UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

MAY 4 2018

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

ERNESTO AGUIRRE,

Petitioner-Appellant,

v.

STUART SHERMAN, Warden,

Respondent-Appellee.

No. 17-56702

D.C. No.
5:15-cv-02102-DMG-KES
Central District of California,
Riverside

ORDER

Before: BYBEE and BEA, Circuit Judges.

The request for a certificate of appealability (Docket Entry No. 2) is denied because appellant has not made a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see also Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Any pending motions are denied as moot.

DENIED.

APPENDIX

B

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ERNESTO AGUIRRE, Petitioner, v. STU SHERMAN, Warden, Respondent.	Case No. EDCV 15-02102-DMG (KES) ORDER ACCEPTING FINDINGS AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE

Pursuant to 28 U.S.C. § 636, the Court has reviewed the Petition, the other records on file herein, 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 and Recommendation to which objections have been made. The Court accepts the findings and recommendations of the Magistrate Judge.

IT IS THEREFORE ORDERED that Judgment be entered dismissing the Petition with prejudice.

DATED: September 29, 2017

Dolly M. Gee

DOLLY M. GEE
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ERNESTO AGUIRRE,

Plaintiff,

v.

STU SHERMAN, Warden,

Defendant.

Case No. EDCV 15-02102-DMG (KES)

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This Report and Recommendation is submitted to the Honorable Dolly M. Gee, 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.

I.

INTRODUCTION

On October 13, 2015, Petitioner filed a Petition for Writ of Habeas Corpus by a Person in State Custody pursuant to 28 U.S.C. §2254. (Dkt. 1.) Petitioner was convicted of first degree murder and gun enhancements in violation of California Penal Code ("PC") §§ 187(a) and 12022.53. (Id. at 2.)

Concurrently with the filing of the Petition, Petitioner filed a "Notice; Motion for Stay and Abeyance" asking the Court to hold his Petition in abeyance while he

exhausted his state remedies with respect to Grounds One, Two and Five. (Dkt. 2.) After briefing, the Magistrate Judge issued a Report and Recommendation recommending denial of the stay motion. (Dkt. 8.) Before receiving a ruling from the District Judge, Petitioner withdrew his stay motion, advising that his claims had been exhausted by the California Supreme Court's denial of his exhaustion petition on April 20, 2016. (Dkt. 12.) Thereafter, Respondent filed an Answer and Petitioner filed a Traverse. (Dkt. 18, 20.)

Just days after filing his Traverse, Petitioner filed additional briefing. (Dkt. 21, 22.) The Court was unsure whether these filings were intended to be supplemental briefing in support of Petitioner's existing claims or a motion for leave to file an amended federal petition asserting new claims, so the Court sought clarification from Petitioner. (Dkt. 23, 25.) Petitioner responded that his filings should be construed as supplemental briefing in support of his existing claims. (Dkt. 26, 27.) As a result, the Petition is now at issue.

For the reasons discussed below, Petitioner is not entitled to relief and his Petition should be dismissed with prejudice.

II.

FACTUAL BACKGROUND

The underlying facts are taken from the unpublished California Court of Appeal decision on Petitioner's direct appeal. (Lodged Document ["LD"] 5); People v. Aguirre, 2014 Cal. App. Unpub. LEXIS 5013 (Cal. App. 4th Dist. July 17, 2014). Unless rebutted by clear and convincing evidence, these facts may be presumed correct. Tilcock v. Budge, 538 F.3d 1138, 1141 (9th Cir. 2008); 28 U.S.C. § 2254(e)(1).

In early July 2010, victim Daniel Martinez sat with another man and a child inside a vehicle located in a drugstore parking lot in San Bernardino. Witness Abdul Sabr Abdullah saw a man later identified as Martinez walk from this vehicle, which Abdullah identified as a Jeep Cherokee, to a smaller car in the same parking

lot. Abdullah testified he passed within a few feet of Martinez and his car as Abdullah went to pay a bill.

Abdullah testified he next saw a dark-colored Honda pull halfway into the driveway of the parking lot and stop about 20 feet away from Martinez's car. The Honda caught Abdulla's attention because its driver did not park in a marked stall. Instead, Abdullah saw a man, later identified by witness Jane Doe No. 1 as defendant Aguirre, exit the passenger side of the Honda, casually walk up to the car where Martinez had just entered and was partially sitting and shoot Martinez at point-blank range. According to Abdulla, the man was young, about 5' 5" tall and wore a dark-colored baseball hat, a hooded pullover and "baggy" shorts.

Abdullah heard six to nine shots in total. Initially, the man shot Martinez in the upper body, then went to the back of the side window of the car and fired about four more shots at Martinez. When the shooter turned around after the shooting, Abdullah saw he had "kind of a smile on his face." Abdullah next saw the shooter drop a weapon that had not been used in the shooting. After picking up that weapon, Abdullah watched the shooter move quickly to, and enter the passenger side of, the Honda. At that point, Abdullah saw the other man who had been sitting in the Cherokee get out of the car and fire three or four shots at the Honda as it fled the scene.

Mohammed Saheed Khan witnessed the shooting as he sat in his car waiting for Abdulla. Khan saw a black Honda parked. Next, he saw a man wearing a black hat walk up to another car and fire about six or seven shots at the victim. Khan also saw the shooter drop a gun after the shooting and then jump into the Honda. Khan testified a man in a Jeep Cherokee parked nearby got out of his car and started shooting at the Honda as it sped off.

Witness Jose Garibo testified he was at a yard sale on the day of the shooting when he saw a black Honda "just c[o]me out of nowhere" and park across the street. Garibo saw two Hispanic males, both with shaved heads wearing shorts and

white socks, get out of the Honda. Garibo next saw the man who had been sitting in the passenger side of the car take off a black shirt and grab "something" with it and run away.

Jane Doe No. 1, a minor, testified on the day of the shooting she came out of a fast food restaurant and saw a black Honda stopped at a stoplight about 10 feet away from where she came to stand on a street corner. As noted, Jane Doe No. 1 identified Aguirre as the passenger in the Honda. According to this witness, the passenger in the Honda was Hispanic, wore a black shirt and black hat and "had no facial hair," but instead was "shaved."

Jane Doe No. 1 saw the black Honda pull into the drugstore parking lot and then heard gunshots. Next, she saw the Honda "rush" out of the parking lot and stop and/or slow down for a few seconds, again about 10 feet from where she was then standing. Jane Doe No. 1 noticed there were now gunshots in the door on the passenger side of the Honda. Jane Doe No. 1 saw the same passenger in the Honda "looking around" and then the car sped off.

After the shooting, Jane Doe No. 1 picked out Aguirre from a photo lineup as the passenger she saw twice in the black Honda on the day of the shooting. Jane Doe No. 1 testified that she was "positive" that Aguirre was the passenger in that Honda. She based her identification of Aguirre not on the fact he was the only individual wearing a black shirt in the photo lineup, but rather on the fact she recognized his face. Jane Doe No. 1 testified she saw the "front" of the face of the passenger in the black Honda the first time the car was stopped at the stoplight before the shooting and the "side" of his face the second time, when the car stopped and/or slowed down near her immediately after the shooting.

Jane Doe No. 2 testified that sometime between 11:30 a.m. and noon her cousin, defendant Aguirre, and another companion knocked on the front door of her home. Jane Doe No. 2 and her husband lived just a few houses away from where the police found the abandoned black Honda with the bullet holes. Jane Doe No.

2's husband answered the front door. Aguirre was wearing a dark hat. Concerned, Jane Doe No. 2 asked Aguirre what was happening. In response, he told her "I don't want to get you involved." Aguirre also told his cousin that the "hoodas" were either after him or were looking for him. Jane Doe No. 2 explained that the word "hoodas" was slang for "cops."

Jane Doe No. 2 testified Aguirre's companion offered to pay $20 for a ride. Jane Doe No. 2 noticed Aguirre did not have his car, although she knew he had a car. Jane Doe No. 2 did not invite Aguirre and his companion into her home, but instead asked Aguirre if he had any guns on him, to which Aguirre replied, "No." Jane Doe No. 2 saw both men get picked up by a car after Aguirre told her their ride was "on its way." (LD 5 at 2-5.)

III.

PROCEDURAL HISTORY

A jury convicted Petitioner of first degree murder and found true the allegations that Petitioner personally and intentionally used and discharged a firearm, causing great bodily injury and death. (LD 1, 2 Clerk's Transcript ["CT"] 247-250, 254.) The trial court sentenced Petitioner to an aggregate term of 50 years to life in prison. (2 CT 346.)

On direct appeal, Petitioner challenged the trial court's denial of his motion for a new trial, arguing prosecutorial misconduct and insufficiency of the evidence. (LD. 3.) The California Court of Appeal affirmed the judgment. (LD 5.) The California Supreme Court summarily denied review. (LD 7).

Petitioner next filed a habeas petition with the San Bernardino Superior Court raising eight claims including ineffective assistance of counsel ("IAC"), juror misconduct, and insufficiency of the evidence. (LD 8 [attachment].) The Superior Court denied relief in a reasoned decision dated March 15, 2015. (LD 8, Ex. A.) After that denial, Petitioner filed the same claims in the California Supreme Court. (LD 8.) The California Supreme Court summarily denied his petition in September

2015. (LD 9.)

On November 20, 2015, Petitioner filed a habeas petition in the California Court of Appeal raising three grounds corresponding with his federal Grounds One, Two and Five. (LD 11.) The Court of Appeal rejected the petition on procedural grounds and on the merits. (LD 12.) Petitioner then raised these same three claims to the California Supreme Court in a petition filed in January 2016. (LD 13.) The California Supreme Court denied the petition with a citation to In re Clark (1993) 5 Cal.4th 750, 767-769. (LD 14.)

IV.

CLAIMS

Petitioner asserts the following five grounds for relief:

Ground One: Petitioner's Sixth Amendment right to effective assistance of counsel was violated when trial counsel failed to competently advise Petitioner to accept a plea deal (Dkt. 1, Petition at 13-20);

Ground Two: The trial court failed to give a sua sponte jury instruction on in-custody informant testimony as required by PC § 1111.5, thereby lowering the prosecution's burden of proof in violation of Petitioner's rights under the Sixth and Fourteenth Amendments (id. at 20- 26);

Ground Three: The eyewitness testimony at trial was insufficient to prove the murder and gun enhancement convictions beyond a reasonable doubt, violating Petitioner's rights to a fair trial and due process (id. at 26-30);

Ground Four: The prosecutor committed misconduct by eliciting prejudicial, inadmissible testimony (id. at 30-34); and

Ground Five: Appellate counsel rendered ineffective assistance by failing to raise Grounds One-Four on direct appeal (id. at 35-36).

V.

STANDARD OF REVIEW

Under the Antiterrorism and Effective Death Penalty Act of 1996

("AEDPA"):

> 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). The "clearly established Federal law" that controls federal habeas review of state court decisions consists of holdings (as opposed to dicta) of Supreme Court decisions "as of the time of the relevant state-court decision." Williams v. Taylor, 529 U.S. 362, 412 (2000).

Although a particular state court decision may be both "contrary to" and "an unreasonable application of" controlling Supreme Court law, the two phrases have distinct meanings. Williams, 529 U.S. at 391, 413. A state court decision is "contrary to" clearly established federal law if the decision either applies a rule that contradicts the governing Supreme Court law, or reaches a result that differs from the result the Supreme Court reached on "materially indistinguishable" facts. Early v. Packer, 537 U.S. 3, 8 (2002) (per curiam); Williams, 529 U.S. at 405-06.

State court decisions that are not "contrary to" Supreme Court law may be set aside on federal habeas review only "if they are not merely erroneous, but an unreasonable application of clearly established federal law, or based on an unreasonable determination of the facts." Early, 537 U.S. at 11 (citation omitted). A state court decision that correctly identified the governing legal rule may be rejected if it unreasonably applied the rule to the facts of a particular case. Williams, 529 U.S. at 406-10, 413 (e.g., the rejected decision may state the

Strickland standard correctly but apply it unreasonably). However, to obtain federal habeas relief for such an "unreasonable application," a petitioner must show that the state court's application of Supreme Court law was "objectively unreasonable." Woodford v. Visciotti, 537 U.S. 19, 24-27 (2002); Williams, 529 U.S. at 413. An "unreasonable application" is different from an erroneous or incorrect one. Williams, 529 U.S. at 409-10; Woodford, 537 U.S. at 25.

Respondent argues that Grounds One, Two and Five are procedurally barred. If they are not, then the California Court of Appeal's denial (LD 12) would be the relevant state court adjudication on the merits for purposes of applying AEDPA's standard of review. Ylst v. Nunnemaker, 501 U.S. 797, 803 (1991) ("Where there has been one reasoned state judgment rejecting a federal claim, later unexplained orders upholding that judgment or rejecting the same claim rest upon the same ground.").

Ground Three (concerning the sufficiency of the eyewitness testimony to support the verdict) was raised by Petitioner's motion for a new trial and therefore addressed on direct appeal. (LD 5 at 18-19.) So too was Ground Four challenging the prosecutor's having eliciting certain statements from a jailhouse informant on direct examination. (LD 5 at 13-17.) As a result, the California Court of Appeal's decision on direct appeal is the relevant state court adjudication on the merits for those two claims. Berghuis v. Thompkins, 560 U.S. 370, 380 (2010) (where state supreme court denied discretionary review of Court of Appeal's decision on direct appeal, the appellate decision on direct appeal is the relevant state court decision for purposes of the AEDPA standard of review).

VI.

DISCUSSION

A. Grounds One, Two and Five are Procedurally Defaulted.

1. Relevant State Court Proceedings.

During state habeas proceedings, the California Court of Appeal determined

that all three of these claims were "barred as untimely" citing In re Swain (1949) 34 Cal.2d 300, 302 and In re Reno (2012) 55 Cal.4th 428, 459. (LD 12.) The Court of Appeal explained that his petition had not been filed until "nearly three years after he was sentenced and knew or should have known of the claims raised ... without any adequate explanation for the delay, and without any showing of a fundamental miscarriage of justice ...." (Id.) As for Ground Two raising instructional error, the Court of Appeal found that a second procedural bar also applied, because "it could have been raised on appeal but was not" citing In re Dixon (1953) 41 Cal.2d 756, 759. (Id.)

The California Supreme Court then rejected all three of these claims with a citation to In re Clark (1993) 5 Cal.4th 750, 767-769. (LD 14.)

2. Applicable Law.

On federal habeas review, the Court will not review a claim on its merits if it is procedurally barred, that is, where a state court dismissed the claim on an "adequate and independent" state law ground. Walker v. Martin, 562 U.S. 307, 311 (2011); Coleman v. Thompson, 501 U.S. 722, 729 (1991). In order for a claim to be procedurally defaulted for federal habeas corpus purposes, the opinion on the last state court rendering a judgment in the case must "clearly and expressly" state that its judgment rests on a state procedural bar. Harris v. Reed, 489 U.S. 255, 263 (1989). Further, the application of the state procedural rule must provide "an adequate and independent state law basis" on which the state court can deny relief. Coleman, 501 U.S. at 729-30.

3. Untimeliness, Dixon, and Clark are All Adequate and Independent State Law Grounds to Deny Relief.

a. The Untimeliness Bar.

California does not employ fixed statutory deadlines to determine the timeliness of a state prisoner's petition for habeas corpus. Instead, California directs petitioners to file known claims "as promptly as the circumstances allow." Walker,

562 U.S. at 310. A prisoner must seek habeas relief without "substantial delay" as "measured from the time the petitioner or counsel knew, or reasonably should have known, of the information offered in support of the claim and the legal basis for the claim." Id. at 307, citing In re Robbins, 18 Cal. 4th 770, 77 (1998). If a petition is filed after substantial delay, the petitioner must explain the delay. In re Swain, 34 Cal. 2d at 302 ("[I]t is the practice of this court to require that one who belatedly presents a collateral attack such as this explain the delay in raising the question.") Similarly, Reno explains that a "criminal defendant mounting a collateral attack on a final judgment of conviction must do so in a timely manner. ... [T]he filing of untimely claims without any serious attempt at justification is an example of abusive writ practice." In re Reno (2012) 55 Cal.4th 428, 459-60.

By citing these authorities and expressly finding that his petition was "barred as untimely," the Court of Appeal invoked California's timeliness rules. (LD 12.) "California's timeliness requirement qualifies as an independent state ground adequate to bar habeas corpus relief in federal court." Walker, 562 U.S. at 308.

b. The Dixon Bar.

The California Court of Appeal also denied Petitioner's instructional error claim with a citation to Dixon. (LD 12.) The general rule in California is that a defendant procedurally defaults a claim raised for the first time on state collateral review if he could have raised it earlier on direct appeal, because "habeas corpus cannot serve as a substitute for an appeal." In re Dixon, 41 Cal. 2d at 759. California's Dixon bar is both independent and adequate. Johnson v. Lee, – U.S. –, 136 S. Ct. 1802, 1806 (2016) (holding the Dixon bar "qualifies as adequate to bar federal habeas review").

c. The Clark Bar.

The California Supreme Court denied Grounds One, Two and Five by citing In re Clark, pages 767-69. (LD 14.) California courts have long held that claims will not be considered when presented to a state court if they could have been

presented to that court in a prior petition. In re Clark, 5 Cal. 4th at 767-69. To determine whether the Clark bar on successive/abusive petitions is adequate, district courts adhere to the following analytic framework:

> Once the state has adequately pled the existence of an independent and adequate state procedural ground as an affirmative defense, the burden to place that defense in issue shifts to the Petitioner. The Petitioner may satisfy this burden by asserting specific factual allegations that demonstrate the inadequacy of the state procedure, including citation to authority demonstrating inconsistent application of the rule. Once having done so, however, the ultimate burden is the state's.

Bennett v. Mueller, 322 F.3d 573, 585-86 (9th Cir. 2003).

Here, Respondent satisfied his initial burden by noting the California Supreme Court's rejection of a petition presenting Grounds One, Two and Five with a citation to Clark at pages 767-69 (LD 14) and pleading that the Clark bar is an independent and adequate state procedural ground. (Dkt. 18 at 2, § II.) The "burden to place that defense in issue" then shifted to Petitioner, but Petitioner did not meet it because nothing in his briefing puts the Clark bar's adequacy in issue.[1] Numerous other courts have concluded that the Clark bar against successive

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[1] Petitioner argues that his claims are not procedurally barred because Respondent's Answer is based on "conclusions of law, [as] opposed to facts." (Dkt. 20 at 2.) Petitioner also argues that this Court should reach the merits of his claims, citing Bennett (which this Court understands as an assertion that he can show "cause" and "prejudice" sufficient to overcome a procedural bar). (Dkt. 22 at 4.) Plaintiff also cites Park v. California, 202 F.3d 1146, 1151-1152 (2000). (Id.) Park held that "at the time of Park's habeas petition, the California Supreme Court's terse denial based on Dixon did not identify" an independent state procedural rule." Park, 202 F.3d at 1153. Park was overruled by the U.S. Supreme Court which found in 2016 that Dixon is an adequate and independent state procedural rule. Johnson, 136 S. Ct. at 1806.

petitions is adequate. See, e.g., Flowers v. Foulk, 2016 U.S. Dist. LEXIS 120101, at *9 (N.D. Cal. Sept. 6, 2016) ("California's bar against successive petitions is also adequate and independent."); Rutledge v. Katavich, 2012 U.S. Dist. LEXIS 78036, at *15 (N.D. Cal. June 5, 2012) (dismissing claim as procedurally barred due to California Supreme Court's rejection of petition in 2011 with citation to Clark); Arroyo v. Curry, 2009 U.S. Dist. LEXIS 25896, at *16 (N.D. Cal. Mar. 17, 2009) (finding "that Respondent has satisfactorily established that California's procedural bar against successive petitions as applied in practice was an adequate state ground for rejecting Petitioner's second habeas petition" in 2006). This Court concludes that Respondent has satisfied his burden to show that the Clark rule against successive/abusive petitions is adequate.

4. Cause and Prejudice.

a. Rules.

When a respondent shows that a claim is procedurally barred, the burden of proof shifts to the habeas petitioner to show "cause" for the default and actual "prejudice" resulting from the alleged constitutional violation. Carter v. Giubino, 385 F.3d 1194, 1198 (9th Cir. 2004) (citing Bennett, 322 F.3d at 586). Cause for a procedural default exists where "something external to the petitioner, something that cannot fairly be attributed to him impeded his efforts to comply with the State's procedural rule." Maples v. Thomas, – U.S. –, 132 S. Ct. 912, 922 (2012); Blake v. Baker, 745 F.3d 977, 982, 984 (9th Cir. 2014) (holding "good cause" to obtain a stay turns on whether the petitioner can set forth a reasonable excuse, supported by sufficient evidence, to justify failure to exhaust; obtaining a stay does not require "any stronger showing of cause" than that sufficient to excuse a procedural default). In extraordinary cases, a federal habeas court may grant a writ even in the absence of cause if the defendant was a "victim of a fundamental miscarriage of justice." Murray v. Carrier, 477 U.S. 478, 495-96 (1986). An extraordinary case is one in which a constitutional violation probably has resulted in the conviction of one who

is actually innocent. Id. at 496.

To show prejudice sufficient to excuse a procedural default, the petitioner "must establish not merely that the alleged error created a possibility of prejudice, but that it worked to his actual and substantial disadvantage, infecting the entire proceeding with constitutional error." Stoklev v. Ryan, 705 F.3d 401, 403 (9th Cir. 2012) (citing Brecht v. Abrahamson, 507 U.S. 619, 623 (1993) (prejudice requires a showing that the error has a "substantial and injurious effect" on the verdict)). Stated differently, the petitioner must show there is "a reasonable probability" that the jury would have reached a different result but for the error. Clark v. Brown, 450 F.3d 898, 916 (9th Cir. 2006) (interpreting Brecht).

b. Analysis.

Petitioner offers two "causes" for his delayed filing of Grounds One, Two and Five. First, he argues that "new legal theories" excuse his filing delays. (Dkt. 22 at 4.) Ground One alleging IAC during the plea bargaining process relies on Lafler v. Cooper, 566 US 156 (2012), a case decided on March 21, 2012. While Lafler was decided after Petitioner's trial, it was decided before Petitioner's opening appellate brief dated June 28, 2013. (LD 3.) Ground Two asserts that the trial court failed to sua sponte instruct the jury the concerning in-custody informant testimony as required by PC § 1111.5. Under that statute, a jury may not base a conviction on "the uncorroborated testimony of an in-custody informant." PC § 1111.5(a). Section 11115 became effective on January 1, 2012. Id. Petitioner's trial began on January 12, 2012 (1 CT 145), such that the timing of PC § 1111.5's enactment cannot have caused Petitioner's failure to present this claim on direct appeal. Finally, Ground Five is an IAC claim, which does not rely on a new legal theory.

Second, in response to the Dixon and Clark bars, Petitioner asserts as "cause" the deficient performance of his appellate counsel who he contends should have raised these claims on direct appeal. (LD 11; Dkt. 1 at 35.) "Cause" is established

when a petitioner's post-conviction counsel is ineffective under the standards of Strickland v. Washington, 466 U.S. 668 (1984). Martinez v. Ryan, – U.S. –, 132 S. Ct. 1309, 1317-18 (2012).

Under Strickland, a petitioner claiming ineffective assistance of counsel must show that counsel's performance was deficient and that the deficient performance prejudiced his defense. "Deficient performance" means unreasonable representation falling below professional norms prevailing at the time of trial. Id. at 688-89. To show deficient performance, a petitioner must overcome a "strong presumption" that his lawyer "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. To meet his burden of showing the distinctive kind of "prejudice" required by Strickland, a petitioner must affirmatively "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694.

The Strickland standard also applies to claims regarding the assistance of appellate counsel. Smith v. Robbins, 528 U.S. 259, 285 (2000). However, appellate counsel has no duty to raise every non-frivolous issue requested by a criminal defendant. Jones v. Barnes, 463 U.S. 745, 751 (1983). Strickland's "two prongs partially overlap when evaluating the performance of appellate counsel. In many instances, appellate counsel will fail to raise an issue because she foresees little or no likelihood of success on that issue; indeed, the weeding out of weaker issues is widely recognized as one of the hallmarks of effective appellate advocacy." Miller v. Keeney, 882 F.2d 1428, 1434 (9th Cir. 1989); see also Wildman v. Johnson, 261 F.3d 832, 840-42 (9th Cir. 2001) (appellate counsel's failure to raise issues on direct appeal does not constitute ineffective assistance of counsel when appeal would not have provided grounds for reversal).

For the reasons discussed by the California Court of Appeal, the procedurally defaulted claims lack merit. (LD 5.) Thus, appellate counsel was not

constitutionally ineffective for failing to raise them on direct appeal, and Petitioner has failed to establish cause or prejudice sufficient to overcome a procedural bar.

Third and finally, Petitioner argues that he does not need to show "cause" because he is "factually innocent." (Dkt. 22 at 4.) He argues that the jury wrongly concluded that he was the shooter based on the erroneous eyewitness testimony of Jane Doe #1. Petitioner's Ground Three attacking the reliability of Jane Doe #1's identification is discussed at Section IV.B below, and this Court finds no constitutional error. Thus, Petitioner has failed to show that his is an "extraordinary case" in which a constitutional violation has probably resulted in the conviction of one who is actually innocent.

In sum, the California Supreme Court rejected Grounds One, Two and Five citing an independent and adequate state procedural rule, and Petitioner has failed to overcome that procedural bar by showing "cause" and "prejudice" or a fundamental miscarriage of justice. This Court, therefore, will not reach the merits of procedurally defaulted Grounds One, Two and Five.

B. Ground Three: Insufficiency of the Evidence.

Petitioner argues that Jane Doe #1's eyewitness testimony was (1) inadmissible, or (2) too unreliable to support his conviction. With regard to admissibility, he also argues that Jane Doe #1 only picked him out of the lineup because he was wearing a black shirt, the same color shirt that she and other witnesses had seen the shooter wearing. (Dkt. 1 at 27, citing 1 CT 45 and 2 RT 368-69, 376, 378.) With regard to reliability, Petitioner argues that Jane Doe #1 testified "that she had only seen the shooter from the bridge of his nose to his chin at a profile angle."[2] (Dkt. 1 at 26, citing 1 CT 43.) Second, Jane Doe #1 testified that the

[2] In fact, Jane Doe #1 testified that when she saw him drive past her before the shooting, she did see the front of his face and that Petitioner's forehead and eyes were covered by a baseball cap. (2 RT 350.) Jane Doe #1also testified that when she saw him a second time, after the shooting, she saw only Petitioner's profile. (2 RT 350.)

shooter did not have a mustache (citing 1 CT 46), contrary to Detective Flesher's testimony that four days after the shooting, Petitioner had a mustache (citing 4 RT 665) and Jane Doe #2's testimony that on the day of the shooting, Petitioner had a mustache (citing 2 CT 412; 3 RT 438-39; 4 RT 665-66, 674). (Dkt. 1 at 26-27.)

1. Respondent has Not Established that Petitioner's Admissibility Claim is Procedurally Defaulted.

Respondent argues that Petitioner's admissibility claim was "not presented to the state courts," but Respondent does not challenge it as unexhausted. (Dkt. 18-1 at 12.)

Respondent next argues that Petitioner's admissibility claim could be "liberally construed" as part of "the second of the two claims exhausted on direct appeal," but even then, it would be "procedurally defaulted." (Id.) This argument fails, because Petitioner's direct appeal was not denied on procedural grounds. (LD 5.)

On direct appeal, Petitioner argued that the trial court should have granted his motion for a new trial, because conflicts between Jane Doe #1's testimony and the accounts of other witnesses rendered her identification too unreliable to support the jury's verdict. (LD 3.) Nothing in Petitioner's briefing on direct appeal argues that the photographic array from which Jane Doe #1 picked out Petitioner was unduly suggestive, and thus inadmissible, because only Petitioner was pictured wearing a black shirt. (LD 3, 6.)

Petitioner did, however, raise the constitutional issue of the admissibility of Jane Doe #1's testimony based on an allegedly suggestive photographic lineup in his ***first*** state habeas petition. (LD 8 at 34.) While the San Bernardino Superior Court wrote a reasoned decision denying this petition (LD 8, Ex. A), that decision does not address whether or not the photographic array was unduly suggestive. Rather, the Superior Court dismissed Petitioner's entire "insufficiency of the evidence" claim citing People v. Duvall, 9 Cal.4th 646, 474, and saying, "Petitioner

is obligated to support his petition with reasonably available documentary evidence. ... [Petitioner] provided the court only with selected pages of the transcripts or quoted certain passages [which] ... provides a sufficient basis for the court to deny the petition." (LD 8, Ex. A, p. 3.)

The Ninth Circuit has found that a denial with citation to page 474 of Duvall constitutes an "independent and adequate state" procedural ground for denying habeas claims. Valerio v. Crawford, 306 F.3d 742, 775-76 (9th Circ. 2002) (en banc). Respondent, however, while raising procedural default as an affirmative defense, failed to analyze the denial of Petitioner's admissibility claim under Duvall. The Court, therefore, finds that Respondent has failed to establish the affirmative defense of procedural default, and the Court will address the merits of Petitioner's admissibility claims de novo. Chaker v. Crogan, 428 F.3d 1215, 1220-21 (9th Cir. 2005) (applying de novo review where there is no state court decision on the merits and the state waived its procedural default defense).

2. The Court of Appeal's Decision.

[T]he record shows the trial court independently weighed the evidence, including the testimony proffered by Jane Doe No. 1, and found it sufficiently credible to support the jury's verdict. Indeed, the record shows that in support of the verdict the court found Jane Doe No. 1 positively identified [Petitioner] as the passenger in the black Honda that was involved in the shooting; that in making this identification, Jane Doe No. 1 used a diagram and a photograph to show where "she was and where the shooter was on two separate occasions when she made an identification of the shooter, showing her line of sight, showing the distance, which was a relatively close distance of about 10 to 12 feet," and the views of the shooter's face in both instances. Thus, the court concluded that based on this testimony alone, there was sufficient, credible evidence to support the verdict.

The trial court also relied on the testimony of Jane Doe No. 2, [Petitioner]'s cousin. It noted her testimony, "in conjunction with the other evidence, in terms of

where, the description of the vehicle that the shooter was in, the location, the direction that the shooter fled in the vehicle, and then a vehicle and the defendant arriving at a location and arriving at the defendant's cousin's house, and statements made by the defendant at his cousin's house, certainly supported an inference that he was at least involved in the shooting incident."

The court also found the testimony of witnesses Abdullah and Khan persuasive in denying [Petitioner]'s new trial motion. Significantly, the court noted, and the record shows, that although neither witness made an actual identification of Aguirre as the shooter, "their testimony does support the identification that was made [by Jane Doe No. 1], and supports the inference to be drawn from Jane Doe No. 2's testimony." That is, both Abdullah and Khan testified they saw the passenger in the black Honda got out of that car after it came to an abrupt stop in the drugstore parking lot, walk up to the victim as he sat in his own car, and fire multiple shots at point-blank range at the victim.

We thus conclude the trial court did not abuse its discretion, much less clearly and unmistakably (see People v. Davis (1995) 10 Cal.4th 463, 524), when it found "that there is, having initially weighed the evidence and independently considering the evidence after independently weighing it," "substantial evidence to support the jury's verdict. And if it were a court trial, the Court would be compelled to reach the same conclusion as the jury." (LD 5 at 18-19.)

3. Applicable Law.

a. Due process and the admissibility of eyewitness identifications.

Due process prohibits the admission of eyewitness identifications obtained after police have arranged identification procedures so impermissibly suggestive as to give rise to a "very substantial likelihood of irreparable misidentification." Perry v. New Hampshire, 565 U.S. 228, 232 (2012); see also Simmons v. United States, 390 U.S. 377, 384 (1968). Courts employ a two-part analysis to evaluate whether an identification has been irreparably tainted by an impermissibly suggestive

pretrial identification procedure. The first step is to determine whether the pretrial identification was unduly suggestive. Simmons, 390 U.S. at 384. This may occur when a photographic identification procedure "emphasize[s] the focus upon a single individual," thereby increasing the likelihood of misidentification. United States v. Bagley, 772 F.2d 482, 493 (9th Cir. 1985). Whether an identification procedure was unduly suggestive is a fact-specific determination, which may involve consideration of the size of the array, the manner of its presentation by the officers, and the details of the photographs themselves. Id.

If the identification procedure was unduly suggestive, the second step requires a determination of whether the totality of the circumstances surrounding the eyewitness's identification indicates that the identification was nonetheless reliable. Neil v. Biggers, 409 U.S. 188, 199 (1972); Simmons, 390 U.S. at 383. Factors considered in assessing reliability include: (1) the opportunity to view the criminal at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the prior description; (4) the witness's level of certainty at the confrontation; and (5) the length of time between the crime and the identification. Neil, 409 U.S. at 199-200. Where "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." Perry, 565 U.S. at 232.

b. Sufficiency of the Evidence.

The Due Process Clause of the Fourteenth Amendment guarantees that a criminal defendant may be convicted only "upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In re Winship, 397 U.S. 358, 364 (1970). A habeas petitioner challenging the sufficiency of the evidence to support his or her state criminal conviction may not obtain relief if "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a

reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319 (1979). Sufficiency claims are judged by the elements defined by state law. Id. at 324, n. 16.

A federal court reviewing collaterally a state court conviction does not determine whether it is satisfied that the evidence established guilt beyond a reasonable doubt. Payne v. Borg, 982 F.2d 335, 338 (9th Cir. 1992). The federal court "determines only whether, 'after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crimes beyond a reasonable doubt.'" See id., quoting Jackson, 443 U.S. at 319. Only where no rational trier of fact could have found proof of guilt beyond a reasonable doubt may the writ be granted. Jackson, 443 U.S. at 324; Payne, 982 F.2d at 338.

If confronted by a record that supports conflicting inferences, a federal habeas court "must presume — even if it does not affirmatively appear in the record — that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution." Jackson, 443 U.S. at 326. A jury's credibility determinations are therefore entitled to near-total deference. Bruce v. Terhune, 376 F.3d 950, 957 (9th Cir. 2004). Except in the most exceptional of circumstances, Jackson does not permit a federal court to revisit credibility determinations. Id. at 957-958.

After the enactment of the AEDPA, a federal habeas court must apply the standards of Jackson with an additional layer of deference. Juan H., 408 F.3d at 1274. Generally, a federal habeas court must ask whether the operative state court decision reflected an unreasonable application of Jackson to the facts of the case. Id. at 1275.

In Cavazos, v. Smith, 565 U.S. 1, 2 (2011), the United States Supreme Court further explained the highly deferential standard of review in habeas proceedings, by noting that Jackson

> makes clear that it is the responsibility of the jury — not the court —

> to decide what conclusions should be drawn from evidence admitted at trial. A reviewing court may set aside the jury's verdict on the ground of insufficient evidence only if no rational trier of fact could have agreed with the jury. What is 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." Renico v. Lett, 559 U.S. 766, 772,130 S. Ct. 1855, 1862, 176 L. Ed. 2d 678 (2010) (internal quotation marks omitted).
>
> Because rational people can sometimes disagree, the inevitable consequence of this settled law is that judges will sometimes encounter convictions that they believe to be mistaken, but that they must nonetheless uphold.

Cavazos, 565 U.S. at 2.

4. Analysis.

a. The Admission of Jane Doe #1's Identification Based on the Photographic Array Did Not Violate Due Process.

Petitioner argues that the "six-pack" photographic array used by the police was unduly suggestive, because the shooter had been described by several witnesses as wearing a black T-shirt, and Petitioner's photograph was the only one depicting a man wearing a black T-shirt. (Dkt. 1 at 29.)

1. Relevant Trial Court Proceedings.

A number of witnesses testified concerning black shirts. Jane Doe #1 testified at the preliminary hearing and at trial that the shooter was wearing a black shirt. (2 RT 343.) During her police interview, Jane Doe #1 described the passenger as follows: "he had a black hat and a black shirt and he was like, umm, Hispanic ... no sideburns, no mustache, no beard or goatee." (2 RT 365, 366.) Jane Doe #2,

Petitioner's cousin who saw him shortly after the murder, told detectives that Petitioner was wearing a black shirt (2 CT 411; 4 RT 705), although she did not recall the color of Petitioner's shirt at trial. (3 RT 435.) Jane Does # #3, 4, and 5 also confirmed in their police interviews and at trial that the passenger was wearing a black shirt. (#3: 2 CT 440, 4 RT 741; #4: 2 CT 454, 4 RT 831; #5: 2 CT 463, 4 RT 793.) Mr. Abdullah told detectives that the passenger was wearing a black hooded pullover or jersey. (2 CT 373; 2 RT 204.) Mr. Garibo, a witness to Petitioner and the driver of the black Honda leaving the car in a neighborhood near Jane Doe #2's house, testified that he saw Petitioner take off a black shirt. (2 RT 293.) The only witness who contradicted this testimony is Mr. Khan, who told detectives that the passenger may have been wearing a green or blue shirt. (4 RT 707.)

A few hours after the shooting, a photographic array was shown to Jane Doe #1. The photo array included pictures of six suspects. (2 RT 367.) Petitioner was the only suspect wearing a black shirt in the photos. (2 RT 368.) Jane Doe #1 identified Petitioner as the passenger in the black Honda, stating, "from the side it, it looks like it from — he would look like it from the side ... just from the side of the face, that's how I recognize him." (2 RT 367, 377.) At trial, when questioned about the photo identification she gave, Jane Doe #1 testified that she had no problem identifying that passenger, and that she did not identify him based on the black shirt he was wearing in the photograph. Rather, her identification was based on his "face structure." (2 RT 369.) She testified at trial that she was still positive she had identified Petitioner correctly. (2 RT 377-78.)

The same photographic array was also shown to Jane Does # #3, 4, and 5. Jane Does # #3 and 4 could not positively identify any of the individuals in the photo array. (2 CT 446; 2 CT 457.) Jane Doe #5 also could not identify the passenger, but stated that a different individual in the photo array, not Petitioner, looked similar to the passenger. (2 RT 790-91; 2 CT 479.) At trial, Detective

O'Neal testified that Jane Doe #5 was only noting who looked similar to the suspect, and that she did not seem certain about her identification. (4 RT 808-10.) Detective O'Neal did not include Jane Doe #5's identification in his report for that reason. (4 RT 808.) Detective O'Neal further testified that if Jane Doe #5 had identified Petitioner instead, he would have put her identification in his report. (4 RT 809.)

2. Two-Step Analysis.

The Ninth Circuit has consistently declined to hold that minor differences between suspects' photographs render a lineup impermissibly suggestive. In Mitchell v. Goldsmith, 878 F.2d 319, 323 (9th Cir. 1989), the Ninth Circuit rejected a habeas petitioner's claim that pretrial identification procedures were unduly suggestive where he was "the only person in the lineup who was photographed against a blue background; four of the seven individuals in the photographic lineup had lighter complexions than his; and [his] photo was the only photo with a 1981 date." Likewise, in United States v. Collins, 559 F.2d 561, 563 (9th Cir. 1977), the court rejected the same argument where the petitioner claimed that "(1) three of the six Negro male individuals depicted appeared to be significantly younger than [the petitioner]; (2) only [the petitioner] and two others appear to have afro-style haircuts; and (3) only [the petitioner] appears to have a beard." See also United States v. Burdeau, 168 F.3d 352, 357 (9th Cir. 1999) (finding photo array not suggestive where defendant's picture "was placed in the center of the array, was darker than the rest, and was the only one in which the eyes were closed," and citing cases for proposition that "such insubstantial differences ... do not in themselves create an impermissible suggestion that the defendant is the offender"); United States v. Johnson, 820 F.2d 1065, 1073 (9th Cir. 1987) (holding photographic array not unduly suggestive where defendant's photograph was hazier than others); United States v. Sambrano, 505 F.2d 284, 286 (9th Cir. 1974) (determining photographic array not unduly suggestive where defendant's

photograph was darker and clearer than others); United States v. Lincoln, 494 F.2d 833, 839 (9th Cir. 1974) (finding photographic array not unduly suggestive where defendant's color driver's license photograph was shown with black and white copies of driver's licenses or other types of photos).

With regard to shirt color, in United States ex rel. Cannon v. Smith, 388 F.Supp. 1201 (W.D.N.Y. 1975), a rape victim was unable to describe her attacker beyond "he had a green shirt on, dark pants and black shoes. He was a male Negro. He was on the thin side." Id. at 1204, n. 4. Four days after the attack, she viewed a lineup and identified the petitioner as her attacker, saying that she recognized his face despite her earlier statement that she never saw his face. The petitioner was wearing a green shirt at the lineup, because he had been instructed to do so by the arresting officer. Id. at 1202. Of the five men in the lineup, one other was also wearing green. Id. at 1203. At trial, the officer present at the lineup testified to the victim's identification, but the victim never testified in court. Id. On these facts, the district court concluded "that the possibility of irreparable misidentification was so great that it was error to admit any testimony with regard to identification at all." Id. at 1204.

Other than Canon, the holding of which turned on the totality of the circumstances surrounding the identification, this Court's research has not located any other federal case finding a photographic array unduly suggestive, even in part, because the petitioner was wearing a color of clothing that matched witness descriptions. See, e.g., Coleman v. Alabama, 399 U.S. 1, 6 (1970) (finding "lineup" identification not unduly suggestive where only petitioner was wearing a hat, and one of the attackers had worn a hat); Caro v. Harman, 628 F. App'x 545, 546 (9th Cir. 2016) (finding "show-up" identification not unduly suggestive where only petitioner was wearing a blue sweater); Barker v. Galaza, 113 F. App'x 754, 755 (9th Cir. 2004) ("[P]hoto lineup was not impermissibly suggestive because each witness testified that he chose Barker based on his memory of him during the

robbery, not because the collar of his shirt matched one witness's description of the robber's shirt."); Brookfield v. Yates, 2013 U.S. Dist. LEXIS 174246, at *87-89 (E.D. Cal. Dec. 11, 2013) (finding photo array admissible where suspect was seen wearing a red shirt and the petitioner alone was pictured wearing a shirt with a red collar); Williams v. Biter, 2012 U.S. Dist. LEXIS 186840, at *36-43 (C.D. Cal. Dec. 10, 2012) (finding photo array admissible where suspect was seen wearing a Hawaiian shirt and the petitioner alone was pictured wearing a Hawaiian shirt); Renteria v. Curry, 2009 U.S. Dist. LEXIS 84838, at *19-25 (E.D. Cal. Sept. 16, 2009) (finding photo array admissible where suspect was seen wearing a hoodie and the petitioner alone was pictured wearing a hoodie).

Other circuit courts have declined to find photographic arrays unduly suggestive because one suspect is wearing a unique color. See, e.g., United States ex rel. Anderson v. Mancusi, 413 F.2d 1012, 1013 (2d Cir. 1969) (finding "show-up" identification not unduly suggestive where victim described suspect as wearing a red shirt and the petitioner was wearing a red shirt); United States v. Dowling, 855 F.2d 114, 117 (3d Cir. 1988) (finding photo array was not unduly suggestive when the defendant was the only one wearing a red shirt because all individuals "were reasonably comparable in dress and appearance") (affirmed without discussion of array at 493 U.S. 342 (1990)); United States v. Little, 1994 U.S. App. LEXIS 2617, at *10-11 (4th Cir. Feb. 16, 1994) (finding photo array admissible where petitioner alone was pictured wearing an orange shirt, a color associated with prison garb).

Here, black T-shirts are very common. Nothing in the record suggests that the police prompted Petitioner to wear a black T-shirt when his photograph was taken for inclusion in the array. It seems unlikely that Jane Doe #1 would have chosen Petitioner's photograph based on his shirt, when she expressly testified that she identified Petitioner based on his "face structure" (2 RT 369), and she surely knew that many men own black T-shirts. Petitioner has not met his burden of

demonstrating that the photographic array was unduly suggestive.

Even if Petitioner's claim had not failed at step one, it would fail at step two. Most of the Neil factors point to the reliability of Jane Doe #1's identification. First, she had the opportunity to view the passenger of the Honda (i.e., the shooter) twice, once before and once after the shooting took place. (2 RT 347-351.) Second, she was paying attention, because the Honda was driving fast and had bullet holes in the passenger-side door the second time it passed her. (2 RT 349.) Third, she described the suspect prior to viewing the photo array as clean-shaven and Hispanic. (2 RT 365, 366.) While she chose a picture of Petitioner with some facial hair, Petitioner is Hispanic.[3] Fourth, Jane Doe #1 testified that she had no problems identifying Petitioner as the passenger in the black Honda (2 RT 369), and that she was still positive of her identification at trial. (2 RT 377-78.) She selected Petitioner's photograph only a couple of hours after the shooting. (2 RT 363-69.)

For all of these reasons, the trial court did not commit constitutional error when it admitted testimony concerning Jane Doe #1's identification of Petitioner from the photographic six-pack.

b. Jane Doe #1's Identification of Petitioner as the Shooter Was Sufficient to Support Petitioner's Conviction.

Petitioner next urges that Jane Doe #1's identification of him was so unreliable that the jury, as a matter of law, was obligated to discount it. During her interview with police the day of the shooting, Jane Doe #1 stated that the shooter was clean-shaven, and that she only saw the shooter's face from below the bridge of his nose, due to a hat covering the upper part of his face. Jane Doe #1 testified to the same during trial. (2 RT 361-62.) Jane Doe #1 also testified that she only got a

[3] Upon viewing him at trial, Detective Flesher, one of the officers that arrested Petitioner, testified that Petitioner's mustache had grown out since the day he was arrested, four days after the shooting. (4 RT 658, 665-66, 674.)

quick glance of the shooter's face, no more than one or two seconds long. (2 RT 350, 351.)

The California Court of Appeal did not unreasonably apply the Jackson standard. Jane Doe #1 consistently identified Petitioner as the passenger in the black Honda both during a police interview hours after seeing him and at trial. (2 RT 369.) She was able to annotate photographs to indicate where she was standing in relation to the Honda both times she saw Petitioner. (2 RT 359-61.) She was able to describe all of the angles from which she was able to view Petitioner. (2 RT 349, 350.) She testified that she had no problems identifying Petitioner in the photo array due to his facial structure, which is not inconsistent with her testimony that she did not see his forehead. (2 RT 365, 369.) She was still confident at trial that her identification was correct. (2 RT 369.) Her testimony was bolstered by the testimonies of Mr. Adbullah and Mr. Khan. Their accounts of where the black Honda entered and left the crime scene match Jane Doe #1's account of when and where she saw Petitioner. (2 RT 347-49; 2 RT 197-203; 2 RT 226-29.) A reasonable juror could have found Jane Doe #1's identification sufficient to convict Petitioner.

Petitioner is not entitled to habeas relief on Ground Three.

C. Ground Four: Prosecutorial Misconduct.

1. Trial Court Proceedings.

Shortly before trial commenced, the People identified Jason Atkins as a new witness. (1 CT 132; 1 RT 6, 15.) Atkins proposed to testify that he was a member of the West Side Verdugo gang; that a person named "Lazy" was a shot caller for this gang; and that Petitioner asked Atkins to get a message to Lazy that was, based on his experience with gang jargon, understood to mean that there was only one witness against Petitioner, and Lazy should order a hit on that witness. (1 RT 14.)

The defense objected to Atkins's proposed testimony, contending it was unreliable, turned the case into a "gang case," and was being raised on the eve of

trial. (1 RT 15-18.) In response, the trial court held a hearing under California Evidence Code section 402, which permits courts to exclude evidence likely to be more prejudicial than probative. (1 RT 59-176; 1 CT 136.)

At the conclusion of that hearing, the court ruled that Atkins could testify about the conversation where Petitioner allegedly said, "Without this witness coming forward they would have nothing on me, so tell Lazy, what's up?" (1 RT 128.) In making its decision, the court noted that Atkins had been a member of the West Side Verdugo gang for 16 years and thus was familiar with the gang language and culture, qualifying him to provide testimony regarding his understanding of the meaning of this statement. (1 RT 125-26.) The court also noted that this statement, if the jury believed it, in fact, was said, was "highly probative" because it "demonstrate[ed] of consciousness of guilt." (1 RT 131.)

The court also ruled, however, that Atkins could not testify that he told Petitioner he "appreciated what the [Petitioner] did for the neighborhood [i.e., implicitly referencing the killing of Martinez], that if [Petitioner] hadn't done that, the neighborhood would have been in trouble or had problems or had a green light on them," noting these statements were hearsay and thus "clearly not admissible." (1 RT 126.)

At trial, Atkins testified that he was a member of the West Side Verdugo street gang; that he had been a member of that gang for about 16 years; that he was a member of the "Little Counts" clique; and that the president of West Side Verdugo and the Little Counts clique was a person who went by the moniker "Lazy." (3 RT 537, 538, 541.) He also told the jury that in light of his testimony, he was now "marked for death" by the gang and in protective custody, and that since his incarceration, he had about four or five contacts with Petitioner. (3 RT 545-46, 547.)

Specifically, Atkins testified that he introduced himself to Petitioner in the jail's recreation yard as a member of the West Side Verdugo gang who went by the

moniker "Hoax." (3 RT 547.) Petitioner shook Atkins's hand and introduced himself as "Gaucho" from the same gang. (3 RT 547.) Atkins said he sent a "kite," which he described as a handwritten note, to his "homies" in the jail asking them to acknowledge their fellow gang member and letting Petitioner know they were there to help out with "hygiene," food or anything else Petitioner might need. (3 RT 548.)

Atkins also testified to a conversation with Petitioner at the courthouse when both were appearing in their respective matters. During this conversation, Atkins asked Petitioner if he wanted to become a member of the Little Counts clique. (3 RT 549.) Atkins said he had the authority to make that offer from Lazy, the president. (3 RT 550.) Petitioner, however, declined the offer, saying that he was now a Christian. (3 RT 550.) In response to Atkins's question about how his case was going, Petitioner told him during this same conversation that "it was good going. That they had nothing against him except for a family member that was coming forward. And, without her, that they would have nothing. [¶] So he [i.e., Petitioner] told me [i.e., Atkins] to tell Lazy, 'What's up? If he could take care of that for him.'" (3 RT 550.)

The prosecutor later asked Atkins why he wanted Petitioner to join the Little Counts clique. The following exchange then took place:

> [Atkins]: My reason was because, I mean, he [i.e., Petitioner] sacrificed the ultimate for us. He showed me that he had —
>
> [The Court]: Sustained.
>
> [Defense Counsel]: Move to strike.
>
> [The Court]: The last answer is stricken.
>
> [Prosecutor]: Did you want to bring [Petitioner] back to West Side Verdugo?
>
> [Atkins]: Yes.
>
> [Prosecutor]: And that was your goal?
>
> [Atkins]: Yes.

(3 RT 553.)

At the next break and outside the presence of the jury, the defense moved for a mistrial, contending Atkins's statement that Petitioner "sacrificed the ultimate for us" was hearsay, as previously ruled by the court during the Evidence Code section 402 hearing, and unduly prejudicial. (3 RT 578-79.) The court denied the motion, ruling as follows:

> The question is whether or not there was prejudice as a result of it [i.e., the statement by Atkins]. And, given that the objection was made promptly when the witness started to answer, the Court did sustain the objection, the Court did instruct the jury to disregard it, I really — and there's no specific reference to this particular incident [i.e., the killing of Martinez], it would be sheer speculation as to what it was he was referring to. [¶] I really don't see that there's prejudice that would justify either a mistrial or a dismissal at this time.

(3 RT 580.)

The defense refused the court's offer to admonish the jury generally that if Atkins "made references to anything he heard, or rumors, that that's not reliable, and it's not to be considered." (3 RT 580-81.) The defense also rejected the court's offer to give a more specific admonition, when the proceedings commenced or at the conclusion of Atkins's testimony or at the end of the case when instructing the jury. (3 RT 581.)

Following his conviction, Petitioner moved for a new trial on grounds including prosecutorial misconduct. (5 RT 969, 974, 978.) At the hearing, the trial court noted that the prosecutor during the Evidence Code section 402 hearing asked Atkins a question that was similar to the one asked of him during the trial; that the court at the conclusion of the Evidence Code section 402 hearing excluded Atkins's response to this question — that Petitioner made the "ultimate sacrifice" for the gang, or words to that effect — and specifically told counsel if either side sought to

admit this testimony at trial it should first apprise the court outside the presence of the jury; and that in response to the similar question at trial, Atkins began to give similar testimony previously deemed inadmissible by the court. (5 RT 993-994.) The court thus concluded that the prosecutor engaged in misconduct when she asked Atkins this question in front of the jury, because it was likely to elicit a response from Atkins that the court already ruled was inadmissible. (5 RT 994.)

The court next turned to the issue of prejudice. It noted Atkins was just beginning to answer this question when an objection interrupted his response, which the court sustained. (5 RT 994.) It further noted the jury was immediately instructed to disregard Atkins's incomplete response. (5 RT 994.) As such, the court found the inference that the jury is presumed to follow a court's admonitions "much stronger" in the instant case than in a typical case. (5 RT 995.) The court further analyzed the issue of prejudice. as follows:

> The question to be asked is whether or not it's reasonably probable that if that question had not been asked there would be a result more favorable to the defendant. And the Court concludes that it is not reasonably probable that a result more favorable to the defendant would have been made, but for that question.
>
> The answer was interrupted. The so-called "ultimate sacrifice" was never explained. As pointed out by [the prosecutor], it was never referred to either directly or indirectly in any further evidence or testimony, was not referred to either directly or indirectly in any of the arguments.
>
> So, the Court finds that [the] misconduct was harmless.

(5 RT 995.)

2. Relevant Appellate Proceedings.

The Court of Appeal rejected Petitioner's prosecutorial misconduct claim, as follows:

A prosecutor's misconduct and/or an improper statement volunteered by a witness, as in the instant case, justifies a mistrial when the trial court finds the incident is incurably prejudicial, such that it has irreparably damaged the defendant's chance of receiving a fair trial. (People v. Dement (2011) 53 Cal.4th 1, 39.) "Whether a particular incident is incurably prejudicial is by its nature a speculative matter, and the trial court is vested with considerable discretion in ruling on mistrial motions." (People v. Haskett (1982) 30 Cal.3d 841, 854.)

Here, the record shows the statement by Atkins that [Petitioner] "sacrificed the ultimate for us" was brief. Indeed, the record shows the trial court sustained an objection to this statement mid-sentence, as Atkins was in the process of answering the prosecutor's question why he invited [Petitioner] to join Little Counts, without giving Atkins an opportunity to explain what he meant by it. In addition, the record shows this statement was not referenced again either in testimony or in argument.

Moreover, the statement was made without regard to the killing of Martinez, as noted by the trial court, which thus led it to find the statement in that context was ambiguous and any attempt to subscribe a certain meaning or understanding to it would be speculative.

[Petitioner] contends Atkins's statement that [Petitioner] "sacrificed the ultimate" for the gang was extremely prejudicial because it injected gang elements in the case where none previously existed and because "it implied his [i.e., [Petitioner]'s direct commission of the murder more than any other evidence presented."

While it is true that Atkins's testimony generally injected gang elements into the case, we note that much of this evidence is not challenged on appeal by [Petitioner], including the testimony by Atkins that [Petitioner] went by the moniker Gaucho and was a member of the West Side Verdugo; that [Petitioner] asked Atkins to tell Lazy, the president of both the Little Counts and the West Side Verdugo gang, "What's up?" and if Lazy could "take care of that for him" after

telling Atkins that his case was going well and the police "had nothing against him except for a family member that was coming forward"; and that Atkins sent a "kite" to his "homies" to let them know that [Petitioner] was not "feeling the love" as a result of his membership in the West Side Verdugo gang. We thus disagree with [Petitioner] that he was prejudiced by the alleged improper statement by Atkins because that statement injected gang evidence into a case where there allegedly was none.

We also disagree with Aguirre's contention that the alleged improper statement by Atkins that [Petitioner] "sacrificed the ultimate" for the gang was unduly prejudicial because it allegedly was the most persuasive evidence that [Petitioner] in fact was involved in the killing. Equally, if not more prejudicial, however, was the testimony that [Petitioner] does not challenge on appeal regarding what occurred in the courthouse, as described and interpreted by Atkins, when [Petitioner] asked Atkins if he could tell Lazy, "What's up?" and if Lazy could take care of what [Petitioner] ostensibly believed was the only witness against him (i.e., his cousin, Jane Doe No. 2). In our view, this unchallenged evidence alone diluted the potential for prejudice arising from Atkins's brief, ambiguous statement that [Petitioner] "sacrificed the ultimate" for the gang. Under the circumstances, the trial court was within its broad discretion in concluding that this statement by Atkins was not incurably prejudicial. (People v. Collins (2010) 49 Cal.4th 175, 199 [rejecting mistrial claim where volunteered testimony was "brief and ambiguous"].)

What's more, the record shows Jane Doe No. 1 positively identified [Petitioner] as the passenger in the Honda that was involved in the shooting. She testified that before the shooting she stood on a street corner about 10 feet away from a man wearing a black hat who was a passenger in a black Honda that was stopped at a stoplight. She further testified she saw the same car pull into the drugstore parking lot, heard gunshots and then saw the black Honda "rush" out of

the parking lot and stop and/or slow down again about 10 feet from where she was then standing. At that point, Jane Doe No. 1 noticed for the first time bullet holes in the passenger side door of the Honda. According to Jane Doe No. 1, the passenger in that car was "looking around" before the car sped away. Jane Doe No. 1 positively identified [Petitioner] from a photo lineup as the passenger in the black Honda.

In denying the mistrial motion for alleged lack of sufficiency of the evidence, the record shows the trial court found the testimony of Jane Doe No. 1 "standing alone" was sufficient to support the guilty verdict against Aguirre.

But that's not all. Jane Doe No. 2 testified that [Petitioner] was her cousin and that sometime between 11:30 a.m. and noon on the day of the shooting [Petitioner] and a companion unexpectedly arrived at the home she shared with her husband, which the record shows was located just a few houses away from where police found the abandoned black Honda (with bullet holes). Jane Doe No. 2 testified [Petitioner]'s companion offered $20 for a ride. Concerned for her cousin, Jane Doe No. 2 asked [Petitioner], who was wearing a dark hat, what was happening. In response, he told her, "I don't want to get you involved" and added the "hoodas" were either looking for or after him. Jane Doe No. 2 said "hooda" was slang for cops.

In addition, although Abdullah could not identify [Petitioner] as the shooter, he saw a dark-colored vehicle he described as a Honda pull into the drugstore parking lot and stop about 20 feet from where he was walking. According to Abdullah, a man wearing a dark hat and baggy pants exited the passenger side of the Honda, casually walked up to the vehicle just entered by the victim and shot the victim multiple times. Abdullah then saw the man return to, and enter the passenger side of, the Honda. At that point, Abdullah saw a man in another vehicle located nearby, who had been with the victim just before he was killed, get out of his Jeep Cherokee and fire several shots at the Honda as it fled the scene. Khan, who had

driven Abdullah that morning to the location where the shooting occurred, corroborated Abdullah's testimony that a man wearing a black hat got out of the passenger side of a black Honda, walked up to another car where the victim was located and fired about six or seven shots at the victim.

The record also shows the court, while instructing the jury before it began deliberations, admonished it that if any testimony was stricken from the record, the jury was required to "disregard it completely" and not consider it "for any purpose" and if an objection to a question was sustained, the jury was required to "ignore the question." (See People v. Gonzales and Soliz (2011) 52 Cal.4th 254, 292 [rejecting mistrial claim where problematic testimony was struck and the jury properly admonished].) We presume the jury was capable of following what we consider were clear and straightforward instructions by the trial court in this case and we note there is nothing in the record to rebut this presumption. (See People v. Homick (2012) 55 Cal.4th 816, 879 [noting a court presumes the jury followed the instruction not to consider a codefendant's extrajudicial statement].)

We therefore conclude on this record the trial court properly exercised its broad discretion when it denied [Petitioner]'s motion for new trial following the guilty verdict. Under the circumstances, even assuming the prosecutor committed misconduct by asking Atkins the question that elicited the improper statement, we conclude [Petitioner] was not prejudiced by Atkins's brief and ambiguous response.

However, even if the court erred in denying [Petitioner]'s new trial motion when it found [Petitioner] was not prejudiced from the fleeting and ambiguous statement made by Atkins, we further conclude, based on the overwhelming evidence of guilt summarized ante, that error was harmless under any standard of review. (See Chapman v. California (1967) 386 U.S.18, 23-24; People v. Watson (1956) 46 Cal.2d 818, 836.) (LD 5 at 13-17.)

3. Federal Law.

a. Due Process and Prosecutorial Misconduct.

To warrant habeas relief, prosecutorial misconduct must so infect "the trial with unfairness as to make the resulting conviction a denial of due process." Darden v. Wainwright, 477 U.S. 168, 181 (1986) (citation and internal quotations omitted). The "appropriate standard of review for such a claim on writ of habeas corpus is the narrow one of due process, and not the broad exercise of supervisory power." Id.

b. Harmless Error.

Even if a trial court commits a constitutional error by failing to grant a mistrial after prosecutorial misconduct, and in the absence of "the rare type of error" that requires automatic reversal, the petitioner still must show that he suffered prejudice under the test set forth in Brecht v. Abrahamson, 507 U.S. 619 (1993); Glebe v. Frost, – U.S. –, 135 S. Ct. 429, 429 (2014) (per curiam). Brecht requires that the error had a substantial and injurious effect or influence on the jury's verdict. On direct appeal, Chapman v. California, 386 U.S. 18 (2010), prescribes the "harmless beyond a reasonable doubt" standard. Id. at 24. In a collateral proceeding, for reasons of finality, comity, and federalism, the Brecht "actual prejudice" test applies. The Brecht standard "subsumes" the requirements that § 2254(d) imposes when a federal habeas petitioner contests a state court's determination that a constitutional error was harmless under Chapman. Davis v. Ayala, – U.S. –, 135 S. Ct. 2187, 2198 (2015). Because the highly deferential AEDPA standard applies, the Court can only grant habeas relief if the California Court of Appeal applied Chapman in an "objectively unreasonable" manner. Id. at 2198. A state-court decision is not unreasonable if "'fairminded jurists could disagree' on [its] correctness." Richter, 562 U.S. at 101 (quoting Yarborough v. Alvarado, 541 U.S. 652, 664 (2004)). Petitioner therefore must show that the state court's decision to reject his claim "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for

fairminded disagreement." Id. at 103.

4. Analysis.

Petitioner argues that the words "ultimate sacrifice" were "extremely powerful and suggestive," such that the jury would not have been able to disregard them, even if the judge ordered them stricken. (Dkt. 1 at 32.) He further argues that this testimony made the trial "emotionally charged" and therefore "unfair." (Id. at 34.) He argues that there "is no physical evidence or reliable witnesses" to support his conviction, such that the Court of Appeal erred by citing such other evidence to show lack of prejudice. (Id. at 33-34.)

The California Court of Appeal reasonably applied Chapman to Petitioner's prosecutorial misconduct claim. Atkin's answer was interrupted mid-sentence, and immediately stricken from the record. (3 RT 553.) Before deliberations, the judge admonished the jury that stricken testimony was to be completely disregarded, and not considered for any purpose. Jurors are presumed to follow the instructions given at trial, and Petitioner has failed to adduce any evidence that the jury did not do so in this case. See, e.g., Weeks v. Angelone, 528 U.S. 225, 234 (2000); Richardson v. Marsh, 481 U.S. 200 (1987); Francis v. Franklin, 471 U.S. 307, 324 n.9 (1985).

Additionally, Atkins was not given an opportunity to explain or elaborate on what "sacrificing the ultimate" might mean in gang parlance, and the statement was made with no reference to the murder of Martinez. The Court of Appeal reasonably determined that the jury would not have reasonably have inferred that the brief mention of "sacrificing the ultimate" meant murdering Martinez. In any event, as discussed above, there was sufficient eyewitness evidence to convict Petitioner without the jury relying on Atkin's testimony.

Petitioner is not entitled to habeas relief on Ground Four.

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VII.

RECOMMENDATION

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

DATED: December 1, 2016

Karen E. Scott

KAREN E. SCOTT
United States Magistrate Judge

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