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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

WILLIAM ROACH,

Petitioner,

No. CIV S-07-997 GEB CHS P

vs.

CURRY, Warden, et al.,

Respondents.

FINDINGS AND RECOMMENDATIONS

_____ /

I. INTRODUCTION

Petitioner William Roach is a state prisoner proceeding pro se with a petition for writ of habeas corpus brought pursuant to 28 U.S.C. §2254.¹ Petitioner stands convicted of recklessly driving under the influence, hit and run, and various other offenses. In the pending petition, he challenges the constitutionality of those convictions. Petitioner makes several claims of prosecutorial misconduct and further alleges that he received ineffective assistance of counsel prior to and during trial and at his motion for a new trial.

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¹ Petitioner is proceeding on his original petition filed on 5/25/07 and amendment of 10/14/09.

1 II. BACKGROUND

2 As set forth in the unpublished opinion of the California Court of Appeal, Third
3 District, the following evidence was adduced at petitioner’s trial:

4 On the morning of February 2, 2002, Hamayak Simon Rostami
5 was working as a cab driver, waiting for his next fare outside the
6 Sacramento International Airport. As defendant got in the cab,
7 Rostami placed his bag in the trunk. During the cab ride,
8 defendant asked Rostami if he was a “highjacker” [sic] and an
9 “Arab.” Rostami noted the smell of alcohol in his cab. Eventually
10 they reached defendant’s apartment complex. The fare was \$42.
11 Rostami removed the bag from the trunk and handed it to
12 defendant. Defendant refused to pay and asked Rostami whether
13 he wanted \$42 or a punch in the face.

14 Defendant walked away towards his apartment. Rostami followed
15 him on foot about 50 feet behind. Defendant began throwing
16 cobblestones toward Rostami. Dennis Rosos, a resident of the
17 complex, observed the defendant shouting profanities and throwing
18 cobblestones at the cab driver. Rostami asked Rosos to call 9-1-1.
19 Defendant quickly walked away and disappeared behind some
20 buildings.

21 Rosos was still on the phone with 9-1-1 when he turned and saw
22 defendant leave the parking lot in a white van. Defendant ran a red
23 light, speeding down the street towards a 7-Eleven. Rosos
24 followed defendant in his car into the 7-Eleven parking lot.

25 J. James Alarcon was using the pay phone in front of the 7-Eleven
26 store that morning. Alarcon made eye contact with defendant as
27 defendant pulled into the parking lot. Defendant smiled at
28 Alarcon, accelerated over a parking barrier and a handicapped
29 blocker, and hit Alarcon, pinning him against a wall. Alarcon felt
30 like his leg had been ripped off. He recalled, “[E]ven when
31 [defendant] had me against the wall he was still smiling.”

32 Witnesses tried to stop defendant from leaving the parking lot by
33 yelling, banging on the window and opening the van door, but to
34 no avail. Defendant backed up, drove out of the lot, and returned
35 to his apartment complex. Rosos followed.

36 Sacramento City Police Officer Janine LaRose responded to two
37 different dispatches concerning an assault with a deadly weapon
38 and a hit and run. When LaRose came into contact with defendant,
39 he was staggering, smelled of alcohol and was difficult to
40 understand. Rostami and other witnesses identified defendant.
41 Defendant refused to take a chemical blood alcohol test. A forced
42 blood draw was administered, revealing that defendant had a blood
43 alcohol content of .30.

1 Alarcon suffered a severe crush injury to his right leg. His doctor
2 subsequently diagnosed the injury as permanent.

3 (C043574 opinion on rehearing² at 3-4.) Petitioner was convicted of recklessly driving under the
4 influence and causing bodily injury (two counts), assault with a deadly weapon, hit and run
5 causing serious and permanent injury, and simple assault. The jury also found true allegations
6 that he had a prior conviction for which he served a prison sentence and that he personally
7 inflicted great bodily harm on the assault with a deadly weapon charge. A sentence of seven
8 years, eight months in state prison was imposed.

9 III. APPLICABLE LAW FOR FEDERAL HABEAS CORPUS

10 An application for writ of habeas corpus by a person in custody under judgment of
11 a state court can be granted only for violations of the Constitution or laws of the United States.
12 28 U.S.C. §2254(a); *see also Peltier v. Wright*, 15 F.3d 860, 861 (9th Cir. 1993); *Middleton v.*
13 *Cupp*, 768 F.2d 1083, 1085 (9th Cir. 1985) (*citing Engle v. Isaac*, 456 U.S. 107, 119 (1982)).
14 This petition for writ of habeas corpus was filed after the effective date of, and thus is subject to,
15 the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”). *Lindh v. Murphy*, 521
16 U.S. 320, 326 (1997); *see also Weaver v. Thompson*, 197 F.3d 359 (9th Cir. 1999). Under
17 AEDPA, federal habeas corpus relief also is not available for any claim decided on the merits in
18 state court proceedings unless the state court’s adjudication of the claim:

19 (1) resulted in a decision that was contrary to, or involved an
20 unreasonable application of, clearly established Federal law, as
determined by the Supreme Court of the United States; or

21 (2) resulted in a decision that was based on an unreasonable
22 determination of the facts in light of the evidence presented in the
State court proceeding.

23 28 U.S.C. § 2254(d); *see also Penry v. Johnson*, 532 U.S. 782, 792-93 (2001); *Williams v.*
24 *Taylor*, 529 U.S. 362, 402-03 (2000); *Lockhart v. Terhune*, 250 F.3d 1223, 1229 (9th Cir. 2001).

25
26 ² Lodged document 2.

1 The “contrary to” and “unreasonable application” clauses of §2254(d)(1) are
2 different. Under the “contrary to” clause of §2254(d)(1), a federal habeas court may grant the
3 writ only if the state court arrives at a conclusion opposite to that reached by the Supreme Court
4 on a question of law or if the state court decides the case differently than the Supreme Court has
5 on a set of materially indistinguishable facts. *Williams*, 529 U.S. at 405. As the Third Circuit
6 has explained, “it is not sufficient for the petitioner to show merely that his interpretation of
7 Supreme Court precedent is more plausible than the state court’s; rather, the petitioner must
8 demonstrate that Supreme Court precedent *requires* the contrary outcome.” *Matteo v.*
9 *Superintendent, SCI Albion*, 171 F.3d 877, 888 (3rd Cir. 1999) (emphasis in original). It is not
10 required that the state court cite the specific controlling test or Supreme Court authority, so long
11 as neither the reasoning nor the result contradict same. *Early v. Packer*, 537 U.S. 3, 8-9 (2002).

12 The court may grant relief under the “unreasonable application” clause if the state
13 court correctly identifies the governing legal principle but unreasonably applies it to the facts of
14 the particular case. *Williams*, 529 U.S. at 410. The focus of this inquiry is whether the state
15 court’s application of clearly established federal law is objectively unreasonable. *Id.* “[A]
16 federal habeas court may not issue the writ simply because that court concludes in its
17 independent judgment that the relevant state-court decision applied clearly established federal
18 law erroneously or incorrectly. Rather, that application must also be unreasonable.” *Id.*

19 The court will look to the last reasoned state court decision in determining
20 whether the law applied to a particular claim by the state courts was contrary to the law set forth
21 in the cases of the United States Supreme Court or whether an unreasonable application of such
22 law has occurred. *Avila v. Galaza*, 297 F.3d 911, 918 (9th Cir. 2002), *cert. dismissed*, 538 U.S.
23 919 (2003). A court may deny a petition for writ of habeas corpus on the ground that relief is
24 precluded by 28 U.S.C. §2254(d) without addressing the merits of the claim. *Lockyer v.*
25 *Andrade*, 538 U.S. 63, 71 (2003).

26 //

1 IV. CLAIMS PRESENTED

2 The petition sets forth six distinct grounds for relief. Petitioner contends that (A)
3 the prosecutor suppressed exculpatory evidence prior to the preliminary hearing; (B) the
4 prosecutor committed prejudicial misconduct during petitioner’s cross-examination; (C) retained
5 attorney Miller rendered ineffective assistance of counsel prior to trial and his associate
6 Nicholson rendered ineffective assistance of counsel at trial; (D) attorney Miller abandoned
7 petitioner; (E) court appointed attorney Daly provided ineffective assistance of counsel at
8 petitioner’s motion for a new trial; and (F) the convictions were obtained by the prosecutor’s use
9 of false testimony by victim Alarcon.

10 V. DISCUSSION

11 A. Suppression of Evidence Prior to the Preliminary Hearing

12 In *Brady v. Maryland*, the United States Supreme Court held that the suppression
13 before trial of requested evidence favorable to an accused violates due process where the
14 evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of
15 the prosecution. 373 U.S. 83 (1963). The *Brady* duty to disclose applies to exculpatory evidence
16 as well as evidence that could be used to impeach the government’s witnesses. *United States v.*
17 *Bagley*, 473 U.S. 667, 676 (1985).

18 For his first ground, petitioner contends that the prosecution suppressed evidence
19 prior to the preliminary hearing. In particular, petitioner refers to a report taken at the scene by a
20 Sacramento Fire EMT responder and a physician’s emergency room report from Alarcon’s
21 medical records. (Pet’s Ex. 4 & 5.) Petitioner asserts that these reports show that Alarcon
22 exaggerated or lied at the preliminary hearing regarding the extent of the injuries he suffered.
23 Petitioner also contends that Alarcon had a criminal record of which the defense was not
24 informed and that additional criminal charges were pending against him prior to and during the
25 trial. Petitioner argues that the suppressed evidence could have been used to impeach Alarcon’s
26 testimony at the preliminary hearing. Petitioner contends that the failure of the prosecutor to

1 disclose this information prior to the preliminary hearing rendered the ensuing commitment order
2 illegal.³

3 On habeas corpus review, the Sacramento County Superior Court denied this
4 claim, finding that petitioner had waived any issue as to errors or irregularities in the preliminary
5 hearing by not filing a motion to dismiss. (06F02061 opinion⁴ at 1.) The superior court also
6 noted that petitioner failed to show that the alleged errors implicated his right to a fair trial since
7 the documents were provided to defense counsel prior to trial. *Id.*

8 Petitioner cites no authority from the United States Supreme Court, or the Ninth
9 Circuit, requiring that *Brady* material be disclosed prior to a preliminary hearing, as opposed to
10 later in the pretrial proceedings. Although petitioner repeatedly refers to the evidence at issue as
11 exculpatory, no actual exculpatory value is apparent from review of the documents. (Pet’s Ex. 4
12 & 5.) If anything, the medical reports contained only impeachment information. The United
13 States Supreme Court has specifically held that *Brady* does not require the disclosure of
14 impeachment information prior to entry of a guilty plea. *Ruiz*, 536 U.S. 622, 629 (2002). It
15 necessarily follows that the withholding of impeachment information prior to a preliminary
16 hearing is also not a *Brady* violation. As noted by Justice Thomas, “[t]he principle supporting
17 *Brady* was ‘avoidance of an unfair trial to the accused.’” *Ruiz*, 536 U.S. at 634 (Justice Thomas,
18 concurring). That concern is not implicated at the preliminary hearing stage.

19 In this case, it is undisputed that the defense received the two reports at issue
20 before trial commenced. On the other hand, petitioner alleges that the prosecution *never*
21 disclosed information that Alarcon had a criminal record or that criminal charges were then
22 pending against him. The crux of petitioner’s argument in this regard is that the prosecution had
23 a duty to discover that its witness had a criminal history.

24
25 ³ Petitioner also alleges that his attorney provided ineffective assistance in failing to file a
26 motion to dismiss on this ground. This allegation is discussed in subsection C(e), *infra*.

⁴ Lodged document 5.

1 “When the state decides to rely on the testimony of [] a witness, it is the state’s
2 obligation to turn over all information bearing on that witness’s credibility.” *Carriger v.*
3 *Steward*, 132 F.3d 463, 480 (9th Cir. 1997) (citing *Giglio v. Unites States*, 405 U.S. 150, 154
4 (1972)). In addition, an “individual prosecutor has a duty to learn of any favorable evidence
5 known to the others acting on the government’s behalf in the case, including the police.” *Kyles*
6 *v. Whitley*, 514 U.S. 419, 437-38 (1995).

7 Some Circuit Courts of Appeal have found a duty under *Brady* to learn of
8 impeachment evidence, at least with respect to key witnesses. See *United States v. Perdomo*, 929
9 F.2d 967 (3rd Cir. 1991); *United States v. Auten*, 632 F.2d 478 (5th Cir. 1980). In *Perdomo*, the
10 Third Circuit found a *Brady* violation when the government failed to check the local criminal
11 records for information concerning its key witnesses. *Perdomo*, 929 F.2d at 970. In *Auten*, the
12 Fifth Circuit found a *Brady* violation when the prosecutor chose not to run a search on one of its
13 key witnesses because of the brief time before trial. *Auten*, 632 F.2d at 481. In both cases, the
14 Courts of Appeal held that the first element of a *Brady* violation was established because the
15 government intentionally failed to seek out information readily available to it. On the other hand,
16 in *United States v. Young*, 20 F.3d 758 (7th Cir. 1994), the Seventh Circuit found that knowledge
17 of a witness’s full criminal history is not imputed just because the prosecutor could have
18 obtained the criminal records. *Id.* at 764.

19 In this case, there is no evidence that anyone involved in petitioner’s case knew
20 that Alarcon had criminal convictions. Petitioner is only entitled to habeas corpus relief if the
21 state court’s decision “was contrary to, or involved an unreasonable application of, clearly
22 established Federal law, as determined by the Supreme Court of the United States.” Given the
23 absence of Supreme Court precedent and the different rules set forth in the Circuit Courts of
24 Appeal, it cannot be said that Supreme Court law clearly establishes that the prosecution was
25 required to discover whether Alarcon had a criminal history.

26 //

1 In any event, petitioner’s allegations regarding Alarcon’s alleged criminal history
2 are too speculative to warrant relief. Under California law, a witness may be impeached with a
3 criminal record only in cases where the offense in question is one of “moral turpitude.” *People v.*
4 *Wheeler*, 4 Cal.4th 284, 296 (1992). Here, petitioner merely speculates that Alarcon might have
5 had convictions for offenses relating to moral turpitude.⁵ But factual allegations, rather than
6 conclusions or speculation, are required. *See Boehme v. Maxwell*, 423 F.2d 1056, 1058 (9th Cir.
7 1970). Petitioner is not entitled to relief on his claim that the prosecution suppressed evidence in
8 violation of *Brady v. Maryland*, 373 U.S. 83 (1963).

9 B. Prosecutorial Misconduct during Cross Examination

10 Petitioner testified that he was taking a cab home from the airport because he had
11 missed his flight. (RT at 353; 392.) During cross examination, the prosecutor asked petitioner,
12 “Isn’t it in fact true that you were actually thrown off the plane for being intoxicated?” (RT at
13 392.) The defense’s objection to the question was sustained. (RT at 392.)

14 During a short recess outside the presence of the jury, the defense moved for a
15 mistrial, arguing that the prosecutor had provided no witnesses or discovery regarding petitioner
16 being thrown off a plane and that the inquiry itself was inflammatory. (RT at 393.) The
17 prosecutor stated that she obtained the information from Rostami, who had obtained the
18 information from his dispatch center. (RT at 394.) When court resumed, the jury was instructed
19 to disregard the last question:

20 THE COURT: ...all parties are present. I must speak with you
21 about something now, ladies and gentlemen. The last statement of
22 the prosecutor before the objection was made, when we recessed, is
23 stricken from the record. You must strike it from your minds, treat
24 it as though you’d never heard it.

23 /////

25 ⁵ It is worth noting that the superior court found, on habeas corpus review, that two of the
26 three case numbers of the criminal cases allegedly pending against Alarcon were invalid, while
the third involved a 1989 misdemeanor crime which was not a crime of moral turpitude.
(06F02061 opinion at 4.)

1 As I told you before, the statements of counsel are not evidence
2 and you're not to consider them as evidence.

3 There's no evidence to -- with regard to the statement that was
4 made, no evidence whatsoever before you. You must strike that
5 statement from your minds and not let it interfere in any way with
6 your judgment in this case.

7 Now, is there anyone who is unable to do that? If there's anyone
8 who's unable to strike it from your minds and not let it interfere
9 with your judgment in any way, is there anyone who cannot do
10 that, please raise your hand.

11 (No Response).

12 THE COURT: I see no response. Thank you. You may proceed,
13 Ms. Becker.

14 (RT at 397-98.)

15 Petitioner contends that the prosecutor's question was especially inflammatory
16 due to the proximity in time to the one year anniversary of the events of September 11, 2001. In
17 his second ground for relief, he contends that his rights to due process, confrontation, and a fair
18 trial were violated.

19 The California Court of Appeal, Third District, applied state law to deny this
20 claim, reasoning that even if the question was improper, it was not a pattern of egregious
21 conduct, and did not amount to bad faith because it was intended to elicit relevant evidence as to
22 petitioner's level of intoxication or his credibility. (C043574 opinion at 14.) In addition, the
23 state appellate court held, the trial court's admonition and subsequent instruction to the jurors
24 cured any potential error, thus the trial court did not abuse its discretion denying the mistrial due
25 to the prosecutor's question. (*Id.* at 15).

26 The standard of review for a claim of prosecutorial misconduct on writ of habeas
corpus is the narrow one of due process. *Darden v. Wainwright*, 477 U.S. 168, 181 (1986). A
prosecutor's error or misconduct does not, per se, violate a petitioner's constitutional rights. *See*
Jeffries v. Blodgett, 5 F.3d 1180, 1191 (citing *Darden*, 477 U.S. at 181 and *Campbell v.*
Kincheloe, 829 F.2d 1453, 1457 (9th Cir. 1987)). A criminal defendant's due process rights are

1 violated only if the error or misconduct renders the trial fundamentally unfair. *Darden*, 477 U.S.
2 at 181. The question to be resolved is “whether the prosecutor’s remarks ‘so infected the trial
3 with unfairness as to make the resulting conviction a denial of due process.’” *Hall v. Whitley*,
4 935 F.2d 164, 165 (9th Cir. 1991) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643
5 (1974). Relief is limited to cases in which the petitioner can establish that the misconduct
6 resulted in actual prejudice. *Johnson v. Sublett*, 63 F.3d 926, 930 (1995) (citing *Brecht v.*
7 *Abrahamson*, 507 U.S. 619, 637-38). Put another way, prosecutorial misconduct violates due
8 process when it has a substantial and injurious effect or influence in determining the jury’s
9 verdict. *See Ortiz-Sandoval v. Gomez*, 81 F.3d 891, 899 (9th Cir. 1996).

10 In this instance, due to the overall strength of the prosecution’s case, it is evident
11 that the prosecutor’s single improper question did not have a substantial and injurious effect or
12 influence in determining the jury’s verdict. There was ample evidence of guilt with respect to the
13 charges of conviction, which included recklessly driving under the influence and causing bodily
14 injury, assault with a deadly weapon with personal infliction of great bodily harm, hit and run
15 causing serious and permanent injury, and simple assault.

16 Rostami testified that petitioner threw big, round, rocks at him at the apartment
17 complex and that the rocks came close to hitting him. (RT at 119-120.) Eyewitness Rosos also
18 testified that petitioner threw softball size cobblestones at Rostami outside of the apartment
19 complex. (RT at 58-60.) Rosos saw petitioner leaving the apartment complex in his white van
20 and followed him to the 7-11. (RT at 63-64, 66.) Rosos witnessed petitioner’s vehicle hit a pole,
21 run a red light, enter the 7-11 parking lot, hit Alarcon and pin him against the wall, back up,
22 leave the parking lot, and speed away. (RT at 63-69). Petitioner was also identified as the
23 individual who hit Alarcon by an employee of the 7-11. (RT at 227-228.)

24 Alarcon testified that he was standing at a pay phone when he turned and made
25 eye contact with petitioner, who was in the driver’s seat of a van. (RT at 190.) The van pulled
26 towards Alarcon, accelerated over a parking block, hit him, and then drove away. (RT at 190-

1 191.) Two arresting officers from the Sacramento Police Department testified that petitioner
2 displayed objective signs of intoxication including an odor of alcohol, impaired speech, and
3 staggering or stumbling. (RT at 240-41; 256.) Petitioner refused a field sobriety test. (RT at
4 241.) A forced blood draw was administered (RT at 244) and his blood alcohol content was
5 determined to be .30. (RT at 305.)

6 Dr. Robinson of Kaiser Hospital testified that he treated Alarcon three days after
7 the incident. (RT at 149, 155.) The leg was not fractured (RT at 156), but Alarcon had sustained
8 a “quadriiceps muscle contusion,” or, in other words, a “crush and bruise injury” in his right thigh
9 area. (RT at 150.) Dr. Robinson testified that it was the most extensive crush injury of that type
10 that he had seen in his experience working at Kaiser Hospital. (RT at 153.) After three months,
11 the injury had improved some, however Dr. Robinson concluded at that time that no further
12 progress would be made and that the resulting loss of strength to the leg was permanent. (RT at
13 152-153.)

14 Given this evidence and the overall strength of the prosecution’s case, the
15 prosecutor’s single unanswered question about whether petitioner was removed from an airplane
16 for being intoxicated did not have a substantial and injurious effect or influence in determining
17 the jury’s verdicts. This claim fails because petitioner cannot establish the element of actual
18 prejudice.

19 C. Constructive Denial of Counsel/ Ineffective Assistance of Trial Counsel

20 For his next ground, petitioner raises numerous allegations of constructive denial
21 of counsel prior to and during trial pursuant to *United States v. Cronin*, 466 U.S. 648 (1984) or,
22 in the alternative, ineffective assistance of counsel pursuant to *Strickland v. Washington*, 466
23 U.S. 668 (1984).

24 The Sixth Amendment guarantees a criminal defendant the effective assistance of
25 counsel. A showing of ineffective assistance of counsel has two components. First, a petitioner
26 must show that, considering all the circumstances, counsel’s performance fell below an objective

1 standard of reasonableness. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). After a
2 petitioner identifies the acts or omissions that are alleged not to have been the result of
3 reasonable professional judgment, the court must determine whether, in light of all the
4 circumstances, the identified acts or omissions were outside the wide range of professionally
5 competent assistance. *Id.* at 690; *Wiggins v. Smith*, 539 U.S. 510, 521 (2003). In assessing an
6 ineffective assistance of counsel claim, “[t]here is a strong presumption that counsel’s
7 performance falls within the ‘wide range of professional assistance.’” *Kimmelman v. Morrison*,
8 477 U.S. 365, 381 (1986) (quoting *Strickland*, 466 U.S. at 689). In addition, there is a strong
9 presumption that counsel “exercised acceptable professional judgment in all significant decisions
10 made.” *Hughes v. Borg*, 898 F.2d 695, 702 (9th Cir. 1990) (citing *Strickland*, 466 U.S. at 689).

11 The second factor required for a showing of ineffective assistance of counsel is
12 actual prejudice caused by the deficient performance. *Strickland*, 466 U.S. at 693-94. Prejudice
13 is found where “there is a reasonable probability that, but for counsel’s unprofessional errors, the
14 result of the proceeding would have been different.” *Id.* at 694. A reasonable probability is “a
15 probability sufficient to undermine confidence in the outcome.” *Id.*; see also *Williams*, 529 U.S.
16 at 391-92; *Laboa v. Calderon*, 224 F.3d 972, 981 (9th Cir. 2000).

17 The Supreme Court has presumed prejudice in Sixth Amendment right to counsel
18 cases where there are “circumstances that are so likely to prejudice the accused that the cost of
19 litigating their effect in a particular case is unjustified.” *United States v. Cronin*, 466 U.S. 648,
20 658, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984). *Strickland*, *Cronin*, and the cases that followed
21 *Cronin* made clear that this exception is limited to the “complete denial of counsel” and
22 comparable circumstances, including: (1) where a defendant “is denied counsel at a critical stage
23 of his trial”; (2) where “counsel entirely fails to subject the prosecution’s case to meaningful
24 adversarial testing”; (3) where the circumstances are such that “the likelihood that any lawyer,
25 even a fully competent one, could provide effective assistance is so small that a presumption of
26 prejudice is appropriate without inquiry into the actual conduct of the trial”; and (4) where

1 “counsel labors under an actual conflict of interest.” *Visciotti v. Woodford*, 288 F.3d 1097, 1106
2 (9th Cir. 2002) (quoting *Cronic*, 466 U.S. at 659-61, 662 n.31), reversed on other grounds by
3 *Woodford v. Visciotti*, 537 U.S. 19 (2002).

4 In this case, petitioner claims that he retained attorney Russell Miller to personally
5 handle his criminal case, but that Miller unexpectedly assigned the case to be tried by Dan
6 Nicholson, Miller’s associate. Nevertheless, petitioner was represented by counsel at all relevant
7 times and did not suffer a complete denial of counsel or any comparable circumstances. The
8 prejudice inquiry of petitioner’s 16 separate allegations (designated in a-q in the petition,
9 excluding the letter h) will thus be analyzed under the standard set forth in *Strickland*, 466 U.S.
10 at 693-94.

11 a. Attorney Miller failed to investigate, file discovery motions, subpoena medical
12 records, and convey plea offers.

13 Petitioner’s allegations that attorney Miller failed to investigate, file discovery
14 motions, and subpoena medical records are conclusory and unsupported by specific factual
15 allegations. Such allegations fail to demonstrate that trial counsel’s performance fell below an
16 objective standard of reasonableness, or that prejudice resulted. *See Jones v. Gomez*, 66 F.3d
17 199, 204 (9th Cir. 1995) (conclusory allegations that counsel provided ineffective assistance “fall
18 far short of stating a valid constitutional violation” (*citing James v. Borg*, 24 F.3d 20, 26 (9th Cir.
19 1994); *Boehme v. Maxwell*, 423 F.2d 1056, 1058 (9th cir. 1970) (“[a]llegations of fact, rather
20 than conclusions, are required”).

21 Petitioner has explained his allegation that Miller failed to inform him of two plea
22 offers made by the prosecution. At the conclusion of trial, the defense made a motion for a new
23 trial, and an evidentiary hearing was held. The prosecutor stated that she had made two plea
24 offers: one prior to the preliminary hearing for three years, and another after the preliminary
25 hearing for six years. (RT at 552, 555.) Petitioner testified that Miller had not advised him of
26 either offer, but that he would have accepted the first offer for three years. (RT at 569.) In

1 contrast, Miller testified that he recalled advising petitioner of a first offer of four years and four
2 months, and a second offer of six years, but that petitioner declined both, indicating he was not
3 interested in any offer that would send him to state prison. (RT at 574-75.) The trial court found
4 Miller to be credible and determined that Miller had in fact communicated two offers to
5 petitioner but that petitioner was unwilling to accept an offer that would send him to state prison.
6 (RT at 589-90.) The trial court concluded that petitioner failed to establish deficient performance
7 and prejudice and denied the motion for a new trial.

8 On direct appeal, the state appellate court rejected petitioner’s claim of ineffective
9 assistance of counsel based on Miller’s alleged failure to communicate plea offers:

10 Although there was conflicting testimony, the preponderance of the
11 evidence does not show Miller’s performance was deficient. The
12 trial court heard the testimony and observed the witnesses, and it
13 concluded Miller’s testimony was credible. That evidence shows
14 Miller’s testimony was credible. That evidence shows Miller’s
15 performance satisfied an objective standard of reasonableness. He
16 communicated each plea offer to defendant immediately and
17 complied with defendant’s wishes not to accept a state prison term.
18 Even near the eve of trial, Miller fought to retrieve the earlier offer
19 of four years four months for his client, but defendant still refused
20 the offer. Miller’s performance satisfied an objective standard of
21 reasonableness under the prevailing norms of practice.

22 Even if we conclude Miller’s performance was deficient, we still
23 would find against defendant on this issue because he failed to
24 establish prejudice, i.e., acceptance of the offer by defendant and
25 approval of the offer by the court... [¶] A defendant’s self-serving
26 statement, made after trial, that he would have accepted the offer
had competent advice been given, is alone insufficient to fulfill the
defendant’s burden of proving prejudice, and must be corroborated
independently by objective evidence.

27 Defendant failed to establish he would have accepted the proffered
28 plea bargains had he actually and accurately been informed of
29 them. Defendant admitted he would not have accepted the six-year
30 term because it included a second strike. Moreover, defendant’s
31 statement he would have accepted the three-year term had it been
32 offered occurred after the fact, is self-serving, and alone is
33 insufficient to establish prejudice. Furthermore, the trial court
34 heard contrary testimony from defense counsel that defendant “was
35 not interested in any offer which would send him to state prison.”

36 Defendant also failed to establish the trial court likely would have

1 approved a three-year prison sentence. Penal Code section 1192.7,
2 subdivision (a), prohibits plea bargaining “in any case in which the
3 indictment or information charges... any offense of driving while
4 under the influence of alcohol... unless there is insufficient
evidence to prove the people’s case, or testimony of a material
witness cannot be obtained, or a reduction or dismissal would *not*
result in a substantial change in sentence.”

5 This statute prohibits the proffered plea bargain of a three-year
6 prison sentence because this case involves a drunk driving offense
7 with sufficient evidence to prove the offense as demonstrated at
8 trial, and because the plea would have substantially reduced the
sentence. The application of Penal code section 1192.7 renders the
proffered plea bargain illegal, so we must presume the trial court
would have rejected the plea bargain.

9 By not proving by a preponderance of evidence Miller’s
10 performance was deficient, defendant would have accepted the
11 offers had they been made to him, and the court would have
approved the agreement, defendant failed to establish ineffective
assistance of counsel at the plea bargaining stage.

12 (C043574 opinion at 8-9.)

13 While petitioner’s allegations that Miller failed to advise him of two plea offers
14 would, if true, demonstrate that counsel’s performance fell below an objective standard of
15 reasonableness, the state appellate court correctly found that petitioner has not satisfied the
16 prejudice inquiry. “In order to prove prejudice where counsel fails to inform the petitioner about
17 a plea offer, the petitioner must prove there is a reasonable probability that he would have
18 accepted the offer. *Jones v. Wood*, 114 F.3d 1002, 1012 (9th Cir. 1997) (rejecting ineffective
19 assistance claim without evidentiary hearing because there was no reasonable probability that, at
20 time of plea offer, the petitioner would have agreed to its terms, despite his self-serving claim
21 that he would have). Here, petitioner has no objective evidence to support his claim of prejudice.
22 To the contrary, Miller testified that petitioner was not interested in any deal that would send him
23 to state prison, and the trial court found this testimony to be credible. Petitioner’s statement that
24 he would have accepted the plea offer is self-serving and by itself, does not establish a reasonable
25 probability that he would have done so but for Miller’s alleged failure to advise him of the offer.
26 *See Toro v. Fairman*, 940 F.2d 1065, 1068 (7th Cir. 1991) (reasonable probability must be

1 established through objective evidence; self-serving statement made years after trial is
2 insufficient basis upon which to find ineffective assistance of counsel on this basis).

3 The California Court of Appeal’s rejection of petitioner’s ineffective assistance of
4 counsel claim based on Miller’s alleged failure to convey plea offers is not contrary to, or an
5 objectively unreasonable application of any clearly established federal law. Nor is it an
6 unreasonable determination of the facts in light of the evidence presented in the state court
7 proceeding.

8 b. Attorney Miller abandoned petitioner’s defense.

9 As set forth above, petitioner claims that he retained Miller to personally handle
10 his criminal case, but that Miller unexpectedly assigned the case to be tried by Nicholson,
11 Miller’s associate. Since this particular allegation is the sole basis for petitioner’s fourth ground
12 for relief, it will be discussed *infra* in subsection D.

13 c. Attorney Nicholson had a conflict of interest.

14 Petitioner contends that Nicholson asked him one day whether he had been
15 making payments for his legal services to Miller. According to petitioner, he responded in the
16 affirmative and Nicholson said “well it looks like I’m doing the trial pro bono.” (Pet. at 23.)
17 Petitioner contends that Nicholson was not being paid for his work on the case and that this
18 constituted a conflict of interest in the representation.

19 Under the Sixth Amendment, a criminal defendant has the right to representation
20 free from any conflicts of interest. *Strickland*, 466 U.S. at 692. Because petitioner raised no
21 objection at trial, “[i]n order to establish a violation of the Sixth Amendment [based on a conflict
22 of interest, he] must demonstrate that an actual conflict of interest adversely affected his lawyer’s
23 performance.” *Cuyler v. Sullivan*, 446 U.S. 335, 348 (1980). If this standard is met, prejudice
24 will be presumed. *Id.* at 349-50. But petitioner must show that an actual conflict affected
25 counsel’s performance, as opposed to a mere theoretical division of loyalties. *United States v.*
26 *Wells*, 394 F.3d 725, 733 (9th Cir. 2005) (citations and internal quotations omitted).

1 The Ninth Circuit has previously recognized that an ineffective assistance of
2 counsel claim based on a conflict of interest may lie, in theory, where an attorney's financial
3 interests are in conflict with his client's interests. *See United States v. Hearst*, 638 F.2d 1190,
4 1193-94 (9th Cir. 1980) (allegation that attorney acted contrary to client interests based on book
5 contract stated a claim), *cert. denied*, 451 U.S. 938 (1981). Pro bono arrangements, however, do
6 not, without more, require Sixth Amendment scrutiny. *Williams v. Calderon*, 52 F.3d 1465, 1473
7 (9th Cir. 1995). Here, petitioner has not stated any additional facts that demonstrate that an actual
8 conflict of interest adversely affected Nicholson's performance. Even accepting petitioner's
9 allegation as true, he has failed to state a valid claim.

10 d. Attorney Nicholson failed to seek a continuance prior to trial.

11 Petitioner alleges that Nicholson received petitioner's case "only days before trial"
12 and that he "did no pre-trial work-up." (Pet. at 14.) Petitioner contends that Nicholson should
13 have sought a continuance to conduct additional investigation and preparation. This particular
14 allegation overlaps with several others regarding Nicholson's alleged deficient performance prior
15 to trial. (See subsections e-q, *infra*.) Within the other allegations, petitioner speculates but fails
16 to demonstrate exactly what the additional investigation or preparation would have accomplished
17 and how the outcome of his case would have been positively affected. Like the other allegations,
18 petitioner's contention that Nicholson should have sought a continuance to conduct additional
19 investigation or preparation lacks necessary factual details and cannot be a basis for habeas corpus
20 relief. *Jones v. Gomez*, 66 F.3d 199, 204 (9th Cir. 1995)

21 e. Attorney Nicholson failed to file the correct motion to dismiss after the
22 preliminary hearing.

23 Prior to commencement of trial, Nicholson made an unsuccessful motion pursuant
24 to Cal. Penal Code § 995. Nicholson argued that the information should be dismissed because
25 insufficient evidence at the preliminary hearing supported the charge of assault with a deadly
26 weapon and the circumstance of great bodily injury. Petitioner alleges that Nicholson should have

1 instead filed a non-statutory motion to dismiss alleging that the prosecutor had improperly
2 suppressed exculpatory evidence, specifically, the medical reports discussed *supra* in subsection

3 A. As to this allegation, the Sacramento County Superior Court reasoned:

4 This “evidence” consists of reports by emergency personnel that
5 responded to the incident. First, there is no evidence that the
6 prosecutor had actual or constructive possession of the fire
7 department report, Exhibit 4. Although petitioner has shown that
8 the prosecutor sought and obtained medical records from Kaiser via
9 subpoena, Petitioner has not shown that the fire department report
10 was part of the subpoenaed Kaiser records. Petitioner also claims
11 that the medical report of Dr. Rowe was exculpatory. Dr. Rowe’s
12 report apparently was part of the records obtained from Kaiser.
13 However, Petitioner’s claim that the report is exculpatory because it
14 contradicts Alarcon’s testimony is unsupported. The report shows
15 that Alarcon’s knee had abrasions, effusion, pain, and tenderness.
16 The notes also suggest that an x-ray might be necessary regarding a
17 possible tibial fracture and recommended a consultation with an
18 orthopedic specialist. The report further states that the injury was
19 due to trauma and that Alarcon was unable to bear weight on the
20 leg. (See Exhibit 5.) None of this appears to be exculpatory in
21 relation to Alarcon’s testimony at the preliminary hearing that his
22 leg felt numb, was smashed, the skin was ripped and the leg was
23 bleeding. (See Exhibit 3.) Since Petitioner has not shown that the
24 evidence was exculpatory, he cannot show that trial counsel should
25 have moved to dismiss the information for a Brady violation.

16 (06F02061 opinion at 3.)

17 For the reasons described above by the state superior court, and the reasons
18 additionally set forth in subsection A, the medical reports at issue were not exculpatory; if
19 anything, they contained only impeachment information. It is undisputed that the defense
20 received the medical reports at issue before trial commenced, accordingly, there was no *Brady*
21 violation (see discussion in subsection A, *supra*) and no basis for counsel to file a motion to
22 dismiss the information on that ground. See *James*, 24 F.3d at 27 (counsel has no duty to make a
23 futile motion).

24 /////
25 /////
26 /////

1
2 f. Attorney Nicholson failed to interview or call as witnesses Sacramento Fire
EMT personnel.

3 As set forth in subsection A, Sacramento Fire EMT personnel responded to the
4 scene, spoke to Alarcon, and created a report which was provided to the defense sometime after
5 the preliminary hearing and before trial. Petitioner contends that Nicholson failed to read or
6 consider this report and further failed to interview or call as a witness any of the emergency
7 responders who were at the scene.

8 “Counsel has a duty to make reasonable investigations or to make a reasonable
9 decision that makes particular investigations unnecessary.” *Wiggins v. Smith*, 539 U.S. 510, 521
10 (2003) (citing *Strickland*, 466 U.S. at 690-90). At the same time, “counsel need not interview
11 every possible witness to have performed proficiently.” *Riley v. Payne*, 352 F.3d 1313, 1318 (9th
12 Cir. 2003). In this case, even assuming that petitioner could show that Nicholson failed to
13 interview or call EMT personnel to testify and that such failure was unreasonable, he has made no
14 showing of prejudice. In order to demonstrate prejudice, a claim of failure to interview or call
15 witnesses must show what the interview would have obtained and how the testimony might have
16 changed the outcome of the case. *United States v. Berry*, 814 F.2d 1406, 1409 (9th Cir. 1989).
17 Here, petitioner has not alleged, nor is it apparent from the report, what would have been obtained
18 from an interview of the first responders, what testimony they could have given, or how the
19 outcome of the case would have been affected.

20
21 g. Attorney Nicholson failed to interview or call as a witness Dr. Rowe, Kaiser
emergency room physician.

22 Petitioner alleges that Nicholson also failed to interview or call as a witness Dr.
23 Rowe, Kaiser emergency room physician. Once again, petitioner’s allegations regarding
24 Nicholson’s alleged failure to interview or call a witness are insufficient, because he has failed to
25 allege what would have been discovered in an interview with Dr. Rowe, what testimony Dr. Rowe
26 would have given at trial, and how such testimony would have changed the outcome of the case.

1 i.⁶ Attorney Nicholson failed to adequately prepare, read, and consider medical
2 documents which could have been used to impeach Alarcon's trial testimony.

3 Petitioner alleges that Nicholson's performance was deficient when he failed to
4 adequately cross-examine and impeach Alarcon's testimony with medical documents,
5 presumably, the documents at issue in subsection A, *supra*. Petitioner contends that counsel could
6 have shown that Alarcon aggravated his own injuries in furtherance of an insurance fraud scheme
7 or civil lawsuit. The Sacramento County Superior Court found, in general, that petitioner's
8 allegations about Nicholson's alleged lack of preparation were lacking in factual detail and
9 therefore insufficient. (06F02061 opinion at 3.)

10 Trial counsel's decision on whether or how to best impeach a witness is generally
11 deemed a strategic one, shielded by the *Strickland* presumption that counsel acted reasonably.
12 *United States v. Lindsay*, 157 F.3d 532, 535-36 (7th Cir. 1998), *but see Reynoso v. Giurbino*, 462
13 F.3d 1099, 1114 (9th Cir. 2006) (failure to impeach crucial witnesses constituted ineffective
14 assistance of counsel). In this case, petitioner has presented nothing to rebut the presumption that
15 counsel's decisions were reasonable.

16 The medical documents at issue, which contain the notations and statements of an
17 emergency responder and an emergency room physician, do not contradict Alarcon's trial
18 testimony. For example, petitioner points out that the emergency responder's statement does not
19 mirror Alarcon's trial testimony because it does not indicate that Alarcon claimed that petitioner
20 pinned him against the wall for 3 minutes while smiling or giggling at him. The absence of this
21 information in a report, however, does not contradict Alarcon's testimony. Likewise, petitioner
22 contends that the officer did not sufficiently describe the injuries he observed on Alarcon, except
23 to note that there was a complaint of pain to the right knee and that it was unknown if the knee
24 was broken. Petitioner contends that a trained accident investigation officer would have made a
25

26 ⁶ The petition contained no allegation lettered h.

1 different notation had Alarcon sustained the type of injury he later described at trial. Again,
2 however, petitioner's allegations fall short of demonstrating any information which counsel could
3 have used to meaningfully impeach Alarcon's trial testimony.

4 Moreover, as discussed *supra*, in section B, there was ample evidence of
5 petitioner's guilt, including eyewitness testimony and the testimony of the physician who
6 diagnosed Alarcon's injury as permanent. Thus, even assuming, for the sake of argument, that
7 Alarcon had been impeached with the information contained in the medical reports, and it had
8 been shown that Alarcon exaggerated his injuries, there is no reasonable probability that the result
9 of the proceeding would have been different.

10 j. Attorney Nicholson failed to investigate and object to photographs purporting to
11 show Alarcon's injuries.

12 During Alarcon's direct examination, the prosecutor displayed to him what had
13 been marked for identification as Court's exhibits 3, 4 and 6, which Alarcon subsequently
14 identified as photographs of his leg, taken by his wife approximately one day after the incident
15 occurred. (RT at 200-01.) Petitioner contends that the photographs should not have been allowed
16 into evidence without testimony from Alarcon's wife or the medical personnel who treated
17 Alarcon.

18 “To authenticate a photograph a foundation must be laid by showing that the
19 picture is a faithful representation of the objects or persons depicted. The showing must be made
20 by a competent witness who can testify to personal knowledge of the correctness of the
21 representation.” *People v. O'Brien*, 61 Cal.App.3d 766, 781 (1976). In this case, the photographs
22 at issue were properly authenticated as to time and place by Alarcon, who was the subject and
23 who was present when they were taken. Petitioner has not shown any basis for an objection by
24 defense counsel.

25 Petitioner also complains of Nicholson's failure to object to the admission of
26 photographs of a cement ashtray that was in front of the 7-11 and which was struck by petitioner's

1 van at the same time Alarcon was hit. During the testimony of officer McCoy of the Sacramento
2 Police department, the prosecutor showed him what had been marked for identification as court's
3 exhibits 10 and 13. (RT at 285-86.) Officer McCoy recognized the photos as depicting an ashtray
4 near the payphones in front of the 7-11, but did not identify either as being in the same condition
5 as when he saw it on the day of the incident. (RT at 286-87.) After Officer McCoy failed to
6 identify court's exhibit 10, the prosecutor did not attempt to publish it to the jury. (RT at 287.)
7 The prosecutor did attempt to publish court's exhibit 13 to the jury, however, contrary to
8 petitioner's assertion, Nicholson did make an objection. (RT at 288.) After a discussion in
9 chambers which was held outside the presence of the jury and which was not transcribed, the
10 prosecutor moved on to other areas without attempting again to publish the photograph.
11 Petitioner admits that neither photograph of the ashtray was admitted into evidence. (See also RT
12 at 279.) Nicholson's performance was thus not deficient in this regard.

13 k. Attorney Nicholson failed to visit the scene and failed to consult with an
14 accident reconstruction expert.

15 Petitioner's allegations that Nicholson failed to visit the scene and consult with an
16 accident reconstruction expert are insufficient as he has failed to give any supporting evidence,
17 other than speculation, including what information would have been obtained, and how the
18 outcome of the trial would have been affected. Petitioner's allegations that counsel would have
19 discovered that Alarcon perjured himself in pursuit of a fraudulent civil lawsuit or insurance fraud
20 scheme are also speculative, conclusory, and insufficient for habeas corpus relief. *See Jones*, 66
21 F.3d at 204.

22 l. Attorney Nicholson failed to object when the prosecutor improperly vouched for
23 the credibility of its witnesses.

24 "The government may not vouch for the credibility of its witnesses, either by
25 putting its own prestige behind the witness, or by indicating that extrinsic information not
26 presented in court supports the witness' testimony..." *United States v. Simtob*, 901 F.2d 799, 805

1 (9th Cir. 1990). Here, petitioner contends that the prosecutor improperly vouched for the
2 credibility of witnesses during closing arguments. The prosecutor argued:

3 Now, those are the charges that the People have alleged against the
4 defendant. And it's up to you, the jury, to decide whether or not
5 these allegations have been proven beyond a reasonable doubt. [¶]
6 Now, you are the ones that get to decide whether or not you believe
7 those witnesses that sat up in that chair. [¶] And again, the law gives
8 you a tool to determine that. Gives you kind of a focus to
9 determine, "Should I believe him or not?" "Do I believe they're
10 credible?" [¶] Well, all the witnesses that you heard last week, from
11 Mr. Rosos, Mr. Rostami, Mr. Alarcon, the officers, the criminalist,
12 and the phlebotomist, none of them have any bias or motive to lie.

13 (RT at 469.) The prosecutor went on to recap the testimony given by each witness, stating again
14 in various places that the witnesses had no reason to lie.

15 Petitioner's allegations in this regard are not supported in the record. The
16 prosecutor's statements did not constitute improper vouching. The prosecutor did not express her
17 own belief in the credibility of any witness, or imply that she knew of information not presented
18 which supported their accounts. Rather, the prosecutor summarized evidence that was actually
19 admitted or not admitted during the trial and offered reasonable inferences therefrom: that the
20 witnesses were telling the truth because they had no bias or motive to lie. This is not improper
21 vouching.

22 m. Attorney Nicholson failed to investigate Alarcon's background.

23 Petitioner alleges that Nicholson failed to investigate Alarcon's background,
24 however, once again, he has failed to show what information would have been obtained, and how
25 it would have changed the outcome of the trial. To the extent petitioner alleges that counsel could
26 have learned that Alarcon had a criminal history, he has failed to demonstrate that Alarcon had
27 any convictions for crimes of moral turpitude which could have been used as impeachment
28 information. (See subsection A, *supra*.)

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30 /////

1 n. Attorney Nicholson failed to impeach Rosos's testimony.

2 At trial, Rosos testified that he saw petitioner pin Alarcon against the wall with the
3 vehicle. (RT at 68.) On cross-examination, Rosos testified that there was shrubbery
4 approximately one foot to one and a half feet tall in his line of sight, but that it did not obstruct his
5 view. (RT at 85-86.) Defense counsel also asked Rosos how far away he was:

6 Q: Okay. About how far away?

7 A: Uh, maybe from -- from where I'm sitting to the back wall there.

8 MR. NICHOLSON: Your Honor, does the Court have --

9 THE COURT: About 30 -- about 30 or so feet.

10 MR. NICHOLSON: I think that's about 30 yards, judge. Do we
11 have a diagram?

12 COURT ATTENDANT: No.

13 MR. NICHOLSON: We don't?

14 COURT ATTENDANT: No.

15 MR. NICHOLSON: Typically, we have those in each courtroom.

16 COURT ATTENDANT: We do.

17 THE COURT: Let's see. We don't have it? Don't have a diagram.

18 COURT ATTENDANT: No. That's about forty feet from where
19 you are to the back door.

20 THE COURT: About forty feet. The jury can see what it is, it's
21 about forty feet.

22 MR. NICHOLSON: Ok.

23 (RT at 86-86.)

24 Petitioner alleges that Rosos was actually 100 feet away and that his view was
25 obstructed by trees, shrubbery, and parked cars. (Pet. at 16-17.) Petitioner contends that
26 counsel's failure to impeach Rosos's testimony in this regard constituted ineffective assistance.

The Sacramento County Superior Court determined that petitioner was not entitled
to relief on this ground because the photographs and drawings he relied upon were not
authenticated or properly identified as accurate representations of the scene. (06F02061 opinion
at 3.) Even assuming, for the sake of argument, that the submitted drawings and photos accurately
depict the scene, petitioner's allegations are still insufficient. For example, petitioner alleges that
Rosos testified that he was only 30 feet away, however Rosos did not give such testimony.
Rather, Rosos estimated the distance to be approximately equal to the distance from where he was
sitting at the time to the back of the courtroom. Rosos did not give a numerical estimate of the

1 distance he described. Moreover, Nicholson did elicit from Rosos on cross examination that there
2 was shrubbery in his line of sight, and this was marked on the diagram displayed to the jury. (RT
3 at 85-86.) Despite petitioner's argument, it is not evident from his allegations or the photographs
4 submitted whether the shrubbery actually obstructed Rosos's view. Rosos testified, however, that
5 his view was not obstructed by the shrubbery. (RT at 86.) Petitioner has failed to demonstrate
6 that Nicholson could have successfully impeached Rosos's testimony in this regard. Moreover,
7 given the substantial evidence of petitioner's guilt, as described in section B, there is no
8 reasonable likelihood that such impeachment, even if successful, would have affected the outcome
9 of the case.

10 o. Attorney Nicholson failed to impeach Alarcon's testimony.

11 Petitioner's allegations that Nicholson failed to impeach Alarcon's trial testimony
12 have already been addressed. (See i., *supra*.)

13 p. Attorney Nicholson failed to prepare petitioner to testify and to consult with
14 him to ensure critical defense testimony was elicited.

15 At trial, petitioner testified in his own defense. He testified that he did not hit
16 Alarcon, and that he saw Alarcon looking around as if to check for witnesses. (RT at 372-73;
17 376.) Petitioner contends that Nicholson failed to prepare and consult with him in order to ensure
18 that critical testimony was elicited. Petitioner does not, however, describe the additional
19 testimony that he could have given or explain how it would have affected the outcome of the case.
20 Petitioner fails to explain how any preparation by counsel would have changed the effectiveness
21 of his testimony. The allegations regarding Nicholson's alleged omissions are, once again,
22 insufficient.

23 q. Attorney Nicholson abandoned petitioner's defense by conceding guilt.

24 Petitioner alleges that Nicholson conceded guilt during his closing argument,
25 admitting that petitioner hit and injured Alarcon. The Sacramento County Superior Court
26 disagreed with his allegation:

1 [A]lthough Petitioner argues that Nicholson conceded guilt, the
2 referenced pages of defense counsel’s closing argument only
3 suggest that certain facts needed to be determined by the jury.
4 Moreover, Nicholson’s statements merely reflected the evidence
5 that was presented at trial, which included victim Alarcon’s
6 testimony that he was in fact injured by Petitioner’s vehicle running
7 into him. Reciting evidence that was admitted at trial does not
8 constitute abandonment by counsel or a concession of guilt.
9 Moreover, even if counsel were conceding guilt as to some of the
10 offenses, conceding guilty is not *necessarily* ineffective assistance
11 of counsel.

12 (06F02061 opinion at 2.)

13 The Supreme Court has emphasized the deference accorded to trial counsel in
14 making closing argument:

15 ... counsel has wide latitude in deciding how best to represent a
16 client, and deference to counsel’s tactical decisions in his closing
17 presentation is particularly important because of the broad range of
18 legitimate defense strategy at that stage. Closing arguments should
19 “sharpen and clarify the issues for resolution by the trier of fact, but
20 which issues to sharpen and how best to clarify them are questions
21 with many reasonable answers... Judicial review of a defense
22 attorney’s summation is therefore highly deferential-- and doubly
23 deferential when it is conducted through the lens of a federal
24 habeas.

25 *Yarborough v. Gentry*, 540 U.S. 1, 5-6 (2003) (internal citations omitted). In the present case,
26 Nicholson’s closing argument discussed in detail Alarcon’s injuries, arguing that great bodily
injury and permanent serious injury had not been proved. Nicholson also stated at one point that
petitioner probably hit the ashtray and that Alarcon “was probably stuck between the telephone
booth and the ashtray.” (RT at 492.) Nicholson argued at length and in detail that, while Alarcon
apparently sustained some injury, it was not of the type or seriousness that he described at trial. It
appears that Nicholson made a tactical decision not to deny that petitioner had hit and injured
Alarcon, at least to some extent. Given the evidence presented in this case, such a tactical
decision was reasonable. Petitioner is not entitled to relief for his allegation that Nicholson
conceded guilt.

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1 D. Abandonment by Retained Counsel Miller

2 As set forth above, petitioner claims that he retained Miller to personally handle his
3 criminal case, but that Miller unexpectedly assigned the case to be tried by Nicholson, Miller's
4 associate, despite the fact that petitioner paid for his representation with checks payable directly to
5 Miller. As to this allegation, the Sacramento County Superior Court reasoned that "Petitioner has
6 not shown that Miller agreed to personally handle Petitioner's case, including the trial. Petitioner
7 was represented by Nicholson during the trial, so he was not 'abandoned' by counsel."

8 (06F02061 opinion at 2.)

9 Petitioner has indeed failed to show the existence of any agreement between
10 attorney Miller and himself. In addition, he has cited no Supreme Court or Ninth Circuit law in
11 support of his claim. Accordingly, the state superior court's rejection of this claim is not contrary
12 to, or an unreasonable application of, any clearly established federal law.

13 E. Constructive Denial of Counsel/ Ineffective Assistance of Counsel at the Motion
14 for a New Trial

15 After petitioner was convicted, the trial court appointed Kresta Daly to prepare a
16 motion for a new trial on petitioner's behalf. Daly filed the motion, which was denied. Petitioner
17 alleges that he was constructively denied counsel at his motion for a new trial (*United States v.*
18 *Cronic*, 466 U.S. 648 (1984)), or, in the alternative that he received ineffective assistance of
19 counsel. (*Strickland v. Washington*, 466 U.S. 668 (1984)). Since it is undisputed that petitioner
20 was represented by attorney Daly at the motion for a new trial, he did not suffer a "complete
21 denial of counsel" or any comparable circumstances. Daly's performance will be analyzed under
22 the standard set forth in *Strickland*, 466 U.S. at 693-94.

23 Petitioner complains that Daly failed to investigate the majority of the issues he
24 identified for her and further complains that the two issues she did raise were inadequately
25 supported. These allegations, however, like the allegations regarding trial counsel's alleged
26 omissions, are unsupported by any evidence in the petition. As determined by the Sacramento

1 County Superior Court:

2 Petitioner complains that Daly’s motion was full of conditional
3 statements and that Daly never did the investigation to show how
4 trial counsel was incompetent. Yet petitioner has not shown that
5 Daly was incompetent since he has not attached the evidence that
6 Daly should have obtained to support the motion for a new trial.
7 Petitioner has not attached any medical records to show that
8 Alarcon had a pre-existing knee injury; he had not attached any
9 evidence to show that Alarcon’s injury was exaggerated or entirely
false; there is no evidence that any expert could or would have
testified that Petitioner had a rising blood alcohol level, that the
accident happened differently from that described by Alarcon, or
that the blood alcohol test results were inaccurate. In the absence of
such evidence, it cannot be said that Daly’s failure to present
evidence to support the motion for new trial was unreasonable or
prejudicial.

10 (060F02061 opinion at 6.) Once again, petitioner’s claim of ineffective assistance of counsel is
11 conclusory, unsupported, and not a sufficient basis for habeas corpus relief.

12 F. Perjured Testimony

13 The knowing use of perjured testimony against a defendant to obtain a conviction
14 violates the Constitution. *Napue v. Illinois*, 360 U.S. 264 (1959). In order to succeed on such a
15 claim, a habeas petitioner must show that some testimony given was actually false, and that the
16 prosecutor was aware of the falsity. *Morales v. Woodford*, 336 F.3d 1136, 1152 (9th Cir. 2003);
17 In addition, the false testimony must have been material. *United States v. Zuno-Arce*, 339 F.3d
18 886, 889 (9th Cir. 2003). Under *Napue*, false testimony is material, and therefore prejudicial, if
19 there is “any reasonable likelihood that the false testimony could have affected the judgment of
20 the jury.” *Hayes v. Brown*, 399 F.3d 972, 984 (9th Cir. 2005) (en banc) (internal citation omitted).

21 For his sixth and final ground, petitioner contends that his convictions were
22 obtained by Alarcon’s false testimony, including his testimony that petitioner made eye contact
23 with Alarcon before hitting him, that petitioner revved his engine, that Alarcon was on the
24 telephone with his wife, when he was really on the telephone with his extramarital girlfriend, that
25 Alarcon was unable to take pain medication, that petitioner’s van pinned Alarcon for three
26 minutes, and that petitioner’s vehicle impacted Alarcon at all. Petitioner also claims that Alarcon

1 lied about his business losses and his ability to read and write English.

2 The Sacramento County Superior Court denied petitioner's claim regarding
3 Alarcon's alleged false testimony. (06F02061 opinion at 7.) The allegations relating to Alarcon's
4 business losses and ability to read and write English were denied because Alarcon did not testify
5 about these issues at petitioner's trial. (*Id.*) These issues were raised only in the civil matter
6 which did not affect petitioner's criminal case. (*Id.*) As to the other issues, the superior court
7 found that petitioner only provided evidentiary support relating to the issue of Alarcon being on
8 the phone with his wife and the issue of taking pain medication. (*Id.*) The other claims were
9 based on Alarcon's perceptions or otherwise not shown to be false. (*Id.*)

10 As to the claims for which petitioner did provide evidentiary support, the superior
11 court likewise rejected them. (06F02061 opinion at 7.) The superior court found that the person
12 to whom Alarcon was talking at the time of the incident was not material. (*Id.*) The superior
13 court also found that petitioner had not shown that Alarcon's testimony relating to the pain
14 medication was materially false. (*Id.*) Petitioner alleged that Alarcon stated he was given pain
15 medication, but that he could not take the medication because it closed off his throat. (*Id.*) At
16 trial, Alarcon admitted he started to take medication until he had a bad reaction; his testimony
17 suggested that he was taking pain medication for a month after he was hurt. (RT at 207.)
18 Portions of Alarcon's deposition testimony in the civil matter show that Alarcon had a different
19 adverse reaction to medication and his answers to interrogatories show he took ibuprofen,
20 Sulindac, Vicodin, and Darvocet. (06F02061 opinion at 7.) The superior court determined that
21 this did not establish that Alarcon's trial testimony was false.

22 The superior court concluded that petitioner had not shown Alarcon's testimony to
23 be materially false, or that there was a reasonable likelihood of a different result. (*Id.*) Indeed,
24 there is no reasonable likelihood that Alarcon's alleged false testimony affected the judgment of
25 the jury in this case. The superior court's rejection of petitioner's false evidence claim is not
26 contrary to, or an unreasonable application of, any clearly established federal law. Petitioner is

1 not entitled to relief.

2 VI. CONCLUSION

3 For all the foregoing reasons, IT IS HEREBY RECOMMENDED that petitioner's
4 application for writ of habeas corpus be DENIED.

5 These findings and recommendations are submitted to the United States District
6 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty
7 days after being served with these findings and recommendations, any party may file written
8 objections with the court and serve a copy on all parties. Such a document should be captioned
9 "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections
10 shall be served and filed within ten days after service of the objections. The parties are advised
11 that failure to file objections within the specified time may waive the right to appeal the District
12 Court's order. *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

13 DATED: November 30, 2009

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15 CHARLENE H. SORRENTINO
16 UNITED STATES MAGISTRATE JUDGE
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