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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

JOEL R. HENDERSON,  
Petitioner,  
v.  
MATTHEW CATE, Secretary of the  
California Department of Corrections,  
Respondent.

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Civil No. 06CV1545 JAH(WMc)  
**ORDER ADOPTING THE  
MAGISTRATE JUDGE’S REPORTS  
AND RECOMMENDATIONS  
[DOCS. # 50, 71]; OVERRULING  
PETITIONER’S OBJECTIONS  
[DOCS. # 58, 73]; DENYING  
PETITIONER’S MOTION FOR  
EVIDENTIARY HEARING [DOC.  
# 66] AND DENYING PETITION  
FOR WRIT OF HABEAS CORPUS  
IN ITS ENTIRETY**

INTRODUCTION

Petitioner, a state prisoner proceeding *pro se* and *in forma pauperis*, has filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. The Honorable William McCurine, Jr., United States Magistrate Judge, issued two separate reports and recommendations recommending that the instant petition, as well as petitioner’s motion for an evidentiary hearing, be denied. Petitioner has filed objections to each of the magistrate judge’s reports. After a careful consideration of the pleadings and relevant exhibits submitted by the parties, and for the reasons set forth below, this Court **ADOPTS** the magistrate judge’s recommendations *in toto*, **OVERRULES** petitioner’s objections; **DENIES** petitioner’s motion for an evidentiary hearing, and **DENIES** the petition for writ of habeas corpus in its entirety.

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1 BACKGROUND<sup>1</sup>

2 After waiving his right to jury trial on his prior convictions, petitioner was convicted  
3 on March 20, 2003, after a jury trial, of one count of second degree robbery stemming  
4 from an altercation that occurred between petitioner, a companion and two Walmart  
5 employees outside a Walmart store in San Diego after petitioner and a companion were  
6 seen placing an item in petitioner's pocket in the store and leaving without paying for it.<sup>2</sup>  
7 On March 24, 2003, petitioner waived his right to a court trial on the prior convictions  
8 and admitted he had suffered prior felony convictions, prison priors, serious felony prior  
9 convictions, an a strike prior conviction. On October 3, 2003, petitioner was sentenced  
10 to a fifteen year prison term.

11 That same day, petitioner filed an appeal of his conviction and concurrently filed  
12 a petition for writ of habeas corpus before the California Court of Appeal. The appeal was  
13 affirmed and the state petition was denied in an unpublished decision filed on  
14 February 18, 2005. Petitioner then filed a petition for review before the California  
15 Supreme Court, which was denied on May 11, 2005.

16 Petitioner filed his first federal habeas petition on July 18, 2005, but that petition  
17 was dismissed without prejudice on November 28, 2005, in order to allow petitioner the  
18 opportunity to exhaust new claims. *See* Case No. 05CV1449 LAB(NLS). On July 31,  
19 2006, petitioner filed his second federal habeas petition before this Court, which  
20 contained both exhausted and unexhausted claims. The petition was stayed so that  
21 petitioner could present his unexhausted claims to the state court.

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24 <sup>1</sup> A detailed statement of facts taken verbatim from the state court's unpublished opinion affirming  
25 petitioner's conviction on direct review was presented by the magistrate judge in both reports. *See* Docs.  
26 # 50 at 4-5; 71 at 2-3. As required on federal habeas review, the factual findings made by the state appellate  
27 court are presumed correct and are to be given great deference. *See* 28 U.S.C. § 2254(a)(1); Sumner v. Mata,  
449 U.S. 539, 545-47 (1981). Petitioner does not object to the factual findings as presented by the  
magistrate judge. *See* Docs. # 58, 73. Therefore, this Court adopts those factual findings in full and presents  
only a general summary of the facts and procedural history here.

28 <sup>2</sup> The jury also found petitioner not guilty on one count of transportation of more than 28.5 grams  
of marijuana, a charge that stemmed from the fact that 284 grams of marijuana were found in a backpack  
located in the trailer of the truck petitioner was driving at the time of his arrest on the robbery charge.

1           Petitioner, on April 12, 2007, filed an amended petition for writ of habeas corpus<sup>3</sup>  
2 along with a second motion seeking a stay of proceedings pending the outcome of a state  
3 court petition containing two new claims presented in his amended petition. This Court,  
4 on August 20, 2007, granted petitioner's second motion and stayed the petition until the  
5 state court issued its ruling on the petition on October 31, 2007.

6           After the petition was fully briefed, the magistrate judge issued a report and  
7 recommendation on May 16, 2008, recommending the petition be denied in its entirety.  
8 On June 23, 2008, petitioner filed objections to the May 16, 2008, indicating, among  
9 other things, that one of the claims presented in the petition, a false evidence claim, was  
10 not addressed in the answer filed by respondent nor the magistrate judge's report. *See*  
11 *Doc. # 58*. In addition, on July 9, 2008, petitioner filed a supplemental response to the  
12 report containing further objections to the magistrate judge's findings and conclusions.  
13 *See Doc. # 61*. On December 1, 2008, this Court, in an abundance of caution, remanded  
14 the matter back to the magistrate judge to address the omitted false evidence claim. *See*  
15 *Doc. # 62*. After the parties filed supplemental briefs addressing the false evidence claim,  
16 the magistrate judge issued a supplemental report, on March 16, 2009, recommending  
17 that the false evidence claim, presented as part of claim eleven in the amended petition  
18 and presented more fully in a supplemental document submitted by petitioner on remand,  
19 as well as the previously addressed claims presented in the petition and the amended  
20 petition be denied. *See Doc. # 71*. Petitioner filed objections to the magistrate judge's  
21 supplemental report on April 16, 2009. No reply to the objections has been filed.

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28           <sup>3</sup> The amended petition was initially filed separately and given a new case number but was later incorporated into this case and construed as an amended petition. *See Doc. # 27*.

1 DISCUSSION

2 **1. Legal Standard.**

3 The district court’s role in reviewing a magistrate judge’s report and  
4 recommendation is set forth in Title 28, United States Code, Section 636(b)(1). Under  
5 this statute, the district court “shall make a *de novo* determination of those portions of the  
6 report . . . to which objection is made,” and “may accept, reject, modify, in whole or in  
7 part, the findings or recommendations made by the magistrate [judge].” *Id.* It is well-  
8 settled, under Rule 72(b) of the Federal Rules of Civil Procedure, that a district court may  
9 adopt those parts of a magistrate judge’s report to which no specific objection is made,  
10 provided they are not clearly erroneous. Thomas v. Arn, 474 U.S. 140, 153 (1985).

11 **2. Analysis**

12 Petitioner presents eighteen claims for habeas relief in his petition, amended  
13 petition and supplement to his amended petition. The claims can be placed into five  
14 categories: (1) jury issues (claims one, two, three and twelve); (2) sentencing errors (claims  
15 seven, eight, nine, and ten); (3) ineffective assistance of trial and appellate counsel (claims  
16 six, eleven, thirteen, fourteen, fifteen, sixteen, and seventeen); (4) the newly addressed  
17 false evidence claim (claim eighteen); and (5) claims that are not cognizable on federal  
18 habeas review (claims four and five). In both reports, the magistrate judge addressed each  
19 claim in depth and concluded that none of petitioner’s claims had merit. Petitioner, in his  
20 objections and supplemental objections, presents both specific and general objections to  
21 the magistrate judge’s findings and conclusions.

22 **1. Jury Issues**

23 Petitioner’s claims one, two, three and twelve allege the trial court erred by (a)  
24 denying petitioner a further hearing regarding possible juror misconduct and coercion  
25 [claims one and twelve]; (b) instructing the jury with a misleading definition of the term  
26 “force” [claim two]; and (b) failing to give an instruction to the jury on the lesser included  
27 offense of petty theft [claim three].

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**a. Claims One and Twelve**

Claims one and twelve allege error in regards to Juror No. 10, who was identified during jury deliberations as being in disagreement with the other eleven jurors on the robbery count and sought to be excused because one of the other jurors believed she was acting out of bias. The trial court, after questioning the jury foreman and Juror No. 10 regarding the alleged bias, allowed the deliberations to resume and the jury eventually reached a unanimous verdict on the robbery count. Petitioner subsequently requested the release of the jurors’ names and addresses in order to investigate the possibility of coercion of Juror No. 10. In addition, sometime after the verdict was reached, Juror No. 10 sent a letter to the trial court in which she claimed she had been treated cruelly during jury deliberations, was never allowed to present her thought processes, and would never know if she had reached a guilty verdict on the facts or simply because she “had reached a point of ‘giving up.’” Lodgment 18, Vol. 5 at 645-46. The letter also stated that:

At the end of deliberations, one juror presented his thought process pertaining to the facts in a manner that was acceptable to me, and my analysis of the facts under the guidance of your instructions, and which would allow me to reach the same verdict as the rest of [the] jurors.”

Id. The trial court denied petitioner’s motion, finding no evidence of misconduct based on this statement and the trial court’s prior admonishment of Juror No. 10 to stand by her version of the facts and not to allow herself to be intimidated or coerced.

**1. Claim One**

In regards to claim one, petitioner contended, in both his petition and traverse, that the trial court erred in denying his motion for an evidentiary hearing on the issue of possible juror misconduct, thereby violating petitioner’s rights under the Sixth and Fourteenth Amendments. *See* Doc. # 28 at 18-31; Doc. # 47-2 at 9-10. The magistrate judge, after a review of the record, determined that the trial court’s denial of petitioner’s motion for an evidentiary hearing was not unreasonable or contrary to clearly established federal law and, thus, recommended the claim be denied. *See* Doc. # 50 at 10 (citing Thompson v. Borg, 74 F.3d 1571, 1574 (9th Cir. 1996))(noting that in cases of alleged

1 juror misconduct where the trial judge “adequately cured the defect that no actual  
2 prejudice resulted, the error is harmless and the defendant is not entitled to the writ.”).  
3 In addition to petitioner’s general objections to the magistrate judge’s findings and  
4 conclusions and a lengthy reiteration of the arguments he had previously presented in his  
5 traverse to the petition, *see* Doc. # 58 at 3-8; Doc. # 47-2 at 9-17, petitioner specifically  
6 objects to the factual findings presented by the magistrate judge, in that petitioner claims  
7 that the magistrate judge “failed to consider the hold out juror [was] broken down in  
8 tears[,] not able to even hold her head up out of her lap when she entered the courtroom  
9 to deliver the verdict [which is] a strong indication that something was wrong ...” *Id.* at  
10 5. Petitioner also specifically objects to the magistrate judge’s citations to various case  
11 authority, contending the cases are not analogous to the facts here. *See* Doc. # 58 at 7-8.

12 This Court has conducted a careful *de novo* review of the factual findings and  
13 conclusions of law presented by the magistrate judge in regards to this issue. Based on  
14 that review, this Court finds the magistrate judge was correct in determining the trial  
15 court’s denial of petitioner’s motion for an evidentiary hearing was not unreasonable nor  
16 contrary to federal law. The magistrate judge correctly noted that federal law does not  
17 require an evidentiary hearing in every case where jury misconduct is at issue, but instead  
18 “must consider the content of the allegations, the seriousness of the alleged misconduct  
19 or bias, and the credibility of the source.” Doc. # 50 at 9 (quoting Tracy v. Palmateer,  
20 341 F.3d 1037, 1044 (9th Cir. 2003)).<sup>4</sup> The magistrate judge also noted the following:

21 While Juror 10 may have expressed concern about the possibility of coercion  
22 by the majority, the evidence suggests Juror 10 was eventually persuaded to  
23 change her vote. When Juror 10 raised the issue with the court, she was told  
24 by the court not to give in to pressure of the others, to stand by her beliefs,  
and that a hung jury was an acceptable result. ... When asked by the trial  
court whether she could ‘stand firm’ in her position, Juror 10 replied she  
could.

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26 <sup>4</sup> Although petitioner objects to the magistrate judge’s citation to Tracy on grounds that the facts  
27 in that case are not analogous to the facts here, *see* Doc. # 58 at 7, this Court finds that Tracy was cited not  
28 for its factual similarity to this case but for the Ninth Circuit’s direction as to what courts must consider  
when determining whether an evidentiary hearing is to be held on allegations of jury misconduct. *See* Doc.  
# 50 at 9 (citing Tracy, 341 F.3d at 1044). Therefore, petitioner’s objection to the magistrate judge’s  
citation to Tracy is OVERRULED.

1 Doc. # 50 at 9 (citing Lodgment 18, Vol. 5 at 595-96). In addition, as to petitioner's  
2 contention regarding the impact of Juror No. 10's letter to the court, the magistrate judge  
3 determined that, despite Juror No. 10's averments concerning the way she perceived  
4 herself to have been treated by her fellow jurors during deliberations, Juror No. 10  
5 indicated clearly in her letter that she believes she had reached her verdict based on a  
6 fellow juror's presentation of "his thought process" which, coupled with the court's jury  
7 instructions, allowed her "to reach the same verdict as the rest of [the] jurors." Doc.  
8 # 50 at 10 (quoting Lodgment 18, Vol. 5 at 595-96). The magistrate judge thus  
9 determined that, under these circumstances, an evidentiary hearing on the issue of juror  
10 misconduct was not mandated by federal law because any error caused by the alleged  
11 misconduct was harmless since it had been adequately cured by the trial court and no  
12 actual prejudice appeared to have resulted. *Id.* (citing Thompson v. Borg, 74 F.3d 1571,  
13 1574 (9th Cir. 1996)).

14 Petitioner generally and specifically objects to this conclusion, arguing specifically  
15 that the magistrate judge did not apply the correct standard and should have determined  
16 whether the error was harmless through a determination of whether "the constitutional  
17 error had substantial and injurious effect or influence in determining the jury verdict."  
18 Doc. # 58 at 8. However, a review of the case authority cited, this Court finds that the  
19 magistrate judge applied the proper standard in analyzing this issue. *See* Thompson, 74  
20 F.3d at 1574 (juror misconduct is harmless error if the trial judge adequately cures the  
21 defect and no actual prejudice results). This Court further finds the magistrate judge  
22 provided a cogent analysis of this claim. Therefore, this Court **OVERRULES** petitioner's  
23 specific and general objections to the magistrate judge's findings and conclusions regarding  
24 claim one.

## 25 2. Claim Twelve

26 In claim twelve, petitioner alleges the trial court coerced Juror No. 10 into casting  
27 a guilty vote in violation of petitioner's rights under the Sixth and Fourteenth  
28 Amendments. *See* Doc. # 28-4 at 29. The magistrate judge determined that this claim

1 was meritless based on a consideration of the totality of the circumstances. Doc. # 50  
2 at 25-27. The magistrate judge pointed out the trial court clearly advised Juror No. 10  
3 that she should “stand by the facts” as she found them and not capitulate to the other  
4 jurors under duress, as well as that a hung jury was an acceptable outcome. Id. at 26. The  
5 magistrate judge further noted that, despite petitioner’s assertions to the contrary, Juror  
6 No. 10 did not indicate further deliberations would be fruitless but, instead, answered  
7 affirmatively when asked if she could continue deliberating while standing by her firm  
8 beliefs. Id. Based on these circumstances, coupled with Juror No. 10's letter indicating  
9 her decision was made after a fellow juror explained the facts in a manner acceptable to  
10 her, the magistrate judge determined no coercion occurred. Id. at 26-27.

11       Petitioner presents extensive objections to this claim. *See* Doc. # 61 at 7-11.<sup>5</sup>  
12 Although petitioner appears to present specific objections to the magistrate judge’s  
13 findings and conclusions, this Court’s careful review of the record reveals that petitioner  
14 simply reiterates in his objections the same arguments he made previously in support of  
15 his claim. *See id.*; *compare* Doc. # 28-4 at 29-33. As such, this Court may adopt the  
16 magistrate judge’s findings and conclusions regarding this claim, provided they are not  
17 clearly erroneous. Thomas, 474 U.S. at 153. This Court, after a careful review of the  
18 record, finds that the magistrate judge presented a cogent analysis of the issue presented  
19 in this claim. This Court agrees with the magistrate judge’s assessment of the totality of  
20 the circumstances, in that the record does not clearly reflect coercion took place in regards  
21 to the trial court’s interaction with Juror No. 10. Therefore, this Court finds the  
22 magistrate judge’s findings and conclusions were not clearly erroneous as to claim twelve.  
23 Accordingly, this Court adopts the magistrate judge’s findings and conclusions on claim  
24 twelve and overrules petitioner’s general objections thereto.

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28       <sup>5</sup> Petitioner numbered the pages on this document beginning with page 5 and continuing sequentially. Thus, page number 1 is numbered as page 5, page number 2 is numbered as page 6, and so on.



1                   **b. Claim Two**

2           In claim two, petitioner alleges the trial court instructed the jury with a misleading  
3 definition of the term “force” thereby violating his due process rights under the Fourteenth  
4 Amendment. *See* Doc. # 28 at 39. Petitioner contends that the jury instruction given,  
5 which stated: “Force, as used in these instructions must be intentional and must be more  
6 than accidental contact,” was misleading, incomplete and not in compliance with state law.  
7 *Id.* at 37-38. The magistrate judge first noted that the state court analyzed this claim  
8 based solely on state law thereby rendering the claim not cognizable. Doc. # 50 at 11  
9 (citing Estelle v. McGuire, 502 U.S. 62, 67 (1991)). However, even assuming the jury  
10 instruction used was in error under state law, the magistrate judge further determined that,  
11 under the facts in this case, “it cannot be said that the instruction ‘so infected the entire  
12 trial that the resulting conviction violated due process.’” Doc. # 50 at 11-12; *see Estelle*,  
13 502 U.S. at 72. Petitioner does not object to these findings and conclusions. This Court  
14 finds that the magistrate judge correctly determined petitioner’s claim is not cognizable  
15 and, even if it were, the claim would fail based on the facts here. Accordingly, this Court  
16 finds the magistrate judge’s determination as to this claim was not clearly erroneous and  
17 adopts the findings and conclusions regarding this claim in full.

18                   **c. Claim Three**

19           In claim three, petitioner contends that the trial court erred by failing to give a jury  
20 instruction on the lesser included offense of petty theft. *See* Doc. # 28 at 41. The  
21 magistrate judge determined that this claim fails for three reasons: (1) such is not  
22 cognizable on federal habeas review; (2) even if it were, the principles of due process were  
23 not violated in this case because a petty theft instruction would only have been warranted  
24 absent force used in the taking of the item; and (3) even if the failure to give the  
25 instruction was considered error, the error was harmless. *See* Doc. # 50 at 12-14.  
26 Petitioner does not object, specifically or generally, to the magistrate judge’s findings and  
27 conclusions regarding this claim. *See* Docs. # 58, 61, 73.

28           After a careful *de novo* review of the record in regards to this issue, this Court agrees

1 with the magistrate judge's assessment. As the magistrate judge pointed out, the Ninth  
2 Circuit has held "the failure of a state court to instruct on a lesser included offense fails  
3 to present a federal constitutional question and will not be considered in a federal habeas  
4 corpus proceeding." James v. Reese, 546 F.2d 325, 327 (1976); *see* Doc. # 50 at 13.  
5 Thus, the magistrate judge correctly determined that, absent a claim of due process  
6 violation on the grounds that the failure to instruct deprived petitioner of a defense  
7 theory, the claim is not cognizable on federal habeas review. The magistrate judge further  
8 correctly determined that no due process violation occurred because the instruction was  
9 not warranted under the circumstances of this case and, even it were, any error by the trial  
10 court was harmless. Therefore, this Court adopts the magistrate judge's findings and  
11 conclusions regarding this claim in full.

## 12 2. Sentencing Errors

13 Petitioner alleges, in claims seven, eight, nine and ten, that (a) the trial court's  
14 imposition of an upper term sentence based on factors not found by the jury [claim seven]  
15 and imposition of a sentence based on prior convictions not submitted to the jury [claim  
16 ten] violates petitioner's rights under the Sixth and Fourteenth Amendments under  
17 Blakeley v. Washington, 542 U.S. 296 (2004), requiring the matter to be remanded for  
18 a new sentencing hearing [claim eight]; and (b) the trial court improperly imposed a  
19 sentence enhancement based on a 1992 conviction for a violation of California Penal Code  
20 § 245(a)(1) [claim nine].

### 21 a. Claims Seven, Eight and Ten

22 Claims seven, eight and ten present challenges to the petitioner's sentence based on  
23 Blakely, 542 U.S. 296. Claims seven and eight allege the trial court imposed an upper  
24 term sentence that runs afoul of Blakely based on the use of factors not found by a jury  
25 The magistrate judge found these claims meritless because any error committed by the trial  
26 court in imposing an upper term sentence was harmless. *See* Doc. # 50 at 17-19. Claim  
27 ten alleges the trial court improperly based petitioner's sentence on prior convictions that  
28 were not submitted to a jury for consideration which the magistrate judge determined was

1 not a correct interpretation of Blakely. *See id.* at 21-22. Petitioner does not present  
2 objections to the magistrate judge’s findings and conclusions concerning these claims.  
3 After a careful review of the record, this Court finds the magistrate judge’s cogent and  
4 thorough analyses of these claims are not clearly erroneous. Therefore this Court adopts  
5 the magistrate judge’s findings and conclusions as to claims seven, eight and ten in their  
6 entirety.

7 **b. Claim Nine**

8 Petitioner alleges, in claim nine, that the trial court erred by improperly imposing  
9 a sentence enhancement based on a conviction that petitioner claimed was insufficient to  
10 constitute a serious felony. The magistrate judge determined this claim lacked merit  
11 because the case authority belied the claim. *See* Doc. # 50 at 20-21. Petitioner does not  
12 object to the magistrate judge’s findings and conclusions regarding this claim. This Court  
13 has thoroughly reviewed the case authority cited by the magistrate judge and finds the  
14 magistrate judge presented a cogent analysis of the issue presented in this claim.  
15 Therefore, this Court finds the magistrate judge’s findings and conclusions as to this claim  
16 are not clearly erroneous and, accordingly, adopts them in full.

17 **3. Ineffective Assistance of Trial and Appellate Counsel**

18 In claims six, eleven, fourteen, fifteen, sixteen, and seventeen, petitioner presents  
19 arguments concerning the effectiveness of his trial and appellate counsel. Specifically,  
20 petitioner contends that (a) trial counsel failed to request a lesser included offense  
21 instruction on petty theft [claims six and seventeen] and appellate counsel failed to  
22 present a claim for ineffective assistance of trial counsel based on failure to request a lesser  
23 included offense instruction on petty theft to the California Supreme Court [claim  
24 sixteen]; (b) appellate counsel failed to raise an ineffective assistance of counsel claim  
25 based on lack of a proper investigation [claim eleven]; (c) appellate counsel failed to raise  
26 a jury coercion claim [claim thirteen]; and (d) appellate counsel failed to raise a claim on  
27 appeal concerning the improper introduction at trial of an automobile gauge [claims  
28 fourteen and fifteen].

1                   **a.       Claims Six, Sixteen and Seventeen**

2           Claims six, sixteen and seventeen all turn on the issue of whether petitioner’s trial  
3 counsel was ineffective by failing to request a jury instruction on the lesser included  
4 offense of petty theft. The magistrate judge determined that counsel’s failure did not  
5 prejudice petitioner and, thus, counsel was not ineffective under the guidelines set forth  
6 in Strickland v. Washington, 466 U.S. 688 (1984). *See* Doc. # 50 at 15-17, 29-30.  
7 Petitioner does not object to the magistrate judge’s determination regarding this issue.  
8 Therefore, based on this Court’s review of the record regarding these claims, this Court  
9 finds the magistrate judge’s findings and conclusions as to claims six, sixteen and  
10 seventeen are not clearly erroneous, in that the magistrate judge presented a cogent and  
11 thorough analysis of these claims. Accordingly, this Court adopts the magistrate judge’s  
12 findings and conclusions regarding claims six, sixteen and seventeen in full.

13                   **b.       Claim Eleven**

14           Petitioner alleges, in claim eleven, that his trial counsel was ineffective because he  
15 failed to conduct a proper investigation. The magistrate judge found this claim meritless  
16 for two reasons: (1) because petitioner failed to meet his heavy burden of demonstrating  
17 counsel’s performance was deficient; and (2) because no prejudice had been shown. *See*  
18 Doc. # 50 at 22-24. Petitioner specifically objects to the magistrate judge’s findings and  
19 conclusions, contending that he presented sufficient evidence, in the form of a declaration,  
20 demonstrating counsel’s performance fell below an objective standard of reasonableness.  
21 *See* Doc. # 61 at 6. However, petitioner does not present objections to the magistrate  
22 judge’s determination that no prejudice had been shown but for counsel’s alleged deficient  
23 performance. This Court has thoroughly reviewed the record and finds that the magistrate  
24 judge correctly found the alleged negligent investigation would not have had an effect on  
25 the outcome of the trial based on the fact that further investigation into the witnesses and  
26 evidence petitioner points to would not have aided in petitioner’s defense. *See* Doc. # 50  
27 at 22-23. Thus, even if petitioner prevailed on his theory of deficient performance,  
28 petitioner could not meet the second prong of Strickland by demonstrating but for

1 counsel's deficient performance, the outcome of the trial would have been different. *See*  
2 Strickland, 466 U.S. at 689. Accordingly, this Court overrules petitioner's specific and  
3 general objections to the magistrate judge's findings and conclusions regarding this claim  
4 and adopts the magistrate judge's determination in full.

5 **c. Claim Thirteen**

6 Petitioner alleges, in claim thirteen, that his appellate counsel was ineffective for  
7 failing to raise a jury coercion claim on appeal. The magistrate judge found that  
8 petitioner's jury coercion claim lacked merit, in that petitioner failed to show he was  
9 prejudiced by appellate counsel's failure to raise the issue on appeal. *See* Doc. # 50 at 27.  
10 No objection to this finding having been presented by petitioner, this Court agrees with  
11 the magistrate judge and finds this claim lacks merit. Therefore, this Court adopts the  
12 magistrate judge's findings and conclusions as to this claim.

13 **d. Claims Fourteen and Fifteen**

14 Claims fourteen and fifteen allege that trial counsel and appellate counsel were each  
15 ineffective because they did not raise, at trial or on appeal, a challenge to the prosecutor's  
16 inference regarding an automobile gauge that was impounded two days after petitioner was  
17 arrested. Petitioner claims that the prosecutor improperly inferred the impounded gauge  
18 was the gauge petitioner was accused of stealing when the impounded gauge was actually  
19 not found in petitioner's truck or in his possession. The magistrate judge noted that the  
20 testimony presented at trial was inconsistent with petitioner's assessment of the evidence,  
21 in that there was no testimony regarding an impounded gauge. *See* Doc. # 50 at 28-29.  
22 The magistrate judge pointed out that the detective whose testimony petitioner claims led  
23 to an improper inference by the prosecution actually testified that the box for the gauge  
24 was the item impounded, not the gauge itself. *See id.* Therefore, based on this testimony,  
25 the magistrate concluded that there was no basis for petitioner's ineffective assistance of  
26 counsel arguments presented in claims fourteen and fifteen. Id. at 29.

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1           Petitioner presents objections to the magistrate judge’s conclusion regarding these  
2 claims. *See* Doc. # 61 at 12-13. However, the objections raised by petitioner in regards  
3 to these two claims appear to be directed at the magistrate judge’s findings and  
4 conclusions as to petitioner’s claim alleging that false evidence was presented at trial and  
5 not directed at the magistrate judge’s findings and conclusions as to trial and appellate  
6 counsel’s alleged failure to challenge the prosecutor’s inference regarding the evidence. *See*  
7 *id.* at 13. Thus, no specific objections has been raised as to these two claims. This  
8 Court’s review of the record reveals that the magistrate judge’s findings and conclusions  
9 as to claims fourteen and fifteen are not clearly erroneous, in that the magistrate judge  
10 correctly concluded, based on the record presented, that there was no basis for petitioner’s  
11 claims. Therefore, this Court adopts the magistrate judge’s findings and conclusions  
12 regarding claims fourteen and fifteen in full.

#### 13           4.       **False Evidence Claim (Claim Eighteen)**

14           Although petitioner did not fully allege a separate false evidence claim in his  
15 petition or amended petition, after a careful review of the record in this case, this Court  
16 deemed it appropriate to allow petitioner the opportunity to present the claim fully in  
17 subsequent pleadings. *See* Doc. # 62. Petitioner provided ample discussion of this issue  
18 in supplemental pleadings, *see* Docs. # 64, 66, and respondent addressed the issue in a  
19 response to petitioner’s supplemental pleadings. *See* Doc. # 68. Petitioner’s false  
20 evidence claim alleges that petitioner’s rights under the Fourteenth Amendment to due  
21 process were violated because two pieces of evidence, in the form of impound  
22 documentation for an empty gauge box and a photograph of the empty gauge box, were  
23 falsified. *See* Doc. # 64 at 9-10, 12-13. The magistrate judge, in a supplemental report  
24 and recommendation, determined that petitioner had failed to meet his burden of  
25 presenting competent evidence to support his claim that the evidence was falsified. Doc.  
26 # 71 at 10-11. In addition, the magistrate judge determined that petitioner was not  
27 entitled to an evidentiary hearing because he had only presented bare conclusory  
28 allegations regarding the alleged falsification of evidence that does not merit an evidentiary

1 hearing. *Id.* at 12 (citing Phillips v. Woodford, 267 F.3d 966, 973 (9th Cir. 2001)).

2         Petitioner presents a lengthy discussion of this claim in his objections to the  
3 magistrate judge's supplemental report and recommendation. *See* Doc. # 73. This Court's  
4 thorough review of petitioner's objections reveals that petitioner does not specifically  
5 object to any particular portion of the magistrate judge's findings and conclusions in  
6 regards to this claim. Instead, petitioner merely generally objects to the ultimate  
7 conclusion that his claim lacks merit and that he does not meet the criteria meriting an  
8 evidentiary hearing on the issue. *See id.* Based on this lack of specificity, this Court need  
9 only determine whether the magistrate judge's findings and conclusions are clearly  
10 erroneous. *See Thomas*, 474 U.S. at 153. This Court's review of the record reveals the  
11 magistrate judge provided a thorough and cogent analysis of this claim. This Court agrees  
12 with the magistrate judge's determination that petitioner has not sufficiently met his  
13 burden of demonstrating the evidence was falsified and that petitioner failed to show he  
14 is entitled to an evidentiary hearing due to his conclusory assertions regarding the alleged  
15 false evidence. Therefore, this Court overrules petitioner's general objections to the  
16 magistrate judge's findings and conclusions and adopts the findings and conclusions  
17 presented by the magistrate judge concerning this claim in full.

#### 18           **5. Not Cognizable Claims**

19         Claim four alleges trial court error in sentencing based on an alleged misapplication  
20 of state law. Doc. # 28 at 59-65. Claim five appears to be a request to consolidate his  
21 state habeas petition with his appeal before the state appellate court. *See* Doc. # 28-2 at  
22 3. The magistrate judge found both of these claims were not cognizable on federal habeas  
23 review. *See* Doc. # 50 at 15. Petitioner raises no objections to this finding. This Court  
24 agrees with the magistrate judge's assessment concerning these claims, in that, there can  
25 be no question that these two claims are not cognizable on federal habeas review.  
26 Accordingly, this Court adopts the magistrate judge's findings and conclusions as to claims  
27 four and five in full.

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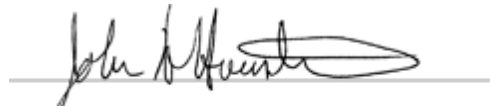
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**CONCLUSION AND ORDER**

For the reasons set forth above, **IT IS HEREBY ORDERED** that:

1. The findings and conclusions of the magistrate judge presented in both reports [docs. # 50, 71] are **ADOPTED** in full;
2. Petitioner’s objections to the reports [docs. # 58, 61, 73] are **OVERRULED**;
3. Petitioner’s motion for an evidentiary hearing is **DENIED**; and.
4. The instant petition for writ of habeas corpus is **DENIED** in its entirety.

DATED: September 23, 2009

  
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JOHN A. HOUSTON  
United States District Judge