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

DOUGLAS ERWIN,

Petitioner,

2: 10 - cv - 2568 - FCD TJB

vs.

ANTHONY HEDGPETH,

Respondent.

ORDER, FINDINGS AND
RECOMMENDATIONS

_____ /

Petitioner, Douglas Wayne Erwin, is a state prisoner proceeding with a *pro se* petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner is currently serving a determinate sentence of twenty-two years in prison after pleading guilty to committing robbery with an enhancement for the intentional discharge of a firearm. Petitioner raises five claims in this federal habeas petition; specifically: (1) That his guilty plea was involuntary as a result of the ineffective assistance of his counsel (“Claim I”); (2) that his counsel was ineffective for failing to conduct a reasonable pretrial investigation (“Claim II”); (3) that his plea was the product of outrageous government misconduct in that the lead detective falsified reports and evidence (“Claim III”); (4) that his counsel was ineffective at sentencing for failing to object to the prosecution’s evidence and for failing to inform him of his right to appeal; and, (5) that evidence

1 used to convict him was obtained through an illegal search in violation of his Fourth Amendment
2 rights. For the reasons stated herein, the federal habeas petition should be denied.

3 I. FACTUAL BACKGROUND

4 1. State Court Decision¹

5 The following facts were revealed at defendant's . . . trial:^[2]

6 F.W. was sitting in her car outside a Circle K in Elk Grove in the
7 early morning hours of July 26, 2005. She worked at the store, but
8 was off-duty at the time. F.W. allowed a short Black man to use
9 her lighter then asked the man if he knew anyone who wanted to
10 buy a bag of marijuana. She gave him her name and phone number.
11 The man returned approximately 10 or 15 minutes later, and
12 demanded her purse at gunpoint. A struggle ensued. A taller,
13 light-skinned man arrived on the scene and told F.W. to open the
14 passenger door. Eventually the taller man pulled the purse from
15 F.W.'s hands. F.W. ran after the two men, yelling, "[Y]ou're not
16 getting nothing" or "[Y]ou all ain't nothing but bitches. . . ." The
17 short man shot F.W. in the groin and thigh, and ran away. The
18 crime scene investigator found a .22-caliber shell casing at the
19 scene of the shooting.

20 2. Further Pertinent Facts and Procedural History

21 Later, on the day of the shooting, police obtained from the manager of the Circle K a
22 compact disc which included the store's video surveillance from the incident. Pet.'s First Am.
23 Pet. (Hereinafter "Pet."), Ex. 48. A detective brought the video to the hospital, where he showed
24 the video to the victim. The victim identified a person in a yellowish shirt who had purchased
25 cigarettes inside the store prior to the robbery as the person who later, along with another man,
26 attempted to rob her. *Id.*; Rep.'s Tr. at 241, 248. The victim identified the man in the yellowish
shirt as the one who shot her. Pet., Ex. 48. The detective then isolated several images of the

23 ¹ The factual background is taken from the California Court of Appeal, Third
24 Appellate District decision on direct appeal from March 2008 and filed in this Court by
25 Respondent on December 23, 2010 as Exhibit 1 to his answer (hereinafter referred to as the "Slip
Op.").

26 ² Defendant's trial ended in a mistrial when the video surveillance from the
Circle K, which had previously been misplaced by the prosecution, was rediscovered. *See infra.*

1 suspect, *id.*, and created a crime bulletin from those images. Pet., Ex. 44. The surveillance
2 video was thereafter lost by the prosecution, *see* Clerk's Tr.at 138, not to be seen by the District
3 Attorney prosecuting the case nor Petitioner or his co-defendant's counsel until it was
4 rediscovered contemporaneously with the victim's testimony at Petitioner's trial. Rep.'s Tr. at
5 230-31. The images taken from the video and placed in the crime bulletin, as well as other
6 detective work by the Sacramento Sheriff's Department, helped identify Petitioner as the suspect
7 seen purchasing cigarettes in the video, though the victim could not identify Petitioner out of a
8 photo lineup. *See* Clerk's Tr. (Preliminary Hearing) at 53-58, 66-67. Eventually, Petitioner was
9 arrested and was scheduled for trial along with his co-defendant, Kenneth Lomack, in early 2007.

10 Prior to trial, Petitioner's counsel recommended Petitioner accept a plea agreement
11 offered by the prosecution and plead guilty to some of the crimes charged in exchange for a
12 twenty-two year prison term. *See* Pet., Ex. 4. Under the agreement, Petitioner would plead
13 guilty to the robbery charge and to an enhancement for the intentional discharge of a firearm in
14 the commission of a felony. *See* Cal. Penal Code § 12022.53(c); Rep.'s Tr. at 337-38. If
15 Petitioner was found guilty of the charged enhancement, discharge of a firearm causing great
16 bodily injury, he would face a mandatory term of twenty-five years to life in prison. *See* Cal.
17 Penal Code § 12022.53(d). At this point, Petitioner refused the proposed plea agreement and
18 decided, against the advice of his attorney, to proceed to trial.

19 During the Court's consideration of the Petitioner's pre-trial motions, the Petitioner
20 expressed dissatisfaction with his representation, and moved to have his counsel removed.³
21 Rep.'s Tr. at 30. After a hearing on the motion, it was denied. Clerk's Tr. at 127.

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25 ³ The transcript of the hearing on the motion was sealed and has not been provided
26 to this court. *See* Rep.'s Tr. at 31-36 (omitted pages). It is not necessary to view the transcript to
determine the merits of Petitioner's claims.

1 Petitioner’s counsel continued to argue various motions on behalf of Petitioner, including
2 a motion to suppress several of Petitioner’s statements to investigators as violations of
3 Petitioner’s *Miranda* rights. *See Rep.’s Tr.* at 67-77. Furthermore, Petitioner’s counsel joined in
4 a motion with Petitioner’s co-defendant’s counsel, pursuant to *California v. Trombetta*, 467 U.S.
5 479 (1984), to have the case dismissed due to the prosecution’s loss of the surveillance video,
6 which the defense claimed may contain exculpatory evidence. *See Rep.’s Tr.* at 62. The court,
7 concluding that the defense could not show that the video contained any exculpatory evidence or
8 that the video was lost in bad faith, denied Petitioner and his co-defendants *Trombetta* motion.
9 *Id.* at 64-66. Lastly, discussed more fully below, Petitioner made a motion to suppress evidence
10 that was discovered in a search of an apartment. *Id.* at 85.

11 At Petitioner’s trial, the victim was called as the prosecution’s first witness and she
12 testified as to the events of the early morning hours of July 26, 2005. *Id.* at 193. The victim was
13 sitting in her car outside the Circle K waiting for the attendant, her friend and co-worker, to come
14 outside and smoke a cigarette with her. She observed a black male wearing a yellowish, bright
15 colored shirt and pajama type pants purchase something inside the Circle K. *Id.* at 204. When
16 the man came out of the Circle K, he borrowed a lighter from the victim. She offered to sell him
17 some marijuana. The man said that he did not need any, but obtained the her phone number in
18 case his friend wanted to purchase some later. *Id.* at 205. Minutes later, the man returned to the
19 Circle K, put a gun in the victim’s face, and demanded her purse. *Id.* at 212-213. A struggle
20 ensued and eventually the man and his accomplice began to walk away with the victim’s purse.
21 She began yelling at the men and the man in the yellowish shirt, who had previously held a gun
22 up to the victim, shot her. *Id.* at 221. She further testified that, later, at the hospital, she was
23 shown the surveillance tape from the Circle K and she identified a man wearing a yellowish shirt,
24 shown at the counter purchasing cigarettes, as the man who robbed and shot her. *Id.* at 241.

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1 The victim's testimony occurred over two days of trial. The morning of the second day
2 the court noted that the surveillance video tape had been found somewhere in the prosecution's
3 files. *Id.* at 229-30. Both Petitioner and his co-defendant moved for a mistrial, *id.* at 230-31,
4 which the court granted after the conclusion of the victim's testimony and hearing additional
5 argument on the motion. *Id.* at 316-17. Petitioner was scheduled to be retried later the same
6 week the mistrial was granted.

7 Prior to retrial, Petitioner's counsel again urged him to accept the proposed plea
8 agreement, believing that it was Petitioner's only possibility of avoiding a life sentence. In a
9 letter to the Presiding Judge of the Superior Court,⁴ Petitioner's mother recalled the moments
10 before Petitioner ultimately decided to plead guilty. *Pet.*, Ex. 21. Counsel, urging Petitioner's
11 mother to tell Petitioner to accept the plea agreement, "yelled" to Petitioner's mother: "do you
12 want your son to do life?" *Id.*; *see also* Clerk's Supp. Tr. (Notice of Appeal) at 2. Just before
13 Petitioner's retrial was to begin, Petitioner agreed to plead guilty in exchange for the twenty-two
14 year determinate sentence. *Rep.'s Tr.* at 337. The court went through a lengthy plea colloquy, in
15 which Petitioner stated that he was aware of the nature of the crimes he was charged with; had
16 sufficient time to speak with his lawyer about the charges, the consequences of the plea, and any
17 legal defenses he may have; that he understood he faced a maximum sentence of life in prison
18 under the charges but would receive a twenty-two year sentence based on the plea agreement; and
19 that he was entering the plea freely and voluntarily after fully discussing the case with his
20 attorney. *Id.* at 338-45. The court found a factual basis for the plea and that Petitioner had
21 entered the plea knowingly, intelligently, and voluntarily. *Id.* at 345. At a later date, Petitioner
22 was sentenced to twenty-two years in prison pursuant to the plea agreement. *Id.* at 357.

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25 ⁴ Petitioner's mother, Rhonda Erwin sent letters to the California Bar, the American
26 Bar Association, and the Presiding Judge of the Superior Court, all seeking help in removing
Petitioner's counsel. *See Pet.*, Ex. 4-9. They responded that they were powerless to act.

1 II. APPLICABLE LAW FOR FEDERAL HABEAS CORPUS

2 An application for writ of habeas corpus by a person in custody under judgment of a state
3 court can only be granted for violations of the Constitution or laws of the United States. *See* 28
4 U.S.C. § 2254(a); *see also Peltier v. Wright*, 15 F.3d 860, 861 (9th Cir. 1993); *Middleton v.*
5 *Cupp*, 768 F.2d 1083, 1085 (9th Cir. 1985) (citing *Engle v. Isaac*, 456 U.S. 107, 119 (1982)).
6 Petitioner filed this petition for writ of habeas corpus after April 24, 1996, thus the Antiterrorism
7 and Effective Death Penalty Act of 1996 (“AEDPA”) applies. *See Lindh v. Murphy*, 521 U.S.
8 320, 326 (1997). Under AEDPA, federal habeas corpus relief is not available for any claim
9 decided on the merits in the state court proceedings unless the state court’s adjudication of the
10 claim: (1) resulted in a decision that was contrary to, or involved an unreasonable application of,
11 clearly established federal law, as determined by the Supreme Court of the United States; or (2)
12 resulted in a decision that was based on an unreasonable determination of the facts in light of the
13 evidence presented in state court. *See* 28 U.S.C. 2254(d); *Perry v. Johnson*, 532 U.S. 782, 792-
14 93 (2001); *Williams v. Taylor*, 529 U.S. 362, 402-03 (2000).

15 In applying AEDPA’s standards, the federal court must “identify the state court decision
16 that is appropriate for our review.” *Barker v. Fleming*, 423 F.3d 1085, 1091 (9th Cir. 2005).
17 “The relevant state court determination for purposes of AEDPA review is the last reasoned state
18 court decision.” *Delgadillo v. Woodford*, 527 F.3d 919, 925 (9th Cir. 2008) (citations omitted).
19 “Where there has been one reasoned state judgment rejecting a federal claim, later unexplained
20 orders upholding that judgment or rejecting same claim rest upon the same ground.” *Ylst v.*
21 *Nunnemaker*, 501 U.S. 797, 803 (1991). To the extent no such reasoned opinion exists, courts
22 must conduct an independent review of the record to determine whether the state court clearly
23 erred in its application of controlling federal law, and whether the state court’s decision was
24 objectively unreasonable. *Delgado v. Lewis*, 223 F.3d 976, 981-82 (9th Cir. 2000). “The
25 question under AEDPA is not whether a federal court believes the state court’s determination
26 was incorrect but whether that determination was unreasonable—a substantially higher

1 threshold.” *Schriro v. Landrigan*, 550 U.S. 465, 473 (2007) (citing *Williams*, 529 U.S. at 410).
2 “When it is clear, however, that the state court has not decided an issue, we review that question
3 *de novo*.” *Reynoso v. Giurbino*, 462 F.3d 1099, 1109 (9th Cir. 2006) (citing *Rompilla v. Beard*,
4 545 U.S. 374, 377 (2005).

5 III. ANALYSIS OF PETITIONER’S CLAIMS

6 1. Claim I

7 In Claim I, Petitioner alleges that his guilty plea was not voluntary and intelligent because
8 the advice he received from counsel with regard to the guilty plea fell below the requisite
9 standard of care. Petitioner did not raise this claim in his direct appeal to the California Court of
10 Appeal. He did, however, raise the claim before the California Supreme Court through a petition
11 for habeas corpus, which was summarily denied. *See* Lodged Doc. No. 11 (Petition for Writ of
12 Habeas Corpus Filed With California Supreme Court) at 3; Lodged Doc. No. 12 (California
13 Supreme Court Order Summarily Denying Petition for Writ of Habeas Corpus).

14 “The longstanding test for determining the validity of a guilty plea is whether the plea
15 represents a voluntary and intelligent choice among the alternative courses of action open to the
16 defendant.” *Hill v. Lockhart*, 474 U.S. 52, 56 (1985) (citations and internal quotation marks
17 omitted). A defendant who has plead guilty upon the advice of counsel “may only attack the
18 voluntary and intelligent character of the guilty plea by showing that the advice he received from
19 counsel was not with the standards set forth in *McMann* [*v. Richardson*, 397 U.S. 759 (1970)].”
20 *Tollett v. Henderson*, 411 U.S. 258, 267 (1973). That is, that counsel’s advice was not “within
21 the range of competence demanded of attorneys in criminal cases.” *McMann*, 397 U.S. at 771.

22 The Sixth Amendment guarantees effective assistance of counsel. In *Strickland v.*
23 *Washington*, 466 U.S. 668 (1984), the Supreme Court articulated the test for demonstrating
24 ineffective assistance of counsel. First, the petitioner must show that considering all the
25 circumstances, counsel’s performance fell below an objective standard of reasonableness. *See id.*
26 at 688. Petitioner must identify the acts or omissions that are alleged not to have been the result

1 of reasonable professional judgment. *See id.* at 690. The federal court must then determine
2 whether in light of all the circumstances, the identified acts or omissions were outside the range
3 of professional competent assistance. *See id.*

4 Second, a petitioner must affirmatively prove prejudice. *See id.* at 693. Prejudice is
5 found where “there is a reasonable probability that, but for counsel’s unprofessional errors, the
6 result of the proceeding would have been different.” *Id.* at 694. A reasonable probability is “a
7 probability sufficient to undermine the confidence in the outcome.” *Id.* A reviewing court “need
8 not determine whether counsel’s performance was deficient before examining the prejudice
9 suffered by defendant as a result of the alleged deficiencies . . . [i]f it is easier to dispose of an
10 ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be
11 followed.” *Pizzuto v. Arave*, 280 F.3d 949, 955 (9th Cir. 2002) (citing *Strickland*, 466 U.S. at
12 697).

13 The Supreme Court has held that the *Strickland* standard applies where a petitioner
14 challenges the effectiveness of his counsel with regard to a plea of guilty. *Hill*, 474 U.S. at 58.
15 “[I]n order to satisfy the ‘prejudice’ requirement, the defendant must show that there is a
16 reasonable probability that, but for counsel’s errors, he would not have pleaded guilty and would
17 have insisted on going to trial.” *Id.* at 59 (footnote omitted). “For example, where the alleged
18 error of counsel is a failure to investigate or discover potentially exculpatory evidence, the
19 determination whether the error ‘prejudiced’ the defendant by causing him to plead guilty rather
20 than go to trial will depend on the likelihood that discovery of the evidence would have led
21 counsel to change his recommendation as to the plea. This assessment, in turn, will depend in
22 large part on a prediction whether the evidence likely would have changed the outcome of the
23 trial.” *Id.*

24 A summary denial by a state court represents a decision on the merits for purposes of
25 AEDPA. *Harrington v. Richter*, ___ U.S. ___, 131 S.Ct. 770, 785, 178 L.Ed.2d 624 (2011)
26 (holding that 28 U.S.C. § 2254(d) “does not require a state court to give reasons before its

1 decision can be deemed to have been ‘adjudicated on the merits.’”). When analyzing a claim for
2 ineffective assistance of counsel where a state court has issued a decision on the merits, a habeas
3 court’s ability to grant the writ is limited by two “highly deferential” standards. *Premo v. Moore*,
4 __ U.S. __, 131 S.Ct. 733, 740, 178 L.Ed.2d 649 (2011). “When § 2254(d) applies,” as it does
5 here, “the question is not whether counsel’s actions were reasonable. The question is whether
6 there is any reasonable argument that counsel satisfied *Strickland*’s deferential standard.” *Id.*

7 Many of Petitioner’s factual allegations in Claim I do not relate to any advice that was
8 given to Petitioner with regard to his plea, but rather with events which occurred during
9 Petitioner’s trial, which ended in a mistrial. For instance, Petitioner alleges that his counsel
10 failed to provide him with an unbiased jury by permitting a probation officer who was a member
11 of the jury pool to state he knew Petitioner. However, the record indicates that the entire jury
12 panel was stricken after this statement. *See Rep.’s Tr. at 166; Clerk’s Tr. at 150.* Therefore
13 Petitioner cannot show that he was in any way prejudiced by such a statement. Furthermore,
14 Petitioner alleges that his “case was prejudiced as his attorney sat him directly facing the jury
15 members as a large projector screen (also facing the jurors) showed photos that prejudiced the
16 case” and that his counsel failed to object to the introduction of prejudicial photos shown at trial.
17 Again, this is a reference to Petitioner’s trial, which ended in a mistrial before Petitioner decided
18 to accept the plea agreement. As such, Petitioner cannot show that he was prejudiced by such
19 activity.

20 Counsel repeatedly suggested Petitioner accept a plea agreement which had been offered
21 by the prosecution. Initially Petitioner refused. As time passed, Petitioner became dissatisfied
22 with counsel’s representation. Before Petitioner’s trial, he made a motion pursuant to *People v.*
23 *Marsden*, 2 Cal.3d 118, 465 P.2d 44, 84 Cal.Rptr. 156 (1970), to have his counsel replaced. The
24 motion was denied. Clerk’s Tr. at 127. Dissatisfaction with one’s counsel, however, even on
25 direct review, is not sufficient to warrant relief for ineffective assistance of counsel. Petitioner
26 must show that his attorney’s conduct fell below an objective standard of reasonableness which

1 resulted in prejudice to his defense. *Strickland*, 466 U.S. at 688.

2 Petitioner claims his counsel should have done further investigation regarding
3 fingerprints on the gun involved in the shooting and done more to question the lead detective's
4 credibility. Petitioner further alleges that the photographic and video evidence were altered to
5 change the color of the suspect's shirt and that counsel should have obtained expert testimony in
6 support of such allegation. Considering the strength of the evidence against Petitioner, it is
7 unlikely that had counsel done as Petitioner suggests that any exculpatory evidence would have
8 been found, or that such evidence would have been enough to change counsel's opinion in
9 suggesting Petitioner plead guilty. *See Hill*, 474 U.S. at 59.

10 A review of the entire record shows Petitioner's counsel thought Petitioner had a weak
11 defense and that the prosecution's case would likely be successful. *See, e.g., Rep.'s Tr.* at 39. At
12 Petitioner's trial, when only pictures were available to corroborate the victim's testimony and
13 place Petitioner at the scene of the crime, Petitioner's counsel attempted to create an identity
14 defense. Petitioner's counsel argued that the prosecution could not prove beyond a reasonable
15 doubt that the person pictured buying cigarettes at the counter inside the store, which counsel
16 admitted was Petitioner,⁵ was the same person who spoke with the victim outside the store about
17 purchasing some marijuana and later returned to rob and shoot her. *See Rep.'s Tr.* at 306. Once
18 the videotape of the surveillance cameras at the scene resurfaced, an identity defense became a
19 much more difficult proposition. The video showed the same person identified as Petitioner at
20 the counter buying cigarettes go outside and converse with the victim. Minutes later, that same
21 person came back to the store, where what appears to be an altercation with the victim ensued.
22 The video thus corroborated the victim's testimony. As the trial judge stated in granting
23 Petitioner and his co-defendant's motion for a mistrial, "the evidence is much stronger in the

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25 ⁵ While a transcript of the interview is absent from the record, the Detective
26 investigating the case claims that Petitioner, after being informed of his rights pursuant to
Miranda, admitted he was the person purchasing cigarettes in the photo. Clerk's Tr. at 61; *id.* at
182 (Petitioner's counsel admitting Petitioner made such a statement).

1 video than it was with the still photography;” “the strength of [the prosecution’s] case
2 considerably improves with the introduction of the videotape;” and, Petitioner’s counsel had
3 “correctly stated that the evidence on the tape arguably is more inculpatory than had previously
4 been suggested by the still photography.” Rep.’s Tr. at 308, 311, 316. As Counsel stated:

5 In my opening statement, I informed the jury, yes, Mr. Erwin was
6 in the store that night, he purchased cigarettes, but he’s not the
7 robber. Yes, [the victim] was robbed; yes, she was shot, but not by
8 my client. . . .

9 Now having looked at the video, the person who had contact with
10 [the victim], after having purchased the cigarettes, is my client, and
11 I’m saying that because the video shows an individual inside the
12 store who I have conceded to the jury is my client, and shortly
13 thereafter he leaves the store. And then a person in a yellow shirt
14 is seen moving around and arguably having a confrontation with
15 [the victim] at her vehicle. . . .

16 *Id.* at 307. Before Petitioner’s retrial began, Counsel again urged Petitioner to accept the plea
17 agreement. She also urged Petitioner’s mother to encourage him to accept the plea agreement,
18 stating that it was the only way for him to avoid life in prison.

19 “Counsel is strongly presumed to have rendered adequate assistance and made all
20 significant decisions in the exercise of reasonable professional judgment,” *Strickland*, 466 U.S.
21 at 690, and counsel is not required to investigate every possible line of defense, *Id.* at 691
22 (“[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that
23 makes particular investigations unnecessary.”). Here, based on the strength of the evidence
24 against Petitioner⁶—the surveillance video and the victim’s testimony—Petitioner’s counsel
25 could reasonably have concluded that any additional investigation was unnecessary and a plea
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⁶ The strength of the evidence would also make it difficult for Petitioner to affirmatively show Prejudice under the second prong of *Strickland*: that “there is a reasonable probability that, but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial.” *Hill*, 474 U.S. at 59; *see Strickland*, 466 U.S. at 692. Petitioner insisted on going to trial, even with the alleged deficiencies of his counsel. It was only when the surveillance footage was rediscovered that Petitioner chose to plead guilty, making this the more likely cause of his plea.

1 agreement was in Petitioner’s best interest to avoid what counsel reasonably believed was an
2 impending life sentence. *See Hill*, 474 U.S. at 59. Applying AEDPA’s highly deferential
3 standard, a reasonable argument exists that counsel satisfied *Strickland*’s deferential standard.
4 *See Premo*, 131 S.Ct. at 740. As such, Petitioner cannot show that his plea was a result of
5 ineffective assistance of counsel and, therefore, Petitioner is not entitled to relief on Claim I.

6 2. Claims II and III

7 Claims II and III raise issues with regard to pre-plea conduct. Specifically, in Claim II,
8 Petitioner contends that his counsel was ineffective because counsel failed to conduct a
9 reasonable pre-trial investigation. In Claim III, Petitioner alleges outrageous government
10 misconduct, arguing that one of the lead detectives in the case not only misrepresented the facts
11 but actually wrote false reports and altered physical evidence in order to implicate Petitioner in
12 the crime.

13 “A plea of guilty and the ensuing conviction comprehend all of the factual and legal
14 elements necessary to sustain a binding, final judgment of guilt and a lawful sentence.
15 Accordingly, when the judgment of conviction upon a guilty plea has become final and the
16 offender seeks to reopen the proceeding, the inquiry is ordinarily confined to whether the
17 underlying plea was both counseled and voluntary. If the answer is in the affirmative then the
18 conviction and the plea, as a general rule, foreclose the collateral attack.” *United States v. Broce*,
19 488 U.S. 563, 569 (1989). “[A] guilty plea represents a break in the chain of events which
20 preceded it in the criminal process. When a criminal defendant has solemnly admitted in open
21 court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise
22 independent claims relating to the deprivation of constitutional rights that occurred prior to the
23 entry of the guilty plea.” *Tollet*, 411 U.S. at 267 (1973); *see Hudson v. Moran*, 760 F.2d 1027,
24 1029-30 (9th Cir. 1985), *cert. denied*, 474 U.S. 981 (1985) (“ As a general rule, one who
25 voluntarily and intelligently pleads guilty to a criminal charge may not subsequently seek federal
26 habeas corpus relief on the basis of pre-plea constitutional violations.”); *Moran v. Godinez*, 57

1 F.3d 690, 699-700 (9th Cir. 1994), *overruled on other grounds by Lockyer v. Andrade*, 538 U.S.
2 63 (2003) (applying *Tollett* to bar inquiry into the merits of a Petitioner’s pre-plea ineffective
3 assistance of counsel claim).

4 As Petitioner’s plea was both counseled and voluntary, *see* Claim I, *supra*, Petitioner is
5 barred from raising any alleged constitutional violations which arose before his plea of guilty.
6 As such, Claims II and III are barred and Petitioner is not entitled to relief on these Claims.

7 3. Claim IV

8 In Claim IV, Petitioner alleges his trial counsel was ineffective at Petitioner’s sentencing.
9 Specifically, Petitioner alleges: 1) his counsel was deficient in failing to object to Petitioner’s
10 probation report, which he asserts contained false information; 2) counsel failed to inform
11 Petitioner of the details of the sentencing procedure; and, 3) counsel failed to inform Petitioner of
12 his right to appeal.

13 Pursuant to *Strickland v. Washington*, discussed more fully *supra*, in order for a Petitioner
14 to succeed on a claim of ineffective assistance of counsel he must show that counsel’s
15 performance fell below an objective standard of reasonableness and that he was actually
16 prejudiced by counsel’s substandard performance. *Strickland*, 466 U.S. at 687. Petitioner cannot
17 affirmatively show that “there is a reasonable probability that, but for counsel’s unprofessional
18 errors, the result of the proceeding would have been different.” *Id.* at 694. Petitioner, facing the
19 possibility of a life sentence if found guilty at trial, plead guilty to the charged crimes in
20 exchange for a determinate sentence of twenty-two years in prison. *See* Rep.’s Tr. at 337-345.
21 Even assuming the information provided in the pre-sentence report was factually incorrect or that
22 counsel failed to inform Petitioner of the detailed sentencing procedures, this had no bearing
23 upon the imposed twenty-two year sentence as this had already been agreed upon when Petitioner
24 plead guilty.⁷ Furthermore, Petitioner cannot show prejudice with regard to counsel’s alleged

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26 ⁷ The pre-sentence probation report recommended a term of twenty-*three* years.
Rep.’s Tr. at 355. The court rejected this recommendation and stood by the stipulated agreement,

1 failure to inform him of his ability to appeal because Petitioner did, in fact, timely appeal his
2 case. *See* Slip Op. As such, Petitioner cannot affirmatively prove he was prejudiced by
3 counsel’s alleged ineffectiveness at sentencing and, therefore, Petitioner is not entitled to relief
4 on Claim IV.

5 4. Claim V

6 In Claim V, Petitioner alleges that evidence used to convict him was obtained through an
7 illegal search of an apartment at which he was an overnight guest in violation of his Fourth
8 Amendment rights. After holding an evidentiary hearing on Petitioner’s motion to suppress, the
9 trial court concluded that the search of the apartment was constitutional and denied the motion.
10 Rep.’s Tr. at 137. On appeal, the California Court of Appeal found as follows:

11 Before trial, the following evidence was introduced at the hearing
12 on defendant's motion to suppress:

13 At approximately 7:00 p.m. on the evening of July 28, 2005,
14 Sacramento Police Officer Zachary Bales was on duty at the
15 Evergreen Shopping Center with his partner Officer Shrum. Bales
16 heard at least three gunshots fired from the direction of apartments
17 across the street. The two officers received a radio dispatch
18 regarding the gunshots at the same time they started driving to the
19 apartments. They advised dispatch that they were responding and
20 asked for back-up units. A copy of the dispatch appeared on Bales's
21 computer which indicated that the caller described the suspects as a
22 group of five 17-year-old Hispanic males in a black and gray SUV.
23 Given the “computer lag time,” Bales was unsure whether he read
24 all the details at the same time that he received the radio dispatch.

19 Mr. Shekh, the security guard at the apartment complex, hailed
20 Bales and Shrum when they drove through the gates. Bales testified
21 that he asked Shekh “if he had heard where the shots had come
22 from” and Shekh responded, “[Y]es, they had run into [apartment]
23 128.” Bales did not ask for details about the physical description of
24 the men that Shekh had seen. Shekh directed the officer to
25 apartment 128. Officer Schrum observed a gray Suburban parked
26 nearby.

Officer Bales noticed children playing in the area and decided to
contact the occupants of unit 128 immediately “for the safety of all
the individuals” at the apartments. The officers smelled a strong

26 a term of twenty-two years in prison. *Id.*

1 odor of marijuana when they came within 10 feet of the door. Bales
2 knocked, loudly announcing, "Sacramento Police Department ...
3 open the door." After about five minutes, a man named Kenneth
4 Carter came to the door and opened it slightly. When he saw Bales,
5 he "raised his hands, opened the door further, and swung his hand
6 backward motioning [Bales] to come in."

7
8 Upon entering the apartment, Bales called for everyone to come
9 out with their hands up. Defendant, his co-defendant and a third
10 man responded by walking out of the apartment. Officer Bales
11 testified that, "all of the subjects stated that they did not live there.
12 They all stated they were on probation."

13 Bales and two officers conducted a protective sweep of the
14 apartment while other officers detained the four suspects outside.
15 Bales explained: "There was shots fired in the immediate time
16 frame and [they] had a witness tell [them] that he saw those
17 individuals run into that area. A vehicle matching the description
18 was right there and several subjects came out of the apartment."
19 During the protective sweep, Bales observed pieces of torn plastic
20 on the floor which looked like narcotics packaging. He also found
21 a plastic bag that contained live ammunition in the back bedroom.

22 At some point, Officer Shrum informed Bales that the apartment
23 was rented by a woman named Maleka Williams. Officer Bales
24 attempted to contact Williams after he carried out the protective
25 sweep to obtain her permission to conduct a more extensive search
26 of the apartment. However, he was unable to obtain a phone
number other than the number for the apartment.

Based on the suspects' stated probation status, Bales decided to
conduct a probation search of the areas under their immediate
control. Because there were no locked doors, and the suspects
came from the back hallway, the officers searched the entire
apartment. They found a .22-caliber revolver in the area between
the kitchen and living room. Bales searched what appeared to be
the master bedroom and found another handgun and a rifle partly
concealed behind the dresser.

Officer Bales contacted Mr. Shekh a second time after the search
was over. Bales acknowledged that there was a significant
language barrier in conversing with him. This time, Shekh told
Bales that he had not heard any gunshots at all.

Defendant moved to suppress evidence collected in the search of
apartment 128. Defendant represented in the statement of facts
included in his points and authorities that "Officers questioned the
men and learned that they were all on *searchable* probation, and
that none of them lived [at the apartment]." (Italics added.) In
addition, defendant filed an unsworn declaration in which he
described his relationship to Maleka Williams, the tenant in

1 apartment 128. Among other things, defendant stated in the
2 declaration that he had “permission on July 28 to stay with Ms.
3 Williams at her apartment until [his] mother could get enough
4 money together to get [him] out of state to stay with a relative for a
5 while.” Defendant had spent the night at Williams's apartment in
6 the past and “was free to come and go, ... to use the facilities ... and
7 keep some possessions there such as necessary clothing and
8 toiletries.” The declaration went on to say, “On the afternoon of
9 July 28, I expected privacy inside Ms. Williams' apartment. It was
10 ‘my house’ at that time as far as I was concerned .”

11 The court denied defendant's motion to suppress the evidence
12 collected at Williams's apartment. First, the court found that as an
13 overnight guest, defendant had a reasonable expectation of privacy
14 in the apartment, including the master bedroom, and was therefore
15 entitled to challenge the search. With respect to the search itself,
16 the court found: (1) given the fact that shots were fired and there
17 were children in the area, the officers had an “absolute duty to
18 make sure that any weapons that may be about would be found”;
19 (2) Carter invited the officers into the apartment; (3) the officers
20 properly conducted a protective sweep to determine whether there
21 were additional people in the apartment; (4) because the suspects
22 were all on probation, the officers “[had] the right to search the
23 apartment”; and (5) once Officer Bales found the ammunition in
24 plain sight, he “clearly had the right to search then the entire
25 presence for the purpose of other weapons. And he did so and
26 further weapons were found.” The court expressly found that there
was no significance in the conflicting description of the suspects,
Shekh's subsequent statement that he had not heard any gun shots,
or the failure to make a more exhaustive attempt to locate
Williams.

17 DISCUSSION

18 Defendant argues that the court erred in denying his motion to
19 suppress because: (1) Carter’s consent to enter did not provide a
20 basis for searching the entire apartment; (2) there were no exigent
21 circumstances to justify the search that resulted in discovery of the
22 firearms; (3) the suspects’ probationary status did not justify the
23 full search of the apartment; and (4) none of the four suspects had
24 authority or control over the master bedroom. Appearing to
25 contradict the last point, defendant asserts in his reply brief that the
26 court properly found that as an overnight guest, defendant had a
reasonable expectation of privacy that allowed him to challenge the
search.

On appeal, we defer to the trial court's factual findings if they are
supported by substantial evidence, but independently review as a
question of law whether, on the facts found, the search conforms to
the constitutional standard of reasonableness. (*People v. Alvarez*
(1996) 14 Cal.4th 155, 182; *People v. Stewart* (2003) 113

1 Cal.App.4th 242, 248 (*Stewart*.) “We may sustain the trial court’s
2 decision without embracing its reasoning.” (*People v. McDonald*
3 (2006) 137 Cal.App.4th 521, 529.) Accordingly, we will affirm the
4 superior court's ruling on defendant's motion to suppress if it is
5 correct on any theory of applicable law, “even if the ruling was
6 made for an incorrect reason.” (*Ibid.*)

7 The first question is whether, as an overnight guest, defendant is
8 entitled by law to challenge the search of apartment 128. “An
9 illegal search or seizure violates the federal constitutional rights
10 only of those who have a legitimate expectation of privacy in the
11 invaded place or the seized thing. [Citations.] The legitimate
12 expectation must exist in the particular area searched or thing
13 seized in order to bring a Fourth Amendment challenge. [Citation.]
14 Defendant bears the burden of showing a legitimate expectation of
15 privacy. [Citation.]” (*People v. Roybal* (1998) 19 Cal.4th 481, 507
16 (*Roybal*.) To establish a reasonable expectation of privacy,
17 defendant must demonstrate that his subjective expectation is
18 objectively reasonable, that is, “justifiable' under the
19 circumstances.” (*Smith v. Maryland* (1979) 442 U.S. 735, 740 [61
20 L.Ed.2d 220, 226-227].) Because the historical facts concerning
21 standing are established by uncontradicted evidence, we
22 independently review the trial court's ruling that defendant was
23 entitled to challenge the search. (*People v. McPeters* (1992) 2
24 Cal.4th 1148, 1172 (*McPeters*.)

25 In deciding whether a defendant has demonstrated a reasonable
26 expectation of privacy, the court must consider whether: (1) the
27 defendant has a property or possessory interest in the place
28 searched; (2) whether he has the right to exclude others from that
29 place; (3) whether he has shown the subjective expectation that the
30 place would remain free from governmental invasion; (4) whether
31 he took normal precautions to maintain his privacy; and (5)
32 whether he was legitimately on the premises. (*Roybal, supra*, 19
33 Cal.4th at p. 507.) Whether an overnight guest has a reasonable
34 expectation of privacy under this test turns on the facts of the
35 particular case. (*See, e.g., McPeters, supra*, 2 Cal.4th at pp.
36 1171-1172; see also *Stewart, supra*, 113 Cal.App.4th at pp.
37 250-253.)

38 Here, defendant’s declaration in support of the suppression motion
39 described his connection with the apartment in broad terms. From
40 defendant's perspective, it was “his house” where he was “free to
41 come and go” as he liked. Nothing in the declaration suggests that
42 defendant's use of the apartment was limited to the common areas
43 in the front. Indeed, Officer Bales testified that defendant and the
44 two other men came from “the back hallway where the two
45 bedrooms were” when he told them to come out. We conclude that
46 the record supports the court's finding that defendant had a
47 reasonable expectation of privacy in the entire apartment.

1 The second question is whether the search of the common areas of
2 the apartment violated defendant's Fourth Amendment rights.
3 Consent is a well-established exception to the warrant requirement.
4 (*People v. Woods* (1999) 21 Cal.4th 668, 674.) A person on
5 probation may validly consent in advance to warrantless searches
6 and seizures in exchange for the chance to avoid serving a state
7 prison term. (*Ibid.*) The People have the burden of showing that
8 the officers conducted the search pursuant to a valid exception to
9 the warrant requirement. (*People v. Williams* (1999) 20 Cal.4th
10 119, 127-128, 136.)

11 The record supports the trial court's finding that Carter consented
12 to the officer's entry into the apartment. At that point, Bales called
13 for the suspects to come out, and then conducted a protective
14 sweep to ensure the safety of the officers and nearby residents. (*See*
15 *People v. Ledesma* (2003) 106 Cal.App.4th 857, 863.) Whether the
16 officer has a reasonable suspicion to justify a protective sweep
17 depends on the totality of the circumstances. (*Ibid.*) Here the
18 protective sweep was justified by the fact that recent shots had
19 been heard in the vicinity, Shekh hailed the officers and directed
20 them to apartment 128, a vehicle matching the dispatch description
21 was parked nearby, children were playing in the area, there was a
22 five minute delay before Carter opened the door of the apartment,
23 and three additional men showed themselves only after the officers
24 told them to come out with their hands up.

25 When the protective sweep revealed a bag of live ammunition in
26 plain view, the officers conducted what Bales called a probation
search based on the suspects' statement that they were on probation
and did not live at the apartment. The officers found a .22-caliber
handgun in the common area, and the additional weapons in the
master bedroom.

Whether the probation search was justified turns on whether the
officers understood that the suspects were subject to a search
condition. (*See People v. Sanders* (2003) 31 Cal.4th 318, 332.)
Although Bales's testimony that defendant was on "probation" may
have been ambiguous, defendant conceded in his points and
authorities in the trial court that it was "searchable probation." The
court properly relied on that concession in ruling that the search
was proper.

Slip Op. at 3-11.

In *Stone v. Wolff*, the Supreme Court held that "where the State has provided an
opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be
granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional

1 search or seizure was introduced at his trial.” *Stone v. Wolff*, 428 U.S. 465, 494 (1976)
2 (footnotes omitted). Here, Petitioner was given a full and fair hearing at the trial court on his
3 motion to suppress. *See Rep.’s Tr.* at 85-130. He was also permitted to appeal the trial court’s
4 ruling and the California Court of Appeal produced a reasoned decision upholding the trial
5 court’s determination not to suppress the evidence. *See Slip Op.* As such, Petitioner’s Fourth
6 Amendment claim is barred by *Stone*. *See Moorman v. Schiro*, 426 F.3d 1044, 1053 (9th Cir.
7 2005) (*Stone* bars consideration of a Fourth Amendment claim in habeas when the state provided
8 an evidentiary hearing at the trial level which was later reviewed by a state appellate court).

9 Furthermore, the remedy for a violation of the Fourth Amendment is exclusion of the
10 illegally seized evidence at trial. *See Warden v. Hayden*, 387 U.S. 294, 304-05 (1967); *Mapp v.*
11 *Ohio*, 367 U.S. 643 (1961) (applying exclusionary rule to the states). In the present case,
12 Petitioner chose not to go to trial and pled guilty to the alleged crime.⁸ His plea was not a result
13 of the denial of his motion to suppress and no evidence obtained in the search was used to
14 convict Petitioner. *See Broce*, 488 U.S. at 569 (“A plea of guilty and the ensuing conviction
15 comprehend all of the factual and legal elements necessary to sustain a binding, final judgment of
16 guilt and a lawful sentence.”). As such, even if Petitioner’s Fourth Amendment rights were
17 violated, as neither court to address the issue concluded, the constitutional infraction had no
18 bearing upon Petitioner’s conviction. Petitioner is not entitled to habeas relief on Claim V.

19 IV. REQUEST FOR AN EVIDENTIARY HEARING

20 Finally, Petitioner requests an evidentiary hearing on his Claims. (*See Pet’r’s Traverse at*
21 *p. 3.*) A court presented with a request for an evidentiary hearing must first determine whether a
22 factual basis exists in the record to support petitioner’s claims, and if not, whether an evidentiary
23 hearing “might be appropriate.” *Baja v. Ducharme*, 187 F.3d 1075, 1078 (9th Cir. 1999); *see*
24

25 ⁸ Fourth Amendment claims are also generally barred by the *Tollett* rule. *Lefkowitz*
26 *v. Newsome*, 420 U.S. 283, 289 (1975). However, an exception exists where, as in California, a
state permits defendants who plead guilty to still challenge the admissibility of the evidence as a
violation of the Fourth Amendment on direct appeal. *Id.* at 289-92.

1 also *Earp v. Ornoski*, 431 F.3d 1158, 1166 (9th Cir. 2005). A petitioner requesting an
2 evidentiary hearing must also demonstrate that he has presented a “colorable claim for relief.”
3 *Earp*, 431 F.3d at 1167 (citations omitted). To show that a claim is “colorable,” a petitioner is
4 “required to allege specific facts which, if true, would entitle him to relief.” *Ortiz v. Stewart*, 149
5 F.3d 923, 934 (9th Cir. 1998) (internal quotation marks and citation omitted). In this case,
6 Petitioner’s claims are readily determined by the record. Petitioner has not alleged any additional
7 facts that, if true, would entitle him to relief and, therefore, Petitioner fails to demonstrate that he
8 has a colorable claim for federal habeas relief. Moreover, the Supreme Court has recently held
9 that federal habeas review under 28 U.S.C. § 2254(d)(1) “is limited to the record that was before
10 the state court that adjudicated the claim on the merits” and “that evidence introduced in federal
11 court has no bearing on” such review. *Cullen v. Pinholster*, __ U.S. __, 131 S.Ct. 1388, 1398,
12 1400 (2011). Thus, his request will be denied.

13 V. CONCLUSION

14 Accordingly, IT IS HEREBY ORDERED that Petitioner’s request for an evidentiary
15 hearing is DENIED.

16 For all of the foregoing reasons, IT IS HEREBY RECOMMENDED that the petition for
17 writ of habeas corpus be DENIED.

18 These findings and recommendations are submitted to the United States District Judge
19 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty-one days
20 after being served with these findings and recommendations, any party may file written objections
21 with the court and serve a copy on all parties. Such a document should be captioned “Objections
22 to Magistrate Judge’s Findings and Recommendations.” Any reply to the objections shall be
23 served and filed within seven days after service of the objections. The parties are advised that
24 failure to file objections within the specified time may waive the right to appeal the District
25 Court’s order. *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991). In any objections he elects to file,
26 Petitioner may address whether a certificate of appealability should issue in the event he elects to

1 file an appeal from the judgment in this case. *See* Rule 11, Federal Rules Governing Section 2254
2 Cases (the district court must issue or deny a certificate of appealability when it enters a final
3 order adverse to the applicant).

4 DATED: June 14, 2011

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A handwritten signature in blue ink, appearing to read 'Timothy J Bommer', written over a horizontal line.

TIMOTHY J BOMMER
UNITED STATES MAGISTRATE JUDGE

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