.) Yoshii testified that "[t]he profile I obtained from the  
26 black ski mask is a mixture consistent with two contributors,"  
27 and "[t]he profile and major contributor matches the profile of  
28 [Ppetitioner]." (Id. at 62-63.) Yoshii testified that the odds

1 of finding another "African-American or black" person with the  
2 same DNA genetic profile "would be one in 273 quintillion." (Id.  
3 at 64.) On cross-examination, he testified that the "the minor  
4 contributor was very minor in this profile, showing up in only  
5 five of the 15 DNA locations." (Id. at 74.)

6 San Gabriel Police Officer Robert Barada testified that he  
7 was part of the police pursuit on January 31, 2011, and when he  
8 conducted a search along the route afterward, he recovered a  
9 black ski mask, a glove, and a black duffle bag. (See id. at 76-  
10 78.) Barada said the duffle bag had miscellaneous jewelry in it.  
11 (Id. at 77.) Officer Barada did not find a gun, a flashlight,  
12 any cash, or a white shirt or sweatshirt. (Id. at 80.)

## 13 **II. The Events Surrounding Petitioner's Plea**

### 14 A. Discussions Concerning Plea Negotiations Outside 15 Petitioner's Presence

16 At the telephonic conference conducted outside of  
17 Petitioner's presence on September 13, 2012, the court noted that  
18 "[t]his is here for jury trial" and asked for "some basic  
19 information about this trial." (Lodged Doc. 2, 2 Rep.'s Tr. at  
20 601-02.)

21 Petitioner's counsel responded,  
22 I did see [Petitioner] in the lockup at the courthouse.  
23 He was very distraught. He is talking about injuring  
24 himself. He's also divulged coming into court tomorrow  
25 and asking that I be relieved, and things of that sort.  
26 (Id. at 605.) Counsel said that Petitioner "is asking to make a  
27 counteroffer to the prosecution in the case." (Id.) The court  
28 said, "Let me hear what the offer is outstanding," and the

1 following colloquy occurred:

2 [Prosecutor]: The current offer is 25 years.

3 [Petitioner's counsel]: And [Petitioner] had asked  
4 me to counter at 19 years.

5 [Prosecutor]: I will take 19 years to my supervisor  
6 and discuss it with her today, absolutely.

7 (Id.) The court later commented that "in light of the ongoing  
8 discussions with what appears to me to be a very serious  
9 counteroffer – that's a serious amount of time, 19 years – my  
10 inclination . . . is to have you back here first thing tomorrow  
11 morning." (Id. at 608.) The court said it would not order a  
12 jury panel until the following week. (See id. at 608-09.)

13 The prosecutor objected, stating,

14 I am requesting that the court order the panel tomorrow.  
15 While there is a 19-year offer, and that is a substantial  
16 amount of time, this case has been through a lot of  
17 negotiation prior to me getting the case. And I think  
18 [Petitioner's counsel] himself actually spoke with my  
19 head deputy and the two of them personally met on the  
20 case. . . . The offer was originally over 27 years, plus  
21 consecutive time on the residential burglary from 2009.  
22 And I think my boss came down to 25 years. I don't  
23 believe she is likely to come down any lower at all. So  
24 I don't believe there is any realistic chance of  
25 resolving the case tomorrow.

26 (Id. at 609.)

27 The court asked Petitioner's counsel for his thoughts, and  
28 counsel said,

1 Well, you know, I think it is a fantastic offer by  
2 [Petitioner], and I think he's come a long way towards  
3 acceptance of responsibility in this case. I think the  
4 court on its own, if the court were inclined to also  
5 accept 19 years. . . . As far as ordering a panel on  
6 Monday, I think that is a good idea.

7 (Id.) The court declined to order a panel for the next day.

8 (Id. at 610.)

9 B. Further Discussions Before Acceptance of Plea

10 Another hearing was held the next day, with Petitioner and  
11 his counsel present. (See id. at 901.) The court announced that  
12 "we are here for trial" and asked the prosecutor "what the status  
13 is concerning any plea negotiations at this point" and "[h]ow  
14 would the court get to the 19 years" that Petitioner sought in a  
15 plea bargain. (See id. at 901-02.) The parties and the court  
16 discussed at length how the sentence in Petitioner's other case –  
17 the one he had been out on bail on when he committed the crimes  
18 in this case – would figure into a plea bargain. (See id. at  
19 902-04.) They also discussed whether Petitioner had prior  
20 "strike" convictions that would affect sentencing calculations  
21 and whether the two sentences would have to run consecutively or  
22 could run concurrently. (See id. at 905-10.) Based on the  
23 prosecutor's representations, the court said it understood the  
24 People's plea offer to be for 25 years; it added, "I am in effect  
25 unable to get to any lower number unless I strike the strike,"  
26 and "based upon the information that I heard, [I am] unwilling to  
27 do that at this time." (Id. at 910-11.)

28 Petitioner's counsel then informed the court that Petitioner

1 wanted to bring a Faretta motion, and the court examined  
2 Petitioner about whether he wanted to discharge his counsel and  
3 represent himself. (See id. at 911-12.) Petitioner told the  
4 court that he wanted counsel relieved because “[i]t is just the  
5 communication has been off between the firm and himself and  
6 myself.”<sup>8</sup> (Id. at 912.) Petitioner said, “I believe we could  
7 have come [sic] to a resolution of this case a long time ago” and  
8 that he had “been willing to dissolve [sic] this case.” (Id. at  
9 913.) The court replied, “Mr. Pollard, let me suggest to you,  
10 based upon what I hear, unless you are not willing to take 25  
11 years, you can resolve this case,” and Petitioner said, “[y]es, I  
12 totally understand that.” (Id.)

13 The court also told Petitioner that it believed that “no  
14 other lawyer” could “get you less than 25 years” “in light of the  
15 People’s position.” (Id.) It noted that it had “done [its]  
16 best” to try to “move the People down below 25” but was unable to  
17 do so. (Id.) It acknowledged that in agreeing to 19 years  
18 Petitioner was accepting “a lot of time,” and “I have reiterated  
19 that to the People and have suggested to them that they should  
20 reach a resolution.” (Id.) It noted that “presumably the People  
21 will take what I have to say at least as seriously as any private  
22 counsel that you might get.” (Id. at 914.) Petitioner thanked  
23 the court for its efforts. (Id. at 913.)

24 The court then effectively denied Petitioner’s motion to  
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26 <sup>8</sup> Petitioner’s counsel later explained that he had been part  
27 of another law firm that had represented Petitioner and had made  
28 earlier appearances in the case, but counsel had since left that  
law firm but kept Petitioner’s case. (See Lodged Doc. 2, 2  
Rep.’s Tr. at 915.)



1 relieve his counsel, finding that because "they are not willing  
2 to budge" it wouldn't "make any difference as to which private  
3 counsel . . . you get" (id. at 914); Petitioner eventually  
4 pleaded no contest to two counts (id. at 1216). Right before he  
5 did so, the court warned Petitioner that

6 I also have to consider the [criminal] history and the  
7 charges. And what I'm telling you is that no additional  
8 information is going to cause me to suggest at the front  
9 end of the case that I'm willing to strike the strike or  
10 that I'm willing to give you a probation offer. The  
11 information will become relevant to this court if in fact  
12 you're convicted and you're sentenced.

13 Now, at that point - I don't want you to read too  
14 much into what I'm saying. At that point, I'll take into  
15 consideration as mitigation what you're showing me. But  
16 I'm not suggesting to you that your sentence is going to  
17 be any particular sentence. I can't say that right now,  
18 consistent with my obligations and duties as an  
19 independent judicial officer. Do you understand that?

20 (Id. at 1205.) Petitioner stated that he did. (Id.) The court  
21 reiterated that

22 I can't do anything for you in terms of the sentence.  
23 You have to decide whether you want to accept the  
24 People's offer or not because I can't get to a lower  
25 point than the 25 years without striking a strike, and  
26 I'm telling you I'm not striking a strike at this point.

27 (Id.) The prosecutor then noted that if Petitioner went to trial  
28 and was convicted, he would ask for the maximum sentence, "over

1 30 years." (Id. at 1207.) The court asked the prosecutor to  
2 clarify exactly what the sentence would be so that Petitioner  
3 could "make a thoughtful judgment in this matter," and the  
4 prosecutor responded, "32 years 8 months maximum," which defense  
5 counsel did not dispute. (Id. at 1208.)

6 The court took a recess, and when it reconvened, Petitioner  
7 asked for a precise calculation from the prosecutor as to how he  
8 arrived at that sentence and wanted to know "whether or not the  
9 court agrees with the calculation." (Id.) The court and counsel  
10 then went through the calculation at length, finally determining  
11 that the actual maximum sentence for both cases would be 34 years  
12 and four months. (Id. at 1213; see also id. at 1209-13.)

13 The court then began the plea colloquy with Petitioner, but  
14 Petitioner interrupted it "to ask the prosecutor, with the  
15 court's permission, whether it's possible to get 23 years plus  
16 that 16 months" on the other case, to run concurrently. (Id. at  
17 1213-14.) The court and counsel discussed the issue off the  
18 record<sup>9</sup> and then took a recess, during which the prosecutor  
19 apparently raised the issue with his supervisor. (Id. at 1214-  
20 15.) The prosecutor subsequently agreed to reduce the sentence  
21 to 23 years and eight months as a result of Petitioner's  
22 counteroffer (id. at 1215), and Petitioner confirmed in open  
23 court that he accepted the plea agreement (id. at 1216).

#### 24 C. Trial Judge's Factual Findings

25 On May 23, 2013, the court set forth a detailed procedural,  
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27 <sup>9</sup> Petitioner has presented no evidence or argument as to  
28 what took place during this or any other off-the-record  
discussion.

1 factual, and legal background concerning Petitioner's plea in its  
2 order denying Petitioner's application for a certificate of  
3 probable cause. (See Pet. at 24-31.) As discussed infra,  
4 because even under de novo review the superior court's recitation  
5 of the facts is presumed correct, this Court quotes that order in  
6 pertinent part as follows:

7           On September 14, 2012, the parties appeared for  
8 trial. At the time, [Petitioner] was represented by  
9 private counsel, Christopher Darden. Mr. Darden informed  
10 the Court that [Petitioner] wanted to address the Court  
11 directly. [Petitioner] then explained that he was  
12 anxious to settle the case short of trial and asked the  
13 Court for its help in trying to resolve it:

14           I'm almost 100 percent [sic] we can resolve  
15 this case. I just need time, a little time, a  
16 small fraction of time to get something  
17 together . . . and speak to my family, just to  
18 inform them exactly how all this  
19 works . . . . Any kind of help you can give  
20 me or assistance as far as helping me resolve  
21 this, I'd really appreciate it.

22           The Court then arranged to allow [Petitioner] to  
23 speak with his family, who were in the audience. Before  
24 doing so, the Court explained that it was unwilling to  
25 give an indicated sentence lower than the People's offer  
26 of 25 years, and that he therefore had to consider  
27 whether he wanted to reach a disposition with the People.  
28 The court also informed [Petitioner] that he should not

1 allow anyone, including his family, to pressure him to  
2 make a decision. The Court emphasized that it would not  
3 accept [Petitioner]'s change of plea unless it was  
4 satisfied that [Petitioner] had not been unduly  
5 pressured. [Petitioner] acknowledged that he would have  
6 to represent to the Court that he made "a deliberative  
7 choice, a thoughtful choice" free from any undue coercion  
8 and pressure.

9 After further reflection and discussion,  
10 [Petitioner] made a counter-offer of 23 years. The  
11 People then lowered its offer to 23 years and 8 months.  
12 [Petitioner] accepted that offer and changed his plea to  
13 "no contest" as to the first degree residential robbery  
14 charge in Count 1 and the first degree residential  
15 burglary charge in Count 4. He also admitted that he  
16 personally used a firearm in committing the robbery and  
17 that he had suffered a prior strike offense. The Court  
18 accepted the change in the plea and the two admissions  
19 and found [Petitioner] guilty on Counts 1 and 4 and found  
20 true the firearm and prior-conviction allegation. The  
21 Court found the plea and waivers were clearly made  
22 knowingly, intelligently, voluntarily, and freely. The  
23 Court then set sentencing and [Petitioner]'s motion for  
24 return of property on October 26, 2012.

25 On October 15, 2012, [Petitioner] filed a  
26  
27  
28

1 handwritten letter to the Court.<sup>10</sup> In that letter,  
2 [Petitioner] explained that he had carefully considered  
3 whether to enter into the plea agreement and that he  
4 remained convinced that it was in his best interest to do  
5 so:

6 On September 14, 2012, I decided that it was  
7 in my best interest to plead no contest which  
8 is the same as a guilty plea. I must say that  
9 it feels as if the weight of the world has  
10 been lifted off my shoulders.

11 In that letter, [Petitioner] was requesting that the  
12 Court allow him to participate in a residential program  
13 offered by the Delancey Street Foundation.

14 The sentencing hearing was continued to November 16,  
15 2012. At that hearing, Mr. Darden informed the Court  
16 that [Petitioner] wished to represent himself and file a  
17 motion to withdraw his plea. The Court granted  
18 [Petitioner]'s request after [Petitioner] completed a  
19 Faretta waiver form and after speaking with [Petitioner].  
20 The Court then set the matter for further proceedings on  
21 November 30, 2012, to ensure that [Petitioner] received  
22 all the material he needed to proceed with his motion to  
23 withdraw his plea. The Court also appointed an  
24 investigator for [Petitioner].

25 On November 30, 2012, [Petitioner] informed the  
26 Court that he was ready to set a hearing date for his  
27

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28 <sup>10</sup> This letter is apparently not in the record.

1 motion, but requested that the hearing date be scheduled  
2 in 60 days. The Court granted [Petitioner]'s request and  
3 set the hearing on February 15, 2013. On January 28,  
4 2013, [Petitioner] filed his motion to withdraw his plea.  
5 In his motion, [Petitioner] raised several issues,  
6 alleging that (i) the San Gabriel police department  
7 committed misconduct in its investigation (e.g., offering  
8 "forged documents" and "deceiving witness[es]"); and  
9 (ii) the prosecution engaged in Brady violations.  
10 [Petitioner]'s motion was almost entirely conclusory and  
11 unsupported by any evidentiary submission other than a  
12 general declaration attesting to the conclusory  
13 allegations.

14 Two days before the scheduled hearing, [Petitioner]  
15 filed a supplement to his motion. In the supplement,  
16 [Petitioner] raised new issues, including that his  
17 counsel was ineffective, that he had not suffered a prior  
18 strike conviction (despite his admission on September 14,  
19 2012 that he had suffered that conviction), and that he  
20 was induced by an illusory promise to enter into the plea  
21 agreement. Once again, [Petitioner]'s allegations were  
22 conclusory and unsupported. It appears that [Petitioner]  
23 was asserting that his counsel was ineffective because he  
24 failed "to investigate the true facts in the case," and  
25 that he was induced to enter into the plea by the  
26 illusory promise by his counsel that he would be allowed  
27 "to litigate the merits of the return of [Petitioner]'s  
28 property." [Petitioner] neglected to serve the motion

1 and supplemental papers on the People, necessitating a  
2 continuance of the hearing.

3 On March 1, 2013, the parties appeared for a hearing  
4 on the motion. The Court specifically inquired whether  
5 [Petitioner] was ready to proceed with the hearing on his  
6 motion. [Petitioner] stated that he was ready. The  
7 Court then heard extensive argument. Before ending the  
8 hearing, the Court expressly asked [Petitioner] if he had  
9 anything further to say. After giving [Petitioner] an  
10 additional opportunity to be heard, the Court inquired  
11 whether [Petitioner] was prepared to submit the motion  
12 for the Court's decision. [Petitioner] stated that he  
13 was submitting the matter for decision.

14 The Court denied the motion, explaining:

15 [Petitioner] entered into a plea agreement on  
16 September 14, 2012. This Court presided over  
17 the plea proceedings and carefully monitored  
18 those proceedings to make sure that any  
19 resulting plea would be made knowingly and  
20 voluntarily, and free of any coercion. The  
21 court made a point of this to [Petitioner]  
22 during the proceedings.

23 [Petitioner] accepted the People's offer and  
24 entered a "no contest" plea. It was clear to  
25 the Court that the defendant's only material  
26 concern was the total amount of time he would  
27 be getting under the agreement, and that the  
28 final offer of 23 years and 8 months was

1 acceptable to him. It was also clear to the  
2 Court that [Petitioner] entered into the  
3 agreement of his own free will without any  
4 undue coercion, threats, or promises.

5 After entering the plea, [Petitioner] moved to  
6 withdraw it, claiming that the video  
7 surveillance was fraudulent or fabricated in  
8 some way. The Court understood [Petitioner] to  
9 be suggesting that an analysis of the video  
10 would support a claim of innocence. Based on  
11 the claim, the court was not about to sentence  
12 [Petitioner] to more than 23 years in prison  
13 without allowing [Petitioner] to have an expert  
14 analyze the video. The Court therefore  
15 appointed an expert and continued the  
16 proceedings.

17 The Court received the expert's report and  
18 independently reviewed the video surveillance  
19 that the expert had analyzed. Having done so,  
20 the Court is satisfied that the video is not  
21 exculpatory. The Court is also satisfied that  
22 the other evidence as presented at the  
23 preliminary hearing provides a factual basis to  
24 support the "no contest" plea. Moreover, the  
25 Court found that [Petitioner] was aware of his  
26  
27  
28



1 fraud claim<sup>11</sup> before he entered his "no contest"  
2 plea. Indeed, on or about November 30, 2012,  
3 [Petitioner] stated that he had entertained  
4 such a belief before he agreed to the plea.  
5 The Court accordingly found that the fraud  
6 claim did not provide a basis for withdrawing  
7 his plea.

8 After raising the fraud claim, [Petitioner]  
9 then expanded the scope of his motion to  
10 withdraw his plea, asserting largely conclusory  
11 claims about: (i) "ineffective assistance of  
12 counsel"; (ii) "police misconduct"; (iii) his  
13 admitted "prior strike conviction["]; and  
14 (iv) being "induced by an illusory promise."

15 In denying the motion, the Court found that  
16 [Petitioner] failed to support any of his allegations  
17 about police misconduct or ineffective assistance of  
18 counsel. The Court also concluded, from supporting  
19 documents submitted by the prosecution, that [Petitioner]  
20 indeed had suffered a prior strike conviction for  
21 committing assault with a deadly weapon (i.e., a pipe or  
22 metal object), causing great bodily injury. It thus  
23 appeared that his admission to a prior strike conviction  
24 had a strong factual basis. The Court further found that  
25

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26 <sup>11</sup> Petitioner's "fraud claim" was apparently his allegation  
27 that police had fabricated evidence having to do with the  
28 surveillance tapes. He has not renewed that claim in the  
Petition.

1 [Petitioner]'s claim of an "illusory promise" was  
2 meritless. This Court specifically addressed the issue  
3 with [Petitioner] in open court on September 14, 2012.  
4 Immediately after [Petitioner] had changed his plea, Mr.  
5 Darden, [Petitioner]'s counsel at the time, notified the  
6 Court that his client intended to move for the return of  
7 the property found in [Petitioner]'s car on the day he  
8 was arrested. The Court had extensive discussion about  
9 the subject and scheduled a hearing to "adjudicate" the  
10 claim that [Petitioner] was entitled to the return of the  
11 property. On April 29, 2013, the Court conducted an  
12 evidentiary hearing and granted in part and denied in  
13 part [Petitioner]'s motion for the return of property.  
14 The Court's ruling is set forth in a minute order dated  
15 April 29, 2013.

16 (Pet. at 26-30 (some citations omitted).)

17 The court denied the application for a certificate of  
18 probable cause, noting that Petitioner had had "a full and fair  
19 opportunity to timely present all his claims" but that they did  
20 not "rise to the level of probable cause" and were "meritless."

21 (Id. at 30-31.)

22 D. The Video Expert

23 As discussed above, after Petitioner discharged his counsel  
24 and moved to withdraw his plea, the court appointed both an  
25 investigator and a "video expert" to help Petitioner investigate  
26 whether the surveillance videos had been altered or fabricated.

27 (See Lodged Doc. 2, 2 Rep.'s Tr. at 1802-11.) Petitioner has  
28 attached to the Petition a copy of a declaration signed on

1 February 8, 2013, from the court-appointed audio/video expert,  
2 Michael L. Jones. (See Pet., Jones Decl. at 19-20.) Petitioner  
3 submitted the declaration to the state courts. (See Lodged Doc.  
4 2, 2 Rep.'s Tr. at 2728-29; Lodged Doc. 10 at 13-17; Lodged Doc.  
5 12 at 14-18; Lodged Doc. 14 at 26-30.)

6 Jones declared that the defense investigator gave him one  
7 11-second video clip. (See Jones Decl. ¶ 5.II.) He opined that  
8 [t]he video contained on the CD is a screen capture of  
9 the original video, and was not harvested directly from  
10 the surveillance system. In other words, a party  
11 utilized a video recording device to capture images of  
12 the incident projected from a visual monitor.

13 (Id. ¶ 5.IV.)

14 Jones went on to declare that "[a]fter analyzing and  
15 enhancing the image(s) of the subject memorialized on the video  
16 in question, the subject appears to be Caucasian or a light  
17 complexioned individual." (Id. ¶ 5.VII.) Jones also declared  
18 that he had reviewed "additional surveillance images" –  
19 apparently still photos – forwarded to him by the Los Angeles  
20 County Sheriff's Department and purportedly depicting "additional  
21 surveillance images from burglary victim Robert Guerrero." (Id.  
22 ¶ 6.A.) Jones opined that "[t]he images forwarded to the  
23 Sheriff's by Mr. Guerrero bear a strong resemblance to the  
24 subject memorialized on the video disc in my custody." (Id.)  
25 Jones further opined that "three (3) grainy, photo-copied images"  
26 that were obtained from the Sheriff's Department also portray  
27 "the subject in question." (Id. ¶ 6.C.)

28

1 **STANDARD OF REVIEW**

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

4 An application for a writ of habeas corpus on behalf of  
5 a person in custody pursuant to the judgment of a State  
6 court shall not be granted with respect to any claim that  
7 was adjudicated on the merits in State court proceedings  
8 unless the adjudication of the claim – (1) resulted in a  
9 decision that was contrary to, or involved an  
10 unreasonable application of, clearly established Federal  
11 law, as determined by the Supreme Court of the United  
12 States; or (2) resulted in a decision that was based on  
13 an unreasonable determination of the facts in light of  
14 the evidence presented in the State court proceeding.

15 Petitioner's two claims do not appear to have been  
16 "adjudicated on the merits" by the state supreme court, and thus  
17 AEDPA's deferential standard of review may not apply. Petitioner  
18 raised his claims in habeas petitions to the court of appeal and  
19 supreme court. (See Lodged Docs. 10, 12 & 14.) The court of  
20 appeal considered the claims on the merits and denied them  
21 summarily. (See Lodged Doc. 11.) The California Supreme Court  
22 denied his first petition by citing Duvall, 9 Cal. 4th at 474,  
23 and Swain, 34 Cal. 2d at 304 (see Lodged Doc. 13 at 2), and  
24 denied the second by citing Miller, 17 Cal. 2d at 735 (see Lodged  
25 Doc. 15 at 2).

26 The supreme court's citations cast doubt on whether the  
27 claims were "adjudicated on the merits" within the meaning of  
28 § 2254(d) and thus whether AEDPA's deferential standard of review

1 applies. See Gaston v. Palmer, 417 F.3d 1030, 1038-39 (9th Cir.  
2 2005) (decision citing Swain is not final ruling on merits), as  
3 modified on other grounds by 447 F.3d 1165 (9th Cir. 2006);  
4 Espinoza-Matthews v. McDonald, No. EDCV 03-921-BRO-(CW), 2016 WL  
5 2993961, at \*8 (C.D. Cal. Feb. 12, 2016) (California Supreme  
6 Court decision citing Swain and Duvall was not on merits for  
7 purposes of AEDPA review), accepted by No. EDCV 03-921-BRO-(LAL),  
8 2016 WL 2993951 (C.D. Cal. May 24, 2016); Carter v. Scribner, No.  
9 2:04-cv-00272-MSB, 2009 WL 4163542, at \*6 (E.D. Cal. Nov. 23,  
10 2009) (citation to Miller is procedural dismissal that does not  
11 constitute adjudication on merits), aff'd, 412 F. App'x 35 (9th  
12 Cir. 2011).

13 Respondent concedes that Petitioner's claims "appear to be  
14 exhausted" and does not argue that they are procedurally  
15 defaulted. (See Answer at 2.) Accordingly, Respondent has  
16 waived any procedural-default argument. See Chaker v. Crogan,  
17 428 F.3d 1215, 1220-21 (9th Cir. 2005).

18 Respondent nonetheless argues that AEDPA deference applies  
19 because the court of appeal's merits denial is "the relevant  
20 adjudication for purposes of 28 U.S.C. § 2254(d) review of the  
21 claims," and "[t]his is so notwithstanding the California Supreme  
22 Court's subsequent rejection of those claims based on Swain,  
23 Duvall, and In re Miller." (Answer at 9.)

24 Respondent cites four cases in support of his argument:  
25 Harrington v. Richter, 562 U.S. 86, 98 (2011); Greene v. Fisher,  
26 132 S. Ct. 38, 45 (2011); Gonzalez v. Brown, 585 F.3d 1202, 1206  
27 (9th Cir. 2009); and Ramsey v. Yearwood, 231 F. App'x 623, 624-25  
28 (9th Cir. 2007). Three of those cases are readily distinguished,

1 however, because the supreme-court denials at issue were "silent"  
2 and thus were presumptively on the merits, see Johnson v.  
3 Williams, 133 S. Ct. 1088, 1096-97 (2013); the federal habeas  
4 court was therefore authorized to "look through" to the lower  
5 state-court opinions. See Richter, 562 U.S. at 98-100  
6 (discussing unexplained summary denial from state supreme court);  
7 Gonzalez, 585 F.3d at 1205-06 (concerning apparent summary denial  
8 of discretionary review by California Supreme Court); Ramsey, 231  
9 F. App'x at 624-25 ("look[ing] through" silent denial from  
10 California Supreme Court).

11 Greene provides the strongest support for Respondent's  
12 argument. In Greene, the U.S. Supreme Court examined whether  
13 "clearly established federal law" included decisions of the Court  
14 that were announced after the last state-court adjudication of  
15 the merits of a petitioner's claims but before the petitioner's  
16 conviction became final. See 132 S. Ct. at 42. The petitioner  
17 in Greene had presented a claim to the state appellate court,  
18 which denied it on the merits; the state's highest court allowed  
19 an appeal but then dismissed it as "improvidently granted." See  
20 id. at 42-43. Petitioner argued that he was entitled to the  
21 benefit of the Supreme Court decision even though it postdated  
22 the last state merits determination. See id. at 44. The Supreme  
23 Court rejected the argument:

24 The words "the adjudication" in the "unless" clause  
25 obviously refer back to the "adjudicat[ion] on the  
26 merits," and the phrase "resulted in a decision" in the  
27 "unless" clause obviously refers to the decision produced  
28 by that same adjudication on the merits. A later

1       affirmance of that decision on alternative procedural  
2       grounds, for example, would not be a decision resulting  
3       from the merits adjudication. And much less would be  
4       (what is at issue here) a decision by the state supreme  
5       court not to hear the appeal – that is, not to decide at  
6       all.

7       Id. at 45. The Court proceeded to apply AEDPA deference to the  
8       claims even though the state supreme court had never considered  
9       their merits. Id. Respondent argues that Greene stands for the  
10      proposition that a later supreme-court “affirmance” of an earlier  
11      court-of-appeal decision “on alternate procedural grounds” does  
12      not preclude review under AEDPA when the court-of-appeal decision  
13      was on the merits. (See Answer at 9-10.)

14      But here there is no “affirmance on alternate procedural  
15      grounds.” The supreme court’s denials of Petitioner’s habeas  
16      petitions with citations to Duvall, Swain, and Miller were not  
17      affirming the court of appeal but were akin to the grant of a  
18      demurrer allowing leave to amend. See, e.g., Gaston, 417 F.3d at  
19      1039; Kim, 799 F.2d at 1319. The supreme court thus arguably  
20      left open the door for Petitioner to obtain further review of his  
21      claims if he stated them more particularly. Further, because the  
22      supreme court’s decisions were “reasoned,” this court may not  
23      look through them to the court of appeal’s decision. See Fox v.  
24      Johnson, 832 F.3d 978, 986 (9th Cir. 2016) (holding that summary  
25      denial with single case citation was “reasoned” and, because  
26      respondent waived procedural-default argument, reviewing de  
27      novo).

28      In any event, as explained infra, Petitioner’s claims fail

1 even when reviewed de novo. See Berghuis v. Thompkins, 560 U.S.  
2 370, 390 (2010) (“Courts can . . . deny writs of habeas corpus  
3 under § 2254 by engaging in de novo review when it is unclear  
4 whether AEDPA deference applies, because a habeas petitioner will  
5 not be entitled to a writ of habeas corpus if his or her claim is  
6 rejected on de novo review[.]”); see also Chaker, 428 F.3d at  
7 1220-21 (when state fails to raise procedural default and state  
8 court never adjudicated claim on merits, federal habeas court  
9 reviews de novo).

10 When a federal habeas court conducts de novo review, it is  
11 “unencumbered by the deference AEDPA normally requires,” and its  
12 analysis proceeds under § 2254(a). See Hardy v. Chappell, 832  
13 F.3d 1128, 1137 (9th Cir. 2016) (citing Frantz v. Hazey, 533 F.3d  
14 724, 735-37 (9th Cir. 2008) (en banc)). When the reasoning of a  
15 state court, even a trial court, is relevant to resolution of  
16 constitutional issues, that reasoning may be part of a federal  
17 habeas court’s consideration even under de novo review. See  
18 Frantz, 533 F.3d at 738 (focusing, under de novo review, on  
19 “trial court’s reasoning to determine whether a constitutional  
20 violation occurred”).

21 Further, even under de novo review, this Court still  
22 presumes the correctness of state-court factual findings and  
23 generally defers to those findings absent clear and convincing  
24 evidence to the contrary. See Pirtle v. Morgan, 313 F.3d 1160,  
25 1167 (9th Cir. 2002) (citing § 2254(e)); Mayfield v. Woodford,  
26 270 F.3d 915, 922 (9th Cir. 2001) (en banc) (under pre-AEDPA de  
27 novo standard, federal court presumes state-court findings of  
28 fact are correct and defers to those findings in absence of



1 "convincing evidence" to contrary or "demonstrated lack of fair  
2 support" in record (citations omitted)).<sup>12</sup>

3 **DISCUSSION**

4 **I. Petitioner's Claim Concerning the Trial Court's**  
5 **Participation in Plea Negotiations Does Not Warrant Habeas**  
6 **Relief**

7 Petitioner argues that the trial court violated his rights  
8 by (1) inserting itself into plea negotiations in violation of  
9 Federal Rule of Criminal Procedure 11; (2) improperly influencing  
10 or coercing Petitioner to accept a plea bargain with an "illusory  
11 promise" that misrepresented Petitioner's eligibility for a work  
12 program and what Petitioner's sentence would be; and (3) refusing  
13 to allow Petitioner to withdraw his plea.

14 A. Violation of Rule 11

15 The heading for this subclaim reads, "Trial judge improperly  
16 participated in plea discussions, in violation of Federal Rules  
17 of Criminal Procedure, rule 11(c)(1)." (Pet. at 5.)  
18 Petitioner's claim is unavailing.<sup>13</sup> Federal rules of procedure  
19 generally do not apply in state-court proceedings. See Southland

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20  
21 <sup>12</sup> Petitioner's claims are arguably unexhausted. A federal  
22 habeas court may not deny an unexhausted claim unless it is not  
23 even "colorable." See Cassett v. Stewart, 406 F.3d 614, 616 (9th  
24 Cir. 2005) (federal habeas court may deny unexhausted claim when  
it is "perfectly clear" that claim is not "colorable"). As  
explained herein, that is the case with Petitioner's claims.

25 <sup>13</sup> Federal Rule of Criminal Procedure 11, entitled "Pleas,"  
26 sets forth federal "Plea Agreement Procedure" and provides, in  
27 pertinent part, that "[a]n attorney for the government and the  
28 defendant's attorney, or the defendant when proceeding pro se,  
may discuss and reach a plea agreement," but "[t]he court must  
not participate in these discussions." See Fed. R. Crim. P.  
11(a), (c)(1).

1 Corp. v. Keating, 465 U.S. 1, 16 n.10 (1984). A California judge  
2 is not bound by those rules, moreover, and the rules are not  
3 "laws" whose "violation" by a state court, without more, can form  
4 the basis for a federal habeas claim. See, e.g., United States  
5 v. Davila, 133 S. Ct. 2139, 2149 (2013) (holding that Rule 11 was  
6 adopted as prophylactic measure, "not one impelled by the Due  
7 Process Clause or any other constitutional requirement"); Loftis  
8 v. Almaguer, 704 F.3d 645, 648 (9th Cir. 2012) ("While Fed. R.  
9 Crim. P. 11 and its state analogs require additional safeguards,  
10 violations of such rules do not ordinarily render a plea  
11 constitutionally infirm and thus vulnerable to collateral  
12 attack." (citing, among others, Estelle v. McGuire, 502 U.S. 62,  
13 68 n.2 (1991))).

14 Accordingly, Petitioner is not entitled to relief on his  
15 Rule 11 claim.

16 B. Petitioner's Plea and Motion to Withdraw It

17 Petitioner complains that shortly before trial was scheduled  
18 to start, the trial judge improperly inserted himself into plea  
19 negotiations, and because Petitioner's counsel was ineffective,  
20 Petitioner was "starting to feel pressure." (Pet., Mem. P. & A.  
21 at 2 (citing Lodged Doc. 2, 2 Rep.'s Tr. at 902, 1203).)

22 Before Petitioner pleaded no contest, his counsel told the  
23 judge that Petitioner wanted to present "a letter from Delancey  
24 Street Foundation," "an alternative incarceration program that  
25 the Petitioner had applied to," and "through a 3-step  
26 interviewing process the Petitioner received an acceptance letter  
27 into the program by US mail." (Id. at 2-3.) Petitioner avers  
28 that based on the colloquy that followed, he formed the

1 impression that he could accept a plea bargain but nevertheless  
2 be diverted to a two- or four-year program at Delancey Street in  
3 spite of whatever sentence Petitioner agreed to in the plea  
4 bargain. (See id. at 3-4 (citing Lodged Doc. 2, 2 Rep.'s Tr. at  
5 916)). Petitioner acknowledges, however, that his counsel also  
6 told the court that "these are the kind of things I would present  
7 in a Romero motion in the event [Petitioner] was convicted prior  
8 to sentencing." (See id. at 3 (citing Lodged Doc. 2, 2 Rep.'s  
9 Tr. at 916-18).)<sup>14</sup> Petitioner notes that the trial court said it  
10 would "certainly" take into consideration "this information  
11 if . . . [Petitioner] were convicted in this matter." (Id.  
12 (citing Lodged Doc. 2, 2 Rep.'s Tr. at 918).) Petitioner avers  
13 that "[t]his statement by the judge was the beginning of the  
14 undue coercion created by the court by participating in plea  
15 discussions which had not been agreed upon in open court." (Id.)  
16 Petitioner goes on to state that after he pleaded no contest he  
17 "discovered through petitioner's own legal research that  
18 petitioner never had a chance to participate in the Delancey  
19 Street Program due to petitioner's prior history." (Id. at 5.)

20 1. *Additional Background*

21 The trial judge addressed Petitioner's claims in numerous  
22

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23 <sup>14</sup> A so-called "Romero motion," see Cal. Penal Code § 1385,  
24 is a request for dismissal of a prior "strike" conviction that  
25 could be used to enhance a sentence under California's Three  
26 Strikes Law. See People v. Superior Court (Romero), 13 Cal. 4th  
27 497 (1996); see also Daire v. Lattimore, 818 F.3d 454, 466 (9th  
28 Cir. 2016) (when defendant brings Romero motion, judge may  
disregard prior felony for sentencing purposes under California's  
Three Strikes Law, but "denial of a Romero motion is generally  
the expectation, not the exception").

1 hearings, and it set forth its findings in three written orders:  
2 (1) a minute order dated April 2, 2013 (Lodged Doc. 1, Clerk's  
3 Tr. at 191-92), (2) a minute order dated April 15, 2013 (id. at  
4 213-14), and (3) the Order Denying Application for Certificate of  
5 Probable Cause filed on May 23, 2013 (see Pet. at 24-31).

6 At a hearing on September 14, 2012, with Petitioner present,  
7 the trial court inquired "what the status is concerning any plea  
8 negotiations at this point"; neither Petitioner nor his counsel  
9 raised any objection. (See id. at 902-03.) Petitioner addressed  
10 the court at that hearing, saying, "I believe we could have come  
11 [sic] to a resolution of this case a long time ago," and "[l]ike  
12 I said, I have been willing to dissolve [sic] this case." (Id.  
13 at 913.) The trial judge shared his thoughts on sentences  
14 proposed in plea negotiations to that point, and Petitioner said  
15 "Yes, sir" and "I thank you for that." (Id.) Later that same  
16 day, Petitioner informed the court that "I would like to resolve  
17 the case, and I think we can resolve the case" - "I'm almost 100  
18 percent we can resolve the case." (Id. at 1202.) He asked for  
19 "any kind of help" or "assistance" the court could give him.  
20 (Id. at 1203.)

21 The court went on to explain that Petitioner could accept  
22 the prosecution's plea offer, or "you could say I want to stand  
23 on my constitutional rights, I want to challenge this case at a  
24 jury trial." (Id. at 1205-06.) He asked Petitioner to "[b]ear  
25 in mind that you should not allow anyone to pressure you . . .  
26 [a]nd you should feel no pressure . . . [b]ut ultimately the  
27 decision has to be yours." (Id. at 1206.)

28 Finally, the court stated as follows:

1 If you decide that you want to accept the offer after  
2 speaking with your family members, you have to be able to  
3 look me in the eye and honestly tell me that: this is my  
4 decision. I'm not being pressured or forced by anyone  
5 else to accept this deal. This is my decision. I may  
6 feel some pressure because of the circumstances, in other  
7 words, I'm looking at a lot of time. But ultimately I've  
8 made a deliberative choice, a thoughtful choice, and I've  
9 decided that I want to accept the offer. . . . Do you  
10 understand what I'm telling you?

11 (Id. at 1206.) Petitioner responded, "Yes, sir." (Id.)

12 Shortly before Petitioner pleaded no contest, his counsel  
13 communicated Petitioner's request to be referred to the Delancey  
14 Street program, which, in Petitioner's own words, was meant to  
15 "help[] someone like myself - ex-cons." (Id. at 916, 918.) The  
16 trial court stated that although it "certainly would take into  
17 consideration this information if, in fact, [Petitioner] were  
18 convicted in this matter, it does not provide a basis for the  
19 court at this time to give any type of indicated sentence." (Id.  
20 at 916.)

21 The following colloquy then occurred:

22 The Court: Is it your hope that the court is going  
23 to somehow give you an indicated sentence on probationary  
24 terms at the outset of the case? Is that what you are  
25 hoping?

26 [Petitioner]: No, sir.

27 The Court: What is it that you hope to accomplish  
28 with respect to presenting this information to another

1 lawyer, to the court, or to myself?

2 [Petitioner]: Well, what I am hoping to get is, I  
3 have been getting different information from different  
4 members of the firm.<sup>15</sup> So in my mind – my mind is going  
5 in circles.

6 The Court: That is what I am trying to explain to  
7 you. And I understand where you are coming from. What  
8 I am trying to explain to you is that this information  
9 that you seek to present to the Court –

10 [Petitioner]: Yes, sir.

11 The Court: – is useful information potentially?

12 [Petitioner]: Yes, sir.

13 The Court: But its usefulness is only going to come  
14 about –

15 [Petitioner]: Yes, sir.

16 The Court: – if you are convicted in this case.

17 [Petitioner]: Yes, sir.

18 (Id. at 919.) The court then clarified that such information was  
19 “premature” and would not be “particularly useful at this time.”

20 (Id. at 920.) It also commented that “right now Mr. Darden is  
21 undoubtedly focused on trying this case . . . trying to avoid a  
22 conviction so sentencing isn’t necessary.” (Id. at 921.) The  
23 court eventually took Petitioner’s no-contest plea at that same  
24 hearing, and Petitioner got the prosecutor to agree to his  
25 counteroffer of a total sentence of 23 years and eight months,  
26

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27  
28 <sup>15</sup> This presumably refers to attorney Darden’s former law  
firm.

1 with no further mention of the Delancey Street program. (See id.  
2 at 1208-26.)

3 At a hearing on March 1, 2013, about Petitioner's motion to  
4 withdraw his plea, the trial court stated that "I also have  
5 reviewed yet again the transcript of the hearing of the taking of  
6 the plea on September 14 of 2012," and

7 I also have received and reviewed a letter that was sent  
8 to the court by [Petitioner] on October 11, 2012. And  
9 that was shortly after the court took the plea and  
10 [Petitioner] wrote a note indicating that he wished to be  
11 given a Delancy [sic] Street Foundation alternative to a  
12 straight-out prison sentence.

13 (Id. at 2701-02.)

14 The trial court stated that it had personally reviewed the  
15 evidence in the case, including the surveillance videos, and  
16 found it "substantial." (Id. at 2709-10.) The judge quoted from  
17 the October 11 letter, stating that Petitioner had said that "I  
18 must say that it feels as if the weight of the world has been  
19 lifted off my shoulders" as a result of the plea. (Id. at 2710.)  
20 The court then asked Petitioner for clarification about why he  
21 sought to withdraw his plea. (See id. at 2713.)

22 Petitioner stated that "I am asserting that I am factually  
23 innocent," and he said that "[w]hat I'm saying to you [is] . . .  
24 I expressed to [ex-counsel] the chain of events totally and  
25 truthfully . . . [and h]e totally lied to me and did not  
26 investigate the chain of events." (Id.) Petitioner went on to  
27 state that "I understand that someone else that fits the  
28 description has been out there committing the crimes," and "I am

1 not that person." (Id.) Petitioner said, "This has nothing to  
2 do with the prison time" and "is all about coming totally clean."  
3 (Id.)

4 When the trial court asked Petitioner why, then, he had  
5 accepted the plea deal, Petitioner stated, "[t]hat plea was  
6 entered because on the . . . faulty advice of counsel that if I  
7 didn't take some sort of deal, that I would spend the rest of my  
8 life and possibly die." (Id. at 2714.) Petitioner said his  
9 ex-counsel "expressed to me that people find love in their old  
10 age; you need to take the deal." (Id.) Petitioner did not make  
11 any allegations concerning Delancey Street or the trial court's  
12 participation in the plea negotiations.

13 The court then noted that it had conducted lengthy plea  
14 proceedings and endeavored to make sure that Petitioner was  
15 "entering this plea agreement freely, voluntarily, and of your  
16 own volition." (Id. at 2714-15.) "So when you tell me that you  
17 were feeling pressured and that you entered into this decision in  
18 effect because someone else forced you to do so, because your  
19 counsel in effect pressured you to do so, I must tell you that is  
20 not consistent with my finding of facts in this matter." (Id. at  
21 2715.)

22 Petitioner then asked the court to allow him "to speak on  
23 the illusionary [sic] promise that I would receive my property,"  
24 which Petitioner asserted was made "[b]y the court, by the  
25 prosecution, and [by] my attorney." (Id. at 2715-16.)  
26 Petitioner stated that "I'm referring to my counsel promised me  
27 that I would be able to get my property upon that plea." (Id. at  
28 2716.)



1 The trial court responded,  
2 The court finds that there was no illusory promise that  
3 was relied upon. . . . The reason the court makes that  
4 finding is because not only did you acknowledge . . . in  
5 open court that there were no promises made to you, other  
6 than those that were made in open court that were  
7 transcribed, but the transcription of the record will  
8 show that there were no promises made to you other than  
9 the court would conduct a contested hearing on the  
10 ownership of the property held by the Agency in the event  
11 that the parties could not reach a mutually agreeable  
12 resolution. . . . And the court does intend to conduct  
13 such a hearing . . . . [But t]hat contested hearing has  
14 been aborted because of the motion to withdraw the plea.

15 (Id. at 2717-18.)

16 Petitioner then complained that his counsel had inadequately  
17 advised him about the nature of his prior "strike" conviction.

18 (See id. at 2720-23.) He gave other reasons for wanting to  
19 withdraw his plea as well: "police misconduct of the DNA reports,  
20 on the chain of custody," the court-appointed video expert  
21 finding that the person in the video looked "Caucasian," and the  
22 criminalist testifying at the preliminary hearing that DNA from  
23 two contributors, one of them Caucasian, was found on the ski  
24 mask. (Id. at 2725, 2728.)

25 The court then commented,

26 [T]he court did review the declaration by the person  
27 reviewing the video. The person reviewing the video  
28 makes appropriate note that the quality of the image is

1 less than ideal. . . . The declarant further notes that  
2 the person appears to be Caucasian or light complexion.  
3 I will tell you that, based upon my own review of that  
4 [video], it was impossible to tell the race of the person  
5 involved. It looked like the person was lighter  
6 complexion; although it's not clear to me whether that  
7 was attributable to the lighting or whether that was, in  
8 fact, something that a person viewing the video could  
9 accurately ascertain. . . . I will note that you are a  
10 light-skinned African-American, quite light-skinned, in  
11 my view. And I will also note that your body type  
12 appears to match the body type that I saw on that video.

13 (Id. at 2728-29.)

14 Petitioner objected to the trial court's findings (see id. at  
15 2729), but the court stated,

16 I looked at the video with in mind [sic] the purpose for  
17 which you had presented it, which was that the videotape  
18 in effect exonerates you. And in my judgment, the  
19 videotape, which you have presented along with the  
20 declaration, does not do so . . . . [I]f I thought that  
21 it did, I would be very reluctant, of course, to accept  
22 a guilty plea in this case and to sentence you in this  
23 matter.

24 (Id.)

25 Petitioner then said that "I never said that the videotape  
26 exonerates me." (Id. at 2730.) Petitioner went on to state that  
27 "I would like to request . . . to withdraw my plea because I was  
28 promised that I would receive my property." (Id. at 2731-32.)

1 The trial court took Petitioner's motion to withdraw his plea  
2 under submission. (Id. at 2732.)

3 As noted, in a minute order dated April 2, 2013, the trial  
4 court denied the motion. (See Lodged Doc. 1, Clerk's Tr. at 191-  
5 92.) The court noted that Petitioner originally moved to  
6 withdraw his plea because he claimed "that the video surveillance  
7 was fraudulent or fabricated in some way." (Id. at 191.) But  
8 "[a]fter raising the fraud claim, [Petitioner] then expanded the  
9 scope of his motion to withdraw his plea, asserting largely  
10 conclusory claims about: . . . (iv) being 'induced by an illusory  
11 promise.'" (Id.) The court observed that "[a]s more fully  
12 stated on March 1, 2013, the court found these additional grounds  
13 to be unsupported and meritless." (Id.)

14 The trial court issued a minute order on April 15, 2013,  
15 which primarily concerned "whether the court had to consider the  
16 strike offense in [the other] case . . . for which [Petitioner]  
17 was convicted and is now before this court for sentencing." (Id.  
18 at 213.) The court found that the plea agreement was enforceable  
19 notwithstanding any issues with how Petitioner should be  
20 sentenced on the two cases. (See id. at 214.)

21 In the May 23, 2013 order denying Petitioner a certificate  
22 of probable cause, the trial court stated,

23 [Petitioner] had a full and fair opportunity to timely  
24 present all his claims - including any factual support  
25 for the claims - before this Court. This Court decided  
26 the motion [to withdraw the plea] after giving  
27 [Petitioner] a substantial amount of time to develop and  
28 present his claims. The Court then afforded [Petitioner]

1 an opportunity to present oral argument. [Petitioner]  
2 represented to the Court that he was ready to proceed  
3 with the hearing on his motion, and after arguing, he  
4 informed the Court that he was ready to submit the matter  
5 for disposition. Accordingly, the Application appears to  
6 be meritless and is hereby denied.

7 (Pet. at 30-31.)

8 2. *Applicable Law*

9 The 14th Amendment requires that when a criminal defendant  
10 enters into a guilty or no-contest plea, the defendant must act  
11 knowingly, intelligently, and voluntarily. See Boykin v.  
12 Alabama, 395 U.S. 238, 242-44 (1969); Loftis, 704 F.3d at 647.  
13 The standard for determining the validity of a guilty plea is  
14 "whether the plea represents a voluntary and intelligent choice  
15 among the alternative courses of action open to the defendant."  
16 North Carolina v. Alford, 400 U.S. 25, 31 (1970); see also  
17 Bradshaw v. Stumpf, 545 U.S. 175, 183 (2005) (guilty plea is  
18 valid "only if done voluntarily, knowingly, and intelligently,  
19 with sufficient awareness of the relevant circumstances and  
20 likely consequences"). The record must reflect that the  
21 defendant understood the nature of the charges against him and  
22 the consequences of his plea, and that he relinquished his  
23 privilege against self-incrimination, his right to trial by jury,  
24 and his right to confront his accusers. See Loftis, 704 F.3d at  
25 647. Beyond these essentials, "the Constitution 'does not impose  
26 strict requirements on the mechanics of plea proceedings.'" Id.  
27 at 648 (quoting United States v. Escamilla-Rojas, 640 F.3d 1055,  
28 1062 (9th Cir. 2011)).

1           Nevertheless, a guilty plea may be involuntary when it is  
2 induced by threats, misrepresentations, or promises "that are by  
3 their nature improper." Mabry v. Johnson, 467 U.S. 504, 509  
4 (1984), overruled in part on other grounds by Puckett v. United  
5 States, 556 U.S. 129 (2009); see also Brady v. United States, 397  
6 U.S. 742, 750 (1970) ("[T]he agents of the State may not produce  
7 a plea by actual or threatened physical harm or by mental  
8 coercion overbearing the will of the defendant."); Doe v.  
9 Woodford, 508 F.3d 563, 570 (9th Cir. 2007) (guilty plea may be  
10 coerced when defendant is induced by promises or threats that  
11 deprive plea of nature of voluntary act (citation and alterations  
12 omitted)).

13           To determine the voluntariness of a plea, a federal habeas  
14 court looks to the "totality of the circumstances," examining  
15 both the defendant's "subjective state of mind" and the  
16 "constitutional acceptability of the external forces inducing the  
17 guilty plea." Woodford, 508 F.3d at 570. When a judge is  
18 alleged to have coerced a defendant to plead guilty through his  
19 participation in plea negotiations, "[t]he critical inquiry . . .  
20 is whether the judge's conduct rendered [the] [p]etitioner's plea  
21 involuntary." Robinson v. Chavez, No. CV 09-9324 CAS (JCG), 2011  
22 WL 3896944, at \*7 (C.D. Cal. July 20, 2011) (citing Brady, 397  
23 U.S. at 748), accepted by 2011 WL 3896937 (C.D. Cal. Sept. 2,  
24 2011). Finally, "[a] habeas petitioner bears the burden of  
25 establishing that his guilty plea was not voluntary and knowing."  
26 Little v. Crawford, 449 F.3d 1075, 1080 (9th Cir. 2006).

### 27           3.    *Analysis*

28           Petitioner is not entitled to federal habeas relief because

1 nothing shows that the trial judge "coerced" him or made any  
2 "misrepresentations" or "illusory promises," and thus it did not  
3 err in denying his request to withdraw his plea.

4 As an initial matter, Petitioner was not present for some of  
5 the trial court's discussion with counsel concerning the plea  
6 negotiations, and thus any comments it made at that time could  
7 not have influenced Petitioner one way or the other.

8 Moreover, as the trial judge reasonably set forth in the  
9 multiple orders referenced above, the record reflects that far  
10 from "coercing" Petitioner into taking a plea, the court was  
11 especially solicitous of him throughout the proceedings and, in  
12 particular, during the plea hearing. Indeed, the court generally  
13 participated simply by "explain[ing] the prosecution's position  
14 and the potential sentence [p]etitioner was facing" rather than  
15 injecting its own personal views into the proceedings. See  
16 Robinson, 2011 WL 3896944, at \*7. To the extent it did more than  
17 that, it did not coerce or intimidate Petitioner.

18 The record reflects that Petitioner made a voluntary choice  
19 to plead guilty. In response to the trial court's questions,  
20 Petitioner acknowledged, among other things, that he had thought  
21 "about this carefully"; he was not pressured by anyone to accept  
22 the deal; and he had had enough time to consider the deal and  
23 wanted to accept it. (See Lodged Doc. 2, 2 Rep.'s Tr. at 1217.)  
24 The trial court went on to advise Petitioner of the rights he was  
25 waiving by pleading guilty, and Petitioner accepted each of those  
26 waivers. (See id. at 1217-19.) The court asked, "Has anyone  
27 threatened you or anyone close to you to get you to enter into a  
28 plea agreement and plead either guilty or no contest here

1 today?," and Petitioner responded, "[n]o, sir." (Id. at 1220.)

2 The record also reflects that the trial court made no  
3 "misrepresentations" to Petitioner and, in particular, made no  
4 "illusory promise" to Petitioner about the possibility of  
5 participating in the Delancey Street program and receiving a  
6 reduced sentence. The court explicitly told Petitioner, at  
7 numerous points throughout the preplea and plea proceedings,  
8 that participation in the Delancey Street program and the chance  
9 of a reduced or probationary sentence would only possibly be  
10 available and would not even be considered until after Petitioner  
11 was convicted. (See, e.g., id. at 919, 1204.)

12 For example, the court asked Petitioner, "[i]s it your hope  
13 that the court is going to somehow give you an indicated sentence  
14 on probationary terms at the outset of the case?," and Petitioner  
15 replied, "[n]o, sir." (Id. at 919.) The court explained that  
16 the information about the Delancey Street program "is useful  
17 information potentially . . . but its usefulness is only going to  
18 come about . . . if you are convicted in this case," to which  
19 Petitioner stated, numerous times, "[y]es, sir." (Id.) The  
20 trial court went on to tell Petitioner, before he pleaded no  
21 contest, that "there isn't anything at this point that you can  
22 present to the court . . . that would cause me, at this point in  
23 time, to strike a strike or to give you a disposition an  
24 indicated sentence that would be probation in nature," and  
25 Petitioner replied, "[y]es, sir." (Id. at 1204.)

26 What Petitioner describes is, at best, his own mistake or  
27 misapprehension; he can point to no misrepresentation or  
28 "illusory promise" made by the trial court that improperly

1 induced him, much less "coerced" him, to accept the plea deal.  
2 See Turner v. Calderon, 281 F.3d 851, 881 (9th Cir. 2002) (self-  
3 serving statement, made years later, that petitioner was  
4 misinformed is insufficient to undermine guilty plea). The  
5 conclusion that Petitioner's allegations are self-serving is  
6 buttressed by the fact that Petitioner complained in the trial  
7 court that the "illusory promise" of having his property returned  
8 influenced him to plead no contest, but later, in his habeas  
9 petitions to the state courts, he complained that the "illusory  
10 promise" was participation in the Delancey Street program.  
11 Petitioner appears to have floated one "illusory promise"  
12 argument after another in a self-serving attempt to latch onto a  
13 winning theory.

14 For the most part, "the judge remained neutral and took  
15 great pains to ensure that Petitioner's plea was voluntary and  
16 based on a complete understanding of his rights and the  
17 consequences of his plea." See Robinson, 2011 WL 3896944, at \*7;  
18 cf. Crater v. Galaza, 491 F.3d 1119, 1132 (9th Cir. 2007) (when  
19 judge did not perform incompatible accusatory and judicial roles  
20 in regard to plea bargain but only "encouraged" plea-bargain  
21 process, habeas relief on bias claim not warranted). When the  
22 judge arguably strayed from neutrality it was to help Petitioner,  
23 trying to get the People to agree to a lighter sentence, for  
24 instance, or making arrangements for Petitioner to speak with his  
25 family about the plea. Indeed, far from being intimidated by the  
26 judge's participation, Petitioner solicited it and more than once  
27 thanked the judge for his efforts. Petitioner also repeatedly  
28 spoke up when he wanted more information or a better deal – and



1 almost always got what he asked for. Because the trial court did  
2 not coerce Petitioner's plea or intimidate him in any way, it  
3 also did not err when it denied his request to withdraw his  
4 plea.<sup>16</sup>

5 **II. Petitioner's Ineffective-Assistance-of-Counsel Claim Does**  
6 **Not Warrant Habeas Relief**

7 Petitioner contends that his counsel was ineffective because  
8 he failed to adequately review the surveillance videos from the  
9 two victims' homes – what Petitioner calls the prosecution's  
10 "main evidence" – and failed to retain an expert to review the  
11 videos, which would have led to reasonable doubt concerning his  
12 guilt. (See Pet. at 5, Mem. P. & A. at 5-6.) Petitioner  
13 complains that if defense counsel had conducted a proper  
14 investigation, Petitioner would not have pleaded no contest.  
15 (See id.)

16 A. Additional Background

17 At a hearing on February 15, 2013, Petitioner advised the  
18 court that he was submitting Jones's declaration as part of his  
19 motion to withdraw his plea. (Lodged Doc. 2, 2 Rep.'s Tr. at  
20 2403.) The court asked Petitioner if the video and the still  
21 photos that Jones had reviewed "pertain[] to the January 30th  
22

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23  
24 <sup>16</sup> To the extent Petitioner argues that the trial court  
25 erred under California law, his claim is not cognizable on  
26 federal habeas review. See Estelle, 502 U.S. at 70; see  
27 also Nicholson v. Johnson, No. 2:13-cv-2407 JAM DAD P, 2015 WL  
28 1637977, at \*11 (E.D. Cal. Apr. 13, 2015) (claim that state court  
abused its discretion under state law in denying petitioner's  
motion to withdraw no-contest plea was not cognizable in federal  
habeas proceeding), request for cert. of appealability denied,  
No. 15-16475 (9th Cir. June 2, 2016).

1 event with Mr. Guerrero," and Petitioner said "yes." (Id. at  
2 2406.) The court confirmed that "[t]he video that [Jones] was  
3 not able to analyze . . . was the video of the chase, if you  
4 will, which relates to the January 31st event, correct?," and  
5 Petitioner said "yes." (Id.) Petitioner complained that the  
6 disk that Jones reviewed had not been authenticated because it  
7 "was recorded from someone's device, I believe . . . one of the  
8 officer's device cell phone, micro recorder, or something  
9 . . . ." (Id. at 2407.) Petitioner objected that the video  
10 pertaining to the incident at Tran's house was played at the  
11 preliminary hearing, but he did not have a copy of it. (Id. at  
12 2407-08.)

13 At a hearing on March 1, 2013, the trial court stated that  
14 it had reviewed Jones's declaration and the transcript of the  
15 preliminary hearing. (Id. at 2701, 2709-10.) Petitioner  
16 asserted that "I am factually innocent," and he argued that his  
17 defense counsel "totally lied to me and did not investigate the  
18 chain of events." (Id. at 2713.) Petitioner went on,

19 I just would like to state that pertaining to the video  
20 expert's report, that in his opinion the individual was  
21 a Caucasian. And I would like to note that it was the  
22 criminalist's statement that it was two sets [of DNA on  
23 the ski mask] – that there was two contributors. And the  
24 criminologist stated that one was African-American and  
25 one was Caucasian.

26 (Id. at 2728.)

27 As noted, the trial judge stated that he had reviewed the  
28 video and in his opinion, the video could possibly depict

1 Petitioner because he was a "quite light-skinned" African-  
2 American whose body type matched the person in the video. (See  
3 id. at 2728-29.) Although the trial judge stated that he was  
4 not, in fact, concluding that Petitioner was the person in the  
5 video, the video did not exonerate Petitioner. (See id. at  
6 2729.)

7 The court then denied Petitioner's motion to withdraw his  
8 plea. (See id. at 2732-35.) In particular, the court stated,  
9 "[t]he court also finds without support the assertion of  
10 ineffective assistance of counsel," and that "even to the extent  
11 that there was any ineffective assistance of counsel, that it was  
12 not prejudicial to [Petitioner]." (Id. at 2734.) The court then  
13 summarized its reasoning:

14 [Petitioner] had full information as to what was the  
15 prosecution's case and the evidence that they had. In my  
16 view, that evidence was strong evidence. Based upon my  
17 review of the preliminary hearing, and my review of the  
18 additional information that has been presented to the  
19 court, it appears that [Petitioner] was looking at a  
20 difficult case in front of him, recognized it as such,  
21 and decided to take the deal because of that evaluation,  
22 not based upon any other facts or circumstances.

23 (Id. at 2734.)

24 Further, as noted above, the trial court's April 2, 2012  
25 minute order also set forth its reasoning:

26 The court received the expert's report and independently  
27 reviewed the video surveillance that the expert had  
28 analyzed. Having done so, the court is satisfied that

1 the video is not exculpatory. The Court is also  
2 satisfied that the other evidence as presented at the  
3 preliminary hearing provides a factual basis to support  
4 the "no contest" plea.

5 (Lodged Doc. 1, Clerk's Tr. at 191.)

6 B. Applicable Law

7 Under Strickland v. Washington, 466 U.S. 668, 687 (1984), a  
8 petitioner claiming ineffective assistance of counsel must show  
9 that counsel's performance was deficient and that the deficient  
10 performance prejudiced his defense. "Deficient performance"  
11 means unreasonable representation falling below professional  
12 norms prevailing at the time of trial. Id. at 688-89. To show  
13 deficient performance, the petitioner must overcome a "strong  
14 presumption" that his lawyer "rendered adequate assistance and  
15 made all significant decisions in the exercise of reasonable  
16 professional judgment." Id. at 689-90. Further, the petitioner  
17 "must identify the acts or omissions of counsel that are alleged  
18 not to have been the result of reasonable professional judgment."  
19 Id. at 690. The initial court considering the claim must then  
20 "determine whether, in light of all the circumstances, the  
21 identified acts or omissions were outside the wide range of  
22 professionally competent assistance." Id.

23 The Supreme Court has recognized that "it is all too easy  
24 for a court, examining counsel's defense after it has proved  
25 unsuccessful, to conclude that a particular act or omission of  
26 counsel was unreasonable." Id. at 689. Accordingly, to overturn  
27 the strong presumption of adequate assistance, the petitioner  
28 must demonstrate that the challenged action could not reasonably

1 be considered sound trial strategy under the circumstances of the  
2 case. Id.

3 To meet his burden of showing the distinctive kind of  
4 "prejudice" required by Strickland, the petitioner must  
5 affirmatively

6 show that there is a reasonable probability that, but for  
7 counsel's unprofessional errors, the result of the  
8 proceeding would have been different. A reasonable  
9 probability is a probability sufficient to undermine  
10 confidence in the outcome.

11 Id. at 694; see also Richter, 562 U.S. at 111 ("In assessing  
12 prejudice under Strickland, the question is not whether a court  
13 can be certain counsel's performance had no effect on the outcome  
14 or whether it is possible a reasonable doubt might have been  
15 established if counsel acted differently.").

16 Strickland applies to challenges to the validity of guilty  
17 pleas based on alleged ineffective assistance of counsel. See  
18 Hill v. Lockhart, 474 U.S. 52, 58 (1985); see also Missouri v.  
19 Frye, 132 S. Ct. 1399, 1405 (2012). To establish prejudice,  
20 however, the petitioner must show that "there is a reasonable  
21 probability that, but for counsel's errors, he would not have  
22 pleaded guilty and would have insisted on going to trial." Hill,  
23 474 U.S. at 59; see also Padilla v. Kentucky, 559 U.S. 356, 372  
24 (2010) (petitioner "must convince the court that a decision to  
25 reject the plea bargain would have been rational under the  
26 circumstances").

27 Counsel "has a duty to make reasonable investigations or to  
28 make a reasonable decision that makes particular investigations

1 unnecessary." Strickland, 466 U.S. at 691. Counsel's "duty to  
2 investigate," however, is not "limitless" and does not  
3 "necessarily require that every conceivable witness be  
4 interviewed" or "every path" pursued. Hamilton v. Ayers, 583  
5 F.3d 1100, 1129 (9th Cir. 2009) (citation omitted). Further,  
6 "when a defendant has given counsel reason to believe that  
7 pursuing certain investigations would be fruitless or even  
8 harmful, counsel's failure to pursue those investigations may not  
9 later be challenged as unreasonable." Strickland, 466 U.S. at  
10 691.

11 To find prejudice from counsel's failure to investigate, the  
12 reviewing court must consider "whether the noninvestigated  
13 evidence was powerful enough to establish a probability that a  
14 reasonable attorney would decide to present it and a probability  
15 that such presentation might undermine the jury verdict." Mickey  
16 v. Ayers, 606 F.3d 1223, 1236-37 (9th Cir. 2010). In doing so,  
17 the reviewing court must consider the overall strength of the  
18 government's case. Rhoades v. Henry, 638 F.3d 1027, 1049-50 (9th  
19 Cir. 2011) (as amended).

20 C. Analysis<sup>17</sup>

21 Petitioner is not entitled to habeas relief on his  
22 Strickland claim even under a de novo standard of review.

23 As an initial matter, because Petitioner never submitted a  
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25 <sup>17</sup> A guilty plea generally bars federal habeas relief for  
26 any alleged preplea constitutional violations. See Tollett v.  
27 Henderson, 411 U.S. 258, 267 (1973). Because Respondent  
28 expressly notes that Petitioner's claims, as construed, "do not  
appear to be barred" under Tollett (Answer at 8 n.4), the Court  
takes Respondent at his word.

1 declaration from trial counsel regarding his reasons for not  
2 conducting further investigation or retaining a video expert,  
3 there was no basis for finding that counsel performed  
4 deficiently. See Gentry v. Sinclair, 705 F.3d 884, 899-900 (9th  
5 Cir. 2012) (as amended Jan. 15, 2013).

6 In any event, Petitioner's claim fails. The evidence in the  
7 Tran incident virtually assured conviction because, among other  
8 things, police observed Petitioner driving away from Tran's home  
9 at a high speed and saw him throw numerous incriminating objects  
10 out of his car during the chase, including a black ski mask.  
11 (See, e.g., Lodged Doc. 1, Clerk's Tr. at 47-48.) Police found  
12 numerous items, including a black gun bag and a number of luxury  
13 purses, inside the car. (See id. at 49-51.) When he was  
14 arrested, Petitioner was carrying denominations of cash similar  
15 to those the robber had taken from Tran. (See id. at 26, 50-51.)  
16 Finally, DNA testing on the black ski mask found along the  
17 getaway route showed that it had undoubtedly been worn by  
18 Petitioner. (See id. at 62-73.) Petitioner sets forth no  
19 theories about how his defense counsel could have conceivably  
20 challenged the Tran charges, and this Court can think of none  
21 either.

22 Arguably, however, because neither Guerrero nor Tran could  
23 identify Petitioner and the video expert opined that the person  
24 in the black-and-white surveillance video may have been white, a  
25 conviction on the Guerrero burglary charge was less certain. But  
26 any such argument ignores that the incidents were linked by  
27 strong circumstantial evidence. The Guerrero burglary occurred  
28 near midnight at a private home in San Gabriel; the Tran crimes

1 occurred just more than an hour later, also at a private home in  
2 San Gabriel. Guerrero and Tran both testified that a man with a  
3 big build, wearing a black ski mask and a white shirt or  
4 sweatshirt, was the perpetrator. One of the officers testified  
5 that Petitioner threw a white shirt and numerous objects from his  
6 car during the chase and positively identified Petitioner as the  
7 driver. (See Lodged Doc. 1, Clerk's Tr. at 48-49.) Based on all  
8 the evidence, it could reasonably be inferred that Petitioner was  
9 a gun-toting burglar who had committed numerous burglaries,  
10 including those of Tran's and Guerrero's houses.

11 Further, based on the trial court's conclusion that the  
12 video did not exonerate Petitioner because he was light skinned  
13 and had a build similar to the suspect in the video, a jury could  
14 reasonably have decided that the person depicted in the video was  
15 Petitioner notwithstanding what any video expert might have  
16 opined.<sup>18</sup> Indeed, testimony from a video expert on the issue of  
17 identification might not even have been allowed, given that  
18 identifying a perpetrator in a video would appear to be well  
19 within the capacity of jurors. See, e.g., United States v.  
20 Labansat, 94 F.3d 527, 530 (9th Cir. 1996) (defendant not  
21 prejudiced by counsel's failure to call identification expert at  
22 trial in part because jury viewed surveillance photographs  
23 itself); People v. Cole, 47 Cal. 2d 99, 103 (1956) ("[D]ecisive  
24 consideration in determining the admissibility of expert opinion  
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26 <sup>18</sup> Indeed, when asked by defense counsel at the preliminary  
27 hearing whether Petitioner was African-American, the state DNA  
28 expert answered, "I have no idea." (Lodged Doc. 1, Clerk's Tr.  
at 73.)



1 evidence is whether the subject of inquiry is one of such common  
2 knowledge that men of ordinary education could reach a conclusion  
3 as intelligently as the [expert] witness[.]”).

4         Petitioner also overlooks that his counsel viewed the  
5 surveillance videos at the preliminary hearing and saw for  
6 himself what they depicted. Counsel was also aware that based on  
7 those videos and the other evidence, the judge at the preliminary  
8 hearing had found probable cause to hold Petitioner to answer the  
9 charges. In light of all these considerations, trial counsel  
10 could have made a strategic decision not to retain a video  
11 expert.

12         Likewise, Petitioner’s challenge to the import of the DNA  
13 evidence fails. Petitioner does not explain how the presence of  
14 DNA from a minority profile on the ski mask would have exonerated  
15 him or even been exculpatory. The eyewitness testimony that  
16 Petitioner himself had thrown the ski mask from his car during  
17 the pursuit was virtually unassailable, as was the DNA evidence  
18 showing that regardless of who else might have done so,  
19 Petitioner had also worn the mask. Consequently, the video  
20 expert’s finding that a light-skinned man was possibly involved  
21 in the Guerrero burglary would have had negligible impact on a  
22 jury’s analysis of the DNA evidence from the ski mask.

23         In light of these factors, Petitioner’s counsel could have  
24 made a reasonable strategic decision to forgo further  
25 investigation into the videos and reasonably counseled Petitioner  
26 to take the plea. Accordingly, Petitioner’s counsel’s  
27 performance was not deficient. See, e.g., Richter, 562 U.S. at  
28 106-10 (counsel’s performance not deficient for failing to hire

1 expert when it was uncertain if expert's testimony would have  
2 been beneficial); Mickey, 606 F.3d at 1246 (counsel's performance  
3 not deficient for failing to call experts when it was  
4 questionable whether admission of experts' testimony would have  
5 been allowed by trial judge and experts' opinions would have been  
6 subject to challenge on cross-examination).


7 Further, Petitioner has not shown that he suffered any  
8 prejudice – that is, that he would have gone to trial rather than  
9 plead no contest if counsel had retained a video expert and  
10 called the DNA evidence into question. In light of all the  
11 evidence, the jury could reasonably have convicted on all charges  
12 even if a video expert had testified that the person in the  
13 Guerrero video looked white. Accordingly, because the Court is  
14 not convinced that Petitioner would have stood trial if his  
15 counsel had performed differently – much less that he would have  
16 been acquitted – Petitioner cannot show prejudice. See, e.g.,  
17 Lambert v. Blodgett, 393 F.3d 943, 982 (9th Cir. 2004) (“Courts  
18 have generally rejected claims of ineffective assistance premised  
19 on a failure to investigate where the record demonstrates that  
20 the defendant would have pled guilty despite the additional  
21 evidence and where the additional evidence was unlikely to change  
22 the outcome at trial.” (citing Hill, 474 U.S. at 56)); Langford  
23 v. Day, 110 F.3d 1380, 1388 (9th Cir. 1996) (as amended Apr. 14,  
24 1997) (denying ineffective-assistance claim on ground that  
25 petitioner would have pleaded guilty anyway even if offered  
26 defense expert).

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**CONCLUSION AND ORDER**

IT IS ORDERED that the Petition is denied and Judgment be entered dismissing this action with prejudice.

DATED: November 30, 2016

  
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JEAN ROSENBLUTH  
U.S. MAGISTRATE JUDGE