

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

ARTURO HUERTA,

Petitioner,

V.

RON DAVIS,

Respondent.

Case No. 1:15-cv-01827-AWI-SAB-HC

**FINDINGS AND RECOMMENDATION TO
DENY STAY, PROCEED WITH
EXHAUSTED CLAIMS, AND DENY
PETITION FOR WRIT OF HABEAS
CORPUS**

Petitioner is a state prisoner proceeding pro se with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254.

I.

BACKGROUND

On December 5, 2012, Petitioner was convicted after a jury trial in the Kern County Superior Court of second-degree murder. (1 CT¹ 279). The jury also found true the use of a deadly weapon enhancement. (1 CT 280). The trial court sentenced Petitioner to an aggregate imprisonment term of sixteen years to life. (2 CT 312). On October 23, 2014, the California Court of Appeal, Fifth Appellate District affirmed the judgment. People v. Huerta, No. F066497, 2014 WL 5392951, at *5 (Cal. Ct. App. Oct. 23, 2014). The California Supreme Court denied Petitioner's petition for review on January 14, 2015. (LDs² 15, 16).

¹ "CT" refers to the Clerk's Transcript on Appeal lodged by Respondent on March 25, 2016. (ECF No. 11).

² “LD” refers to the documents lodged by Respondent on March 25, 2016 and August 11, 2017. (ECF Nos. 11, 22).

1 On December 7, 2015, Petitioner filed the instant federal petition for writ of habeas
2 corpus. (ECF No. 1). In the petition, Petitioner raises the following claims for relief:
3 (1) insufficient evidence to establish that his conduct caused the victim's death; (2) the trial
4 court's erroneous restriction of Petitioner's cross-examination of the substitute pathologist;
5 (3) insufficient evidence that Petitioner acted with express or implied malice; and (4) the original
6 pathologist's unavailability for examination at trial, in violation of the Confrontation Clause.
7 Respondent filed an answer, and Petitioner filed a traverse. (ECF Nos. 10, 12).

F.I.

EXHAUSTION AND REQUEST FOR STAY

10 In the answer, Respondent asserts that claims 2 and 4 are unexhausted. (ECF No. 10 at
11 20, 25).³ In the traverse, Petitioner states that he filed a state habeas petition in the superior court
12 on February 16, 2016 in order to exhaust the two claims. Additionally, Petitioner requests that
13 the Court hold the petition in abeyance pending resolution of the unexhausted claims in state
14 court. (ECF No. 12 at 5). On April 21, 2017, the Court ordered Petitioner to file a brief
15 addressing whether he is entitled to “stay and abeyance” under Rhines v. Weber, 544 U.S. 269
16 (2005). (ECF No. 15). Petitioner did not submit a brief.

17 A petitioner in state custody who is proceeding with a petition for writ of habeas corpus
18 must exhaust state judicial remedies. 28 U.S.C. § 2254(b)(1). The exhaustion doctrine is based
19 on comity to the state court and gives the state court the initial opportunity to correct the state's
20 alleged constitutional deprivations. Coleman v. Thompson, 501 U.S. 722, 731 (1991); Rose v.
21 Lundy, 455 U.S. 509, 518 (1982). A petitioner can satisfy the exhaustion requirement by
22 providing the highest state court with a full and fair opportunity to consider each claim before
23 presenting it to the federal court. O'Sullivan v. Boerckel, 526 U.S. 838, 845 (1999); Duncan v.
24 Henry, 513 U.S. 364, 365 (1995); Picard v. Connor, 404 U.S. 270, 276 (1971).

25 On August 11, 2017, Respondent lodged with the Court state court records that
26 demonstrate Petitioner did not present claims 2 and 4 to the California Supreme Court. (LD 25).
27 It appears that the claims were raised in the Kern County Superior Court and the California Court

²⁸ ³ Page numbers refer to ECF page numbers stamped at the top of the page.

1 of Appeal, Fifth Appellate District. (LDs 17, 21). However, the exhaustion requirement is not
2 satisfied because Petitioner did not present claims 2 and 4 to the California Supreme Court. As
3 Petitioner has not sought relief in the California Supreme Court, this Court cannot proceed to the
4 merits of those claims. 28 U.S.C. § 2254(b)(1).

5 Petitioner has requested the Court to hold the petition in abeyance pending resolution of
6 the unexhausted claims in state court. (ECF No. 12 at 5). Under Rhines v. Weber, “stay and
7 abeyance” is available only in “limited circumstances,” and only when: (1) there is “good cause”
8 for the failure to exhaust; (2) the unexhausted claims are not “plainly meritless”; and (3) the
9 petitioner did not intentionally engage in dilatory litigation tactics. 544 U.S. at 277–78. Although
10 the Court provided Petitioner with an opportunity to file a brief addressing whether he was
11 entitled to a Rhines stay, Petitioner failed to do so. Accordingly, the undersigned will
12 recommend that Petitioner’s request for a stay be denied.

13 Rhines instructs that “if a petitioner presents a district court with a mixed petition and the
14 court determines that stay and abeyance is inappropriate, the court should allow the petitioner to
15 delete the unexhausted claims and to proceed with the exhausted claims if dismissal of the entire
16 petition would unreasonably impair the petitioner’s right to obtain federal relief.” Rhines, 544
17 U.S. at 278. Accordingly, the undersigned will recommend that Petitioner be allowed to proceed
18 with the exhausted claims, the merits of which are addressed below.

19 **III.**

20 **STATEMENT OF FACTS⁴**

21 Appellant rented a bedroom from Velia Alvarez. On April 17, 2011, Alvarez
22 heard the sounds of an argument coming from appellant’s room, and heard a
23 woman’s voice yelling “[N]o, no, Arturo, please. I moved with my daughter to
2nd Street.” Alvarez then heard the sound of glass breaking and items being
24 thrown around the room and called the police.

25 When police arrived at the scene, they observed appellant pacing inside his room
26 and evidence of blood on the rear door. The officers then entered the residence
27 from the front and rear entrances, and found appellant standing motionless in the
kitchen, covered in blood, and the body of Acamea Coy in appellant’s bedroom.
Coy’s arms were tied with a necktie, and a scarf was tied around her face. Inside

28 ⁴ The Court relies on the California Court of Appeal’s October 23, 2014 opinion for this summary of the facts of the
crime. See Vasquez v. Kirkland, 572 F.3d 1029, 1031 n.1 (9th Cir. 2009).

1 the room there was broken glass on the floor, a glass Cisco bottle, and blood on
2 all of the walls.

3 Appellant was subsequently arrested and charged with first degree murder. At
4 trial, the substitute pathologist, Dr. Adel Shaker, testified that he believed the
5 victim's cause of death to be exsanguination due to sharp injuries. Appellant
6 testified in his own defense and stated that he did not intend to kill the victim, but
7 that she had struck appellant with a Cisco bottle, and the two had struggled and
8 rolled in the broken glass. He further testified that during the struggle the victim
9 got up, ran into a wall, and fell.

10 Huerta, 2014 WL 5392951, at *1.

11 IV.

12 STANDARD OF REVIEW

13 Relief by way of a petition for writ of habeas corpus extends to a person in custody
14 pursuant to the judgment of a state court if the custody is in violation of the Constitution or laws
15 or treaties of the United States. 28 U.S.C. § 2254(a); 28 U.S.C. § 2241(c)(3); Williams v. Taylor,
16 529 U.S. 362, 375 (2000). Petitioner asserts that he suffered violations of his rights as guaranteed
17 by the U.S. Constitution. The challenged conviction arises out of Kern County Superior Court,
18 which is located within the Eastern District of California. 28 U.S.C. § 2241(d).

19 On April 24, 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act
20 of 1996 ("AEDPA"), which applies to all petitions for writ of habeas corpus filed after its
enactment. Lindh v. Murphy, 521 U.S. 320 (1997); Jeffries v. Wood, 114 F.3d 1484, 1499 (9th
Cir. 1997) (en banc). The instant petition was filed after the enactment of AEDPA and is
therefore governed by its provisions.

21 Under AEDPA, relitigation of any claim adjudicated on the merits in state court is barred
22 unless a petitioner can show that the state court's adjudication of his claim:

23 (1) resulted in a decision that was contrary to, or involved an
24 unreasonable application of, clearly established Federal law, as
25 determined by the Supreme Court of the United States; or
26 (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.

27 28 U.S.C. § 2254(d); Harrington v. Richter, 562 U.S. 86, 97–98 (2011); Lockyer v. Andrade, 538
28 U.S. 63, 70–71 (2003); Williams, 529 U.S. at 413.

1 As a threshold matter, this Court must “first decide what constitutes ‘clearly established
2 Federal law, as determined by the Supreme Court of the United States.’” Lockyer, 538 U.S. at 71
3 (quoting 28 U.S.C. § 2254(d)(1)). In ascertaining what is “clearly established Federal law,” this
4 Court must look to the “holdings, as opposed to the dicta, of [the Supreme Court’s] decisions as
5 of the time of the relevant state-court decision.” Williams, 529 U.S. at 412. “In other words,
6 ‘clearly established Federal law’ under § 2254(d)(1) is the governing legal principle or principles
7 set forth by the Supreme Court at the time the state court renders its decision.” Id. In addition,
8 the Supreme Court decision must “‘squarely address [] the issue in th[e] case’ or establish a legal
9 principle that ‘clearly extend[s]’ to a new context to the extent required by the Supreme Court in
10 . . . recent decisions”; otherwise, there is no clearly established Federal law for purposes of
11 review under AEDPA. Moses v. Payne, 555 F.3d 742, 754 (9th Cir. 2009) (quoting Wright v.
12 Van Patten, 552 U.S. 120, 125 (2008)); Panetti v. Quarterman, 551 U.S. 930 (2007); Carey v.
13 Musladin, 549 U.S. 70 (2006). If no clearly established Federal law exists, the inquiry is at an
14 end and the Court must defer to the state court’s decision. Musladin, 549 U.S. 70; Wright, 552
15 U.S. at 126; Moses, 555 F.3d at 760.

16 If the Court determines there is governing clearly established federal law, the Court must
17 then consider whether the state court’s decision was “contrary to, or involved an unreasonable
18 application of, [the] clearly established Federal law.” Lockyer, 538 U.S. at 72 (quoting 28 U.S.C.
19 § 2254(d)(1)). “Under the ‘contrary to’ clause, a federal habeas court may grant the writ if the
20 state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question
21 of law or if the state court decides a case differently than [the] Court has on a set of materially
22 indistinguishable facts.” Williams, 529 U.S. at 412–13; see also Lockyer, 538 U.S. at 72. “The
23 word ‘contrary’ is commonly understood to mean ‘diametrically different,’ ‘opposite in character
24 or nature,’ or ‘mutually opposed.’” Williams, 529 U.S. at 405 (quoting Webster’s Third New
25 International Dictionary 495 (1976)). “A state-court decision will certainly be contrary to
26 [Supreme Court] clearly established precedent if the state court applies a rule that contradicts the
27 governing law set forth in [Supreme Court] cases.” Id. If the state court decision is “contrary to”
28 clearly established Supreme Court precedent, the state decision is reviewed under the pre-

1 AEDPA de novo standard. Frantz v. Hazey, 533 F.3d 724, 735 (9th Cir. 2008) (en banc).

2 “Under the ‘reasonable application clause,’ a federal habeas court may grant the writ if
3 the state court identifies the correct governing legal principle from [the] Court’s decisions but
4 unreasonably applies that principle to the facts of the prisoner’s case.” Williams, 529 U.S. at 413.
5 “[A] federal court may not issue the writ simply because the court concludes in its independent
6 judgment that the relevant state court decision applied clearly established federal law erroneously
7 or incorrectly. Rather, that application must also be unreasonable.” Id. at 411; see also Lockyer,
8 538 U.S. at 75–76. The writ may issue only “where there is no possibility fair minded jurists
9 could disagree that the state court’s decision conflicts with [the Supreme Court’s] precedents.”
10 Richter, 562 U.S. at 102. In other words, so long as fair minded jurists could disagree on the
11 correctness of the state court’s decision, the decision cannot be considered unreasonable. Id. If
12 the Court determines that the state court decision is objectively unreasonable, and the error is not
13 structural, habeas relief is nonetheless unavailable unless the error had a substantial and injurious
14 effect on the verdict. Brecht v. Abrahamson, 507 U.S. 619, 637 (1993).

15 The court looks to the last reasoned state court decision as the basis for the state court
16 judgment. Stanley v. Cullen, 633 F.3d 852, 859 (9th Cir. 2011); Robinson v. Ignacio, 360 F.3d
17 1044, 1055 (9th Cir. 2004). If the last reasoned state court decision adopts or substantially
18 incorporates the reasoning from a previous state court decision, this court may consider both
19 decisions to ascertain the reasoning of the last decision. Edwards v. Lamarque, 475 F.3d 1121,
20 1126 (9th Cir. 2007) (en banc). “When a federal claim has been presented to a state court and the
21 state court has denied relief, it may be presumed that the state court adjudicated the claim on the
22 merits in the absence of any indication or state-law procedural principles to the contrary.”
23 Richter, 562 U.S. at 99. This presumption may be overcome by a showing “there is reason to
24 think some other explanation for the state court’s decision is more likely.” Id. at 99–100 (citing
25 Ylst v. Nunnemaker, 501 U.S. 797, 803 (1991)).

26 Where the state court reaches a decision on the merits but provides no reasoning to
27 support its conclusion, a federal habeas court independently reviews the record to determine
28 whether habeas corpus relief is available under § 2254(d). Stanley, 633 F.3d at 860; Himes v.

1 Thompson, 336 F.3d 848, 853 (9th Cir. 2003). “Independent review of the record is not de novo
2 review of the constitutional issue, but rather, the only method by which we can determine
3 whether a silent state court decision is objectively unreasonable.” Himes, 336 F.3d at 853. While
4 the federal court cannot analyze just what the state court did when it issued a summary denial,
5 the federal court must review the state court record to determine whether there was any
6 “reasonable basis for the state court to deny relief.” Richter, 562 U.S. at 98. This court “must
7 determine what arguments or theories … could have supported, the state court’s decision; and
8 then it must ask whether it is possible fairminded jurists could disagree that those arguments or
9 theories are inconsistent with the holding in a prior decision of [the Supreme] Court.” Id. at 102.

10 **V.**

11 **REVIEW OF EXHAUSTED CLAIMS**

12 In his first and third claims for relief, Petitioner asserts that there was insufficient
13 evidence to support a valid conviction for second-degree murder. (ECF No. 1 at 5, 8).
14 Respondent argues that the state court’s denial of Petitioner’s sufficiency of evidence claims was
15 reasonable. (ECF No. 10 at 17, 23).

16 **A. Legal Standard**

17 The United States Supreme Court has held that when reviewing a sufficiency of the
18 evidence claim, a court must determine whether, viewing the evidence and the inferences to be
19 drawn from it in the light most favorable to the prosecution, any rational trier of fact could find
20 the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S.
21 307, 319 (1979). A reviewing court “faced with a record of historical facts that supports
22 conflicting inferences must presume—even if it does not affirmatively appear in the record—that
23 the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that
24 resolution.” Id. at 326. State law provides “for ‘the substantive elements of the criminal offense,’
25 but the minimum amount of evidence that the Due Process Clause requires to prove the offense
26 is purely a matter of federal law.” Coleman v. Johnson, 566 U.S. 650, 655 (2012) (quoting
27 Jackson, 443 U.S. at 319).

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1 “[A]fter AEDPA, we apply the standards of Jackson with an additional layer of
2 deference’ to state court findings.” Ngo v. Giurbino, 651 F.3d 1112, 1115 (9th Cir. 2011)
3 (quoting Juan H. v. Allen, 408 F.3d 1262, 1274 (9th Cir. 2005)). As the Supreme Court has
4 stated,

5 Jackson . . . makes clear that it is the responsibility of the jury—not the court—to
6 decide what conclusions should be drawn from evidence admitted at trial. A
7 reviewing court may set aside the jury’s verdict on the ground of insufficient
8 evidence only if no rational trier of fact could have agreed with the jury. What is
9 more, a federal court may not overturn a state court decision rejecting a
sufficiency of the evidence challenge simply because the federal court disagrees
with the state court. The federal court instead may do so only if the state court
decision was “objectively unreasonable.”

10 Cavazos v. Smith, 565 U.S. 1, 2 (2011) (per curiam) (quoting Renico v. Lett, 559 U.S. 766, 773
11 (2010)).

12 **B. Natural and Probable Consequence**

13 In his first claim for relief, Petitioner asserts that there was no substantial evidence that
14 his conduct caused the victim’s death. (ECF No. 1 at 5). Petitioner raised this sufficiency of
15 evidence claim regarding natural and probable consequence on direct appeal to the California
16 Court of Appeal, Fifth Appellate District, which denied the claim in a reasoned decision. The
17 California Supreme Court summarily denied Petitioner’s petition for review. As federal courts
18 review the last reasoned state court opinion, the Court will “look through” the California
19 Supreme Court’s summary denial and examine the decision of the California Court of Appeal.
20 See Brumfield v. Cain, 135 S. Ct. 2269, 2276 (2015); Johnson v. Williams, 568 U.S. 289, 297
21 n.1 (2013); Ylst, 501 U.S. at 806.

22 In denying the sufficiency of evidence claim with respect to natural and probable
23 consequence, the California Court of Appeal stated:

24 **A. Standard of Review.**

25 We view the record in the light most favorable to the conviction and presume the
26 existence of every fact in support of the conviction the trier of fact could
27 reasonably infer from the evidence. (*People v. Maury* (2003) 30 Cal.4th 342,
396.). “Reversal is not warranted unless it appears ‘ “that upon no hypothesis
whatever is there sufficient substantial evidence to support [the conviction].”
[Citation.]’ [Citation.]” (*People v. Duran* (2002) 97 Cal.App.4th 1448, 1457.)

B. Analysis

In cases of homicide, criminal liability only attaches if the victim's death is the "natural and probable consequence of a defendant's act [.]" (*People v. Roberts* (1992) 2 Cal.4th 271, 321.) On appeal, appellant asserts that there was insufficient evidence to establish that the victim's death was a natural or probable result of appellant's actions, as appellant struck the victim after she broke a bottle over his head, and appellant could not predict that the victim would then fall on the glass and die from rapid exsanguination.

This argument, however, is based on appellant's version of events and not on a review of the record in the light most favorable to the conviction that presumes the existence of every fact in support of the conviction the trier of fact could reasonably infer from the evidence. Using the appropriate standard of review, there was evidence presented that appellant and the victim were arguing before the victim's death, that the victim was overheard pleading with appellant, and that a bottle was broken during the argument. The evidence also showed the victim was subsequently found dead from exsanguination in a pile of broken glass, and that her hands had been tied and her eyes blindfolded by appellant. All of this evidence, viewed in the light most favorable to the conviction, is sufficient to establish that the victim's injuries and exsanguination were caused by appellant's actions.

Appellant also argues, however, that causation was not established at trial due to Dr. Shaker's testimony that it was equally compelling that the victim died due to the combination of alcohol and cocaine that was in her bloodstream, as it was that she died from exsanguination. While it is true that Dr. Shaker testified that he could not exclude cocaethylene poisoning as a cause of death with medical certainty, he also testified that he believed the victim's death was caused by exsanguination due to sharp injuries, that he assigned a high probability to that causation theory, and that it was the only cause of death he listed on his report.

Viewing this direct and circumstantial evidence in the light most favorable to the conviction, we find there was substantial evidence to support a finding that the victim's death was a natural or probable result of appellant's actions and to support appellant's conviction for second degree murder.

Huerta, 2014 WL 5392951, at *1–2.

Viewing the record in the light most favorable to the prosecution and presuming that any conflicts were resolved in favor of the prosecution, the Court finds that a rational trier of fact could have found true beyond a reasonable doubt that the victim's death was a natural and probable consequence of Petitioner's actions. Velia Alvarez, who rented a bedroom to Petitioner, testified at trial that she heard noise from Petitioner's bedroom on April 17, 2011, at approximately 9:30 p.m. (3 RT⁵ 178, 180, 187). Alvarez heard glass breaking and objects being thrown. (3 RT 190). Alvarez also heard a woman screaming, "[N]o, no, Arturo, please. I moved with my daughter to 2nd Street." (3 RT 187-88). Officer Barthelmes testified that when he

⁵ "RT" refers to the Reporter's Transcript on Appeal lodged by Respondent on March 25, 2016. (ECF No. 11).

1 walked into Petitioner's bedroom "[t]here was blood spatter on every single wall of the room"
2 and he saw the body of Acamea Coy. (3 RT 232–33). Barthelmes testified that there was a scarf
3 tied around the victim's face covering her eyes, nose, and mouth and that her arms were tied in
4 front of the body with a necktie. (3 RT 233–34, 236–37). Detective Moore testified that in the
5 bedroom they found the top of a Cisco drink bottle and large pieces of broken glass on the floor.
6 (3 RT 252). Dr. Adel Shaker, the substitute pathologist, could not exclude cocaethylene as a
7 cause of death with medical certainty, but testified that in his opinion the victim's death was
8 caused by exsanguination from sharp force injuries. (4 RT 430–31, 450, 464).

9 On the other hand, Petitioner testified at trial that the victim took fifty dollars from him,
10 hit him in the face, and hit him with a Cisco wine bottle, which broke. (4 RT 554–57). Petitioner
11 and the victim fought, fell onto the broken glass, and rolled around. (4 RT 559–60). At some
12 point, the victim stood up, hit a wall, and fell. (4 RT 560). After Petitioner was unsuccessful in
13 his attempts to get help, he returned to the room and put a scarf on the victim's head and a tie on
14 her hands. (4 RT 563–65). In light of the verdict, the jury clearly did not find Petitioner to be
15 credible. “[U]nder Jackson, the assessment of credibility of witnesses is generally beyond the
16 scope of review.” Schlup v. Delo, 513 U.S. 298, 330 (1995). See also Bruce v. Terhune, 376
17 F.3d 950, 957 (9th Cir. 2004) (“A jury's credibility determinations are . . . entitled to near-total
18 deference under Jackson.”).

19 “When the deference to state court decisions required by § 2254(d) is applied to the state
20 court's already deferential review,” Cavazos, 565 U.S. at 7, the Court finds that the state court's
21 decision denying Petitioner's sufficiency of evidence claim with respect to natural and probable
22 consequence was not contrary to, or an unreasonable application of, clearly established federal
23 law, nor was it based on an unreasonable determination of fact. The decision was not “so lacking
24 in justification that there was an error well understood and comprehended in existing law beyond
25 any possibility for fairminded disagreement.” Richter, 562 U.S. at 103. Accordingly, Petitioner is
26 not entitled to habeas relief on his first claim, and it should be denied.

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C. Malice

In his third claim for relief, Petitioner asserts that there was no substantial evidence of express or implied malice to support a second-degree murder conviction. (ECF No. 1 at 8). Petitioner raised the sufficiency of evidence claim with respect to malice on direct appeal to the California Court of Appeal, Fifth Appellate District, which denied the claim in a reasoned decision. The California Supreme Court summarily denied Petitioner's petition for review. As federal courts review the last reasoned state court opinion, the Court will "look through" the California Supreme Court's summary denial and examine the decision of the California Court of Appeal. See Brumfield, 135 S. Ct. at 2276 (2015); Ylst, 501 U.S. at 806.

In denying the sufficiency of evidence claim with respect to malice, the California Court of Appeal stated:

“Second degree murder is the unlawful killing of a human being with malice aforethought but without the additional elements, such as willfulness, premeditation, and deliberation, that would support a conviction of first degree murder.” (*People v. Knoller* (2007) 41 Cal.4th 139, 151.) “Such malice may be either express or implied.” (Pen.Code, § 188.) “[W]hen it is proved that the defendant assaulted the victim with a deadly weapon in a manner endangering life and resulting in death, ‘ ‘malice is implied from such assault in the absence of justifying or mitigating circumstances.’ ’ [Citation.]” (*People v. Lines* (1975) 13 Cal.3d 500, 506.)

Here, appellant argues that there was insufficient evidence to establish malice, as hitting the victim with his hands and struggling with the victim do not constitute an assault with a deadly weapon in a manner endangering life. In the alternative, appellant argues that striking the victim with a bottle is also insufficient to establish implied malice, as fatal exsanguination is not a foreseeable consequence of the infliction of superficial wounds.

With regard to the first claim, appellant again assumes his own version of events rather than viewing the evidence in the light most favorable to the conviction. Given the direct and circumstantial evidence supporting a finding that appellant struck the victim with a bottle, the prosecution was under no obligation to show that unarmed blows constituted an assault with a deadly weapon in a manner endangering life. Regarding the second claim, appellant's assertion that a glass bottle is not a deadly weapon is contradicted by applicable case law. In *People v. Cordero* (1949) 92 Cal.App.2d 196, 199, the First District Court of Appeal found that a glass bottle, when used as a club, is a deadly weapon. Further, Dr. Shaker's testimony established that exsanguination was a possible consequence of superficial wounds, and that the victim in this case did in fact die from such exsanguination.

Therefore, viewing this direct and circumstantial evidence in the light most favorable to the conviction, we find there was substantial evidence to support a

1 finding that appellant acted with malice, and to support appellant's conviction for
2 second degree murder.

3 Huerta, 2014 WL 5392951, at *2–3.

4 Here, the California Court of Appeal stated that in the absence of justifying or mitigating
5 circumstances, the implied malice element is satisfied when it is proven that the defendant
6 assaulted the victim with a deadly weapon in a manner endangering life and resulting in death. In
7 addition, the California Court of Appeal noted that applicable caselaw has found that a glass
8 bottle, when used as a club, is a deadly weapon. Huerta, 2014 WL 5392951, at *2–3. These
9 determinations are binding on this Court. See Bradshaw v. Richey, 546 U.S. 74, 76 (2005) (“[A]
10 state court's interpretation of state law, including one announced on direct appeal of the
11 challenged conviction, binds a federal court sitting in habeas corpus.”).

12 As discussed above, there was evidence admitted at trial establishing that a scarf was tied
13 around the victim's face and her arms were tied in the front with a necktie. The top of a Cisco
14 bottle and large pieces of broken glass were found in the room where the victim's body was
15 located. There was blood spatter on every wall. A witness testified hearing glass breaking,
16 objects being thrown, and a woman screaming, “[N]o, no, Arturo, please.” A rational trier of fact
17 could conclude that Petitioner assaulted the victim with a deadly weapon in a manner
18 endangering life and resulting in death.

19 “When the deference to state court decisions required by § 2254(d) is applied to the state
20 court's already deferential review,” Cavazos, 565 U.S. at 7, the Court finds that the state court's
21 decision denying Petitioner's sufficiency of evidence claim with respect to malice was not
22 contrary to, or an unreasonable application of, clearly established federal law, nor was it based
23 on an unreasonable determination of fact. The decision was not “so lacking in justification that
24 there was an error well understood and comprehended in existing law beyond any possibility for
25 fairminded disagreement.” Richter, 562 U.S. at 103. Accordingly, Petitioner is not entitled to
26 habeas relief on his third claim, and it should be denied.

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1 VI.

2 RECOMMENDATION

3 Accordingly, the undersigned HEREBY RECOMMENDS that:

4 1. Petitioner's request for a Rhines stay be DENIED;

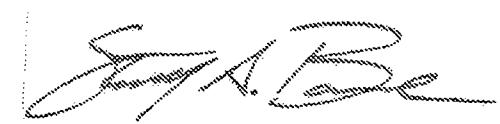
5 2. Petitioner be allowed to proceed with the exhausted claims in his petition; and

6 3. The petition for writ of habeas corpus be DENIED.

7 This Findings and Recommendation is submitted to the assigned United States District
8 Court Judge, pursuant to the provisions of 28 U.S.C. § 636 (b)(1)(B) and Rule 304 of the Local
9 Rules of Practice for the United States District Court, Eastern District of California. Within
10 **THIRTY (30) days** after service of the Findings and Recommendation, any party may file
11 written objections with the court and serve a copy on all parties. Such a document should be
12 captioned "Objections to Magistrate Judge's Findings and Recommendation." Replies to the
13 objections shall be served and filed within fourteen (14) days after service of the objections. The
14 assigned District Judge will then review the Magistrate Judge's ruling pursuant to 28 U.S.C. §
15 636(b)(1)(C). The parties are advised that failure to file objections within the specified time may
16 waive the right to appeal the District Court's order. Wilkerson v. Wheeler, 772 F.3d 834, 839
17 (9th Cir. 2014) (citing Baxter v. Sullivan, 923 F.2d 1391, 1394 (9th Cir. 1991)).

18 IT IS SO ORDERED.

19 Dated: August 18, 2017



20 UNITED STATES MAGISTRATE JUDGE

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Appendix D

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6 **UNITED STATES DISTRICT COURT**

7 EASTERN DISTRICT OF CALIFORNIA
8

9 ARTURO HUERTA,

10 Petitioner,

11 v.

12 RON DAVIS,

13 Respondent.

Case No. 1:15-cv-01827-AWI-SAB-HC

14 ORDER ADOPTING FINDINGS AND
RECOMMENDATION, DENYING
PETITION FOR WRIT OF HABEAS
CORPUS, DIRECTING CLERK OF COURT
TO CLOSE CASE, AND DECLINING TO
ISSUE A CERTIFICATE OF
APPEALABILITY

(ECF No. 26)

15
16 Petitioner is a state prisoner proceeding pro se with a petition for writ of habeas corpus
17 pursuant to 28 U.S.C. § 2254. On August 18, 2017,¹ the Magistrate Judge issued Findings and
18 Recommendation that recommended denying Petitioner's request for a stay and denying the
19 exhausted claims in the petition. (ECF No. 26). This Findings and Recommendation was served
20 on Petitioner and contained notice that any objections were to be filed within thirty (30) days of
21 the date of service of that order. The Court subsequently granted an extension of time to file
22 objections. (ECF No. 28). To date, Petitioner has filed no objections, and the time for doing so
23 has passed.

24 In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C), this Court has conducted
25 a de novo review of the case. Having carefully reviewed the entire file, the Court concludes that
26 the Findings and Recommendation is supported by the record and proper analysis, and there is no
27 need to modify the Findings and Recommendation.

28 ¹ The Findings and Recommendation was signed on August 18, 2017, and docketed on August 21, 2017.

1 A state prisoner seeking a writ of habeas corpus has no absolute entitlement to appeal a
2 district court's denial of his petition, and an appeal is only allowed in certain circumstances.
3 Miller-El v. Cockrell, 537 U.S. 322, 335–36 (2003). The controlling statute in determining
4 whether to issue a certificate of appealability is 28 U.S.C. § 2253, which provides as follows:

5 (a) In a habeas corpus proceeding or a proceeding under section
6 2255 before a district judge, the final order shall be subject to
7 review, on appeal, by the court of appeals for the circuit in which
the proceeding is held.

8 (b) There shall be no right of appeal from a final order in a
9 proceeding to test the validity of a warrant to remove to another
district or place for commitment or trial a person charged with a
criminal offense against the United States, or to test the validity of
such person's detention pending removal proceedings.

10 (c) (1) Unless a circuit justice or judge issues a certificate of
11 appealability, an appeal may not be taken to the court of
12 appeals from—

13 (A) the final order in a habeas corpus proceeding in which
14 the detention complained of arises out of process issued by
a State court; or

15 (B) the final order in a proceeding under section 2255.

16 (2) A certificate of appealability may issue under paragraph (1)
17 only if the applicant has made a substantial showing of the
denial of a constitutional right.

18 (3) The certificate of appealability under paragraph (1) shall
19 indicate which specific issue or issues satisfy the showing
required by paragraph (2).

20 A court should issue a certificate of appealability if “reasonable jurists could debate
21 whether (or, for that matter, agree that) the petition should have been resolved in a different
22 manner or that the issues presented were ‘adequate to deserve encouragement to proceed
23 further.’” Slack v. McDaniel, 529 U.S. 473, 484 (2000) (quoting Barefoot v. Estelle, 463 U.S.
24 880, 893 & n.4 (1983)). In the present case, the Court finds that reasonable jurists would not find
25 the Court's determination that Petitioner's federal habeas corpus petition should be dismissed
26 debatable or wrong, or that Petitioner should be allowed to proceed further. Therefore, the Court
27 declines to issue a certificate of appealability.

28 ///

1 Accordingly, IT IS HEREBY ORDERED that:

2 1. The Findings and Recommendation signed on August 18, 2017 (ECF No. 26) is
3 ADOPTED IN FULL;

4 2. Petitioner's request for a Rhines stay is DENIED;

5 3. The petition for writ of habeas corpus is DENIED;

6 4. The Clerk of Court is directed to CLOSE the case; and

7 5. The Court DECLINES to issue a certificate of appealability.

8
9 IT IS SO ORDERED.

10 Dated: December 4, 2017



A handwritten signature in black ink, appearing to read "J. Michael" or a similar variation, is written over a horizontal line. Below the line, the text "SENIOR DISTRICT JUDGE" is printed in a standard font.

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4 **UNITED STATES DISTRICT COURT**

5 EASTERN DISTRICT OF CALIFORNIA

6 ARTURO HUERTA,

7 Petitioner,

8 v.

9 RON DAVIS,

10 Respondent.

11 Case No. 1:15-cv-01827-AWI-SAB-HC

12 ORDER DENYING PETITIONER'S
13 MOTION FOR RECONSIDERATION

14 (ECF No. 31)

15 Petitioner is a state prisoner who proceeded pro se and in forma pauperis with a § 2254
16 petition for writ of habeas corpus. On December 4, 2017, the Court denied Petitioner's request
17 for a Rhines stay, denied the exhausted claims of the petition, and declined to issue a certificate
18 of appealability. (ECF No. 29). That same day, the Court entered judgment. (ECF No. 30).

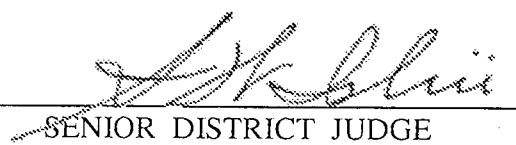
19 On December 14, 2017, the Court received the instant motion for reconsideration with
20 respect to the denial of a certificate of appealability. (ECF No. 31). The motion for
21 reconsideration will be denied as Petitioner has not shown that reconsideration is warranted. See
22 Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co., 571 F.3d 873, 880 (9th Cir. 2009).

23 The Court notes that Petitioner may seek a certificate of appealability from the court of appeals.
24 See Fed. R. App. P. 22(b)(1).

25 Accordingly, IT IS HEREBY ORDERED that Petitioner's motion for reconsideration
26 (Doc. No. 49) is DENIED.

27 IT IS SO ORDERED.

28 Dated: February 6, 2018



29
30 SENIOR DISTRICT JUDGE

Appendix E

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

JAN 16 2018

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

ARTURO HUERTA,

Petitioner-Appellant,

v.

RON DAVIS,

Respondent-Appellee.

No. 17-17529

D.C. No.
1:15-cv-01827-AWI-SAB
Eastern District of California,
Fresno

ORDER

The court's records indicate that this appeal was filed during the pendency of a timely-filed Fed. R. App. P. 4(a)(4) motion. The notice of appeal is therefore ineffective until entry of the order disposing of the last such motion outstanding.

See Fed. R. App. P. 4(a)(4). Accordingly, proceedings in this court shall be held in abeyance pending the district court's resolution of the pending December 14, 2017, motion. *See Leader Nat'l Ins. Co. v. Industrial Indemnity Ins. Co.*, 19 F.3d 444 (9th Cir. 1994).

To appeal the district court's ruling on the post-judgment motion, appellant must file an amended notice of appeal within the time prescribed by Federal Rule of Appellate Procedure 4. *See* Fed. R. App. P. 4(a)(4).

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

FEB 7 2018

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

ARTURO HUERTA,

Petitioner-Appellant,

v.

RON DAVIS,

Respondent-Appellee.

No. 17-17529

D.C. No.
1:15-cv-01827-AWI-SAB
Eastern District of California,
Fresno

ORDER

On January 16, 2018, this court issued an order staying appellate proceedings pending disposition of the motion for reconsideration in the district court. On February 6, 2018, the district court denied the motion for reconsideration. The stay order filed January 16, 2018, is lifted and this appeal shall proceed. This court will rule on the request for a certificate of appealability and any pending motions in a later order.

To appeal the district court's ruling on the post-judgment motion, appellant must file an amended notice of appeal within the time prescribed by Federal Rule of Appellate Procedure 4. *See* Fed. R. App. P. 4(a)(4).

FOR THE COURT:

MOLLY C. DWYER
CLERK OF COURT

By: Karen M. Burton
Deputy Clerk
Ninth Circuit Rule 27-7

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

JUN 22 2018

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

ARTURO HUERTA,

Petitioner-Appellant,

v.

RON DAVIS,

Respondent-Appellee.

No. 17-17529

D.C. No. 1:15-cv-01827-AWI-SAB
Eastern District of California,
Fresno

ORDER

Before: PAEZ and RAWLINSON, Circuit Judges.

This appeal is from the denial of appellant's 28 U.S.C. § 2254 petition and subsequent motion for reconsideration. The request for a certificate of appealability is denied because appellant has not shown that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also* 28 U.S.C. § 2253(c)(2); *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012); *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003); *United States v. Winkles*, 795 F.3d 1134, 1143 (9th Cir. 2015), *cert. denied*, 136 S. Ct. 2462 (2016); *Lynch v. Blodgett*, 999 F.2d 401, 403 (9th Cir. 1993) (order).

Any pending motions are denied as moot.

DENIED.

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