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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

BRIAN KEITH BARNETT,
Petitioner,
v.
W.L. MONTGOMERY, Warden,
Respondent.

Case No.: 17-cv-00209-AJB-BLM

ORDER:

- (1) ADOPTING REPORT AND RECOMMENDATION;**
 - (2) OVERRULING PETITIONER’S OBJECTIONS;**
 - (3) DENYING PETITIONER’S PETITION FOR WRIT OF HABEAS CORPUS; AND**
 - (4) DECLINING TO ISSUE A CERTIFICATE OF APPEALABILITY**
- (Doc. Nos. 1, 29, 30)

On February 1, 2017, Petitioner Brian Keith Barnett (“Petitioner”), a state prisoner proceeding pro se, filed his petition for writ of habeas corpus. (Doc. No. 1.) On August 29, 2017, Magistrate Judge Barbara Lynn Major filed a Report and Recommendation (“R&R”) denying Petitioner’s request for judicial notice and recommending that the district court

1 deny Petitioner’s petition. (Doc. No. 29.) Petitioner filed an objection to the R&R on
2 September 22, 2017. (Doc. No. 30.) For the reasons set forth more fully below, the Court
3 **ADOPTS** the R&R in full, (Doc. No. 29), **OVERRULES** Petitioner’s objections, (Doc.
4 No. 30), and **DENIES** Petitioner’s petition for writ of habeas corpus, (Doc. No. 1).

5 **I. BACKGROUND¹**

6 The following facts are taken from the California Court of Appeal’s April 29, 2016,
7 opinion in People v. Barnett, Appeal No. D065324:

8 On the night of June 21, 2013, [Petitioner] and Frederick
9 Morao had a loud argument at a residential hotel in San Diego.
10 The two men were friends and [Petitioner] was temporarily
11 staying with Morao. Morao had purchased methamphetamine
12 from [Petitioner], and both had consumed “a lot” of “crystal
meth” that day. The men argued about money [Petitioner]
13 claimed Morao owed him for the methamphetamine.

14 Earlier in the day, Morao had witnessed [Petitioner] hit
15 Devon Clements (a friend of Morao’s), with sufficient force to
16 knock him down. During the argument, Morao told [Petitioner]
17 “I ain’t Devon. You ain’t going to hit me like Devon.” One of
18 the two men said something like “We’ll handle this,” or “[I]et’s
19 hit the corner” and Morao walked away from the hotel.
20 [Petitioner] followed behind. Morao carried the bottom part of a
21 pool cue (approximately two feet long and two inches in
22 diameter) concealed inside his sweater. He had it with him
23 because he knew [Petitioner] carried weapons, including a
serrated knife with a four-to-five inch blade. When [Petitioner]
24 got close to Morao, Morao turned around, thinking [Petitioner]
25 was going to “swing, hit me some kind” and “swung too,”
26 swinging the pool cue at [Petitioner]. [Petitioner] was able to
27 disarm Morao of the pool cue before being struck. Morao then
28 began throwing punches at [Petitioner], many of which landed.

Clements followed slowly behind the men and saw
[Petitioner] holding a cylindrical object about a foot and a half
long during the fight. Clements initially stated he did not see
[Petitioner] use the object on Morao, but later testified it did not

¹ The R&R also employs the same factual background provided by the California Court
of Appeal’s opinion.

1 make contact with Morao. Clements originally described the
2 object as looking like a rolling pin and testified it was wider than
3 the pool cue. Morao felt blows to his chest and stomach during
4 the fight. The brief fight stopped when Morao felt like he “got
5 enough hits in,” and Morao and [Petitioner] separated.
6 [Petitioner] walked away limping and yelling something. Morao
7 joined Clements and said something like “I got him.” The two
8 men gave each other “daps,” a celebratory gesture. Morao and
9 Clements then walked back toward the hotel and Morao realized
10 he was bleeding heavily. After Morao reached the lobby, the
11 hotel security guard called an ambulance. Morao lost
12 consciousness after the paramedics arrived and the next thing he
13 remembered is waking up after surgery. Morao remained in the
14 hospital for a week.

15 Morao had multiple stab wounds, at least one to the left
16 side of his stomach and one on his back. A doctor told Morao
17 there were 14 stab wounds. Clements also recalled hearing from
18 a police officer that Morao was stabbed 14 to 16 times and might
19 not make it. In addition, the investigating officer, Detective
20 Tews, recalled hearing from police officers at the scene that
21 Morao was stabbed 14 times, but was unable to personally verify
22 the number.

23 Detective Tews interviewed Morao. Morao initially told
24 Detective Tews he had been jumped by two Hispanic men.
25 Morao had prior felony convictions including theft, possession
26 of methamphetamine for sale, petty theft with a prior, and
27 robbery. He used his “felon mentality” when first speaking with
28 the police. After learning about surveillance video of the
incident, Morao told Detective Tews the truth about what
happened, explaining he made up the initial story because he did
not want to be a rat.

Detective Tews also interviewed [Petitioner]. [Petitioner]
denied stabbing Morao. [Petitioner] told Detective Tews Morao
tried to hit him with a pool cue, he took the cue away, Morao ran
and was then attacked from behind by a “Hispanic dude.”
[Petitioner] admitted he always carried a knife and he had a
black, foot-long, serrated knife with him at the time of the
incident, but denied using the knife on Morao.

On June 21, 2013, Morao was either 5’3” or 5’7 and
weighed around 205 or 210 pounds. [Petitioner] is significantly
taller than Morao. Morao felt threatened by the size disparity due

1 to [Petitioner's] advantage of height and "reach." Morao was
2 very soft spoken and nervous during [Petitioner's] cross-
3 examination. Morao does not like weapons, does not know
4 anything about knives, and does not need a knife. However,
[Petitioner] had promised to get Morao a knife.

5 *Section 1118 Motion for Acquittal*

6 At the close of the prosecution's case, [Petitioner] moved
7 for acquittal under section 1118. He argued there was insufficient
8 evidence to show he used a knife. He further argued evidence
9 showed Morao had a concealed pool cue, which he attempted to
10 strike [Petitioner] with, [Petitioner] took the cue away from him
11 and Morao swung and hit [Petitioner] 20 times. [Petitioner]
12 asserted he "had an absolute right to defend himself" under those
13 circumstances. The trial court denied the motion, noting although
14 evidence established Morao (the smaller individual) initially had
15 a pool cue, any force Morao used after being disarmed "did not
16 justify the deadly force that [Petitioner] used when he stabbed
17 him in the gut." The court therefore ruled there was sufficient
18 evidence for a reasonable jury to find [Petitioner] guilty.

19 *Defense Evidence*

20 [Petitioner] represented himself. [Petitioner] first called
21 Dr. Murphy, a forensic psychologist, who testified about the fight
22 or flight syndrome and similar responses of people using crystal
23 methamphetamine. [Petitioner] also called San Diego Police
24 Officer Carlos Munoz (Officer Munoz), who had written a report
25 of the incident stating Morao was stabbed 14 times. Hospital staff
26 had informed Officer Munoz of the 14 stab wounds, but the
27 specific source was not identified in his report and he could not
28 recall who it was. Officer Munoz did not take pictures of any of
the stab wounds.

[Petitioner] took the stand. He described his relationship
with Morao as one in which Morao depended upon him to "help
him out" by supplying crystal methamphetamine and testified he
would come from various locations in Southern California, at his
own expense, to supply Morao. The fight with Morao occurred
because Morao was angry that [Petitioner's] friends would not
give him a cheap price on illegal drugs. When Morao said "Let's
go handle it," [Petitioner] anticipated a fistfight and believed he
"ain't got no problem," as he was "fixing to whip this little

1 chump’s ass, you know, for crossing me up, plain and simple.”
2 [Petitioner] was not worried about fighting the younger Morao,
3 a “guy in his prime,” because “[m]ost youngsters these days, they
4 don’t even know how to sling the fist. They can’t even fight. You
5 know, I [was] brought up using my hands to defend myself.”

6 [Petitioner] was attacked by Morao and “just defended
7 [him]self.” After [Petitioner] took the pool stick away from
8 Morao, Morao ran and [Petitioner] did not pursue him. At the
9 time, [Petitioner] saw Clements was following behind, and
10 thought he was going to try to help Morao, but was not worried
11 about being “double team[ed]” by the men. [Petitioner] had a gun
12 in one of his back pockets during the incident, but had no
13 intention of using it. [Petitioner’s] “big ol’ knife” was in his other
14 back pocket. [Petitioner] was “hit in the nose” by Morao, and
15 there was some bleeding.

16 [Petitioner] testified he used only his fists on Morao and
17 did not stab him. Instead, Morao was stabbed by a Hispanic male
18 after [Petitioner] disarmed him and Morao ran off into the street.
19 After [Petitioner] took Morao’s weapon away, Morao “turned
20 around and he got stabbed.”

21 (Doc. No. 9-22 at 2–7.)²

22 After trial, the jury found Petitioner guilty of assault with a deadly weapon. (*Id.* at
23 2.) On January 29, 2014, the trial court sentenced Petitioner to seventeen years in state
24 prison. (Doc. No. 9-12.)

25 On December 5, 2014, Petitioner appealed his conviction, arguing that the trial court
26 committed reversible error by (1) denying his motion for acquittal under section 1118.1
27 because there was insufficient evidence to find Petitioner did not act in self-defense, and
28 (2) prejudicially instructing the jury regarding self-defense after an attacker is disabled or
danger ceases. (Doc. No. 9-19.) On April 29, 2016, the California Court of Appeal affirmed
Petitioner’s conviction. (Doc. No. 9-22.) On June 3, 2016, Petitioner filed a petition for
review in the California Supreme Court reasserting the same claims raised in his appeal.

² Page numbers refer to the CM/ECF page number and not the number on the original document.

1 (Doc. No. 9-23.) On July 27, 2016, the Supreme Court of California denied the petition for
2 review without any discussion. (Doc. No. 9-24.)

3 On January 29, 2014, Petitioner filed a petition for Writ of Habeas Corpus in the
4 California Court of Appeal arguing that (1) his Faretta rights to due process and equal
5 protection were violated when the county jail made decisional and statutory law available
6 via a “kiosk” separate from the desktop with a word processor and denied him access to
7 confidential legal phone calls and black ink pens, and (2) the thumb drive and media disc
8 provided by the prosecution did not function, he could not contact the court clerk to
9 calendar a hearing or obtain sufficient copies of documents for service, and the prosecutor
10 had denied receiving his motions. (Doc. No. 9-25.) On January 31, 2014, the California
11 Court of Appeal denied the Petition as untimely, explaining that Petitioner “should have
12 brought his complaints to the attention of the trial court before—not after—he proceeded
13 to trial and was convicted[.]” (Doc. No. 9-26.)

14 On May 3, 2016, Petitioner filed a second Petition for Writ of Habeas Corpus in the
15 California Court of Appeal, arguing that (1) the prosecutor knowingly and intentionally
16 withheld exculpatory evidence, or alternatively, destroyed it before trial and (2) the
17 prosecutor knowingly elicited and permitted the introduction of false testimony. (Doc. No.
18 9-27.) On May 17, 2016, the California Court of Appeal denied the petition, noting that
19 Petitioner demonstrated neither the materiality of the alleged undisclosed information nor
20 that the police or prosecution were acting in bad faith. (Doc. No. 9-28.)

21 On August 25, 2014, Petitioner filed a Petition for Writ of Habeas Corpus in the
22 California Supreme Court, arguing that (1) the prosecutor knowingly and intentionally
23 withheld exculpatory evidence of a digital recording of the initial interview with witness
24 Devon Michael Clements and (2) the California Court of Appeal failed to hold an
25 evidentiary hearing on the prosecution’s alleged withholding of evidence. (Doc. No. 9-31.)
26 On November 9, 2016, the California Supreme Court denied the petition without
27 discussion. (Doc. No. 9-32.)

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1 **II. PROCEDURAL BACKGROUND**

2 On February 1, 2017, Petitioner filed the present matter, his Petition for Writ of
3 Habeas Corpus asserting five grounds for relief: (1) the prosecution knowingly and
4 intentionally withheld the digital recording of statements of witness Devon Michael
5 Clements in violation of his due process discovery rights; (2) the appellate court failed to
6 order an evidentiary hearing on the prosecution allegedly withholding evidence; (3)
7 arbitrary and capricious jail policies obstructed and interfered with Petitioner’s exercise of
8 his Faretta Rights; (4) the jail obstructed Petitioner’s ability to produce his moving papers
9 and did not provide him copies for lawful service via U.S. Mail; and (5) the trial court erred
10 by denying Petitioner’s motion for a judgment of acquittal based on insufficient evidence.
11 (*See generally* Doc. No. 1.) Subsequently, Petitioner was granted in forma pauperis status.
12 (Doc. No. 3.)

13 On April 4, 2017, Respondent filed his response and on May 10, 2017, Petitioner
14 filed his traverse. (Doc. Nos. 8, 12.) On July 17, 2017, Petitioner filed a request for judicial
15 notice. (Doc. No. 28.) Thereafter, on August 29, 2017, Magistrate Judge Major filed an
16 R&R denying Petitioner’s request for judicial notice and recommending that his petition
17 be denied. (Doc. No. 29.) Petitioner then filed his objection to the R&R by the deadline set
18 by the Court. (Doc. No. 30.)

19 **III. LEGAL STANDARDS**

20 A. Review of the Report and Recommendation

21 Federal Rule of Civil Procedure 72(b) and 28 U.S.C. § 636(b)(1) set forth a district
22 judge’s duties in connection with a magistrate judge’s report and recommendation. The
23 district judge must “make a de novo determination of those portions of the report . . . to
24 which objection is made,” and “may accept, reject, or modify, in whole or in part, the
25 findings or recommendations made by the magistrate judge.” 28 U.S.C. § 636(b)(1)(C);
26 *see also United States v. Remsing*, 874 F.2d 614, 617 (9th Cir. 1989). However, in the
27 absence of timely objection(s), the court “need only satisfy itself that there is no clear error
28 on the face of the record in order to accept the recommendation.” Fed. R. Civ. P. 72(b),

1 Advisory Committee Notes (1983); *see also United States v. Reyna-Tapia*, 328 F.3d 1114,
2 1121 (9th Cir. 2003).

3 B. Standard of Review Under 28 U.S.C. § 2254

4 A petitioner in state custody pursuant to the judgment of a state court may challenge
5 his detention only on the grounds that his custody is in violation of the United States
6 Constitution or the laws of the United States. 28 U.S.C. § 2254(a); *accord Williams v.*
7 *Taylor*, 529 U.S. 362, 375 n.7 (2000). The Anti-Terrorism and Effective Death Penalty Act
8 (“AEDPA”), applies to § 2254 habeas corpus petitions filed after 1996. *See Lindh v.*
9 *Murphy*, 521 U.S. 320, 322 (1997). Federal habeas relief is available only if the result
10 reached by the state court on the merits is “contrary to” or “an unreasonable application”
11 of Supreme Court precedent, or if the adjudication is “an unreasonable determination”
12 based on the facts and evidence. 28 U.S.C. § 2254(d)(1)-(d)(2).

13 **IV. DISCUSSION**

14 The law is well established that a district judge “shall make a de novo determination
15 of those portions of the report or specified proposed findings or recommendations to which
16 objection is made.” 28 U.S.C. § 636(b)(1). Presently, Petitioner proffers three objections
17 to Magistrate Judge Major’s R&R: (1) that it incorrectly concluded that the State Appellate
18 Court adjudicated ground one of Petitioner’s application; (2) that Magistrate Judge Major
19 misconstrued Petitioner’s claim that the Appellate court did not review an audio recording;
20 and (3) Magistrate Judge Major incorrectly concluded that the prosecution provided one
21 audio recording of witness Devon Clements. (*See generally* Doc. No. 30.) The Court notes
22 that Petitioner does not object to the R&R in regards to ground two through five of his
23 petition, nor does he discuss the denial of his request for judicial notice. (*See generally id.*)
24 Instead, Petitioner focuses solely on ground one—the prosecution allegedly knowingly and
25 intentionally withholding exculpatory evidence. (*Id.*)

26 A. Alleged Withholding of the Audio Recording

27 The crux of Petitioner’s objection is that he was not at any time prior to or during
28 his state trial provided any opportunity to review any recording of witness Devon Michael

1 Clements’ (“Clements”) statements to San Diego Police detective Tews. (Doc. No. 30 at
2 2.) This occurred despite the duty of the prosecution to disclose evidence to Petitioner
3 during his trial and despite the Superior Court’s order to the Prosecution to provide the
4 audio recording to him. (Doc. No. 40 at 4–5, 7.)

5 Under 28 U.S.C. § 2254(d) as amended by AEDPA:

6 (d) An application for a writ of habeas corpus on behalf of a
7 person in custody pursuant to the judgment of a State court shall
8 not be granted with respect to any claim that was adjudicated on
9 the merits in State court proceedings unless the adjudication of
10 the claim—(1) resulted in a decision that was contrary to, or
11 involved an unreasonable application of, clearly established
12 Federal law, as determined by the Supreme Court of the United
13 States; or (2) resulted in a decision that was based on an
14 unreasonable determination of the facts in light of the evidence
15 presented in the State court proceeding.

16 28 U.S.C. § 2254(d).

17 “The prosecution’s affirmative duty to disclose evidence favorable to a defendant
18 can trace its origins to early 20th-century strictures against misrepresentation and is of
19 course most prominently associated with this Court’s decision in *Brady v. Maryland*, 373
20 U.S. 83, 83, S.Ct. 1194, 10 L.Ed.2d 215 (1963).” *Kyles v. Whitley*, 514 U.S. 419, 432
21 (1995). *Brady* held “that the suppression by the prosecution of evidence favorable to an
22 accused upon request violates due process where the evidence is material either to guilt or
23 to punishment, irrespective of the good faith or bad faith of the prosecution.” *Brady*, 373
24 U.S. at 87.

25 “[A] showing of materiality does not require demonstration by a preponderance that
26 disclosure of the suppressed evidence would have resulted ultimately in the defendant’s
27 acquittal[.]” *Kyles*, 514 U.S. at 434. Instead the touchstone of materiality is a “reasonable
28 probability” of a different result. *Id.* However, “[t]he question is not whether the defendant
would more likely than not have received a different verdict with the evidence, but whether
in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of

1 confidence.” *Id.*

2 In sum, for petitioner to prevail on his *Brady* claim he must show that (1) the
3 evidence was favorable to the accused either because it was exculpatory or impeaching;
4 (2) the evidence was suppressed by the State; and (3) the suppression resulted in prejudice.
5 *Strickler v. Greene*, 527 U.S. 263, 281–82 (1999).

6 Unfortunately for Petitioner, the crucial flaw with the objections he proffers is that
7 Petitioner still fails to demonstrate the materiality of the Clements audio recording. *See*
8 *United States v. Bagley*, 473 U.S. 667, 682 (1985) (holding that evidence is material “if
9 there is a reasonable probability that, had the evidence been disclosed to the defense, the
10 result of the proceeding would have been different. A ‘reasonable probability’ is a
11 probability sufficient to undermine the confidence in the outcome.”). Instead, Petitioner
12 focuses his objections on detailing how the appellate court did not review the audio
13 recording, that the prosecutor allegedly failed to disclose the evidence, that Magistrate
14 Judge Major was incorrect when she stated that Petitioner stated that he received a copy of
15 the recorded interview, and that the materiality of the recording is not the issue. (*See*
16 *generally* Doc. No. 30.)

17 The Court notes that it has carefully taken under consideration the various issues
18 Petitioner has with the alleged Clements recording and does not downplay his qualms and
19 concerns. However, Petitioner’s ten page objection and its claim of prosecutorial
20 misconduct cannot be distinct from a material determination. As Magistrate Judge Major
21 discussed in great detail, when a prosecutor is accused of suppressing exculpatory evidence
22 in violation of due process, the petitioner must show (1) the prosecution suppressed
23 evidence; (2) the evidence was favorable to the accused; and (3) the evidence was material
24 to the issue of guilt or punishment. *Brady*, 373 U.S. at 87. Thus, other than claiming that
25 the Clements recording “could have influenced the determination of the case,” (Doc. No.
26 30 at 5), and that he “intended to use the recording for impeachment purposes,” (*id.* at 7),
27 Petitioner does not demonstrate how the alleged recording was favorable to his case. *See*
28 *Benn v. Lambert*, 283 F.3d 1040, 1053 (2002) (“Evidence is deemed prejudicial, or

1 material, only if it undermines confidence in the outcome of the trial.”); *see also Strickler*,
2 527 U.S. at 281 (holding that “there is never a real ‘*Brady* violation’ unless the
3 nondisclosure was so serious that there is a reasonable probability that the suppressed
4 evidence would have produced a different verdict.”).

5 In coming to this conclusion, for Petitioner’s benefit, the Court highlights that
6 Petitioner was provided with notes from the interview with Clements and both the
7 interviewing officer and witness testified at trial. (Doc. No. 9-28 at 1–2.) Moreover, the
8 Court agrees with the appellate court that Petitioner’s claim that the Clements recording
9 may have included additional or contradictory information is “entirely speculative.” (*Id.* at
10 2.)

11 Second, as detailed clearly in the R&R, Clements’ trial testimony was consistent
12 with the information that he provided during his June 21, 2013 interview, thus the
13 information was not impeaching. (Doc. No. 29 at 13–15.) Finding no need to repeat the
14 R&R’s findings, the Court briefly summarizes that detective Tew’s Investigator’s Report
15 from June 21, 2013, describes that Clements was awoken by Morao who was angry, that
16 he followed Morao and Petitioner, Morao and Petitioner then began to fight by a tuxedo
17 shop, he never saw a knife, and that after the fight Morao noticed that he was bleeding.
18 (Doc. No. 16 at 19.) In comparison, during trial, Clements testified that Morao came by his
19 room in an angry state, that he observed Petitioner and Morao argue as they walked down
20 the street, that he saw Petitioner strike Morao with something, and that after the fight Morao
21 realized he was bleeding. (Doc. No. 9-7 at 30–38, 48–49, 76–77, 82, 100–01, 104–06, 108,
22 138–39.) Consequently, comparing the two, the Court finds that Clements’ testimony at
23 trial and Detective Tews’ June 21, 2013 Investigator’s Report are consistent.

24 On a final note, the Court finds that Petitioner has failed to demonstrate that a
25 recording actually existed. Both the prosecutor and detective Tews stated on the record that
26 there is no recording of the June 21, 2013 interview of Clements and Petitioner does not
27 provide any further evidence of such a recording in his objection. (Doc. No. 9-8 at 41–42;
28 Doc. No. 9-3 at 28–29, Doc. No. 9-5 at 28–30.)

1 Based on the foregoing, despite Petitioner’s various arguments, most of which are
2 irrelevant to the matter at hand, Petitioner has not established the materiality of the
3 Clements recording and thus his *Brady* violation fails. Accordingly, the Court
4 **OVERRULES** Petitioner’s objections.

5 **V. CONCLUSION**

6 As explained in more detail above, the Court hereby (1) **ADOPTS** Magistrate Judge
7 Major’s R&R; (2) **OVERRULES** Petitioner’s objections; (3) **DENIES** the Petition on the
8 merits; and (4) **DECLINES** to issue a certificate of appealability.³

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10 Dated: December 8, 2017


11 Hon. Anthony J. Battaglia
12 United States District Judge
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22 ³ When a district court enters a final order adverse to the applicant in a habeas proceeding,
23 it must either issue or deny a certificate of appealability. *See* 28 U.S.C. § 2253(c)(1)(A). A
24 certificate of appealability is required to appeal a final order in a habeas proceeding. *See*
25 *id.* A certificate of appealability is appropriate only where the petitioner makes “a
26 substantial showing of the denial of a constitutional right.” *Id.* § 2253(c)(2); *Miller-El v.*
27 *Cockrell*, 537 U.S. 322, 326 (2003). Under this standard, the petitioner must demonstrate
28 that “reasonable jurists could debate whether . . . the petition should have been resolved in
a different manner or that the issues presented were ‘adequate to deserve encouragement
to proceed further.’” *Slack v. McDaniel*, 529 U.S. 473, 475 (2000) (quoting *Barefoot v.*
Estelle, 463 U.S. 880, 893 & n.4 (1983)).