(HC) Reed v. Clay et al Doc. 26

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

JOHN HENRY REED,

Petitioner,

v.

WARDEN CLAY, *et al.*,

Respondents.

CASE NO. 2:07-cv-00595-RAJ-JLW

REPORT AND RECOMMENDATION

I. INTRODUCTION

Petitioner is a California prisoner who is currently incarcerated at the Gabilan Conservation Camp #38 in Soledad, California. He seeks relief under 28 U.S.C. § 2254 from his 2004 jury conviction in Sacramento County Superior Court for selling cocaine base. (*See* Docket 1.) Respondent has filed an answer to the petition, together with relevant portions of the state court record, and petitioner has filed a traverse in reply to the answer. (*See* Dkt. 18; Dkt. 21.) The Court, having thoroughly reviewed the record and briefing of the parties, recommends the Court deny the petition, and dismiss this action with prejudice.

II. FACTUAL AND PROCEDURAL HISTORY

The probation officer's report described petitioner's commitment offense as follows:

> [O]n October 17, 2000 … a confidential informant (CI) made arrangements with a subject, later identified as the [petitioner],

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> to purchase an "8 ball" of cocaine base. Detectives observed the [petitioner] arrive at a pre-designated buy location. The drug transaction was later completed and the CI provided officers approximately 3.5 grams of Valtox positive cocaine base. The CI was shown a photograph of John Henry Reed, the [petitioner], and positively identified him as the person who sold him the cocaine base.
> The [petitioner] was subsequently arrested on October 25, 2000, for violating Section 11352(a) H&S, 11351.5 H&S, 245(c) P.C., 3056 P.C., and 182(a)(1) P.C. and booked into the Main Jail without incident….

(Dkt. 19, Lodged Document 23 at 494.)

The Sacramento County Superior Court held a preliminary examination on May 31 and June 1, 2001, to determine whether there was probable cause to believe petitioner was guilty of committing a felony offense, sale of cocaine base. (*See id*. at 21-81.) Petitioner's challenges to various aspects of this preliminary hearing form the basis for his habeas challenge.

During the hearing, the Deputy District Attorney called a single witness, Detective Scott Maldonado, a law enforcement officer with nine years experience, who described the narcotics investigation and "controlled buy" of cocaine which led to petitioner's arrest. (*See id*. at 25-75.) Specifically, Detective Maldonado testified that he and his partner, Detective Chaplin, made contact with a confidential informant in the course of a narcotics investigation around 5:45 in the afternoon of October 17, 2000. (*See id*. at 25.) The confidential informant told the detectives that he could purchase cocaine from an adult black male he knew as "J.R." (*See id*. at 26.) After Detective Maldonado had strip-searched the confidential informant, the informant used a telephone in the presence of the officers to arrange a purchase of an "eight-ball" of rock cocaine from "J.R." (*See id*. at 27.) Detective Maldonado then listened to the

01 narcotics transaction through a one-way radio transmitter, conducted another strip search of
02 the confidential informant as soon as the transaction had concluded, and booked the "eight-
03 ball" of cocaine purchased from "J.R." into evidence. (*See id.* at 32-34.) Detective
04 Maldonado was also present when the informant subsequently identified a photograph of
05 petitioner as "J.R.," the suspect who had sold him the cocaine during the "controlled buy."
06 (*See id.* at 33-34.)

07 When the Deputy District Attorney asked Detective Maldonado to estimate the
08 number of occasions he "had contact with that same confidential informant in the past,"
09 Detective Maldonado responded, "Um, two." (*Id.*) When the Deputy District Attorney asked
10 whether Detective Maldonado, "in [his] past encounters with the confidential informant …
11 [found] that the information that the confidential informant provided to you was reliable,"
12 Detective Maldonado answered, "Yes." (*Id.*) When he was asked during cross-examination
13 "[w]hat led [him] to render the opinion on direct examination that … the confidential
14 informant had provided reliable information," he responded that the "[i]nformation was
15 corroborated and arrests were made." (*Id.* at 41.)

16 During the proceeding, Detective Maldonado occasionally used the two-page arrest
17 report prepared by Detective Chaplin to refresh his recollection regarding details of the
18 investigation. (*See id.* at 29-31.) The arrest report noted that Detective Chaplin and Detective
19 Maldonado "made contact with a confidential informant in the mid-town area of Sacramento"
20 on October 17, 2000, but did not discuss any contacts with the confidential informant taking
21 place prior to that date. (*See* Dkt. 16, LD 5, Ex. C at 1.) The report then described the
22 "controlled buy" carried out on October 17, 2000, as well as the confidential informant's

positive identification of petitioner "as J.R. who sold cocaine base to C.I." after viewing a photograph of petitioner on October 24, 2000. (*Id*. at 2.)

The identity of the confidential informant was fully disclosed at trial, and he testified as a witness for the prosecution. (See Dkt. 19, LD 24 at 304-30.) During the preliminary hearing, however, Detective Maldonado did not disclose the informant's identity. (*See id*., LD 23 at 22-23 and 37-43.) Over defense counsel's continuing objection that any evidence obtained from the confidential informant was "unreliable" unless the informant's identity was disclosed, the superior court admitted Detective Maldonado's testimony, and found that the informant's identity qualified as privileged "official information" in order to protect his or her safety. (*See id*. at 23-26.) *See also* California Evidence Code § 1040 (protecting against disclosure of "official information" where such disclosure "is against the public interest because there is a necessity for preserving the confidentiality of the information that outweighs the necessity for disclosure in the interest of justice…."). At the conclusion of the hearing, the superior court found "sufficient cause to believe that the [petitioner] John Henry Reed is the person guilty of … the felony offense that has been established in this matter. He'll be held to answer for further proceedings." (*See* Dkt. 19, LD 23 at 76.)

An amended information dated January 14, 2002, charged petitioner with one count of sale of a controlled substance, cocaine base, committed on or about October 17, 2000, in violation of Health and Safety Code § 11352(a). (*See* Dkt. 16, LD 3 at 1; Dkt. 19, LD 23 at 106-08.) The information also alleged four prior convictions. (*See* Dkt. 19, LD 23 at 106-07.) Petitioner's first trial resulted in a mistrial on June 18, 2002, after the jury announced it could not reach a verdict. (*See* Dkt. 16, LD 3 at 2.) During petitioner's second jury trial, he

01 was convicted of one count of sale of cocaine base on August 20, 2004. (*See id.*, LD 1 at 1.)
02 Petitioner also admitted all four of the prior conviction allegations set forth in the information,
03 which were used to enhance his sentence. (*See id.* at 2-3.) He originally received an
04 aggregate term of thirteen (13) years. (*See id.*, LD 1 at 1.)
05 Petitioner, through counsel, appealed his judgment and sentence to the California
06 Court of Appeal, contending that one of his prior convictions should not have been used to
07 enhance his sentence. (*See* Dkt. 16, LD 4.) Respondent conceded that the Court should strike
08 one of petitioner's sentence enhancements. (*See id.*, LD 3 at 4.) Accordingly, the California
09 Court of Appeal modified petitioner's sentence from thirteen (13) to ten (10) years. (*See id.*,
10 LD 4.) The Court affirmed petitioner's conviction and sentence in all other respects. (*See id.*)
11 On June 5, 2006, petitioner filed a petition for writ of habeas corpus with the
12 California Court of Appeal claiming ineffective assistance of appellate counsel, and asserting
13 that the trial court's denial of his motion to dismiss the information for lack of probable cause
14 pursuant to California Penal Code § 995 violated his constitutional rights under the
15 Confrontation Clause and Due Process Clause. (*See id.*, LD 5.) The California Court of
16 Appeal denied the petition without comment on June 8, 2006. (*See id.*, LD 6.) Petitioner
17 promptly filed a petition for review of this decision with the California Supreme Court, but
18 that petition was also denied without comment on August 2, 2006. (*See id.*, LD 7; *id.*, LD 8.)
19 Petitioner filed the instant federal petition on March 28, 2007. (*See* Dkt. 1 at 1.)
20 Respondent concedes in his answer to the petition that petitioner has exhausted his alleged
21 claims for relief, and does not dispute that the petition was timely. (*See* Dkt. 18 at 4.)
22

III. FEDERAL CLAIMS FOR RELIEF

Petitioner contends that the Sacramento County Superior Court erred by denying his motion to dismiss the information for lack of probable cause. (*See* Dkt. 1 at 5-7.) Specifically, he claims the superior court erroneously overruled petitioner's hearsay objections during the preliminary hearing, and admitted out-of-court statements made by the confidential informant in violation of petitioner's rights under the Confrontation Clause and Due Process Clause. (*See id*. at 5-6.) He also asserts that his federal due process rights were violated by the prosecution's "subordination of perjur[e]d" testimony by Detective Maldonado during the preliminary hearing, as well as the inclusion of false information in Detective Chaplin's arrest report. (*See id*. at 7.) As a result, petitioner contends that he is entitled to habeas relief. (*See id*. at 5-7.)

IV. STANDARD OF REVIEW

The Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA") governs this petition because it was filed on March 28, 2007, after the enactment of AEDPA. *See Lindh v. Murphy*, 521 U.S. 320, 326-27 (1997). Because petitioner is in custody of the California Department of Corrections pursuant to a state court judgment, 28 U.S.C. § 2254 provides the exclusive vehicle for his habeas petition. *See White v. Lambert*, 370 F.3d 1002, 1009-10 (9th Cir.), *cert. denied*, 543 U.S. 991 (2004) (providing that § 2254 is "the exclusive vehicle for a habeas petition by a state prisoner in custody pursuant to a state court judgment…."). Under AEDPA, a habeas petition may not be granted with respect to any claim adjudicated on the merits in state court unless petitioner demonstrates that the highest state court decision rejecting his petition was either "contrary to, or involved an unreasonable application of,

clearly established Federal law, as determined by the Supreme Court of the United States," or "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)(1) and (2).

As a threshold matter, this Court must ascertain whether relevant federal law was "clearly established" at the time of the state court's decision. To make this determination, the Court may only consider the holdings, as opposed to dicta, of the United States Supreme Court. *See Williams v. Taylor*, 529 U.S. 362, 412 (2000). In this context, Ninth Circuit precedent remains persuasive but not binding authority. *See id.* at 412-13; *Clark v. Murphy*, 331 F.3d 1062, 1069 (9th Cir. 2003).

The Court must then determine whether the state court's decision was "contrary to, or involved an unreasonable application of, clearly established Federal law." *See Lockyer v. Andrade*, 538 U.S. 63, 71 (2003). "Under the 'contrary to' clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the] Court has on a set of materially indistinguishable facts." *Williams*, 529 U.S. at 412-13. "Under the 'unreasonable application' clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from [the] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 413. At all times, a federal habeas court must keep in mind that it "may not issue the writ simply because [it] concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather that application must also be [objectively] unreasonable." *Id.* at 411.

In each case, the petitioner has the burden of establishing that the state court decision was contrary to, or involved an unreasonable application of, clearly established federal law. *See* 28 U.S.C. § 2254; *Baylor v. Estelle*, 94 F.3d 1321, 1325 (9th Cir. 1996). To determine whether the petitioner has met this burden, a federal habeas court looks to the last reasoned state court decision because subsequent unexplained orders upholding that judgment are presumed to rest upon the same ground. *See Ylst v. Nunnemaker*, 501 U.S. 797, 803-04 (1991); *Medley v. Runnels*, 506 F.3d 857, 862 (9th Cir. 2007). Where, as in this case, the state courts have reviewed the claims and denied them without comment, the federal court conducts an independent review of the record "to determine whether the state court clearly erred in its application of controlling federal law." *Delgado v. Lewis*, 223 F.3d 976, 982 (9th Cir. 2000).

Finally, AEDPA requires federal courts to give considerable deference to state court decisions, and state courts' factual findings are presumed correct. *See* 28 U.S.C. § 2254(e)(1). Federal courts are also bound by a state's interpretation of its own laws. *See Murtishaw v. Woodford*, 255 F.3d 926, 964 (9th Cir. 2001) (citing *Powell v. Ducharme,* 998 F.2d 710, 713 (9th Cir. 1993)).

V. DISCUSSION

A. *Confrontation Clause Claim Related to Hearsay Testimony*

Petitioner claims that the information charging him with the commitment offense should have been set aside by the superior court pursuant to his motion under California Penal Code § 995, which provides that "an information shall be set aside by the court in which the defendant is arraigned, upon his or her motion … [if] the defendant [was] committed without

01 reasonable or probable cause." Cal. Penal Code § 995. (*See* Dkt. 1 at 5-7; Dkt. 19, LD 23 at
02 82-94.) Specifically, petitioner asserts that probable cause was not established during his
03 preliminary hearing because the superior court admitted, over petitioner's hearsay objections,
04 unreliable hearsay statements made by the confidential informant, Jessie Bennett, as related
05 by Detective Maldonado. (*See* Dkt. 1 at 5-6.) Petitioner argues that his rights under the
06 federal Confrontation Clause were violated by the admission of this hearsay testimony during
07 the preliminary hearing. (*See id*. at 5-7; Dkt. 21 at 7-12.)

08 To the extent that petitioner is arguing the superior court violated California Penal
09 Code § 995 by failing to grant his motion to dismiss the information following the
10 preliminary hearing, he is asserting a state law claim. (*See* Dkt. 1 at 5-7.) State law claims
11 are not cognizable in a federal habeas proceeding. *See Estelle v. McGuire*, 502 U.S. 62, 67-68
12 (1991) ("Federal habeas corpus relief does not lie for errors of state law … it is not the
13 province of the federal habeas court to reexamine state-court determinations on state-law
14 questions."). As discussed above, this Court is limited to determining whether the state court
15 decision denying petitioner's request for habeas relief "clearly erred in its application of
16 controlling *federal* law." *Delgado*, 223 F.3d at 982 (emphasis added).

17 With respect to petitioner's contention that his rights under the federal Confrontation
18 Clause were violated during the preliminary hearing, the U.S. Supreme Court has consistently
19 held that "[t]he right to confrontation is basically a trial right." *Barber v. Page*, 390 U.S. 719,
20 725 (1968)). *Accord Kentucky v. Stincer,* 482 U.S. 730, 737-39 (1987) (noting that the "right
21 to confrontation is a functional one for the purpose of promoting reliability in a criminal
22 trial…."); *Pennsylvania v. Ritchie*, 480 U.S. 39, 52 (1987) ("The opinions of this Court show

that the right to confrontation is a *trial* right, designed to prevent improper restrictions on the types of questions that defense counsel may ask during cross-examination."); *California v. Green*, 399 U.S. 149, 156-57(1970) ("[I]t is this literal right to 'confront' the witness at the time of trial that forms the core of the values furthered by the Confrontation Clause."). The federal confrontation right "includes both the opportunity to cross-examine and the occasion for the jury to weigh the demeanor of the witness. A preliminary hearing is ordinarily a much less searching exploration into the merits of a case than a trial, simply because its function is the more limited one of determining whether probable cause exists to hold the accused for trial." *Barber*, 390 U.S. at 725.

The U. S. Supreme Court squarely held in *Gerstein v. Pugh* that the "timely judicial determination of probable cause" required by the Fourth Amendment does not also require "the full panoply of adversary safeguards – counsel, confrontation, cross-examination, and compulsory process." 420 U.S. 103, 119 (1975). Rather, the "issue [of] whether there is probable cause for detaining the arrested person pending further proceedings … can be determined reliably without an adversary hearing." *Id.* at 120. Specifically, "[t]he standard is the same as that for arrest. That standard – probable cause to believe the suspect has committed a crime – traditionally has been decided by a magistrate [judge] in a nonadversary proceeding on hearsay and written testimony, and the Court has approved these informal modes of proof." *Id.* Thus, although the U.S. Supreme Court has acknowledged that confrontation and cross-examination "may enhance the reliability of probable cause determinations in some cases," it has held that "[i]n most cases ... their value would be too slight to justify holding, as a matter of constitutional principles, that these formalities and

safeguards designed for trial must also be employed in making … [a] determination of probable cause." *Id.* at 121-22.

Similarly, when the California Supreme Court considered whether the admission of hearsay testimony during a defendant's preliminary hearing violated the federal Confrontation Clause, it noted that California law also "allow[s] an investigating officer to relate at the preliminary hearing any relevant statements of victims or witnesses, if the testifying officer has sufficient knowledge of the crime or the circumstances under which the out-of-court statement was made so as to meaningfully assist the magistrate [judge] in assessing the reliability of the statement."[1] *Whitman v. Superior Court*, 54 Cal.3d 1063, 1075 (1991). In fact, "the magistrate [judge may] base a finding of probable cause entirely on that testimony." *Id*. Specifically, the *Whitman* court explained that a recently enacted initiative, Proposition 115, amended the language of the California Constitution and California Penal Code to declare hearsay evidence admissible at preliminary hearings to establish probable cause to believe a defendant committed a felony offense. *See id.* at 1070; Cal. Const. art. I § 30(b); Cal. Penal Code §§ 866(b) and 872(b). The *Whitman* court then concluded that preliminary hearings in California "sufficiently resembl[e] the Fourth Amendment probable cause hearing examined in *Gerstein* … to meet federal confrontation clause standards despite reliance on hearsay evidence." *Id*. at 1082 (*citing Gerstein*, 420 U.S. 103).

Accordingly, petitioner's rights under the federal Confrontation Clause are inapplicable during a preliminary hearing held to establish probable cause. *See Gerstein*, 420

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[1] Petitioner's contention, in his traverse, that Detective Maldonado was not qualified to testify during his preliminary hearing under the standards set forth by the California Supreme Court in *Whitman* is not cognizable in this federal habeas proceeding. (*See* Dkt. 21 at 15-16.) *See also Estelle*, 502 U.S. at 67-68.

U.S. at 119-24. His contention that the admission of hearsay statements during his preliminary hearing violated his rights under the Confrontation Clause is therefore unavailing.

B. *Due Process Clause Claim Related to Hearsay Testimony*

Petitioner also argues that the admission of the confidential informant's hearsay statements during his preliminary hearing violated his federal due process rights. (*See* Dkt. 1 at 5-7; Dkt. 21 at 7-12.) Although petitioner acknowledges the absence of federal authority to support his claim, he nevertheless asserts that the admission of hearsay testimony during his preliminary hearing "clearly violates all principles of due process…." (Dkt. 21 at 8.)

Conclusory allegations, without more, cannot provide a basis for habeas relief, and petitioner failed to cite any federal authority to support his federal due process claim. *See Jones v. Gomez,* 66 F.3d 199, 204-05 (9th Cir. 1995) (stating that conclusory allegations are not sufficient to support habeas relief); *Silva v. Woodford*, 279 F.3d 825, 835 (9th Cir. 2002) (holding that it is petitioner's burden to show he is in custody in violation of the Constitution). Accordingly, I recommend this Court find that petitioner's federal due process rights were not violated by the admission of hearsay testimony during petitioner's preliminary hearing.

C. *Due Process Clause Claim Related to Allegedly Perjured Testimony*

Petitioner contends that his federal due process rights were violated by the prosecution's knowing use of perjured testimony during his preliminary hearing, as well as the inclusion of false information in an arrest report, in order to obtain a conviction. Specifically, petitioner alleges that Detectives Maldonado and Chaplin knew that their "confidential informant," Jessie Bennett, was unreliable, but nevertheless misrepresented him during the preliminary hearing as a "reliable confidential informant" with whom the

01 detectives had prior dealings in other narcotics investigations. Because "[t]hese officers and
02 the Deputy District Attorney knew there [were never] any prior contacts with the allegedly
03 confidential informant to substantiate reliability as untruthfully stated in police reports and
04 perjured testimony at the preliminary examination," petitioner claims their conduct was "so
05 outrageous [it] violated the fundamental fairness required by the due process clause…."[2]
06 (Dkt. 1 at 7; Dkt. 21 at 21.)

07 The U.S. Supreme Court has long held that a criminal conviction may violate a
08 defendant's federal due process rights if it is obtained through testimony or evidence that the
09 prosecutor knows to be false, or later discovers to be false and allows to go uncorrected. *See*
10 *Napue v. People of the State of Illinois*, 360 U.S. 264, 269-70 (1959). *Accord Alcorta v.*
11 *Texas*, 355 U.S. 28, 31 (1957); *Pyle v. Kansas*, 317 U.S. 213, 215-16 (1942); *Mooney v.*
12 *Holohan*, 294 U.S. 103, 112-13 (1935); *Jackson v. Brown,* 513 F.3d 1057, 1071 (9th Cir.
13 2008) ("The Supreme Court has long held that a conviction obtained using knowingly
14 perjured testimony violates due process."). A due process violation can result from the
15 prosecution's presentation of false evidence or testimony during preliminary proceedings, as
16 well as during a criminal trial. *See Hayes v. Brown*, 399 F.3d 972, 979-80 (9th Cir. 2005)
17 (holding that the prosecution violated a defendant's due process rights by knowingly making
18 false representations to the trial judge during the defendant's preliminary examination, in

19 [2] Petitioner cites *U.S. v. Russell*, 411 U.S. 423 (1973), in support of his contentions. (*See* Dkt. 21 at 27.) He argues that the *Russell* decision demonstrates that "instances of police misconduct as
20 outrageous as these in the present case require the criminal charges [against petitioner] be dismissed." *Id*. Contrary to his assertions, however, *Russell* is inapplicable to petitioner's due process claim.
21 Specifically, *Russell* involved the affirmative defense of entrapment. *See Russell*, 411 U.S. at 432 (holding that an undercover narcotics agent who provided an essential, but legal, ingredient to a
22 defendant being investigated for illicitly manufacturing a drug, did not violate the defendant's due process rights by entrapping him). In contrast, petitioner's due process claim involves alleged subornation of perjury his preliminary hearing.

01 addition to presenting false evidence to the jury during the subsequent trial).

02 Furthermore, *Napue* does not only prohibit subornation of perjury. *See Hayes*, 399
03 F.3d at 980-81 (rejecting the State's claim that "it is constitutionally permissible for [the State
04 to] knowingly present false evidence … as long as the witness used to transmit the false
05 information is kept unaware of the truth" and therefore "did not commit perjury."). Rather,
06 "*Napue*, by its terms, addresses the presentation of false *evidence*, not just subornation of
07 perjury." *Id.* at 981 (*citing Napue*, 360 U.S. at 269). "There is nothing in *Napue,* its
08 predecessors, or its progeny, to suggest that the Constitution protects defendants only against
09 the knowing use of perjured testimony. Due process protects defendants against the knowing
10 use of any false evidence by the State, whether it be by document, testimony, or any other
11 form of admissible evidence." *Id.* (*citing Phillips v. Woodford,* 267 F.3d 966, 984-85 (9th
12 Cir. 2001)).

13 Mere inconsistencies in the evidence, however, do not constitute the knowing use of
14 false testimony by the prosecution, and it is "within the province of the jury to resolve the
15 disputed testimony." *See United States v. Geston,* 299 F.3d 1130, 1135 (9th Cir. 2002).
16 Thus, prosecutors will not be held accountable for discrepancies in testimony or evidence
17 where there is no evidence from which to infer prosecutorial misconduct. *See United States v.*
18 *Zuno-Arce,* 44 F.3d 1420, 1423 (9th Cir. 1995). A petitioner must establish a factual basis for
19 attributing knowledge to the government that the testimony or evidence at issue was false.
20 *See Morales v. Woodford,* 388 F.3d 1159, 1179 (9th Cir. 2004), *as amended* Oct. 21, 2004)
21 (rejecting a due process claim where petitioner "sets out no factual basis for attributing any
22 misconduct, any knowing presentation of perjury, by the government….").

Thus, in order to prevail on a federal due process claim for habeas relief, a petitioner must demonstrate that (1) the testimony or evidence was actually false; (2) the prosecution knew or should have known that the testimony or evidence was actually false; and (3) the false testimony or evidence was material. *See Hayes*, 399 F.3d at 984 (*quoting United States v. Zuno-Arce*, 339 F.3d 886, 889 (9th Cir. 2003)) (setting forth the requirements for a petitioner to prevail under the *Mooney-Napue* line of cases). In assessing "materiality" under *Napue*, a federal habeas court must determine whether there is "any reasonable likelihood that the false testimony [or evidence] could have affected the judgment of the jury," and if so, "the conviction must be set aside." *Id*. (*quoting United States v. Agurs,* 427 U.S. 97, 103 (1976)). Specifically, "[t]he question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Id*. (noting that a federal habeas court conducting an analysis under *Mooney-Napue* need not also "conduct a separate harmless error analysis under *Brecht v. Abrahamson*, 507 U.S. 619 (1993), because the required finding of materiality necessarily compels the conclusion that the error was not harmless."). *See Kyles v. Whitley*, 514 U.S. 419, 434 (1995).

In the instant case, petitioner is unable to satisfy the requirements of *Mooney-Napue* with respect to either Detective Maldonado's testimony during the preliminary hearing, or Detective Chaplin's arrest report. As a result, his federal due process claim is unavailing.

During direct examination at trial, Detective Maldonado acknowledged that he had testified during the preliminary hearing that law enforcement officers made contact with the confidential informant, Jessie Bennett, on two occasions prior to October 17, 2000. (*See*

Dkt. 19, LD 24 at 239-42.) He also admitted, however, that he had been mistaken about these prior contacts, because Bennett actually "didn't have any contact [with law enforcement officers] before the 17th." (*Id*. at 242.) During cross-examination, Detective Maldonado explained that he made this mistake during the preliminary hearing because "there [were] multiple C.I.'s involved in this investigation, and another C.I. that [Detective] Chaplain had was used to do the search warrant for Jessie [Bennett]," which was executed on October 17. (*Id*. at 250). Thus, Detective Maldonado had "mistakenly referred to the other C.I.," who actually had been contacted by law enforcement officers on several occasions prior to October 17, 2000. (*Id*. at 253.)

Furthermore, Detective Maldonado testified that he did not have an opportunity to review the "roughly [300] to 500 page" case file before testifying at the preliminary hearing. He was only in possession of the two-page arrest report drafted by Detective Chaplin, which did not reference any contacts with the confidential informant taking place prior to October 17, 2000. (*See id*. at 240; Dkt. 16, LD 5, Ex. C at 1.) As a result, Detective Maldonado had relied upon his memory to answer the question regarding prior contacts with the informant, and he made a mistake. After explaining his error, he testified that his first contact with Bennett actually took place on October 17, 2000, the date of the "controlled buy," and he described his interactions with Bennett in detail. (*See* Dkt. 19, LD 24 at 241 and 248.)

Detective Maldonado did not commit perjury during the preliminary hearing, because his inaccurate testimony was the result of mistake rather than deliberate deception. *See People v. Howard*, 17 Cal.App.4th 999, 1004 (1993) (noting that a witness who gave false testimony is not guilty of perjury if it was "due to confusion, mistake, or faulty memory");

01 Cal. Penal Code § 118 (setting forth the definition of perjury). Nevertheless, Detective
02 Maldonado admitted that his testimony during the preliminary hearing was "actually false."
03 *See Hayes*, 399 F.3d at 980-81 ("*Napue*, by its terms, addresses the presentation of false
04 evidence, not just subornation of perjury.") The first requirement under *Mooney-Napue* was
05 therefore satisfied.

06 Petitioner has failed, however, to demonstrate that the prosecution knew or should
07 have known that Detective Maldonado's testimony during the preliminary hearing was
08 actually false. *See id.* at 984. Specifically, petitioner did not provide any factual basis for
09 attributing knowledge to the government. *See Morales,* 388 F.3d at 1179. Petitioner simply
10 made the conclusory assertion that "Deputy District Attorney Kevin Higgins willfully
11 procured a witness to commit perjury, as the Deputy District Attorney knew that the
12 testimony to be given was false, and this was subornation of perjury…." (Dkt. 1 at 7.) He
13 also argued, in his traverse, that "one cannot believe the Deputy District Attorney did not
14 know" the testimony was false "because it is so clear and blatant one cannot help but to
15 recognize the falsehood…." (Dkt. 21 at 28.)

16 Contrary to petitioner's contentions, the record does not indicate that the Deputy
17 District Attorney either "knew" Detective Maldonado's testimony during the preliminary
18 hearing was false, or allowed the false testimony to go "uncorrected." *Napue,* 360 U.S. at
19 269. When the Deputy District Attorney realized that Detective Maldonado's prior testimony
20 was inaccurate, he questioned Detective Maldonado about the discrepancy during direct
21 examination. (*See* Dkt. 19, LD 24 at 239-42.) Thus, there is no evidence from which to infer
22 prosecutorial misconduct. *See Zuno-Arce,* 44 F.3d at 1423. Where there is no evidence that

01 the prosecution knew, or should have known, that a witness' testimony was false, "[a]t most,
02 two conflicting versions … [have been] presented to the jury. It [is] within the province of
03 the jury to resolve the disputed testimony." *See Geston,* 299 F.3d at 1135.

04 Petitioner is also unable to satisfy the requirements of *Mooney-Napue* with respect to
05 Detective Chaplin's arrest report, because he failed to show that any information contained in
06 the report was actually false. (*See* Dkt. 21 at 22-24.) Specifically, Detective Chaplin's arrest
07 report did not reference any contacts with the confidential informant prior to October 17,
08 2000, and it did not refer to Bennett as a "reliable" confidential informant. (Dkt. 16, LD 5,
09 Ex. C at 1.) Although Detective Maldonado used Detective Chaplin's arrest report to refresh
10 his recollection during the preliminary hearing regarding some details related to the
11 investigation, the report was not the cause of Detective Maldonado's mistaken testimony. In
12 addition, Detective Chaplin testified at trial that he never considered Bennett a "reliable
13 confidential informant" because Bennett had not "provided information that's been proven"
14 on prior occasions. (Dkt. 19, LD 24 at 159.) Rather, Bennett served as a "confidential
15 informant" on October 17, 2000, by providing information related to an ongoing narcotics
16 investigation, which the Sacramento Police Department then corroborated by carrying out a
17 "controlled buy" of narcotics from petitioner. (*See id*. at 158-59.)

18 Finally, even if Detective Chaplin's arrest report did contain false information,
19 petitioner failed to satisfy the last two requirements under *Mooney-Napue*. He failed to
20 demonstrate that the prosecution knew or should have known that information in the arrest
21 report was actually false, and he failed to show a "reasonable likelihood that the false
22 [evidence] could have affected the judgment of the jury." *Hayes*, 399 F.3d at 984. As a

01 result, petitioner’s federal due process claim lacks merit.

02 VI. CONCLUSION

03 As discussed above, petitioner’s rights under the federal Confrontation Clause and
04 Due Process Clause were not violated by the superior court’s admission of hearsay statements
05 made by a confidential informant, as related by Detective Maldonado, during his preliminary
06 hearing. His claim that his federal due process rights were violated by the prosecution’s
07 knowing use of perjured testimony during his preliminary hearing, as well as the inclusion of
08 false information in an arrest report, was also unavailing. As a result, the California Supreme
09 Court’s Order denying the instant habeas petition was therefore not contrary to, or an
10 unreasonable application of, clearly established federal law, or based on an unreasonable
11 determination of facts. I therefore recommend that the Court find that petitioner’s
12 constitutional rights were not violated, and that it deny his habeas petition, and dismiss this
13 action with prejudice.

14 This Report and Recommendation is submitted to the United States District Judge
15 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(l). Within twenty days
16 after being served with this Report and Recommendation, any party may file written
17 objections with this Court and serve a copy on all parties. Such a document should be
18 captioned “Objections to Magistrate Judge’s Report and Recommendation.” Failure to file
19 objections within the specified time may waive the right to appeal the District Court’s Order.

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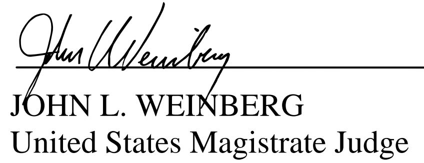
See Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991). A proposed order accompanies this Report and Recommendation.

DATED this 18th day of November, 2009.



JOHN L. WEINBERG
United States Magistrate Judge