NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

_____

TAUMU JAMES – Petitioner

vs.

STATE OF CALIFORNIA –Respondent

_____

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Counsel for Petitioner
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QUESTIONS PRESENTED

1. In *Perry v. New Hampshire*, 565 U.S. 228 (2012), this Court held that the right to due process is generally not denied by identification evidence unless it was produced by state suggestion. Does *Perry* govern the due process analysis if identification evidence is challenged based on the fact that it admittedly does not purport to identify the person who committed the crime, or was *Perry* confined to the analysis of claims of suggestive identification?
2. Does it deprive a habeas petitioner of a fair application of 28 U.S.C. § 2254 when a circuit court sets up its own standard for what constitutes "clearly established federal law" and then fails to apply or even acknowledge that standard when a habeas petitioner invokes it?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINION BELOW

The Initial Memorandum issued of the Ninth Circuit Court of Appeals appears at Appendix A to this petition. The Amended Memorandum issued after Petitioner's Petition for Rehearing appears at Appendix B. The underlying opinion of the state court is included as Appendix C.

JURISDICTION

On April 25, 2018, the Ninth Circuit Court of Appeals denied petitioner's petition for rehearing and issued an Amended Memorandum affirming the District Court's denial of petitioner's habeas petition. This petition is filed within 90 days of the court's order, and is timely pursuant to Rule 13.3 of this Court. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment XIV: "... [N]or shall any State deprive any person of life, liberty, or property, without due process of law...."

STATEMENT OF THE CASE

Petitioner was convicted in 2010 of six counts of robbery and various enhancements stemming from an incident in which several masked men entered a home in La Puente, California, and took property from the occupants.

The victims of the robbery were able to provide police with only a cursory description of the robbers, who were characterized as black men wearing masks. The central question at trial was identity.

Six months after the robbery, before any victim had identified petitioner as being involved in the crime, the victims received a letter from an unknown agency[1] stating that petitioner was a suspect. Three victims went on the Internet and found petitioner's photo on the website of the Arizona Department of Corrections, where petitioner was an inmate. A few

1 It was never determined which agency sent this letter.

days later, they picked petitioner's photo in a "six-pack" photo array. The victims stated they were merely selecting the person whose picture they had seen on the Internet.

This evidence was admitted at trial. Two of the victims then went on to make dramatic *in-court* identifications of petitioner in front of the jury, this time stating that they were merely pointing out the person whose photograph they had circled in the six-pack. In short, the jury was exposed to multiple six-pack identification claims and multiple in-court "identifications" that were admittedly nothing but a match to a photograph on the Internet.

Petitioner argued on direct appeal that it violated his right to due process to admit the identification evidence provided by these three victims. This evidence was extremely misleading, petitioner argued, since even the prosecutor admitted after trial that this evidence did not purport to identify the person who had been in the home at the time of the robbery. Yet it had all the emotional impact of normal identification evidence.

The California Court of Appeal concluded that although the trial court should "arguably . . . should have excluded as irrelevant" this evidence, the admission of the evidence did not violate petitioner's right to due process because there was a "permissible inference" that could have been drawn from the evidence – specifically, that the witnesses "recognized

defendant's photograph in the array from seeing his photograph on the Internet." Appendix C, 10-11.

Petitioner challenged the state court's conclusion via habeas in the federal district court and then appealed to the Ninth Circuit from the denial of that petition. On April 25, 2018, the Ninth Circuit denied petitioner's appeal and denied his petition for rehearing.

REASONS FOR GRANTING THE PETITION

The first issue petitioner raises concerns the analysis that the Ninth Circuit conducted when it considered the merits of petitioner's claim that the identification evidence rendered his trial fundamentally unfair, in violation of his right to due process. See Appendix B, Amended Memorandum, 4. The crux of this argument was that the evidence was extremely misleading, since even the prosecution conceded that it had no bearing on who committed the crime, but it looked and sounded exactly like regular "identification" evidence.

The Ninth Circuit invoked *Perry v. New Hampshire* for the proposition that since this case did not involve suggestive circumstances arranged by law enforcement, due process could not be violated as long as petitioner was able to " 'test reliability through the rights and opportunities generally designed for that purpose' " such as cross-examination and

standard trial procedures. Appendix B, Amended Memorandum, 4, quoting *Perry*, 565 U.S. at 233. The Ninth Circuit then reviewed the various ways petitioner had "tested the reliability" of the identification evidence, implying that the *Perry* standard was satisfied, and that no due process violation could have occurred. Appendix B, 4-5.

In other words, *Perry*, which was a case about whether state involvement is necessary for a *suggestive* identification procedure to violate due process, was applied here to resolve a due process claim *that was not based on suggestivity*. *Perry* never considered or resolved the type of problem that was at issue in petitioner's case, which was identification evidence that was unfair because it admittedly had no bearing on the identity of the person who committed the crime. *Perry*'s statement that standard trial procedures "suffice" to defeat a due process concern was invoked in a way that implied that the existence of those trial procedures eliminates any possibility for identification evidence to violate due process, even though petitioner's challenge to the evidence was based on the fact that the evidence was *misleading*, not that it had been produced via suggestion.

This is both a very broad reading of *Perry* and one that is in tension with the statement, in *Payne v. Tennessee*, 501 U.S. 808, 825 (1991), that "In the event that evidence is introduced that is so unduly prejudicial that it

renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief." 501 U.S. at 825. *Perry* was a case in which the disputed evidence ultimately *did* purport to identify the person who had stolen car stereo components, and the analysis in that case would not have gone the way it did if the witness in *Perry* admittedly was not even attempting to identify the perpetrator. To suggest that *Perry* sets a broad rule that makes it categorically impossible for identification evidence to violate due process in the absence of state suggestion is to ignore the possibility that identification evidence can implicate the right to due process for reasons that have nothing to do with suggestivity.

However, petitioner's case is not the only case that has reframed the reasonable and relatively narrow holding of *Perry* into a sweeping rule that seems far broader than anything this Court considered or intended.

Courts now frequently cite *Perry* as meaning that it is categorically impossible for identification evidence to raise due process concerns unless state-arranged suggestiveness is present. See, e.g., *Shaw v. Uribe*, CV 11-10675-CJC, 2013 U.S. Dist. LEXIS 182834 at * 41 (C.D.Cal. 2013) ("due process bars admission only of unreliable identifications arising from 'improper law enforcement activity,'" quoting *Perry*, 132 S.Ct. at 721); *Hubbard v. Sherman*, CV 14-3329-MWF (JPR), 2015 U.S. Dist. LEXIS

177221 at * 25-26 (C.D. Cal. 2015) (same, and asserting that "The Supreme Court has not extended the same constitutional protections to in-court identifications untainted by prior impropriety"); *Dion v. Tampkins*, CV 12-2821-DSF (JPR), 2013 U.S. Dist LEXIS 43856 at * 32 (same); *Summers v. Pfeiffer*, CV 16-3588-GW (JPR), 2017 U.S. Dist. LEXIS 187341 at * 22 (asserting that "constitutional protections do not extend to in-court identifications untainted by prior official impropriety" and citing *Perry*); *Bazemore v. Shirley*, 2:14-cv-0651-GEB-EFB P (TEMP), 2016 U.S. Dist. LEXIS 97636 at * 63 (E.D. Cal. 2016) (stating that *Perry* "clarified that due process bars admission only of unreliable identifications arising from 'improper law enforcement activity,' " quoting *Perry*); *Davis v. Ludwick*, 10-CV-11240, 2013 U.S. Dist. LEXIS 41145 at * 35 (E.D. Mich., 2013) (stating that *Perry* held "that the Due Process Clause does not require preliminary judicial inquiry into the reliability of an eyewitness identification unless the identification was procured under unnecessarily suggestive circumstances arranged by law enforcement officers").

This matters in this case because the most egregious aspect of petitioner's trial was that emotionally inflammatory *in-court* identifications of petitioner were presented by two victims who undisputedly were merely identifying petitioner as a person whom they had selected from a six-pack, and whose photograph they admittedly circled in the six-pack because he

was the person they saw on the Internet, *not the person who committed the crime*. These victims described the color of the shirt and tie petitioner was wearing to the jury, with one of the victims pointing at petitioner and stating "It's him," in spite of the fact that they both were merely describing the person whose picture they had selected in the six-pack. 2ER 327-328. Petitioner repeatedly argued, both in the in-limine arguments prior to trial and in the context of a new trial motion, that there was no purpose for presenting these in-court identifications, and that they were extremely misleading, violating petitioner's right to due process. The distorting effect of this evidence was demonstrated, moreover, by the fact that the judge herself misunderstood what these witnesses had said, and thought they had identified petitioner *as the robber*. See Appendix B, Amended Memorandum, 5.

The Ninth Circuit initially claimed in a footnote that these in-court identifications did not have to be considered as part of the due process analysis because it believed petitioner had not challenged these identifications in front of the district court. See Appendix A, Initial Memorandum, 4, fn. 1. Petitioner pointed out in a petition for rehearing that this was incorrect, and that petitioner had explicitly challenged the in-court identifications at every level of post-conviction review, from the state appellate court, to the habeas petition filed in the district court, to the

objections that were filed to the magistrate's report and recommendations. Indeed, a troubling aspect of this case is that these in-court identifications, which have been challenged in the headings of petitioner's argument at every stage of review, have been systematically ignored by the reviewing court at each level of post-conviction analysis.

The Ninth Circuit ultimately deleted this footnote, yet the resulting memorandum still refers only to whether "admission of the **pre-trial identification evidence**" violated petitioner's right to due process. Appendix B, Amended Memorandum, 5, emphasis added. In the very framing of this question, the Ninth Circuit ignores petitioner's central concern that live identification testimony was presented to the jury that was misleading and prejudicial, and that this rendered his trial unfair. In disregarding the central component of petitioner's argument, the Ninth Circuit plainly fails to evaluate "the entire proceedings," despite alluding to that legal standard. See Appendix B, Amended Memorandum 4, citing *Romano v. Oklahoma*, 512 U.S. 1, 12 (1994).

To the extent that the Ninth Circuit's engages with the question of whether the trial was fundamentally fair, it does so entirely by invoking the *Perry* standard in suggesting that since petitioner "tested the reliability" of evidence via standard trial practices such as cross-examination and the introduction of an eyewitness expert, no due process violation can have

occurred. Appendix A, Amended Memorandum, 4-5. In other words, the Ninth Circuit suggests that *Perry* means *any* sort of identification evidence (other than that produced via state suggestion) may be paraded before the jury, no matter how aggressively inflammatory it is, as long as standard trial tools are available to the defense.

This cannot be correct. Due process is not secured merely by giving a defendant the opportunity to try to mitigate the damage after a proverbial bomb is set off in the courtroom. Some forms of evidence may render a trial fundamentally unfair simply because they are so likely to skew the jury's analysis, regardless of whether the defendant has a chance to "test their reliability."

This case consequently raises an opportunity to clarify that the *Perry* standard was confined to the subject it actually addressed – due process claims related to identifications produced via suggestive procedures – and that *Perry* does not create an "anything goes" standard that makes it impossible for due process to be implicated by identification evidence if that evidence is unfair for reasons unrelated to suggestiveness.

The second issue petitioner raises concerns the problems that are created, for purposes of federal habeas review, when a federal appellate court creates its own standard for determining whether a state court's

analysis has run afoul of "clearly established federal law."

The underlying legal standard, as articulated by this Court, is that the admission of evidence may violate the right to due process if it renders a trial fundamentally unfair. *Payne*, 501 U.S. at 825; see *Estelle v. McGuire*, 502 U.S. 62 (1991) (introduction of evidence in a jury trial might violate the right to fair trial if the evidence " 'so infused the trial with unfairness as to deny due process of law' ").

In the Ninth Circuit, however, a standard that is repeatedly invoked is that a due process violation based on the introduction of evidence can occur only if there are "*no* permissible inferences" that the jury could have drawn from the evidence. *Jammal v. Van de Kamp*, 926 F.2d 918, 920 (9th Cir., 1991), emphasis in original. The Ninth Circuit created this standard in *Jammal*, citing no authority in support of it, and has repeated it in more than 50 cases since *Jammal*. California appellate courts, including the court that decided this case, have repeated this standard in more than 200 cases to deny claims of due process violations.

Since *Jammal*, one or two District Courts outside the Ninth Circuit have invoked the "no permissible inferences" standard in evaluating due process claims related to the introduction of evidence, always citing to Ninth Circuit case law when they do so. See, e.g., *Nelson v. Ballard*, 2:14-CV-86, 2015 U.S. Dist. LEXIS 175129 at * 18 (N.D. W.Va. 2015), citing

Boyde v. Brown, 404 F.3d 1159, 1172 (9th Cir. 2005). Overwhelmingly, however, the District Courts that invoke this standard are in the Ninth Circuit, and they have done so roughly 100 times since 1991.

No other federal appellate court besides the Ninth Circuit has ever invoked the "no permissible inferences" standard in evaluating whether the admission of evidence violated the right to due process.

Instead, other circuit courts employ broader language that simply refers to the fundamental fairness of the trial. See *Kater v. Maloney*, 459 F.3d 56, 64 (1st Circ. 2006) ("the question is not whether the admission of the evidence was state-law error, but whether any error rendered the trial so fundamentally unfair that it violated the Due Process Clause"); *Biros v. Bagley*, 422 F.3d 379, 391 (6th Cir. 2006) (evidentiary errors may be cognizable in habeas if "they so perniciously affect the prosecution of a criminal case as to deny the defendant the fundamental right to a fair trial"); *United States v. Mound*, 149 F.3d 799, 801 (8th Cir. 1998) (To determine whether the admission of evidence violates due process "we consider whether introduction of this evidence is so extremely unfair that its admission violates fundamental conceptions of justice") (internal quotations and citation omitted); *Welch v. Sirmons*, 451 F.3d 675, 692 (10th Cir. 2006) (constitutional implication of challenged evidence is "governed by the general principle that 'the Due Process Clause of the Fourteenth

Amendment provide s a mechanism for relief' when 'evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair,' " quoting *Payne*, 501 U.S. at 825); *Collin v. Francis*, 728 F.2d 1322, 1336 (11th Cir. 1984) ("In evaluating whether an admission of evidence constituted a due process violation, we review the record "only to determine whether [any error we find] was of such magnitude as to deny fundamental fairness to the criminal trial," quoting *Hills v. Henderson*, 529 F.2d 397, 501 (5th Cir. 1976)).

Thus, defendants who raise a due process-based argument about evidence in jurisdictions that follow the Ninth Circuit have to pass the unique "no permissible inferences" test of that court if they wish to demonstrate that the introduction of evidence rendered their trial fundamentally unfair. It is not enough merely to show that the evidence was *extremely misleading* or *extremely confusing to the jury*, because according to the Ninth Circuit those factors are inadequate to violate the right to due process if there are also "permissible inferences" that could theoretically have been drawn from the same evidence.

The question of "permissible inferences" was, therefore, the legal battleground that petitioner was forced to fight on in arguing that the introduction of misleading identification evidence rendered his trial fundamentally unfair. The state appellate court cited this "no permissible

inferences" standard in denying his claim, and petitioner then pursued relief in the federal court by arguing that the state court misapplied the "no permissible inferences" standard. He argued that the evidence rendered his trial fundamentally unfair, both because there were no permissible inferences that could be drawn from the evidence, and because even if the inference described by the state court – that the witnesses "recognized defendant's photograph in the array from seeing his photograph on the Internet" – was "permissible," the evidence that was actually introduced, particularly the in-court identifications of petitioner by those witnesses, went far beyond anything that was necessary to convey that inference to the jury. See Appendix C, 10-11.

In its final memorandum opinion, however, the Ninth Circuit asserts that petitioner "does not argue that the California Court of Appeal unreasonably applied" the standard barring the introduction of evidence that is so unduly prejudicial that it renders a trial fundamentally unfair. Appendix B, Amended Memorandum, 3. The Ninth Circuit suggests that petitioner merely made an argument simply about *relevance*, and that matters of relevance cannot be the basis for habeas relief. Appendix B, Amended Memorandum, 2. Neither the District Court nor the Attorney General were confused about what petitioner was arguing, but the Ninth Circuit implies that petitioner pursued a federal claim for years purely to

argue about a state evidentiary standard. Remarkably, the memorandum never mentions or applies the "no permissible inferences" standard at all, a point that remained unchanged in its language even after petitioner pointed out, in his petition for rehearing, that the relationship between "permissible inferences" and a due process violation was *the central contention in the appeal*.

Thus, this case illustrates a basic unfairness that exists when a federal appellate court creates its own standard for evaluating a question of clearly established federal law. Were petitioner's case in another jurisdiction, he could have simply argued that the misleading "identification" evidence rendered his trial fundamentally unfair. Since he was before the Ninth Circuit, however, he was forced to frame his argument in terms of whether "permissible inferences" existed – only to have this very effort turned against him via the obviously incorrect assertion that he was raising a quarrel simply about state relevance standards. Petitioner argued about what "permissible inferences" are and whether "permissible inferences" existed in this case because *that is the standard that the Ninth Circuit created for these sorts of claims*. Had he not done so, he would have lost his claim for failure to contend that there were "no permissible inferences." Having followed the path set out by the Ninth Circuit, however, he was then met with the disingenuous response that he did not

raise a claim about fundamental unfairness.

This Catch-22 is unfair not only to petitioner but to all other litigants who must argue, whether in habeas review or on direct appeal in state courts that follow the Ninth Circuit, according to a standard that the Ninth Circuit invented and treats as a precondition for a showing of a due process violation based on the introduction of misleading evidence.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

DATED: July 23, 2018

Respectfully submitted,

ALEX COOLMAN
Attorney for Taumu James

APPENDIX A: ORIGINAL MEMORANDUM OF THE NINTH CIRCUIT COURT OF APPEALS

NOT FOR PUBLICATION

FILED

MAR 14 2018

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

TAUMU JAMES, Petitioner-Appellant, v. J. SOTO, Warden, Respondent-Appellee.	No. 16-56783 D.C. No. 2:13-cv-07523-SVW-SP MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Stephen V. Wilson, District Judge, Presiding

Submitted March 9, 2018**
Pasadena, California

Before: W. FLETCHER and OWENS, Circuit Judges, and MOSKOWITZ,*** Chief District Judge.

Taumu James appeals from the district court's denial of his petition for habeas relief under 28 U.S.C. § 2254. Mr. James challenges his conviction—for

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

*** The Honorable Barry Ted Moskowitz, Chief United States District Judge for the Southern District of California, sitting by designation.

six counts of home-invasion robbery—on the grounds that the government introduced eyewitness identification evidence that was so irrelevant and prejudicial as to violate due process. As the parties are familiar with the facts, we do not recount them here. We have jurisdiction under 28 U.S.C. § 2253, and we affirm.

1. The California Court of Appeal did not rely on an unreasonable determination of fact in its 2012 decision on direct appeal, and so 28 U.S.C. § 2254(d) bars habeas relief. *See* 28 U.S.C. § 2254(d)(2); *Berghuis v. Thompkins*, 560 U.S. 370, 380 (2010).

The "unreasonable factual determination" that Mr. James identifies to overcome 28 U.S.C. § 2254(d)'s bar is the California Court of Appeal's conclusion that the identification evidence "could have supported the inference that these witnesses 'recognized [Mr. James's] photograph in the array from seeing his photograph on the Internet.'" This objection appears to be a criticism of the state court's legal analysis presented as a challenge to a factual determination. Mr. James does not argue that, as a factual matter, the witnesses' testimony could *not* have supported the inference that they picked his photograph out of a six-photograph array solely because they had previously seen his photograph on the internet. Rather, Mr. James argues that the state court incorrectly considered that inference a relevant one. State evidence law questions such as relevance are generally not cognizable on federal habeas review. *See Estelle v. McGuire*, 502

U.S. 62, 67–68 (1991); *Jammal v. Van de Kamp*, 926 F.2d 918, 919 (9th Cir. 1991).

In his opening brief, Mr. James states in a heading that "The State Court misapplied established federal law in concluding that the admission of this evidence was consistent with the right to due process." This appears to implicate the "unreasonable application of[] clearly established Federal law" prong of 28 U.S.C. § 2254(d)(1). Mr. James does not, however, explain how the California Court of Appeal's decision was contrary to, or an unreasonable application of, "clearly established" Supreme Court law. In *Estelle*, the Court expressly declined to "explore [whether] it is a violation of the due process guaranteed by the Fourteenth Amendment for evidence that is not relevant to be received in a criminal trial," so Mr. James cannot argue that a due process bar on irrelevant evidence is "clearly established." 502 U.S. at 70; *see also Holley v. Yarborough*, 568 F.3d 1091, 1101 (9th Cir. 2009). And while in *Payne v. Tennessee*, 501 U.S. 808, 825 (1991), the Court observed that the due process clause bars the admission of evidence "so unduly prejudicial that it renders the trial fundamentally unfair," Mr. James does not argue that the California Court of Appeal unreasonably applied this precedent.

Accordingly, Mr. James's petition for habeas relief is barred by 28 U.S.C. § 2254(d).

2. Even assuming that 28 U.S.C. § 2254(d)'s bar is overcome and reviewing Mr. James's due process claim de novo, *see Crittenden v. Chappell*, 804 F.3d 998, 1010–11 (9th Cir. 2015), admission of the pre-trial identification evidence[1] does not justify an award of habeas relief because it did not render Mr. James's trial "fundamentally unfair" in violation of the Fourteenth Amendment, *see Payne*, 501 U.S. at 825; *Holley*, 568 F.3d at 1101.

When determining whether the trial was fundamentally unfair, this court conducts an "examination of the entire proceedings." *Romano v. Oklahoma*, 512 U.S. 1, 12 (1994) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)). In cases in which "the suggestive circumstances were not arranged by law enforcement officers . . . it suffices to test reliability through the rights and opportunities generally designed for that purpose, notably, the presence of counsel at postindictment lineups, vigorous cross-examination, protective rules of evidence, and jury instructions on both the fallibility of eyewitness identification and the requirement that guilt be proved beyond a reasonable doubt." *Perry v. New Hampshire*, 565 U.S. 228, 232–33 (2012).

[1] On appeal, Mr. James also challenges the in-court identifications of Mr. James by Ms. Saavedra and Ms. Gonzalez. But Mr. James did not challenge this evidence in his habeas petition before the district court, so he cannot challenge this evidence for the first time on appeal. *See United States v. Pimental-Flores*, 339 F.3d 959, 967 (9th Cir. 2003).

At trial, Mr. James thoroughly tested the reliability of the three witnesses' identifications through cross-examination of the three witnesses and of Detective Chism, who had conducted the six-photograph array identifications. Mr. James also introduced eyewitness-identification expert Dr. Robert Shomer, who testified at length regarding the unreliability of eyewitness identification. In response to a hypothetical question based upon the identifications in this case, Dr. Shomer opined that no identification could be deemed valid under such circumstances.

In closing, the government did not rely on the three witnesses' identification of Mr. James. Defense counsel repeatedly emphasized the unreliability of the identifications and used the tainted identifications by Ms. Barragan, Ms. Saavedra, and Ms. Gonzalez to argue that the identification by Ms. Jardines was tainted, as well.

Finally, it was undisputed that Mr. James was the "major contributor" of DNA found on a ski mask containing a gun. That ski mask was found a few blocks away from the victims' home, next to a glove bearing the DNA of a man whom the victims positively identified as one of the unmasked robbers within hours after the robbery.

It is true that, during the hearing on Mr. James's motion for a new trial, the state trial court incorrectly stated that Ms. Saavedra and Ms. Gonzalez had identified Mr. James in court as "the man with the mask," rather than as the man

whose photo they had previously seen on the internet. But the trial court's confusion several months after the conclusion of the trial does not indicate that the jury was similarly confused during the trial itself. Indeed, during deliberations, the jury sent out a note asking about the source of the letter identifying Mr. James as a suspect, indicating that they were attuned to the prejudicial effect that the letter had on the witnesses' identifications.

Accordingly, in the context of "the entire proceedings," *Romano*, 512 U.S. at 12, admission of the three witnesses' pre-trial identifications of Mr. James did not render the trial so "fundamentally unfair" as to violate due process, *Holley*, 568 F.3d at 1101.

AFFIRMED.

APPENDIX B: ORDER AND AMENDED MEMORANDUM OF THE NINTH CIRCUIT COURT OF APPEALS

Case: 16-56783, 04/25/2018, ID: 10849908, DktEntry: 44-1, Page 1 of 2

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

APR 25 2018

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

TAUMU JAMES,

Petitioner-Appellant,

v.

J. SOTO, Warden,

Respondent-Appellee.

No. 16-56783

D.C. No.
2:13-cv-07523-SVW-SP
Central District of California,
Los Angeles

ORDER

Before: W. FLETCHER and OWENS, Circuit Judges, and MOSKOWITZ,* Chief District Judge.

The memorandum disposition filed on March 14, 2018, and reported at 2018 WL 1311823, is hereby amended. The superseding amended memorandum disposition will be filed concurrently with this order.

The panel has voted to deny the petition for panel rehearing. Judges Fletcher and Owens voted to deny the petition for rehearing en banc, and Chief District Judge Moskowitz so recommends.

The full court has been advised of the suggestion for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

* The Honorable Barry Ted Moskowitz, Chief United States District Judge for the Southern District of California, sitting by designation.

The petition for panel rehearing and rehearing en banc is DENIED.

No further petitions for panel rehearing or petitions for rehearing en banc will be entertained.

Case: 16-56783, 04/25/2018, ID: 10849908, DktEntry: 44-2, Page 1 of 6

NOT FOR PUBLICATION

FILED

APR 25 2018

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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six counts of home-invasion robbery—on the grounds that the government introduced eyewitness identification evidence that was so irrelevant and prejudicial as to violate due process. As the parties are familiar with the facts, we do not recount them here. We have jurisdiction under 28 U.S.C. § 2253, and we affirm.

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The "unreasonable factual determination" that Mr. James identifies to overcome 28 U.S.C. § 2254(d)'s bar is the California Court of Appeal's conclusion that the identification evidence "could have supported the inference that these witnesses 'recognized [Mr. James's] photograph in the array from seeing his photograph on the Internet.'" This objection appears to be a criticism of the state court's legal analysis presented as a challenge to a factual determination. Mr. James does not argue that, as a factual matter, the witnesses' testimony could *not* have supported the inference that they picked his photograph out of a six-photograph array solely because they had previously seen his photograph on the internet. Rather, Mr. James argues that the state court incorrectly considered that inference a relevant one. State evidence law questions such as relevance are generally not cognizable on federal habeas review. *See Estelle v. McGuire*, 502

U.S. 62, 67–68 (1991); *Jammal v. Van de Kamp*, 926 F.2d 918, 919 (9th Cir. 1991).

In his opening brief, Mr. James states in a heading that "The State Court misapplied established federal law in concluding that the admission of this evidence was consistent with the right to due process." This appears to implicate the "unreasonable application of[] clearly established Federal law" prong of 28 U.S.C. § 2254(d)(1). Mr. James does not, however, explain how the California Court of Appeal's decision was contrary to, or an unreasonable application of, "clearly established" Supreme Court law. In *Estelle*, the Court expressly declined to "explore [whether] it is a violation of the due process guaranteed by the Fourteenth Amendment for evidence that is not relevant to be received in a criminal trial," so Mr. James cannot argue that a due process bar on irrelevant evidence is "clearly established." 502 U.S. at 70; *see also Holley v. Yarborough*, 568 F.3d 1091, 1101 (9th Cir. 2009). And while in *Payne v. Tennessee*, 501 U.S. 808, 825 (1991), the Court observed that the due process clause bars the admission of evidence "so unduly prejudicial that it renders the trial fundamentally unfair," Mr. James does not argue that the California Court of Appeal unreasonably applied this precedent.

Accordingly, Mr. James's petition for habeas relief is barred by 28 U.S.C. § 2254(d).

2. Even assuming that 28 U.S.C. § 2254(d)'s bar is overcome and reviewing Mr. James's due process claim de novo, *see Crittenden v. Chappell*, 804 F.3d 998, 1010–11 (9th Cir. 2015), admission of the pre-trial identification evidence does not justify an award of habeas relief because it did not render Mr. James's trial "fundamentally unfair" in violation of the Fourteenth Amendment, *see Payne*, 501 U.S. at 825; *Holley*, 568 F.3d at 1101.

When determining whether the trial was fundamentally unfair, this court conducts an "examination of the entire proceedings." *Romano v. Oklahoma*, 512 U.S. 1, 12 (1994) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)). In cases in which "the suggestive circumstances were not arranged by law enforcement officers . . . it suffices to test reliability through the rights and opportunities generally designed for that purpose, notably, the presence of counsel at postindictment lineups, vigorous cross-examination, protective rules of evidence, and jury instructions on both the fallibility of eyewitness identification and the requirement that guilt be proved beyond a reasonable doubt." *Perry v. New Hampshire*, 565 U.S. 228, 232–33 (2012).

At trial, Mr. James thoroughly tested the reliability of the three witnesses' identifications through cross-examination of the three witnesses and of Detective Chism, who had conducted the six-photograph array identifications. Mr. James also introduced eyewitness-identification expert Dr. Robert Shomer, who testified

at length regarding the unreliability of eyewitness identification. In response to a hypothetical question based upon the identifications in this case, Dr. Shomer opined that no identification could be deemed valid under such circumstances.

In closing, the government did not rely on the three witnesses' identification of Mr. James. Defense counsel repeatedly emphasized the unreliability of the identifications and used the tainted identifications by Ms. Barragan, Ms. Saavedra, and Ms. Gonzalez to argue that the identification by Ms. Jardines was tainted, as well.

Finally, it was undisputed that Mr. James was the "major contributor" of DNA found on a ski mask containing a gun. That ski mask was found a few blocks away from the victims' home, next to a glove bearing the DNA of a man whom the victims positively identified as one of the unmasked robbers within hours after the robbery.

It is true that, during the hearing on Mr. James's motion for a new trial, the state trial court incorrectly stated that Ms. Saavedra and Ms. Gonzalez had identified Mr. James in court as "the man with the mask," rather than as the man whose photo they had previously seen on the internet. But the trial court's confusion several months after the conclusion of the trial does not indicate that the jury was similarly confused during the trial itself. Indeed, during deliberations, the jury sent out a note asking about the source of the letter identifying Mr. James as a

suspect, indicating that they were attuned to the prejudicial effect that the letter had on the witnesses' identifications.

Accordingly, in the context of "the entire proceedings," *Romano*, 512 U.S. at 12, admission of the three witnesses' pre-trial identifications of Mr. James did not render the trial so "fundamentally unfair" as to violate due process, *Holley*, 568 F.3d at 1101.

AFFIRMED.

APPENDIX C: OPINION OF THE CALIFORNIA COURT OF APPEAL

Filed 4/23/12 P. v. James CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. TAUMU JAMES, Defendant and Appellant.	B230771 (Los Angeles County Super. Ct. No. KA085233 consolidated with No. KA086790)
In re TAUMU JAMES on Habeas Corpus.	B237448

APPEAL from a judgment of the Superior Court of Los Angeles County. Charlaine F. Olmedo, Mike Camacho, and Daniel J. Buckley, Judges. Modified and affirmed.

ORIGINAL PROCEEDING; petition for a writ of habeas corpus. Petition denied.

Alex Coolman, under appointment by the Court of Appeal, for Defendant, Appellant, and Petitioner.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Scott A. Taryle, Supervising Deputy Attorney General, and Eric J. Kohm, Deputy Attorney General, for Plaintiff and Respondent.

Defendant Taumu James appeals from the judgment entered following a jury trial in which he was convicted of six counts of first degree robbery, with personal gun use, acting in concert, and child victim findings. Defendant contends the trial court erred by admitting evidence of pretrial identifications by three victims who had found and viewed his photograph on the Internet, denying his pretrial motion for a "try-on lineup," and denying his motion for discovery pursuant to *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*). He further contends insufficient evidence supports the robbery convictions pertaining to two children whose property was not taken. We affirm.

Defendant also petitions for a writ of habeas corpus, contending that the prosecutor's failure to obtain and disclose a letter sent by an unknown person or entity to the victims violated due process. We deny the petition for a writ of habeas corpus.

BACKGROUND

About 8:45 p.m. on November 23, 2008, five men entered a five-bedroom home on Trailside Drive in La Puente shared by Rafael and Felicitas Gonzalez, Rafael's daughters Brenda Barragan and Annette Saavedra, Rafael's son Walter Gonzalez, Felicitas's daughter Nancy Jardines, Annette's husband Jose Saavedra and their son, Jardines's twin toddler sons, and Barragan's nine-year-old daughter and six-year-old son. Barragan was in the garage sorting laundry when an African-American man wearing a ski mask entered the garage. She began shouting for help. The man placed his hand over her mouth and a gun against her head and ordered her to be quiet and walk into the house. She complied. The man led her into the living room, where she saw both of her children lying facedown on the floor. An unmasked African-American man was standing near her children, pointing a gun at them. He ordered Barragan to lie down on the floor next to them. She complied.

Rafael testified two masked men and one unmasked African-American man entered the living room and ordered him to lie on the floor. All three men had guns. Rafael lay on the floor and pretended to have fainted when they later tried to lift him.

One of the men stepped on his back. He heard Barragan screaming and then heard her enter the house with someone else.

Felicitas testified she was chasing after one of Jardines's sons when she encountered a masked African-American and an unmasked Hispanic man, both of whom held guns. The men pointed a gun at Felicitas's head and forced her to walk to Jardines's bedroom.

Jardines testified she was in the kitchen when five men, all carrying guns, entered the house. At least two of the men were wearing masks. Four of them were African-American and she thought one was Hispanic because he spoke Spanish. Jardines took one of her sons to her bedroom, and two of the African-American men—one masked and the other not—entered her bedroom. They had Felicitas with them and were pointing a gun at her back. They asked Jardines if she had phoned the police, and she told them she had not. The masked man took Jardines's telephone off the hook.

The two men then forced Felicitas and Jardines to walk into Felicitas's bedroom, where the safe was located. The masked man repeatedly told Felicitas to open the safe and fill a pillowcase with money from the safe. One of the robbers grabbed Barragan's son and brought him into Felicitas's bedroom. Barragan grabbed her daughter and followed, but one of the robbers forced Barragan and her daughter to lie down in the hallway outside the bedroom. One of the robbers pointed a gun at Barragan's son. Felicitas testified the robbers threatened to shoot the boy in the head if Felicitas did not open the safe. Felicitas opened the safe, which contained no money, only papers and some jewelry. The men took the jewelry and repeatedly asked where the money was. Jardines testified that they threatened to shoot Barragan's son if Jardines did not give them money. Jardines and Felicitas told them there was no money.

Saavedra testified that she and her husband were in their bedroom at the time the robbers invaded the home. She peeked through a window that looks into the home's interior and saw two African-American men wearing masks, an unmasked African-American man, and an unmasked Hispanic man, all of whom had guns. She heard one of

the men demand money. She called 911, but hung up when she heard one of the men walking toward her bedroom.

Walter emerged from his bedroom late in the incident. The robbers ordered him to lie on the floor, and he did so. The robbers expressed concern that Walter had phoned the police, then they left the house.

The robbers had taken Barragan's wallet from her bedroom, jewelry from the safe, two mobile phones owned by Rafael, Felicitas's mobile phone, and the keys to Felicitas's car.

Sheriff's deputies who responded to the robbery call were notified that personnel in a police helicopter had seen two African-American men run into the yard at 545 South Fifth Avenue, La Puente. A deputy detained codefendant Dion Hawkins as he walked north on Fifth Avenue at Proctor Avenue. Other deputies transported Barragan, Rafael, and Jardines, one at a time, to view Hawkins. Barragan identified Hawkins as the unmasked robber who had pointed a gun at her children as they lay on the living room floor. Rafael identified Hawkins as the unmasked robber who put a gun to his head. Jardines also identified Hawkins as one of the robbers. The next day, Barragan and Jardines identified Hawkins from a photographic array.

At 545 South Fifth Avenue deputies recovered a hooded sweatshirt, sweatpants, and gloves. Two houses south, at 555 South Fifth Avenue, they recovered a dark blue jumpsuit, a pair of gloves, and a black ski mask with a gun inside of it. The ski mask appeared to be a knit cap into which someone had cut two holes for eyes and one hole for the nose or mouth. Deputies found a third pair of gloves and a black "beanie" at Lomitas Avenue and Redburn Avenue, La Puente.

A police criminalist extracted DNA from 11 items of the recovered clothing, including from (1) the inside of the cap turned into a ski mask that had been found with a gun inside of it at 555 South Fifth Avenue, (2) the inside of the gloves found at the same address, and (3) the collar of the blue jumpsuit found at the same address. Dr. Paul Colman conducted the DNA analysis. He testified that the profile of the major

contributor to the DNA extracted from inside the ski mask that had been found at 555 South Fifth Avenue matched defendant. There was a 1 in 5.2 quintillion chance that the DNA could have come from another African-American man. Colman testified the DNA from the mask revealed a second, "very weak, very minor" contributor, who could not have been Hawkins. But Colman testified that Hawkins matched the profile of the major contributor to the DNA extracted from inside one of the gloves that had been recovered from 555 South Fifth Avenue. A second very minor profile on that glove did not match defendant. Colman further testified that the DNA extracted from the jumpsuit's collar exhibited a partial profile indicating two contributors, and he could not exclude Hawkins as one of the contributors.

On June 2, 2009, Detective Robert Chism returned to the victims' home to show them, one at a time, a photographic array containing defendant's photograph. Barragan and Saavedra each selected defendant's photograph. When Chism asked them how they recognized defendant, they told him that the family had received a letter informing them that someone named Taumu James was a suspect in their case, then Saavedra went onto the Internet, looked up defendant's name, and found his photograph. The letter did not tell them to go on the Internet, it was something they just did because, according to Barragan, they "wanted to be nosey." Barragan testified that she and Felicitas were present when Saavedra found the photograph, but Jardines was not. Saavedra testified that Barragan and Felicitas were present when she viewed the photograph on the Internet, and she believed Jardines was, as well. Chism testified he neither sent the letter nor knew of its existence before the victims told him about it.

Jardines also selected defendant's photograph from the array Chism showed her, and although she knew about the letter, she testified and told Chism that she had not seen defendant's photograph on the Internet at that time. She told Chism she recognized defendant's face, eyes, and mouth. She added, "He was standing in my face." She saw defendant's photograph on the Internet after making her pretrial identification. At trial,

she testified that everyone in the family viewed the photograph on the Internet together, but this was sometime after Chism showed them the photographic array.

Chism showed the photographic array to Felicitas on July 6, 2009, and she selected defendant's photograph, then told him about the letter and viewing defendant's photograph on the Internet with Saavedra. Chism testified that Felicitas said her selection of defendant's photograph was based solely upon seeing his photograph on the Internet. At trial, Felicitas denied making that statement and further denied that her selection of defendant's photograph was based solely upon seeing his photograph on the Internet.

At trial, only Jardines identified defendant as one of the robbers. She testified that defendant threatened everyone, demanded money, and demanded that they open the safe. He was close to her the entire time, at times just one foot away from her, and even though he was masked, the mask did not cover his mouth, nose, eyes, or the skin around his eyes. Saavedra and Felicitas merely identified defendant at trial as the person whose photograph they had selected in the photographic array.

Defense DNA expert Mehul Anjara had no criticisms of the processes used to collect or analyze the DNA, and he agreed that defendant's profile matched that of the major contributor of the DNA on the inside of the ski mask. But he opined that because the DNA from the mask contained a second profile, multiple people could have worn it at different times. Anjara further opined that defendant's DNA could have gotten onto the mask without him wearing it, for example by him salivating or perspiring on it.

The defense investigator testified that he interviewed Jardines about one month before the trial began. She told him that she received the letter naming defendant and viewed defendant's photograph on the Internet before Chism showed her the photographic array. Jardines denied making this statement.

Defense eyewitness identification expert Dr. Robert Shomer testified regarding the unreliability of eyewitness identification, and specifically identified the masking of the perpetrator's face, the use of guns, the participation of multiple perpetrators, stress, a difference in race between the perpetrator and the witness, and exposure to a photograph

of a suspect prior to an identification procedure as factors detrimental to the accuracy of an identification. In response to a hypothetical question based upon the testimony in this case regarding the victims' receipt of a letter naming the suspect, followed by their viewing of the suspect's photograph on the Internet, Shomer opined that no subsequent identification could be deemed valid.

Hawkins pleaded guilty before defendant's trial commenced. A jury convicted defendant of six counts of first degree robbery (pertaining to Rafael, Barragan, Felicitas, Jardines, and Barragan's daughter and son), with findings that defendant personally used a gun (Pen. Code, § 12022.53, subd. (b); all further statutory references pertain to the Penal Code unless otherwise specified) and acted in concert with two or more others (§ 213, subd. (a)(1)(A)) in the commission of each robbery. The jury also found that Barragan's son and daughter were under 14 years of age, and defendant knew or reasonably should have known this. (§ 667.9, subd. (a).) The jury acquitted defendant of kidnapping Barragan, and the trial court had previously dismissed a seventh robbery charge naming Walter Gonzalez as the victim. Defendant waived a jury trial on a section 667, subdivision (a)(1) enhancement allegation, which the court found true. The court sentenced defendant to 71 years in prison.

DISCUSSION

1. Admission of pretrial identification evidence

At the outset of the trial, defendant asked the court to exclude evidence that Jardines, Barragan, Saavedra, and Felicitas selected defendant's photograph from the photographic array on the ground that the identifications were "tainted" and deprived of any probative value through their viewing of defendant's photograph on the Internet. Defense counsel told the court that the victims "received a letter from Los Angeles County Probation indicating that Taumu James may be involved in the case that they are witnesses and/or victims on, and he may be released." After conferring with defendant, defense counsel added, "One person has said the probation department. One has said the Arizona Department of Corrections. But either way, there is a law enforcement agency

that has given notice to these individuals indicating that Mr. James is about to be released from the Arizona Department of Corrections, and he may be a suspect in their case." Counsel then explained, "There's independent actions by the individuals in the house to look up Mr. James on the Arizona Department of Corrections Web site. At that point they are able to obtain a picture." With respect to Jardines, counsel argued that her claim that she had not seen the photo on the Web site was not credible because she contradicted herself to the defense investigator and she lived in a small house with many family members. Defense counsel also argued that admitting the identifications would inform the jury that defendant had been in prison and require "a mini trial on this identification because if the identification comes in, not only does this other information come in, but then I have got to bring in an I.D. expert."

The prosecutor informed the court that he did not have a copy of the letter because the victims had never provided one to the detective or the prosecutor.

The trial court agreed that the witnesses should not refer to the Arizona Department of Corrections, but denied the motion to exclude evidence of their pretrial identifications of defendant. The court expressed doubt as to whether "it implicates a state action," "because it is a different state and totally independent of this investigation and these law enforcement officers." But even if sending the letter qualified as state action, the court did not "find it to be so impermissibly suggestive, because the witnesses themselves are the ones that went online to find the picture and to take a look at the individual. So I do think this really is a matter that goes to weight, not admissibility."

Defendant contends that the trial court erred by admitting evidence that Barragan, Saavedra, and Felicitas selected defendant's photograph from the array because such evidence was irrelevant. He further contends that the admission of this evidence violated due process because the pretrial identifications were the product of an unfairly suggestive identification procedure and there was no permissible inference the jury could draw from the evidence.

a. Due process claim

Due process requires that evidence of a pretrial identification "infected by improper police influence" be screened by a trial court and excluded if the court determines "there is 'a very substantial likelihood of irreparable misidentification,' [citation]." (*Perry v. New Hampshire* (2012) __ U.S. __, __ [132 S.Ct. 716, 720] (*Perry*).) "[I]f the indicia of reliability are strong enough to outweigh the corrupting effect of the police-arranged suggestive circumstances, the identification evidence ordinarily will be admitted, and the jury will ultimately determine its worth." (*Ibid.*) But the introduction of purportedly unreliable identification evidence does not violate due process "when the identification was not procured under unnecessarily suggestive circumstances arranged by law enforcement." (*Id.* at p. 730.) "When no improper law enforcement activity is involved, . . . it suffices to test reliability through the rights and opportunities generally designed for that purpose, notably, the presence of counsel at postindictment lineups, vigorous cross-examination, protective rules of evidence, and jury instructions on both the fallibility of eyewitness identification and the requirement that guilt be proved beyond a reasonable doubt." (*Id.* at p. 721.)

The record does not establish the existence of "police-arranged suggestive circumstances." The record indicates that the letter was sent by an unknown source that was not a part of the prosecution team, probably the state of Arizona, without any involvement by California law enforcement or the prosecution team. Chism testified he had nothing to do with the letter, and indeed only found out about it when the victims told him about it. Defense counsel's argument that the Los Angeles County Probation Department sent the letter is implausible, as the record demonstrates that defendant was not on probation during the relevant time period. At the time of the charged offenses he was on parole in California following prison terms for his 2002 and 2003 convictions. Thereafter, he was in prison in Arizona for a March 2009 conviction, and defense counsel specifically told the court that the letter stated that defendant was about to be released from an Arizona prison. Thus, Arizona was the probable source of the letter. In either

case, the record fails to show police-arranged suggestive circumstances because neither the state of Arizona nor the Los Angeles County Probation Department were part of the investigative or prosecutorial team in this case. "A primary aim of excluding identification evidence obtained under unnecessarily suggestive circumstances . . . is to deter law enforcement use of improper lineups, showups, and photo arrays in the first place. . . . This deterrence rationale is inapposite in cases, like [defendant's], in which the police engaged in no improper conduct." (*Perry*, 132 S.Ct. at p. 726.)

Even if there were a basis for imputing responsibility for the letter to the investigative or prosecutorial team, everything that happened after the victims received the letter was a result of the victims' own initiative and actions. There was no evidence or suggestion that the letter included a photo of defendant or told the recipients they could see his photo on the Arizona corrections Web site or elsewhere on the Internet. Indeed, Barragan later testified that the letter did not tell her family to look up defendant online. Instead, they took the initiative "to be nosey" and searched for defendant's photo. "The most outrageous behavior by a private party seeking to secure evidence against a defendant does not make that evidence inadmissible under the Due Process Clause." (*Colorado v. Connelly* (1986) 479 U.S. 157, 166 [107 S.Ct. 515].) As stated in *Perry*, defendant's constitutional protections lay in the jury instructions on evaluating eyewitness testimony and the prosecutor's burden of proof, and in the various means at defendant's disposal to attempt to persuade the jury that the evidence that Barragan, Saavedra, and Felicitas selected defendant's photo from the array should be discounted as unworthy of credit, as a result of these victims' conduct in seeking out and viewing his photo. (*Perry*, 132 S.Ct. at p. 723.)

The admission of evidence may violate due process if there is no permissible inference a jury may draw from the evidence. (*People v. Steele* (2002) 27 Cal.4th 1230, 1246; *People v. Albarran* (2007) 149 Cal.App.4th 214, 229.) Defendant's contention that there were no permissible inferences to be drawn from the identification evidence in issue is wrong: The permissible inference to be drawn from the evidence was that Barragan,

Saavedra, and Felicitas recognized defendant's photograph in the array from seeing his photograph on the Internet. Although the relevance of such an inference was minimal, it was not impermissible, unlike an inference of a propensity to commit crimes, for example.

In addition, "the admission of evidence, even if erroneous under state law, results in a due process violation only if it makes the trial *fundamentally unfair*." (*People v. Partida* (2005) 37 Cal.4th 428, 439.) Admission of the pretrial "identification" evidence did not render defendant's trial fundamentally unfair because the jury was repeatedly informed of the circumstances surrounding the selection of defendant's photograph in the array by Barragan, Saavedra, and Felicitas that made that "identification" worthless. These circumstances were set forth in the prosecutor's opening statement; defense counsel's opening statement; the testimony of Barragan, Saavedra, Felicitas, and Chism; Shomer's testimony; defense counsel's argument to jury; and the prosecutor's rebuttal argument. The jury indicated its awareness of the role of the letter, Internet search, and viewing of defendant's photograph online in a note it sent on the second day of its deliberations, in which it asked, "Was it ever stated in this case where (from whom) the letter (sent to the family), which identified Mr. James as a suspect?"

b. State law claim

We review any ruling on the admissibility of evidence for abuse of discretion. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1113.) Evidence is relevant if it has any tendency in reason to prove or disprove any disputed fact of consequence to the determination of an action. (Evid. Code, § 210.)

Arguably, the trial court should have excluded as irrelevant any evidence of identifications by Saavedra, Barragan, and Felicitas. But the court's erroneous admission of the evidence requires reversal only if it is reasonably probable defendant would have obtained a more favorable outcome had the evidence been excluded. (Evid. Code, § 353, subd. (b); *People v. Earp* (1999) 20 Cal.4th 826, 878; *People v. Watson* (1956) 46 Cal.2d 818, 836.)

Any error in admitting evidence of identifications of defendant by Saavedra, Barragan, and Felicitas was harmless, in light of the abundant evidence and argument fully informing the jury of the receipt of the letter, the conduct of Saavedra, Barragan, and Felicitas in response to the letter, and the role of the Internet photo in their identifications; Jardines's identification of defendant; and the DNA evidence showing the presence of DNA matching defendant's profile on the inside of a ski mask containing a gun found near the crime scene in the immediate wake of the crime. Although, as the defense DNA expert testified, defendant's DNA could have been placed on the cap on some other occasion and possibly even without him wearing it, acceptance of this theory would require the jury to discount a number of improbabilities: Defendant put his DNA on the inside of the mask at another time, but it was found close to crime scene in the immediate wake of the crime, with a gun inside of it and with other discarded clothing, including a pair of gloves bearing DNA that matched Dion Hawkins, who was arrested soon after the crimes a little farther north on the same street where the clothing was discarded and identified by three of the victims as one of the unmasked robbers. Alternatively, the jury could have concluded that defendant's DNA got on the mask when he wore it during the robberies, and defendant discarded the mask and the gun he used in the robberies as he fled from the crime scene with Hawkins. Given the absence of any evidentiary showing of alternative acts by defendant that would have placed his DNA on the inside of the mask, it is reasonably probable that the jury concluded defendant wore the mask during the robberies.

The admission of evidence of the pretrial selection of defendant's photograph in the array by Saavedra, Barragan, and Felicitas may have even benefitted defendant because, in conjunction with the defense investigator's testimony, it allowed him to cast doubt upon Jardines' identification on the theory that she must also have viewed defendant's photograph on the Internet. Had the trial court excluded the evidence of pretrial "identifications" by Saavedra, Barragan, and Felicitas, defendant would not have been able to fully develop this theory.

It is thus not reasonably probable that defendant would have obtained a more favorable result if the trial court had excluded the evidence in controversy.

2. Denial of request for a "try-on lineup"

Defendant represented himself through much of the pretrial phase, commencing on July 28, 2009. On September 2, 2009, he filed a motion requesting a "'try-on' lineup," in which he and five other similar men would wear black ski masks while being viewed by Jardines and "all complaining" witnesses. Judge Daniel Buckley initially addressed the motion the day it was filed. The prosecutor informed the court that although he had not seen the written DNA report, he had been informed that there was a DNA match on recovered evidence, and he thus believed identification would not be an issue. He further noted that in his experience, "it's at least four weeks before the sheriff's department will schedule a line-up, and that puts us past the trial date," which was then set for September 25, 2009. The court indicated it would delay ruling on the motion "until we know what the DNA results are." Defendant argued that the sole issue was identification: "Whether the People say there is DNA on some clothing recovered, the issue is the only evidence they're presenting is someone saying they were able to view me through a mask." Defendant agreed to waive time, with October 6, 2009 as day zero of 60.

On October 6, 2009, the prosecutor filed written opposition to the motion for a lineup, explaining that three of the robbers wore masks but codefendant Hawkins was not masked; shortly after the robbery personnel in a police helicopter saw two men running from the crime scene; deputies went to where the men were running and arrested Hawkins; deputies searching the area found "items of discarded clothing consistent with the clothing described by the robbery victims," including gloves and "a knit mask with a gun wrapped inside of it"; the victims identified Hawkins; DNA consistent with defendant was found on the mask; DNA consistent with Hawkins was found on coveralls and gloves; and "[a]ccording to the forensic expert, the likelihood that the DNA was [from] someone other than defendant James is one in 5.2 Quintillion." The prosecutor's opposition also explained that Jardines identified defendant from a photographic lineup,

saying she recognized his eyes and mouth, and "[o]ther evidence indicating that defendant James was involved in the robbery includes intercepted calls from a federal wiretap. Law enforcement officers were monitoring calls of various Main Street Mafia Crips, of which defendant James and Hawkins are members. Prior to the robbery, calls were intercepted between defendant Hawkins and defendant James and a third individual discussing a plan and casing of a location by these three and other individuals." The prosecutor thus argued, "The likelihood of a misidentification in this case does not exist. The DNA match of defendant James to the mask is substantial evidence of his participation. The item which contained defendant James' DNA was found with items containing defendant Hawkins' DNA. Defendant Hawkins, who was not wearing a mask, has been identified by multiple victims as being involved in the robbery."

Judge Buckley revisited defendant's motion on October 6, 2009. The court stated that it had reviewed the prosecutor's opposition to the motion, "which basically says the case against you is based on DNA, not on the identification. It's DNA." Defendant replied, "It's about DNA." The prosecutor explained, "A black knit mask, like a ski mask with holes for the eyes and mouth, which was recovered, which you've been requesting photographs of, Mr. James." Defendant replied, "Okay." The prosecutor continued, "There was DNA. Your DNA was taken off that mask." Defendant again replied, "Okay." The prosecutor further explained, "It was with items that had Mr. Hawkins' DNA on it that was [*sic*] recovered not far from the crime scene." Defendant responded, "I don't understand how that makes a DNA case. Somebody said that I done that. They seen me do something. That's what you're going to do at preliminary hearing? I don't see how does that make it a DNA case." (This discussion occurred two months after the preliminary hearing.) The prosecutor explained, "I don't have to present everything that I have at the preliminary hearing. So there's DNA tying you to the crime." Defendant replied, "Okay." The court then denied defendant's motion.

Citing his arguments regarding the admission of the identification evidence addressed above, defendant contends that the trial court "based its conclusion on an

inaccurate understanding of the case," and "[i]n light of the unusual problems with the identity evidence in this case," the court violated due process by denying his motion for a masked lineup.

As a preliminary matter, we note that the issue of whether a challenge to a denial of a request for a pretrial lineup must be raised by way of pretrial writ petition or may be raised on appeal is pending before the Supreme Court in *People v. Mena* (2009) 173 Cal.App.4th 1446, review granted August 26, 2009, S173973. We treat the issue as preserved for appellate review.

"[D]ue process requires in an appropriate case that an accused, upon timely request therefor, be afforded a pretrial lineup in which witnesses to the alleged criminal conduct can participate. The right to a lineup arises, however, only when eyewitness identification is shown to be a material issue and there exists a reasonable likelihood of a mistaken identification which a lineup would tend to resolve." (*Evans v. Superior Court* (1974) 11 Cal.3d 617, 625.) "[W]hether eyewitness identification is a material issue and whether fundamental fairness requires a lineup in a particular case are inquiries" that are entrusted to the trial court's discretion. (*Ibid.*) The court should consider "not only . . . the benefits to be derived by the accused and the reasonableness of his request but also . . . the burden to be imposed on the prosecution, the police, the court and the witnesses." (*Ibid.*)

Defendant's claim is premised on a hindsight view of the case, based upon the evidence that was introduced at trial. But we must evaluate the propriety of the trial court's ruling "at the time it was made, . . . not by reference to evidence produced at a later date." (*People v. Welch* (1999) 20 Cal.4th 701, 739.) At the time the trial court ruled on the motion, defendant did not attempt to counter the prosecution's explanation of the nature of the evidence against defendant. Nor did he raise any coherent, let alone persuasive, argument to counter the prosecutor's argument that proof of his identity as one of the robbers was based principally on DNA. Notably, a little earlier in the hearing,

counsel for codefendant Hawkins had already informed the court that the prosecutor's case was based upon DNA.

Accordingly, the trial court did not abuse its discretion by accepting the prosecutor's persuasive and effectively unrebutted representation regarding the nature and quality of the prosecution's case against defendant, which established—for purposes of the propriety of the trial court's ruling on the motion—that eyewitness identification was not a material issue and that there was no reasonable likelihood of a mistaken identification that a lineup would tend to resolve.

3. Sufficiency of evidence regarding child victims' possession of property

Barragan's nine-year-old daughter and six-year-old son were named as robbery victims in counts 6 and 7, respectively, although nothing in the record indicated that any of their property was taken in the robbery. The jury was instructed on actual and constructive possession and heard defense counsel's argument that Barragan's daughter was not in possession of any property taken from the home. (Defendant did not argue a lack of possession with respect to Barragan's son.) Defendant contends that the evidence was insufficient to support his convictions of robbing Barragan's children because the children were in neither actual nor constructive possession of any of the property that was taken.

To resolve this issue, we review the whole record in the light most favorable to the judgment to decide whether substantial evidence supports the conviction, so that a reasonable jury could find guilt beyond a reasonable doubt. (*People v. Ceja* (1993) 4 Cal.4th 1134, 1138.)

Robbery is defined as the taking of personal property of some value, however slight, from a person or the person's immediate presence by means of force or fear, with the intent to permanently deprive the person of the property. (§ 211; *People v. Marshall* (1997) 15 Cal.4th 1, 34.) Robbery is an offense against the person. (*People v. Weddles* (2010) 184 Cal.App.4th 1365, 1369 (*Weddles*).) Any person who owns or who exercises direct physical control over, or who has constructive possession of, any property taken

may be a victim of a robbery if force or fear is applied to such person. (*People v. Scott* (2009) 45 Cal.4th 743, 749–750 (*Scott*).)

"Constructive possession does not require an absolute right of possession. 'For the purposes of robbery, it is enough that the person presently has some loose custody over the property, is currently exercising dominion over it, or at least may be said to represent or stand in the shoes of the true owner.'" (*People v. DeFrance* (2008) 167 Cal.App.4th 486, 497.) "For constructive possession, courts have required that the alleged victim of a robbery have a 'special relationship' with the owner of the property such that the victim had authority or responsibility to protect the stolen property on behalf of the owner." (*Scott, supra*, 45 Cal.4th at p. 750.) "By requiring that the victim of a robbery have possession of the property taken, the Legislature has included as victims those persons who, because of their relationship to the property or its owner, have the right to resist the taking, and has excluded as victims those bystanders who have no greater interest in the property than any other member of the general population." (*Id.* at pp. 757–758.) Civil Code section 50 establishes the right to use "necessary force" to protect the "property of oneself, or of a wife, husband, child, parent, or other relative, or member of one's family." Several published cases have upheld convictions for robbing victims of property belonging to their family members against insufficiency of evidence claims. (*People v. Gordon* (1982) 136 Cal.App.3d 519 [parents robbed of marijuana belonging to their adult son]; *DeFrance*, 167 Cal.App.4th 486 [mother robbed of car owned by her adult son]; *Weddles, supra*, 184 Cal.App.4th 1365 [man robbed of his brother's money].)

"Two or more persons may be in joint constructive possession of a single item of personal property, and multiple convictions of robbery are proper if force or fear is applied to multiple victims in joint possession of the property taken." (*Scott, supra*, 45 Cal.4th at p. 750.)

Under Civil Code section 50, Barragan's children had authority to protect Barragan's property, and thus had constructive possession of her wallet, which the robbers took. The children were not so young as to be either unaware of the robbery or

unable (if not held at gunpoint) to resist the taking of their mother's property, by, for example shouting or phoning for help, running away with the property, or hiding it. The children also arguably had possession of their grandparents' property for the same reason. And because multiple people may simultaneously possess a single item of personal property, Barragan's presence did not divest the children of their statutory authority to protect, or constructive possession of, Barragan's property. Defendant and his accomplices apparently considered it sufficiently necessary to overcome potential resistance by Barragan's children that they forced them to lie facedown on the floor and kept a gun pointed at them. "When two or more persons are in joint possession of a single item of personal property, the person attempting to unlawfully take such property must deal with all such individuals. All must be placed in fear or forced to unwillingly give up possession. To the extent that any threat may provoke resistance, and thus increase the possibility of actual physical injury, a threat accompanied by a taking of property from two victims' possession is even more likely to provoke resistance. [¶] We view the central element of the crime of robbery as the force or fear applied to the individual victim in order to deprive him of his property. Accordingly, if force or fear is applied to two victims in joint possession of property, two convictions of robbery are proper." (*People v. Ramos* (1982) 30 Cal.3d 553, 589, reversed in part on other grounds in *California v. Ramos* (1983) 463 U.S. 992 [103 S.Ct. 3446].)

We conclude that defendant's robbery convictions pertaining to Barragan's children were supported by both the law and substantial evidence.

4. Denial of *Pitchess* motion

While defendant was representing himself, he filed a *Pitchess* motion seeking information regarding complaints against Detectives Chism and Richardson pertaining to "racial prejudice, dishonesty, false arrest, the fabrication of charges and (or) evidence." Defendant's declaration in support of his motion stated that "detectives in this case did commit misconduct by fabricating reports and evidence, and also coerced witness [*sic*] into giving perjured testimony." The declaration continued, "The defendant[']s defense

in this case is that this is a case of mistaken identification due impart [*sic*] to coercion by the detectives in this case. . . . [T]he defense believes that without the constant pressuring of the victims the defendant would not have been identified in this case. At the time of this crime the victim Nancy Jardines never gave any description of the suspects, also the detectives interviewed the victim in this case several times over a seven month period and no description was given. Only after the victims received a letter informing them that the defendant had been involved in the robbery and all the victims in the residen[ce] except Nancy Jardines saw a picture of the defendant on the internet, that is when a description was given and he was positively identified. [¶] It is the defense[] theory that the identification came about do [*sic*] to illegal misconduct by the detectives. The defense plans to prove these detectives have knowledge and was [*sic*] indirectly responsible for the mysterious letter that was sent to the victim's residence and that the failure to collect or preserve this letter was done in bad faith to cover their misconduct."

Judge Mike Camacho denied defendant's motion, stating, "[I]t's insufficient. You haven't shown good cause to even have the hearing. Your motion is based entirely upon speculation as to police misconduct. You certainly have provided the court with no plausible factual scenario that there is any police misconduct. You simply concluded there must be police misconduct because of the identification issues and therefore you're entitled to this motion. So your motion is denied without prejudice for failure to establish good cause."

Defendant contends the trial court erred by denying his *Pitchess* motion because "[h]e alleged several acts of misconduct that were grounded in the facts of his case, including pressuring the witnesses to make a false identification, facilitating the mailing of the letter to the witnesses and failing to collect or preserve the letter in a bad faith effort to conceal their own involvement in its mailing."

To obtain *Pitchess* discovery of a police officer's personnel records and complaints against such officers, a defendant or petitioner must file a motion describing the type of records sought and showing, inter alia, the materiality of the information to the

subject of the pending action and good cause for disclosure. (Evid. Code, §§ 1043, 1045.) "To show good cause as required by section 1043, defense counsel's declaration in support of a *Pitchess* motion must propose a defense or defenses to the pending charges. The declaration must articulate how the discovery sought may lead to relevant evidence or may itself be admissible direct or impeachment evidence [citations] that would support those proposed defenses." (*Warrick v. Superior Court* (2005) 35 Cal.4th 1011, 1024 (*Warrick*).) "Counsel's affidavit must also describe a factual scenario supporting the claimed officer misconduct." (*Ibid*.) "The court then determines whether defendant's averments, '[v]iewed in conjunction with the police reports' and any other documents, suffice to 'establish a plausible factual foundation' for the alleged officer misconduct and to 'articulate a valid theory as to how the information sought might be admissible' at trial. [Citation.] . . . What the defendant must present is a specific factual scenario of officer misconduct that is plausible when read in light of the pertinent documents." (*Id.* at p. 1025.) "[A] plausible scenario of officer misconduct is one that might or could have occurred. Such a scenario is plausible because it presents an assertion of specific police misconduct that is both internally consistent and supports the defense proposed to the charges." (*Id.* at p. 1026.)

If the trial court grants the motion, it should only order disclosure of complaints or incidents directly relevant to the specific factual scenario asserted by the defendant. (*Warrick*, *supra*, 35 Cal.4th at pp. 1022, 1027 [defendant who asserted police falsely accused him of discarding controlled substance entitled to discover complaints of making false arrests, planting evidence, committing perjury, and falsifying police reports or probable cause, but not reports of using excessive force or exhibiting racial, gender or sexual orientation bias]; *People v. Jackson* (1996) 13 Cal.4th 1164, 1220 [defendant who claimed officers coerced his confession entitled to discover only complaints alleging coercive interrogation techniques, not all excessive force complaints].)

Initially, we note that defendant's declaration failed to even attempt to show good cause for discovery of complaints relating to racial prejudice, dishonesty, or false arrest. At best, his declaration addressed a claim of fabrication of evidence.

Defendant's declaration did not present a specific and plausible factual scenario of officer misconduct. First, defendant made a conclusory assertion that Richardson and Chism fabricated reports and evidence, and also coerced a witness into giving perjured testimony, but failed to describe or specify any perjured testimony that the detectives had coerced or any report or evidence that they had fabricated. The only person who had testified in this case at the time the *Pitchess* motion was heard was Chism—the sole witness at the preliminary hearing, and the trial court could reasonably conclude that it was not plausible that Richardson had coerced Chism's testimony at the preliminary hearing. To the extent the claim of fabricated reports and evidence was supposed to refer to the "mysterious" letter from Arizona, defendant's declaration was both inadequate and internally inconsistent in that it asserted that the detectives were only "indirectly responsible for" the letter. Defendant failed to explain what the detectives did to make them "indirectly responsible" for a letter sent by the Arizona Department of Corrections or how their unspecified conduct constituted fabricating reports, fabricating evidence, or even misconduct. The trial court could also reasonably conclude that it was not plausible that the detectives bore any level of responsibility for causing the Arizona Department of Corrections to send the letter. Defendant's final assertion, that the detectives engaged in misconduct by failing "to collect or preserve" the letter so as to cover up their misconduct, is undermined by both (1) his failure to assert that the victims still had the letter and would have provided it to the detectives if they asked and (2) his prior failure to make a specific and plausible showing that the detectives engaged in misconduct by "indirectly" causing the letter to be mailed.

Defendant's claim that the detectives constantly pressured the victims is internally inconsistent with his assertion that they "interviewed the victim . . . several times over a seven month period" and also insufficient to establish coercion, as opposed to mere

tenacity. His claim that he would not have been identified without the detectives constantly pressuring the victims, their "illegal misconduct," and their indirect responsibility for "the mysterious letter" is internally inconsistent with his statement that Jardines had not seen defendant's photograph on the Internet.

Accordingly, we conclude the trial court did not abuse its discretion by denying defendant's *Pitchess* motion.

5. Calculation of presentence custody credits

Defendant contends, and the Attorney General aptly concedes, that defendant was entitled to three additional days of presentence custody credit. Accordingly, we modify the judgment to reflect an additional three days of credit.

6. Petition for a writ of habeas corpus

Defendant also filed a petition for a writ of habeas corpus that we agreed to consider with his appeal. The Attorney General filed an informal response to the petition, and defendant filed a reply to that response. The petition alleges that Chism and the prosecutor violated due process by failing to obtain and provide defendant with the letter sent to the victims. It alleges "that the Los Angeles County Sheriff's Department was the original source of the facts relayed in the letter," and that because the prosecutor has stated he does not know who sent the letter, he must have violated a duty to search for and disclose exculpatory information.

We evaluate defendant's petition "by asking whether, assuming the petition's factual allegations are true, the petitioner would be entitled to relief." (*People v. Duvall* (1995) 9 Cal.4th 464, 474–475.) If no prima facie case for relief is established, we summarily deny the petition.

Brady v. Maryland (1963) 373 U.S. 83, 87 [83 S.Ct. 1194] (*Brady*), established that due process requires the prosecution to disclose to the defense any and all potentially exculpatory evidence. The defendant must establish that the undisclosed information was both favorable to the defense and material, meaning that there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the trial would have

been different. (*Kyles v. Whitley* (1995) 514 U.S. 419, 433–434 [115 S.Ct. 1555] (*Kyles*).) Such a reasonable probability exists where the undisclosed evidence "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." (*Id.* at p. 435; *In re Williams* (1994) 7 Cal.4th 572, 611.) "'The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish "materiality" in the constitutional sense.' [Citation.]" (*People v. Fauber* (1992) 2 Cal.4th 792, 829, quoting *United States v. Agurs* (1976) 427 U.S. 97, 109–110 [96 S.Ct. 2392].)

A prosecutor's duty of disclosure extends to all evidence the prosecution team knowingly possesses or has the right to possess. (*People v. Jordan* (2003) 108 Cal.App.4th 349, 358.) The prosecution team includes both investigative and prosecutorial agencies and personnel. (*Ibid*.) An individual prosecutor is presumed to know of all information gathered in connection with the government's investigation. (*In re Brown* (1998) 17 Cal.4th 873, 879.)

Impeachment evidence, as well as exculpatory evidence, falls within the scope of *Brady*. (*United States v. Bagley* (1985) 473 U.S. 667, 676 [105 S.Ct. 3375].)

Testimony in the appellate record, of which the petition for writ of habeas corpus requests judicial notice, established several facts regarding the nature of the letter and whether the investigative team was responsible for it or the victims' conduct after its receipt. At the preliminary hearing, Chism testified that Barragan, Saavedra, and Felicitas told him that they "had received information in the mail regarding Mr. James' pending arrest, and they had looked it up on the Arizona Department of Corrections Web site" and viewed a photograph of him. Chism did not tell the victims to go to the Web site and first learned they had done so on the day he showed them the photographic array containing defendant's photo. Chism testified that Jardines told him she had not seen the photograph on the Internet and the other victims had not discussed it with her. At trial, Chism testified that when he showed the photographic array containing defendant's photograph to Barragan, Saavedra, and Felicitas, they each told him they had received a letter, and

based upon the information in that letter, they looked defendant up on the Internet and found a photograph of him. Chism neither sent the letter nor knew of its existence before the victims told him about it. Chism also testified that Jardines said she had not seen defendant's photograph on the Internet.

Barragan testified at trial that the letter the family received indicated that someone named Taumu James was a suspect in the case involving them, and although the letter did not tell them to go on the Internet, some family members "wanted to be nosey," so Saavedra went onto the Internet to find a picture of Taumu James. Barragan and Felicitas were present when Saavedra found the photograph, but Jardines was not. Barragan further testified that Chism had not told them they would receive a letter and had not told them to go on the Internet to find a picture of James.

Jardines testified at trial that the letter the family received indicated that a person named Taumu James was a suspect in the case, and someone in the family went on the Internet, but Jardines did not view the photograph on the Internet until after Chism showed her the photographic array containing defendant's photo.

Saavedra testified at trial that a few days before Chism came to their house to show them a photographic array, someone in the family received a letter that indicated that someone named Taumu James might be a suspect in the case in which they were involved. Saavedra looked online and found a photograph of defendant. Barragan and Felicitas were with her at the time, and she believed Jardines was as well.

Felicitas testified that the family received a letter that indicated that someone named Taumu James was a suspect in the case in which they were involved. She and Saavedra went on the Internet and found a picture of Taumu James.

In addition to the testimony regarding the letter, the prosecutor informed the court in response to defendant's pretrial request for the letter, "He is requesting a letter that was mailed to the victims in this case, from the Department of Corrections of Arizona, which I do not have. I have no control over. It results [*sic*] to basically his case in Arizona, and I

don't believe I'm required to turn that over since I don't have possession of that letter to begin with."

In addition, as previously set forth, when defendant moved to exclude evidence of the victims' pretrial identification of defendant, defense counsel represented that one or more victims had stated that the letter was from the Arizona Department of Corrections and one had said it was from the Los Angeles County Probation Department. Defense counsel further represented the contents of the letter as "giv[ing] notice to these individuals indicating that Mr. James is about to be released from the Arizona Department of Corrections, and he may be a suspect in their case." Defense counsel then explained, "There's independent actions by the individuals in the house to look up Mr. James on the Arizona Department of Corrections Web site. At that point they are able to obtain a picture."

The petition fails to state a prima facie claim under *Brady* because the letter was neither material not potentially exculpatory. Testimony in the appellate record establishes that the letter merely told the victims that defendant was a suspect in the case and might be arrested. This information was not exculpatory. Testimony established that the letter did not instruct the victims to look for defendant's photograph on the Internet, and that they instead took the initiative and sought out his photograph. Their conduct and its effect or potential effect upon their ability to identify defendant before and at trial was fully explored through the testimony presented at trial. There is no reasonable probability that, had the prosecutor managed to obtain the letter and then disclosed it to the defense, the result of the trial would have been any different. Neither introduction of the letter in evidence nor additional testimony regarding it "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." (*Kyles, supra*, 514 U.S. at p. 435.) Defendant argues that Jardines's identification testimony could have been impeached or even excluded if he had the letter because the letter "would have raised serious doubts about the notion that [Jardines], despite being informed about [defendant's] image at the same time as the other family members, chose to wait to view

that image." The petition does not allege that the letter included defendant's image or any information about his image, and the appellate record establishes that the letter did not tell them to look on the Internet; rather, some of the victims "wanted to be nosey" and made an independent decision to look defendant up online, where they found his photograph.

Thus, even if defendant could overcome the significant burden of establishing that the prosecution team knowingly possessed or had the right to possess the letter, his *Brady* claim would have no merit. Accordingly, we deny the writ petition.

DISPOSITION

The judgment is modified by increasing defendant's presentence credits by three days to a total of 621 days. As modified, the judgment is affirmed. The petition for a writ of habeas corpus is denied.

NOT TO BE PUBLISHED.

MALLANO, P. J.

We concur:

CHANEY, J.

JOHNSON, J.

APPENDIX D: REPORT AND RECOMMENDATIONS OF THE MAGISTRATE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

TAUMU JAMES, Petitioner, v. J. SOTO, Warden, Respondent.	Case No. CV 13-7523-SVW (SP) REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This Report and Recommendation is submitted to the Honorable Stephen V. Wilson, United States District Judge, pursuant to the provisions of 28 U.S.C. § 636 and General Order 05-07 of the United States District Court for the Central District of California.

I.

INTRODUCTION

On October 10, 2013, petitioner Taumu James filed a Petition for Writ of Habeas Corpus by a Person in State Custody ("Petition"). Petitioner challenges his 2010 convictions in the Los Angeles County Superior Court for home invasion robbery.

Petitioner raises three grounds for relief, all of which relate to the admission of photographic identifications made by victims following their receipt of a letter naming petitioner as a suspect, and after they had looked up petitioner's photograph on the internet: (1) a due process violation resulting from the admission of irrelevant and misleading identification evidence; (2) a due process violation resulting from the suggestive identification procedure; and (3) a violation of *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), due to the prosecutor's failure to locate and turn over the letter.

For the reasons discussed below, petitioner's claims do not merit habeas relief. It is therefore recommended that the Petition be denied with prejudice.

II.

STATEMENT OF FACTS[1]

About 8:45 p.m. on November 23, 2008, five men entered a five-bedroom home on Trailside Drive in La Puente shared by Rafael and Felicitas Gonzalez, Rafael's daughters Brenda Barragan and Annette Saavedra, Rafael's son Walter Gonzalez, Felicitas's daughter Nancy Jardines, Annette's husband Jose Saavedra and their son, Jardines's twin toddler sons, and Barragan's nine-year-old daughter and six-year-old son. Barragan was in the garage sorting laundry when an African-American man wearing a ski mask entered the garage. She began shouting for help. The man placed his hand over her mouth and a gun against her head and ordered her to be quiet and walk into the house. She complied. The man led her into the living room, where she saw both of her children lying facedown on the floor. An unmasked African-American man was standing near her children, pointing a gun at them. He ordered Barragan to lie down on the floor next to them.

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[1] The facts set forth are drawn substantially verbatim from the California Court of Appeal's decision on direct appeal. *See* Lodged Doc. No. 7 at 2-7. Such statement of facts is presumed correct. 28 U.S.C. § 2254(e)(1); *Vasquez v. Kirkland*, 572 F.3d 1029, 1031 n.1 (9th Cir. 2009).

She complied.

Rafael testified two masked men and one unmasked African-American man entered the living room and ordered him to lie on the floor. All three men had guns. Rafael lay on the floor and pretended to have fainted when they later tried to lift him. One of the men stepped on his back. He heard Barragan screaming and then heard her enter the house with someone else.

Felicitas testified she was chasing after one of Jardines's sons when she encountered a masked African-American and an unmasked Hispanic man, both of whom held guns. The men pointed a gun at Felicitas's head and forced her to walk to Jardines's bedroom.

Jardines testified she was in the kitchen when five men, all carrying guns, entered the house. At least two of the men were wearing masks. Four of them were African-American and she thought one was Hispanic because he spoke Spanish. Jardines took one of her sons to her bedroom, and two of the African-American men – one masked and the other not – entered her bedroom. They had Felicitas with them and were pointing a gun at her back. They asked Jardines if she had phoned the police, and she told them she had not. The masked man took Jardines's telephone off the hook.

The two men then forced Felicitas and Jardines to walk into Felicitas's bedroom, where the safe was located. The masked man repeatedly told Felicitas to open the safe and fill a pillowcase with money from the safe. One of the robbers grabbed Barragan's son and brought him into Felicitas's bedroom. Barragan grabbed her daughter and followed, but one of the robbers forced Barragan and her daughter to lie down in the hallway outside the bedroom. One of the robbers pointed a gun at Barragan's son. Felicitas testified the robbers threatened to shoot the boy in the head if Felicitas did not open the safe. Felicitas opened the safe, which contained no money, only papers and some jewelry. The men took the

jewelry and repeatedly asked where the money was. Jardines testified that they threatened to shoot Barragan's son if Jardines did not give them money. Jardines and Felicitas told them there was no money.

Saavedra testified that she and her husband were in their bedroom at the time the robbers invaded the home. She peeked through a window that looks into the home's interior and saw two African-American men wearing masks, an unmasked African-American man, and an unmasked Hispanic man, all of whom had guns. She heard one of the men demand money. She called 911, but hung up when she heard one of the men walking toward her bedroom.

Walter emerged from his bedroom late in the incident. The robbers ordered him to lie on the floor, and he did so. The robbers expressed concern that Walter had phoned the police, then they left the house.

The robbers had taken Barragan's wallet from her bedroom, jewelry from the safe, two mobile phones owned by Rafael, Felicitas's mobile phone, and the keys to Felicitas's car.

Sheriff's deputies who responded to the robbery call were notified that personnel in a police helicopter had seen two African-American men run into the yard at 545 South Fifth Avenue, La Puente. A deputy detained codefendant Dion Hawkins as he walked north on Fifth Avenue at Proctor Avenue. Other deputies transported Barragan, Rafael, and Jardines, one at a time, to view Hawkins. Barragan identified Hawkins as the unmasked robber who had pointed a gun at her children as they lay on the living room floor. Rafael identified Hawkins as the unmasked robber who put a gun to his head. Jardines also identified Hawkins as one of the robbers. The next day, Barragan and Jardines identified Hawkins from a photographic array.

At 545 South Fifth Avenue deputies recovered a hooded sweatshirt, sweatpants, and gloves. Two houses south, at 555 South Fifth Avenue, they

recovered a dark blue jumpsuit, a pair of gloves, and a black ski mask with a gun inside of it. The ski mask appeared to be a knit cap into which someone had cut two holes for eyes and one hole for the nose or mouth. Deputies found a third pair of gloves and a black "beanie" at Lomitas Avenue and Redburn Avenue, La Puente.

A police criminalist extracted DNA from 11 items of the recovered clothing, including from (1) the inside of the cap turned into a ski mask that had been found with a gun inside of it at 555 South Fifth Avenue, (2) the inside of the gloves found at the same address, and (3) the collar of the blue jumpsuit found at the same address. Dr. Paul Colman conducted the DNA analysis. He testified that the profile of the major contributor to the DNA extracted from inside the ski mask that had been found at 555 South Fifth Avenue matched petitioner. There was a 1 in 5.2 quintillion chance that the DNA could have come from another African-American man. Colman testified the DNA from the mask revealed a second, "very weak, very minor" contributor, who could not have been Hawkins. But Colman testified that Hawkins matched the profile of the major contributor to the DNA extracted from inside one of the gloves that had been recovered from 555 South Fifth Avenue. A second very minor profile on that glove did not match petitioner. Colman further testified that the DNA extracted from the jumpsuit's collar exhibited a partial profile indicating two contributors, and he could not exclude Hawkins as one of the contributors.

On June 2, 2009, Detective Robert Chism returned to the victims' home to show them, one at a time, a photographic array containing petitioner's photograph. Barragan and Saavedra each selected petitioner's photograph. When Chism asked them how they recognized petitioner, they told him that the family had received a letter informing them that someone named Taumu James was a suspect in their case, then Saavedra went onto the Internet, looked up petitioner's name, and found

his photograph. The letter did not tell them to go on the Internet, it was something they just did because, according to Barragan, they "wanted to be nosey." Barragan testified that she and Felicitas were present when Saavedra found the photograph, but Jardines was not. Saavedra testified that Barragan and Felicitas were present when she viewed the photograph on the Internet, and she believed Jardines was, as well. Chism testified he neither sent the letter nor knew of its existence before the victims told him about it.

Jardines also selected petitioner's photograph from the array Chism showed her, and although she knew about the letter, she testified and told Chism that she had not seen petitioner's photograph on the Internet at that time. She told Chism she recognized petitioner's face, eyes, and mouth. She added, "He was standing in my face." She saw petitioner's photograph on the Internet after making her pretrial identification. At trial, she testified that everyone in the family viewed the photograph on the Internet together, but this was sometime after Chism showed them the photographic array.

Chism showed the photographic array to Felicitas on July 6, 2009, and she selected petitioner's photograph, then told him about the letter and viewing petitioner's photograph on the Internet with Saavedra. Chism testified that Felicitas said her selection of petitioner's photograph was based solely upon seeing his photograph on the Internet. At trial, Felicitas denied making that statement and further denied that her selection of petitioner's photograph was based solely upon seeing his photograph on the Internet.

At trial, only Jardines identified petitioner as one of the robbers. She testified that petitioner threatened everyone, demanded money, and demanded that they open the safe. He was close to her the entire time, at times just one foot away from her, and even though he was masked, the mask did not cover his mouth, nose, eyes, or the skin around his eyes. Saavedra and Felicitas merely identified

petitioner at trial as the person whose photograph they had selected in the photographic array.

Defense DNA expert Mehul Anjara had no criticisms of the processes used to collect or analyze the DNA, and he agreed that petitioner's profile matched that of the major contributor of the DNA on the inside of the ski mask. But he opined that because the DNA from the mask contained a second profile, multiple people could have worn it at different times. Anjara further opined that petitioner's DNA could have gotten onto the mask without him wearing it, for example by him salivating or perspiring on it.

The defense investigator testified that he interviewed Jardines about one month before the trial began. She told him that she received the letter naming petitioner and viewed petitioner's photograph on the Internet before Chism showed her the photographic array. Jardines denied making this statement.

Defense eyewitness identification expert Dr. Robert Shomer testified regarding the unreliability of eyewitness identification, and specifically identified the masking of the perpetrator's face, the use of guns, the participation of multiple perpetrators, stress, a difference in race between the perpetrator and the witness, and exposure to a photograph of a suspect prior to an identification procedure as factors detrimental to the accuracy of an identification. In response to a hypothetical question based upon the testimony in this case regarding the victims' receipt of a letter naming the suspect, followed by their viewing of the suspect's photograph on the Internet, Shomer opined that no subsequent identification could be deemed valid.

III.

PROCEEDINGS

On August 12, 2010, a jury found petitioner guilty of six counts of home invasion robbery (Cal. Penal Code § 211), as well as finding true allegations that

petitioner personally used a firearm, petitioner acted in concert, and there were youthful victims (Cal. Penal Code §§ 12022.53(b), 667(a), 667.9). Clerk's Transcript ("CT") at 296. On January 12, 2011, the trial court sentenced petitioner to seventy-one years in prison. *Id.*

Petitioner, represented by counsel, appealed his conviction. Lodged Doc. No. 1. Petitioner raised five arguments: (1) the trial court erred and violated his due process rights when it admitted irrelevant and misleading evidence that was a result of a suggestive identification procedure; (2) the trial court erred and violated his due process rights when it denied petitioner's request for a try-on lineup; (3) insufficient evidence that the children were victims of a robbery; (4) the trial court erred when it denied petitioner's *Pitchess* motion; and (5) sentencing error. *Id.* While the appeal was pending, petitioner filed a habeas petition in the California Court of Appeal claiming a *Brady* violation. Lodged Doc. No. 4. On April 23, 2012, the Court of Appeal, in a reasoned decision considering both petitioner's direct appeal claims and habeas claim, modified the sentence but otherwise affirmed the judgment and denied the habeas petition. Lodged Doc. No. 7.

Petitioner filed two petitions for review in the California Supreme Court, presenting four of the arguments raised below: (1) the trial court erred and violated his due process rights when it admitted irrelevant and misleading evidence that was a result of a suggestive identification procedure; (2) the trial court erred and violated his due process rights when it denied petitioner's request for a try-on lineup; (3) insufficient evidence that the children were victims of a robbery; and (4) a *Brady* violation. Lodged Doc. Nos. 8-9. On July 18, 2012, the California Supreme Court summarily denied both petitions for review. Lodged Doc. Nos. 10-11.

IV.

STANDARD OF REVIEW

This case is governed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). AEDPA provides that federal habeas relief "shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings *unless* the adjudication of the claim –

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

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1)-(2) (emphasis added).

In assessing whether a state court "unreasonably applied" Supreme Court law or "unreasonably determined" the facts, the federal court looks to the last reasoned state court decision as the basis for the state court's justification. *Robinson v. Ignacio*, 360 F.3d 1044, 1055 (9th Cir. 2004). Here, the California Court of Appeal's opinion on April 23, 2012, stands as the last reasoned decision.

V.

DISCUSSION

A. Petitioner Is Not Entitled to Relief on His Claim That the Identification Evidence Was Irrelevant

In Ground One, petitioner argues the trial court violated his due process rights by admitting the six-pack identifications of petitioner made by Brenda Barragan, Annette Saavedra, and Felicitas Gonzalez. Pet. at 5; Pet. Mem. at 16-32. Specifically, petitioner contends that the six-pack photo identifications were irrelevant and misleading because the witnesses were identifying petitioner as a person they saw on the internet rather than as one of the intruders. *See id.*

Habeas corpus relief is available only if the petitioner's conviction or sentence is "in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). *See Estelle v. McGuire*, 502 U.S. 62, 68, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991). As such, in general, state evidence law questions are not cognizable on federal habeas review. *Jammal v. Van de Kamp*, 926 F.2d 918, 919 (9th Cir. 1991). Habeas relief may only be available when the wrongly admitted evidence renders the trial so fundamentally unfair as to violate due process. *See Holley v. Yarborough*, 568 F.3d 1091, 1101 (9th Cir. 2009).

Here, Ground One is first and foremost a state evidentiary issue, and as such is not cognizable on federal habeas review. A petitioner may not "transform a state-law issue into a federal one merely by asserting a violation of due process." *Langford v. Day*, 110 F.3d 1380, 1389 (9th Cir. 1997). The question then is whether the admission of Barragan's, Saavedra's, and Gonzalez's identifications of petitioner rendered the trial fundamentally unfair. They did not.

After the jury had been impaneled and prior to opening statements, the trial court held a hearing to discuss petitioner's motion to exclude testimony that Barragan, Saavedra, and Gonzalez identified petitioner from a six-person photographic line-up ("six-pack"). *See* 2 Reporter's Transcript ("RT") at 306-27. Petitioner's counsel argued the identifications were tainted from the witnesses' viewing of petitioner's photograph on the internet and that there was no probative value to the identifications. *Id.* at 307-08. The trial court found that there was no constitutional issue and the identifications were probative. *Id*. at 324-25.

Before the jury, Detective Chism testified he visited the victims' home on June 2 and July 6, 2009 to present them with a six-pack, which included a photograph of petitioner. 4 RT at 1575-79. On June 2, 2009, he separately showed the six-pack to Nancy Jardines, Brenda Barragan, and Annette Saavedra, and each of them separately identified petitioner. *See id.* at 1575-76. After making the

identification, Barragan and Saavedra told Detective Chism that, sometime prior to his visit, they had received a letter informing them petitioner was a suspect in the case, at which point they looked up his photograph on the internet. *Id*. at 1576-77. By contrast, Jardines told Detective Chism that although petitioner had been wearing a mask, she recognized petitioner's eyes and mouth, and she stated she had not at that point seen petitioner's photograph on the internet. *Id.* at 1578. When Detective Chism returned to the victims' home on July 6, 2009, he showed the six-pack to Felicitas Gonzales, who also picked out petitioner's photograph but stated she had seen his photo on the internet and that was the sole basis for her identification. *Id.* at 1579. Detective Chism testified his understanding was that Barragan, Saavedra, and Gonzalez had no independent recollection of petitioner and picked out petitioner's photograph based on what they had seen on the internet. *Id*. at 1581-83.

Barragan's and Saavedra's testimony was consistent with Detective Chism's on this point, but Gonzalez's was not. Barragan and Saavedra testified that, prior to Detective Chism's visit when he showed them the six-pack, they received the letter and, with Barragan and Gonzalez present, Saavedra went onto the internet and looked up petitioner's photograph. 2 RT at 666-68, 3 RT at 1214-17. Barragan testified she would be unable to identify the intruder wearing the ski mask in the garage, and Saavedra admitted she told Detective Chism she could only identify petitioner as the person on the internet. 2 RT at 668, 3 RT at 1225. Gonzalez also testified that she had seen petitioner's photograph on the internet prior to identifying him in the six-pack Detective Chism showed her, and that her identification was based on having seen him on the internet. 3 RT at 1247, 1259. But on cross-examination she denied that she picked petitioner's photograph *solely* based on the internet photo, and she denied having told Detective Chism the internet photo was the sole basis for her identification. *Id.* at 1259-60.

Consistent with what she told Detective Chism, at trial Jardines testified she identified petitioner from the six-pack as the intruder who entered her bedroom and was wearing a mask, and she was able to recognize him in the photograph because the mask did not cover his mouth, nose, or eyes. *Id*. at 959-60. She denied seeing petitioner's photograph on the internet prior to making the six-pack identification. *Id.* at 960. Although Saavedra testified she "believe[d]" Jardines was there when she pulled up petitioner's photograph from the internet (*id.* at 1217), Barragan testified Jardines was not there (2 RT at 668), and Gonzalez testified she did not remember if Jardines was there. 3 RT at 1247. On cross-examination, Jardines also denied telling the defense investigator she had seen petitioner's photo on the internet prior to picking it out of the six-pack. *Id.* at 984-86.

In Ground One here, petitioner is not challenging the admission of evidence of Jardines's identification of petitioner, but he is challenging the admission of the evidence that Barragan, Saavedra, and Gonzalez identified petitioner in the six-pack. In considering this claim, the California Court of Appeal held that the admission of the identification evidence did not violate due process because a permissible inference could be drawn from it, albeit with one with "minimal" relevance – namely, that Barragan, Saavedra, and Gonzalez recognized petitioner from seeing his photograph on the internet. Lodged Doc. No. 7 at 10-11. The Court of Appeal further found that, even if erroneous, the admission of such evidence did not render the trial fundamentally unfair because the jury was repeatedly informed of the circumstances surrounding the witnesses selecting petitioner from the six-pack. *Id*. at 11.

To say Barragan's and Saavedra's identifications of petitioner had even minimal relevance is generous. Indeed, the only apparent relevance of the fact that they recognized petitioner from having seen his photo on the internet would be to provide background evidence that might be used by the defense to call into

question whether Jardines truly recognized petitioner from having seen him through a mask during the crime, as opposed to having also seen his photo on the internet. Gonzalez's identification, on the other hand, did have some probative value given that she denied selecting petitioner's photograph from the six-pack solely based on the internet photo. But even if Barragan's and Saavedra's identifications were irrelevant, their admission did not violate due process.

In the Ninth Circuit, the admission of evidence violates due process "[o]nly if there are *no* permissible inferences the jury may draw from" it. *Boyde v. Brown*, 404 F.3d 1159, 1172 (9th Cir. 2005) (quoting *Jammal*, 926 F.2d at 920) (emphasis in original); *Houston v. Roe*, 177 F.3d 901, 910 n.6 (9th Cir. 1999). Here, the inference that could be drawn from the evidence – that Barragan and Saavedra, and possibly also Gonzalez, recognized petitioner solely from his internet photograph – while of no real probative value, was not impermissible in the sense that it was not character evidence or other similarly impermissible evidence. As such, the Court of Appeal reasonably found there was a permissible inference the jury could draw from the identification evidence.

Moreover, the Supreme Court "has not yet made a clear ruling that admission of irrelevant or overtly prejudicial evidence constitutes a due process violation sufficient to warrant issuance of the writ [of habeas corpus]." *Holley*, 568 F.3d at 1101. As such, there is no clearly established Supreme Court law directly addressing this issue, and therefore the state court's decision on this issue cannot be contrary to or an unreasonable application of federal law. *See Wright v. Van Patten*, 552 U.S. 120, 125-26, 128 S. Ct. 743, 169 L. Ed. 2d 583 (2008); *Carey v. Musladin*, 549 U.S. 70, 77, 127 S. Ct. 649, 166 L. Ed. 2d 482 (2006).

Petitioner nonetheless argues the admission of the evidence was so misleading it violated due process by rendering the trial fundamentally unfair. Petitioner contends the evidence suggested, falsely, that all these witnesses actually

identified petitioner as a perpetrator, and that even the trial judge was confused on this point. Pet. Mem. at 26-29; Reply at 6. Petitioner is correct that, in denying the motion for a new trial, the trial judge initially stated Jardines, Saavedra, and Gonzalez all identified petitioner as "the man with the mask." 5 RT at 3629. But on further examination of her trial notes, the judge correctly stated that Jardines identified petitioner as a perpetrator, and that Gonzalez was cross-examined as to whether her identification was based on the internet photo and she said it was not. *Id.* at 3631. This is accurate. *See* 3 RT at 959-60, 1259-60. Thus, at most, the trial judge may have been confused as to the nature of Saavedra's identification of petitioner.

This does not mean there is no chance the jury was misled by the evidence of Barragan's and Saavedra's identifications; however, the admission of the identification evidence did not violate due process because there is no basis to find it was so misleading or prejudicial that it had a substantial and injurious effect on the jury's verdict. *See Brecht v. Abrahamson*, 507 U.S. 619, 637, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1993). Petitioner's counsel thoroughly cross-examined each witness and was able to solicit admissions that the selection of petitioner from the six-pack was based on the internet photograph and not a recollection of the intruder, and that their testimony concerning the intruder's appearance was inconsistent with what they told the police. *See, e.g.*, 3 RT at 1224, 1251-54. Petitioner's counsel also presented an expert witness challenging the reliability of eyewitness testimony. *See* 4 RT at 1834-62. Detective Chism testified unequivocally that Barragan's, Saavedra's, and Gonzalez's identifications were based on their viewing of the internet photo and not from any personal recollection. 4 RT at 1581; *see also* 2 RT at 668, 3 RT at 1224. Other than Jardines's identification of petitioner from the six-pack, the prosecution did not mention any of the other six-pack identifications in his closing argument. *See* 5 RT at 2115-16.

Most important, there was other evidence to support the jury's finding, specifically the DNA evidence that petitioner was the major contributor of DNA on the inside of a mask found only a few blocks from the victims' home and with a glove bearing the DNA of a co-perpetrator. *See* 2 RT at 710, 4 RT at 1556. Thus, the Court of Appeal reasonably determined the identification evidence did not render the trial fundamentally unfair.

Accordingly, petitioner is not entitled to relief on Ground One. The Court of Appeal's decision was not contrary to clearly established federal law or an unreasonable interpretation of the facts.

B. Petitioner Is Not Entitled to Relief on His Claim That the Identification Procedure Was Suggestive

In Ground Two, petitioner argues the six-pack identifications resulted from suggestive procedures and therefore were a violation of his due process rights. Pet. at 5; Pet. Mem. at 33-44. Specifically, petitioner contends that although the sender of the letter was never determined, it was a state actor who sent the letter. *See id*. Petitioner also argues that the source of the letter could only have received information concerning petitioner and the victims from the prosecution or Los Angeles County Sheriff's Department, the law enforcement agency investigating petitioner, and thus either the prosecutor or Sheriff's Department caused the suggestive identification procedure. *See id.*

In *Stovall v. Denno*, the Supreme Court prohibited the use of identification procedures that are "unnecessarily suggestive and conducive to irreparable mistaken identification." 388 U.S. 293, 302, 87 S. Ct. 1967, 18 L. Ed. 2d 1199 (1967), overruled on other grounds by *Griffith v. Kentucky*, 479 U.S. 314, 326, 107 S. Ct. 708, 93 L. Ed. 2d 649 (1987). But the "bare fact that [an identification] was suggestive does not alone establish constitutional error. The [identification] must be impermissibly or unduly suggestive under the totality of the circumstances."

Johnson v. Sublett, 63 F.3d 926, 929 (9th Cir. 1995). And if unduly suggestive, "the court must determine whether [the identification procedure] was sufficiently reliable such that it does not implicate the defendant's due process rights." *U.S. v. Carr*, 761 F.3d 1068, 1074 (9th Cir. 2014); *see Neil v. Biggers*, 409 U.S. 188, 199, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972) (looking at the totality of circumstances to determine the identification was reliable).

In order for there to be a due process violation, a petitioner must show that the identification was "procured under unnecessarily suggestive circumstances arranged by law enforcement." *Perry v. New Hampshire*, __ U.S. __, 132 S. Ct. 716, 730, 181 L. Ed. 2d 694 (2012). "When no improper law enforcement activity is involved, . . . it suffices to test reliability through the rights and opportunities generally designed for that purpose . . .." *Id*. at 721.

Here, there was no evidence that the Sheriff's Department used a suggestive identification procedure. Indeed, it was not determined who sent the letter to the victims and when. *See* 2 RT at 310-11. Petitioner alleges the letter may have been sent from either the Arizona Department of Corrections or the Los Angeles County Probation Department. *See id.* What is not in dispute is that neither the prosecutor nor the Sheriff's Department sent the letter, Detective Chism was unaware of the letter when he first went to the victims' house with the six-pack, the letter was sent to the victims prior to the six-pack identifications, the letter did not direct the victims to look up petitioner's photo, and at least some of the victims independently decided to look up petitioner's photo on the internet prior to June 2, 2009. *See* 2 RT 666-67; 3 RT 960, 1214-16, 1247; 4 RT at 1575-81. Because petitioner concedes that neither the prosecution nor the Sheriff's Department sent the letter or was even aware of its existence prior to the six-pack identification, the identification procedure was not "procured under unnecessarily suggestive circumstances arranged by law enforcement." *See Perry*, 132 S. Ct. at 730.

Petitioner argues *Perry* does not limit due process checks to only the investigative and prosecutorial teams, but rather extends to all state actors. *See* Pet. Mem. at 40-41. As such, because the party who sent the letter is likely either the Arizona Department of Corrections or the Los Angeles County Probation Department, the state action requirement was met. *See id*. Petitioner's argument calls for an overly broad interpretation of *Perry*. The *Perry* decision clearly focused on the law enforcement agency investigating the defendant. Indeed, the Supreme Court noted that a "primary aim of excluding identification evidence obtained under unnecessarily suggestive circumstances . . . is to deter law enforcement use of improper lineups, showups, and photo arrays . . .." *Perry*, 132 S. Ct. at 726. Further, the Supreme Court declined to "enlarge the domain of due process," noting that most eyewitness identifications "involve some type of suggestion" such as seeing a photograph of the defendant in the press, and that safeguards such as the right to confront are built into the system to protect a defendant against the fallibility of eyewitness identification. *Id*. at 787-29. Petitioner's broad extension of due process checks to all state actors, including those who played no role in the investigation, is an insupportable application of *Perry*.

In any event, to the extent the Supreme Court has not held whether its discussion of state actor in *Perry* applies to all state actors regardless of whether they had any role in the investigation, then the Court of Appeal's determination that *Perry* applies only to the investigative and prosecutorial teams, and not to agencies not involved in the investigation and prosecution, cannot be contrary to clearly established federal law. *See Wright*, 552 U.S. at 126; *Carey*, 549 U.S. at 77; Lodged Doc. No. 7 at 9-10.

Petitioner's alternative argument that the prosecution and Los Angeles County Sheriff's Department must have been involved with the identification

procedure also fails. Petitioner argues that it "can *only* have been" one of them who "disseminated [the] information to the agency that sent the letter to the victims" and that such actions, even if inadvertent, constituted improper state conduct under *Perry*. Pet. Mem. at 41-43. Notwithstanding the lack of facts establishing which agency sent the letter and who was the source of information that purportedly prompted the agency to send the letter, petitioner's argument is tenuous. Even assuming that either the prosecutor or Sheriff's Department notified the Arizona Department of Corrections, or whichever agency mailed the letter, of the victim and suspect information the agency would have needed to know where to send the letter, there was no evidence that either of those agencies directed the Arizona Department of Corrections to send a letter to the victims. Moreover, it requires a leap to find the letter – even if it had been sent by an involved state actor – constitutes a suggestive identification procedure by law enforcement, given that it was the victims who took the initiative to research petitioner's photo on the internet, something no state actor suggested.

Finally, petitioner utilized and was protected by many of the safeguards contemplated by the Supreme Court in *Perry*. As discussed above, petitioner's counsel thoroughly cross-examined each witness on the circumstances surrounding the identifications and any inconsistencies with earlier statements. Petitioner's counsel also called an expert witness to challenge the eyewitness identifications and an investigator to call into question Jardines's credibility. *See* 4 RT at 1831-62. The trial court read jury instructions on eyewitness identification testimony and what factors to consider. *See id*. at 1896-97. Given all these protections, the introduction of the identification evidence did not render the trial fundamentally unfair.

Accordingly, petitioner is not entitled to relief on Ground Two.

C. Petitioner Is Not Entitled to Relief on His *Brady* Claim

Petitioner contends, in Ground Three, that the prosecution committed a *Brady* violation by failing to search for and disclose the letter that was sent to the victims. Pet. at 6; Pet. Mem. at 45-54.

Under *Brady v. Maryland*, 373 U.S. 83, "the State violates a defendant's right to due process if it withholds evidence that is favorable to the defense and material to the defendant's guilt or punishment." *Smith v. Cain*, __ U.S. __, 132 S. Ct. 627, 630, 181 L. Ed. 2d 571 (2012). "To prevail on a *Brady* claim, [a] defendant must show that '(1) the evidence was exculpatory or impeaching; (2) it should have been, but was not produced; and (3) the suppressed evidence was material to his guilt or punishment.'" *U.S. v. Antonakeas*, 255 F.3d 714, 725 (9th Cir. 2001) (quoting *Paradis v. Arave*, 130 F.3d 385, 392 (9th Cir. 1997)). Evidence is material "when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different." *Cone v. Bell*, 556 U.S. 449, 469-70, 129 S. Ct. 1769, 173 L. Ed. 2d 701 (2009). The prosecution's responsibility for disclosing evidence extends to evidence known by law enforcement agents but not the prosecutor. *Kyles v. Whitley*, 514 U.S. 419, 437-38, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995); *U.S. v. Chen*, 754 F.2d 817, 824 (9th Cir. 1985) ("T]he prosecution must disclose any information within the possession or control of law enforcement personnel.").

There is no dispute that, well prior to trial, the prosecution disclosed to petitioner that the victims received a letter informing them that petitioner was a suspect, that Barragan, Saavedra, and Gonzalez looked up petitioner's photograph prior to the six-pack identification, and that they only identified petitioner based off of his photograph on the internet. *See, e.g.*, CT at 325-26. The source of the letter and when the letter was sent were unknown, and the victims did not keep it. *See* 2 RT at 310-12. At an October 6, 2009 pre-trial hearing, the prosecution explained

that petitioner requested the letter but the prosecutor did not have it and did not believe he was required to turn it over. Augmented Reporter's Transcript ("ART") at 8. The trial court agreed and informed petitioner that the prosecution did not have an obligation to produce the letter because it did not have the letter and the letter was not written by the police investigators in the case. *Id*. at 12. At a later hearing, the prosecution again explained that no one from the Sheriff's Department was even aware of the letter until the victims informed them of it on June 2, 2009. *Id*. at 315.

At trial, the victims' testimony was consistent with the information the prosecution provided petitioner. Barragan also testified the letter did not instruct them to look up petitioner's photograph, and they did so on their own initiative "to be nosey." 2 RT at 667. Detective Chism testified that he was unaware of the letter before June 2, 2009. 4 RT at 1578.

The Court of Appeal found petitioner failed to state a claim under *Brady* because the letter was neither material nor potentially exculpatory. Lodged Doc. No. 7 at 25. The court agrees, and finds that petitioner fails to meet any prong of the *Brady* test.

First, the information in the letter was not exculpatory, nor is it clear how it would further impeach anyone's testimony. Petitioner argues the date of the letter and the specific addressee might have been used to impeach Jardines, had the letter been addressed to her and dated well prior to June 2, 2009. Thus, petitioner's theory as to how the letter might be exculpatory is based on speculation. But even if those facts were known and were as petitioner hopes, they would not call into question Jardines's credibility any more than petitioner already did at trial. Whenever the letter was received, such information would not have impeached Jardines's testimony as to whether she viewed petitioner's internet photograph before or after the six-pack identification, or whether she viewed it with the other

victims. Although petitioner argues that the letter "bore on the truthfulness of" Jardines's testimony, the contents of the letter were not at issue. *See* Pet. Mem. at 46.

Similarly, the letter was not material to petitioner's guilt. Petitioner impliedly argues that Jardines's identification was critical to the guilty verdict. *See* Pet. Mem. at 46-48. But just as the letter would not have been impeaching, there is no reasonable probability that the jury would have acquitted petitioner had the letter been admitted into evidence. As discussed above, the contents of the letter were admitted into evidence through testimony. All of the victims testified that they could not remember when they received the letter, only that they received it before the six-pack identification. Therefore, it was already established that Jardines, as well as the other victims, knew of the letter prior to the identification, and whether the victims received the letter two weeks prior or two months prior would not have challenged Jardines's reliability to such an extent as to undermine confidence in the verdict. *See U.S. v. Bagley*, 473 U.S. 667, 678, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985). Further, even if the letter were specifically addressed to Jardines, that still would not have raised serious doubts as to Jardines's veracity. The testimony plainly established the letter was widely shared among all the victims and that some of them took the initiative to look up petitioner's photograph. There is no reason to believe Jardines would have been more likely to look up petitioner on the internet had she been the specific recipient.

Finally, the prosecution had no duty to produce the letter. The prosecution only has a duty to produce evidence that is in its possession or to which it has reasonable access. *U.S. v. Monroe*, 943 F.2d 1007, 101 n.2 (9th Cir. 1991). The letter was not written by either the prosecutor or the Sheriff's Department. There was no evidence that either agency ever possessed or saw the letter. Furthermore, there was no evidence that the source of the letter was acting on the behalf of the

prosecutor or Sheriff's Department. *See Kyles*, 514 U.S. at 437 (a prosecutor "has a duty to learn of any favorable evidence known to the others acting on the government's behalf").

Accordingly, petitioner is not entitled to relief on Ground Three.

VI.

RECOMMENDATION

IT IS THEREFORE RECOMMENDED that the District Court issue an Order: (1) approving and accepting this Report and Recommendation; and (2) directing that Judgment be entered denying the Petition and dismissing this action with prejudice.

DATED: June 3, 2016

SHERI PYM
United States Magistrate Judge

APPENDIX E: DISTRICT COURT ORDER ADOPTING THE REPORT AND RECOMMENDATIONS OF THE MAGISTRATE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

TAUMU JAMES, Petitioner, v. J. SOTO, Warden, Respondent.	Case No. CV 13-7523-SVW (SP) **ORDER ACCEPTING FINDINGS AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE**

Pursuant to 28 U.S.C. § 636, the Court has reviewed the Petition, records on file, and the Report and Recommendation of the United States Magistrate Judge. Petitioner has not filed any written Objections to the Report within the time permitted. The Court accepts the findings and recommendation of the Magistrate Judge.

IT IS THEREFORE ORDERED that Judgment will be entered denying the Petition and dismissing this action with prejudice.

DATED: November 22, 2016

HONORABLE STEPHEN V. WILSON
UNITED STATES DISTRICT JUDGE