

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

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

KEVIN LAMONT WILSON,
Petitioner,
v.
FOULK, Warden,
Respondent.

Case No. LA CV 14-3253 PSG (JCG)
**ORDER ACCEPTING REPORT AND
RECOMMENDATION OF UNITED
STATES MAGISTRATE JUDGE AND
DENYING CERTIFICATE OF
APPEALABILITY AND
EVIDENTIARY HEARING**

Pursuant to 28 U.S.C. § 636, the Court has reviewed the Petition, the Magistrate Judge’s Report and Recommendation (“R&R”), Petitioner’s Objections to the R&R, and the remaining record, and has made a *de novo* determination.

Petitioner’s Objections generally reiterate the arguments made in his Petition and Traverse, and lack merit for the reasons set forth in the R&R. There are two issues, however, that warrant brief amplification here.

First, Petitioner notes, correctly, that the R&R appears to overlook the affidavit that Petitioner attached to his Traverse. (*See* Objections at 2-3; Traverse at 30-33.) Therein, Petitioner’s wife affirms that: (1) she was willing to testify at Petitioner’s trial; (2) the prosecution prevented her from testifying; and (3) if allowed to testify, she would have told the jury that the victim – who testified for the prosecution – was “a

1 crook” who had engaged in “identity theft and credit card fraud” with Petitioner.¹
2 (Traverse at 32-33.)

3 As a rule, a prosecutorial misconduct claim may provide grounds for habeas
4 relief only when deemed prejudicial under the harmless error test articulated in *Brecht*
5 *v. Abrahamson*, 507 U.S. 619, 637 (1993). That is, relief is warranted only if the
6 misconduct had a “substantial and injurious effect or influence in determining the
7 jury’s verdict.” *Shaw v. Terhune*, 380 F.3d 473, 478 (9th Cir. 2004) (citing *Brecht*,
8 507 U.S. at 637).

9 Here, Petitioner argues that his wife’s testimony was “vital to Petitioner[’]s
10 defense strategy of impeaching” the victim. (Objections at 2.) However, Petitioner’s
11 attorney raised the victim’s alleged criminal activities during his cross-examination of
12 both the victim and the investigating detective. (*See* Lodg. No. 4 at 82-83, 86, 196.)

13 Thus, on this record – and particularly in light of the ample evidence at trial of
14 Petitioner’s guilt – the Court does not find the requisite prejudice here. (*See* Lodg. No.
15 10 at 2-4); *see also* 28 U.S.C. § 2254(e)(1) (facts presumed correct).

16 Second, Petitioner argues that “there was no one present on [his] behalf” when
17 the victim identified Petitioner in a photographic line-up. (*See* Objections at 4.)

18 However, this line-up took place before Petitioner’s arrest, and thus before the
19 attachment of his Sixth Amendment right to counsel. (*See* Lodg. No. 4 at 120, 177,
20 182, 224); *see also United States v. Ash*, 413 U.S. 300, 321 (1973); *Kirby v. Illinois*,
21 406 U.S. 682, 688 (1972).

22 Thus, Petitioner is not entitled to federal habeas relief.

23 Accordingly, IT IS ORDERED THAT:

- 24 1. The Report and Recommendation is approved and accepted;
25 2. Judgment be entered denying the Petition and dismissing this action with
26

27 ¹ Specifically, according to Petitioner, the “equipment and materials that [the victim] s[ells] can
28 also be used in manufacturing fraudul[e]nt credit cards and false identification cards.” (Pet. at 10.)

1 prejudice; and

2 3. The Clerk serve copies of this Order on the parties.

3 Additionally, for the reasons set forth above and in the Report and
4 Recommendation, the Court finds that Petitioner has not made a substantial showing of
5 the denial of a constitutional right. *See* 28 U.S.C. § 2253; Fed. R. App. P. 22(b);
6 *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). Thus, the Court declines to issue a
7 certificate of appealability.

8 Nor is Petitioner entitled to an evidentiary hearing. *See Cullen v. Pinholster*,
9 131 S. Ct. 1388, 1398 (2011) (AEDPA “requires an examination of the state court-
10 decision at the time it was made. It follows that the record under review is limited to
11 the record in existence at that same time *i.e.*, the record before the state court.”).

12
13 DATED: __June 23, 2015_____



14
15 HON. PHILIP S. GUTIERREZ
16 UNITED STATES DISTRICT JUDGE
17
18
19
20
21
22
23
24
25
26
27
28