Appendix A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

AUG 29 2018

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

GABRIEL CERVANTES VALENCIA,

Petitioner-Appellant,

v.

DAVE DAVEY, Warden,

Respondent-Appellee.

No. 17-56910

D.C. No.
2:14-cv-08476-R-PJW
Central District of California,
Los Angeles

ORDER

Before: FARRIS and LEAVY, Circuit Judges.

Appellant's "motion for reconsideration" (Docket Entry No. 4) is construed as a request for a certificate of appealability. So construed, the request is denied. Appellant has not made a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see also Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Any pending motions are denied as moot.

DENIED.

A copy of the corrected petition must be served on opposing counsel.

Sincerely,
Scott S. Harris, Clerk
By: 

Jacob Levitan
(202) 479-3392

Enclosures

Jurisdictional Exhibit 2 of 2.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

APR 30 2018

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

GABRIEL CERVANTES VALENCIA, Petitioner-Appellant, v. DAVE DAVEY, Warden, Respondent-Appellee.	No. 17-56755 D.C. No. 2:14-cv-08476-R-PJW Central District of California, Los Angeles ORDER

Before: TASHIMA, PAEZ, and IKUTA, Circuit Judges.

Appellant's motion for an extension of time to file motions for rehearing (Docket Entry No. 8) is granted. The motion for rehearing and rehearing en banc and motion to recall dismissal of the appeal have been filed.

The motion for rehearing and motion to recall dismissal of the appeal (Docket Entry Nos. 9, 10) are denied, and the motion for rehearing en banc (Docket Entry No. 9) is denied on behalf of the court. *See* 9th Cir. R. 27-10; 9th Cir. Gen. Ord. 6.11.

No further filings will be entertained in this closed case No. 17-56755.

Appellant's December 15, 2017 notice of appeal from the district court's judgment entered on November 15, 2017 remains pending as a request for certificate of appealability in docket No. 17-56910.

DA/Pro Se

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

DEC 22 2017

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

GABRIEL CERVANTES VALENCIA,

Petitioner-Appellant,

v.

DAVE DAVEY, Warden,

Respondent-Appellee.

No. 17-56755

D.C. No.
2:14-cv-08476-R-PJW
Central District of California,
Los Angeles

ORDER

Before: TASHIMA, PAEZ, and IKUTA, Circuit Judges.

A review of the record and appellant's filings in this court demonstrates that this court lacks jurisdiction over this appeal because the order challenged in the appeal is not final or appealable. *See Serine v. Peterson*, 989 F.2d 371, 372-73 (9th Cir. 1993) (magistrate judge's findings and recommendations not appealable; premature appeal not cured by subsequent entry of final judgment by district court). Consequently, this appeal is dismissed for lack of jurisdiction.

DISMISSED.

DA/Pro Se

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B.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

NOV 21 2017

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

GABRIEL CERVANTES VALENCIA, Petitioner-Appellant, v. DAVE DAVEY, Warden, Respondent-Appellee.	No. 17-56755 D.C. No. 2:14-cv-08476-R-PJW Central District of California, Los Angeles ORDER

A review of the record suggests that this court may lack jurisdiction over this appeal because the order challenged in the appeal is not final or appealable. *See Serine v. Peterson*, 989 F.2d 371, 372-73 (9th Cir. 1993) (magistrate judge's findings and recommendations not appealable; premature appeal not cured by subsequent entry of final judgment by district court). To date, appellant has not filed a notice of appeal from the district court's final judgment entered on November 15, 2017.

Within 21 days after the date of this order, appellant shall move for voluntary dismissal of the appeal or show cause why it should not be dismissed for lack of jurisdiction. If appellant elects to show cause, a response may be filed within 10 days after service of the memorandum.

If appellant does not comply with this order, the Clerk shall dismiss this appeal pursuant to Ninth Circuit Rule 42-1.

DA/Pro Se

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Appendix B

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

GABRIEL CERVANTES VALENCIA, Petitioner, v. DAVEY, WARDEN, Respondent.	CASE NO. CV 14-8476-R (PJW) REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This Report and Recommendation is submitted to the Hon. Manuel L. Real, United States District Judge, pursuant to 28 U.S.C. § 636 and General Order 05-07 of the United States District Court for the Central District of California. For the reasons discussed below, it is recommended that the Petition be denied and the action be dismissed with prejudice.

I.

SUMMARY OF PROCEEDINGS

A. State Court Proceedings

In 2012, a jury in Los Angeles County Superior Court found Petitioner guilty of second degree robbery, possession of a firearm by a felon, and dissuading a witness by force. (Clerk's Transcript ("CT") 200-02.) The jury also determined that Petitioner committed

the offenses to benefit a criminal street gang. (CT 200-02.) After finding that Petitioner had one prior "strike" under California's Three Strikes law and had been on bail when he committed the offenses, the trial court sentenced him to 28 years and four months in prison. (CT 243-46.)

Petitioner appealed to the California Court of Appeal, which affirmed the judgment. (Lodged Document Nos. 3-6.) He then filed a petition for review in the California Supreme Court, which was summarily denied. (Lodged Document Nos. 7-8.) Thereafter, he filed habeas corpus petitions in the Los Angeles County Superior Court, the California Court of Appeal, and the California Supreme Court, all of which were denied. (Lodged Document Nos. 10-15.)

B. Federal Court Proceedings

On October 28, 2014, Petitioner, proceeding pro se, filed a petition for writ of habeas corpus in this court, containing both exhausted and unexhausted claims. After eventually exhausting all of his claims in state court, on June 17, 2016, he filed a First Amended Petition ("Petition") raising six grounds for relief:

1. There was insufficient evidence to support his conviction for dissuading a witness.
2. California Penal Code § 654 prohibits duplicative punishment for robbery using a firearm and for being a felon in possession of a firearm, when the firearm was possessed by Petitioner as an accomplice to the crimes.
3. The prosecutor committed a *Brady* violation by failing to disclose favorable evidence to the defense.
4. The prosecutor committed misconduct by knowingly using perjured testimony to obtain a conviction.

5. There was insufficient evidence to support the gang enhancement allegation and the gang evidence that was admitted prejudiced Petitioner's trial.

6. Trial counsel was ineffective in failing to conduct a reasonable pre-trial investigation.[1]

(Petition at A5-A6, A8, A14-A64.[2])

II.

FACTUAL SUMMARY

The following statement of facts, including the footnotes, was taken verbatim from the California Court of Appeal's opinion affirming Petitioner's conviction:

> [O]n August 25, 2011, shortly before midnight, [Petitioner] robbed Danielle Martinez in Azusa as follows.[3] Martinez was sitting in her car which was parked in front of the apartment building of her friend, Jose Contreras, and she was waiting for him. A van, its headlights on, drove up

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[1] In November 2016, Respondent filed a motion to dismiss the Petition, arguing that Petitioner had not exhausted Grounds Three, Four, and Six. (*See* Docket No. 41.) That Court denied the motion. (*See* Docket No. 47.) Although Respondent still maintains that these claims are unexhausted, (Answer to Petition for Writ of Habeas Corpus ("Answer") at 1, n.2), the Court will not revisit its finding to the contrary.

[2] The Court notes that, in his Traverse, Petitioner claimed that he wanted to "drop" Grounds One and Two if doing so did not prevent the Court from reaching the merits of Grounds Three through Six. (Traverse at 4-5.) The Court has elected to address the merits of all six claims as they are fully briefed and Petitioner has not formally moved to amend the Petition.

[3] There is no dispute [Petitioner] committed the offenses alleged in counts 1 and 2. In light of that fact and our analysis of [Petitioner's] contentions on appeal, there is no need to detail the identification evidence[;] [Petitioner] was a person who committed the crimes alleged in counts 1 through 3.

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and parked in front of, and facing, Martinez's car. Martinez testified her headlights were on in the beginning, she later turned her car off, and it was not running at the time of the incident.

A man exited the driver's side of the van, approached Martinez's driver's side window, and asked her to roll it down. She complied. The man asked Martinez what she was doing there and she replied she was picking up Contreras. The man asked where Contreras was, and Martinez replied she was waiting for him. The man lifted the right side of his shirt and displayed a gun in his waistband. Martinez testified the man (hereafter, gunman) asked her if "[she] had his money or something." The gunman asked Martinez to give him her wallet and purse, and also asked if Martinez was spending his money. He was about two feet from Martinez.

Martinez began throwing everything out of her car. At that time, Martinez saw a second man emerge from the passenger side of the van and approach her on the driver's side of her car. The second man began threatening Martinez and told her to throw her belongings into the street.

Martinez's car had four doors. She opened the driver's door and exited. The gunman backed up perhaps a foot. Martinez opened the left rear door and entered the back of her car. She subsequently threw other items out of the car. The second man came to the left rear door where Martinez was and told her to hurry and throw her things out. Martinez testified the second man got pretty close because he hit her

on the back of the head, but she also testified she did not know who hit her. Martinez also testified that the gunman hit her on the head and that she told this to an officer. Martinez was in the back seat when she was hit on the back of her head.

After Martinez was hit on the head, Contreras arrived and asked what was happening. Martinez was in the back seat and the two men were on the driver's side of Martinez's car. Martinez testified ". . . I heard them two yell at him saying something, 'Where's my money?'" Contreras fled and the two men chased him. About a minute later, the two men returned and put Martinez's property into the van. [Petitioner] robbed Martinez of various property, including purses, money, credit cards, and her driver's license reflecting her personal information.

One of the two men wrote down Martinez's license plate number. Martinez did not remember which of the two men wrote down her license plate number. Neither man said anything to her after one wrote down her license plate number. Martinez denied telling an officer "they threatened [Martinez] that they had [her] personal information and knew where to find [her] if [she] were to tell anyone."[4]

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[4] Martinez testified that in the beginning she was concerned about retaliation because "these people had my information." Four days after the robbery, Azusa Police Detective Thomas Avila interviewed Martinez and discussed a photograph she previously had selected during a photographic lineup. During the interview, Martinez asked if the document was a public record and whether someone would "look up and see if, . . . I had pointed someone out or identified someone . . . ." Martinez denied she was afraid at time of trial. She was not afraid at time of trial because she had not identified the

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Martinez also denied remembering she told this to an officer. After one of the two men wrote down her license plate number, they left the scene.

Martinez testified there were "only two guys" in this case and she did not see more than two people. About five to seven minutes passed from the time the two men first approached Martinez to the time they finally left. Martinez testified the gunman and second man were probably equally close to Martinez "from where [she] was sitting."

Azusa Police Officer Robert Chivas testified as follows. About 11:57 p.m. on August 25, 2011, Chivas responded to the location and talked with Martinez. She told him that before they left, one of the subjects wrote down her license plate number, although she did not know whether that subject was the gunman or the second man. The following then occurred during the People's direct examination of Chivas: "Q. And then what else did she tell you about one of those two subjects before they left? [¶] A. They had made a mention something to the effect of that they now had her information and that they would be able to find her if she--if she told anybody what had happened."

Contreras testified as follows. On the night of the robbery, he saw a van drive up in front of Martinez's car and he fled onto a golf course. He knew a person named Gabriel, and [Petitioner] was Gabriel. [Petitioner] was an Azusa 13 gang member. Contreras was in protective custody

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robber at the preliminary hearing.

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at time of trial, he was a "greenlighter," and he was worried and nervous. During cross-examination, Contreras denied he saw a gun on the night of August 25, 2011. Contreras testified "from him opening his hood of his car and from my knowledge from the past, I knew that's where he would put his gun."

Azusa Police Officer Jason Kimes testified that about 11:57 p.m. on August 25, 2011, he responded to the crime scene and Contreras told him three persons exited a van, Contreras fled, and the three chased him. One of the three was the van's driver, [Petitioner].

Kimes also testified Contreras said the following. [Petitioner] and his "three friends" first approached Contreras and, after Contreras fled, [Petitioner] and his three friends went in the van, then went to Contreras's friend, who was sitting in a parked car. [Petitioner] then took out what appeared to be a black semiautomatic handgun from under the hood of the van, and "the three subjects approached [Contreras's] friend who was sitting in the car and robbed her."

Azusa Police Detective Thomas Avila interviewed Contreras at the station and Contreras told him the following. [Petitioner's] van pulled up right beside Martinez, and "they just jumped out the car and they did what they did." Contreras did not get a good look at what happened until he turned around. Contreras said, "By the time I turned around, I just heard Danielle like screaming kind of and then I just seen--I seen them open up the hood

of their car and from my understanding from before, I know . . . in the hood of his car he always--that's where he has his stuff . . . ." Avila asked what Contreras meant by "stuff," and Contreras replied, ". . . that's where he puts the stuff. You know, he puts the drugs or his gun. In the hood it's like he has like a stash pot in there." Contreras said ". . . I don't know why he would pull out any drugs at that time, so I was thinking that he was maybe pulling out his gun, . . . [.]"

Contreras told Avila that Contreras guessed "he . . . threatened her" and took her belongings. Contreras also said "it looked like a gun" but he was on the golf course and pretty far from the scene. Contreras also told Avila the following. Contreras could not describe the gun in detail. [Petitioner] was holding what Contreras thought was a gun. Contreras did not know exactly what happened but they pulled away and left. Contreras returned and Martinez said "they pistol whipped her."

Avila testified that on October 5, 2011, he was driving Contreras to court. Avila testified without objection, "During general conversation, Mr. Contreras had said he got a phone call from [Petitioner]. The phone call he had told --or was Mr. Contreras getting ahold of victim Martinez to tell her not to testify in this case against him."[5] In

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[5] During direct examination, the prosecutor asked Contreras if, during a drive with Avila, Contreras told Avila that Contreras received a call from [Petitioner] while [Petitioner] was in custody and that [Petitioner] told Contreras to tell Martinez not to testify against [Petitioner]. Contreras replied, "No. I didn't get a call from him personally." The prosecutor asked whether Contreras told a detective that Contreras received such a call, and Contreras replied

response to the prosecutor's hypothetical questions based on evidence in this case, Avila opined at trial [Petitioner] was an Azusa 13 gang member and the robbery, possession of a firearm, and threat at the scene, as well as a telephone threat weeks later, were committed for the benefit of the gang. [Petitioner] presented no defense witnesses.

(Lodged Document No. 6 at 2-6 (footnotes renumbered).)

III.

STANDARD OF REVIEW

The standard of review in this case is set forth in 28 U.S.C. § 2254:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court 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).

A state court decision is "contrary to" clearly established federal law if it applies a rule that contradicts Supreme Court case

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he did not remember.

law or if it reaches a conclusion different from the Supreme Court's in a case that involves facts that are materially indistinguishable. *Bell v. Cone*, 535 U.S. 685, 694 (2002). To establish that the state court unreasonably applied federal law, a petitioner must show that the state court's application of Supreme Court precedent to the facts of his case was not only incorrect but objectively unreasonable. *Renico v. Lett*, 559 U.S. 766, 773 (2010). Where no decision of the Supreme Court has squarely decided an issue, a state court's adjudication of that issue cannot result in a decision that is contrary to, or involves an unreasonable application of, clearly established Supreme Court precedent. *See Harrington v. Richter*, 562 U.S. 86, 101 (2011).

The claims raised in the instant Petition were raised before the California Supreme Court, but that court did not explain why it was denying them. Grounds One and Two were discussed by the California Court of Appeal in its decision affirming Petitioner's conviction on direct appeal. (*See* Lodged Document No. 6.) This Court presumes that the state supreme court rejected these claims for the same reasons the state appellate court did. The Court, therefore, looks to the appellate court's reasoning and will not disturb it unless it concludes that "fairminded jurists" would all agree that the decision was wrong. *Richter*, 562 U.S. at 102; *Johnson v. Williams*, 568 U.S. 289, 133 S. Ct. 1088, 1094 n.1 (2013) (approving reviewing court's "look through" of state supreme court's silent denial to last reasoned state-court decision).

The California Supreme Court rejected the remaining claims on procedural grounds in a habeas corpus petition. (*See* Lodged Document No. 15.) Generally speaking, the state supreme court's rejection of a

petitioner's claims on procedural grounds bars this Court from addressing the claims on the merits. *See, e.g., Johnson v. Lee*, 136 S. Ct. 1802, 1805-06 (2016); *Walker v. Martin*, 562 U.S. 307, 317-21 (2011). The Court has, however, elected to overlook the procedural default because it is easier and more efficient to address the merits of the claims than the procedural issues.[6] *See Lambrix v. Singletary*, 520 U.S. 518, 524-25 (1997) ("We do not mean to suggest that the procedural-bar issue must invariably be resolved first . . . ."); *see also Franklin v. Johnson*, 290 F.3d 1223, 1232 (9th Cir. 2002) ("Procedural bar issues are not infrequently more complex than the merits issues presented by the [habeas petition], so it may well make sense in some instances to proceed to the merits if the result will be the same."). In doing so, the Court will conduct a *de novo* review of the record to determine whether the claims are meritorious. *See Cone v. Bell*, 556 U.S. 449, 472 (2009) ("Because the [state] courts did not reach the merits of [Petitioner's] claim, federal habeas review is not subject to the deferential standard that applies under AEDPA . . . . Instead, the claim is reviewed *de novo*."); *Stanley v. Schriro*, 598 F.3d 612, 622 (9th Cir. 2010).

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[6] Here, the California Supreme Court rejected the claims with a string-cite of cases that stand for various state procedural rules: "*See People v. Duvall* (1995) 9 Cal. 4th 464, 474; *In re Dixon* (1953) 41 Cal. 2d 756, 759; *In re Swain* (1949) 34 Cal. 2d 300, 304; *In re Lindley* (1947) 29 Cal. 2d 709, 723." (Lodged Document No. 15.) The state supreme court did not, however, indicate which citations applied to which claims.

IV.

DISCUSSION

A. Insufficient Evidence

In Ground One, Petitioner claims that there was insufficient evidence to support his conviction for dissuading a witness. (Petition at A5; Lodged Document No. 7 at 11-14.[7]) There is no merit to this claim.

The United States Supreme Court established in *Jackson v. Virginia*, 443 U.S. 307, 324 (1979), that federal habeas corpus relief is not available to a petitioner who claims that the evidence was insufficient to support his conviction unless he can show that, considering the trial record in the light most favorable to the prosecution, "no rational trier of fact could have found proof of guilt beyond a reasonable doubt." In evaluating such claims, the Court presumes, even if it does not affirmatively appear in the record, that the jury resolved any conflicting inferences in favor of the prosecution. *Wright v. West*, 505 U.S. 277, 296-97 (1992). Further, the Court reviews that state court's decision "with an additional layer of deference," granting relief only when the state court's judgment was contrary to or an unreasonable application of *Jackson*. *Juan H. v. Allen*, 408 F.3d 1262, 1274-75 (9th Cir. 2005).

Here, Petitioner was charged with "unlawfully attempt[ing] to prevent and dissuade Danielle Martinez" from reporting a crime to the police. (CT 95.) At trial, Martinez testified that one of the robbers wrote down her license plate number. (Reporter's Transcript

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[7] Because Petitioner did not explain the basis of his claims in Grounds One and Two, the Court has assumed that he was raising the same arguments raised in his petition for review in the state supreme court.

("RT") 369, 371.) Officer Chivas testified that, immediately after the robbery, Martinez told him that the robbers had written down her car's license plate number and threatened that if she told anyone about the robbery "they" knew where to find her. (RT 1028.) The jury was instructed that Petitioner could be convicted of this offense only if Petitioner threatened Martinez--either as the direct perpetrator of the threat or for aiding and abetting his cohort in making the threat --during the course of the robbery. (RT 1295, 1532.)

The California Court of Appeal found Officer Chivas's testimony was sufficient for the jury to have found that Petitioner threatened Martinez:

> [A]lthough the prosecutor asked Chivas, "And then what else did [Martinez] tell you about *one* of those two subjects before they left?" (italics added), Chivas replied without objection, "*They* had made a mention something to the effect of that *they* now had her information and that *they* would be able to find her if she--if she told anybody what had happened." (Italics added.) Chivas's reply provided substantial evidence *[Petitioner] and* his confederate directly perpetrated the August 25, 2011 dissuasion.

(Lodged Document No. 6 at 7.)

The state appellate court concluded that there was sufficient evidence to convict Petitioner even if it was Petitioner's confederate who uttered the actual threat because Petitioner and his confederate had acted jointly throughout the entire robbery:

> [E]ven if [Petitioner's] confederate was the only direct, oral perpetrator of the August 25, 2011 dissuasion, the jury reasonably could have concluded beyond a reasonable

> doubt [Petitioner's] confederate, *in [Petitioner's] presence and within his hearing*, orally stated "they" had Martinez's information and "they" would be able to find her if she told anyone what had happened. The statement of [Petitioner's] confederate thus indicated [Petitioner's] confederate and [Petitioner] had the information and would be able to find her, and implied criminal dissuasion by [Petitioner's] confederate and [Petitioner].
>
> Neither Martinez nor Chivas testified [Petitioner] responded to, or denied, the statement of [Petitioner's] confederate. Thus, there was substantial evidence [Petitioner's] confederate made a statement in the presence of [Petitioner] under circumstances that would normally call for a response if the statement were untrue (because the statement implied the confederate *and [Petitioner]* were criminally dissuading Martinez), [Petitioner] reacted with silence, and his silence was a tacit admission [Petitioner] had Martinez's information and would be able to find her (and was thus dissuading her). [Petitioner's] silence was an adoptive admission of his confederate's statement. We conclude there was sufficient evidence to convince a rational trier of fact, beyond a reasonable doubt, [Petitioner] was the direct perpetrator of the August 25, 2011 dissuasion.

(Lodged Document No. 6 at 9-10 (citation omitted).)

The Court agrees. Officer Chivas's testimony provided sufficient evidence under the law for the jury to convict Petitioner of

dissuading a witness. Accordingly, the state court reasonably rejected this claim.

B. Sentencing Error

In Ground Two, Petitioner contends that California Penal Code § 654 barred the trial court from sentencing him for both robbery with the use of a firearm and for being a felon in possession of a firearm "[b]ecause the firearm that [Petitioner] was convicted of possessing was the same firearm that one of the robbers possessed during the commission of the [robbery], and his sole intent was to possess the firearm to facilitate the robbery." (Petition at 5; Lodged Document No. 7 at 17.) He argues that the sentence for possession of a firearm by a felon must be stayed. (Lodged Document No. 7 at 17.) There is no merit to this claim.

Because a state trial court's sentencing decisions are purely matters of state law, sentencing errors are generally not cognizable in federal habeas corpus proceedings. *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991) ("[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions."); *Lewis v. Jeffers*, 497 U.S. 764, 780 (1990) ("[F]ederal habeas corpus relief does not lie for errors of state law."); *see also Watts v. Bonneville*, 879 F.2d 685, 687 (9th Cir. 1989) (holding claim based on California Penal Code § 654 is not cognizable on federal habeas review). Thus, even assuming that the trial court misapplied California law, Petitioner would not be entitled to relief unless he could show that his sentence was fundamentally unfair. *Christian v. Rhode*, 41 F.3d 461, 469 (9th Cir. 1994). There is no evidence to

support such an argument here. Consequently, this claim does not warrant federal habeas relief.[8]

C. *Brady* Violation

In Ground Three, Petitioner claims that the prosecutor failed to turn over a copy of the taped interview Martinez had with the police following the robbery. (Petition at A14.) He argues that the tape would have led to Petitioner's acquittal because it would have demonstrated that Martinez did not identify Petitioner as one of the robbers. (Petition at A17-A21.) There is no merit to this claim.

The Due Process Clause requires the prosecution to disclose to the defense any evidence in its possession that is both favorable to the accused and is material to guilt or punishment. *Brady v. Maryland*, 373 U.S. 83, 87 (1963). Evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 667, 682 (1985). Where the prosecution fails to produce *Brady* material and a defendant can establish prejudice, he is entitled to a new trial. *See Kyles v. Whitley*, 514 U.S. 419, 422 (1995).

After the robbery, Danielle Martinez was interviewed by Officer Chivas at the police station. According to Chivas, during that interview, Martinez identified Petitioner from a six-pack photographic

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[8] The California Court of Appeal determined that "substantial evidence" supported a finding that Petitioner's "gun possession on [the date of the robbery] . . . was distinctly antecedent and separate from, and unrelated to, the robbery, and was not merely possession in conjunction with the robbery." (Lodged Document No. 6 at 12.) Thus, the state appellate court concluded that the trial court properly sentenced Petitioner for being a felon in possession of a firearm and for robbery with the use of a firearm. (Lodged Document No. 6 at 10-12.)

lineup, telling him that she was "99 percent sure that was him." (CT 38-40; RT 41.) It appears that the interview was recorded but police were unable to retrieve the recording from the system before it was erased.[9] (RT 39-42.)

Martinez was later interviewed by Detective Avila, during which Martinez was shown the same photographic lineup and confirmed her identification of Petitioner as one of the robbers. (RT 39-40, 42.) That interview was recorded and turned over to the defense prior to trial. (RT 42.)

At trial, Martinez was a reluctant witness. Nevertheless, she admitted that she had picked out Petitioner's photo and told Chivas that he "resembled one of the guys that was there that night." (RT 635-36.) She claimed, however, that she also told Chivas that she was "very unsure" of her identification but that Chivas told her to just go ahead and circle Petitioner's photograph anyway. (RT 638, 644-45.) She admitted that she did not tell Detective Avila in a subsequent interview that there was a problem with her identification in the previous interview. (RT 639.) However, she maintained that she told Chivas "a hundred times" that she was unsure of her identification. (RT 659.)

Officer Chivas testified that he had recorded the interview with Martinez when she picked out Petitioner's photo but that he had been unable to preserve a copy of the interview. (RT 1030-32.) He testified that he never told Martinez which photograph to circle. (RT 1033.)

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[9] At the preliminary hearing, Officer Chivas testified that he had "video recorded" the interview on a "new system," but was "unable to download the DVD copy." (CT 40.) Later, the prosecutor told the court that they had been unable to retrieve the recording. (RT 41.)

As a threshold matter, it is not clear that, under the circumstances here, *Brady* applies. The record establishes that neither the police nor the prosecutor actually had the recording of the interview with Martinez and withheld it from the defense.[10] *See California v. Trombetta*, 467 U.S. 479, 486-89 (1984) (distinguishing the analysis applied in *Brady*--where the government has failed to disclose exculpatory evidence--from a situation where the exculpatory evidence has been lost or destroyed and, therefore, is no longer in the government's possession); *see also United States v. Gardner*, 244 F.3d 784, 788 (10th Cir. 2001) (holding *Brady* did not control where tape recording of interview was lost and was no longer in government's possession).

Even assuming *Brady* does apply, however, Petitioner has not put forth any evidence that the recorded interview with Officer Chivas contained exculpatory evidence. Officer Chivas testified at the preliminary hearing that Martinez was highly confident in her identification of Petitioner as one of the robbers. And, though Martinez claimed at trial that she told Officer Chivas that she was unsure, she admitted that she had in fact circled Petitioner's photo and signed the photographic lineup card in Chivas' presence and confirmed it in Avila's presence.

Petitioner offers no other evidence as to how the recording would have aided his defense. He argues that the tape recording would have undermined Martinez's identification testimony but the Court does not find that argument persuasive. Assuming that the recording contained Martinez's protestations that she was unsure about her identification,

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[10] The record is unclear whether there was a recording of the interview that was later destroyed (i.e., erased) or whether the attempt to record the interview was simply unsuccessful.

that would have only reinforced her trial testimony that she repeatedly told Chivas that she was unsure. Speculation that the recording might have contained other exculpatory evidence does not suffice to establish a *Brady* violation. *See, e.g., Phillips v. Woodford*, 267 F.3d 966, 987 (9th Cir. 2001) (rejecting *Brady* claim where petitioner failed to prove that a report existed or that it would have contained exculpatory evidence); *Downs v. Hoyt*, 232 F.3d 1031, 1037 (9th Cir. 2000) (rejecting *Brady* claim as too speculative). Accordingly, Petitioner's *Brady* claim is rejected.

Similarly, any claim that the government's destruction of the recording amounted to a constitutional violation would also fail. The government's destruction of, or failure to preserve, potentially exculpatory evidence violates the Due Process Clause only when the government acts in bad faith. *Arizona v. Youngblood*, 488 U.S. 51, 58 (1988); *Trombetta*, 467 U.S. at 489. Here, there is no evidence that the government acted in bad faith. Nor, as was discussed previously, was there any apparent exculpatory value in the interview where Martinez identified Petitioner as one of her assailants and testified at trial that she had told Chivas that she was not positive of her identification. Accordingly, there could have been no due process violation. *See Youngblood*, 488 U.S. at 58 (holding accidental destruction of evidence of unclear content that might or might not have exonerated the defendant does not violate due process).

D. Prosecutorial Misconduct

In Ground Four, Petitioner claims that the prosecutor knowingly used perjured testimony from Jose Contreras to obtain a conviction. (Petition at A24-A38.) There is no merit to this claim.

A conviction obtained by the knowing use of false evidence or perjured testimony is fundamentally unfair and violates a defendant's constitutional rights. *United States v. Agurs*, 427 U.S. 97, 103 (1976); *see also Napue v. Illinois*, 360 U.S. 264, 269-70 (1959) ("A lie is a lie, no matter what its subject, and, if it is in any way relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth." (internal quotation marks omitted)). To merit habeas relief, a petitioner must show that the testimony was actually false, that the prosecutor knew or should have known that it was false, and that the falsehood was material to the case. *Jackson v. Brown*, 513 F.3d 1057, 1071-72 (9th Cir. 2008). A *Napue* violation is material if there is any reasonable likelihood that the false testimony could have affected the jury's decision. *Libberton v. Ryan*, 583 F.3d 1147, 1164 (9th Cir. 2009).

Petitioner claims that Contreras's testimony implicating him in the robbery was a lie. He points to the fact that Contreras admitted to lying about "a few things" on the stand, had previously been convicted of several crimes (including forgery and receiving stolen property), had a drug habit, and had used methamphetamine on the night of the robbery. (RT 922-25, 934.) Further, Contreras asked for--but did not receive--immunity for a drug offense in exchange for testifying against Petitioner. (RT 1220-21.) Although these facts, all of which were presented to the jury, certainly could have impacted

Contreras's credibility as a witness, none establishes that Contreras's testimony that Petitioner robbed Martinez was false or that the prosecutor knew it. *See, e.g., United States v. Houston,* 648 F.3d 806, 814 (9th Cir. 2011) (finding impeaching evidence "raises a question about [the witness's] credibility, but it does not establish that [the witness] lied, or that the government knowingly presented false testimony").

Petitioner points out numerous contradictions between Contreras's testimony and his previous statements to police and the testimony of other witnesses. For example, Contreras claimed that there were four suspects in his initial call to 9-1-1 and in an interview with Officer Kimes. (RT 936, 1016.) Martinez testified that there were only two. Mere inconsistencies in testimony such as this are quite common and do not establish that the testimony offered at trial was false. *United States v. Croft*, 124 F.3d 1109, 1119 (9th Cir. 1997). Ultimately, it was for the jurors to decide whether to believe Contreras's testimony and this Court is not empowered or inclined to second guess the jury. *See United States v. Geston*, 299 F.3d 1130, 1135 (9th Cir. 2002) ("It was within the province of the jury to resolve the disputed testimony.").

Finally, even assuming Contreras was at times inaccurate or untruthful, Petitioner has presented no evidence that the prosecutor *knowingly* presented any false testimony. *See Murtishaw v. Woodford*, 255 F.3d 926, 959 (9th Cir. 2001) (rejecting prosecutorial misconduct claim because, even assuming testimony was false, petitioner presented no evidence the prosecution knew it was false); *see also United States v. Sherlock*, 962 F.2d 1349, 1364 (9th Cir. 1992) (holding prosecutor who presented witnesses with contradictory stories did not necessarily

present perjured testimony because defendant failed to show prosecutor knew which story was true). For all these reasons, this claim is denied.

E. Gang Evidence Errors

Petitioner claims in Ground Five that there was insufficient evidence to convict him of the gang enhancements with respect to the robbery and witness intimidation offenses. (Petition at A39-A50.) The Court disagrees.

Where, as here, the state requires that the underlying facts supporting an enhancement be proven beyond a reasonable doubt, the *Jackson* standard applies. *See Garcia v. Carey*, 395 F.3d 1099, 1102-04 (9th Cir. 2005). To support the gang enhancement (California Penal Code § 186.22(b)(1)), the prosecution had to prove that "the crime for which the defendant was convicted had been committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members." *People v. Gardeley*, 14 Cal.4th 605, 616-17 (1996) (internal quotation marks omitted).

Here, Petitioner was unquestionably a member of the Azusa 13 gang.[11] At trial, Detective Avila testified as a gang expert for the prosecution. (*See* RT 1221-23.) Detective Avila was familiar with the Azusa 13 gang and testified that Petitioner was a current member. (RT 1227, 1235-36.) He identified numerous Azusa 13 gang tattoos on Petitioner, including one that identified his gang moniker, "Gangster." (RT 1237-42.) When given a hypothetical based on the

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[11] In fact, Petitioner offered to stipulate that he was a member of the Azusa 13 gang in lieu of evidence being presented regarding the gang and Petitioner's membership. (*See* RT 1203-04.)

facts of the robbery, Detective Avila opined that it was done to benefit the Azusa 13 gang. (RT 1250.) Detective Avila based his opinion on the fact that Petitioner used a gun, but only took the victim's purse and not her car or other valuables. (RT 1250.) He noted that the crime was done in the gang's territory with an accomplice and that taking the purse with the victim's personal information was a way to assert "fear and intimidation" by the gang. (RT 1250-51.) He also testified that Petitioner's attempts to dissuade Martinez from contacting the police about the robbery was another way the gang intimidated witnesses and enabled the gang "to continue their criminal activity within the city." (RT 1251.) Thus, he concluded, the crime benefitted the gang as well. (RT 1251.)

Petitioner argues that the evidence was "more consistent" with a crime committed for personal gain than to advance the interests of his gang. (Petition at A41.) The Court's task, however, is not to re-weigh the evidence and decide if it would have found the enhancement true, but only to determine whether any rational juror could have found the enhancement true based on the evidence. *See Coleman v. Johnson*, 566 U.S. 650, 132 S. Ct. 2060, 2065 (2012) ("[T]he only question under *Jackson* is whether [the jury's] finding was so insupportable as to fall below the threshold of bare rationality."). Under this standard, there was sufficient evidence to support the gang enhancements.

Finally, Petitioner suggests that the gang evidence should not have been admitted at all because it was more prejudicial than probative. (Petition at A46-49.) To the extent that Petitioner is arguing that the trial court's admission of the gang evidence was an abuse of discretion under state rules of evidence (i.e., unduly

prejudicial or irrelevant), his claim is not cognizable on habeas review. *See Estelle*, 502 U.S. at 67-68 (holding correctness of state evidentiary rulings presenting only issues of state law are not cognizable on federal habeas corpus review). Further, the Court concludes that there was no due process violation because the gang evidence was relevant to the motive for the robbery and to prove the accompanying gang enhancement allegations. *See, e.g., Valdez v. Gipson*, 2015 WL 545844, at *8 (E.D. Cal. Feb. 10, 2015) (finding admission of gang evidence did not violate due process because it was relevant to both the underlying offense and charged gang enhancement); *Lopez v. Clark*, 2009 WL 3417784, at *7 (C.D. Cal. Oct. 20, 2009) (finding gang evidence was "highly relevant" because petitioner was charged with a criminal street gang enhancement; "It is difficult to conceive how the prosecution would have been able to prove the . . . gang enhancement without introducing evidence of Petitioner's membership in the . . . criminal street gang."). Accordingly, this claim is denied.

F. Ineffective Assistance of Counsel

In Ground Six, Petitioner claims that trial counsel rendered ineffective assistance by failing to conduct a reasonable pre-trial investigation. (Petition at A51-A53.) There is no merit to this claim.

The Sixth Amendment right to counsel guarantees not only assistance, but effective assistance, of counsel. *See Strickland v. Washington*, 466 U.S. 668 (1984). In order to prevail on a claim of ineffective assistance of counsel, Petitioner has to establish: (1) counsel's performance fell below an "objective standard of reasonableness" under prevailing professional norms; and (2) the

deficient performance prejudiced the defense, i.e., "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 687-88, 694. A claim of ineffective assistance must be rejected upon finding either that counsel's performance was reasonable or that the alleged error was not prejudicial. *Id.* at 697.

Here, Petitioner presents a laundry-list of allegations purportedly evidencing how his attorney's lack of preparation for trial and performance during trial amounted to ineffective assistance of counsel. (*See* Petition at A51-A53.) All of his claims, however, are too vague and lack sufficient evidentiary support for the Court to grant relief. *See Jones v. Gomez*, 66 F.3d 199, 204-05 (9th Cir. 1995) (holding vague speculation or mere conclusions without reference to the record or other documentary evidence fails to discharge a petitioner's prima facie burden for an ineffective assistance of counsel claim); *James v. Borg*, 24 F.3d 20, 26 (9th Cir. 1994) ("Conclusory allegations which are not supported by a statement of specific facts do not warrant habeas relief.").

For example, Petitioner argues that counsel should have investigated other potential suspects that could have committed the crimes. (Petition at A51.) He does not, however, identify any other potential suspects or offer any evidence that he was not involved in the crimes. *See Brown v. Subia*, 2009 WL 1118871, at *9 (E.D. Cal. Apr. 27, 2009) (rejecting claim counsel was ineffective for failing to investigate other "potential suspects" because petitioner failed to provide "specific evidence or allegations of what might have been uncovered").

He also faults counsel for not hiring experts to testify about the possible effects of methamphetamine use on the witnesses' testimony and relied on the prosecution's "cell phone tower specialist." (Petition at A51-A52.) Yet, again, he fails to offer any affidavits from potential experts or explain how their testimony would have been helpful at trial. *See Wildman v. Johnson*, 261 F.3d 832, 839 (9th Cir. 2001) (rejecting ineffective assistance claim because defendant offered no evidence expert would have provided beneficial testimony); *Grisby v. Blodgett*, 130 F.3d 365, 373 (9th Cir. 1997) ("Speculation about what an expert could have said is not enough to establish [ineffective assistance of counsel].").

Petitioner argues that counsel failed to investigate whether Contreras received a deal from the government in exchange for his testimony or whether police "targeted" Petitioner for prosecution. (Petition at A52.) But Petitioner does not offer any evidence to support such claims and there is nothing in the record, either. Thus, this claim, too, is entirely speculative. *See James*, 24 F.3d at 26.

In short, Petitioner has not demonstrated that counsel's efforts were lacking. *See, e.g., Spreitz v. Ryan*, 617 F. Supp.2d 887, 917 (D. Ariz. May 12, 2009) ("[O]ther than asserting that counsel should have done more to develop a defense, Petitioner fails to explain what counsel should or could have done to present a different, viable defense" in light of overwhelming evidence of his guilt); *Elizaldi v. Rawers*, 2007 WL 963284, at *35 (E.D. Cal. Mar. 29, 2007) ("Trial counsel is not required to fashion defenses out of whole cloth or to perform impossible feats of evidentiary legerdemain in order to render effective assistance to his client."). For this reason, this claim, too, is denied.

V.

RECOMMENDATION

For these reasons, IT IS RECOMMENDED that the Court issue an Order (1) accepting this Report and Recommendation and (2) directing that Judgment be entered denying the Petition and dismissing the case with prejudice.[12]

DATED: October 17, 2017.

Patrick J. Walsh

PATRICK J. WALSH
UNITED STATES MAGISTRATE JUDGE

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[12] The Court is not inclined to issue a certificate of appealability in this case. *See* Rule 11, Federal Rules Governing Section 2254 Cases ("The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant."). If Petitioner believes a certificate should issue, he should explain why in his Objections.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

GABRIEL CERVANTES VALENCIA, Petitioner, v. DAVEY, WARDEN, Respondent.	CASE NO. CV 14-8476-R (PJW) ORDER ACCEPTING REPORT AND ADOPTING FINDINGS, CONCLUSIONS, AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE, AND DENYING CERTIFICATE OF APPEALABILITY

Pursuant to 28 U.S.C. Section 636, the Court has reviewed the Petition, records on file, and the Report and Recommendation of the United States Magistrate Judge. Further, the Court has engaged in a *de novo* review of those portions of the Report to which Petitioner has objected. The Court accepts the Report and adopts the findings, conclusions, and recommendations of the Magistrate Judge.

Further, for the reasons stated in the Report and Recommendation, the Court finds that Petitioner has not made a substantial showing of the denial of a constitutional right and, therefore, a certificate of appealability is denied. *See* 28 U.S.C.

§ 2253(c)(2); Fed. R. App. P. 22(b); *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003).

DATED: November 9, 2017.

MANUEL L. REAL
UNITED STATES DISTRICT JUDGE

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

GABRIEL CERVANTES VALENCIA, Petitioner, v. DAVEY, WARDEN, Respondent.	CASE NO. CV 14-8476-R (PJW) J U D G M E N T

Pursuant to the Order Accepting Report and Adopting Findings, Conclusions, and Recommendations of United States Magistrate Judge,

IT IS ADJUDGED that the Petition is denied and this action is dismissed with prejudice.

DATED: November 9, 2017

MANUEL L. REAL
UNITED STATES DISTRICT JUDGE

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