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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

STEVEN KLEIN,  
  
Petitioner,  
  
v.  
  
NEIL MCDOWELL, warden,  
  
Respondent.

Case No.: 17cv00380 JAH-PCL

**ORDER ADOPTING THE  
MAGISTRATE JUDGE’S REPORT  
AND RECOMMENDATION AND  
DENYING PETITION FOR WRIT  
OF HABEAS CORPUS AND  
DENYING CERTIFICATE OF  
APPEALABILITY**

**INTRODUCTION**

Pending before the Court is Petitioner Steven Klein’s First Amended Petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. section 2254. Respondent filed an answer and Petitioner filed a traverse. Pursuant to 28 U.S.C. section 636(b)(1), the Honorable Peter C. Lewis, United States Magistrate Judge, submitted a Report and Recommendation (“Report”) to this Court recommending denial of the petition. Petitioner filed objections to the Report, and filed a supplemental petition with additional grounds for relief. After careful consideration of the pleadings and relevant exhibits submitted by the parties, and for the reasons set forth below, this Court OVERRULES the objections, ADOPTS Judge Lewis’s report, DENIES the petition in its entirety and DENIES a certificate of appealability.

1  
2 **BACKGROUND<sup>5</sup>**

3 On March 4, 2016, a jury convicted Petitioner of driving under the influence of  
4 alcohol in violation of California Vehicle Code section 23152(a) and driving while having  
5 a measurable blood alcohol of 0.08 or more, in violation California Vehicle Code section  
6 23152(a) and (b). Lodg. 2 at 168 (Doc. No. 21-1). Petitioner was sentenced to 6 years  
7 imprisonment. Id. at 142.

8 Petitioner appealed his conviction through a brief submitted pursuant to People v.  
9 Wende, 25 Cal.3d 436 (1979) and Anders v. California, 386 U.S. 738 (1967), requesting  
10 the Court of Appeal to independently review the record and determine whether errors  
11 occurred requiring reversal. See Lodg. 8 (Doc. No. 21-11). While the appeal was pending,  
12 Petitioner, appearing *pro se*, filed a petition for writ of habeas corpus before the California  
13 Court of Appeal. See Lodg. 9 (Doc. No. 21-12). The California Court of Appeal affirmed  
14 the judgment, and denied his petition for writ of habeas corpus. See Lodgs. 10, 11 (Doc.  
15 Nos. 21-13, 21-14). Petitioner filed a petition for review which the California Supreme  
16 Court denied without opinion. See Lodgs. 12, 13 (Doc. Nos. 21-15, 21-16).

17 Petitioner original filed a petition for writ of habeas corpus on February 23, 2017,  
18 and filed a First Amended Petition on March 23, 2017. He also filed a supplement to his  
19 amended petition provided transcripts and a brief filed pursuant to Wende and a copy of a  
20 case in support of his petition. Defendant filed an answer and Petitioner filed a traverse.

21 Judge Lewis filed a report recommending the Court deny the petition. Petitioner  
22 filed objections to the Report on December 1, 2017. On June 22, 2018, Petitioner filed a  
23 motion to amend his petition and a request for stay and abeyance. He filed a second request  
24 for stay and abeyance on January 30, 2018. On March 12, 2018, he filed a request for  
25 ruling on structural error, requested the Court mandate the authentication of the MVARs,  
26

27  
28 <sup>5</sup> The underlying facts set forth in the report are adopted *in toto*, and referenced as if fully  
set forth herein. This Court provides only a brief procedural background.

1 a request for leave to amend his petition and request for counsel. He later filed a motion  
2 for leave to file electronically, a motion for ruling on his motions and a motion to substitute  
3 the respondent.

## 4 DISCUSSION

### 5 I. Petition for Writ of Habeas Corpus

#### 6 A. Legal Standard

7 The district court's role in reviewing a magistrate judge's report and  
8 recommendation is set forth in 28 U.S.C. section 636(b)(1). Under this statute, the district  
9 court "shall make a de novo determination of those portions of the report . . . to which  
10 objection is made," and "may accept, reject, or modify, in whole or in part, the findings or  
11 recommendations made by the magistrate [judge]." *Id.* When no objections are filed, the  
12 Court may assume the correctness of the magistrate judge's findings of fact and the district  
13 court is not required to conduct a de novo review of the magistrate judge's report and  
14 recommendation. See Wang v. Masaitis, 416 F.3d 992, 1000 n. 13 (9th Cir. 2005) (stating  
15 that "de novo review of a R & R is only required when an objection is made"); United  
16 States v. Reyna-Tapia, 328 F.3d 1114, 1121 (9th Cir. 2003) (en banc) (holding that 28  
17 U.S.C. section 636(b)(1)(c) "makes it clear that the district judge must review the  
18 magistrate judge's findings and recommendations de novo if objection is made, but not  
19 otherwise").

#### 20 B. Analysis

21 Petitioner asserts the following grounds for relief: (1) denial of due process caused  
22 by the prosecutor's use of perjured testimony; (2) ineffective assistance of trial counsel;  
23 (3) denial of right to testify; (4) presentation of false testimony; (5) ineffective assistance  
24 of appellate counsel; and (6) structural error. In his supplemental petition, he attaches  
25 transcripts which he believes demonstrates structural error, in support of ground six.  
26 Petitioner also asserts additional grounds for relief, (7) failure to preserve evidence and (8)  
27 ineffective assistance of trial and appellate counsel.

28 //

1 **1. Ground 1**

2 In ground 1, Petitioner contends the prosecutor allowed Officer Vidana to offer  
3 perjured testimony at the preliminary hearing, motion to suppress and at trial. He maintains  
4 the Mobile Video Audio Recording System (“MVARs”) proves Officer Vidana’s  
5 testimony was false. He further contends the prosecutor colluded with trial counsel to  
6 conceal the audio evidence of the MVARs when only the video portion was played at trial.  
7 Respondent argues the MVARs does not prove Officer Vidana’s testimony was false and  
8 provides a CD copy of both the video and audio of the MVARs.

9 The last reasoned decision, the state appellate court, determined Petitioner’s  
10 assertion that the officer testified falsely was unsupported by evidence and was insufficient  
11 to state a claim for habeas relief.

12 Judge Lewis reviewed both the audio and video of the MVARs showing the pursuit,  
13 stop and arrest of Petitioner provided by Respondent. Citing Napue v. Illinois, 360 U.S.  
14 264 (1959), Judge Lewis determined the MVARs does not establish Vidana’s testimony  
15 was false. Additionally, Judge Lewis found there was no evidence to demonstrate trial  
16 counsel’s decision to present only the video portion of the videotape was anything other  
17 than a tactical decision, and the audio portions could only hurt Petitioner at trial. Judge  
18 Lewis determined the state court’s denial of Petitioner’s perjury and collusion claims was  
19 neither contrary to, nor an unreasonable application of clearly established Supreme Court  
20 law nor based on an unreasonable determination of the facts.

21 Petitioner objects. He contends the MVARs was not authenticated, and it was  
22 actually a “Digitally Remastered Remix.” Objections at 3. He contends the file format  
23 reduced the size and quality of the MVARs, and thereby compromised evidence. Noting  
24 Respondent submitted the video without any information to authenticate it, this Court  
25 directed Respondent to respond to Petitioner’s objection or submit a declaration attesting  
26 to its authenticity. In response, Respondent explains current counsel did not lodge the  
27 video for the Court’s review, has no personal knowledge about how the video was obtained  
28 and cannot authenticate it. However, Respondent obtained a copy of the video admitted

1 during the trial which includes audio, although defense counsel chose not to play the audio  
2 during his cross-examination. Respondent attests to its authenticity and lodges a copy with  
3 the Court. The Court finds Petitioner's allegations of the video being remixed are  
4 unsubstantiated and overrules his objection to the authenticity of the video. Additionally,  
5 Petitioner's groundless allegation that the video was altered is insufficient to support the  
6 claims for knowingly offering perjured testimony or colluding to offer false testimony.  
7 The Court agrees that the video does not demonstrate the officer's testimony was false,  
8 and, therefore, the Court adopts Judge Lewis's findings and recommendation to deny this  
9 claim.

## 10 **2. Ground 2**

11 Petitioner asserts trial counsel violated his Sixth Amendment rights by colluding to  
12 conceal evidence of the audio of the MVARs, failing to present expert witness testimony  
13 at trial and failing to renew a motion to suppress. Respondent contends counsel's tactical  
14 decisions were reasonable.

15 The California Court of Appeal denied the claim upon determining Petitioner failed  
16 to submit evidence that the officer testified falsely, failed to present a declaration from an  
17 expert or any other evidence explaining what the expert testimony would have been or how  
18 it would have helped his case, and failed to show a renewed motion to suppress would be  
19 meritorious and that there is a reasonable probability that the verdict would have been  
20 different absent the excludable evidence.

21 Relying on Strickland v. Washington, 4666 U.S. 668 (1984), Judge Lewis found  
22 counsel's decision to not present audio does not constitute deficient performance or that  
23 there is a reasonable probability that the result of the proceeding would have been different.  
24 Judge Lewis similarly found counsel's failure to call a defense expert did not constitute  
25 deficient performance and Petitioner failed to establish how the expert would have changed  
26 the outcome of the case. With regard to counsel's failure to renew his motion to suppress,  
27 Judge Lewis found Petitioner did not establish he was prejudiced by the failure. Judge  
28 Lewis determined the state court's denial of this claim was neither contrary to, nor an

1 unreasonable application of clearly established Supreme Court law nor based on an  
2 unreasonable determination of the facts.

3         Petitioner objects and points to different portions of the record in support of his claim  
4 that counsel colluded to conceal evidence. However, upon review of the record, this Court  
5 finds these discussions between the trial court and the parties about the MVARs during the  
6 trial process do not demonstrate any attempt or agreement to conceal evidence or otherwise  
7 show counsel's decision not to play the audio at trial was anything other than a tactical  
8 decision. As such, the Court agrees with Judge Lewis's determination that the decision to  
9 not present audio does not constitute deficient performance. The Court also agrees with  
10 Judge Lewis's determination that counsel's failure to call a defense expert and failure to  
11 renew a motion to suppress did not constitute deficient performance, and Petitioner failed  
12 to establish the trial outcome would have been different had counsel done so. Accordingly,  
13 Petitioner's objections are overruled and the Court adopts Judge Lewis's findings and  
14 denies this ground for relief.

### 15 **3. Ground 3**

16         In ground 3, Petitioner maintains he was denied his constitutional right to testify.  
17 He contends his attorney knew he wanted to testify but when he asked his attorney, the  
18 attorney responded it was too late. Respondent argues Petitioner made a conscious  
19 decision to not testify and, thereby, waived the right.

20         The California Court of Appeal determined Petitioner failed to state a prima facie  
21 case for denial of his right to testify because he does not allege he informed his counsel or  
22 the trial court of his desire to testify at any time before he was found guilty.

23         Judge Lewis found the record contained no evidence that Petitioner insisted on  
24 testifying, spoke to the court about his wish to testify or that he discharged his lawyer for  
25 refusing to permit him to testify and the record supported a conclusion Petitioner waived  
26 his right to testify. This Court agrees with Judge Lewis that the record supports the  
27 conclusion that Petitioner waived his right to testify and, therefore, the state court's denial  
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1 of the claim was neither contrary to, nor an unreasonable application of clearly established  
2 Supreme Court law nor based on an unreasonable determination of the facts.

3 **4. Ground 4**

4 In ground 4, Petitioner contends the prosecutor made a false statement in his closing  
5 argument about the expert's testimony regarding the margin of error for the breathalyzer  
6 and trial counsel did not object. Respondent argues the prosecutor did not misquote the  
7 expert and his argument was grounded on the evidence.

8 The California Court of Appeal determined Petitioner failed to state a prima facie  
9 case for habeas relief because his unsupported assertion that numerous cases acknowledge  
10 the margin of error was insufficient to establish prejudicial error warranting vacating  
11 judgment.

12 Judge Lewis determined the record establishes the prosecutor's statements correctly  
13 characterized the expert's opinion. This Court agrees. Therefore, the state court's denial  
14 of the claim was neither contrary to nor an unreasonable application of clearly established  
15 Supreme Court law nor based on an unreasonable determination of the facts.

16 **5. Ground 5**

17 Petitioner asserts, in ground 5, that appellate counsel was ineffective when he failed  
18 to secure and review audio and video evidence. Respondent contends Petitioner cannot  
19 overcome the presumption of correctness and demonstrate prejudice.

20 The California Court of Appeal determined Petitioner failed to state a prima facie  
21 claim of constitutionally ineffective assistance of appellate counsel because the claims he  
22 argues appellate counsel should have raised on appeal have no merit and the right to  
23 effective assistance of appellate counsel does not include the right to have counsel press  
24 frivolous or meritless arguments.

25 Relying on Strickland, Judge Lewis found Petitioner does not establish he was  
26 prejudiced by appellate counsel's actions because he fails to demonstrate he would have  
27 prevailed on appeal had counsel obtained and reviewed the MVARs videotape. This Court  
28 agrees that Petitioner is not entitled to relief as to this claim because he cannot establish

1 prejudice. Therefore, the states court’s denial of the claim was neither contrary to, nor an  
2 unreasonable application of clearly established Supreme Court law, nor based on an  
3 unreasonable determination of the facts.

#### 4 **6. Supplemental Grounds**

5 Petitioner asserts three additional grounds not included in his amended petition: (a)  
6 structural error; (b) failure to preserve evidence, and (c) ineffective assistance of trial and  
7 appellate counsel for failing to challenge the structural error.

8 In a supplemental document entitled “Motion(s)” Petitioner provides the copy of a  
9 docket indicating he filed a petition for a writ of habeas corpus with the California Supreme  
10 Court on November 30, 2017, which was denied on February 14, 2018. His petition  
11 includes the following claims: (1) for structural error based upon the trial court overruling  
12 defense counsel’s objection to the prosecutor’s misstatement of the burden of proof, (2)  
13 collusion, evidence tampering, due process, ineffective assistance of counsel, prosecutorial  
14 misconduct, conspiracy and fraud based upon a failure to preserve evidence, and (3)  
15 ineffective assistance of trial and appellate counsel for failure to address structural error.  
16 Petitioner also attaches a copy of the California Supreme Court decision denying his  
17 petition on February 14, 2018, which reads:

18 The petition for writ of habeas corpus is denied. (See *In re Clark* (1993) 5 Cal.4th  
19 750, 767-769 [courts will not entertain habeas corpus claims that are successive].)  
20 Individual claims are denied, as applicable. (See *People v. Duvall* (1995) 9 Cal.4th  
21 464, 474 [a petition for writ of habeas corpus must include copies of reasonably  
22 available documentary evidence]; *In re Dixon* (1953) 41 Cal.2d 756, 759 [courts will  
23 not entertain habeas corpus claims that could have been, but were not, raised on  
24 appeal]; *In re Miller* (1941) 17 Cal.2d 734, 735 [courts will not entertain habeas  
25 corpus claims that are repetitive].).

26 Doc. No. 31 at 22.

#### 27 **a. Ground 6**

28 In ground 6, Petitioner requests the Court review the record and determine whether  
the state court proceedings offended Petitioner’s constitutional rights. In his supplemental  
petition, he contends “structural error” occurred which requires reversal of his conviction.  
He refers to appellant counsel’s Wende brief which asserts’ the trial court’s act of



1 overruling the defense objection to the prosecutor’s closing argument which misstated the  
2 law was error. Respondent argues Petitioner’s request for the Court to review the  
3 proceedings for error is without precedent. Respondent further argues Petitioner’s specific  
4 complaints are unexhausted and should be denied as meritless. In his traverse, Petitioner  
5 contends appellate counsel’s Wende brief identified structural error when the prosecution  
6 lowered its burden of proof.

7 Judge Lewis held the court cannot conduct an independent review of the record to  
8 determine this ground for relief. Judge Lewis also determined the new specific claims  
9 raised in ground 6 are unexhausted and meritless. Petitioner objects. He maintains neither  
10 Respondent nor Judge Lewis address the structural error claim.

11 Petitioner’s supplemental and subsequent filings clarify what he is asserting in this  
12 ground for relief and provide additional argument in support. He argues the trial court  
13 erred when it overruled trial counsel’s objection to the prosecutor’s closing argument  
14 which, he maintains, improperly lowered the burden of proof. Specifically, he contends  
15 the prosecutor misstated the burden of proof when he stated the jury must consider all of  
16 the evidence together in deciding whether there was a reasonable doubt as to Petitioner’s  
17 guilt.

18 A defendant’s due process rights are violated when a prosecutor’s misconduct  
19 renders a trial fundamentally unfair. See Darden v. Wainwright, 477 U.S. 168, 180 (1986).  
20 “[U]nder Darden, the first issue is whether the prosecutor’s remarks were improper and, if  
21 so, whether they infected the trial with unfairness.” Tan v. Runnels, 413 F.3d 1101, 1112  
22 (9th Cir. 2005).

23 Petitioner challenges the following statement made by the prosecutor during the  
24 rebuttal closing argument:

25 You have to consider all of the evidence together, and then consider whether all of  
26 that evidence together points to a reasonable doubt, and if all of the evidence together  
27 does not point to a reasonable doubt, and only points to guilt, then you must reject  
28 the ones --

1 RT 314:3 – 6, Lodg. 5 (Doc. No. 21-7). Petitioner argues the prosecutor’s statement  
2 lessened the burden of proof by suggesting the defendant must raise reasonable doubt as to  
3 all the evidence together. Immediately following the statement, defense counsel objected.  
4 After the court overruled defense counsel’s objection, the prosecutor continued and  
5 explained:

6 Again, the standard is you must accept only reasonable conclusions and reject any  
7 that are unreasonable. If a conclusion is unreasonable, you have to reject it. It’s not  
8 a standard of scientific certainty. It’s a standard of reasonable doubt. And it’s not a  
9 standard of beyond all possible doubt. You have to decide this case based on the  
10 evidence in this case, evidence, not speculation about what might have occurred or  
11 what’s possible. And the evidence in this case establishes beyond a reasonable doubt  
12 that he’s guilty of both counts.

11 RT 314:23 - 315:6.

12 The prosecutor was addressing an instruction explaining circumstantial evidence.  
13 Immediately prior to the challenged statement, the prosecutor read a portion of the  
14 instruction and stated:

15 How it works is you take all of the evidence in this case, and then when you consider  
16 all of the evidence in this case, is there one reasonable conclusion or is there two  
17 reasonable conclusions?

17 RT 314:3 – 6.

18 Defense counsel objected, which the court overruled and explained:

19 Ladies and gentlemen, it is your interpretation of the instructions and your  
20 interpretation of the evidence that is of paramount importance.

20 RT 314:10-12.

21 This Court finds, in context, the statement did not mislead the jury as to the burden  
22 of proof. The court’s instruction on circumstantial evidence permits either party to draw  
23 reasonable inferences from the evidence, and reasonable inferences from the totality of the  
24 evidence may support any or all elements of a criminal act. The trial court instructed the  
25 jury on the standard of reasonable doubt, and what is evidence. The court also explained  
26 that the closing arguments were not evidence and if either attorney’s comments conflicted  
27 with the instructions, they were to follow the written instructions. The trial court’s  
28 instructions and both counsels’ closing arguments conveyed to the jury that they were

1 required to find the prosecutor proved each element of the charges beyond a reasonable  
2 doubt.

3 Even if the prosecutor's comments were improper, in light of the instructions given  
4 by the trial court, there is nothing to indicate the jury followed the statements by the  
5 prosecutor rather than the instructions provided by the court. Accordingly, Petitioner is  
6 not entitled to relief as to this claim.

7 **b. Failure to Preserve Evidence**

8 In his seventh ground for relief, Petitioner asserts the prosecution and his trial  
9 counsel conspired to deprive him due process by concealing evidence material to his  
10 defense, namely the audio portion of the MVARs. He, again, claims the MVARs was  
11 altered.

12 Petitioner claims that the MVARs was somehow altered are unsubstantiated and  
13 unsupported by the evidence, including the recent authentication provided by Respondent.  
14 Additionally, the record does not support Petitioner's allegations of a conspiracy to conceal  
15 evidence. As explained above, the discussions between the trial court and the parties about  
16 the MVARs during the trial process do not demonstrate any attempt or agreement to  
17 conceal evidence or otherwise show counsel's decision not to play the audio at trial was  
18 anything other than a tactical decision. As such, this claim is without merit.

19 **c. Ineffective Assistance of Trial and Appellate Counsel**

20 Petitioner contends trial and appellate counsel failed to challenge structural error that  
21 resulted in a deficient standard of proof. Specifically, he contends trial counsel failed to  
22 seek a writ of mandate prior to sentencing based upon the deficient standard of proof used  
23 to obtain his conviction. He further contends appellate counsel failed to file a merits brief  
24 on appeal and, instead, "buried" a structural error argument within a Wende brief which  
25 declared no arguable issue could be found. This Court has determined in section I.B.6.b.  
26 Petitioner's claims of structural error are without merit. As such, counsels' purported  
27 failure to challenge the conviction based upon structural error was not deficient.  
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1           Petitioner also argues both trial and appellate counsel were ineffective for failing to  
2 preserve the MVARs evidence and moving for sanctions. This claim is supported by  
3 Petitioner’s assertion that the MVARs is altered which are unsubstantiated and groundless.

4           As such, Petitioner fails to establish counsels’ failure to challenge his conviction  
5 based upon structural error and failure to preserve evidence constitutes deficient  
6 performance. He also fails to show there is a reasonable probability the results would have  
7 been different. Therefore, his claim is denied.

## 8 **7. Evidentiary Hearing**

9           The Court agrees with Judge Lewis’ determination that Petitioner is not entitled to  
10 an evidentiary hearing based upon the fact he is not entitled to habeas relief.

## 11 **II. Certificate of Appealability**

12           Pursuant to Rule 11 of the Rules following 28 U.S.C. section 2254, which was  
13 amended effective December 1, 2009, a district court now “must issue or deny a certificate  
14 of appealability when it enters a final order adverse to the applicant.” A state prisoner may  
15 not appeal the denial of a section 2254 habeas petition unless he obtains a certificate of  
16 appealability from a district or circuit judge. 28 U.S.C. § 2253(c)(1)(A); *see also United*  
17 *States v. Asrar*, 116 F.3d 1268, 1269–70 (9th Cir. 1997) (holding that district courts retain  
18 authority to issue certificates of appealability under AEDPA). A certificate of appealability  
19 is authorized “if the applicant has made a substantial showing of the denial of a  
20 constitutional right.” 28 U.S.C. § 2253(c)(2). To meet this threshold showing, petitioner  
21 must show: (1) the issues are debatable among jurists of reason, (2) a court could resolve  
22 the issues in a different manner, or (3) the questions are adequate to deserve encouragement  
23 to proceed further. *Lambright v. Stewart*, 220 F.3d 1022, 1024–25 (9th Cir. 2000) (citing  
24 *Slack v. McDaniel*, 529 U.S. 473 (2000); *Barefoot v. Estelle*, 463 U.S. 880 (1983)).


25           The Court finds no issues are debatable among jurists of reason. This Court further  
26 finds no issues could be resolved in a different manner. Lastly, this Court finds no  
27 questions are adequate to deserve encouragement to proceed further. Accordingly, this  
28 Court DENIES Petitioner a certificate of appealability.

1 **CONCLUSION AND ORDER**

2 Based on the foregoing, IT IS HEREBY ORDERED:

- 3 1. Petitioner's motion to substitute respondent is **GRANTED IN PART**.  
4 Neil McDowell is substituted in as respondent.
- 5 2. Petitioner's objections to the Magistrate Judge's report and  
6 recommendations are **OVERRULED**.
- 7 3. The Magistrate Judge's report and recommendation is **ADOPTED**.
- 8 4. The petition is **DENIED** in its entirety.
- 9 5. Petitioner's remaining motions are **DENIED as moot**.
- 10 6. Petitioner is **DENIED** a certificate of appealability.

11 DATED: November 16, 2018

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14 JOHN A. HOUSTON  
15 United States District Judge  
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