UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

ANDRES CAMARENA HERNANDEZ, Petitioner, v. SCOTT KERNAN, Secretary, Respondent.	Case No.: 16-CV-1211-CAB (WVG) **REPORT AND RECOMMENDATION ON PETITION FOR WRIT OF HABEAS CORPUS**

I. INTRODUCTION

Petitioner Andres Camarena Hernandez, a state prisoner proceeding *pro se*, has filed a Petition for Writ of Habeas Corpus ("Petition") pursuant to 28 U.S.C. § 2254 challenging his convictions in San Diego Superior Court for assault with a deadly weapon, resisting an executive officer, battery, being under the influence of methamphetamine, and attempting to dissuade a witness from reporting a crime. The trial court also made a true finding that Hernandez incurred a prior strike and a prior serious felony. Petitioner raises three claims in support of his Petition.

The Court has read and considered the Petition, Respondent's Answer, Petitioner's Traverse, and all of the lodgments filed. For the reasons discussed below, the Court **RECOMMENDS** the Petition be **DENIED**.

///

II. FACTUAL BACKGROUND

The Court gives deference to state court findings of fact and presumes them to be correct unless Petitioner rebuts the presumption of correctness by clear and convincing evidence. *See* 28 U.S.C. § 2254(e)(1). The following facts are taken from the California Court of Appeal's unpublished opinion on Petitioner's direct appeal, affirming the judgment of the trial court.

> While under the influence of methamphetamine, [Petitioner] got into a violent altercation with two of his brothers, with whom he shared a residence. [Petitioner] first punched and shoved his brother Elias shortly after Elias returned home from work in the afternoon. Elias retreated to his car, locked the door and called 911 while [Petitioner] was violently punching the car. [Petitioner's] brother Steven then intervened by trying to pull [Petitioner] away from the car. [Petitioner] started punching Steven, who was walking with a crutch because of a broken ankle. [Petitioner] grabbed Steven's crutch, hitting Steven with the crutch four times while Steven was on the ground, and then continued to punch Steven. Neighbors intervened by pulling [Petitioner] off Steven and tackling [Petitioner].
>
> Sheriff deputies arrived in response to the 911 call. [Petitioner] was agitated and yelling profanities after the deputies handcuffed him. While a deputy was in the process of moving [Petitioner] to the patrol car, [Petitioner] jumped up into the air, placed his legs straddling the officer's legs, violently twisted his body, and attempted to roll. The deputy identified the maneuver as a technique used by prisoners to injure an officer's legs.

(Lodg. 5, ECF No. 21-19 at 2-3.)

III. PROCEDURAL BACKGROUND

A. STATE COURT

On October 30, 2013, Petitioner was convicted by a jury of assault with a deadly weapon, resisting an executive officer, battery, being under the influence of methamphetamine, and attempting to dissuade a witness from reporting a crime.

(Lodgment 1, ECF No. 21-1 at 181-85.)[1] On April 24, 2014, Petitioner filed a direct appeal in the California Court of Appeal. (Lodg. 1 at 258.) In his direct appeal, Petitioner argued the trial court violated his Sixth Amendment right by denying him access to the jurors' identification information, an opportunity to investigate possible juror misconduct, and by applying the wrong legal standard to Petitioner's request for juror identification information. (Lodg. 3, ECF No. 21-17 at 22-32.) On April 14, 2015, the California Court of Appeal affirmed the trial court's ruling in an unpublished opinion. (Lodg. 5.) The court held the trial court applied the correct legal standard and acted within its discretion in determining Petitioner did not establish a prima facie showing of good cause to release juror information. (*Id.* at 5-9.)

On May 18, 2015, Petitioner filed a petition for review with the California Supreme Court. (Lodg. 6, ECF No. 21-20.) The petition for review was denied on June 24, 2015, without comment or citation to authority. (Lodg. 7, ECF No. 21-21.) On July 5, 2016, Petitioner filed a petition for habeas corpus with the California Supreme Court. (Lodg. 8, ECF No. 21-22.) Petitioner's three grounds for relief in support of his petition were: (1) suppression of exculpatory evidence; (2) failure to produce the weapon used in the crime or to conduct DNA or fingerprint analysis; and (3) ineffective assistance of counsel. (*Id.* at 5.) On August 31, 2016, the California Supreme Court denied the petition for habeas corpus without comment or citation to authority. *See In re Hernandez*, 2016 Cal. LEXIS 7142.

B. FEDERAL COURT

On May 18, 2016, Petitioner filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. (Petition, ECF No. 1.) The Court dismissed the action without prejudice, allowing Petitioner until July 18, 2016 to satisfy the filing fee requirement and file a First Amended Petition. (*See* ECF No. 5 at 3.) On May 25, 2016, Petitioner paid the filing fee. (ECF No. 6.) On July 19, 2016, Petitioner filed another petition. (*See* ECF No. 9.) The Court construed this as a motion to reopen the case and a motion to amend. (*See* ECF No.

[1] The page numbers cited refer to the page numbers imprinted by Pacer unless otherwise noted.

11.) On July 26, 2016, the Court granted the motions and deemed the First Amended Petition filed as of July 13, 2016, the date in which Petitioner signed the Petition. (*See* ECF No. 11.) On April 12, 2017, Respondent timely filed an Answer to the Petition and lodged numerous state court records. (Answer, ECF No. 20.) On May 11, 2017, Petitioner timely filed a Traverse. (Traverse, ECF No. 24.)

III. STANDARD OF REVIEW

This Petition is governed by the provisions of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). *See Lindh v. Murphy*, 521 U.S. 320, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997). Under AEDPA, a habeas petition will not be granted with respect to any claim adjudicated on the merits by a state court unless that adjudication: (1) resulted in a decision that was contrary to, or involved an unreasonable application of clearly established federal law; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented at the state court proceeding. 28 U.S.C. § 2254(d); *Early v. Packer*, 537 U.S. 3, 8, 123 S.Ct. 362, 154 L.Ed.2d 263 (2002). In deciding a state prisoner's habeas petition, a federal court is not called upon to decide whether it agrees with the state court's determination, rather, the court applies an extraordinarily deferential review, inquiring only whether the state court's decision was objectively unreasonable. *See Yarborough v. Gentry*, 540 U.S. 1, 4, 124 S.Ct. 1157, L.Ed.2d 1 (2003); *see also Medina v. Hornung*, 386 F.3d 872, 877 (9th Cir. 2004). To prevail, a petitioner must establish that "the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error … beyond any possibility for fairminded disagreement." *Burt v. Titlow*, — U.S. —, —, 134 S.Ct. 10, 16 (2013).

A federal habeas court may grant relief under the "contrary to" clause if the state court applied a rule different from the governing law set forth in Supreme Court cases, or if it decided a case differently than the Supreme Court on a set of materially indistinguishable facts. *See Bell v. Cone*, 535 U.S. 685, 694, 122 S.Ct. 1843, 152 L.Ed.2d 914 (2002). The court may grant relief under the "unreasonable application" clause if the

state court correctly identified the governing legal principle from Supreme Court decisions but unreasonably applied those decisions to the facts of a particular case. *Id*. Additionally, the "unreasonable application" clause requires the state court decision be more than incorrect or erroneous; to warrant habeas relief, the state court's application of clearly established federal law must be "objectively unreasonable." *See Lockyer v. Andrade*, 538 U.S. 63, 75, 123 S.Ct. 1166, 155 L.Ed.2d 144 (2003). The Court may also grant relief if the state court's decision was based on an unreasonable determination of the facts. 28 U.S.C. § 2254(d)(2).

Where there is no reasoned decision from the state's highest court, the Court "looks through" to the last reasoned state court decision and presumes it provides the basis for the higher court's denial of a claim or claims. *See Ylst v. Nunnemaker*, 501 U.S. 797, 805-06, 111 S.Ct. 2590, 115 L.Ed.2d 706 (1991). If the dispositive state court order does not "furnish a basis for its reasoning," federal habeas courts must conduct an independent review of the record to determine whether the state court's decision is contrary to, or an unreasonable application of, clearly established Supreme Court law. *See Delgado v. Lewis*, 223 F.3d 976, 982 (9th Cir. 2000) (overruled on other grounds by *Andrade*, 538 U.S. at 75-76); accord *Himes v. Thompson*, 336 F.3d 848, 853 (9th Cir. 2003). However, a state court need not cite Supreme Court precedent when resolving a habeas corpus claim. *See Early*, 537 U.S. at 8. "[S]o long as neither the reasoning nor the result of the state-court decision contradicts [Supreme Court precedent,]" the state court decision will not be "contrary to" clearly established federal law. *Id*. Clearly established federal law, for purposes of § 2254(d), means "the governing principle or principles set forth by the Supreme Court at the time the state court renders its decision." *Andrade*, 538 U.S. at 72.

IV. DISCUSSION

Petitioner raises three claims that include four separate grounds for relief in his Petition. He contends that: (1) the State suppressed evidence in violation of *Brady v. Maryland*, 373 U.S. 83, 95, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963); (2) the State violated the federal constitution by not producing the crime weapon; (3) the State violated the

federal constitution by not conducting DNA or fingerprint analysis; and (4) his trial counsel provided ineffective assistance. (FAP.)[2] The Court will discuss each in turn.

A. Suppression of Evidence

Petitioner contends the State violated the Fifth and Fourteenth Amendment by suppressing evidence. (*Id.* at 14-16.) In support of his argument, Petitioner claims he "checked thouroughly [sic] all the discovery material, plus the list of evidence exibits [sic]" and did not find the police reports. (*Id.* at 16). Petitioner appears to argue that, as a result of the reports missing, he was not prepared to rebut testimony regarding prior charges for obstruction of a public officer under California Penal Code section 148(a)(1) ("Prior 148s") contained within those police reports. (*Id.* at 14.) In addition, Petitioner contends the State suppressed evidence in the police reports that demonstrated one of the witnesses, Officer Glover, knew Petitioner from prior incidents. (*Id.* at 15). Petitioner argues the State hid the name of Officer Glover in the police reports because prior excessive force complaints against the officer would have damaged Officer Glover's credibility and exonerated Petitioner. (Traverse at 2.) Petitioner claims Officer Glover's testimony that he knew Petitioner prior to the incident "disadvantage[d]" [sic] him. (FAP at 15.) Petitioner cites *Brady*, 373 U.S. 83 at 95 in support of his claims. (*Id.* at 14.) Respondent argues the state court's decision was not an unreasonable application of or contrary to Supreme Court precedent. (Memorandum of Points and Authorities, ECF No. 20-1 at 4-7.)

"The suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment." *Brady*, 373 U.S. at 87. In order to prove a *Brady* violation, Petitioner must satisfy three elements: (1) the withheld evidence was beneficial to the defense because it was exculpatory or impeachment evidence; (2) the evidence was wilfully or inadvertently suppressed by the State; and (3) the suppressed evidence prejudiced Petitioner. *Benn v.*

---

[2] Petitioner presented the claims regarding the weapon and investigation as a single claim. The Court will discuss these as separate claims for clarity purposes.

Lambert, 283 F.3d 1040, 1052-53 (9th Cir. 2002) (citations omitted).

Petitioner raised this claim in his state habeas petition. (Lodg. 8.) The California Supreme Court denied the petition without comment or citation to authority. (Lodg. 9.) Because Petitioner did not raise this claim on direct appeal no reasoned state court decision exists and this Court must conduct an independent review of the record to determine whether the state court's decision is contrary to or an unreasonable application of clearly established Supreme Court law. *See Delgado*, 223 F.3d at 982 (9th Cir. 2000.)

Common to all three prongs of the *Brady* test is one element: the evidence must have been suppressed or withheld by the prosecution. A thorough review of the record indicates the police reports were not suppressed or withheld by the prosecution and Petitioner did receive the police reports at issue.

On Thursday, September 26, 2013, the prosecutor, Mr. Allard, sought to introduce Petitioner's Prior 148 offenses contained in the police reports at issue in Petitioner's trial. However, the prosecutor had not yet provided the police reports to Petitioner's counsel, Mr. Gonzalez. The trial judge, the prosecutor, and defense counsel discussed the police reports containing the information of Petitioner's Prior 148 offenses:

> The Court: All right. Mr. Allard, are you requesting to use prior 148s, the testimony of the officers with regards to [Petitioner]?
>
> Mr. Allard: I have to review the cases more thoroughly before I can make that call on -- and provide them to Mr. Gonzalez before I did that. We can do that this afternoon.
>
> The Court: All right. Why don't you provide that to him this afternoon. We will see on Monday if he's prepared to go forward with trial or not.

(Lodg. 2-1[3] at 31:22-32:3.)

> [The Court:] So we will tackle [the admissibility of prior offenses] on Monday. Until you have a copy of the reports and

---

[3] Lodgment 2 citations refer to the lodgment number and the reporter's transcript volume number unless otherwise noted.

you have an idea of what it is you're trying to get introduced.

(*Id*. at 34:23-25.)

At the next hearing, on October 17, 2013, before discussing whether the prior incidents found in the police reports were admissible pursuant to California evidentiary code, Petitioner's counsel and the prosecutor acknowledged they had received and exchanged all discovery:

> The Court: So both of you have gotten all the discovery, you think?
>
> Mr. Gonzalez: Yes, your honor.
>
> Mr. Allard: I believe so, your honor.

(Lodg. 2-3 at 7:10-13.) [4]

Since the previous conversation of discovery involved the police reports and defense counsel indicated all discovery was received, it was reasonable for the state court to find that "all discovery" included the police reports with the prior offenses Petitioner is now claiming were omitted. Petitioner provides no evidence, outside of his claim that he could not find the reports, which rebuts the record showing the police reports were received prior to trial. Lastly, Petitioner has provided no evidence that shows Officer Glover's name was redacted from the reports received by his trial attorney. Indeed, this claim is questionable at best and cuts directly against Petitioner's first argument at worst. If Petitioner never received the police reports, as he claims, then Petitioner would be unaware of whether Officer Glover's information was redacted. If Petitioner saw that Officer Glover's information was redacted, then Petitioner must have received the police reports.

Since the record indicates Petitioner received the police reports in question, and Petitioner has provided no evidence to the contrary, the Court need not reach the *Brady* test

---

[4] The Court notes that the Monday after September 26, 2013 would have been September 30, 2013. However, the state court judge continued the hearing originally set for September 30, 2013 to October 17, 2013. (Lodg. 2-2 at 4:26-27.)

regarding suppressed evidence by the State. Accordingly, the Court finds the state court did not rule contrary to or unreasonably apply clearly established federal law. Petitioner is not entitled to relief as to this claim.

B. Failure to Produce and Test the Weapon

Petitioner contends his right to due process was violated because the prosecutor did not preserve the weapon used in the crime for which Petitioner was charged. (FAP at 17-18.) It also appears that Petitioner contends the State should have collected the weapon because the crime was serious, forensics were used in other charges against the Petitioner, a juror asked for the weapon during deliberations, and DNA testing was necessary. (FAP at 17.) In support of his argument, Petitioner claims DNA testing of the weapon would have been "exculpatory in nature" because the testing would have determined whether he touched the crutch. (*Id.* at 18). Furthermore, Petitioner argues the State should have conducted DNA testing because "other forensic evidence was collected," such as blood samples, and the State called multiple forensic experts to testify. (Traverse at 3-4.) Petitioner also argues the evidence was lost "at a very crucial time" and the police "did not collect the actual weapon knowing the exculpatory value of that weapon." (Traverse at 3.) Respondent argues the state court did not rule contrary to or unreasonably apply Supreme Court precedent when rejecting this claim because there is no constitutional requirement to produce the actual weapon. (P&A at 7.)

Petitioner raised this claim in the petition filed in the California Supreme Court. (Lodg. 8.) The California Supreme Court denied the petition without comment or citation to authority. (Lodg. 9.) Because Petitioner did not raise this claim on direct appeal, no reasoned state court decision exists and this Court must conduct an independent review of the record to determine whether the state court's decision is contrary to or an unreasonable application of clearly established Supreme Court law. *See Delgado*, 223 F.3d at 982 (9th Cir. 2000.)

In general, law enforcement officials have a duty to preserve "evidence that might be expected to play a significant role in the suspect's defense." *California v. Trombetta*,

467 U.S. 479, 488, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984). However, "unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." *Arizona v. Youngblood*, 488 U.S. 51, 58, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988). The Supreme Court has not directly addressed the duty to *collect* evidence. However, the Ninth Circuit Court of Appeals has ruled that the analysis applied to *Youngblood* is equally applied to the collection of evidence and thus "a bad faith failure to collect potentially exculpatory evidence" violates "the due process clause." *Miller v. Vasquez*, 868 F.2d 1116, 1120 (1989). This duty applies only to "material evidence, i.e., evidence whose exculpatory value was apparent before its destruction and that is of such nature that the defendant cannot obtain comparable evidence from other sources." *Cooper v. Calderon*, 255 F.3d 1104, 1113 (9th Cir. 2001) (citing *Trombetta*, 467 U.S. at 489). "The presence or absence of bad faith by the police for purposes of the Due Process Clause must necessarily turn on the police's knowledge of the exculpatory value of the evidence at the time it was lost or destroyed." *Youngblood*, 488 U.S. at 56, n.*. The burden of proving bad faith falls on the defendant. *Youngblood*, 488 U.S. at 58. Additionally, the rule announced in *Youngblood* applies to a petitioner in a habeas corpus petition. *See Mitchell v. Goldsmith,* 878 F.2d 319, 322 (9th Cir. 1989). Even when the police do collect evidence, "the police do not have a constitutional duty to perform any particular tests" on that evidence. *Youngblood*, 488 U.S. at 59.

A thorough review of the records indicates the weapon was not collected by sheriff deputies. The officer reports of the incident lists blood vials, digital photographs, and video of the blood draw as the only evidence collected. (ECF No. 21-1 at 51.) Petitioner has not articulated how the weapon may have played a significant role in his defense. Moreover, Petitioner has provided no evidence the sheriff deputies acted in bad faith by not collecting the weapon.

The sheriff deputies could have reasonably concluded the weapon had no exculpatory value given the multiple and consistent eye-witness statements provided by five different witnesses to the event. Steven Hernandez, one of the victims, stated Petitioner

"picked up [his] crutch and hit him across the upper back […]." (*Id.* at 46.) Elias Hernandez, another victim, stated Petitioner "took one of the crutches from Steven" and that Petitioner "swung the crutch," striking Elias and Steven "multiple times." (*Id.* at 49.) Veronica Roman, a witness, "observed [Petitioner] violently hit Elias and Steven with Steven's crutch." (*Id.* at 50) Darrell Barnett, another witness, "observed [Petitioner] violently hit and jab Elias and Steven with a crutch in the front yard." (*Id.*) Given the multiple and consistent witness statements, sheriff deputies could have reasonably concluded the weapon had no exculpatory value. Lastly, even assuming the sheriff deputies had collected the crutch, the sheriff deputies had no "constitutional duty to perform" a DNA test. *Youngblood*, 488 U.S. at 59.

Petitioner has failed to show sheriff deputies acted in bad faith by not collecting and preserving the weapon. Further, the record indicates sheriff deputies could have reasonably concluded the weapon had no exculpatory value. Lastly, the sheriff deputies had no constitutional obligation to conduct DNA testing. Accordingly, the Court finds the state court did not rule contrary to or unreasonably apply clearly established federal law. Petitioner is not entitled to relief as to this claim.

C. Ineffective Assistance of Counsel

Petitioner argues he was denied effective assistance of counsel for four reasons: (1) his attorney failed to assert a claim for prosecutorial misconduct when the State did not conduct DNA testing; (2) his attorney failed to notice the State introduced evidence that had not been exchanged during discovery; (3) his attorney failed to go into sufficient depth when cross-examining Deputy Glover as to how the deputy knew Petitioner;[5] and (4) his attorney failed to object to the submission of "foreign material as evidence" when the State used an exemplar crutch rather than the actual weapon. (FAP at 15, 19.) Respondent argues the state court was not objectively unreasonable in rejecting Petitioner's ineffective

---

[5] Petitioner brings up this claim in the suppression of evidence ground but the Court addresses it in this section because it is an ineffective assistance of counsel claim.

assistance of counsel claims because he does not meet the standards required by *Strickland v. Washington,* 466 U.S. 668, 719, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) and AEDPA. (P&A at 9.)

Petitioner did not raise the ineffective assistance of counsel claim on direct appeal. Petitioner first raised the ineffective assistance of counsel in his petition for habeas corpus to the Supreme Court of California. (Lodg. 8.) The Supreme Court of California denied his petition without comment or citation to authority. (Lodg. 9.) Because Petitioner did not raise this claim on direct appeal no state court reasoned decision exists and this Court must conduct an independent review of the record to determine whether the state court's decision is contrary to or an unreasonable application of clearly established Supreme Court law. *See Delgado*, 223 F.3d at 982 (9th Cir. 2000.)

The clearly established United States Supreme Court law governing ineffective assistance of counsel claims is set forth in *Strickland*, 466 U.S. 668 (1984); *see also Baylor v. Estelle*, 94 F.3d 1321, 1323 (9th Cir. 1996). The Supreme Court has explained the *Strickland* inquiry as follows:

> To establish deficient performance, a person challenging a conviction must show that counsel's representation fell below an objective standard of reasonableness. A court considering a claim of ineffective assistance must apply a strong presumption that counsel's representation was within the wide range of reasonable professional assistance. The challenger's burden is to show "that counsel made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment.
>
> With respect to prejudice, a challenger must demonstrate 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.

Harrington v. Richter, 562 U.S. 86, 104, 131 S.Ct. 770178 L.Ed.2d 624 (2011) (internal citations and quotation marks omitted). "Failure to make the required showing of either

deficient performance or sufficient prejudice defeats the ineffectiveness claim." *Strickland*, 466 U.S. at 700.

"The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland*, 466 U.S. at 686. The likelihood of a different outcome must be "substantial," not merely "conceivable," *Richter*, 562 U.S. at 112, and when *Strickland* and AEDPA operate "in tandem," as here, the review must be "doubly" deferential, *id*. at 105. "When [Section] 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland's* deferential standard." *Id*.

i. Failure to Assert a Claim for Prosecutorial Misconduct

Petitioner argues his counsel was ineffective because his counsel failed to assert a claim for prosecutorial misconduct when the State did not conduct DNA or fingerprint testing. (FAP at 19.) Petitioner provides no evidence demonstrating why his counsel's decisions not to allege prosecutorial misconduct was objectively unreasonable or prejudicial.

There is no federal constitutional requirement that law enforcement or the State conduct any particular tests during an investigation. *See Youngblood*, 488 U.S. at 59. Given this, raising a claim for prosecutorial misconduct would likely have been a meritless argument. "Failure to raise a meritless argument does not constitute ineffective assistance." *Boag v. Raines*, 769 F.2d 1341, 1344 (9th Cir. 1985) (citations omitted). Given this, the state court could have reasonably concluded that counsel was not objectively unreasonable by foregoing such a claim.

Additionally, a careful review of the record demonstrates Petitioner was not prejudiced by the decision such that "the result of the proceeding would have been different." *Harrington*, 562 U.S. at 104. The record indicates that regardless of who else may have touched the crutch and where, Petitioner grabbed the crutch at some point and struck his brother with it during the altercation.

Petitioner's brother, Steven Hernandez, testified the following on October 21, 2013:

> Q: Go ahead and tell us what happened.
>
> A: After I pulled him off from punching the window, he turned around and started punching at me. I tried to defend myself by throwing back. My crutch fell. And then [Petitioner] picked up the crutch, hit me once in the thigh and about three times in the back.

(Lodg. 2-4 at 89:14-19.)

Petitioner's other brother, Elias Hernandez, testified the following on October 22, 2013:

> Q: What did you see [Petitioner] do with the crutch when Steven was on the ground?
>
> A: [Petitioner] proceeded to strike him with it.

(Lodg. 2-5 at 28:9-11.)

Petitioner's neighbor, Veronica Roman testified the following on October 23, 2013:

> Q: And who had the crutch?
>
> A: The brothers. When [Petitioner] pushed his brother down, he grabbed the crutch and he hit the brother on the back.

(Lodg. 2-6 at 134:27-135:1.)

A temporary visitor staying with Veronica Roman, Catalina Vazquez, testified the following on October 23, 2013:

> Q: And what happened after the pushing?
>
> A: Well, [Petitioner] took the crutch away from the one that had the crutch and wanted to hit him."

(*Id.* at 161:27-162:1.)

Another neighbor, Juanita Jacobo, testified the following on October 23, 2013:

> Q: So after [Petitioner] started the fight, then he took Steven's crutch away and you told Mr. Gonzalez's investigator that [Petitioner], after taking the crutch away from Steven, hit him

with it several times.

A: Yes

(*Id.* at 176:24-28.)

Given the extensive testimony regarding Petitioner holding the crutch, the information Petitioner has provided to the Court is not enough to convince the Court the outcome would have been different under the prejudicial prong of *Strickland*. In the Court's view, DNA and fingerprint analysis of the crutch would have likely bolstered the State's case and hindered Petitioner's. Given this, Petitioner has failed to demonstrate prejudice. Since the "[f]ailure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim," Petitioner is not entitled to relief as to this claim. *Strickland*, 466 U.S. at 700.

ii. Failure to Object to Demonstrative Crutch

Petitioner asserts a crutch "was brought from [the] prosecutor's home" and his counsel should have objected to its demonstrative use. (FAP at 19.) Petitioner has provided no evidence that the prosecutor's use of a demonstrative crutch was prejudicial to the trial. A thorough review of the record indicates that the jury was informed on several different occasions that the crutch was a demonstrative aid and not the actual weapon. The prosecutor identified it as a "demonstrative tool" when examining Petitioner's brother, Steven Hernandez. (Lodg. 2-4 at 121:26-122:5.) Additionally, the state court judge clarified the crutch used in the trial was "not evidence" but was simply "a demonstrative piece" that the jurors could not consider when deliberating. (Lodg. 2-10 at 40:28-41:3.) Petitioner appears to claim this is objectionable because it was not the real weapon. However, this fails to demonstrate prejudice. For this reason alone, Petitioner's claim should fail.

Even assuming, *arguendo*, there was prejudice, there is no indication Petitioner's counsel's failure to object to the demonstrative crutch was objectively unreasonable. Counsel has "wide latitude [] in making tactical decisions." *Strickland,* 466 U.S. at 689.

Petitioner's counsel could have reasonably determined the use of such a demonstrative aid was not worthy of an objection. This is particularly true since the "use of such demonstrative aids is routine" in state court proceedings. *People v. Gonzales*, 281 P.3d 834, 867 (Cal. 2012) (citations omitted). Thus, Petitioner has failed to show his counsel's decision not to object to the demonstrative crutch was objectively unreasonable.

Since the "[f]ailure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim," Petitioner is not entitled to relief as to this claim. *Strickland*, 466 U.S. at 700.

iii. <u>Failure to Go In Depth Of Deputy Glover's Knowledge Of Petitioner</u>

Petitioner asserts "[his] attorney of record asked Officer Glover if he knew [Petitioner] but [did not] go into depth," claiming this was ineffective assistance of counsel. (FAP at 15.) The following is the cross-examination of Deputy Glover by Petitioner's counsel regarding the prior knowledge of Petitioner:

> Q: In this situation, you didn't know [Petitioner] prior to this incident, right?
>
> A: That's not entirely true, no.
>
> Q: So you know him already?
>
> A: Yes.
>
> Q: Have you personally met him before?
>
> A: I have.

(Lodg. 2-6 at 45:27-46:7). Petitioner's counsel then stopped questioning Officer Glover and his prior knowledge of Petitioner. *Id*.

Petitioner does not provide any evidence to support his claim that this decision was objectively unreasonable or prejudicial. It is also quite likely that had Petitioner's counsel explored further the prior relationship that Officer Glover had with Petitioner, damaging or otherwise unfavorable information (e.g., Officer Glover had previously arrested

Petitioner) may have been revealed. The depth and breadth of cross-examination done by counsel is a tactical decision and counsel has "wide latitude [] in making tactical decisions." *Strickland,* 466 U.S. at 689. Without providing any evidence at all as to why counsel was deficient in the cross-examination of Office Glover, Petitioner has failed to meet his burden. Since the "[f]ailure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim," Petitioner is not entitled to relief as to this claim. *Strickland*, 466 U.S. at 700.

iii. <u>Failure to Identify Evidence Not Exchanged During Discovery</u>

Petitioner alleges his counsel failed to recognize the State introduced police reports not exchanged during discovery. Petitioner states "had [his] counsel been alert" counsel would have requested police reports the State introduced at trial but did not exchange in discovery. (FAP at 19.)

The record contradicts Petitioner's claim that evidence was presented without being exchanged. As explained above, Petitioner's counsel acknowledged that the police reports in question were received. *See*, *supra*, 7:11-8:11. Petitioner does not provide any evidence that contradicts the record outside of the naked assertions in his Petition and Traverse claiming discovery was not exchanged. Without anything further, Petitioner has not satisfied his burden of demonstrating deficient performance or prejudice and, accordingly, is not entitled to relief as to this claim.

iv. <u>Conclusion</u>

Because Petitioner has not shown that his counsel performed deficiently and failed to show prejudice, his claim for ineffective assistance of counsel must fail. Accordingly, the Court finds the state court did not rule contrary to or unreasonably apply clearly established federal law. Petitioner is not entitled to relief as to this claim.

D. <u>Evidentiary Hearing</u>

Petitioner also requests an evidentiary hearing. (Traverse at 6.) "In deciding whether to grant an evidentiary hearing, a federal court must consider whether such a hearing could enable an applicant to prove the petition's factual allegations, which, if true, would entitle

the applicant to federal habeas relief." *Schriro v. Landrigan*, 550 U.S. 465, 474 (2007). A district court is not required to hold an evidentiary hearing where "the record refutes the applicant's factual allegations or otherwise precludes habeas relief [.]" *Id.*; *see also Hibbler v. Benedetti*, 693 F.3d 1140, 1147 (9th Cir. 2012) ("An evidentiary hearing is not required on issues that can be resolved by reference to the state court record.") (citation omitted).

Petitioner simply claims the state court failed to hold an evidentiary hearing and as a result this Court should hold an evidentiary hearing. However, the record refutes the factual allegations Petitioner asserts in his claim that the State improperly suppressed evidence and a portion of his claim for ineffective assistance of counsel.[6] Moreover, the record demonstrates that Petitioner's federal constitutional rights were not violated when the State did not collect or test the weapon used in the crime. Lastly, Petitioner's remaining claims of ineffective assistance of counsel are issues that are "resolved by reference to the state court record," *Hibbler*, 693 F.3d at 1147, given the "doubly" deferential standard for analyzing ineffective assistance of counsel claims, *Richter*, 562 U.S. at 105.

For these reasons, it is **RECOMMENDED** Petitioner's request for an evidentiary hearing be **DENIED**.

VI. CONCLUSION

For the aforementioned reasons, the Court **RECOMMENDS** Petitioner's Petition for Writ of Habeas Corpus be **DENIED** without prejudice. This Report and Recommendation is submitted to U.S. District Judge Cathy Ann Bencivengo, pursuant to the provision of 28 U.S.C. Section 636(b)(1).

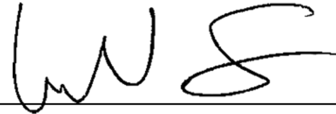
IT IS ORDERED that no later than **August 25, 2017** any party to this action may file written objections with the Court and serve a copy on all parties. The document should be captioned "Objections to Report and Recommendation."

[6] Specifically, the claim that Petitioner's counsel failed to object to evidence presented without being introduced into discovery is refuted by the record before the Court.

IT IS FURTHER ORDERED that any reply to any objections shall be filed with the Court and served on all parties no later than **September 1, 2017**. The parties are advised that failure to file objections within the specified time may waive the right to raise those objections on appeal. *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

IT IS SO ORDERED.

Dated: July 28, 2017



Hon. William V. Gallo
United States Magistrate Judge