UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ROBERT STEPHEN COUTURIER, Petitioner, v. THE PRESIDING JUDGE OF THE LOS ANGELES SUPERIOR COURT, et al., Respondents.	NO. CV 16-8278-BRO(E) REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This Report and Recommendation is submitted to the Honorable Beverly Reid O'Connell, United States District Judge, pursuant to 28 U.S.C. section 636 and General Order 05-07 of the United States District Court for the Central District of California.

PROCEEDINGS

On December 5, 2016, Petitioner filed the operative "First Amended Petition for Writ of Habeas Corpus By a Person in State Custody" ("First Amended Petition" or "FAP"), with attachments ("FAP Att."). On March 30, 2017, Respondent filed a "Motion to Dismiss and

Answer to Petition for Writ of Habeas Corpus" ("Answer"). The Answer asserts that two of the four claims raised in the First Amended Petition are unexhausted and procedurally defaulted, and that the remaining two claims fail on the merits. Respondent concurrently lodged multiple documents in support of the Answer ("Respondent's Lodgments"), including the Clerk's Transcript ("C.T.") and Reporter's Transcript ("R.T."). On May 3, 2017, Petitioner filed an Opposition with attachments ("Opposition Att.").

On June 6, 2017, the case was reassigned from Magistrate Judge Bristow to Magistrate Judge Eick.

BACKGROUND

A "Misdemeanor Complaint for Arrest Warrant" ("Complaint") filed in the Los Angeles County Superior Court on October 10, 2014, alleged that on or about July 14, 2014, Petitioner committed petty theft by unlawfully stealing, taking, and carrying away the personal property of Felisa Richards (C.T. 1-3). Complainant Detective E. Harrold attached to the Complaint "official reports and documents of a law enforcement agency" to establish probable cause consisting of, inter alia, an "Incident Report" and a "Vehicle Report," both dated July 20, 2014, and a "Supplementary Report" dated July 31, 2014 (C.T. 2; see also Respondent's Lodgment 2 (copy of Complaint and attachments)). On October 15, 2014, Judge Valerie Salkin issued the warrant upon a finding of probable cause (C.T. 3-4).

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On October 30, 2014, Petitioner, proceeding pro per, appeared before Judge Salkin and, after waiving his right to counsel for the arraignment only and waiving the reading of the Complaint, pleaded not guilty to the charge (C.T. 6-7; R.T. A-1 - A-7).[1]

On January 6, 2015, Petitioner, with the assistance of private counsel, waived his right to a jury trial (C.T. 10). Following a bench trial on January 20, 2015, Judge Salkin found Petitioner guilty of petty theft, sentenced Petitioner to 36 months of probation, and issued a protective order requiring Petitioner to stay away from the victim (C.T. 12-15; R.T. 50-60).

On September 22, 2015, the Appellate Division of the Los Angeles County Superior Court affirmed the judgment. The Appellate Division

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[1] Judge Salkin had advised Petitioner that he was charged with misdemeanor petty theft (R.T. A-5 - A-6), and that he could talk with the prosecutor regarding how the prosecutor wanted to resolve the case (R.T. A-8). The following exchange then occurred:

> [Petitioner]: I would be interested in trying to understand why I'm here and what [the prosecutor's] intentions are because it's – I believe it involves a license plate that the sheriffs came knocking on my door about.
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> The Court: I'm going to stop you for a second. I don't know anything about the charge in this case. I can tell you that there is in fact a – a redacted copy of the discovery in here. . . .

(R.T. A-8). When Petitioner later commented on certain discovery, the court interrupted, "Keep in mind, I don't know the facts of this case" (R.T. A-9). It is not clear whether Judge Salkin then recalled having signed Petitioner's arrest warrant weeks before the arraignment.

found the evidence sufficient to support Petitioner's conviction, and determined that Petitioner had failed to show his trial counsel was ineffective for: (1) recommending that Petitioner have a court trial instead of a jury trial; (2) not subpoenaing the deputy sheriff(s) who interviewed the witnesses and prepared a report of the interviews; and (3) not objecting when the prosecutor allegedly "coached" witnesses and assertedly misstated the witnesses' testimony. See Respondent's Lodgments 4, 6, 7.

On November 12, 2015, the California Court of Appeal summarily denied a petition to transfer the matter from the Appellate Division. See Respondent's Lodgment 8 (order); Opposition Att. (containing copy of petition for transfer and exhibits thereto). On November 30, 2015, the Appellate Division of the Los Angeles County Superior Court issued a remittitur affirming the judgment (Respondent's Lodgment 9).

On December 15, 2015, Petitioner filed a habeas petition with the Los Angeles County Superior Court (the "First State Petition") (Respondent's Lodgment 10). Construing the First State Petition liberally, the Court deems Petitioner to have alleged therein a claim of ineffective assistance of trial counsel for: (1) recommending a bench trial; (2) failing to bring in an expert witness from Honda to testify concerning how license plates are attached to Honda bumpers; (3) failing to object to prosecutorial statements concerning certain evidence assertedly not in the record; (4) failing to subpoena and present police witnesses who assertedly could have laid a foundation for the police reports and the arguably inconsistent victim and witness statements contained therein; and (5) failing to ask for a

continuance to subpoena and present police witnesses regarding the reports. See Respondent's Lodgment 10, pp. 4-6. The First State Petition also alleged prosecutorial misconduct for "occasionally ma[king] statements that were not in the record of the trial" (id., p. 14). On December 22, 2015, the Superior Court denied the First State Petition "summarily" for raising issues that had been raised and rejected on appeal, for raising issues that could have been raised on appeal but were not, and for failing to establish prejudice from counsel's allegedly ineffective assistance (Respondent's Lodgment 11 (citing Strickland v. Washington, 466 U.S. 668, 697 (1984)).

On February 9, 2016, Petitioner filed a second habeas petition with the Los Angeles County Superior Court (the "Second State Petition") (Respondent's Lodgment 12). The Second State Petition alleged a claim of ineffective assistance of counsel similar to the claim alleged in the First State Petition, but with more factual detail. On February 17, 2016, the Superior Court denied the Second State Petition for raising issues that had been raised and rejected on direct appeal and in a prior habeas petition, for raising issues that could have been raised on appeal but were not, and for having filed a prior habeas petition that failed to raise claims contained in the current petition (Respondent's Lodgment 13).

On February 12, 2016, Petitioner filed a habeas petition with the California Court of Appeal (the "Third State Petition") (Respondent's Lodgment 14). The Third State Petition alleged the same ineffective assistance of counsel claim previously alleged in the Second State Petition. On February 25, 2016, the California Court of Appeal denied

the Third State Petition without prejudice to refiling in the Superior Court. See Respondent's Lodgment 15 (citing In re Steele, 32 Cal. 4th 682, 692, 10 Cal. Rptr. 3d 536, 85 P.3d 444 (2004); In re Hillery, 202 Cal. App. 2d 293, 294, 20 Cal. Rptr. 759 (1962)).

On March 3, 2016, Petitioner filed another habeas petition with the Los Angeles County Superior Court (the "Fourth State Petition") (Respondent's Lodgment 16). The Fourth State Petition repeated the ineffective assistance of counsel claim Petitioner previously alleged in the Second and Third State Petitions. On March 8, 2016, the Superior Court observed that the petition appeared to be a duplicate of the petitions filed on December 15, 2015, and February 9, 2016 (i.e., the First and Second State Petitions) (Respondent's Lodgment 17). The Superior Court denied the Fourth State Petition for the same reasons that Court had denied the Second State Petition.

On April 22, 2016, Petitioner filed a habeas petition with the California Supreme Court (the "Fifth State Petition") (Respondent's Lodgment 18). The Fifth State Petition alleged the same claim of ineffective assistance of counsel previously alleged in the Second, Third, and Fourth State Petitions. Petitioner included redacted copies of the police reports as exhibits to the Fifth State Petition. See Respondent's Lodgment 18. On May 25, 2016, the California Supreme Court summarily denied the Fifth State Petition (Respondent's Lodgment 19).

On November 21, 2016, Petitioner filed another habeas petition with the California Supreme Court (the "Sixth State Petition")

(Respondent's Lodgment 20). The Sixth State Petition alleged the claims now alleged in the First Amended Petition herein. Compare FAP and Respondent's Lodgment 20, with Respondent's Lodgment 18. The Sixth Amended Petition presented for the first time unredacted exhibits later filed with the First Amended Petition. On December 21, 2016, the California Supreme Court denied the Sixth State Petition, citing In re Clark, 5 Cal. 4th 750, 797-98, 21 Cal. Rptr. 2d 509, 855 P.2d 729 (1993), which indicated that the petition was successive.

SUMMARY OF TRIAL EVIDENCE AND THE TRIAL COURT'S FINDING OF GUILT

The following summary is taken from the decision of the Appellate Division of the Los Angeles County Superior Court on direct appeal (Respondent's Lodgment 7).[2]

> Felisa Richards [a.k.a. Felisa Bayze], Christopher Vang, and [Petitioner] were neighbors and lived on a cul-de-sac in Castaic, California [R.T. 5, 7, 9, 12-13, 24-26]. On July 14, 2014, Richards parked her vehicle, a Honda Civic with the front and rear license plates affixed, in front of [Petitioner's] home and behind Vang's van [R.T. 6-8]. Richards did not give [Petitioner] permission to remove or take her license plate [R.T. 9]. She discovered the next day that the [front] plate was missing [R.T. 8-9].

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[2] The Court has reviewed the Reporter's Transcript and has confirmed that the Appellate Division accurately summarized the evidence.

> At approximately 10:00 p.m. on July 14, 2014, Vang was driving home when he observed [Petitioner] crouched behind Vang's van and in front of Richards's [sic] vehicle [R.T. 26]. Vang observed [Petitioner] "pop up and go into his yard real quick," and return to the area between the van and the car [R.T. 27-28]. Vang then observed [Petitioner] emerge from between the two vehicles and "walk back in his yard with a [license] plate in his hand" [R.T. 28, 37]. After [Petitioner] went inside, Vang approached the parked vehicles and noticed his rear license plate was still there but Richard's [sic] front plate was missing [R.T. 29-30].
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> Vang was approximately 70 feet from [Petitioner] while watching him, and he could not see what [Petitioner] was doing when he was between the two vehicles [R.T. 28, 34-37]. He also testified that the area was illuminated by a street light that was above the two vehicles [R.T. 28-29].

(Respondent's Lodgment 7, pp. 1-2).

The Court found Petitioner guilty, stating:

> . . . the part I just can't get around, and why I am going to find you guilty, Mr. Couturier, is that Mr. Vang testified, and I found him believable that he saw you with the license plate. And I can't wrap my head around that any other way. [Vang] said he saw [Petitioner] crouched down. ¶ I think, [defense counsel], you did do a good job of

trying to question that, but the prior inconsistent statement, if made, we don't have the information that that was made. He was asked about a police report that was not admitted, and even if it was made, maybe the officer got it wrong, maybe he didn't, I don't know, but I have what I have here.

(R.T. 49-50).

PETITIONER'S CONTENTIONS

Petitioner contends:

1. His trial counsel was ineffective for assertedly: (a) performing unreasonably in virtually every aspect of representation (Ground One; Ground Two; Opposition);[3] and (b) specifically failing to seek recusal of the trial judge on the ground the trial judge had signed Petitioner's arrest warrant (and therefore had seen the police reports relating to the alleged crime) (Ground Three);

2. The trial judge erred by failing to recuse herself (Ground Four).

See FAP, pp. 5-6; FAP Attach., pp. A1 - A5.

[3] The Court presumes that Petitioner intends to include among Grounds One and Two his claim that counsel was ineffective for recommending a bench trial rather than a jury trial.

STANDARD OF REVIEW

Under the "Antiterrorism and Effective Death Penalty Act of 1996" ("AEDPA"), a federal court may not grant an application for writ of habeas corpus on behalf of a person in state custody with respect to any claim that was adjudicated on the merits in state court proceedings unless the adjudication of the claim: (1) "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States"; or (2) "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d); Woodford v. Visciotti, 537 U.S. 19, 24-26 (2002); Early v. Packer, 537 U.S. 3, 8 (2002); Williams v. Taylor, 529 U.S. 362, 405-09 (2000).

"Clearly established Federal law" refers to the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision on the merits. Greene v. Fisher, 565 U.S. 34, 44 (2011); Lockyer v. Andrade, 538 U.S. 63, 71-72 (2003). A state court's decision is "contrary to" clearly established Federal law if: (1) it applies a rule that contradicts governing Supreme Court law; or (2) it "confronts a set of facts . . . materially indistinguishable" from a decision of the Supreme Court but reaches a different result. See Early v. Packer, 537 U.S. at 8 (citation omitted); Williams v. Taylor, 529 U.S. at 405-06.

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Under the "unreasonable application" prong of section 2254(d)(1), a federal court may grant habeas relief "based on the application of a governing legal principle to a set of facts different from those of the case in which the principle was announced." Lockyer v. Andrade, 538 U.S. at 76 (citation omitted); see also Woodford v. Visciotti, 537 U.S. at 24-26 (state court decision "involves an unreasonable application" of clearly established federal law if it identifies the correct governing Supreme Court law but unreasonably applies the law to the facts).

"In order for a federal court to find a state court's application of [Supreme Court] precedent 'unreasonable,' the state court's decision must have been more than incorrect or erroneous." Wiggins v. Smith, 539 U.S. 510, 520 (2003) (citation omitted). "The state court's application must have been 'objectively unreasonable.'" Id. at 520-21 (citation omitted); see also Waddington v. Sarausad, 555 U.S. 179, 190 (2009); Davis v. Woodford, 384 F.3d 628, 637-38 (9th Cir. 2004), cert. dism'd, 545 U.S. 1165 (2005). "Under § 2254(d), a habeas court must determine what arguments or theories supported, . . . or could have supported, the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court." Harrington v. Richter, 562 U.S. 86, 101 (2011). This is "the only question that matters under § 2254(d)(1)." Id. at 102 (citation and internal quotations omitted). Habeas relief may not issue unless "there is no possibility fairminded jurists could disagree that the state court's decision conflicts with [the United States Supreme Court's] precedents." Id. "As a condition

for obtaining habeas corpus from a federal court, a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." Id. at 103.

In applying these standards, the Court ordinarily looks to the last reasoned state court decision. See Delgadillo v. Woodford, 527 F.3d 919, 925 (9th Cir. 2008). Where no reasoned decision exists, as where the state court summarily denies a claim, "[a] habeas court must determine what arguments or theories . . . could have supported the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court." Cullen v. Pinholster, 563 U.S. 170, 188 (2011) (citation, quotations and brackets omitted). If the state court did not decide a federal constitutional issue of the merits, this Court must consider that issue under a de novo standard of review. See Scott v. Ryan, 686 F.3d 1130, 1133 (9th Cir. 2012), cert. denied, 134 S. Ct. 120 (2013).

Additionally, federal habeas corpus relief may be granted "only on the ground that [Petitioner] is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). In conducting habeas review, a court may determine the issue of whether the petition satisfies section 2254(a) prior to, or in lieu of, applying the standard of review set forth in section 2254(d). Frantz v. Hazey, 533 F.3d 724, 736-37 (9th Cir. 2008) (en banc).

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DISCUSSION

The First Amended Petition should be denied and dismissed with prejudice.[4]

I. Petitioner's Various Claims of Ineffective Assistance of Counsel Do Not Merit Federal Habeas Relief.

Petitioner contends that his trial counsel was ineffective in multiple respects. Petitioner contends that counsel assertedly failed to: (1) visit the crime scene; (2) interview the alleged victim or Vang prior to trial; (3) subpoena the authors of the police reports as witnesses to lay a foundation for statements in the reports to impeach the prosecution's witnesses, or seek a continuance to present those authors; or (4) call an expert witness from Honda or an auto body shop

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[4] The Court has read, considered and rejected on the merits all of Petitioner's arguments. The Court discusses Petitioner's principal arguments herein. Respondent argues that Grounds Three and Four herein, i.e., Petitioner's claims that trial counsel was ineffective for failing to move to recuse the trial judge for potential bias, and his claim that the trial judge should have recused herself, are unexhausted and procedurally defaulted. Answer, pp. 15-20. The Court has exercised its discretion to deny these Grounds on the merits. See Lambrix v. Singletary, 520 U.S. 518, 524-25 (1997) (in the interest of judicial economy, federal courts may address merits of defaulted habeas claim if issues on claim's merits is clear but the procedural default issues are not); Flournoy v. Small, 681 F.3d 1000, 1004 n.1 (9th Cir. 2012), cert. denied, 133 S. Ct. 880 (2013) ("While we ordinarily resolve the issue of procedural bar prior to any consideration on the merits on habeas review, we are not required to do so when a petition clearly fails on the merits.") (citation omitted); Cassett v. Stewart, 406 F.3d 614, 623-24 (9th Cir. 2005), cert. denied, 546 U.S. 1172 (2006) (habeas court may deny on the merits unexhausted claims that are not "colorable").

to impeach the alleged victim's testimony concerning how the license plate attached to her front bumper. Petitioner also faults counsel for recommending that Petitioner waive his right to a jury trial. See FAP Att., pp. A-1 - A-5; Opposition, p. 11.

Petitioner appears to have raised some but not all of these claims in the Fifth State Petition that was filed with the California Supreme Court. However, Petitioner did not present to the California Supreme Court all of his current ineffective assistance of counsel claims with the supporting exhibits until he filed the Sixth State Petition, which was denied as successive. Nonetheless, Respondent states that the California Supreme Court's denial of the Fifth State Petition exhausted Grounds One and Two. See Answer, pp. 20, 24, 29.

In any event, the Court need not determine whether the AEDPA standard of review applies to Grounds One and Two. As discussed below, Petitioner is not entitled to federal habeas relief, even under a de novo review of these claims.

A. Standards Governing Claim of Ineffective Assistance of Counsel

To establish ineffective assistance of counsel, Petitioner must prove: (1) counsel's representation fell below an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. Strickland v. Washington, 466 U.S. 668, 688, 694, 697 (1984) ("Strickland"). A reasonable probability of a different result

"is a probability sufficient to undermine confidence in the outcome." Id. at 694. The court may reject the claim upon finding either that counsel's performance was reasonable or the claimed error was not prejudicial. Id. at 697; Rios v. Rocha, 299 F.3d 796, 805 (9th Cir. 2002) ("Failure to satisfy either prong of the Strickland test obviates the need to consider the other.") (citation omitted).

Review of counsel's performance is "highly deferential" and there is a "strong presumption" that counsel rendered adequate assistance and exercised reasonable professional judgment. Williams v. Woodford, 384 F.3d 567, 610 (9th Cir. 2004), cert. denied, 546 U.S. 934 (2005) (quoting Strickland, 466 U.S. at 689). The court must judge the reasonableness of counsel's conduct "on the facts of the particular case, viewed as of the time of counsel's conduct." Strickland, 466 U.S. at 690. The court may "neither second-guess counsel's decisions, nor apply the fabled twenty-twenty vision of hindsight. . . ." Matylinsky v. Budge, 577 F.3d 1083, 1091 (9th Cir. 2009), cert. denied, 558 U.S. 1154 (2010) (citation and quotations omitted); see Yarborough v. Gentry, 540 U.S. 1, 8 (2003) ("The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight.") (citations omitted). Petitioner bears the burden to show that "counsel made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment." Harrington v. Richter, 562 U.S. at 104 (citation and internal quotations omitted); see Strickland, 466 U.S. at 689 (petitioner bears burden to "overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy") (citation and quotations omitted).

"In assessing prejudice under Strickland, the question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently." Harrington v. Richter, 562 U.S. at 111 (citations omitted). Rather, the issue is whether, in the absence of counsel's alleged error, it is "'reasonably likely'" that the result would have been different. Id. (quoting Strickland, 466 U.S. at 696). "The likelihood of a different result must be substantial, not just conceivable." Id. at 112.

B. Analysis

Petitioner's myriad contentions regarding counsel's alleged ineffectiveness, raised as Grounds One and Two of the Petition and in portions of the Opposition, do not merit federal habeas relief.

1. Counsel's Recommendation that Petitioner Waive Jury and Agree to a Bench Trial

Petitioner faults counsel for recommending that Petitioner waive his right to a jury trial and agree to a bench trial instead. Petitioner has failed to demonstrate that counsel's recommendation was unreasonable or prejudicial.

An attorney's decision to advise his or her client to waive a jury trial "is a classic example of a strategic trial judgment" which constitutes "a conscious, tactical choice between two viable alternatives." Hatch v. State of Oklahoma, 58 F.3d 1447, 1459 (10th

Cir. 1995), cert. denied, 517 U.S. 1235 (1996) (citations omitted); see Hensley v. Crist, 67 F.3d 181, 184-85 (9th Cir. 1995) (counsel not ineffective for advising petitioner to waive jury and submit case on stipulated facts); Thoel v. Leiback, 2002 WL 1990702 *4 (N.D. Ill. Aug. 27, 2002) ("Petitioner cannot establish that his attorney's performance in recommending a bench trial fell below . . . an objective standard of reasonableness, or that he was prejudiced by this recommendation, as required by *Strickland* . . ."; see also Morris v. California, 966 F.2d 448, 456-57 (9th Cir.), cert. denied, 506 U.S. 831 (1992) (if the court can conceive of a reasonable explanation for counsel's action or inaction, the court need not determine the actual explanation).

As to Strickland's prejudice requirement, Petitioner offers only speculation that he would not have been convicted if his case had been heard by 12 jurors rather than one judge with "prior case knowledge." (Opposition, pp. 11-12). To find Petitioner guilty of misdemeanor petty theft, a trier of fact need only find that Petitioner took or carried away personal property of Richards of a value not exceeding fifty dollars ($50). See Cal. Penal Code §§ 484, 490.1; People v. Whitmer, 59 Cal. 4th 733, 744, 174 Cal. Rptr. 3d 594, 329 P.3d 154 (2014). The evidence adduced at trial was fairly straightforward. On July 14, 2014, Richards parked her car with her front license plate intact (R.T. 8). After she parked, neighbor Vang returned home and witnessed Petitioner crouching in front of Richards' car then leaving with a licence plate in hand (R.T. 26-28). Vang went to where he saw Petitioner crouched and discovered that Richards' front license plate was missing from her car (R.T. 29). Richards did not give Petitioner

permission to take the plate (R.T. 9). Petitioner did not testify at trial, and the defense rested without presenting any evidence (R.T. 41). The prosecution's evidence likely would have impelled any reasonable trier of fact to find Petitioner guilty of petty theft. See Respondent's Lodgment 7, pp. 2-3 (Superior Court finding testimony of Richards and Vang established the elements of petty theft).

The fact that, months before trial, the trial judge had been privy to information regarding Petitioner's case does not suggest Petitioner suffered any prejudice from a bench trial rather than a jury trial. See Osborn v. Belleque, 385 Fed. App'x 701, 703 (9th Cir. 2010) (petitioner whose counsel allegedly failed to advise him adequately concerning a jury waiver could not show prejudice because, in light of the overwhelming evidence at trial, a jury was no more likely to acquit than the trial judge); Hensley v. Crist, 67 F.3d at 185 (counsel's advice to waive jury trial and submit case to judge on stipulated facts did not prejudice petitioner, where evidence was so strong that "more likely than not [the petitioner] would have been convicted had he gone to trial"); Ortiz v. Yates, 2010 WL 4628197, at *30 (E.D. Cal. Nov. 5, 2010), adopted, 2011 WL 124758 (E.D. Cal. Jan. 14, 2011) (finding no Strickland prejudice due to bench trial where the evidence against petitioner was "overwhelming," and petitioner had not shown a reasonable likelihood that he could have obtained a more favorable result with a jury trial). As explained in section II below, Petitioner has not proven any bias on the part of the trial judge.

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2. Counsel's Alleged Failures to Visit the Crime Scene and Call An Expert to Testify Regarding How a License Plate Would Attach to the Victim's Car

Petitioner also faults counsel for allegedly failing to visit the crime scene to see the Honda and "gain a clearer understanding that there never had been a license plate attached to the Honda vehicle." Petitioner alleges that the Honda was parked in front of Petitioner's house from the time of the police reporting of the incident until a few months after trial. Petitioner further alleges that the pictures of the Honda "are not as clear as on site observation." See FAP Att., p. A-1 - A-3; Opposition, pp. 11, 16. Petitioner also faults counsel for failing to present an expert witness who could have testified how license plates are affixed. See FAP Att., p. A-1, A-4; Opposition, pp. 11, 14-15, 19, 22.

Richards testified that there were two screws that held her license plate on the front of her 1994 Honda Civic's bumper (R.T. 6, 19). Richards identified from a photograph two areas where the front license plate attached to the bumper (R.T. 18). On the left side screw area there was a "little rubber piece" (or cap) that comes with the Honda (R.T. 18). There was no rubber cap on the right side (R.T. 18-19). Richards said there were screw holes in the center of the area on the right side, and a hole that "goes through the middle of [the rubber cap]" (R.T. 19). Counsel asked Richards if there was no hole through the middle of the rubber cap in the photograph, and Richards said, "I don't understand. ¶ There were two screws that held my license plate on to this portion of my vehicle" (R.T. 19). The

trial court admitted into evidence the photographs of the bumper from which counsel suggested there was no visible left-side screw hole (R.T. 41-42).

Richards admitted that, as part of her job, she drove on a movie ranch over brush and things that nicked and scratched her bumper, and that she regularly spray painted over the nicks and scratches (R.T. 14). Defense counsel argued in closing that: (1) Richards did not know the condition of her car, and the license plate could have fallen off from her work conditions; (2) Richards had spray painted the bumper where the front license plate would have been, so the plate was removed to paint the bumper and might have been put back on incorrectly; and (3) a license plate could not be put over the cap seen on the left side of the bumper – the license plate goes beneath the cap (R.T. 45-47). The court reasonably observed, in accordance with the prosecutor's rebuttal argument, that if Richards had removed the plate to spray paint the bumper, there would have been paint on the unpainted area of the bumper (R.T. 47-49).

Petitioner has provided as exhibits unsworn, unverified letters from: (1) Shane Wanjon, the purported owner of "Exclusive Image" dated September 28, 2016; and (2) William Scott, Parts Manager at Autonation Honda Valencia, undated (including a parts list that has a bracket for front license plate assembly). Wanjon states: "The correct way, when you have a front license plate, is to remove the caps filling the holes, and put correct sized bolts thru the holes." See FAP Att. Scott states: "When shown the photo's [sic] of the vehicle in question my first response was that there was never any license plate affixed

to this vehicle. . . . [B]ased on the fact that one of the 2 plugs is still in the hole and looks to be the same paint color as the rest of the car[,] and that there is no lower bracket or frame installed[,] I would in my own opinion have to say that no front license plate was ever attached to the front of this car. At least not the way it was designed to be attached [sic]. This is just my own opinion and should be noted as such." (id.).

Unauthenticated, unsworn statements generally cannot carry a habeas petitioner's burden to show Strickland prejudice. See United States v. Ashimi, 932 F.2d 643, 650 (7th Cir. 1991) ("evidence about the testimony of a putative witness must generally be presented in the form of actual testimony by the witness or an affidavit"); accord United States v. Cockrell, 720 F.2d 1423, 1427 (5th Cir. 1983), cert. denied, 467 U.S. 1251 (1984); see also Brown v. Swarthout, 2011 WL 5975056, at *9 (C.D. Cal. Oct. 20, 2011), adopted, 2011 WL 5974672 (C.D. Cal. Nov. 29, 2011) (habeas petitioner's unsworn assertion "is not competent evidence"). The letters (if accepted and believed) might suggest that the Honda's front license plate may not have been attached in the precise manner in which the assembly may have been "designed to be attached." Such suggestion would prove little, however. The letters are not persuasive evidence that the Honda always lacked an attached front license plate or that the Honda lacked an attached front license plate on the day in question. In short, the letters do not establish any substantial likelihood of a different outcome at trial.

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The fact, if it is a fact, that counsel did not physically inspect the bumper prior to trial does not establish ineffective assistance. Photographs in evidence adequately demonstrated the condition of the bumper. Counsel's visual inspection of the bumper would not have added anything material with respect to the license plate's installation. Petitioner has failed to demonstrate that a visual inspection would have enabled counsel to weaken appreciably the decisive testimony of the prosecution witnesses.

3. Counsel's Alleged Failures to Interview the Prosecution's Witnesses Prior to Trial and Subpoena and Present the Authors of the Police Reports

Petitioner faults counsel for failing to interview Richards or Vang prior to trial. Petitioner suggests that counsel could have learned through pretrial interviews that Vang would testify differently from the statements attributed to Vang in the police reports, and could have anticipated the need to call the authors of the police reports to impeach Vang, and to call the Honda experts to impeach Richards regarding the attachment of the license plate to the Honda. Petitioner faults counsel for failing to take the necessary steps to introduce Vang's reported statements from police reports to attempt to impeach Vang further. See FAP Att., pp. A-1, A-3 - A-4; Opposition, pp. 11, 16-18, 21-22.

Again, Petitioner has failed to demonstrate Strickland prejudice. Initially, Petitioner has not shown that either Richards or Vang would have consented to speak with Petitioner's counsel before trial.

Neither Richards nor Vang would have been under any legal obligation to do so. See Fenenbock v. Director of Corrections, 692 F.3d 910, 916-17 (9th Cir. 2012); Cacoperdo v. Demosthenes, 37 F.3d 504, 509 (9th Cir. 1994), cert. denied, 514 U.S. 1026 (1995). Assuming arguendo Richards and Vang would have consented, Petitioner still has failed to demonstrate Strickland prejudice. For the reasons discussed in Section 2 above, any alleged harm from failing to interview Richards prior to trial so that counsel could anticipate the supposed need to call Honda experts for impeachment was insufficiently prejudicial.

As to Vang, he testified that he could not see what Petitioner was doing when Petitioner was between the two parked cars, but Vang did see Petitioner later walk through Petitioner's yard with a license plate in Petitioner's hand. See R.T. 28; compare Respondent's Lodgment 2 (Vehicle Report, pp. 1-2) (stating in relevant part: "The witness [Vang] stated he watched the suspect on 7/14/14 at approx. 2200 hrs. as he removed the front license plate from the victim's vehicle."). Vang also testified that he did not tell the police that when Vang was exiting his vehicle he saw Petitioner crouched in front of the Honda (R.T. 31, 40). Vang said he saw Petitioner as Vang was driving down the street. See R.T. 31, 34; compare Respondent's Lodgment 2 (Supplementary Report, p. 1) (providing in relevant part: "[Vang] stated that he arrived at his home at approx. 2200 hrs. and parked in his driveway. As he was exiting the vehicle, [Vang] saw [Petitioner] crouched at the front of the victim's vehicle."). Vang was shown a copy of a police report and said, "Maybe it was taken down mistakenly, but that's not what happened." (R.T. 32). Counsel

attempted to offer the statement in the police report in evidence, and the court advised:

> It's not admissible in that regard. You can use it for impeachment as a prior statement. I assume somebody is going to bring in the police officer to testify what was said or wasn't said, but the police report itself is not admissible. . . . There's been no foundation laid for that. I haven't heard from a police officer as to whether it was taken down correctly, whether it was described correctly. Anything. Police reports, in general, never come into evidence.

(R.T. 32-33).

Petitioner has not shown sufficient prejudice from any failure further to attempt to impeach Vang's testimony. The reports were not verbatim recorded statements from Vang. The variance between the police reports and Vang's testimony was relatively immaterial. Nothing contradicted Vang's testimony that he saw Petitioner walking away from Richards' car with a license plate in Petitioner's hand. Counsel questioned Vang at length with accompanying photographs concerning the relationship of Vang's house and yard to Petitioner's driveway, the distance from which Vang reportedly observed Petitioner, the location of the two parked cars in relation to the street, and the location where Vang hid in his yard to watch Petitioner near bushes and trees (R.T. 33-39). Vang stated that from his vantage he had a "straight perfect view" or "perfect vantage" of the whole side of

Vang's van, the front of Richards' car, and the whole sidewalk (R.T. 36). Vang clearly and unequivocally testified that he saw Petitioner walk back in his yard from the cars with a license plate in hand (R.T. 28).

For all the foregoing reasons, Petitioner is not entitled to federal habeas relief on Ground One or Ground Two. See 28 U.S.C. § 2254(a).

II. Petitioner's Claim of Judicial Bias and His Related Claim of Ineffective Assistance of Counsel Do Not Merit Federal Habeas Relief.

Petitioner contends that the trial judge should have recused herself for bias because she had issued the arrest warrant in Petitioner's case months before trial (FAP, Ground Four; FAP Att., pp. A-1 - A-2; Opposition, pp. 1, 3, 5-6, 8-9, 12, 14-19, 22-23). Petitioner also contends that his trial counsel was ineffective for failing to seek the recusal of the trial judge on this basis (FAP, Ground Three; FAP Att., p. A-1; Opposition, p. 14).

A. Standards Governing Judicial Bias Claims

The Due Process Clause requires a "fair trial in a fair tribunal" before a judge with no actual bias against the defendant. Bracy v. Gramley, 520 U.S. 899, 904-05 (1997); Smith v. Mahoney, 611 F.3d 978, 997 (9th Cir.), cert. denied, 562 U.S. 965 (2010). Where judicial bias is claimed, habeas relief is limited to circumstances in which

the state trial judge's behavior rendered the trial so fundamentally unfair as to violate due process. See Duckett v. Godinez, 67 F.3d 734, 740 (9th Cir. 1995), cert. denied, 517 U.S. 1158 (1996). To succeed on a judicial bias claim, Petitioner must "overcome a presumption of honesty and integrity in those serving as adjudicators." Withrow v. Larkin, 421 U.S. 35, 47 (1975); Larson v. Palmateer, 515 F.3d 1057, 1067 (9th Cir.), cert. denied, 555 U.S. 871 (2008).

"[N]ot subject to deprecatory characterization as 'bias' or 'prejudice' are opinions held by judges as a result of what they learned in earlier proceedings. It has long been regarded as normal and proper for a judge to sit in the same case upon its remand, and to sit in successive trials involving the same defendant." Liteky v. United States, 510 U.S. 540, 551 (1994).

> [J]udicial rulings alone almost never constitute a valid basis for a bias or partiality motion. In and of themselves (i.e., apart from surrounding comments or accompanying opinion), they cannot possibly show reliance upon an extrajudicial source; and can only in the rarest circumstances evidence the degree of favoritism or antagonism required . . . when no extrajudicial source is involved. * * * [O]pinions formed by the judge on the basis of facts introduced on events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that

would make fair judgment impossible.

Id. at 555; see also United States v. Johnson, 610 F.3d 1138, 1148 (9th Cir. 2010) ("Adverse findings do not equate to bias. Nothing Judge Alsup did was outside his official duties or even shown to be erroneous in any way."); Taylor v. Regents Univ. of Cal., 993 F.2d 710, 712 (9th Cir. 1993) (per curiam), cert. denied, 510 U.S. 1076 (1994) (a judge's prior adverse ruling is not sufficient cause for recusal) (citations omitted).

B. Analysis

Petitioner has not shown that the judge harbored any "deep-seated favoritism or antagonism that would make fair judgment impossible." Liteky v. United States, 510 U.S. at 555. The mere fact that the trial judge (months before trial) had reviewed the Complaint and supporting police reports and had found probable cause to issue the arrest warrant does not suggest that the judge was biased. A judge making a probable cause ruling is not prejudging the merits, but rather is making a preliminary determination regarding the likelihood the defendant committed a crime. See Garcia v. County of Merced, 639 F.3d 1206, 1209 (9th Cir. 2011) (for probable cause there must exist a fair probability that one committed a crime based on the totality of the evidence); People v. Richardson, 43 Cal. 4th 959, 989, 77 Cal. Rptr. 3d 163, 183 P.3d 1146 (2008), cert. denied, 555 U.S. 1177 (2009) ("Probable cause to issue an arrest . . . warrant must . . . be based on information contained in an affidavit providing a substantial basis from which the magistrate can reasonably conclude there is a fair

probability that a person has committed a crime") (citation omitted); see also Almont Ambulatory Surgery Center, LLC v. United Health Group, Inc., 2015 WL 12807875, at *3 (C.D. Cal. Feb. 12, 2015) ("In any bench trial, the judge will know considerably more about the case than the evidence admitted at trial. Moreover, a determination of probable cause is not a finding of fact."). In connection with almost every bench trial, the trial judge becomes privy to inadmissible evidence while ruling on objections and motions in limine. These common and necessary judicial functions do not render the trial judge biased or otherwise require the judge's recusal. See Harris v. Rivera, 454 U.S. 339, 346 (1981) ("In bench trials, judges routinely hear inadmissible evidence that they are presumed to ignore when making decisions.").

"Even a judge who is 'exceedingly ill disposed towards the defendant' after presiding at trial 'is not thereby recusable for bias or prejudice, since his knowledge and the opinion it produced were properly and necessarily acquired in the course of the proceedings.' ¶ If a judge's formation of an opinion of a defendant in the course of a criminal case does not violate constitutional due process, certainly reviewing an affidavit, finding mere probable cause to believe the defendant has committed a crime, and authorizing the filing of an Information does not." Golden v. Kirkegard, 2015 WL 417900, at *1 (D. Mont. Jan. 30, 2015) (quoting Liteky v. United States, 510 U.S. at 550-51); see also Ayers v. Kirkegard, 2015 WL 268870, at *1-2 (D. Mont. Jan. 21, 2015) (same; rejecting due process challenge to judge's further participation in criminal proceedings after finding probable cause existed to file an information); cf. United States v. Griffin, 874 F.2d 634, 637-38 (9th Cir. 1989) (in a

federal prosecution applying federal statutory recusal standards, conviction affirmed even though the trial judge kept the citation and police report on the bench during the trial; trial judge's actions deemed "not good practice," but harmless). In sum, Petitioner's arguments of judicial bias must be rejected. "The judicial test defendant advances, equating knowledge acquired as part of pretrial adjudication with an appearance of impropriety thus requiring recusal for bench trial purposes, finds no support in law, ethics or sound policy." People v. Moreno, 70 N.Y.2d 403, 407, 516 N.E.2d 200, 203, 521 N.Y.S.2d 663, 666 (1987).

Petitioner also has failed to demonstrate that his counsel was ineffective for failing to request the recusal of the trial judge based on the judge's finding of probable cause to arrest Petitioner. As demonstrated above, any such request would have been futile. Counsel cannot be deemed ineffective for failing to take a futile action. See Gonzalez v. Knowles, 515 F.3d 1006, 1017 (9th Cir. 2008); Rupe v. Wood, 93 F.3d 1434, 1445 (9th Cir. 1996), cert. denied, 519 U.S. 1142 (1997); Shah v. United States, 878 F.2d 1156, 1162 (9th Cir.), cert. denied, 493 U.S. 869 (1989).

For the foregoing reasons, Petitioner is not entitled to federal habeas relief on Ground Three or Ground Four. See 28 U.S.C. § 2254(a).

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RECOMMENDATION

For the reasons discussed above, IT IS RECOMMENDED that the Court issue an order: (1) accepting and adopting this Report and Recommendation; and denying and dismissing the First Amended Petition with prejudice.[5]

DATED: July 6, 2017.

/s/
CHARLES F. EICK
UNITED STATES MAGISTRATE JUDGE

[5] Petitioner's request for an evidentiary hearing is denied. Petitioner has had ample opportunity to develop the factual record, and Petitioner has failed to demonstrate that an evidentiary hearing would reveal anything material to Petitioner's claims.

NOTICE

Reports and Recommendations are not appealable to the Court of Appeals, but may be subject to the right of any party to file objections as provided in the Local Rules Governing the Duties of Magistrate Judges and review by the District Judge whose initials appear in the docket number. No notice of appeal pursuant to the Federal Rules of Appellate Procedure should be filed until entry of the judgment of the District Court.

If the District Judge enters judgment adverse to Petitioner, the District Judge will, at the same time, issue or deny a certificate of appealability. Within twenty (20) days of the filing of this Report and Recommendation, the parties may file written arguments regarding whether a certificate of appealability should issue.