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7 UNITED STATES DISTRICT COURT
8 FOR THE EASTERN DISTRICT OF CALIFORNIA
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10 GEORGE WALLACE,

11 Petitioner,

12 vs.

13 RON E. BARNES,

14 Respondent.
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No. 2:14-cv-0157-MCE-EFB-P

ORDER AND FINDINGS AND
RECOMMENDATIONS

16 Petitioner is a state prisoner proceeding without counsel with a petition for a writ of
17 habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner challenges a judgment of conviction
18 entered against him on December 10, 2010, in the Sacramento Superior Court on charges of
19 first degree murder with special circumstances. He seeks federal habeas relief on the following
20 alleged grounds: (1) the evidence introduced at his trial is insufficient to support his conviction;
21 (2) his trial and appellate counsel rendered ineffective assistance; and (3) prosecutorial
22 misconduct violated his right to due process. Upon careful consideration of the record and the
23 applicable law, it is recommended that petitioner's application for habeas corpus relief be denied.

24 On July 5, 2016, petitioner filed another habeas petition, in which he claims that the trial
25 court erred in failing to consider his "economic situation" in determining the "payment and
26 manner" of a restitution fine. The court will construe petitioner's filing in this regard as a motion
27 to amend his pending habeas petition to add his restitution claim. For the reasons set forth below,
28 the motion to amend must be denied as futile.

1 **I. Background**

2 **A. Events Preceding the Murders**

3 In November 2009, petitioner lived with his girlfriend Bryanna Warren. On the 26th of
4 November, Warren engaged in a physical altercation with Lawanda Shoals at an apartment shared
5 by Shoals and her boyfriend Clifford Brown. Warren left the apartment after the altercation.

6 On the 28th of November, Warren returned to the apartment and shot both Shoals and
7 Brown, neither fatally. James Turner was rooming with Shoals and Brown at the time and was
8 also present at the time of the shooting. Police responded to the shooting and took information
9 from Brown and Turner. Warren was subsequently arrested on December 2, 2009 and charged
10 with two counts of attempted murder.

11 After Warren's arrest, petitioner spoke with Antonio Meneses – another resident of his
12 own apartment complex. He told Meneses about Warren's predicament and said that he would
13 "kill a nigga." Meneses understood this to be a joke.

14 Petitioner subsequently spoke with Brown's mother and asked for Brown's telephone
15 number. Brown's mother dialed her son and allowed petitioner to speak with him. Petitioner
16 stated that they should "squash this" – referring to the dispute that had led to the November 28
17 shooting. Brown hung up on petitioner.

18 **B. The Murders of James Turner and Clifford Brown**

19 On December 14, 2009, Shoals, Turner, Brown, and George Clark were at Brown's and
20 Shoals' residence. After midnight, Brown and Shoals were in their bedroom; Turner was in his
21 bedroom; and Clark was in the living room. A loud noise emanated from the kitchen. A man
22 with a shotgun appeared, pointed the gun at Clark, but did not shoot him. Clark subsequently fled
23 the premises.

24 Brown had walked into the hallway after hearing the noise and, grasping the situation, ran
25 back to the bedroom he shared with Shoals. He pulled Shoals to the floor and attempted to push
26 her under the bed. The shooter fired the shotgun in the direction of Turner's room and then shot
27 Brown twice. The shooter then left.

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1 Shoals dialed 911 at approximately 1:00 a.m. Both Brown and Turner died at the scene.
2 Turner had sustained a shotgun wound to his face and another to his back. Several pellets had
3 also gone through his forearm. Brown had taken two shotgun wounds – one to his head and
4 another to his chest.

5 Shoals described the shooter as wearing a black sweat suit with a ski mask over his face.
6 She described him as bulky in the chest area and estimated that he was between 5'9" and 5'11".
7 Both Shoals and Clark described the shooter as an African-American man dressed in black. After
8 Clark was shown a photograph of petitioner, he testified that the shooter was the same size.

9 C. The Murder Investigation

10 Police determined that no items of value had been removed from the residence. Nothing
11 indicated that the killings were connected to monetary debts or the sale of narcotics.

12 A search of petitioner's apartment uncovered a complete copy of the police report on
13 Warren's November shooting. The report included addresses and contact information for Shoals,
14 Brown, and Turner. Petitioner denied possessing any firearms or ammunition, but .9 millimeter
15 bullets and a holster were found in his apartment.

16 Petitioner denied involvement, and told police that he had not left his residence on
17 December 14, 2009. He did admit to leaving his residence at two or three in the morning on
18 December 15, 2009. Petitioner claimed that he had simply driven out around the apartment
19 complex before returning to his residence. Despite his claims, petitioner appeared on a Walmart
20 video surveillance tape on December 14, 2009. Dressed in black, he arrived at approximately
21 11:24 p.m. and left at approximately 11:50 p.m.

22 Police seized petitioner's clothing. A black hooded sweatshirt and black sweatpants were
23 discovered in a hamper in his bedroom. A black vest jacket and another black sweatshirt were
24 also found. Several articles of clothing had gunshot residue.

25 A search of petitioner's computer determined that he had searched for "Clifford Brown"
26 on November 28, a route from petitioner's apartment to the victims' residence on December 9,
27 and searches for news reports on the shooting perpetrated by Warren.

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1 **D. Petitioner's Defense**

2 Petitioner did not testify at trial. His counsel argued that the inferences urged by the
3 prosecutor were unreasonable or pointed to both guilt and innocence. He explained that the
4 gunshot residue could have come from contact with Warren after she committed the November
5 28 shooting. Counsel also noted that, although petitioner had been seen at his apartment complex
6 with two pistols, no one had seen him in possession of a shotgun.

7 **II. Standards of Review Applicable to Habeas Corpus Claims**

8 An application for a writ of habeas corpus by a person in custody under a judgment of a
9 state court can be granted only for violations of the Constitution or laws of the United States. 28
10 U.S.C. § 2254(a). A federal writ is not available for alleged error in the interpretation or
11 application of state law. *See Wilson v. Corcoran*, 562 U.S. 1,5 (2010); *Estelle v. McGuire*, 502
12 U.S. 62, 67-68 (1991); *Park v. California*, 202 F.3d 1146, 1149 (9th Cir. 2000).

13 Title 28 U.S.C. § 2254(d) (AEDPA) sets forth the following standards for granting federal
14 habeas corpus relief:

15 An application for a writ of habeas corpus on behalf of a
16 person in custody pursuant to the judgment of a State court shall not
17 be granted with respect to any claim that was adjudicated on the
merits in State court proceedings unless the adjudication of the
claim -

18 (1) resulted in a decision that was contrary to, or involved
19 an unreasonable application of, clearly established Federal law, as
determined by the Supreme Court of the United States; or

20 (2) resulted in a decision that was based on an unreasonable
21 determination of the facts in light of the evidence presented in the
State court proceeding.

22 For purposes of applying § 2254(d)(1), "clearly established federal law" consists of
23 holdings of the United States Supreme Court at the time of the last reasoned state court decision.
24 *Thompson v. Runnels*, 705 F.3d 1089, 1096 (9th Cir. 2013) (citing *Greene v. Fisher*, 565 U.S. 34
25 (2011); *Stanley v. Cullen*, 633 F.3d 852, 859 (9th Cir. 2011) (citing *Williams v. Taylor*, 529 U.S.
26 362, 405-06 (2000)). Circuit court precedent "may be persuasive in determining what law is
27 clearly established and whether a state court applied that law unreasonably." *Stanley*, 633 F.3d at
28 859 (quoting *Maxwell v. Roe*, 606 F.3d 561, 567 (9th Cir. 2010)). However, circuit precedent

1 may not be “used to refine or sharpen a general principle of Supreme Court jurisprudence into a
2 specific legal rule that th[e] [Supreme] Court has not announced.” *Marshall v. Rodgers*, 133 S.
3 Ct. 1446, 1450 (2013) (citing *Parker v. Matthews*, 132 S. Ct. 2148, 2155 (2012) (per curiam)).
4 Nor may it be used to “determine whether a particular rule of law is so widely accepted among
5 the Federal Circuits that it would, if presented to th[e] [Supreme] Court, be accepted as correct.”
6 *Id.* Further, where courts of appeals have diverged in their treatment of an issue, it cannot be said
7 that there is “clearly established Federal law” governing that issue. *Carey v. Musladin*, 549 U.S.
8 70, 77 (2006).

9 A state court decision is “contrary to” clearly established federal law if it applies a rule
10 contradicting a holding of the Supreme Court or reaches a result different from Supreme Court
11 precedent on “materially indistinguishable” facts. *Price v. Vincent*, 538 U.S. 634, 640 (2003).
12 Under the “unreasonable application” clause of § 2254(d)(1), a federal habeas court may grant the
13 writ if the state court identifies the correct governing legal principle from the Supreme Court’s
14 decisions, but unreasonably applies that principle to the facts of the prisoner’s case.¹ *Lockyer v.*
15 *Andrade*, 538 U.S. 63, 75 (2003); *Williams*, 529 U.S. at 413; *Chia v. Cambra*, 360 F.3d 997, 1002
16 (9th Cir. 2004). In this regard, a federal habeas court “may not issue the writ simply because that
17 court concludes in its independent judgment that the relevant state-court decision applied clearly
18 established federal law erroneously or incorrectly. Rather, that application must also be
19 unreasonable.” *Williams*, 529 U.S. at 412. *See also Schriro v. Landrigan*, 550 U.S. 465, 473
20 (2007); *Lockyer*, 538 U.S. at 75 (it is “not enough that a federal habeas court, in its independent
21 review of the legal question, is left with a ‘firm conviction’ that the state court was ‘erroneous.’”).
22 “A state court’s determination that a claim lacks merit precludes federal habeas relief so long as
23 ‘fairminded jurists could disagree’ on the correctness of the state court’s decision.” *Harrington v.*
24 *Richter*, 562 U.S. 86, 101 (2011) (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)).
25 Accordingly, “[a]s a condition for obtaining habeas corpus from a federal court, a state prisoner

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27 ¹ Under § 2254(d)(2), a state court decision based on a factual determination is not to be
28 overturned on factual grounds unless it is “objectively unreasonable in light of the evidence
presented in the state court proceeding.” *Stanley*, 633 F.3d at 859 (quoting *Davis v. Woodford*,
384 F.3d 628, 638 (9th Cir. 2004)).

1 must show that the state court's ruling on the claim being presented in federal court was so
2 lacking in justification that there was an error well understood and comprehended in existing law
3 beyond any possibility for fairminded disagreement." *Richter*, 562 U.S. at 103.

4 If the state court's decision does not meet the criteria set forth in § 2254(d), a reviewing
5 court must conduct a de novo review of a habeas petitioner's claims. *Delgadillo v. Woodford*,
6 527 F.3d 919, 925 (9th Cir. 2008); *see also Frantz v. Hazey*, 533 F.3d 724, 735 (9th Cir. 2008)
7 (en banc) ("[I]t is now clear both that we may not grant habeas relief simply because of §
8 2254(d)(1) error and that, if there is such error, we must decide the habeas petition by considering
9 de novo the constitutional issues raised.").

10 The court looks to the last reasoned state court decision as the basis for the state court
11 judgment. *Stanley*, 633 F.3d at 859; *Robinson v. Ignacio*, 360 F.3d 1044, 1055 (9th Cir. 2004). If
12 the last reasoned state court decision adopts or substantially incorporates the reasoning from a
13 previous state court decision, this court may consider both decisions to ascertain the reasoning of
14 the last decision. *Edwards v. Lamarque*, 475 F.3d 1121, 1126 (9th Cir. 2007) (en banc). "When
15 a federal claim has been presented to a state court and the state court has denied relief, it may be
16 presumed that the state court adjudicated the claim on the merits in the absence of any indication
17 or state-law procedural principles to the contrary." *Richter*, 562 U.S. at 99. This presumption
18 may be overcome by a showing "there is reason to think some other explanation for the state
19 court's decision is more likely." *Id.* at 785 (citing *Ylst v. Nunnemaker*, 501 U.S. 797, 803 (1991)).
20 Similarly, when a state court decision on a petitioner's claims rejects some claims but does not
21 expressly address a federal claim, a federal habeas court must presume, subject to rebuttal, that
22 the federal claim was adjudicated on the merits. *Johnson v. Williams*, 568 U.S. 289, 293 (2013).

23 Where the state court reaches a decision on the merits but provides no reasoning to
24 support its conclusion, a federal habeas court independently reviews the record to determine
25 whether habeas corpus relief is available under § 2254(d). *Stanley*, 633 F.3d at 860; *Himes v.*
26 *Thompson*, 336 F.3d 848, 853 (9th Cir. 2003). "Independent review of the record is not de novo
27 review of the constitutional issue, but rather, the only method by which we can determine whether
28 a silent state court decision is objectively unreasonable." *Himes*, 336 F.3d at 853. Where no

1 reasoned decision is available, the habeas petitioner still has the burden of “showing there was no
2 reasonable basis for the state court to deny relief.” *Richter*, 562 U.S. at 98.

3 A summary denial is presumed to be a denial on the merits of the petitioner’s claims.
4 *Stancle v. Clay*, 692 F.3d 948, 957 & n. 3 (9th Cir. 2012). While the federal court cannot analyze
5 just what the state court did when it issued a summary denial, the federal court must review the
6 state court record to determine whether there was any “reasonable basis for the state court to deny
7 relief.” *Richter*, 562 U.S. at 98. This court “must determine what arguments or theories ... could
8 have supported, the state court’s decision; and then it must ask whether it is possible fairminded
9 jurists could disagree that those arguments or theories are inconsistent with the holding in a prior
10 decision of [the Supreme] Court.” *Id.* at 102. The petitioner bears “the burden to demonstrate
11 that ‘there was no reasonable basis for the state court to deny relief.’” *Walker v. Martel*, 709 F.3d
12 925, 939 (9th Cir. 2013) (quoting *Richter*, 562 U.S. at 98).

13 When it is clear, however, that a state court has not reached the merits of a petitioner’s
14 claim, the deferential standard set forth in 28 U.S.C. § 2254(d) does not apply and a federal
15 habeas court must review the claim de novo. *Stanley*, 633 F.3d at 860; *Reynoso v. Giurbino*, 462
16 F.3d 1099, 1109 (9th Cir. 2006); *Nulph v. Cook*, 333 F.3d 1052, 1056 (9th Cir. 2003).

17 **III. Petitioner’s Claims**

18 **A. Sufficiency of the Evidence**

19 In his first and second grounds for relief, petitioner raises claims that this court construes
20 as a challenge to the sufficiency of the evidence to support his conviction for first degree murder.
21 In ground one, petitioner argues that the California Court of Appeal “used an incorrect standard to
22 determine there was sufficient evidence of identity to satisfy federal and state due process.” ECF
23 No. 67 at 19. He argues that there was no direct evidence he was the shooter and that there “was
24 not sufficient substantial circumstantial evidence to logically draw an inference of guilt, but the
25 court of appeal has set forth a contrary view.” *Id.*

26 Petitioner’s second ground for relief is described as follows:

27 The Third District brought forth a new method of analyzing the
28 sufficiency of the evidence in petitioner’s case. The Third District
used a “no evidence” determination in the sense that it found

1 inferences to guilt where individually each was conjectural or
2 speculative but because they did not rule out guilt the evidence was
3 sufficient and this violated Mr. Wallace Federal and state right to
4 due process.

5 *Id.* at 20. In the “supporting facts” section of his second ground for relief, petitioner argues that
6 the California Court of Appeal failed to examine the “entire record” to determine whether the
7 evidence was sufficient to support his conviction, but instead focused only on the testimony and
8 evidence that supported a guilty finding. He points out instances where, in his opinion, witnesses
9 testified falsely, certain testimony was inconsistent with other testimony, the prosecutor
10 “presented and argued false evidence,” and his trial counsel’s arguments and statements caused
11 the jurors to focus on inculpatory evidence presented by the prosecution and not on evidence of
12 his innocence. *Id.* at 20-22. For instance, petitioner argues: (1) Shoals testified falsely that she
13 was on the floor and hidden from the gunman’s sight, which was inconsistent with the testimony
14 of Officer Kawasaki that Shoals was sitting upright with her back against the wall when he
15 looked into the bedroom; (2) the prosecutor “presented and argued false evidence” that Brown
16 was shot while he was in his bedroom, which is inconsistent with Shoals’ testimony that she
17 heard a gunshot when Brown was out of the bedroom; (3) Shoals testified falsely that she “heard
18 the first gunshot while Brown was in the bedroom after Brown hid her;” (4) Shoals testified and
19 the prosecutor argued the “false evidence” that the gunman shot Brown from the bedroom
20 doorway and then walked into the bedroom and shot Brown in the head; (5) the testimony of the
21 prosecution pathologist that Brown was shot from a distance of 2-3 feet “destroyed” Shoals’
22 testimony and the prosecutor’s argument that the gunman shot Brown from the bedroom doorway
23 and then walked up to Brown and shot him in the head; (6) Officer Chin’s testimony that he could
24 see blood all over the bedroom and Shoals sitting upright, but could not see Brown’s body, was
25 inconsistent with other testimony that Brown was shot in the bedroom as opposed to being shot
26 “before re-entering his bedroom;” (7) his trial counsel’s arguments regarding blood spatter
27 improperly caused the jury to focus on the gunshot residue that was found on petitioner’s clothes
28 instead of on the fact that if Brown was shot at a distance of 2-3 feet there should have been blood

1 spatter on petitioner's clothes and there wasn't any; and (8) his trial counsel improperly asked the
2 jury "to view all the gruesome photos of the victims." *Id.* at 20-27.

3 **1. State Court Decision**

4 The California Court of Appeal denied petitioner's claim that the evidence was
5 insufficient to support the jury's verdict. The court reasoned as follows:

6 **A. Sufficiency of the Evidence**

7 There is no dispute about the scope of appellate review of a
8 challenge to the sufficiency of the evidence. A challenger faces an
9 extraordinary burden on appeal to demonstrate that "no rational
10 trier of fact could have agreed with the jury." (*Cavazos v. Smith*
11 (2011) ___ U.S. ___, ___ [181 L.Ed.2d 311, 313].) We must
12 "'review the whole record in the light most favorable to the
13 judgment below to determine whether it discloses substantial
14 evidence - that is, evidence which is reasonable, credible, and of
15 solid value - such that a reasonable trier of fact could find the
16 defendant guilty beyond a reasonable doubt.'" [Citation.] (*People*
17 *v. Maury* (2003) 30 Cal.4th 342, 396.)

18 Because the prosecution's case rests entirely on circumstantial
19 evidence, defendant reminds us that a reasonable inference "'may
20 not be based on suspicion alone, or on imagination, speculation,
21 supposition, surmise, conjecture, or guess work A finding of
22 fact must be an inference drawn from evidence rather than . . . a
23 mere speculation as to probabilities without evidence.'" [Citation.]"
24 (*People v. Morris* (1988) 46 Cal.3d 1, 21, *disapproved on another*
25 *ground in In re Sassounian* (1995) 9 Cal.4th 535, 543, fn. 5.) He
26 dissects each piece of evidence in a futile attempt to expose fatal
27 weaknesses in the inferences the jury was asked to, and presumably
28 did, draw from the evidence.

We need not determine whether any of the evidence independently
would be sufficient to support the judgment. Defendant argues, for
example, that the "clothes were not substantial evidence, and the
Walmart recordings that [defendant] wore black clothing at 11:30
p.m. also do not constitute substantial evidence." The question is
not whether the clothes or the Walmart tapes or the gunshot residue
or the directions to the victims' house or the computer searches
constitute substantial evidence, but whether cumulatively all the
evidence is sufficient to support the judgment. Defendant posits
that innocent circumstances were made to look incriminating by
piling one conjecture upon another conjecture. (*People v. Flores*
(1943) 58 Cal.App.2d 764, 769-770.) We disagree. This case was
not built on conjecture, but on abundant circumstantial evidence
that, when viewed as a whole, gave rise to the reasonable inference
that defendant was the shooter and he killed two potential witnesses
in his girlfriend's upcoming trial.

Our recitation of the facts presents a compelling distillation of the
evidence that defendant had the motive to kill Turner and Brown,

1 two witnesses to his girlfriend's attempted murders; that he had the
2 same body type and ethnicity as the shooter; that he was wearing
3 the same kind of clothes as the shooter a short time before the
4 murders; that gunshot residue was found on his clothes; that he had
5 no alibi during the time the murders occurred; that he lied to the
6 police; that he had obtained a police report on his girlfriend's
7 shootings and knew who the witnesses were and where they lived;
8 and that he had contacted Brown and told him of his desire to
9 "squash" the case. Defendant argues on appeal, as he did in closing
10 argument before the jury, weaknesses in the evidence and why the
11 inferences the prosecution urged the jury to make should be
12 rejected. It was the jury's prerogative, however, and not ours to
13 accept or reject defendant's arguments and determine whether the
14 inferences were indeed reasonable.

15 Although defendant recites the appropriate standard of review, he
16 fails to apply it. We acknowledge any number of weaknesses in the
17 evidence, including the lack of blood on defendant's clothes, the
18 somewhat improbable possibility the gunshot residue was
19 transferred to defendant's clothes, the fact that there are other
20 African American males who are overweight and wear black
21 clothing, and that a protective lover might lie, investigate, or cover
22 up for his girl without being willing to kill witnesses against her,
23 but we do not agree that the jury's verdict is irrational or premised
24 on mere conjecture and speculation. To the contrary, the evidence
25 is circumstantial, but it is compelling. It is neither physically
26 impossible nor inherently improbable. Rather, defendant fit the
27 physical description of the assailant, he had the opportunity and the
28 means to commit the shooting, and he certainly had the motive to
eliminate the witnesses to his girlfriend's shootings. Indeed, he
chose not to shoot George Clark, a guest at Brown's house who was
not a witness to the earlier shootings, and proceeded to shoot both
Turner and Brown, both of whom had been witnesses, twice at very
close range. Fortunately for Shoals, the only remaining witness,
Brown successfully hid her from defendant before Brown himself
was shot and killed. All said, there is ample evidence to support the
jury verdicts.

20 *People v. Wallace*, No. C066938, 2012 WL 5207027, at *3-4 (Cal. App. 3d Dist. Oct. 23, 2012).

21 **2. Applicable Legal Standards**

22 The Due Process Clause "protects the accused against conviction except upon proof
23 beyond a reasonable doubt of every fact necessary to constitute the crime with which he is
24 charged." *In re Winship*, 397 U.S. 358, 364 (1970). There is sufficient evidence to support a
25 conviction if, "after viewing the evidence in the light most favorable to the prosecution, any
26 rational trier of fact could have found the essential elements of the crime beyond a reasonable
27 doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). "[T]he dispositive question under
28 *Jackson* is 'whether the record evidence could reasonably support a finding of guilt beyond a

1 reasonable doubt.” *Chein v. Shumsky*, 373 F.3d 978, 982 (9th Cir. 2004) (quoting *Jackson*, 443
2 U.S. at 318). Put another way, “a reviewing court may set aside the jury’s verdict on the ground
3 of insufficient evidence only if no rational trier of fact could have agreed with the jury.” *Cavazos*
4 *v. Smith*, ___ U.S. ___, 132 S.Ct. 2, *4 (2011). Sufficiency of the evidence claims in federal
5 habeas proceedings must be measured with reference to substantive elements of the criminal
6 offense as defined by state law. *Jackson*, 443 U.S. at 324 n.16.

7 In conducting federal habeas review of a claim of insufficient evidence, “all evidence
8 must be considered in the light most favorable to the prosecution.” *Ngo v. Giurbino*, 651 F.3d
9 1112, 1115 (9th Cir. 2011). “*Jackson* leaves juries broad discretion in deciding what inferences
10 to draw from the evidence presented at trial,” and it requires only that they draw “reasonable
11 inferences from basic facts to ultimate facts.” *Coleman v. Johnson*, ___ U.S. ___, 132 S.Ct.
12 2060, 2064 (2012) (per curiam) (citation omitted). “Circumstantial evidence and inferences
13 drawn from it may be sufficient to sustain a conviction.” *Walters v. Maass*, 45 F.3d 1355, 1358
14 (9th Cir.1995) (citation omitted).

15 “A petitioner for a federal writ of habeas corpus faces a heavy burden when challenging
16 the sufficiency of the evidence used to obtain a state conviction on federal due process grounds.”
17 *Juan H. v. Allen*, 408 F.3d 1262, 1274 (9th Cir. 2005). Because this case is governed by the
18 AEDPA, this court owes a “double dose of deference” to the decision of the state court. *Long v.*
19 *Johnson*, 736 F.3d 891, 896 (9th Cir. 2013) (quoting *Boyer v. Belleque*, 659 F.3d 957, 960 (9th
20 Cir. 2011), cert. denied ___ U.S. ___, 132 S.Ct. 2723 (2012)). See also *Johnson*, 132 S.Ct. at
21 2062 (“*Jackson* claims face a high bar in federal habeas proceedings because they are subject to
22 two layers of judicial deference.”).

23 **3. Analysis**

24 In his claim before this court, petitioner points to weaknesses in the trial evidence by
25 using evidentiary examples that are different than the examples he cited in his claim before the
26 California Court of Appeal. However, his basic argument is the same: those weaknesses
27 demonstrate that the evidence against him was insufficient to support his conviction. However,
28 after reviewing the record in the light most favorable to the jury’s verdict, this court concludes

1 that there was sufficient evidence introduced at petitioner's trial to support his conviction for first
2 degree murder.

3 If the record supports conflicting inferences, the reviewing court "must presume – even if
4 it does not affirmatively appear in the record – that the trier of fact resolved any such conflicts in
5 favor of the prosecution, and must defer to that resolution." *McDaniel v. Brown*, 558 U.S. 120,
6 133 (2010) (per curiam) (quoting *Jackson*, 443 U.S. at 326). In evaluating the evidence presented
7 at trial, this court may not weigh conflicting evidence or consider witness credibility. *Wingfield*
8 *v. Massie*, 122 F.3d 1329, 1332 (10th Cir. 1997). Instead, as noted above, the Court must view
9 the evidence in the "light most favorable to the prosecution," *Jackson*, 443 U.S. at 319. Further,
10 juries have broad discretion in deciding what inferences to draw from the evidence presented at
11 trial. This court may not "impinge[] on the jury's role as factfinder," or engage in "fine-grained
12 factual parsing." *Johnson*, 132 S.Ct. at 2065. As the Ninth Circuit has explained, "[t]he relevant
13 inquiry is not whether the evidence excludes every hypothesis except guilt, but whether the jury
14 could reasonably arrive at its verdict." *United States v. Mares*, 940 F.2d 455, 458 (9th Cir. 1991).
15 Under *Jackson*, the Court need not find that the conclusion of guilt was compelled, only that it
16 rationally could have been reached. *Drayden v. White*, 232 F.3d 704, 709-10 (9th Cir. 2000).

17 Even though there was conflicting evidence in this case regarding when and where Brown
18 was shot and whether petitioner's physical description matched that of the shooter, the evidence,
19 when viewed as a whole, supports the jury's conclusion that petitioner was the person who
20 committed the murders of Brown and Turner. As noted by the California Court of Appeal, there
21 was significant evidence that petitioner had the motive, opportunity, and intent to commit these
22 crimes. Which version of the events was true was up to the jury alone to decide. *Johnson*, 132
23 S.Ct. at 2064. Although the evidence was circumstantial, the jury was entitled to rely on that
24 evidence to find petitioner guilty. Further, although petitioner claims that some of the testimony
25 was "false" because it was inconsistent with other testimony or evidence of record, there is no
26 evidence to support this assertion. There is also no evidence that the prosecutor knew any
27 testimony was false or that any material evidence was withheld from the jury.

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Petitioner's assertion in the traverse that "these murders were not witness killings concerning Petitioner's girlfriend case, but for some other reason such as drug dealing or drug using" (ECF No. 75 at 38) is based on speculation and has no support in the evidence. The court also notes that the arguments or statements of counsel are not evidence, and petitioner's jury was so instructed. Clerk's Transcript on Appeal (CT) at 499 (instructing that "[n]othing that the attorneys say is evidence."). Thus, statements made by petitioner's trial counsel and the prosecutor were not part of the evidence considered by the jury in determining whether petitioner was guilty of the murders. *See Kansas v. Marsh*, 548 U.S. 163, 179 (2006) (jurors are presumed to have followed jury instructions); *Richardson v. Marsh*, 481 U.S. 200, 206 (1987) (same); *Fields v. Brown*, 503 F.3d 755, 782 (9th Cir. 2007) (same).

The Court of Appeal used the correct standard to evaluate petitioner's claim of insufficient evidence and applied that standard appropriately. The decision of the California Court of Appeal that a rational trier of fact could have found beyond a reasonable doubt that petitioner was guilty of the murders of Brown and Turner is not an unreasonable application of *In re Winship* and *Jackson* to the facts of this case. Accordingly, petitioner is not entitled to federal habeas relief on his claims of insufficient evidence.

B. Ineffective Assistance of Trial and Appellate Counsel

In his next ground for relief, petitioner claims that his trial counsel rendered ineffective assistance through numerous errors and that his appellate counsel rendered ineffective assistance in failing to raise a claim of ineffective assistance of trial counsel on appeal. He argues:

Petitioner's trial counsel so utterly failed to defend against the charges that the trial was the functional equivalent of a guilty plea, rendering counsel's representation presumptively inadequate. That Petitioner is actual innocent of the murders. And that appeal counsel failed to argue effective counsel.

ECF No. 67 at 23.

Petitioner describes numerous perceived errors by trial counsel, as follows: (1) "trial counsel was aware that witness Shoals heard the first gunshot while Brown was out of the west bedroom, but he allowed witness Shoals to testify falsely that the first gunshot was into victim Turner's bedroom after Brown hid her (Shoals)" (*id.* at 23); (2) trial counsel allowed Shoals to

1 testify that she was laying on the floor looking under the bed at the gunman's feet even though
2 counsel was aware that Officer Kawasaki, who was the first officer on the scene, saw Shoals
3 sitting upright against the wall "with Brown across her legs in plain view and not hid" (*id.*); (3)
4 trial counsel "refused" to cross-examine Officer Kawasaki and improperly argued to the jury that
5 Shoals was hidden from the gunman (*id.*); (4) trial counsel allowed Shoals to testify and the
6 prosecutor to argue that the gunman came into the bedroom doorway and shot Brown in the chest
7 and then walked to the foot of the bed and shot Brown in the head even though counsel was aware
8 that "if pathologist Fiore testified that Brown was in the same distance as he was when the
9 gunman shot Brown in the chest and head which was 2 to 3 feet away from the barrel of the
10 shotgun, that Brown was shot at two locations of the house" (*id.* at 24); (5) trial counsel "allowed
11 the prosecutor" to hide from petitioner and the jury the "heavy blood puddles" that were on top of
12 Brown's dresser in the master bedroom, which would have demonstrated that Brown was fatally
13 wounded before he re-entered his bedroom (*id.*); (6) trial counsel failed to present evidence that
14 "lead CSI D. Noonan" seized a shotgun pellet from Brown's living room wall, thereby preventing
15 the jury from knowing that Brown was first shot in the chest while he was in the living room with
16 George Clark, who "also testified falsely to the events of the murders" (*id.* at 25); (7) trial counsel
17 failed to subpoena Nga Thi Nguyen, who told a police officer that she saw Clark and another
18 male walk into Brown's house a few minutes before the shootings, which would have provided
19 evidence that "there was a fifth person was with Clark either witness the shooting of Brown first
20 in the living room or either was a part of committing the murders because Clark lied about the
21 events of the murders" (*id.*); (8) trial counsel "lied at petitioners *Marsden* hearing that witness
22 Nguyen made no such statement" (*id.*); (9) trial counsel "allowed the prosecutor" to hide from the
23 jury and the petitioner that there were photographs of blood spatter against the east wall of
24 Brown's west bedroom, which would have absolved petitioner of the murders (*id.* at 25-26); (10)
25 trial counsel failed to point out to the jury "the pellet under item 4 on top side of Shoals side of
26 the bed" and failed to "present that if Brown was shot in his chest facing south then why is the
27 pellet that exited his back in front of him" (*id.* at 26); (11) trial counsel allowed the state
28 pathologist to testify falsely that Brown did not have an exit wound from his head injury "so that

1 the jury wouldn't know that Brown was facing the east wall with blood spatter against and that
2 the pellet under item 4 on Shoals side of the bed exited from the right side of Browns head" (*id.*);
3 (12) trial counsel failed to disclose to petitioner and to the jury that there was a report written by
4 Detective K. Campbell indicating that "Shoals stated that Brown was wounded before coming in
5 the bedroom and that the gunman was in their room while Shoals was on the bed" (*id.* at 26-27);
6 and (13) trial counsel "made the jury believe" that no black shoes were seized from petitioner's
7 apartment, even though in fact black shoes were seized from his apartment that were smaller than
8 the shoes that left the footprint on the kitchen door at the crime scene (*id.* at 27).

9 Petitioner raised these claims in three separate petitions for a writ of habeas corpus filed in
10 the California Supreme Court. Resp't's Lod. Doc. entitled "Petition for Writ of Habeas Corpus,
11 California Supreme Court Case No. S214393, November 1, 2013;" Resp't's Lod. Doc. entitled
12 "Petition for Writ of Habeas Corpus, Case No. S219853, July 10, 2014;" and Resp't's Lod. Doc.
13 entitled "Petition for Writ of Habeas Corpus, Case No. S223942, January 20, 2015." The petition
14 in case No. S214393 was summarily denied and the other two petitions were denied with a
15 citation to *In re Clark*, 5 Cal.4th 750, 767-69 (1993). Resp't's Lod. Doc. entitled "Order Denying
16 Petition for Writ of Habeas Corpus Case No. S214393, February 19, 2014;" Resp't's Lod. Doc.
17 entitled "Order Denying Petition for Writ of Habeas Corpus, Case No. S219853, October 1,
18 2014;" and Resp't's Lod. Doc. entitled "Order Denying Petition for Writ of Habeas Corpus, Case
19 No. S223942, March 25, 2015." Respondent argues that the Supreme Court's citation to *In re*
20 *Clark* constitutes a procedural bar which precludes this court from addressing the merits of
21 petitioner's claims of ineffective assistance of counsel.

22 As a general rule, "[a] federal habeas court will not review a claim rejected by a state
23 court 'if the decision of [the state] court rests on a state law ground that is independent of the
24 federal question and adequate to support the judgment.'" *Walker v. Martin*, 562 U.S. 307, 314
25 (2011) (quoting *Beard v. Kindler*, 558 U.S. 53 (2009)). However, a reviewing court need not
26 invariably resolve the question of procedural default prior to ruling on the merits of a claim.
27 *Lambrix v. Singletary*, 520 U.S. 518, 524-25 (1997); *see also Franklin v. Johnson*, 290 F.3d 1223,
28 1232 (9th Cir. 2002) ("Procedural bar issues are not infrequently more complex than the merits

1 issues presented by the appeal, so it may well make sense in some instances to proceed to the
2 merits if the result will be the same”); *Busby v. Dretke*, 359 F.3d 708, 720 (5th Cir. 2004) (noting
3 that although the question of procedural default should ordinarily be considered first, a reviewing
4 court need not do so invariably, especially when the issue turns on difficult questions of state
5 law). Where deciding the merits of a claim proves to be less complicated and less time-
6 consuming than adjudicating the issue of procedural default, a court may exercise discretion in its
7 management of the case to reject the claim on the merits and forgo an analysis of procedural
8 default. *See Franklin*, 290 F.3d at 1232 (citing *Lambrix*, 520 U.S. at 525).

9 Under the circumstances presented here, the court finds that petitioner’s claims of
10 ineffective assistance of trial and appellate counsel can be resolved more easily by addressing
11 them on the merits. Accordingly, the court will assume that these claims are not defaulted.
12 However, for the reasons set forth below, the court concludes that petitioner is not entitled to
13 habeas relief on his claims of ineffective assistance of trial and appellate counsel, under either a
14 de novo or the AEDPA standard of review.

15 **1. Applicable Legal Principles**

16 The applicable legal standards for a claim of ineffective assistance of counsel are set forth
17 in *Strickland v. Washington*, 466 U.S. 668 (1984). To succeed on a *Strickland* claim, a defendant
18 must show that (1) his counsel’s performance was deficient and that (2) the “deficient
19 performance prejudiced the defense.” *Id.* at 687. Counsel is constitutionally deficient if his or
20 her representation “fell below an objective standard of reasonableness” such that it was outside
21 “the range of competence demanded of attorneys in criminal cases.” *Id.* at 687–88 (internal
22 quotation marks omitted). “Counsel’s errors must be ‘so serious as to deprive the defendant of a
23 fair trial, a trial whose result is reliable.’” *Richter*, 562 U.S. at 114 (quoting *Strickland*, 466 U.S.
24 at 687).

25 A reviewing court is required to make every effort “to eliminate the distorting effects of
26 hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the
27 conduct from counsel’s perspective at the time.” *Strickland*, 466 U.S. at 669. Reviewing courts
28 must also “indulge a strong presumption that counsel’s conduct falls within the wide range of

1 reasonable professional assistance.” *Strickland*, 466 U.S. at 689. This presumption of
2 reasonableness means that the court must “give the attorneys the benefit of the doubt,” and must
3 also “affirmatively entertain the range of possible reasons [defense] counsel may have had for
4 proceeding as they did.” *Cullen v. Pinholster*, 563 U.S. 170, 196 (2011) (internal quotation marks
5 and alterations omitted).

6 Prejudice is found where “there is a reasonable probability that, but for counsel’s
7 unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466
8 U.S. at 694. A reasonable probability is “a probability sufficient to undermine confidence in the
9 outcome.” *Id.* “The likelihood of a different result must be substantial, not just conceivable.”
10 *Richter*, 562 U.S. at 189. A reviewing court “need not first determine whether counsel’s
11 performance was deficient before examining the prejudice suffered by the defendant as a result of
12 the alleged deficiencies If it is easier to dispose of an ineffectiveness claim on the ground of
13 lack of sufficient prejudice . . . that course should be followed.” *Strickland*, 466 U.S. at 697.

14 The *Strickland* standards apply to appellate counsel as well as trial counsel. *Smith v.*
15 *Murray*, 477 U.S. 527, 535-36 (1986); *Miller v. Keeney*, 882 F.2d 1428, 1433 (9th Cir. 1989).
16 However, an indigent defendant “does not have a constitutional right to compel appointed counsel
17 to press nonfrivolous points requested by the client, if counsel, as a matter of professional
18 judgment, decides not to present those points.” *Jones v. Barnes*, 463 U.S. 745, 751 (1983).
19 Counsel “must be allowed to decide what issues are to be pressed.” *Id.* Otherwise, the ability of
20 counsel to present the client’s case in accord with counsel’s professional evaluation would be
21 “seriously undermined.” *Id.* See also *Smith v. Stewart*, 140 F.3d 1263, 1274 n.4 (9th Cir. 1998)
22 (Counsel is not required to file “kitchen-sink briefs” because it “is not necessary, and is not even
23 particularly good appellate advocacy.”) There is, of course, no obligation to raise meritless
24 arguments on a client’s behalf. See *Strickland*, 466 U.S. at 687-88 (requiring a showing of
25 deficient performance as well as prejudice). Thus, counsel is not deficient for failing to raise a
26 weak issue. See *Miller*, 882 F.2d at 1434. In order to establish prejudice in this context,
27 petitioner must demonstrate that, but for counsel’s errors, he probably would have prevailed on
28 appeal. *Id.* at 1434 n.9.

1 2. Analysis

2 Petitioner's claims of ineffective assistance of counsel should be denied for lack of
3 prejudice. As explained above, the jury heard all of the testimony, including testimony that
4 tended to be exculpatory, and decided that petitioner was guilty of the two murders. The jury
5 knew, for instance, that petitioner did not have blood on his clothes. The jury also knew that
6 there was no direct evidence that petitioner was the shooter. However, even if trial counsel had
7 pointed out some of the inconsistencies described by petitioner, petitioner has failed to show a
8 reasonable probability that the jury would have come to a different result. Regardless of where or
9 how Brown was shot, the evidence as a whole was compelling that petitioner was the person who
10 killed Brown and Turner. Given all of the circumstantial evidence against petitioner, trial
11 counsel's errors, as they are alleged by petitioner, do not "undermine confidence in the outcome"
12 of these proceedings.

13 The court notes that defense counsel does not have the ability or the duty to control how a
14 witness will testify or to "force" the prosecutor to engage in any particular actions. Further,
15 "appointed counsel, and not his client, is in charge of the choice of trial tactics and the theory of
16 defense." *United States v. Wadsworth*, 830 F. 2d 1500, 1509 (9th Cir. 1987) (citing *Henry v.*
17 *Mississippi*, 379 U.S. 443 (1965)). "The lawyer has--and must have--full authority to manage the
18 conduct of the trial." *Taylor v. Illinois*, 484 U.S. 400, 418 (1988). It was incumbent on
19 petitioner's trial counsel to decide what evidence was introduced and which witnesses to call.
20 The fact that petitioner disagrees with counsel's conduct of the trial does not demonstrate that his
21 trial counsel's performance was ineffective. This court has reviewed the trial record and finds no
22 evidence that trial counsel's actions constituted a violation of the *Strickland* standards or resulted
23 in prejudice. Accordingly, petitioner is not entitled to relief on these claims of ineffective
24 assistance of trial counsel.

25 Nor is petitioner entitled to relief on his claim that his appellate counsel rendered
26 ineffective assistance in failing to raise a claim of ineffective assistance of trial counsel on appeal.
27 As set forth above, there is no obligation to raise meritless arguments on a client's behalf.

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1 Appellate counsel's decision to press claims with arguably more merit than the ineffective
2 assistance of trial counsel claims now suggested by petitioner was well "within the range of
3 competence demanded of attorneys in criminal cases." *McMann v. Richardson*, 397 U.S. 759,
4 771 (1970). *See also Smith v. Robbins*, 528 U.S. 259, 288 (2000) ("appellate counsel who files a
5 merits brief need not (and should not) raise every nonfrivolous claim, but rather may select from
6 among them in order to maximize the likelihood of success on appeal"); *Gray v. Greer*, 800 F.2d
7 644, 646 (7th Cir. 1985) ("Generally, only when ignored issues are clearly stronger than those
8 presented, will the presumption of effective assistance of counsel be overcome"). The United
9 States Supreme Court has stated that "appellate counsel who files a merits brief need not (and
10 should not) raise every nonfrivolous claim, but rather may select from among them in order to
11 maximize the likelihood of success on appeal." *Robbins*, 528 U.S. at 288. This is because "[a]
12 brief that raises every colorable issue runs the risk of burying good arguments - those that, in the
13 words of the great advocate John W. Davis, 'go for the jugular.'" *Barnes*, 463 U.S. at 751-52.

14 For the foregoing reasons, petitioner is not entitled to habeas relief on his claims of
15 ineffective assistance of counsel.

16 C. Prosecutorial Misconduct

17 In his final ground for relief, petitioner claims that the prosecutor committed misconduct
18 by introducing knowingly false testimony. ECF No. 67 at 28. Specifically, he alleges the
19 prosecutor: (1) "allowed" Shoals to testify that she was on the floor, hidden from the gunman's
20 view, knowing that Officer Kawasaki saw Shoals sitting upright; (2) "hid" the pools of blood on
21 top of the master dresser "so that the jury wouldn't know that Brown was fatally shot in the chest
22 before re-entering his bedroom;" and (3) "hid" evidence of blood spatter against Brown's "east
23 wall" so that "petitioner wouldn't be absolve of the murders" *Id.* In support of petitioner's
24 claims in this regard, petitioner has attached photographs of the crime scene, his slippers, and
25 blood spatters on Shoals. *Id.* at 36-54. Petitioner argues:

26 from the above exhibits it shows that Brown was not shot by a
27 gunman who stood in the doorway of the bedroom while Brown
28 was on the north side of the bed hiding [sic] witness Shoals (1RT
211-216). Any one looking at these colored paper photos would
know that Brown came in that bedroom fatally wounded bleeding

1 out over the dresser, in front of the dresser, to around the north side
2 of the bed.

3 *Id.* at 32-33. In the traverse, petitioner makes other allegations against the prosecutor, including:
4 (1) “the prosecutor would have been aware that the crime scene was altered [sic] to support the
5 events of Shoals false testimony . . . that Brown was shot twice while in his bedroom” ECF No.
6 75 at 49; and the prosecutor failed to correct the pathologist when she testified that “Brown had
7 no exit wound from his head injury.” *Id.* at 50.

8 Petitioner raised his claims of prosecutorial misconduct in a petition for writ of habeas
9 corpus filed in the California Supreme Court in case No. S214393. The Supreme Court
10 summarily denied that petition. Accordingly, this court must review the state court record to
11 determine whether there was any “reasonable basis for the state court to deny relief.” *Richter*,
12 562 U.S. at 98.

13 **1. Applicable Law**

14 A criminal defendant’s due process rights are violated when a prosecutor’s misconduct
15 renders a trial fundamentally unfair. *Darden v. Wainwright*, 477 U.S. 168, 181 (1986). Claims of
16 prosecutorial misconduct are reviewed ““on the merits, examining the entire proceedings to
17 determine whether the prosecutor’s [actions] so infected the trial with unfairness as to make the
18 resulting conviction a denial of due process.”” *Johnson v. Sublett*, 63 F.3d 926, 929 (9th Cir.
19 1995) (citation omitted). *See also Greer v. Miller*, 483 U.S. 756, 765 (1987); *Donnelly v.*
20 *DeChristoforo*, 416 U.S. 637, 643 (1974); *Towery v. Schriro*, 641 F.3d 300, 306 (9th Cir. 2010).
21 When prosecutorial conduct is called in question, the issue is whether, considered in the context
22 of the entire trial, that conduct appears likely to have affected the jury’s discharge of its duty to
23 judge the evidence fairly. *United States v. Young*, 470 U.S. 1, 11 (1985).

24 Relief on such claims is limited to cases in which the petitioner can establish that
25 prosecutorial misconduct resulted in actual prejudice. *Darden*, 477 U.S. at 181-83. *See also*
26 *Towery*, 641 F.3d at 307 (“When a state court has found a constitutional error to be harmless
27 beyond a reasonable doubt, a federal court may not grant habeas relief unless the state court’s
28 determination is objectively unreasonable”). Prosecutorial misconduct violates due process when

1 it has a substantial and injurious effect or influence in determining the jury's verdict. *See Ortiz-*
2 *Sandoval v. Gomez*, 81 F.3d 891, 899 (9th Cir. 1996).

3 A violation of a defendant's rights occurs if the government knowingly uses false
4 evidence in obtaining a conviction. *Giglio v. United States*, 405 U.S. 150, 153-54 (1971); *Napue*
5 *v. Illinois*, 360 U.S. 264, 269 (1959). There are several components to establishing a claim for
6 relief based on the prosecutor's introduction of perjured testimony at trial. First, the petitioner
7 must establish that the testimony was false. *United States v. Polizzi*, 801 F.2d 1543, 1549-50 (9th
8 Cir. 1986). Second, the petitioner must demonstrate that the prosecution knowingly used the
9 perjured testimony. *Id.* Finally, the petitioner must show that the false testimony was material.
10 *United States v. Juno-Arce*, 339 F.3d 886, 889 (9th Cir. 2003). False evidence is material "if
11 there is any reasonable likelihood that the false [evidence] could have affected the judgment of
12 the jury." *Hein v. Sullivan*, 601 F.3d 897, 908 (9th Cir. 2010) (quoting *United States v. Bagley*,
13 473 U.S. 667, 678 (1985)). Mere speculation regarding these factors is insufficient to meet
14 petitioner's burden. *United States v. Aichele*, 941 F.2d 761, 766 (9th Cir. 1991).

15 **2. Analysis**

16 Petitioner has failed to demonstrate that the prosecutor committed misconduct or that any
17 misconduct resulted in prejudice. First, there is no evidence that any of the trial testimony was
18 false, or that the prosecutor knew it was false. Under these circumstances, the prosecutor did not
19 commit misconduct in failing to direct or dictate the testimony given by any trial witness. Nor is
20 there evidence that the prosecutor withheld from the defense that there were blood stains on the
21 dresser and blood spatter on the east wall. On the contrary, petitioner alleges that his trial counsel
22 was aware of these facts but failed to tell petitioner or the jury. ECF No. 67 at 24-25.

23 Given the substantial evidence that petitioner was the person who shot Brown and Turner,
24 the prosecutor's failure to prevent Shoals from testifying that she was hidden from the gunman's
25 view, or her failure to ensure the jury was informed there was blood on the dresser and the east
26 wall of the other bedroom, or that Brown had an exit wound from his head injury, would not have
27 had a substantial and injurious effect on the verdict in this case. To the extent petitioner is
28 arguing that if the witnesses had testified truthfully it would be apparent that the shooter would

1 have had blood on his clothes, the jury was aware that this was one of the weaknesses in the
2 evidence. Petitioner's trial counsel argued extensively in his closing argument that petitioner
3 should have had blood on his clothing if he were the shooter. Reporter's Transcript on Appeal
4 (RT) at 1091-95. The jury heard all of the evidence that raised questions about whether petitioner
5 was the shooter and found petitioner guilty of the murders even though he did not have any blood
6 on his clothing.

7 The decision of the California Supreme Court denying petitioner's claim of prosecutorial
8 misconduct is not contrary to or an unreasonable application of United States Supreme Court
9 authority. Certainly it is not "so lacking in justification that there was an error well understood
10 and comprehended in existing law beyond any possibility for fairminded disagreement." *Richter*,
11 562 U.S. at 103." Accordingly, petitioner is not entitled to relief on this claim.²

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16 ² Although petitioner states in the traverse that his "federal writ presents an actual
17 innocent claim," (ECF No. 75 at 7), he has not raised a freestanding claim of actual innocence in
18 the petition before this court. Rather, he claims that his claims for relief are not subject to a
19 procedural default because he is innocent. *See Schlup v. Delo*, 513 U.S. 298 (1995) (a federal
20 habeas petitioner "can overcome a procedural default, including a failure to comply with the
21 statute of limitations, by demonstrating actual innocence of the crime underlying his conviction").
22 As set forth above, this court has assumed that petitioner's claims are not procedurally defaulted
23 and has addressed all of the claims on the merits. Even if petitioner were raising a claim of actual
24 innocence, he is not entitled to relief. The standard for establishing entitlement to relief on a
25 freestanding claim of actual innocence is "extraordinarily high." *Carriger v. Stewart*, 132 F.3d
26 463, 476 (9th Cir.1997) (en banc) (quoting *Herrera v. Collins*, 506 U.S. 390, 417 (1993)). In
27 order to prevail on such a claim, a petitioner "must go beyond demonstrating doubt about his
28 guilt, and must affirmatively prove that he is probably innocent." *Id.* *See also Cooper v. Brown*,
510 F.3d 870, 923 (9th Cir. 2007) (same); *Boyde v. Brown*, 404 F.3d 1159, 1168 (9th Cir. 2005)
(same). Petitioner has failed to make a showing that he is probably innocent of the murders of
Turner and Brown. Petitioner also appears to be raising numerous additional claims in the
traverse, alleging entirely new instances of insufficient evidence, ineffective assistance of
counsel, and prosecutorial misconduct. *See* ECF No. 75 at 52-67. To the extent petitioner is
attempting to belatedly raise new claims in the traverse, relief should be denied. *See Cacoperdo*
v. Demosthenes, 37 F.3d 504, 507 (9th Cir. 1994) (a traverse is not the proper pleading to raise
additional grounds for relief); *Greenwood v. Fed. Aviation Admin.*, 28 F.3d 971, 977 (9th Cir.
1994) ("we review only issues which are argued specifically and distinctly in a party's opening
brief"). In any event, petitioner's allegations in the traverse fail to demonstrate that the evidence
supporting the jury verdict was insufficient, that his trial or appellate counsel rendered ineffective
assistance, or that the prosecutor committed prejudicial misconduct. Accordingly, any such
claims should be denied.

1 **D. Pending Motions**

2 **1. Motion to Amend/Restitution Fine**

3 In his habeas petition filed on July 5, 2016, petitioner claims that the trial court erred in
4 imposing a \$10,000 restitution fine without considering his “economic situation” and ability to
5 pay such a fine. ECF No. 80 at 4-15. Petitioner argues that he does not have the ability to pay a
6 restitution fine from his prison wages or even after he is released. *Id.* at 13. He contends that his
7 sentence should be modified by striking the \$10,000 restitution fine and reducing it to \$200.00.
8 *Id.* at 15. A review of the record reflects that petitioner was assessed a \$10,000 restitution fine
9 pursuant to Cal. Penal Code § 1202.4(b). *Id.* at 30, 32. The court will construe this filing as a
10 motion to amend petitioner’s pending habeas petition to add a challenge to his restitution fine.
11 *See Woods v. Carey*, 525 F.3d 886, 889 (9th Cir. 2008) (when a second habeas petition is filed
12 before adjudication of an initial habeas petition, the court should construe the second petition as a
13 motion to amend the pending petition).

14 The federal writ of habeas corpus is only available to persons “in custody” at the time the
15 petition is filed. 28 U.S.C. §§ 2241(c), 2254(a); *Carafas v. LaVallee*, 391 U.S. 234, 238 (1968).
16 This requirement is jurisdictional. *Id.* The Ninth Circuit has explicitly held that “an attack on a
17 restitution order is not an attack on the execution of a custodial sentence . . . [Thus,] § 2254(a)
18 does not confer jurisdiction over a challenge to a restitution order.” *Bailey v. Hill*, 599 F.3d 976,
19 983 (9th Cir. 2010) (citing *United States v. Kramer*, 195 F.3d 1129 (9th Cir. 1999)). Because
20 petitioner’s claim challenges only the restitution portion of his sentence, the “custody”
21 requirement of Section 2254(a) is not satisfied and the court does not have jurisdiction to
22 entertain this claim. In addition, to the extent petitioner’s claim challenging his restitution order
23 concern violations of state law, petitioner has failed to state a cognizable federal habeas claim.
24 As set forth above, federal habeas relief does not lie for violations of state law. *Estelle v.*
25 *McGuire*, 502 U.S. 62, 67 (1991); *Jammal v. Van de Kamp*, 926 F.2d 918, 919 (9th Cir. 1991)
26 (“the issue for us, always, is whether the state proceedings satisfied due process; the presence or
27 absence of a state law violation is largely beside the point”).

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1 For the foregoing reasons, petitioner's challenge to his restitution fine in this federal
2 habeas action lacks merit. Accordingly, his request to amend his pending habeas petition to add
3 this claim is futile and should be denied on that basis.

4 **2. Motion for Discovery**

5 Habeas petitioners are not entitled to discovery as a matter of course and, instead, may
6 pursue discovery only upon a showing of good cause and in the discretion of the court. *Rich v.*
7 *Calderon*, 187 F.3d 1064, 1068 (9th Cir. 1999). In his lengthy motion, petitioner identifies nine
8 items of discovery which range from surveillance video to law enforcement officer's "raw
9 reports." ECF No. 81 at 2-3. Petitioner argues that he "has always contended that he was
10 actually innocent" of the crime he was convicted of and that "false evidence was underhandedly
11 used against him by the state to support the conviction." *Id.* at 4. He goes on to criticize the
12 state's theory of the case and argue that "the discovery that he seeks in this motion will prove
13 beyond doubt that the prosecution Donell Slivka, [t]rial attorney Jessie Morris, Judge Patrick
14 Marlette, and the Sacramento police officers worked in collusion to gain an illegal conviction
15 against petitioner." *Id.* at 13.

16 The court concludes that petitioner has not shown good cause for allowing him to engage
17 in wide-ranging discovery. First, as noted *supra*, the court has already concluded that his habeas
18 claims do not entitled him to relief. Second, habeas petitioners should not be granted leave to
19 engage in discovery as a "fishing expedition . . . to explore their case in search of its existence."
20 *Rich*, 187 F.3d at 1067 (quoting *Calderon v. U.S.D.C. (Nicolaus)*, 98 F.3d 1102, 1106 (9th Cir.
21 1996)). Petitioner is not seeking discovery for some limited purpose related to the claims in his
22 petition; rather he appears to be trying to collect wide-ranging evidence in an attempt to re-try his
23 case. This intention is underscored by petitioner's broad and unsupported allegation that the
24 prosecutor, law enforcement officers, and the trial judge colluded to illegally convict him. ECF
25 No. 81 at 13.

26 Based on the foregoing, the motion is denied.

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1 **3. Motion for Finding of Actual Innocence**

2 On April 24, 2017, months after the relevant petition for habeas corpus was filed,
3 petitioner filed a motion for finding of factual innocence. ECF No. 82. Therein, he asks the court
4 to find him “factually innocent” based on a “preponderance of the evidence presented . . . that the
5 crime with which he was charged was not committed by him.” ECF No. 82 at 1. Petitioner cites,
6 as the legal basis for his motion, California Senate Bill 1134 which, *inter alia*, amends Cal. Penal
7 Code § 1485.55 to read:

8 In a contested or uncontested proceeding, if the court grants a writ
9 of habeas corpus and did not find the person factually innocent in
10 the habeas corpus proceedings, the petitioner may move for a
11 finding of factual innocence by a preponderance of the evidence
 that the crime with which he or she was charged was either not
 committed at all or, if committed, was not committed by him or her.

12 Cal. Penal Code § 1485.55 (b). He also cites Assembly Bill 1909 which amends Cal. Penal Code
13 § 141 and pertains to the falsification of evidence. Cal. Penal Code § 141. These citations
14 underscore changes in California state law and, to the extent either entitles petitioner to any relief,
15 must be raised in the appropriate state court. As the court has already noted, petitioner did not
16 raise an actual innocence claim in his current federal petition. *See supra* n. 2. This motion is
17 denied.

18 **4. Motion to Amend Petition**

19 On June 21, 2017, petitioner filed a new habeas petition in case in *Wallace v. The People*
20 *of the State of California*, 2:17-cv-1270 – KJN. His new petition was construed as motion to
21 amend and filed this in this action. ECF No. 85.

22 A responsive pleading has been filed in this case and, accordingly, petitioner must obtain
23 leave of court to file an amended petition. *See Anthony v. Cambra*, 236 F.3d 568, 577 (9th Cir.
24 2000). Habeas petitions may be amended or supplemented as provided in the Federal Rules of
25 Civil Procedure. *See* 28 U.S.C. § 2242; *Anthony*, 236 F.3d at 576. And although Federal Rule of
26 Civil Procedure 15(a) requires that leave to amend “shall be freely given when justice so
27 requires,” the court should also weigh whether there is any evidence of undue delay, bad faith or
28 dilatory motives with respect to the filing of an amendment when determining whether leave to

1 amend should be granted. *See Anthony*, 236 F.3d at 577-78. Here, the court concludes that
2 granting petitioner leave to amend would be futile because his claims are untimely.

3 A federal habeas petition must be filed within one year of: (1) the date the state court
4 judgment became final, either by conclusion of direct review or the expiration of time to seek
5 such review; (2) the date on which an impediment to filing created by state action is removed (if
6 the applicant was prevented from filing by that action); (3) the date on which a constitutional
7 right is newly recognized by the Supreme Court and made retroactive on collateral review; or (4)
8 the date on which the factual predicate of the claim could have been recognized through the
9 exercise of due diligence. *See* 28 U.S.C. § 2244(d). In most cases the statute of limitations
10 begins to run after the state court judgment becomes final pursuant to 28 U.S.C. § 2244(d)(1).

11 The original petition filed with this court indicates that the underlying conviction occurred
12 on September 30, 2010. ECF No. 1 at 1. Petitioner appealed and the conviction was affirmed by
13 the court of appeal on October 23, 2012 (Resp't's Lod. Doc. entitled "California Court of Appeal,
14 Unpublished Opinion") and his petition for review was denied by the California Supreme Court
15 on January 30, 2013 (Resp't's Lod. Doc. entitled "Order Denying Petition for Review, California
16 Supreme Court Case No. S206808). Petitioner filed numerous state habeas petitions, the latest of
17 which was denied by the California Supreme Court in March of 2015. *See* Resp't's Lod. Doc.
18 entitled "Order Denying Petition for Writ of Habeas Corpus, Case No. S223942, March 25,
19 2015." Assuming that petitioner was entitled to continuous tolling until March 25, 2015, his
20 newly added claims – which were filed more than two years later on June 7, 2017³ - would still be
21 untimely. *See Wallace*, 2:17-cv-1270-KJN, ECF No. 1 at 46.

22 The claims might be saved if they could be construed to relate to back to a timely petition.
23 The Ninth Circuit has held that Federal Rule of Civil Procedure 15(c) applies to a petitioner's
24 attempt to amend his petition to add newly exhausted claims. *See Anthony*, 236 F.3d at 576. The
25 claims may only relate back if respondent was on notice of them before the statute of limitations
26

27 ³ *See Houston v. Lack*, 487 U.S. 266 (1988) (establishing rule that a prisoner's court
28 document is deemed filed on the date the prisoner delivered the document to prison officials for
mailing).

1 period expired. *Id.* at 576-77. Additionally, the Supreme Court has explicitly rejected the
2 proposition that a claim relates back solely on the basis that it arises from the same “trial,
3 conviction, or sentence.” *See Mayle v. Felix*, 545 U.S. 644, 664 (2005) (internal quotation marks
4 omitted). The motion to amend raises three new claims, namely: (1) that the trial judge erred in
5 denying petitioner discovery; (2) that the prosecutor violated his obligation under *Brady v.*
6 *Maryland*, 373 U.S. 83 (1963) by withholding evidence that was in possession of investigative
7 agencies and to which the state had access; and (3) that the appellate court erred in denying
8 petitioner’s writ relief concerning the trial judge’s denial of discovery. ECF No. 85 at 10-22.
9 The court finds that none of these claims relate back.

10 The original petition, filed on January 14, 2014, raised claims that: (1) the court of appeal
11 used an incorrect standard to determine whether sufficient evidence supported his conviction; (2)
12 the court of appeal erroneously used a new method of analyzing the sufficiency of the evidence
13 underlying his conviction; (3) his trial counsel “utterly failed to defend against the charges”
14 and appellate counsel failed to raise ineffective assistance of counsel on appeal; and (4) the
15 prosecutor knowingly used perjured testimony to obtain the conviction. ECF No. 1 at 14-23.

16 Nor do the other, amended petitions in this case invoke the claims petitioner now seeks to
17 add. The court determined that those petitions raised only the claims identified above: (1) the
18 evidence introduced at petitioner’s trial is insufficient to support his conviction; (2) petitioner’s
19 trial and appellate counsel rendered ineffective assistance; and (3) prosecutorial misconduct
20 violated petitioner’s right to due process. These are also the claims as respondent understood
21 them, as evidenced by his answer. ECF No. 73.

22 Finally, the court finds that the other circumstances contemplated in 28 U.S.C. § 2244(d)
23 do not apply. That is, petitioner has not shown that: (1) some impediment to filing these claims
24 created by state action was removed; (2) the claims rely on a constitutional right that was newly
25 recognized by the Supreme Court and made retroactive on collateral review; or (3) that he could
26 not have recognized the factual predicate of these claims by the exercise of due diligence until
27 recently. 28 U.S.C. § 2244(d). And, although the Ninth Circuit has recognized an exception to
28 the limitations period for claims of actual innocence, *see Lee v. Lampert*, 653 F.3d 929 (9th Cir.

2011), his motion to amend does not appear to explicitly invoke that theory. And even if it could be construed to do so, the court finds that petitioner has not produced sufficient evidence to establish that he falls within the narrow class of cases that would qualify for this exception. *Id.* at 937 (“In order to present otherwise time-barred claims to a federal habeas court . . . a petitioner must produce sufficient proof of his actual innocence to bring him within the narrow class of cases . . . implicating a fundamental miscarriage of justice.”) (internal quotations marks and citations omitted).

IV. Conclusion

For the foregoing reasons, IT IS HEREBY ORDERED that petitioner’s motions for discovery (ECF No. 81) and factual innocence (ECF No. 82) are DENIED.

Further, IT IS RECOMMENDED that:

1. Petitioner’s third amended petition (ECF No. 80), construed as a motion to amend, be DENIED;
2. Petitioner’s motion to amend (ECF No. 85) be DENIED; and
3. Petitioner’s application for a writ of habeas corpus be DENIED.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned “Objections to Magistrate Judge’s Findings and Recommendations.” Any reply to the objections shall be served and filed within fourteen days after service of the objections. Failure to file objections within the specified time may waive the right to appeal the District Court’s order. *Turner v. Duncan*, 158 F.3d 449, 455 (9th Cir. 1998); *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991). In his objections petitioner may address whether a certificate of appealability should issue in the event he files an appeal of the judgment in this case. *See* Rule 11, Rules Governing Section

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1 2254 Cases (the district court must issue or deny a certificate of appealability when it enters a
2 final order adverse to the applicant).

3 DATED: September 20, 2017.

4 

EDMUND F. BRENNAN

UNITED STATES MAGISTRATE JUDGE

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Case Name: (HC) Wallace v. Barnes

Case Number: 2:14-cv-00157-MCE-EFB

Filer:

Document Number: 86

Docket Text:

ORDER and FINDINGS and RECOMMENDATIONS signed by Magistrate Judge Edmund F. Brennan on 09/20/17 DENYING [81], [82] Motion for discovery and factual innocence. Also, RECOMMENDING that petitioner's motion to amend [85] be denied; and petitioners application for a writ of habeas corpus be denied. Motion to amend [85] referred to Judge Morrison C. England Jr. Objections due within 14 days. (Plummer, M)

2:14-cv-00157-MCE-EFB Notice has been electronically mailed to:

Jesse Noel Witt Jesse.Witt@doj.ca.gov, diane.camargo@doj.ca.gov,
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8 UNITED STATES DISTRICT COURT
9 FOR THE EASTERN DISTRICT OF CALIFORNIA
10

11 GEORGE WALLACE,

12 Petitioner,

13 v.

14 RON E. BARNES,

15 Respondent.
16

No. 2:14-cv-00157-MCE-EFB-P

ORDER

17 Petitioner, a state prisoner proceeding pro se, has filed this application for a writ of habeas
18 corpus pursuant to 28 U.S.C. § 2254. The matter was referred to a United States Magistrate
19 Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 302.

20 On September 21, 2017, the magistrate judge filed findings and recommendations herein
21 which were served on all parties and which contained notice to all parties that any objections to
22 the findings and recommendations were to be filed within fourteen days. Petitioner has filed
23 objections to the findings and recommendations.

24 In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C) and Local Rule 304, this
25 court has conducted a de novo review of this case. Having carefully reviewed the entire file, the
26 court finds the findings and recommendations to be supported by the record and by proper
27 analysis.

28 ////

1 Accordingly, IT IS HEREBY ORDERED that:

2 1. The findings and recommendations filed September 21, 2017, are adopted in full;

3 2. Petitioner's third amended petition (ECF No. 80), construed as a motion to amend,
4 is DENIED;

5 3. Petitioner's motion to amend (ECF No. 85) is DENIED;


6 4. Petitioner's application for a writ of habeas corpus is DENIED;

7 5. The Clerk is directed to close the case; and

8 6. The court declines to issue a certificate of appealability.

9 IT IS SO ORDERED.

10 Dated: December 11, 2017

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12 MORRISON C. ENGLAND, JR.
13 UNITED STATES DISTRICT JUDGE
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Eastern District of California – Live System

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Case Name: (HC) Wallace v. Barnes

Case Number: 2:14-cv-00157-MCE-EFB

Filer:

WARNING: CASE CLOSED on 12/12/2017

Document Number: 93

Docket Text:

ORDER signed by District Judge Morrison C. England, Jr on 12/11/2017 ADOPTING [86] Findings and Recommendations in full, DENYING [80] and [85] Motion to Amend, and DENYING [1] Petition for Habeas Corpus. The court DECLINES to issue a certificate of appealability. CASE CLOSED. (Hunt, G)

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**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA**

JUDGMENT IN A CIVIL CASE

GEORGE WALLACE,

CASE NO: 2:14-CV-00157-MCE-EFB

v.

RON E. BARNES,

XX -- Decision by the Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

**THAT JUDGMENT IS HEREBY ENTERED IN ACCORDANCE WITH THE
COURT'S ORDER FILED ON 12/11/2017**

Marianne Matherly
Clerk of Court

ENTERED: December 12, 2017

by: /s/ G. Hunt
Deputy Clerk

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--Case Participants: Jesse Noel Witt (diane.camargo@doj.ca.gov, docketingsacawt@doj.ca.gov, ecfcordinator@doj.ca.gov, jesse.witt@doj.ca.gov), District Judge Morrison C. England, Jr (caed_cmecf_mce@caed.uscourts.gov), Magistrate Judge Edmund F. Brennan (caed_cmecf_efb@caed.uscourts.gov)

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U.S. District Court

Eastern District of California - Live System

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Case Name: (HC) Wallace v. Barnes

Case Number: 2:14-cv-00157-MCE-EFB

Filer:

WARNING: CASE CLOSED on 12/12/2017

Document Number: 94

Docket Text:

JUDGMENT dated *12/11/2017* in favor of Defendant against Plaintiff pursuant to order signed by District Judge Morrison C. England, Jr on 12/11/2017. (Hunt, G)

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

JUN 22 2018

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

GEORGE WALLACE,

Petitioner-Appellant,

v.

RON E. BARNES, Warden,

Respondent-Appellee.

No. 18-15572

D.C. No. 2:14-cv-00157-MCE-EFB
Eastern District of California,
Sacramento

ORDER

Before: PAEZ and RAWLINSON, Circuit Judges.

The request for a certificate of appealability is denied because appellant has not made a “substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2); *see also Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Any pending motions are denied as moot.

DENIED.

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