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

JOHN NGUYEN,

No. C 11-03324 WHA

Petitioner,

**ORDER DENYING PETITION FOR
WRIT OF HABEAS CORPUS;
GRANTING CERTIFICATE OF
APPEALABILITY**

v.

KATHLEEN DICKENSON,

Respondent.

_____ /

INTRODUCTION

This is a non-capital habeas corpus action filed by a state prisoner pursuant to 28 U.S.C. 2254 alleging ineffective assistance of counsel. Respondent was ordered to show cause why the writ should not be granted. For the reasons set forth below, the petition is **DENIED**. There is no need for an evidentiary hearing.

STATEMENT

On September 4, 2007, petitioner John Nguyen was convicted of attempted murder following a jury trial and sentenced to an indeterminate term of 25 years to life consecutive to a determinate term of five years. Petitioner appealed his conviction to the California Court of Appeal, which affirmed in an unpublished opinion dated January 5, 2010. On the same day, the Court of Appeal summarily denied petitioner’s state habeas petition. The California Supreme Court denied the petition for review and summarily denied petitioner’s habeas petition on March 16, 2011.

1 The following facts are drawn from the decision of the California Court of Appeal on the
2 direct appeal of the petitioner's conviction, *People v. Nguyen*, No. H032459, 2010 WL 22359
3 (Cal. App. Jan. 5, 2010), and are consistent with this Court's own review of the record.

4 By way of overview, on March 21, 2005, petitioner and his friends Tony Nguyen and
5 Hung Nguyen went to the Heo May Café in San Jose. At the café, they met another group of
6 men, Howson Nguyen, Howson's younger brother Tung Nguyen, and Howson's friends Minh
7 Trinh and Kha Nguyen. A dispute arose over paying a gambling debt, and the owner asked the
8 men to leave. Once outside the café, Howson and petitioner got into a physical altercation.
9 While they were struggling, a single shot was fired (by someone other than petitioner), which hit
10 Minh. More gunshots were then fired. Minh was shot multiple times and was later taken to the
11 hospital in critical condition, but survived. (Because many of the witnesses have the same last
12 name, for ease of reference this order may refer to them by their first names.)

13 **1. THE PROSECUTION'S CASE.**

14 The critical question was whether petitioner was a shooter. The prosecution's case
15 proceeded as follows.

16 Howson, the friend of Victim Minh, was a key witness for the prosecution. He testified
17 that, after the men were kicked out of the café, petitioner acted as if he wanted to fight. In the
18 parking lot outside the café, petitioner swung at Howson, hitting him in the head. Howson then
19 ducked down and grabbed petitioner's shirt. A gunshot was fired, at which point Howson pulled
20 petitioner down to the ground, turned around, and ran. Howson's friend Kha followed. When
21 Howson reached the end of the café parking lot, he realized that he had lost his car keys. He
22 could still hear gunshots coming from in front of the café, so he ducked down between two
23 parked cars. Kha also ducked down and hid about three or four cars away from Howson.
24 Howson testified that he heard gunshots for about twenty to forty seconds. After the gunfire had
25 ceased, Howson received a call on his cell phone from Minh, who said that he had been shot.
26 Howson went back through the parking lot and saw Minh lying on the ground bleeding. Howson
27 did not say that he saw the shooter(s).
28

1 Howson testified at trial that he picked petitioner's photo out of the photo lineup and
2 identified him as the man with whom he had been fighting. He similarly identified petitioner at
3 the preliminary examination and at trial as the man with whom he had been fighting.

4 Victim Minh testified that he watched Howson and petitioner struggling outside the café.
5 Minh ran when he heard the first gunshot, but fell to the ground and realized he had been shot in
6 the lower back. Continuing to hear gunshots, he crawled between two parked cars to hide. Minh
7 hid near the front wheel of the driver's side of a black Mitsubishi that had been backed into its
8 parking stall. Minh further testified that petitioner came around the car on the driver's side,
9 approaching from the rear of the car. Petitioner had a gun in his left hand and pointed it down at
10 Minh. Minh said, "hey, man, you got the wrong guy," and scooted backwards out of the parking
11 stall. He raised his arms to cover his face when he saw petitioner raise the gun and point it at his
12 body. The gunshot hit Minh in the arm. Minh saw a second man lean over the hood from the
13 passenger's side of the car and fire at him once or twice. Minh felt a shot hit him in the stomach.
14 He then saw petitioner and the other man get into the car and drive off. Minh testified that he
15 used his cell phone to tell Howson that he had been shot. Howson and Kha found Minh lying on
16 the ground in the parking lot.

17 Minh testified that on the morning of March 23, two days after the shooting, Howson
18 visited him at the hospital. Minh asked Howson what had happened. Howson told Minh that
19 they had gone to the café in order to collect some money. He said that Hung (petitioner's friend)
20 owed Tung (Howson's brother) money from a gambling debt, and that Hung had called to tell
21 them to come collect it. Howson asked Minh who shot him. Minh responded that it was the man
22 who had been fighting with Howson. Howson said that the man was named "John."

23 Minh testified that he had picked petitioner's photo out of the lineup and that he was sure
24 petitioner was one of the men who shot him. This was because petitioner, who Minh identified
25 at trial, was the same man who fought with Howson and because petitioner stood right in front of
26 Minh prior to shooting him.

27 Tung, Howson's younger brother, testified that he saw petitioner shoot Victim Minh.
28 Tung testified that, when he heard the gunshots, he ran and hid behind a car elsewhere in the

1 parking lot. Tung saw Minh fall down beside another car, and then saw petitioner stand over
2 Minh and shoot him one or two times before getting into a car. Tung did not see anyone else
3 shoot Minh. Tung was afraid, so he ran across the street to a 7-Eleven store. Tung was
4 interviewed about the shooting by the police that night, and on several occasions thereafter.
5 Tung testified at trial that he only saw one man shoot Minh, that he knew the shooter as John
6 Nguyen, the petitioner. On cross-examination, Tung admitted that he had never told the police
7 that he saw petitioner shoot Minh (Reporter's Tr. at 460).

8 San Jose police officers responded to the scene, took photographs, and secured the scene.
9 Officers photographed and collected 13 nine-millimeter shell casings and two .380-caliber
10 casings. Officers interviewed Howson, who gave them a statement. Howson later admitted that
11 the statement he gave left out certain information, including that he had gone to the café to
12 collect a gambling debt and that the person he had been fighting with was named John (*id.* at
13 300). Howson testified at trial that he did not tell the police everything because he was
14 concerned for his and his family's safety. The police found Tung at the nearby 7-Eleven. Tung
15 did not tell the police what he had seen. He testified at trial that he did not provide any
16 information because he was afraid. Officers also interviewed Kha about what he had seen.

17 Officer Parker Hathaway, who was assigned as an investigator on the case, testified that
18 he had received reports that approximately two hours after the incident, petitioner's friend Hung
19 called 911 and reported that he had received a gunshot wound to his leg. At the time of his call,
20 Hung was at the 7-Eleven store across the street from the café. Officers responded and seized
21 Hung's car, a white Honda, from the cafe's parking lot. Hung's hands were swabbed and the
22 clothing he was wearing was seized. Testing in the county crime lab revealed that no gunshot
23 residue was detected on the swabs, but gunshot residue was found on the right waistband area of
24 Hung's pants. Because of this, Hung became a "person of interest."

25 Officer Hathaway also testified that he contacted Minh at the hospital the morning after
26 the shooting, March 22, but was unable to interview him in detail due to Minh's condition. On
27 March 23, sometime after Howson had visited Minh, Officer Hathaway spoke to Minh in the
28 hospital. Officer Hathaway testified that Minh said that Tung was arguing with a man inside the

1 café over a debt. They all went outside, where a man verbally confronted Howson. Minh heard
2 a gunshot and felt numb. He knew that he had been shot, because his leg went numb after he
3 heard the shot. Officer Hathaway further testified that Minh said he then tried to crawl to the
4 parking lot area to hide by a parked car. Minh told him that the same man who had struggled
5 with Howson came and shot Minh while he was on the ground by the parked car. Minh did not
6 tell the officer that there was a second shooter (*id.* at 678).

7 On March 24, Officer Hathaway spoke to Howson at the police station. Howson said he
8 had been in a fight with a man named “John” over a gambling debt. He said that “John” was 23
9 years old, about five feet eight inches tall with a medium build, and that he had been wearing a
10 red long-sleeved collared shirt over a white T-shirt and a white or gray sweatshirt.

11 Officer Hathaway further testified that Tung, Howson’s brother, was interviewed over the
12 telephone by Officer Thuy Le. On April 16, 2005, Tung was shown a photo lineup containing a
13 photo of Hung. Tung pointed out Hung’s photo and gave the officer contact information for
14 Hung and Hung’s brother, Tony.

15 Officer Hathaway interviewed Hung in September 2005, who was a “person of interest”
16 because he had been shot the night of the incident and testing indicated that he had gunshot
17 residue on his clothing. Hung was cooperative until he was asked specific questions about the
18 incident, at which point he asked for a lawyer and the interview concluded. Officer Hathaway
19 tried to determine who Hung’s associates were. He was “able to associate” petitioner with Hung
20 because “they had been contacted together at a previous time.”

21 Officer Hathaway further testified that, about a year after the incident, Kha, Minh,
22 Howson, and Tung were shown some photo lineups. Kha picked out petitioner’s photo. Victim
23 Minh identified the photo of petitioner as “John,” the person who argued with Howson and who
24 shot Minh while Minh was lying by the car in the parking lot. Minh also identified the photo of
25 Tony as the man Minh thought may have shot him while leaning over the hood of the car.
26 Howson picked out petitioner’s photo from the photo lineup as the person he had been fighting
27 with. Tung was shown the photo lineups and pointed out petitioner. Tung told police that
28 petitioner was sitting with Hung at the café, that petitioner and Howson argued, and that

1 petitioner hit Howson outside the café prior to the shooting. Tung did not say that he had seen
2 petitioner shoot Minh.

3 Petitioner was arrested in April 2006. Officer Hathaway testified that petitioner told him
4 that Hung was his barber around the time of the incident. Petitioner further told the officer that
5 he had not talked to Hung in six or seven months because Hung had “disappeared.” Petitioner
6 also said that he knew Hung’s brother Tony. Petitioner owned a brown Honda.

7 **2. THE DEFENSE’S CASE.**

8 Petitioner was represented at trial by Attorney David Johnson. Petitioner testified on his
9 own behalf that he is right-handed, not left-handed. He further testified that he did not have a
10 gun on the night of March 21, 2005, and that he did not shoot Minh. Petitioner went to the café
11 that night with his friend Tony, who told petitioner that Tony’s brother, Hung, owed some
12 money. Tony drove petitioner to the café and Hung arrived later.

13 Then, the other group of men came into the café (Howson, Tung, Minh, and Kha). There
14 was a disagreement over the debt, which was gambling-related, and petitioner and Howson
15 injected themselves into the discussion. The disagreement became more heated and the café
16 manager told them to take their argument outside. The two groups of men went outside, as did
17 several other café customers.

18 Once outside, petitioner saw Howson approach and, thinking that Howson was going to
19 hit him, petitioner tried to hit Howson. Howson grabbed petitioner’s shirt and they struggled.
20 Petitioner fell to the ground. He then heard a number of gunshots. Because he was scared,
21 petitioner ran out of the parking lot and hid by a mobile home. After a few minutes, petitioner
22 saw Hung limping towards him, carrying a gun. Hung said that he could not run any farther but
23 told petitioner to keep going. Petitioner walked home, about five miles away.

24 Petitioner saw Hung the next day. Hung said that he had been at the hospital and that he
25 “got one of the guys good.” After that, petitioner did not see Hung again. Contrary to the
26 foregoing, petitioner told Officer Hathaway in April 2006 that he did not know anything about
27 the shooting. He told the officer this because he did not want to “get involved” and did not want
28 to “snitch” on Hung, the person of interest to the police.

1 The defense called Officer Le as a witness, who testified that he and Officer Hathaway
2 interviewed Minh at the hospital on March 22, the day after the incident. Minh said that Tung
3 began to argue with some men inside the café about a gambling debt. After everyone went
4 outside, the men fought with Tung. Minh said that he was shot when he was two feet from the
5 front door of the café. After he was shot, he fell to the ground. The shooter walked up to him,
6 called him a “motherfucker,” and shot him three or four times at close range. Minh said that he
7 could not remember what happened next. He described the shooter as being about 25 to 26 years
8 old, five feet seven inches tall, 150 pounds, and wearing a black jacket. Minh did not say that
9 the person who shot him was named “John.”

10 Officer Le further testified that officers interviewed Minh again the following day, March
11 23. Minh said that Howson was fighting with someone; during this time, someone came up from
12 behind Minh and shot him in the back. Minh fell to the ground and crawled to a parked car for
13 safety. He was lying next to the driver’s side door of a black Mitsubishi when the person who
14 had been fighting with Howson walked towards him and shot him four times before getting into
15 the Mitsubishi and leaving the area. Minh did not mention a second shooter at that time.

16 David Flores, a private investigator, testified that he took measurements at the café and
17 determined that the distance from the front door of the café to the far end of the parking stall
18 where Minh was found was 57 feet five inches.

19 Neither Hung nor his brother Tony were available to testify at trial. Hung was
20 questioned once by Officer Hathaway about six months after the shooting, but officers were
21 unable to find him again before the trial, or since (*id.* at 848). Tony had a warrant out for his
22 arrest, but police were unable to locate him at the time of the trial (*id.* at 761-62, 781).

23 * * *

24 The jury found petitioner guilty of attempted murder and found that petitioner personally
25 and intentionally discharged a handgun and that he personally inflicted great bodily injury upon
26 a person not an accomplice during the commission of the offense. The jury found that the
27 attempted murder had not been proven to be willful, deliberate, and premeditated. The trial
28 judge sentenced petitioner to the indeterminate term of 25 years to life consecutive to the

1 determinate term of five years. The court struck the bodily-injury enhancement. According to
2 the probation officer's report, submitted to the court at sentencing, petitioner was 25 years old at
3 the time of sentencing and did not have a prior criminal record (Clerk's Tr. Exh. 2 at 286-87).

4 Petitioner filed the instant federal petition for writ of habeas corpus on July 7, 2011. The
5 petition asserts two ineffective assistance of counsel claims: (1) trial counsel rendered
6 ineffective assistance by failing to present a ballistics expert at trial, and (2) trial counsel
7 rendered ineffective assistance when he failed to present exculpatory evidence from three
8 witnesses who would have testified on petitioner's behalf. The petition also includes a claim for
9 relief based on actual innocence. Included with the petition are three declarations from
10 witnesses who claim to have been at the café on the night of the shooting, two declarations from
11 alleged expert witnesses, and a declaration from petitioner's trial counsel. These declarations
12 were all included with the state habeas petition. The record presented in this federal action was
13 presented in full on the state habeas application, which was denied without comment.

14 Here, respondent was ordered to show cause why a writ should not issue. Respondent
15 filed an answer, along with a supporting memorandum. Petitioner then filed a traverse in
16 response. The parties were requested to file supplemental briefs based on a point of dispute in
17 the parties' briefs regarding whether petitioner, his counsel, the police, or the prosecution
18 withheld information about the three fact witness declarants prior to or during trial. Following a
19 status conference, the parties filed supplemental briefs regarding the district court's authority to
20 hold an evidentiary hearing regarding ambiguous and/or disputed issues of fact in declarations
21 submitted with the petition.

22 ANALYSIS

23 1. THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT.

24 Pursuant to AEDPA, a district court may not grant a writ of habeas corpus with respect to
25 any claim that was adjudicated on the merits in state court unless the state court's adjudication of
26 the claim: "(1) resulted in a decision that was contrary to, or involved an unreasonable
27 application of, clearly established Federal law, as determined by the Supreme Court of the
28 United States; or (2) resulted in a decision that was based on an unreasonable determination of

1 the facts in light of the evidence presented in the State court proceeding.” 28 U.S.C. 2254(d). A
2 state court’s decision is “contrary to” clearly established United States Supreme Court law if it
3 fails to apply the correct controlling authority or if it applies the controlling authority to a case
4 involving facts materially indistinguishable from those in a controlling case, but nonetheless
5 reaches a different result. *See Williams v. Taylor*, 529 U.S. 362, 404, 413–14 (2000). A decision
6 constitutes an “unreasonable application” of United States Supreme Court law if “the state court
7 identifies the correct governing legal principle . . . but unreasonably applies that principle to the
8 facts of the prisoner’s case.” *Id.* at 414. “[A]n *unreasonable* application of federal law is
9 different from an *incorrect* application of federal law.” *Harrington v. Richter*, — U.S. —, —,
10 —, 131 S.Ct. 770, 785 (2011) (citing *Williams*, 529 U.S. at 410) (emphasis in original). A
11 federal court must presume the correctness of the state court’s factual findings, and the
12 presumption of correctness may only be rebutted by clear and convincing evidence. 28 U.S.C.
13 2254(e)(1).

14 “[A] federal habeas court may not issue the writ simply because the court concludes in its
15 independent judgment that the relevant state-court decision applied clearly established federal
16 law erroneously or incorrectly. Rather, that application must be objectively unreasonable.”
17 *Lockyer v. Andrade*, 538 U.S. 63, 75–76 (2003). “While the ‘objectively unreasonable’ standard
18 is not self-explanatory, at a minimum it denotes a great[] degree of deference to the state
19 courts.” *Clark v. Murphy*, 331 F.3d 1062, 1068 (9th Cir. 2003). Holdings of the Supreme Court
20 at the time of the state-court decision are the only definitive source of clearly established federal
21 law under AEDPA. *See Williams*, 529 U.S. at 412. While circuit law may be “persuasive
22 authority” for purposes of determining whether a state-court decision is an unreasonable
23 application of Supreme Court law, only the Supreme Court’s holdings are binding on the state
24 courts and only those holdings need be applied, and then only reasonably. *See Clark*, 331 F.3d
25 at 1070.

26 2. REVIEW OF STATE COURT SUMMARY DENIAL.

27 When presented with a state-court decision that is unaccompanied by a rationale for its
28 conclusions, a federal court must conduct an independent review of the record to determine

1 whether the state-court decision is objectively unreasonable. *Delgado v. Lewis*, 223 F.3d 976,
2 982 (9th Cir. 2000). This review is not a “de novo review of the constitutional issue”; rather, it
3 is the only way a federal court can determine whether a state-court decision is objectively
4 unreasonable where the state court is silent. *Himes v. Thompson*, 336 F.3d 848, 853 (9th Cir.
5 2003). “[W]here a state court’s decision is unaccompanied by an explanation, the habeas
6 petitioner’s burden still must be met by showing there was no reasonable basis for the state court
7 to deny relief.” *Richter*, 131 S.Ct. at 784.

8 As stated recently by the Supreme Court in *Pinholster*, a federal court’s review under
9 Section 2254(d) “focuses on what a state court knew and did.” *Cullen v. Pinholster*, — U.S.
10 —, —, 131 S.Ct. 1388, 1399 (2011). Under California law, a “summary denial of a habeas
11 petition on the merits reflects that court’s determination that the claims made in th[e] petition do
12 not state a prima facie case entitling the petitioner to relief.” *Id.* at 1403 n.12 (internal quotation
13 and citation omitted). A California appellate court reviewing a habeas petition must determine
14 whether, assuming the petition’s factual allegations are true, the petitioner would be entitled to
15 relief. “If no prima facie case for relief is stated, the court will summarily deny the petition. If,
16 however, the court finds the factual allegations, taken as true, establish a prima facie case for
17 relief, the court will issue an [order to show cause].” *People v. Duvall*, 9 Cal. 4th 464, 475
18 (1995). A federal court’s review under Section 2254(d) is limited to the record before the state
19 court. *Pinholster*, 131 S.Ct. at 1398.

20 Our court of appeals has similarly instructed that the federal court should “examine
21 precisely what the state court did” in evaluating a habeas petition. In *Nunes v. Mueller*, 350 F.3d
22 1045, 1054 (9th Cir. 2003), our court of appeals considered whether the state court’s
23 determination that petitioner had failed to establish a prima facie case for ineffective assistance
24 of counsel and that an evidentiary hearing was unnecessary was unreasonable. In holding that
25 the state court’s decision rejecting the petitioner’s habeas claim was unreasonable under both
26 Sections 2254(d)(1) and (d)(2), the federal appellate court there stated that “it is entirely
27 appropriate — even necessary — that federal courts ask whether the state court applied correct
28 legal principles (in this case, the *Strickland* analysis) in an objectively unreasonable way, an

1 inquiry that requires analysis of the state court’s method as well as its result.” *Id.* at 1054–55.
2 *First*, the state court there claimed to have taken the petitioner’s claims at “face value,” but
3 unreasonably applied the *Strickland* analysis to the facts. “With the state court having purported
4 to evaluate [the petitioner’s] claim for sufficiency alone, it should not have required [the
5 petitioner] to prove his claim without affording him an evidentiary hearing In other words,
6 it was objectively unreasonable for the state court to conclude on the record before it that no
7 reasonable factfinder could believe that [petitioner] had been prejudiced.” *Ibid.* *Second*,
8 viewing the state court’s findings as a factual determination, our court of appeals determined that
9 the state court “went well beyond its self-assigned task of assessing [the petitioner’s] allegations
10 for sufficiency. . . .” *Id.* at 1055. Although state-court findings are generally presumed correct
11 unless rebutted by clear and convincing evidence or based on an unreasonable evidentiary
12 foundation, the court found that because the state court refused to afford the petitioner an
13 evidentiary hearing, no deference to the state court’s factual findings was required. *Id.* at 1054
14 (citations omitted). “While there may be instances where the state court can determine without a
15 hearing that a criminal defendant’s allegations are entirely without credibility or that the
16 allegations would not justify relief even if proved, that was certainly not the case here.” *Id.* at
17 1055.

18 In the instant case, the state court summarily dismissed the habeas petition and request
19 for an evidentiary hearing without issuing an order to show cause. Under California law, the
20 state court’s dismissal indicated that the court found that the factual allegations, taken as true,
21 did not establish a prima facie case for relief. *See, Duvall*, 9 Cal. 4th at 475. Pursuant to
22 *Pinholster* and *Nunes*, this Court’s review will consider whether the state court’s rejection of
23 petitioner’s habeas claims without issuing an order to show cause was unreasonable, where it is
24 presumed that the state court took petitioner’s factual allegations as true. As required by
25 *Pinholster*, Section 2254(d) review is limited to the record before the state court. Again, the
26 witness declarations included in petitioner’s federal habeas petition, as well as the habeas claims,
27 are the same as those presented to the state court.
28

1 **3. INEFFECTIVE ASSISTANCE OF COUNSEL.**

2 The Sixth Amendment guarantees the right to effective assistance of counsel. *Strickland*
3 *v. Washington*, 466 U.S. 668, 686 (1984). To prevail on a claim of ineffective assistance of
4 counsel, petitioner must show both that counsel’s performance was deficient and that the
5 deficient performance prejudiced petitioner’s defense. *Id.* at 688. To prove deficient
6 performance, petitioner must demonstrate that counsel’s representation fell below an objective
7 standard of reasonableness under prevailing professional norms. *Ibid.* This requires showing
8 that counsel made errors so serious that counsel was not functioning as the “counsel” guaranteed
9 by the Sixth Amendment. *Id.* at 687–88.

10 The relevant inquiry is not what defense counsel could have done, but rather whether the
11 choices made by defense counsel were reasonable. *See Babbitt v. Calderon*, 151 F.3d 1170,
12 1173 (9th Cir. 1998). Judicial scrutiny of counsel’s performance must be highly deferential, and
13 a court must indulge a strong presumption that counsel’s conduct falls within the wide range of
14 reasonable professional assistance. *See Strickland*, 466 U.S. at 689; *Wildman v. Johnson*, 261
15 F.3d 832, 838 (9th Cir. 2001); *Sanders v. Ratelle*, 21 F.3d 1446, 1456 (9th Cir. 1994). The
16 reasonableness of counsel’s decisions must be measured against the prevailing legal norms at the
17 time counsel represented the defendant. *Wiggins v. Smith*, 539 U.S. 510, 522–23 (2003).

18 Under AEDPA, “[t]he pivotal question is whether the state court’s application of the
19 *Strickland* standard was unreasonable. This is different from asking whether defense counsel’s
20 performance fell below *Strickland’s* standard.” *Richter*, 131 S.Ct. at 785. The state decision
21 under review need not explain the state court’s reasoning, and the habeas petitioner still bears the
22 burden to show there was no reasonable basis for the state court to deny relief. *Id.* at 784. To
23 prove counsel’s performance was prejudicial, petitioner must demonstrate a “reasonable
24 probability that, but for counsel’s unprofessional errors, the result of the proceeding would have
25 been different. A reasonable probability is a probability sufficient to undermine confidence in
26 the outcome.” *Strickland*, 466 U.S. at 694. A petitioner must show that counsel’s errors were
27 “so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.” *Id.* at 687.
28 The test for prejudice is not outcome-determinative, *i.e.*, defendant need not show that the

1 deficient conduct more likely than not altered the outcome of the case; however, a simple
2 showing that the defense was impaired is also not sufficient. *Id.* at 693.

3 The *Strickland* prejudice analysis is complete in itself. Therefore, there is no need for
4 additional harmless error review pursuant to *Brecht*, 507 U.S. at 637. *Musladin v. Lamarque*,
5 555 F.3d 830, 834 (9th Cir. 2009). This order now turns to petitioner’s two claims for
6 ineffective assistance of counsel.

7 **A. Failure to present expert witness testimony.**

8 Petitioner’s claim for ineffective assistance of counsel is based on trial counsel’s failure
9 to present expert testimony regarding the ballistics evidence. Petitioner relies on the declarations
10 of two ballistics experts, whose testimony he claims would have demonstrated that the shooting
11 “could not have occurred in the location where Minh testified [petitioner] shot him” (Dkt. No. 1
12 at 18). These declarations were also in the record before the state habeas court. As discussed
13 below, however, the state court’s determination that petitioner failed to establish an ineffective
14 assistance of counsel claim was not unreasonable.

15 Fifteen shell casings were found at the scene, including thirteen nine-millimeter shell
16 casings and two .380-caliber shell casings. Six of the casings were found in a cluster 30–35 feet
17 south of where Minh was found and where he testified he was shot. At trial, the prosecution
18 called Officer Hathaway to testify regarding his investigation into the incident. Officer
19 Hathaway also testified as an expert, opining on how shell casings were expelled when fired
20 (Reporter’s Tr. at 731–38). In particular, Officer Hathaway testified that both nine-millimeter
21 and .380-caliber casings eject to the right. He further testified that an expelled shell casing could
22 be found on a hard asphalt surface 30–35 feet away from the shooter’s location (*id.* at 739–40).
23 The prosecutor relied on this testimony in his closing argument to support the state’s theory of
24 the case that Minh was shot by two shooters while he was next to the black Mitsubishi in the
25 parking lot (*id.* at 1002).

26 Petitioner’s first expert, Kenneth Moses, states that Officer Hathaway was correct that
27 casings eject to the right, but that he failed to note that casings also travel slightly backward
28 (Moses Decl. ¶ 8). Therefore, if the shooter had been standing between two cars next to the door

1 of the black Mitsubishi, the casings would have hit the side of nearby cars and dropped to the
2 pavement near those locations. Moses also states that “[f]iring a pistol while it is pointed
3 downward will significantly decrease the distance the ejected casings will travel” (*id.* at ¶ 9).
4 According to Moses, studies indicate that casings ejected from nine-millimeter or .380-caliber
5 pistols “most often end up in a cluster within 20 feet from the shooter if the weapon is pointed
6 parallel to the ground” (*ibid.*). The second expert, John Murdock, states that the nature of the
7 surface a casing lands on is most determinative of the casing location. Factors affecting the
8 location of an ejected casing would include the “firearm, ammunition used, surface struck,
9 weather conditions, etc.” as well as post-ejection activities such as whether the casing was
10 kicked or run over (Murdock Decl. at ¶ 8). Unlike Moses’s opinion, Murdock’s declaration
11 states that “[f]iring a pistol while it is pointed downward will not significantly decrease the
12 distance the ejected casings will travel away from the shooter” (*Ibid.*).

13 At trial, defense counsel did not put on any experts to contradict Officer Hathaway’s
14 testimony, although counsel now professes in a declaration submitted with the habeas petition
15 that he would have obtained one had he known in advance that the state would seek to qualify
16 Officer Hathaway as an expert (Johnson Decl. ¶ 6). Trial counsel did, however, cross-examine
17 Officer Hathaway and elicited the fact that Officer Hathaway did not base his opinion on any
18 testing done on the specific guns used in the shootings (as none were recovered). He also
19 elicited testimony that Officer Hathaway could not determine from the location of the casings
20 what direction the guns were fired in or the actual location of the shooter (Reporter’s Tr. at 746).

21 *i. Counsel was not ineffective under Strickland.*

22 Although trial counsel now contends that he would have obtained an expert, counsel’s
23 later statement “runs afoul of the rule of contemporary assessment.” *Hendricks v. Calderon*, 70
24 F.3d 1032, 1039 (9th Cir. 1995). Based on the inconsistent, if not directly contradictory, expert
25 witness declarations submitted with the habeas petition, it would appear that different expert
26 witnesses’ interpretations of the same forensic evidence in this case would likely have been
27 inconclusive, potentially confusing, and ultimately unlikely to be persuasive to a jury. In
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1 preparing for trial, counsel could have reasonably determined not to focus on the physical
2 evidence.

3 Moreover, as stated by the Supreme Court in *Richter, Strickland* does not require that
4 counsel be prepared for every contingency, including the late introduction of prosecution expert
5 witnesses. *Richter*, 131 S. Ct. at 791. In *Richter*, the Supreme Court considered whether trial
6 counsel’s failure to introduce expert witness testimony constituted ineffective assistance of
7 counsel, where the prosecution presented a previously undisclosed expert to testify about
8 physical evidence at the crime scene. The Supreme Court found that, even if counsel should
9 have foreseen that the prosecution would offer such evidence, the petitioner “would still need to
10 show it was indisputable that *Strickland* required his attorney to act upon that knowledge.” *Ibid.*
11 The Supreme Court stated that “*Strickland* does not enact Newton’s third law for the
12 presentation of evidence, requiring for every prosecution expert an equal and opposite expert
13 from the defense. In many instances cross-examination will be sufficient to expose defects in an
14 expert’s presentation.” *Ibid.*

15 Here, trial counsel did cross-examine Officer Hathaway, whose direct testimony was, at
16 best, general. Trial counsel’s questioning elicited testimony from Officer Hathaway establishing
17 that his opinion was not based on actual testing of any of the weapons in question, and that he
18 could not actually determine the location of the shooter based on the location of the shell
19 casings. It was not unreasonable for the state court to determine that counsel’s performance was
20 not so deficient as to “undermine[] the proper functioning of the adversarial process” such that
21 petitioner was denied a fair trial. *Ibid.* (quoting *Strickland*, 466 U.S. at 686).

22 ***ii. Petitioner failed to demonstrate prejudice.***

23 The expert testimony offered in support of Minh’s testimony, as well as the expert
24 witness declarations now offered to contradict such testimony, are not so precise as to allow a
25 conclusion that there is a reasonable likelihood the result would have been different. Minh
26 testified that he was lying between two cars in the parking lot. When petitioner approached and
27 began shooting at him, Minh testified that he was backing away from petitioner, moving away
28 from the edge of the parking lot and towards the center. Even considering Moses’s statement

1 that casings from a shooter located between two cars would bounce off the cars, it is entirely
2 possible that some or all of the shots were fired while the shooter was forward enough (in
3 relation to the cars) that ejected casings would not hit the sides of parked cars. Minh’s testimony
4 regarding his location and the location of the shooters was not so detailed and complete that such
5 scenarios would be foreclosed.

6 Furthermore, even if corroborative of petitioner’s theory at trial, the physical evidence
7 and expert witness testimony was at best a minor point in comparison to the evidence introduced
8 at trial, which focused on eyewitness accounts directly identifying petitioner as a shooter. As
9 evidenced by the expert declarations submitted by petitioner and by Officer Hathaway’s
10 testimony, reasonably experienced individuals could disagree regarding how to reconstruct the
11 shooting and what factors would be most significant in determining the most probable scenario.
12 A dispute regarding how far, and under what circumstances, shell casings would likely eject and
13 come to rest on the asphalt in the café parking lot would not likely be determinative in relation to
14 the core evidence in the case, which rested on the testimony of witnesses present at the shooting.
15 This order finds that petitioner has failed to establish prejudice on account of counsel’s deficient
16 conduct. Moreover, it was not unreasonable for the state court to so conclude.

17 **B. Failure to present fact witness testimony.**

18 Petitioner also claims that trial counsel was ineffective for failing to investigate and
19 present testimony from three fact witnesses who were at the Heo May Café on the night of the
20 shooting.

21 None of the three declarants ever contacted the police regarding the incident, and they
22 were never interviewed by the police or trial counsel. Kelly avers that he did not hear anything
23 more about the incident until he learned that petitioner was charged with murder, approximately
24 one year later. Even though he was aware of the charges against petitioner, Kelly did not come
25 forward until after petitioner was convicted. Jason’s declaration states that he “did not come
26 forward after the shooting because [he] was afraid the shooting was gang related. [He] did not
27 want to be involved because [he] was recently married and expecting a new baby” (Le Decl. ¶
28 9). Similarly, Philip states that he did not want to be involved because he was scared the

1 incident was gang-related. Petitioner’s trial counsel submitted a declaration stating that he had
2 not been given any information about Jason and Kelly prior to trial (Johnson Decl. ¶ 8).

3 Although none of the declarants contacted the police or defense counsel prior to or during
4 the three-week trial, both Jason and Kelly submitted letters to the court in connection with
5 petitioner’s sentencing. Jason’s letter, dated October 8, 2007, stated that petitioner was his
6 cousin and that they have been best friends since petitioner was born (Clerk’s Tr. at 305–07).
7 Kelly’s letter, dated October 12, 2007, stated that petitioner was a good friend from high school,
8 where they had been on the wrestling team together. Despite the seeming incongruity in their
9 failure to come forward prior to petitioner’s conviction, Jason, Kelly, and Philip’s declarations
10 all state that they would have been available to testify to the facts in their declarations if called as
11 a witness at petitioner’s trial (Le Decl. ¶ 10; Kelly Decl. ¶ 7; P. Nguyen Decl. ¶ 5).

12 *i. Prejudice.*

13 As a preliminary matter, this order notes that neither Kelly nor Philip’s declaration would
14 have added much to the defense’s case. Kelly’s habeas declaration states that he saw petitioner
15 wrestling with someone he did not recognize in front of the café. Petitioner fell to the ground.
16 Kelly did not see anything in petitioner’s hand when petitioner got up. Kelly then lost sight of
17 petitioner as Kelly ran away in the direction of Jason’s car and Senter Road, the road to the west
18 of the café and parking lot. Philip’s habeas declaration avers that he picked Jason and Kelly up
19 after the shooting and that they looked for petitioner for a few minutes.

20 At most, Kelly’s testimony would have established that petitioner did not have a gun
21 when he stood up after he had been pulled to the ground by Howson (or at least that Kelly did
22 not see a gun in petitioner’s hand). Kelly, however, lost sight of petitioner while Kelly was
23 running away from the café. Philip was not present at the shooting. His testimony would have
24 had little probative value, other than as corroborative of the testimony of other witnesses.

25 **a. Jason Le Declaration.**

26 Jason Le’s habeas declaration, however, is a different matter. His declaration states facts
27 that, if taken at face value, would contradict the prosecution’s theory of the case and support
28 petitioner’s testimony at trial. Jason’s declaration states that he drove Kelly to the café that

1 night. Jason parked his car and the two men walked toward the café. They noticed a group of
2 people standing in front of the café, among whom Jason recognized petitioner. Jason saw
3 petitioner struggle with a man he did not recognize and fall to the ground. Jason also saw Hung,
4 who was arguing and struggling with another man unknown to Jason. Hung fell to the ground
5 and when he got up, Jason saw that Hung had a gun in his hand.

6 Jason then heard a single gun shot, although he was not sure where it came from (but
7 recall that the first shot did not come from petitioner even according to the prosecution's case).
8 He ran back towards his car and towards Senter Road. As Jason was running, he saw that
9 petitioner was also running towards Senter Road. Jason then heard about ten more gunshots.
10 Specifically, the declaration states:

11 As I was running toward Senter Road, I saw that [petitioner] was also
12 running out of the parking lot and toward Senter Road. I did not see
13 anything in his hands. I then heard more gunshots. I heard about ten
14 more gunshots, two or three gunshots at a time. *At this same time*, I
15 saw [petitioner] continue running toward the intersection of Senter and
16 Tully Roads. I did not see a gun in [petitioner]'s hand.

17 (Le Decl. ¶ 5) (emphasis added). That is, *while the shots were being fired*, Jason saw petitioner
18 running away from the parking lot, and away from the parking stall where Minh was found. A
19 few minutes later, Philip picked up Jason and Kelly and they drove around for a few minutes
20 looking for petitioner but could not find him. Several days later, Jason picked up his car from
21 the parking lot, which had been parked next to the parking stall where Minh was found. The car
22 was a Jeep Cherokee with license plate number 4YHR695. Jason noticed that the car had two
23 bullet holes in it.

24 Respondent argues that Jason's declaration establishes only that Jason and Kelly heard a
25 single gunshot, after which Jason ran out of the parking lot. Jason and Kelly then "lost sight of
26 petitioner by the time they heard multiple gunshots, followed by another round of gunshots"
27 (Ans. 12). A fair reading of the declaration does not support respondent's interpretation. While
28 it may be possible to pick apart each word of the declaration, read as a whole and assuming the
truth of the facts stated therein, the reasonable interpretation based on the face of the declaration
is that Jason heard a round of ten gunshots while he saw petitioner run away from the parking lot

1 without a gun in his hands. To the extent that the state court’s decision relied on a factual
2 finding such as that now advanced by respondent, such a finding would have been unreasonable.

3 The undersigned judge is well aware that lawyer-prepared declarations in habeas cases
4 are often carefully worded to conceal inconsistencies and gloss over gaps. In many instances,
5 such declarations fall apart when the witness is cross-examined. For example, the statement that
6 Jason “did not see a gun” in petitioner’s hand begs the question as to whether Jason was in a
7 position to observe, or did actually observe, petitioner’s hand. This type of inquiry, however,
8 generally cannot reliably be based solely on the face of the habeas declarations and is of the type
9 suited to determination after an evidentiary hearing. Here, the state court summarily dismissed
10 the habeas claims without an evidentiary hearing. Where a state court “makes evidentiary
11 findings without holding a hearing and giving petitioner an opportunity to present evidence, such
12 findings clearly result in an ‘unreasonable determination’ of the facts.” *Taylor v. Maddox*, 366
13 F.3d 992, 1001 (9th Cir. 2004). Where the record is silent, however, it cannot be determined
14 whether the state court reached such a conclusion.

15 Respondent also argues that “petitioner cannot show that, even if counsel had discovered
16 at the time of trial that [Jason] was at the scene, [Jason] would have agreed to testify at trial”
17 (Dkt. No. 31 at 9). In support, respondent points out that none of the three declarants came
18 forward prior to petitioner’s sentencing, despite the fact that both Kelly and Jason submitted
19 letters of support to the judge. Although the state court is not required to accept conclusory
20 statements as true, *Duvall*, 9 Cal. 4th at 474, it would have been unreasonable for the state court
21 to have made a finding that the declarants would not have testified at trial. They now declare
22 they would have. It would have been unreasonable for the state court to have decided their
23 statements were not credible, at least without an evidentiary hearing. Respondent’s argument, if
24 accepted, would mean that the state court either did not accept the facts presented in the petition
25 as true, or that the state court based its decision on an unreasonable determination of the facts in
26 light of the evidence presented under Section 2254(d)(2).

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b. Whether it was reasonably likely that the outcome would have been different.

Respondent also argues that the prosecution’s evidence at trial established that there were several rounds of gunshots fired. Specifically, after the first gunshot was fired, several more shots were fired for about ten to fifteen seconds. Minh testified that there was a lull of approximately thirty seconds following this second round of shots (Reporter’s Tr. at 552). Only after this lull was Minh approached and shot multiple times by petitioner and a second shooter. Thus, respondent argues that Jason’s declaration is not inconsistent with the evidence, because petitioner could have run away from the parking lot during the initial shooting, then returned and shot Minh. Respondent’s argument that the habeas declarations are not inconsistent with the prosecution’s evidence at trial is supported by the record before the state court. At trial, however, the prosecutor argued in closing that petitioner came upon Minh “moments” after the fight with Howson and shot Minh (*id.* at 1007–08).

The standard for prejudice is not innocence or exoneration, but whether petitioner has demonstrated “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability *sufficient to undermine confidence in the outcome.*” *Richter*, 131 S.Ct. at 787–88 (quoting *Strickland*, 466 U.S. at 694) (emphasis added). If the only record before the jury was Jason’s habeas declaration, without the benefit of cross-examination, the prosecution’s case would have been more difficult to prove. Petitioner has set forth facts demonstrating a prima facie showing of prejudice based on the substantial likelihood that the outcome would have been different. It was undisputed that petitioner did not fire the first shot. Based on Jason’s declaration, the prosecution would have had to account for why petitioner ran away from the parking lot without a gun drawn while ten more shots were fired by someone else. The prosecution would have to establish (beyond a reasonable doubt) that petitioner returned to the parking lot within the 30-second lull of gunfire and shot Minh, which would have been a steeper mountain to climb.

The prosecution’s case against petitioner was based largely on two eyewitnesses. There were no confessions or admissions by petitioner, who testified in his own defense that he ran away from the parking after the first shot was fired. The physical evidence was inconclusive.

1 There was no gunshot residue evidence against petitioner. The prosecution qualified a police
2 officer to testify regarding the location of shell casings in support of the eyewitness accounts of
3 the shooting, but there was no other physical or forensic evidence linking petitioner to the
4 shooting. Given that the prosecution's evidence relied largely on the credibility of two
5 eyewitnesses, whose stories had been enlarged with time, Jason's testimony would have been
6 strongly corroborative of petitioner's testimony and inconsistent with that of the prosecution
7 witnesses. The testimony, if believed, would have undermined the prosecution's theory of the
8 case, as it would have established that petitioner ran away from the parking lot without a gun in
9 his hand while the majority (if not all) of the shots were fired. That petitioner would have run
10 from the violence without a gun visible, then turned around and quickly returned to shoot Minh
11 would have been an unlikely and improbable scenario, and one that the prosecution did not
12 present at trial. Moreover, Jason's testimony, if believed, would have established that Hung, not
13 Jason, had a gun in his hand right after the first shot was fired.

14 Based on the current record (without the benefit of an evidentiary hearing), this order
15 finds that petitioner was prejudiced within the meaning of *Strickland* by the failure of counsel to
16 present the eyewitness testimony, as the theory of the defense would have greatly benefitted
17 from a corroborating witness. Additionally, the record of jury deliberations indicates that this
18 was a close case. The jury deliberated for more than thirteen hours over the course of three days
19 and requested two readbacks of trial testimony (Clerk's Tr. at 255, 255a). *See, e.g., Mayfield v.*
20 *Woodford*, 270 F.3d 915, 932 (9th Cir. 2001) (deliberations lasting one-and-a-half days
21 indicated close case in penalty phase of death-penalty trial); *United States v. Kojayan*, 8 F.3d
22 1315, 1323 (9th Cir. 1996) (two-day deliberations indicated close case in drug trafficking trial).

23 To the extent that the state court's dismissal of this claim for ineffective assistance of
24 counsel relied on a finding that petitioner had not established a prima facie showing of prejudice,
25 the state court's decision constituted an unreasonable application of the law to the facts under
26 Section 2254(d)(1), or relied on an unreasonable determination of the facts presented under
27 2254(d)(2).

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ii. Whether counsel’s performance was ineffective under Strickland.

Although the prejudice prong of the *Strickland* test has been resolved herein in petitioner’s favor, petitioner is not entitled to relief on his claim of ineffective assistance of counsel. The record before the state court was clear that, prior to trial, trial counsel had no information about Jason or Kelly, the two witnesses who claim to have witnessed the incident at the café (Johnson Decl. ¶ 8). Moreover, none of the declarants ever contacted the police. It was not unreasonable for the state court to determine that petitioner failed to meet the first prong of the *Strickland* test, namely that petitioner failed to show that counsel’s representation fell below an objective standard of reasonableness.

In *Wiggins v. Smith*, 539 U.S. 510, 526 (2003), the Supreme Court held that counsel’s performance was deficient under *Strickland* where the circumstances suggested that counsel’s failure to conduct a reasonable investigation into mitigation evidence “resulted from inattention, not reasoned strategic judgment.” Similarly, in *Porter v. McCollum*, 558 U.S. 30, 130 S.Ct. 447 (2009), counsel failed to conduct a reasonable investigation of his client’s background to prepare a penalty-phase mitigation case in a death-penalty trial. The Supreme Court found that counsel’s decision not to investigate did not reflect a reasonable professional judgment, where he “ignored pertinent avenues for investigation of which he should have been aware,” including interviewing witnesses and obtaining records. *Porter*, 558 U.S. 30, 130 S.Ct. at 453. It is well established, on the other hand, that counsel may “make a reasonable decision that makes particular investigations unnecessary.” *Strickland*, 466 U.S. at 691.

This is not a case in which counsel has refused to give a habeas declaration to explain his conduct, such that an evidentiary hearing and court compulsion are needed to compel his testimony. Rather, trial counsel *has* provided a declaration to habeas counsel and has cooperated with habeas counsel. His declaration, expansive on aspects of the trial, merely says, as to the missing eyewitnesses, that he was “not given information” about them. His declaration, submitted by habeas counsel, does *not* say he conducted no search for witnesses. For all the declaration reveals, he actually did a reasonable search for witnesses but simply came up empty. It would have been easy for counsel to add a page or even a paragraph to the declaration

1 describing the extent of his search. If trial counsel had refused to do so (and nothing in this
2 record states he did) then habeas counsel could have so described the refusal in his own
3 declaration, but no such declaration was provided to the state court or federal court. The burden
4 was on petitioner to demonstrate to the state court that counsel's investigation was deficient or at
5 least that trial counsel refused to address the extent of his investigation such that an evidentiary
6 hearing was needed to extract the truth from him. This burden was not carried. Consequently, it
7 was not unreasonable for the state court to stand by the presumption that trial counsel had
8 performed at least at the level required by the Sixth Amendment.

9 Petitioner argues that the witnesses were not undiscoverable. Counsel could have located
10 Jason based on information establishing that, on the night of the shooting, Jason's car was
11 parked in the stall next to where Minh was shot. The prosecutor provided counsel with a
12 diagram depicting the parking lot and café. The diagram noted the license plate numbers and
13 locations of the approximately 60 cars in the parking lot, the location of the shell casings, where
14 Minh's body was found, and other features of the parking lot (Le Decl. Exh. 1). Jason's Jeep
15 Cherokee was located directly adjacent to where Minh's body was found, as indicated by the
16 license plate number on the diagram. Respondent replies that neither the police nor the
17 prosecutor's investigation uncovered Jason. To the extent that Jason could have been discovered
18 based on the diagram of the parking lot, an investigation of roughly 60 license plate numbers
19 was not required by *Strickland's* standard of representation, or so respondent argues.

20 Without reaching the latter proposition, this order repeats the fundamental point that trial
21 counsel could have, in the declaration submitted by habeas counsel, told the state court and the
22 federal court what he did to find corroborating witnesses. Counsel could have explained the
23 extent to which he did or did not track down all 60 cars in the parking lot in a search for potential
24 witnesses. For all the record shows, he might have tried to track down some of the individuals to
25 whom the license plates listed on the diagram were registered. The record is silent regarding
26 what trial counsel did. He could, however, have told us. This order is unwilling to infer that
27 trial counsel's failure to discover certain witnesses — witnesses who were admittedly seeking to
28 avoid involvement — was the result of an unreasonable or indifferent investigation. The state

1 court could have reasonably concluded that petitioner failed to meet his burden of establishing a
2 violation of the Sixth Amendment on this record. See, e.g., *United States v. Rogers*, 769 F.2d
3 1418, 1425 (9th Cir. 1985) (stating that a court “cannot resolve challenges to an attorney’s
4 competence from a silent record or by engaging in fanciful speculation.”)

5 Neither the state court nor this Court should have to conduct an evidentiary hearing to fill
6 in information that counsel could have supplied. There is nothing in the record here or before
7 the state habeas court that states that trial counsel refused to set forth in his declaration the extent
8 of his investigation. Put differently, once trial counsel places a declaration in the habeas record,
9 it should not be so selective as to leave gaps; it should set forth his or her statement on the issues
10 in play (or at least explain why he or she will not do so). If habeas counsel submits no
11 declaration by trial counsel, he should explain why one was unavailable.

12 “The question under AEDPA is not whether a federal court believes the state court’s
13 determination was incorrect but whether that determination was unreasonable — a substantially
14 higher threshold.” *Schiro v. Landrigan*, 550 U.S. 465, 473 (2007). As discussed above, the
15 petition does not pass review under Section 2254(d) based on the record before the state court.
16 A federal district court reviewing such a record should not hold an evidentiary hearing or
17 otherwise expand the record to fill in the blanks with information that habeas counsel could have
18 provided to the state court from trial counsel but chose not to do. Petitioner’s claim for habeas
19 relief based on ineffective assistance of trial counsel is therefore **DENIED**.

20 4. ACTUAL INNOCENCE CLAIM.

21 Petitioner contends that he is factually innocent and that he is entitled to habeas relief on
22 this ground. Petitioner cannot demonstrate that the state court’s denial of this claim was
23 unreasonable pursuant to Section 2254(d). The Supreme Court has never held that a
24 freestanding claim of actual innocence may serve as a basis for a grant of habeas relief. *Herrera*
25 *v. Collins*, 506 U.S. 390, 400 (1993). Rather, “[c]laims of actual innocence based on newly
26 discovered evidence have never been held to state a ground for federal habeas relief absent an
27 independent constitutional violation occurring in the underlying state criminal proceeding.”
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1 *Ibid.* The state court’s determination that petitioner had not established a prima facie case based
2 on a claim of actual innocence was not unreasonable.

3 **CONCLUSION**

4 The petition for a writ of habeas corpus is **DENIED**. Judgment will be entered in favor of
5 respondent and against petitioner.

6 Rule 11(a) of the Rules Governing Section 2254 Cases requires a district court to rule on
7 whether a petitioner is entitled to a certificate of appealability in the same order in which the
8 petition is denied. Petitioner must make a substantial showing that his claims amounted to a
9 denial of his constitutional rights or demonstrate that a reasonable jurist would find this Court’s
10 denial of his claim debatable or wrong. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

11 A district court judge may grant a certificate of appealability “only if the applicant has
12 made a substantial showing of the denial of a constitutional right.” 28 U.S.C. 2253(c)(2). The
13 certificate is granted if the petitioner demonstrates “that the issues are debatable among jurists of
14 reason; that a court could resolve the issues [in a different manner]; or that the questions are
15 adequate to deserve encouragement to proceed further.” *Lambright v. Stewart*, 220 F.3d 1022,
16 1025 (9th Cir. 2000) (citations omitted). Any doubt is resolved in the petitioner’s favor. *Ibid.*
17 Petitioner advances three claims. He has made a substantial showing as to only one of them.
18 Therefore, the **CERTIFICATE OF APPEALABILITY IS GRANTED** only as to petitioner’s claim that
19 he was denied effective assistance of counsel due to trial counsel’s failure to investigate and
20 present fact witnesses. Although this Court denied this claim, reasonable jurists might disagree.
21 No certificate of appealability is warranted as to petitioner’s claim of actual innocence or
22 ineffective assistance of counsel due to the failure to present expert witnesses.

23 The Clerk of the Court shall transmit the file, including a copy of this order, to the Court
24 of Appeals for the Ninth Circuit.

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27 Dated: February 1, 2013.

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WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE