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APPENDIX 'A'

UNITED STATES COURT OF APPEALS

FILED

FOR THE NINTH CIRCUIT

OCT 19 2017

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

RALPH RAUL CONTRERAS,

Petitioner-Appellant,

v.

F. CHAVEZ,

Respondent-Appellee.

No. 16-17318

D.C. No.

1:13-cv-00623-AWI-SMS

Eastern District of California,

Fresno

ORDER

Before: THOMAS, Chief Judge, and WARDLAW, Circuit Judge.

The request for a certificate of appealability (Docket Entry No. 6) 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.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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DEC 18 2017

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

RALPH RAUL CONTRERAS,

Petitioner-Appellant,

v.

F. CHAVEZ,

Respondent-Appellee.

No. 16-17318

D.C. No.
1:13-cv-00623-AWI-SMS
Eastern District of California,
Fresno

ORDER

Before: BYBEE and MURGUIA, Circuit Judges.

The motion for reconsideration (Docket Entry No. 9) is denied. *See* 9th Cir.

R. 27-10.

No further filings will be entertained in this closed case.

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APPENDIX 'B'

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5 UNITED STATES DISTRICT COURT
6 EASTERN DISTRICT OF CALIFORNIA
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8 RALPH RAUL CONTRERAS,
9 Petitioner,

10 v.

11 F. CHAVEZ, Warden,

12 Respondent.
13

CASE NO. 1:13-CV-623-AWI-SMS

ORDER ADOPTING FINDINGS AND
RECOMMENDATIONS
RECOMMENDING DENIAL OF THE
PETITION

(Doc. 22)

14 Petitioner is a state prisoner proceeding *pro se* and *in forma pauperis* with a petition for
15 writ of habeas corpus pursuant to 28 U.S.C. § 2254. Doc. 1. Respondent filed an answer and
16 Petitioner filed a reply. Docs. 13, 16. The Court referred the matter to the Magistrate Judge
17 pursuant to 28 U.S.C. § 636(b)(1) and Local Rules 302 and 304.

18 On April 13, 2016, the Magistrate Judge filed findings and recommendations ("F&R") in
19 which she recommended the Court deny the petition. The Magistrate Judge found the state court
20 adjudication of Petitioner's claims did not result in a decision which was contrary to, and did not
21 involve an unreasonable application of, clearly established federal law. The F&R, which was
22 served on the same date, provided that objections could be served within thirty days. Doc. 22.

23
24 Petitioner filed objections on July 18, 2016.¹ Doc. 25. No reply was filed. In accordance
25

26 ¹ On May 25, 2016, the Court granted Petitioner's request for an extension to file objections by
27 July 15, 2016. Doc. 24. Though Petitioner's objections reflect a filing date of July 18, 2016, his
28 brief and proof of service show a date of July 12, 2015. Under the mailbox rule, the objections are
therefore timely filed. Doc. 25. *See* Rule 3(d), Rules Governing § 2254 Cases; *Stewart v. Cate*,
757 F.3d 929, 933 (9th Cir.) (stating the mailbox rule "calculates a pro se prisoner litigant's filing


1 with the provisions of 28 U.S.C. § 636(b)(1)(C), the Court has reviewed the file *de novo* and finds
2 the F&R supported by the record and proper analysis.

3
4 Accordingly, IT IS HEREBY ORDERED that:

- 5 1. The findings and recommendations filed April 13, 2016, are ADOPTED in full;
6 2. Petitioner's petition for writ of habeas corpus is DENIED;
7 3. Judgment is entered for Respondent;
8 4. The court declines to issue a certificate of appealability; and
9 5. The Clerk of Court shall CLOSE this case.
10

11
12 IT IS SO ORDERED.

13 Dated: November 15, 2016

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16 SENIOR DISTRICT JUDGE

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27 date from the date the document is delivered to a prison official for mailing”), *cert. denied sub*
28 *nom. Stewart v. Beard*, 135 S. Ct. 341 (2014).

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APPENDIX 'C'

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5 UNITED STATES DISTRICT COURT
6 EASTERN DISTRICT OF CALIFORNIA
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8 RALPH RAUL CONTRERAS,
9 Petitioner,

10 v.

11 F. CHAVEZ, Warden,
12 Respondent.
13

CASE NO. 1:13-CV-623-AWI-SMS

FINDINGS AND RECOMMENDATIONS
RECOMMENDING DENIAL OF THE
PETITION

14
15 Petitioner is a state prisoner proceeding *pro se* and *in forma pauperis* with a petition for
16 writ of habeas corpus pursuant to 28 U.S.C. § 2254. Doc. 1. The petition, answer, and reply are
17 presently before the Court. Docs. 1, 13, 16. For the following reasons, the Court recommends that
18 the petition be denied.

19 **I. BACKGROUND**

20 On August 15, 2005, around 6 p.m. a Kern County Sheriff's Deputy arrested a Mr. Moore
21 at a house in Bakersfield.¹ At the central receiving facility, the deputy conducted several sobriety
22 tests and took a sample of Moore's urine for drug and alcohol testing. Moore's demeanor rapidly
23 cycled between cooperative and uncooperative. The deputy told the booking officer that Moore
24 was mentally unstable. Later, the urine test was found to be negative for drugs and alcohol.

25 Moore was sent to a nurse's station and was uncooperative. Two officers pepper-sprayed
26 him. Officers attempted to handcuff him while he was face down on the floor. Eventually six
27 officers were on top of a struggling Moore. Officers handcuffed him behind his back and placed
28

¹ This brief factual background is summarized from the California Court of Appeals opinion.

1 leg shackles on his ankles. They removed the handcuffs and put waist chains on, which held his
2 hands close to his sides. Moore was ordered to be placed in a cell with padded walls. He was
3 inspected by a nurse who observed redness from the restraints, but no significant injuries.

4 Around 7 p.m. a shift change occurred. Officers removed Moore from the padded cell to
5 complete the booking process. He was cooperative. The officers removed the leg irons and
6 photographed him. Around 7:35, Moore was struggling with six or seven officers, including
7 Petitioner, in the dress-out area, the area where inmates change into jail clothes. In this struggle,
8 officers were trying to hold Moore down and put side-bar restraints on him, which would keep his
9 hands at his sides. Officers testified that Moore had no restraints on at the beginning of the
10 struggle. Sergeant Randall Holtz applied a carotid choke hold around Moore's neck from behind
11 causing Moore to lose consciousness for five to ten seconds. The officers put side bars and leg
12 irons on him. Blood was coming from Moore's eye, ear, and mouth, and he was missing a tooth. A
13 nurse checked Moore's vital signs and said he was okay. Sergeant Holtz ordered Petitioner and
14 another officer to take Moore by car to a hospital according to their policy following a carotid
15 hold.

16 Moore was uncooperative on the way to the car, refusing to walk and grabbing a door
17 handle without letting go. Still restrained in side bars and leg irons and refusing to walk, fourteen
18 officers went with Moore to the garage. Moore resisted being placed inside the vehicle, stiffened
19 his body, lodged his feet in a wheel well, and held on to the exterior in the car. After at least four
20 separate attempts to get him in the car. Sergeant Holtz hit Moore with a baton two to five times in
21 the legs. An officer tripped Moore and he landed on his back on the concrete. An officer kicked
22 him twice in the center of his face and once in his upper chest. Another officer got on top of
23 Moore and punched him about three times in the kidneys. Petitioner stood over Moore and struck
24 him once in the face with a baton. Another officer stood with her boot on Moore's collarbone as
25 he lay on the floor. After the beating, Moore's eyes were swollen shut and his face was covered in
26 blood. An ambulance was called.

27 Around 10:26 p.m. a Bakersfield City Fire Department Truck was the first to arrive. Scott
28 Dragoun, the engineer and an EMT, testified that Moore was on his back, shackled in leg irons and

1 side bars with two officers standing on the chains. Dragoun observed bruising, swelling, and
2 redness from Moore's head to toes. Moore's face was puffy and he had linear bruises on his torso
3 and thighs consistent with baton strikes. Dragoun found no indications of internal head injury.
4 Moore was alert and oriented, his pupils responded normally to light, his pulse, respiration and
5 temperature were normal. An ambulance arrived two or three minutes after the fire truck. Brooke
6 Brown, an EMT, along with a paramedic, placed the gurney beside Moore, who began to resist
7 being moved by raising his chest and drawing his legs toward his chest. He was still restrained and
8 was not punching or kicking officers. He also avoided being strapped to the gurney by thrashing
9 about. Several officers jumped Moore, punching him in the testicles and groin. An officer and
10 Brown said to stop because Moore would not stop moving while being hit in that manner. An
11 officer secured Moore to the gurney by attaching a restraint to the gurney with handcuffs.

12 While ambulance remained in the parking garage, Petitioner stood at the head of the
13 gurney. He held down Moore's head with one hand and punched him in the face with the other.
14 Dragoun testified that Petitioner struck Moore's head from ten to twelve inches above with his
15 forearm and fist. Petitioner struck Moore more than three times, making contact with the top of his
16 head, his nose, and his neck. The strike to Moore's nose caused it to bleed profusely. At one point,
17 Dragoun testified that he saw Petitioner's other hand covering Moore's mouth and nose for about
18 twenty seconds and stated sarcastically that "if you cover his mouth and his nose, he'll stop
19 resisting." Petitioner punched Moore in the face several times with one hand while covering his
20 mouth and nose with the other. Moore was still trashing about. The fire department captain and
21 Brown also saw another officer, Lindini, applying force to Moore's head and neck, pushing his
22 forearm with solid force across the side of the face, cheek, and neck area, forcing Moore's face to
23 the right. Brown saw that Moore was not breathing. Petitioner and Lindini were at the head of the
24 gurney. Brown told Lindini to let go, but he did not. The third time, he let go. At about this time,
25 the officers had succeeded in buckling the gurney straps onto Moore's body and stepped away
26 from the gurney. Moore's pulse was faint and then stopped. Emergency personnel performed
27 CPR. Moore was loaded into the ambulance and taken to the hospital. During the five-minute
28 drive to the hospital, Moore's pulse was restored. Hospital personnel worked on stabilizing him.

1 Brown observed that Moore's injuries were worse than when she first arrived and found Moore on
2 the floor. His eyes were swollen shut, his face was covered in blood, and blood was coming from
3 his nose and ears. An officer testified that Petitioner told her that Petitioner punched Moore every
4 time Moore struggled or tried to raise himself. Moore was found to be brain dead and removed
5 from the respirator and died on August 21, 2005, six days after his arrest.

6 Dr. Debra Hanks performed the autopsy and testified that the cause of death was head and
7 neck injuries due to blunt force trauma. Blood was present at the base of the skull, in the region
8 considered the brain stem. Dr. Hanks found that the brain had experienced a cutoff of blood supply
9 and lack of oxygen and the brain was swollen. These conditions were caused by the blunt force
10 trauma to the head and neck. Dr. Hanks testified that Moore's injuries with consistent with the
11 type of force applied by Petitioner while Moore was on the gurney. Petitioner had held his head to
12 one side with one hand and punched his head and neck with the other. Dr. Hanks testified that the
13 turned head exposed the area of the junction of head and spinal cord and created stress at the base
14 of the skull at the top of the spinal cord and that Petitioner's actions would cause injury to the
15 neural tissue. Dr. Hanks also testified that Moore's death was multifactorial and was not able to
16 attribute his death to any one traumatic injury or assign percentages of causation to those injuries.
17 She testified that damage to the brain stem can cause breathing to stop.

18 Dr. Frank Sheridan testified as an expert for the prosecution. He opined that the cause of
19 death was blunt force trauma to the brain stem. He opined that the impacts damaged the brain
20 stem, which caused respiratory failure, which contributed to the oxygen cut-off to the brain. Dr.
21 Sheridan also could not say which traumatic injuries caused the brain stem injury. He testified that
22 it could have been to cumulative effect of a number of blows. However, he also testified that the
23 major injuries occurred after the fire and ambulance crews arrived, based on the paramedics
24 finding that Moore's mental state was normal upon their arrival. Dr. Sheridan testified that he did
25 not think Petitioner's actions while Moore was on the gurney would alone cause the brain stem
26 injury, but could have contributed to the cause of death.

27 Lieutenant Steven Hansen of the Kern County Sheriff's Department testified for the
28 prosecution as an expert on the use of force by officers. He testified that Petitioner's actions while

1 Moore was on the gurney would be unreasonable because the inmate was no threat under those
2 circumstances and the officer's actions did nothing but punish him.

3 The jury found Petitioner guilty as charged of second degree murder and assault under
4 color of authority. The Court imposed a sentence of fifteen years to life for second degree murder,
5 and stayed a two-year sentence for assault under color of authority. Lindini, who was at the head
6 of the gurney with Petitioner, was tried together with Petitioner and found guilty of involuntary
7 manslaughter and assault under color of authority. The California Court of Appeal affirmed the
8 conviction in a thorough opinion. The California Supreme Court denied further review. The
9 California Supreme court also denied habeas relief on the merits.

10 In this petition, Petitioner argues 1) that the trial court's failure to instruct the jury on use
11 of accomplice testimony violated his right to due process; 2) that his right to effective assistance
12 of counsel was violated by trial counsel in its failure to request the jury instruction on accomplice
13 testimony, failure to file a motion for change of venue, agreement to stipulate to a urine sample,
14 and its potential bias in representing the Sheriff's Department; 3) that his right to effective
15 assistance of counsel was violated by appellate counsel in its failure to brief the lack of accomplice
16 testimony jury instruction, failure to brief ineffective assistance of trial counsel, failure to brief
17 trial counsel's failure to file a motion for change of venue, and failure to obtain transcripts of voir
18 dire and jury selection; 4) that his right to due process was violated by the cumulative impact of
19 the errors; and 5) that his right to due process was violated because his conviction was not
20 supported by sufficient evidence.

21 II. STANDARD OF REVIEW

22 Habeas corpus is neither a substitute for a direct appeal nor a device for federal review of
23 the merits of a guilty verdict rendered in state court. *Jackson v. Virginia*, 443 U.S. 307, 332 n. 5
24 (1979) (Stevens, J., concurring). Habeas corpus relief is intended to address only "extreme
25 malfunctions" in state criminal justice proceedings. *Id.* Under the Antiterrorism and Effective
26 Death Penalty Act of 1996 ("AEDPA"), which applies to all petitions for writ of habeas corpus
27 filed after its enactment, a petitioner can prevail only if he can show that the state court's
28 adjudication of his claim:

1 (1) resulted in a decision that was contrary to, or involved an unreasonable application of
2 clearly established Federal law, as determined by the Supreme Court of the United States;
3 or
4 (2) resulted in a decision that was based on an unreasonable determination of the facts in
5 light of the evidence presented in the State court proceeding.

6 28 U.S.C. § 2254(d); *Lockyer v. Andrade*, 538 U.S. 63, 70-71 (2003); *Williams v. Taylor*, 529 U.S.
7 362, 413 (2000). “By its terms, § 2254(d) bars relitigation of any claim ‘adjudicated on the merits’
8 in state court, subject only to the exceptions set forth in §§ 2254(d)(1) and (d)(2).” *Harrington v.*
9 *Richter*, 562 U.S. 86, 98 (2011).

10 The AEDPA standard is difficult to satisfy since even a strong case for relief does not
11 demonstrate that the state court’s determination was unreasonable. *Harrington*, 562 U.S. at 102.
12 “A federal habeas court may not issue the writ simply because the court concludes in its
13 independent judgment that the relevant state-court decision applied clearly established federal law
14 erroneously or incorrectly.” *Lockyer*, 538 U.S. at 75-76. “A state court’s determination that a
15 claim lacks merit precludes federal habeas relief so long as ‘fairminded jurists could disagree’ on
16 the correctness of the state court’s decision.” *Harrington*, 562 U.S. at 101 (*quoting Yarborough v.*
17 *Alvarado*, 541 U.S. 652, 664 (2004)). Put another way, a federal court may grant habeas relief
18 only when the state court’s application of Supreme Court precedent was objectively unreasonable
19 and no fair-minded jurist could disagree that the state court’s decision conflicted with Supreme
20 Court’s precedent. *Williams*, 529 U.S. at 411.

21 III. ACCOMPLICE TESTIMONY JURY INSTRUCTION

22 The trial court did not instruct the jury with CALCRIM 335 regarding use of accomplice
23 testimony. This instruction directs the jury to view statements of an accomplice tending to
24 incriminate the defendant with caution. CALCRIM 335. Petitioner argues that the failure to
25 provide jury instruction regarding use of accomplice testimony violated due process. The
26 California Superior Court rejected this claim in its order denying Petitioner’s state habeas petition.
27 The Superior Court noted that none of the witnesses had been charged with any crime because
28 there was no evidence that they participated in the beatings or condoned Petitioner’s conduct.
They were admonished by the trial court concerning their right against self-incrimination, and
decided to testify.

1 A challenge to a jury instruction solely as an error under state law is not cognizable in
2 federal habeas corpus proceedings. *Estelle v. McGuire*, 502 U.S. 62, 71-72 (1991). Federal habeas
3 relief is available for instructional error only if “the ailing instruction by itself so infected the
4 entire trial that the resulting conviction violates due process.” *Cupp v. Naughten*, 414 U.S. 141,
5 147 (1973). Therefore, if an error is found, the court also must determine that the error had a
6 “substantial and injurious effect or influence in determining the jury’s verdict.” *Brecht v.*
7 *Abrahamson*, 507 U.S. 619, 627 (1993) (quoting *Kotteakos v. United States*, 328 U.S. 750, 776
8 (1946).

9 The Kern County Superior Court’s opinion, undisturbed by the California Supreme Court,
10 was not contrary to, and did not involve an unreasonable application of, clearly established Federal
11 law. The trial court had no obligation to instruct the jury on accomplice testimony when none of
12 the witnesses were charged as accomplices. Further, even if the jury should have received an
13 instruction to consider accomplice or witness testimony with caution, there is no evidence that
14 such an instruction would have an effect on the verdict. Various officers and medical personnel
15 testified as to Petitioner’s actions throughout the evening of Moore’s arrest. Medical experts
16 testified as to the cause of death occurring after the medical personnel arrived. The jury instruction
17 does not require the jury to discount the accomplice testimony, only view it with caution. There is
18 no evidence that the lack of jury instruction regarding accomplice testimony had an effect in
19 determining the jury’s verdict. Hence, the lack of instruction did not infect the trial such that the
20 resulting conviction violates due process.

21 IV. INEFFECTIVE ASSISTANCE OF COUNSEL

22 Petitioner argues that his constitutional right to effective assistance of counsel was violated
23 in several ways, at both the trial and appellate level. He argues that trial counsel was ineffective in
24 its failure to request the jury instruction on accomplice testimony, failure to file a motion for
25 change of venue, for agreeing to stipulate to the victim’s urine sample, and for a potential conflict
26 of interest regarding the fee arrangement. He also argues that appellate counsel was ineffective for
27 failing to brief and argue the lack of the accomplice testimony jury instruction, ineffective
28 assistance of trial counsel, and trial counsel’s failure to file a change of venue, and for failing to

1 augment the record to include transcripts of voir dire and jury selection. Petitioner's grounds for
2 ineffective assistance of counsel are primarily arguments as to what counsel *could* have done
3 differently, but Petitioner has not alleged any constitutional errors.

4 A. Applicable Law

5 A habeas claim alleging appellate counsel was ineffective is evaluated under *Strickland v*
6 *Washington*, 466 U.S. 668 (1984). See *Williams v. Taylor*, 529 U.S. 362, 390-91 (2000). To
7 establish ineffective assistance of counsel, petitioner must prove: (1) counsel's representation fell
8 below an objective standard of reasonableness under prevailing professional norms, and (2) there
9 is a reasonable probability that, but for counsel's errors, the result of the proceeding would have
10 been different. *Strickland*, 466 U.S. at 687-94, 697. The relevant inquiry is not what counsel could
11 have done; rather, it is whether the choices made by counsel were reasonable. *Babbitt v. Calderon*,
12 151 F.3d 1170, 1173 (9th Cir.1998). Habeas relief for ineffective assistance of counsel may only
13 be granted if the state-court decision unreasonably applied the *Strickland* standard. *Knowles v.*
14 *Mirzayance*, 556 U.S. 111, 129 S.Ct. 1411, 1419 (2009).

15 B. Analysis

16 Trial Counsel's Failure to Request a Jury Instruction on Accomplice Testimony

17 Regarding the jury instruction on accomplice testimony, the Kern County Superior Court
18 denied Petitioner's ineffective assistance of trial counsel claims on the merits. The Superior Court
19 found that the jury instruction on accomplice testimony was unnecessary; thus, counsel's failure to
20 request the instruction was not deficient and there was no showing of prejudice. The Court agrees
21 that trial counsel was not ineffective for this reason, nor is it reasonably probable that the failure to
22 request the jury instruction was prejudicial.

23 Trial Counsel's Failure to Request a Change of Venue

24 Petitioner argues that trial counsel should have requested a change of venue due to local
25 media coverage of his case. The Superior Court reasoned that not requesting a change of venue
26 was a reasonable tactical decision by counsel considering the joint trial with Lindini. The Superior
27 Court also found that Petitioner could not show prejudice from the media coverage and that
28 Plaintiff's allegations of prejudice are speculative. The Court agrees that trial counsel's failure to

1 file a change in venue did not fall below an objective standard of reasonableness and that
2 Petitioner has not demonstrated that he was prejudiced by remaining in the venue where tried.

3 Trial Counsel's Stipulating to the Urine Sample

4 Petitioner argues that the urine sample obtained from Moore when he was booked could
5 have been tainted because it was given to an officer in a paper cup and transferred to a vial for
6 processing. Petitioner argues that trial counsel's stipulation to the sample at the preliminary
7 hearing and trial counsel's failure to make a motion to exclude the sample were ineffective
8 assistance of counsel. The Superior Court held that it is common practice to stipulate for the
9 purposes of preliminary hearing and that there is no evidence that the admission of the urine
10 sample and its results affected the outcome of the trial. This Court agrees. The toxicologist
11 expressed no concern over the sample. Further, whether or not Moore was intoxicated at the time
12 of booking is almost irrelevant to the ultimate conviction. Witnesses testified that Moore was very
13 uncooperative, trashing about, and thought to be mentally unstable. Witnesses also testified that
14 Moore was restrained in the gurney and unable to harm officers when the fatal injuries occurred.
15 Petitioner cannot demonstrate that trial counsel's stipulation and failure to object to the admission
16 of the urine sample had any effect on the jury's verdict.

17 Trial Counsel's Conflict of Interest

18 Petitioner alleges his attorney was retained on his behalf by his union, the Sheriff Officers'
19 Union. The union paid his attorney's fees and retained counsel for other officers that were tried.
20 Petitioner argues that this conflict of interest prevented him from receiving effective assistance of
21 counsel. The Superior Court found that Petitioner did not meet his burden to show that the conflict
22 of interest fundamentally undermined the attorney/client relationship—the record was devoid of
23 evidence of union meddling and his claims were speculative. This Court also finds that Plaintiff
24 has not met his burden to demonstrate that counsel's fee agreement with the union created a
25 conflict of interest. The union paid Petitioner's attorney's fees. There is no evidence that the union
26 interfered with or otherwise affected his representation. There is no evidence that Petitioner's
27 counsel represented any witness who testified at Petitioner's trial. Petitioner argues that counsel's
28 failure to call Sergeant Holtz, who administered the carotid hold and hit Moore several times with

1 a baton, is evidence of a conflict of interest. However, Holtz was not active during the most
2 relevant time –while Moore was on the gurney. Other witnesses testified as to the events occurring
3 before Moore was on the gurney and it may have been a tactical reason not to call Holtz to testify.
4 Petitioner has not demonstrated that counsel’s payment of fees by the union violated his
5 constitutional right to effective assistance of counsel.

6 Trial Counsel’s Failure to Allow Petitioner to Testify

7 To the extent that Petitioner argues that his attorney’s advice to not to testify at trial was
8 prejudicially ineffective, the Superior Court found that counsel’s tactical decision was objectively
9 reasonable in light of the overwhelming evidence of petitioner’s guilt. This Court agrees that
10 counsel’s decision to not have Petitioner testify did not fall below an objectively reasonable
11 standard and that Petitioner cannot demonstrate prejudice due to his failure to testify on his own
12 behalf.

13 Appellate Counsel’s Failure to Brief All Issues

14 The California Court of Appeal appointed an attorney to represent Petitioner on appeal. In
15 the opening brief, appellate counsel argued that the evidence was insufficient to find implied
16 malice and that Petitioner’s conduct was a substantial factor in causing the victim’s death.
17 Petitioner now argues that appellate counsel was ineffective because he failed to brief the trial
18 court’s failure to instruct the jury on accomplice testimony, ineffective assistance of trial counsel,
19 and trial counsel’s failure to request a change of venue. The Superior Court found that appellate
20 counsel need not raise meritless claims. As discussed in this order, each of Petitioner’s claims that
21 he argues appellate counsel should have briefed are untenable. Therefore, appellate counsel’s
22 failure to brief them was not objectively unreasonable and did not prejudice Petitioner.

23 Appellate Counsel’s Failure to Augment the Record with Transcripts of the Jury Selection Process

24 Petitioner’s outline mentions appellate counsel’s failure to augment the record to include
25 transcripts of the jury voir dire and jury selection; however, he does not brief the issue. It is
26 unclear whether this claim has been exhausted and it is not addressed in Respondent’s answer.
27 Nevertheless, Petitioner has not demonstrated appellate counsel fell below an objective standard of
28 reasonableness or that he was prejudiced by the lack of jury selection transcripts in the appellate

1 record.

2 Summary

3 The state court correctly found that each of Petitioner's allegations regarding ineffective
4 assistance of trial and appellate counsel failed. For each of Petitioner's allegations, he has not meet
5 the requisite showing that but for counsel's actions, the outcome of the trial would have been
6 different. In order to show ineffective assistance of counsel, it is not sufficient for Petitioner to
7 suggest actions that counsel could have possibly taken. According to *Strickland*, he must
8 demonstrate that counsel's actions fell below an objectively reasonable standard, and that there is
9 a reasonable probability that but for such errors, the result of the proceeding would have been
10 different. *Strickland v. Washington*, 466 U.S. 668, 697 (1984). The Superior Court correctly
11 applied the *Strickland* test to each of Petitioner's allegations of ineffective assistance of counsel in
12 denying Petitioner's claims. Hence, the state court findings that Petitioner's trial and appellate
13 counsel were not prejudicially ineffective were not contrary to, and did not involve unreasonable
14 application of, clearly established federal law.

15 **V. CUMMULATIVE ERROR**

16 Petitioner argues that the cumulative impact of the errors denied him due process. As this
17 Court finds that the Superior Court's rulings on the issues were not contrary to clearly established
18 federal law, it follows that the Superior Court's rejection of Petitioner's cumulative error argument
19 is not contrary to clearly established federal law.

20 **VI. SUFFICIENCY OF THE EVIDENCE**

21 Petitioner argues that the evidence was insufficient for findings of implied malice and that
22 Petitioner's conduct was a substantial factor in causing the victim's death.

23 The Due-Process Clause "protects the accused against conviction except upon proof
24 beyond a reasonable doubt of every fact necessary to constitute the crime with which he is
25 charged." *In re Winship*, 397 U.S. 358, 364 (1970). A state prisoner "who alleges that the evidence
26 in support of his state conviction cannot be fairly characterized as sufficient to have led a rational
27 trier of fact to find guilt beyond a reasonable doubt" may bring a federal habeas claim. *Jackson v.*
28 *Virginia*, 443 U.S. 307, 321 (1979). The district court habeas review "does not determine whether

1 it is satisfied that the evidence established guilt beyond a reasonable doubt,” it determines only
2 ““after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact
3 could have found the essential elements of the crime beyond a reasonable doubt.” *Payne v. Borg*,
4 982 F.2d 335, 338 (9th Cir. 1992)(*quoting Jackson*, 443 U.S. at 319 (emphasis in *Jackson*)). The
5 “only question” on federal habeas is review is whether the jury’s finding “was so insupportable as
6 to fall below the threshold of bare rationality.” *Coleman v. Johnson*, 132 S. Ct. 2060, 2065 (2012).

7 Implied Malice

8 Petitioner argues that there was insufficient evidence to support a conviction of second
9 degree murder on a theory of implied malice. Under California law, murder is “the unlawful
10 killing of a human being [...] with malice aforethought.” Cal. Pen. Code § 187(a). Malice may be
11 express or implied. Cal. Pen. Code § 188. It is implied “when no considerable provocation
12 appears, or when the circumstances attending the killing show an abandoned and malignant heart.”
13 *Id.* The California Supreme Court has found that “implied malice requires a defendant’s awareness
14 of engaging in conduct that endangers the life of another.” *People v. Knoller*, 41 Cal. 4th 139, 143
15 (2007). The jury instruction on implied malice requires four findings by the jury: 1) that the
16 defendant intentionally committed an act; 2) the natural consequences of the act were dangerous to
17 human life; 3) at the time he acted, he knew his act was dangerous to human life; and 4) he
18 deliberately acted with conscious disregard for human life. CALCRIM 520.

19 The California Court of Appeal, in a decision undisturbed by the California Supreme
20 Court, found that a reasonable jury could find each of the four elements of implied malice based
21 on the evidence presented. First, there was no doubt that Petitioner committed intentional acts at
22 the gurney when he held down Moore’s head with one hand and punched his head and neck with
23 the other, and when he covered Moore’s mouth and nose with his hand. Second, the Court of
24 Appeal found that the jury could reasonably find that the natural consequences of Petitioner’s
25 actions at the gurney were dangerous to human life. The nature of the beating, combined with the
26 other injuries already sustained and the medical testimony support this finding. Third, the jury
27 could reasonably infer that Petitioner knew of the danger to Moore’s life. The Court of Appeal
28 reasoned that it is likely that anyone inflicting an assault of this kind would have subjective

1 knowledge of its danger to life. The Court of Appeal also reasoned that Petitioner's braggadocio
2 regarding the beating support an inference that he knew he was performing acts that were
3 dangerous to human life. Fourth, the Court of Appeal found that the jury could reasonably find
4 that Petitioner consciously disregarded the danger to Moore's life.

5 The relevant inquiry on habeas review is not whether a rational trier of fact could have
6 found that Petitioner did not act with implied malice, but whether, after viewing the facts in the
7 light most favorable to the prosecution, any rational trier of fact could have found that Petitioner
8 did act with implied malice. The Court of Appeal correctly found that one could. As Petitioner
9 argues, it may be possible that a juror could have found that Petitioner did not know of the danger
10 of his actions to Moore's life. However, the Court of Appeal correctly found that a reasonable
11 juror could have found that Petitioner, a trained officer, knew that holding Moore's head to the
12 side and striking him in the head and neck, after already sustaining several punches and blows
13 from Petitioner and others, would endanger Moore's life. The evidence supports a reasonable
14 finding that Petitioner knew of the danger to Moore's life and that he consciously disregarded that
15 danger.

16 Substantial Factor

17 Petitioner argues that there was insufficient evidence to support a finding that Petitioner's
18 actions were a substantial factor in causing Moore's death. Petitioner argues that Moore had been
19 assaulted and physically harmed by several other officers in the previous two or three hours, and at
20 least three other officers at the time he stopped breathing. Petitioner argues that it cannot be
21 determined that Moore would not have died if Petitioner had not struck him in the face. However,
22 Petitioner does not articulate the correct standard.

23 Under California law, when the conduct of more than one person contributes concurrently
24 as the proximate cause of death, "the conduct of each is a proximate cause of the death if that
25 conduct was also a substantial factor contributing to the result." *People v. Sanchez*, 26 Cal. 4th
26 834, 847 (2001)(internal quotations omitted). Therefore, it is not required that a defendant's
27 conduct is the "but for" cause or "primary" cause of death. *People v. Jennings*, 50 Cal. 4th 616,
28 643-44 (2010).

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The Court of Appeal found that Petitioner's acts were a substantial factor in causing Moore's death. The Court of appeal noted that the fatal brain injuries were sustained after the emergency medical personnel arrived. The fatal beating took place on the gurney with Petitioner and Lindini participating. The medical testimony established that the blows like those delivered at the gurney were consistent with Moore's fatal injury and could be substantial factors in causing to Moore's death. The Court of Appeal found that the jury could reasonably find that Petitioner's actions were a substantial factor contributing to Moore's death based on this "ample evidence." The Court of Appeal applied the correct standard and correctly found that Petitioner's actions were a substantial factor in causing Moore's death. Petitioner's pointing fingers at other officers does not release him from liability. The medical experts testified that the beatings that caused Petitioner's fatal injury occurred after the emergency medical personnel arrived. The beatings suffered by Moore prior to their arrival may have been harsh, but they were not a cause of death. The autopsist testified that it was blunt force trauma to the head and neck, consistent with Petitioner's actions at the gurney, that caused Moore's death. The medical expert for the prosecution also testified that Petitioner's actions could have been the proximate cause of the fatal brain stem injury. Thus, the Court of Appeal's finding that there was substantial evidence to support a finding that Petitioner's actions were a substantial factor in causing Moore's death was not contrary to, and did not involve an unreasonable application of, clearly established federal law.

VII. APPEALABILITY

For the reasons set forth above, Petitioner has not shown "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right [or] that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Hence, the Court should decline to issue a certificate of appealability.

VIII. RECOMMENDATION

Based on the foregoing, it is RECOMMENDED that:

1. The petition for writ of habeas corpus be DENIED;

- 1 2. Judgment be ENTERED for Respondent; and
2 3. The Court DECLINE to issue a certificate of appealability.

3 These findings and recommendations are submitted to the Honorable Anthony W. Ishii,
4 United States District Court Judge, pursuant to the provisions of 28 U.S.C. § 636(b)(1)(B) and
5 Rule 72-304 of the Local Rules of Practice for the United States District Court, Eastern District of
6 California. Within thirty (30) days after being served with a copy, Petitioner may file written
7 objections with the Court, serving a copy on all parties. Such a document should be captioned
8 "Objections to Magistrate Judge's Findings and Recommendations." The Court will then review
9 the Magistrate Judge's ruling pursuant to 28 U.S.C. § 636(b)(1)(C). The parties are advised that
10 failure to file objections within the specified time may waive the right to appeal the District
11 Court's order. *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

12
13 IT IS SO ORDERED.

14 Dated: April 13, 2016

/s/ Sandra M. Snyder
UNITED STATES MAGISTRATE JUDGE

**Additional material
from this filing is
available in the
Clerk's Office.**