APPENDIX

NOT FOR PUBLICATION

FILED

AUG 21 2018

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JUANITA CELIA GARCIA, Petitioner-Appellant, v. DEBORAH K. JOHNSON, Respondent-Appellee.	No. 17-55618 D.C. No. 2:13-cv-06864-JFW-FFM MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
John F. Walter, District Judge, Presiding

Argued and Submitted August 9, 2018
Pasadena, California

Before: CALLAHAN and NGUYEN, Circuit Judges, and EZRA, District Judge**

Juanita Garcia was convicted of murdering her longtime boyfriend, David Zweig. Because the jury found that Garcia killed Zweig for financial gain, she was sentenced to life without parole. Garcia appeals from the district court's denial of her habeas petition, in which she alleged ineffective assistance of counsel. We

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

** The Honorable David A. Ezra, United States District Judge for the District of Hawaii, sitting by designation.

have jurisdiction under 28 U.S.C. §§ 1291 and 2253, and we affirm.[1]

We review de novo a district court's denial of a habeas petition. *Murray v. Schriro*, 882 F.3d 778, 801 (9th Cir. 2018). Our review is governed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2254. Under AEDPA, habeas relief cannot be granted "unless the state court decision: '(1) was contrary to clearly established federal law as determined by the Supreme Court, (2) involved an unreasonable application of such law, or (3) . . . was based on an unreasonable determination of the facts in light of the record before the state court.'" *Murray*, 882 F.3d at 801 (quoting *Fairbank v. Ayers*, 650 F.3d 1243, 1251 (9th Cir. 2011), as amended).

To establish a claim for ineffective assistance of counsel, a petitioner must show (1) constitutionally deficient performance by counsel (2) that prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Garcia argues her trial counsel provided constitutionally deficient representation because, she alleges, he contacted the administrator of Zweig's trust to make payments to Garcia. At trial, the prosecution offered evidence of the attorney's contact with the trust administrator in support of its theory of Garcia's financial motive. Garcia argues that her trial counsel thus had an impermissible conflict of interest that prejudiced

[1] Because the parties are familiar with the factual and procedural history of the case, we need not recount it here.

her defense.[2]

Garcia fails to meet her burden under *Strickland*'s prejudice prong and AEDPA. Although the California Court of Appeal's decision indisputably recites *Strickland*'s prejudice standard correctly, Garcia argues the Court of Appeal misapplied the standard because in two instances in its decision it did not use the precise "reasonable probability" terminology. Despite any such imprecision, we are satisfied that the state court applied the correct standard, especially in light of AEDPA's requirement that we give state courts the benefit of the doubt. *See Woodford v. Visciotti*, 537 U.S. 19, 23–24 (2002) (reversing court of appeals' grant of habeas petition where state court used imprecise language in applying *Strickland* prejudice prong); *Mann v. Ryan*, 828 F.3d 1143, 1158 (9th Cir. 2016) (en banc) ("Under AEDPA, because we can read the decision to comport with clearly established federal law, we must do so.").

Garcia's primary argument that she meets *Strickland*'s prejudice prong is that the evidence of her attorney contacting the trust administrator was the "linchpin" of the prosecution's financial motive theory. Garcia's argument ignores the state court's conclusion that "[e]ven if the jury did not hear evidence of

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[2] Garcia concedes that the alleged conflict of interest does not excuse her from satisfying *Strickland*'s prejudice requirement. *See Mickens v. Taylor*, 535 U.S. 162, 166 (2002) (holding that prejudice is presumed "where assistance of counsel has been denied entirely or during a critical stage of the proceeding").

[counsel's] contact with the trust attorney, there was ample evidence to support a finding of financial motive." The Court of Appeal stated:

> [Garcia] knew that Zweig had created a trust. In fact, she told the trust attorney that he had misspelled Zweig's name in the trust documents. She admitted she knew he was leaving most of his assets to her. Audio recordings from the surveillance system also show that in early October, [Garcia] demanded Zweig pay her $15,000 to move out and when he only offered her $5,000 to leave immediately, she threatened to "take [him] down." [Garcia] also contacted the trust attorney both before and after Zweig died regarding paying his medical and funeral expenses.

A fairminded jurist could have concluded that, in light of the other evidence of Garcia's financial motive, Garcia failed to show a reasonable probability that, but for the asserted conflict, the result of the proceeding would have been different. The California Court of Appeal's conclusion that Garcia failed to show prejudice under *Strickland* was not contrary to clearly established federal law, did not involve an unreasonable application of such law, and was not based on an unreasonable determination of the facts.

AFFIRMED.

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JUANITA CELIA GARCIA, Petitioner-Appellant, v. DEBORAH K. JOHNSON, Respondent-Appellee.	No. 17-55618 D.C. No. 2:13-cv-06864-JFW-FFM Central District of California, Los Angeles ORDER

Before: CALLAHAN and NGUYEN, Circuit Judges, and EZRA, District Judge**

The petition for panel rehearing is denied.

** The Honorable David A. Ezra, United States District Judge for the District of Hawaii, sitting by designation.

Lodged Clerk . 8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. JUANITA GARCIA, Defendant and Appellant.	B233491 (Los Angeles County Super. Ct. No. NA057199) COURT OF APPEAL - SECOND DIST. FILED

APPEAL from a judgment of the Superior Court of Los Angeles County. Jose I. Sandoval, Judge. Affirmed.

Richard D. Miggins, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Linda C. Johnson and Michael Katz, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Juanita Garcia challenges the trial court's denial of her motion for new trial. Appellant contends it should have been granted on the grounds she received ineffective assistance of counsel as a result of an irreconcilable conflict of interest. We affirm.

FACTUAL[1] AND PROCEDURAL HISTORY

Appellant had a turbulent relationship with David Zweig characterized by mutual violence and abuse. They lived together in a house owned by Zweig in Long Beach. Zweig had installed a computerized camera system in the house which recorded appellant shooting Zweig in the stomach on October 13, 2002. Zweig died on November 17, 2002, as the result of complications from the gunshot wound. Appellant was the primary beneficiary to Zweig's trust, which contained assets of approximately $2.1 million after taxes. Appellant contacted Zweig's trust attorney several times after the shooting to ask about using trust assets to pay his medical bills and his funeral expenses.

Attorney Benjamin Wasserman was retained by appellant to represent her interests in the trust and in the criminal case that was later filed against her in connection with Zweig's death. Wasserman made demands on the trust on her behalf after Zweig's death. He also made several calls to police investigators to check on the status of the criminal case in relation to appellant's entitlement to the proceeds of the trust.

A jury convicted appellant of premeditated murder with use of a firearm and she was sentenced to life without possibility of parole pursuant to a financial gain special circumstance. Appellant appealed the judgment on various grounds. We remanded the matter to the trial court to allow appellant the opportunity to file a motion for new trial, but affirmed the judgment in all other respects.

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[1] An extensive recital of the facts in the case is presented in our previous opinion (*People v. Garcia* (May 13, 2009, B197063) [nonpub. opn.]). We offer a summary here and discuss any specific facts relevant to our analysis below.

A remittitur was issued on October 7, 2009, and an attorney from the Public Defender's office was appointed to represent her. Appellant filed a notice of motion for new trial due to ineffective assistance of counsel on January 19, 2011. Appellant argued that Wasserman's representation of her in the criminal action and in the trust proceedings created a conflict of interest that denied her due process and a fair trial. Appellant asserted that two separate conflicts of interest arose which resulted in prejudice to her. First, appellant argued that it was Wasserman's contact with the trust attorney which brought the trust to the police's attention and ultimately resulted in a criminal charge for murder with the special circumstance allegation that it was committed for financial gain. Second, appellant contended that Wasserman became a material part of the evidence against her when the trust attorney testified that Wasserman contacted him about distribution of the trust proceeds on appellant's behalf shortly after Zweig's death. As a result, Wasserman's credibility was compromised in the jury's eyes.

In opposition, the People argued that appellant waived the conflict during a preliminary hearing and in any event, Wasserman did not have a conflict of interest. The trial court denied the motion for new trial on June 2, 2011, finding the waiver was ineffective but that there was not a reasonable probability the result would have been different. The trial court explained, "If an appropriate waiver had been taken, the people would still have introduced evidence that defendant contacted the trust administrator in their effort to show greed as a motive to commit the murder. If there had been no waiver, her new attorney would still have had to deal with the defendant's having contacted the trust [attorney]. It does not appear that the defendant has sufficiently shown that even if there were a conflict, that it adversely affected her representation. The record indicates that the defense called 18 witnesses in their defense throughout a [trial] length of 33 days and that the Court of Appeal ultimately upheld the conviction. The court also notes there appears to have been strong evidence against the defendant including video tape evidence of the shooting. Given the lengthy trial and numerous witnesses it does not appear that the counsel's representation fell below a standard as to raise a concern about ineffective assistance of counsel."

Appellant filed her notice of appeal the same day.

DISCUSSION

Appellant contends on appeal that the trial court abused its discretion when it denied her motion for new trial as there was substantial evidence in the record which established ineffective assistance of counsel as a result of a conflict of interest. Appellant argues that she received ineffective assistance of counsel because Wasserman contacted the trust attorney, which brought the trust to the attention of the authorities and resulted in the financial gain special circumstance allegation being levied against her. Further, Wasserman reported the existence of the trust to authorities because he wanted to be paid from its proceeds. We disagree.

In *Strickland v. Washington* (1984) 466 U.S. 668, 687, the Supreme Court held that claims of conflicts of interest are a category of ineffective assistance of counsel that generally require a defendant to show (1) counsel's deficient performance, and (2) a reasonable probability that, absent counsel's deficiencies, the result of the proceeding would have been different. (*Mickens v. Taylor* (2002) 535 U.S. 162 (*Mickens*); *People v. Doolin* (2009) 45 Cal.4th 390, 417.) A reasonable probability is a probability sufficient to undermine confidence in the outcome. (*In re Sixto* (1989) 48 Cal.3d 1247, 1257.)

We review the trial court's ruling for abuse of discretion.[2] (*People v. Navarette* (2003) 30 Cal.4th 458, 526; see 6 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Criminal Judgment, §§ 123–124, pp. 153–155, and cases cited.) Thus, appellant has the

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[2] The People note that the Courts of Appeal have applied differing standards of review in cases involving motions for new trial based on ineffective assistance of counsel claims. (Compare *People v. Taylor* (1984) 162 Cal.App.3d 720, 724-725 [substantial evidence of trial court's findings with independent review of legal questions] with *People v. Callahan* (2004) 124 Cal.App.4th 198, 211 [abuse of discretion].) The California Supreme Court itself has noted that courts have applied differing standards of review in new trial motions based on other grounds depending on whether the motion was granted or denied. (*People v. Ault* (2004) 33 Cal.4th 1250, 1261-1263.) Appellant also appears to conflate the standards of review, urging us to find an abuse of discretion due to substantial evidence of a conflict. For our purposes, this is a distinction without a difference and we need not reach the issue as our conclusion would remain under either standard.

burden to demonstrate that the trial court's decision was "irrational or arbitrary," or that it was not "'"grounded in reasoned judgment and guided by legal principles and policies appropriate to the particular matter at issue. . . ."'" (*People v. Callahan, supra,* 124 Cal.App.4th at pp. 211-212.) This burden is a heavy one. The appellate court gives the order all of the presumptions in favor of any appealable judgment and need only find "some showing" to support the trial court's order. (*Ibid.*) With these guidelines in mind, we conclude there was no abuse of discretion. There was more than "some showing" supporting the trial court's finding that appellant would not have obtained a more favorable result in the absence of Wasserman's purported conflict.

It was undisputed that appellant shot Zweig. She confessed to the crime, but claimed she acted in self-defense. The video recordings from Zweig's surveillance system, however, show that appellant retrieved a gun from her bedroom and hid it behind a pillow when she shot him. There was no indication Zweig was threatening her at the time. The night before the shooting, officers responded to a 911 call by one of appellant's sons that claimed Zweig was threatening people with guns. Appellant told officers that Zweig was acting aggressively and might be drunk but did not ask them to remove Zweig or the guns from the house. Zweig told the officers that appellant and her sons were setting him up because he was trying to evict them. The officers concluded that Zweig did not appear drunk and that no crime had occurred.

There was also ample evidence appellant had a financial motive to kill Zweig. Appellant knew that Zweig had created a trust. In fact, she told the trust attorney that he had misspelled Zweig's name in the trust documents. She admitted she knew he was leaving most of his assets to her. Audio recordings from the surveillance system also show that in early October, appellant demanded Zweig pay her $15,000 to move out and when he only offered her $5,000 to leave immediately, she threatened to "take [him] down." Appellant also contacted the trust attorney both before and after Zweig died regarding paying his medical and funeral expenses. Even if the jury did not hear evidence of Wasserman's contact with the trust attorney, there was ample evidence to support a finding of financial motive.

Moreover, the trial court's finding that even if there were a conflict, it did not adversely affect Wasserman's representation of appellant was supported by the record. At trial, the defense presented considerable evidence, including testimony from appellant, appellant's family, the neighbors, Zweig's ex-wife, appellant's and Zweig's friends, and even Zweig's dog trainer, to show Zweig's violent nature and abusive relationship with appellant. The witnesses also testified that appellant was not concerned about money. Appellant had been gainfully employed; she declined a $100,000 share of her father's estate; and she declined expensive jewelry from Zweig. Given the evidence against her and the considerable defense mounted by counsel, it is unlikely the outcome of the proceedings would have been different. There was no abuse of discretion in the trial court's ruling.

Nevertheless, appellant contends she need not show prejudice because a presumption of prejudice is warranted in this case. Appellant relies on *Mickens, supra,* 535 U.S. 162 for the proposition that Wasserman's representation of her implicated his financial interests and created an actual conflict of interest which compelled a presumption of prejudice. *Mickens* does not support appellant's argument.

The question presented in *Mickens* was whether a presumption of prejudice applied where the trial court failed to inquire into a potential conflict of interest about which it knew or reasonably should have known. (*Mickens, supra,* at p. 164.) The holding reached in *Mickens* is inapplicable. The dicta in *Mickens*, however, does present analysis relevant to our inquiry. However, it does not advance appellant's argument.

In dicta, the *Mickens* court noted that "[w]e have spared the defendant the need of showing probable effect upon the outcome, and have simply presumed such effect, where assistance of counsel has been denied entirely or during a critical stage of the proceeding. When that has occurred, the likelihood that the verdict is unreliable is so high that a case-by-case inquiry is unnecessary." (*Mickens, supra,* at p. 166.) The court then examined Supreme Court cases in which the presumption had been properly applied. In those cases, counsel had represented multiple defendants or was hired and paid by a party with divergent interests. In its consideration of circuit cases, the court cautioned against an

"expansive application" of the presumption, citing to, among others, cases where representation of a defendant somehow implicated counsel's personal or financial interests. (*United States v. Hearst* (9th Cir. 1980) 638 F.2d 1190, 1193 [book deal], *Garcia v. Bunnell* (9th Cir. 1994) 33 F.3d 1193, 1194-1195, 1198, fn. 4 [a job with the prosecutor's office], *U.S. v. Michaud* (1st Cir. 1991) 925 F.2d 37, 40-42 [teaching classes to Internal Revenue Service agents].) Thus, *Mickens* does not stand for the proposition that a presumption of prejudice is always warranted where there is a financial conflict of interest. Instead, it appears to caution against it.

Accordingly, we conclude a presumption of prejudice is not applicable to the conflict asserted here. It is not the case that appellant was denied the assistance of counsel entirely or during a critical stage of the proceeding. Indeed, the finding that Wasserman's performance was not deficient is supported by the record. As discussed above, there is ample evidence supporting appellant's conviction and thus, the likelihood that the verdict is unreliable is low.

Appellant's reliance on *United States Ex Rel. Simon v. Murphy* (E.D. Pa. 1972) 349 F.Supp. 818 (*Murphy*), and *People v. Rundle* (2008) 43 Cal.4th 76 (*Rundle*) is similarly misplaced. In *Rundle,* the court held that no presumption of prejudice applied and the record did not demonstrate prejudice. (*Rundle, supra,* at pp. 173-174.) In *Murphy*, the defendant established the probability of a different outcome. There, defense counsel would only be paid upon acquittal. As a result, he was late in communicating an offer to the defendant and counseled against it. The trial court found she would have accepted the plea agreement. (*Murphy, supra,* at p. 823.) Those are simply not the facts of the instant case, and thus we find *Murphy* distinguishable.

DISPOSITION

The judgment is affirmed.

BIGELOW, P. J.

We concur:

FLIER, J. GRIMES, J.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JUANITA CELIA GARCIA, Petitioner, v. DEBORAK K. JOHNSON, Warden, Respondent.	No. CV 13-6864-JFW (FFM) REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

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

I. PROCEEDINGS

Juanita Celia Garcia, a state prisoner in the custody of the California Department of Corrections who is represented by counsel, filed a Petition for Writ of Habeas Corpus by a Person in State Custody pursuant to 28 U.S.C. § 2254 on September 18, 2013. She subsequently filed a Second Amended Petition ("SAP")

on May 15, 2015. In her SAP, Petitioner asserted five claims for relief. On July 13, 2016, the District Court entered an order dismissing Petitioner's fifth claim for relief as untimely. Thereafter, on August 15, 2016, Respondent filed a return to the SAP. On October 17, 2016, Petitioner filed a traverse. The matter, thus, stands submitted and ready for decision.

II. PROCEDURAL HISTORY

A Los Angeles County Superior Court jury found Petitioner guilty of first degree murder. The jury also found that Petitioner used a firearm and that she committed the murder for financial gain. Thereafter, Petitioner was sentenced to life in prison without the possibility of parole.

Petitioner then appealed her conviction. On May 13, 2009, the California Court of Appeal filed an unpublished opinion in which it remanded the case to the trial court to allow Petitioner the opportunity file a motion for new trial based on her trial counsel's purported conflict of interest. In all other respects, however, the court of appeal affirmed the judgment against Petitioner. Petitioner then filed a petition for review in the California Supreme Court, which denied the petition on August 26, 2009.

On remand, the trial court denied Petitioner's motion for new trial. Petitioner then appealed. On June 18, 2012, the California Court of Appeal affirmed the judgment. On July 20, 2012, Petitioner filed a petition for review in the California Supreme Court, which denied the petition on September 12, 2012.

Petitioner then initiated this action.[1]

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[1] After initiating this action, Petitioner filed a habeas petition in the Los Angeles Superior Court, which denied the petition on November 19, 2013.

III. FACTUAL BACKGROUND

The following facts were taken verbatim from the overview of the factual summary in the California Court of Appeal's opinion affirming Petitioner's conviction:[2]

> The charged offense took place on the evening of October 13, 2002, at the Long Beach home shared by [Petitioner] and victim David Zweig (Zweig). [Petitioner] had been living with Zweig for several years, but they were not married. Zweig owned the home, in which he had installed a computerized camera system which recorded many of the events material to this case, including the shooting itself. The computer contained images, without sound, taken by 16 cameras between late September and October 13.
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> The prosecution established that the shooting occurred shortly after appellant retrieved a loaded handgun from a chest in her bedroom, and argued the video recording proved the absence of any imminent attack by Zweig. The day before the shooting, Zweig placed on the kitchen counter a handwritten, thirty-day notice of eviction of [Petitioner]. During an early October conversation tape recorded by [Petitioner], she

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[2] The California Court of Appeal's opinion also contains an lengthy, exhaustive summary of the facts underlying Petitioner's conviction. *See People v. Garcia*, 2009 WL 1315504, *1-19 (Cal. Ct. App. May 13, 2008). Because of the length of that summary, only the court of appeal's "overview" of the facts is included in this Report. Any reference to facts not included in the court of appeal's "overview" will be accompanied by a pinpoint citation to the court of appeal's opinion.

demanded that Zweig pay her $15,000 to move out. When he offered her much less, [Petitioner] threatened to "take [Zweig] down." When Zweig asked if she was threatening his life she responded, "No, that's a promise, honey. I have nothing to lose." The prosecution proved [Petitioner] was the primary beneficiary of Zweig's trust, which was designed to support her for life after Zweig's death, and that her attorney made inquiries about accessing trust funds following Zweig's death.

The defense presented extensive evidence regarding the relationship between Zweig and [Petitioner] and Zweig's character for violent and threatening conduct. [Petitioner] testified that she armed herself after Zweig threatened to kill her son, who was living next door, and that she shot Zweig intending only to wound him as he charged at her. [Petitioner] explained her demand for money as based on a previous promise by Zweig to pay for her upcoming surgery. She denied intending to physically harm Zweig when she made the threat, and denied any financial motive at the time of the shooting. She denied intending to use trust funds for herself. [Petitioner] and other witnesses established that Zweig had kicked her out of his home many times before, only to insist that she return. The defense sought to establish, through expert testimony and several witnesses, that Zweig had abused [Petitioner] emotionally, verbally and physically throughout their relationship, and that the battered women's syndrome

> explained the shooting and other aspects of [Petitioner's] conduct.

People v. Garcia, 2009 WL 1315504, *1-19 (Cal. Ct. App. May 13, 2008).

IV. PETITIONER'S CLAIMS

1. The prosecutor failed to present sufficient evidence to support the jury's finding that Petitioner committed the charged murder for financial gain.
2. Petitioner was denied her Sixth Amendment right to trial counsel because her counsel was laboring under an actual conflict of interest that prevented counsel from adequately defending Petitioner.
3. The trial court violated Petitioner's right to due process by making a statement during voir dire that effectively communicated to the jury that Petitioner's theory of defense was invalid.
4. The trial court violated Petitioner's right to a fair and impartial jury by refusing to allow Petitioner's trial counsel to exercise a peremptory strike against one of the potential jurors.

V. STANDARD OF REVIEW

The standard of review applicable to Petitioner's claims herein is set forth in 28 U.S.C. § 2254(d), as amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") (Pub. L. No. 104-132, 110 Stat. 1214 (1996)). *See* 28 U.S.C. § 2254(d); *see also Lindh v. Murphy*, 521 U.S. 320, 336, 117 S. Ct. 2059, 138 L. Ed. 2d 481 (1997). Under AEDPA, a federal court may not grant habeas relief on a claim adjudicated on its merits in state court unless that

adjudication "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 "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."[3] 28 U.S.C. § 2254(d); *see Williams v. Taylor*, 529 U.S. 362, 402, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000).

The phrase "clearly established Federal law" means "the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision."[4] *Lockyer v. Andrade*, 538 U.S. 63, 71-72, 123 S. Ct. 1166, 155 L. Ed. 2d 144 (2003). However, a state court need not cite the controlling Supreme Court cases in its own decision, "so long as neither the reasoning nor the result of the state-court decision contradicts" relevant Supreme Court precedent which may pertain to a particular claim for relief. *Early v. Packer*, 537 U.S. 3, 8, 123 S. Ct. 362, 154 L. Ed. 2d 263 (2002) (*per curiam*).

A state court decision is "contrary to" clearly established federal law if the decision applies a rule that contradicts the governing Supreme Court law or reaches a result that differs from a result the Supreme Court reached on "materially indistinguishable" facts. *Williams*, 529 U.S. at 405-06. A decision involves an "unreasonable application" of federal law if "the state court identifies

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[3] In addition, under 28 U.S.C. § 2254(e)(1), factual determinations by a state court "shall be presumed to be correct" unless the petitioner rebuts the presumption "by clear and convincing evidence."

[4] Under AEDPA, the only definitive source of clearly established federal law is set forth in a holding (as opposed to dicta) of the Supreme Court. *See Williams*, 529 U.S. at 412; *see also Yarborough v. Alvarado*, 541 U.S. 652, 660-61, 124 S. Ct. 2140, 158 L. Ed. 2d 938 (2004). Thus, while circuit law may be "persuasive authority" in analyzing whether a state court decision was an unreasonable application of Supreme Court law, "only the Supreme Court's holdings are binding on the state courts and only those holdings need be reasonably applied." *Clark v. Murphy*, 331 F.3d 1062, 1069 (9th Cir. 2003).

the correct governing legal principle from [Supreme Court] decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 413. A federal habeas court may not overrule a state court decision based on the federal court's independent determination that the state court's application of governing law was incorrect, erroneous, or even "clear error." *Lockyer*, 538 U.S. at 75. Rather, a decision may be rejected only if the state court's application of Supreme Court law was "objectively unreasonable." *Id.*

The standard of unreasonableness that applies in determining the "unreasonable application" of federal law under Section 2254(d)(1) also applies in determining the "unreasonable determination of facts in light of the evidence" under Section 2254(d)(2). *Taylor v. Maddox*, 366 F.3d 992, 999 (9th Cir. 2004). Accordingly, "a federal court may not second-guess a state court's fact-finding process unless, after review of the state-court record, it determines that the state court was not merely wrong, but actually unreasonable." *Id.*

Where more than one state court has adjudicated the petitioner's claims, the federal habeas court analyzes the last reasoned decision. *Barker v. Fleming*, 423 F.3d 1085, 1091 (9th Cir. 2005) (citing *Ylst v. Nunnemaker*, 501 U.S. 797, 803, 111 S. Ct. 2590, 115 L. Ed. 2d 706 (1991) for presumption that later unexplained orders, upholding judgment or rejecting same claim, rest upon same ground as the prior order). Thus, a federal habeas court looks through ambiguous or unexplained state court decisions to the last reasoned decision in order to determine whether that decision was contrary to or an unreasonable application of clearly established federal law. *Bailey v. Rae*, 339 F.3d 1107, 1112-13 (9th Cir. 2003).

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VI. DISCUSSION

A. Sufficiency of the Evidence

In her first claim for relief, Petitioner contends that the prosecutor failed to present sufficient evidence to support the jury's finding that she committed the murder for financial gain. In particular, Petitioner notes that the prosecutor presented no direct evidence or admissions by Petitioner to prove that she shot the victim for financial gain. This lack of direct evidence, according to Petitioner, was fatal to the prosecution's financial gain allegation because there was "abundant evidence" showing that Petitioner had rejected money in the past from both her father and from the victim. Consequently, in Petitioner's view, no rational juror could have concluded that she committed the murder for financial gain.

The California Court of Appeal rejected this claim on the merits. In doing so, the court of appeal set forth and applied the proper legal standard governing challenges to the sufficiency of the evidence. *See Garcia*, 2009 WL 1315504 at 25 (citing *Jackson v. Virginia*, 443 U.S. 307, 317-20, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)). Accordingly, the court of appeal's resolution of Petitioner's claim was not contrary to the Supreme Court's clearly established precedents. As such, the only avenue through which Petitioner can obtain habeas relief on her sufficiency of the evidence claim is by showing that the court of appeal's resolution of her claim constituted an "unreasonable application of" the Supreme Court's clearly established precedent -- that is, she must show that the court of appeal unreasonably applied the governing legal standard to the facts of her case. *See Penry v. Johnson*, 532 U.S. 782, 792, 121 S. Ct. 1910, 150 L. Ed. 2d 9 (2001). As explained below, Petitioner cannot make that showing.

Habeas relief is unavailable on a sufficiency of the evidence challenge unless "no rational trier of fact could have agreed with the jury." *Cavasos v. Smith*, __ U.S. __, 132 S. Ct. 2, 181 L. Ed. 2d 311 (2011) (*per curiam*); *Jackson*,

443 U.S. at 319. All evidence must be considered in the light most favorable to the prosecution. *Jackson*, 443 U.S. at 319. Accordingly, if the facts support conflicting inferences, reviewing courts "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." *Id.* at 326; *Bruce v. Terhune*, 376 F.3d 950, 957 (9th Cir. 2004) (*per curiam*); *Turner v. Calderon*, 281 F.3d 851, 882 (9th Cir. 2002). Under AEDPA, federal courts must "apply the standards of *Jackson* with an additional layer of deference." *Juan H. v. Allen*, 408 F.3d 1262, 1274 (9th Cir. 2005).

Furthermore, circumstantial evidence and inferences drawn from it may be sufficient to sustain a conviction. *See Jones v. Wood*, 207 F.3d 557, 563 (9th Cir. 2000) (finding sufficient evidence for murder conviction where "evidence was almost entirely circumstantial and relatively weak"). The reviewing court must respect the exclusive province of the factfinder to determine the credibility of witnesses, resolve evidentiary conflicts, and draw reasonable inferences from proven facts. *See United States v. Goode*, 814 F.2d 1353, 1355 (9th Cir. 1987).

Under California law, to prove a special circumstance allegation of murder for financial gain, the prosecution must show two things: (1) the murder was intentional; and (2) it was carried out for financial gain. Cal. Penal Code § 190.2(a)(1). "'[T]he relevant inquiry is whether the defendant committed the murder in the expectation that he would thereby obtain the desired financial gain.'" *People v. Crew*, 31 Cal. 4th 822, 850-51, 3 Cal. Rptr. 3d 733, 74 P.3d 820 (2003) (quoting *People v. Howard*, 44 Cal. 3d 375, 409, 243 Cal. Rptr. 842, 749 P.2d 279 (1988)).

Here, the prosecutor introduced ample evidence to support the jury's finding that Petitioner committed the murder for financial gain. Indeed, evidence showed that shortly before Petitioner shot the victim, she had demanded $15,000 from him. And, in making that demand, Petitioner made statements that

reasonably could have been construed as threats on the victim's life if he did not give her the amount of money that she demanded. Moreover, evidence showed that Petitioner knew that the victim had established a trust whereby Petitioner inherited all of the victim's personal property, which had an after-tax value of $2.1 million. *See Garcia*, 2009 WL 1315504 at *2. Not only was Petitioner aware of the trust, she affirmatively took steps to ensure that she would be the beneficiary of the trust when Petitioner died. Specifically, after the victim established the trust, Petitioner contacted the victim's trust attorney to inform him that he had misspelled the victim's name on the trust instrument. (*Id.*) From this evidence alone, the jury reasonably could infer that Petitioner committed the murder for financial gain.

The prosecutor, however, presented additional evidence supporting a reasonable conclusion that the murder was financially motivated. In particular, testimony showed that Petitioner twice attempted to personally access the trust assets. (*Id.* at *10.) Although those attempts involved Petitioner's efforts to obtain money to, first, pay the victim's medical expenses and, second, to pay for the victim's burial costs (*see id.*), they nevertheless show that Petitioner was aware of the trust and that she believed that she had a right to access the trust assets. Moreover, after the victim's death, Petitioner's attorney twice attempted to enforce Petitioner's beneficiary rights to the trust assets. In sum, there was substantial evidence supporting the jury's finding that the murder was committed for financial gain.

Furthermore, it makes no difference for purposes of Petitioner's sufficiency of the evidence claim that there was evidence showing that Petitioner committed the murder because she feared for her safety. To be sure, trial counsel presented testimony from numerous witnesses showing that the victim was abusive and erratic. However, the jury was under no obligation to credit that testimony, and,

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indeed, even if the jury had credited that testimony, it did not preclude a finding that Petitioner committed the murder with the expectation of financial gain.

In sum, there was ample evidence to show that Petitioner murdered the victim for financial gain. Accordingly, the court of appeal's rejection of this claim was neither an unreasonable application of, nor contrary to, clearly established federal law as determined by the Supreme Court.

B. Conflict of Interest

In her second claim for relief, Petitioner contends that she was denied her Sixth Amendment right to trial counsel because her retained trial counsel, Benjamin Wasserman, was laboring under an actual conflict of interest that prevented him from adequately defending Petitioner against the allegation that she committed the murder for financial gain. Petitioner maintains that Wasserman's conflict stemmed from the fact that he represented Petitioner in both her efforts to obtain disbursements under the trust created by the victim and in the criminal case resulting from the victim's death. According to Petitioner, Wasserman took actions in his role as Petitioner's advocate regarding the trust proceeds that adversely impacted not only Petitioner's defense, but also his ability to adequately defend Petitioner against the allegation that she murdered the victim for financial gain. Specifically, Petitioner faults Wasserman for making pre-trial demands for trust fund disbursements on Petitioner's behalf. Petitioner asserts that she neither authorized, nor was aware of, the disbursement demands that Wasserman made on the trust. Petitioner, furthermore, contends that Wasserman made those demands solely to ensure that he would be paid for the legal services that he already had provided to Petitioner, and, presumably, for those that he later would provide to her in connection with the criminal trial.

Petitioner maintains that, as a result of those pre-trial actions, Wasserman became a critical -- yet unavailable -- witness in the criminal case against her. In particular, Petitioner asserts that, had Wasserman not been laboring under a

conflict, he could have countered the testimony of the victim's trust attorney, who testified that, after the victim's death, Wasserman made demands on the trust on Petitioner's behalf. Specifically, Petitioner believes that Wasserman would have testified that he made the demands on the trust solely to ensure that he would receive compensation. Petitioner maintains that Wasserman also would have testified that Petitioner was unaware of his actions and, further, that she wanted no part of the trust proceeds. But, according to Petitioner, Wasserman could not testify to those facts because he was acting as counsel for Petitioner, and therefore, could not testify as a witness.

Moreover, Petitioner contends that Wasserman's self-interest caused him to refrain from questioning Petitioner about whether she was aware of his actions. In particular, Petitioner appears to suggest that Wasserman elected not to pursue this line of questioning because, if he had, he would have exposed himself to misconduct charges based on the fact that he made unauthorized demands on the trust proceeds. Petitioner contends that Wasserman's purported conflict caused the jury to view him as an unethical liar, which, in turn, prejudiced the jury against Petitioner.

Citing the foregoing arguments, Petitioner concludes that Wasserman was laboring under an actual conflict of interest that adversely affected his representation of Petitioner. As such, according to Petitioner, she is entitled to habeas relief even if she cannot show that the purported conflict prejudiced her. The California Court of Appeal rejected this claim on its merits. As explained below, the court of appeal did not commit constitutional error in doing so.

The Sixth Amendment right to counsel includes the right to assistance by a conflict-free attorney. *Wood v. Georgia*, 450 U.S. 261, 271, 101 S. Ct. 1097, 67 L. Ed. 2d 220 (1981). Where a petitioner raises a Sixth Amendment challenge based on a conflict of interest, the defendant must demonstrate that his attorney's performance was "adversely affected" by the conflict of interest. *Mickens v.*

Taylor, 535 U.S. 162, 174, 122 S. Ct. 1237, 152 L. Ed. 2d 291 (2002); *Cuyler v. Sullivan*, 446 U.S. 335, 350, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980).

As a general rule, a habeas petitioner alleging a conflict of interest also must demonstrate prejudice by establishing "'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Mickens*, 535 U.S. at 166 (quoting *Strickland v. Washington*, 466 U.S. 668, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). An exception to the prejudice requirement may occur in a case of joint representation leading to a conflict of interest. *Mickens*, 535 U.S. at 166-67; *Cuyler*, 446 U.S. at 349-50. There is, however, no clearly established Supreme Court precedent applying the exception outside the context of joint representation. *Mickens*, 535 U.S. at 175-76. And, in fact, the Supreme Court has cautioned against extending this exception beyond cases involving joint representation. *Mickens*, 535 U.S. at 174 (expressing disapproval of the "holdings of Courts of Appeals, which have applied [Supreme Court's Sixth Amendment conflict precedent] unblinkingly to all kinds of alleged attorney ethical conflicts," including conflicts involving counsel's personal or financial interests); *see also Earp v. Ornoski*, 431 F.3d 1158, 1184-85 (9th Cir. 2005). For this reason, courts reviewing habeas challenges arising from conflicts other than those involving joint representation require the petitioner to satisfy the two-part test set forth in *Strickland*. *See, e.g.*, *United States v. Bernard*, 762 F.3d 467, 476 (5th Cir. 2014); *Hughes v. Singh*, 2013 WL 2423128, *11 (C.D. Cal. June 4, 2013); *Arenas v. Adams*, 2011 WL 7164453. *12 (C.D. Cal. Nov. 30, 2011); *Bouldon v. Chrones*, 2009 WL 2058164, *4 (C.D. Cal. July 9, 2009).[5]

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[5] In rejecting Petitioner's conflict of interest claim, the court of appeal applied the proper federal legal standard applicable to ineffective assistance of counsel claims. *See People v. Garcia*, 2012 WL 2237942, *2 (citing *Strickland v.*

(continued...)

Here, Petitioner's claim is premised on an alleged conflict arising from Wasserman's financial interests, not from his joint representation of clients with conflicting interests. Accordingly, Petitioner must establish prejudice under *Strickland* in order to prove his claim. *See Mickens*, 535 U.S. at 176. Under *Strickland*, a petitioner can establish prejudice by demonstrating a reasonable probability that, but for his counsel's errors, the result would have been different. *Strickland*, 466 U.S. at 694; *Hardy v. Chappell*, 832 F.3d 1128, 1143 (9th Cir. 2016) ("The relevant inquiry under *Strickland*'s prejudice prong is 'whether it is reasonably likely the result would have been different' had counsel not performed deficiently."). The errors must not merely undermine confidence in the outcome of the trial, but must result in a proceeding that was fundamentally unfair. *Williams v. Taylor*, 529 U.S. 362, 393 n.17, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000).

Petitioner cannot make that showing based on Wasserman's purported conflict of interest.[6] At bottom, Petitioner contends that, if she had been

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[5](...continued)
Washington, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). Moreover, the court of appeal analyzed the Supreme Court's opinion in *Mickens* and reasonably concluded that "*Mickens* does not stand for the proposition that a presumption of prejudice is always warranted where there is a financial conflict of interest. Instead, it appears to caution against it." (*Id.* at *3-4.) Petitioner, therefore, cannot obtain habeas relief on this claim unless she can show that the court of appeal unreasonably applied the governing legal standard to the facts of her case. *See Penry*, 532 U.S. at 792. As explained herein, Petitioner cannot make that showing.

[6] The state court of appeal did not affirmatively decide whether or not trial counsel in this case was actually laboring under a conflict of interest. Instead, the court of appeal assumed a conflict and proceeded to address whether Petitioner suffered prejudice as a result. Accordingly, this Court shall do the same. Nevertheless, the Court notes that the Supreme Court has never held that a (continued...)

represented by conflict-free counsel, she could have called Wasserman to testify that he contacted the victim's trust attorney on his own behalf, rather than on Petitioner's behalf or at Petitioner's direction. This contention fails for lack of evidence. Although Petitioner submitted a declaration from Wasserman in support of her SAP, nothing in that declaration supports Petitioner's claim that Wasserman made demands on the trust to obtain payment for his legal fees or that Petitioner was unaware of his actions. *See Gentry v. Sinclair*, 705 F.3d 884, 900 (9th Cir. 2013) (noting that petitioner "had no evidence to indicate why [counsel's] failure to present evidence . . . was unreasonable under the circumstances" where counsel submitted declaration supporting other aspects of ineffective assistance of counsel claim, but did not address specific allegation of failure to present evidence). On the contrary, Wasserman states that he "had several conversations with [Petitioner] about the Trust proceeds. . . ." (SAP, Exh. A.) In short, there is no basis to believe that Wasserman would have testified

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purported conflict arising from a trial counsel's financial interests gives rise to actual conflict of interest claim under the Sixth Amendment. *See Foote v. Del Papa*, 492 F.3d 1026, 1030 (9th Cir. 2007) (rejecting habeas relief based on conflict of interest and noting that no Supreme Court case stands for proposition that criminal defendant states Sixth Amendment claim by alleging either "irreconcilable conflict" with his appointed appellate counsel or alleging conflict based on defendant's prior lawsuit against appointed counsel); *Earp*, 431 F.3d at 1184 (rejecting claim that petitioner's "intimate relationship with his attorney" created actual conflict of interest because Supreme Court precedent limits "an actual conflict of interest" to context of joint representation). In the absence of such precedent, the court of appeal's rejection of this claim could neither have been an unreasonable application of, nor contrary to, clearly established federal law as determined by the Supreme Court. *See Lopez v. Smith*, __ U.S. __, 2014 WL 4956764 (2014) (per curiam); *Carey v. Musladin*, 549 U.S. 70, 77, 127 S. Ct. 649, 166 L. Ed. 2d 482 (2006) (where Supreme Court precedent gives no clear answer to question presented, "it cannot be said that the state court 'unreasonab[ly] appli[ed] clearly established Federal law'").

that, as Petitioner states, "[Wasserman] wanted the money so [P]etitioner could pay his legal fees as her attorney with respect to the estate and with respect to the pending murder investigation and potential charges." (Traverse at 5.) Accordingly, there is no reason to believe that Wasserman's inability to testify prejudiced Petitioner.

There is, likewise, no reason to believe that the jury would have accepted Petitioner's proposed testimony that she was unaware of Wasserman's efforts to obtain funds from the trust. First, the jury's verdict shows that it rejected Petitioner's credibility. And, the record shows that the jury had good reason to do so. For example, video evidence undermined Petitioner's account of the shooting. Although Petitioner claimed that she shot the victim because he had charged at her, the video showed no indication that the victim had threatened Petitioner before or after the shooting or that he had charged at her before she shot him. Rather, it showed that Petitioner retrieved a gun from her bedroom, hid it behind a pillow, and then shot him. *See Garcia,* 2009 WL 1315504 at *3.

Her accounts of the shooting were also internally inconsistent. For example, she maintained she shot Petitioner because she feared for her life when Petitioner charged at her. But, when she relayed the circumstances behind the shooting to her neighbor, she indicated that she acted to protect the neighbor and his family. (*See id.* at *13.) In particular, the neighbor testified that Petitioner had stated that, on the night of the murder, the victim had a gun and planned to shoot the neighbor and his family. (*Id.*) The neighbor further recounted that Petitioner said that the victim placed the gun down and that, when he did, Petitioner picked it up and shot him. (*Id.*)

Second, Petitioner's purported ignorance of Wasserman's efforts to obtain money from the trust would be difficult to reconcile with the evidence showing that, in fact, she was interested in those proceeds. Petitioner retained Wasserman to exercise her rights under the trust. Given this affirmative step to enforce her

beneficiary rights to the trust proceeds, the jury would be hard pressed to accept Petitioner's representation that she had no idea that, in fact, he would make demands on the trust. Moreover, the record was clear that Petitioner was aware that the victim had established a trust whereby Petitioner was the main beneficiary. Petitioner was also aware that the victim was wealthy. Testimony further established that Petitioner took affirmative steps to ensure the validity of the trust -- namely, she contacted the trust attorney to have him correct a typographical error in the original trust document. Additionally, after the shooting, she attempted to access the trust proceeds. Although she initially did so only to obtain funds to cover the victim's medical and funeral costs, her actions nevertheless show that she believed that, as the beneficiary of the trust, she was authorized to access the trust proceeds.

Third, Petitioner's claim that she somehow disapproved of Wasserman's efforts to obtain funds from the trust was inherently suspect in light of the evidence showing that she was acutely concerned with obtaining money from the victim. Just days before the shooting, Petitioner and the victim argued over money. Specifically, the victim, who was attempting to evict Petitioner from his home, told Petitioner that he would give her $5,000 if she agreed to leave his home. Petitioner countered by demanding that he give her $15,000 and that, if he refused to do so, she would "take [him] down." The fact that, days after these events, Petitioner not only shot the victim, but also made contradictory and unsupported statements about the shooting, strongly indicates that, as the jury found, the shooting was financially motivated. And, as explained above, Petitioner was aware that she was the beneficiary of the trust and that she stood to inherit a large sum of money under the terms of that trust when the victim died. Put simply, there is no reason to believe that the jury would have credited Petitioner's proposed testimony that she had no interest in the trust proceeds. The jury was equally unlikely to accept that Petitioner was unaware that the attorney

whom she had hired to represent her in connection with the trust made demands on the trust on her behalf.

For the foregoing reasons, Petitioner cannot show that the jury would have reached a more favorable verdict to her than the one it actually reached if Wasserman had not been laboring under a conflict of interest at trial.[7] Accordingly, the court of appeal's rejection of this claim was neither contrary to, nor an unreasonable application of, clearly established federal law as determined by the Supreme Court.

C. Judicial Misconduct

In her third claim for relief, Petitioner contends that the trial court violated her right to a fair trial by making a statement during voir dire that effectively communicated to the jury that Petitioner's theory of defense was invalid. Although Petitioner acknowledges that the trial court attempted take steps to alleviate the impact of its purportedly prejudicial statement, Petitioner maintains that the court's statement was so prejudicial that the attempt to lessen the statement's prejudicial impact was insufficient. Accordingly, Petitioner asserts that the trial court's statement deprived her of her right to a fair trial by an impartial jury. As explained below, this claims lacks merit.[8]

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[7] The Court further notes that most of the actions that counsel took in furtherance of Petitioner's rights under the trust occurred well-before she was charged with the victim's murder. Petitioner could not have suffered a Sixth Amendment violation for those actions alone because, at that time, she had no Sixth Amendment right to counsel. *See Kirby v. Illinois*, 406 U.S. 682, 92 S. Ct. 1877, 32 L. Ed. 2d 411 (1972) (stating that "a person's Sixth and Fourteenth Amendment right to counsel attaches only at or after the time that adversary judicial proceedings have been initiated against him.").

[8] Respondent argues that this claim is procedurally barred because the California Court of Appeal rejected it pursuant to an independent and adequate state law. There is, however, no need to address Respondent's procedural bar argument

(continued...)

1. Factual Background

During voir dire, the prospective jurors were questioned regarding their experience, if any, with domestic violence. During that questioning, the following exchange occurred:

> The Court: That's good. We thank you very much. [¶] "Anybody else? Remember, we're talking about a domestic violence type thing. I don't know anything about the facts of this case, and please do not imply anything by any question I ask or anything I say, but I'm just trying to -- from what I understand, there's a defense that she was a battered cohabitant. So if any of you have been battered cohabitants, you ought to let me know right now. Or maybe you have had a daughter that has been battered or sister or very close friend of yours. Don't tell us about some far out acquaintance. Juror No. 22, you raised your hand.
>
> Prospective Juror No. 22: I just mention this -- I think I was a baby when this happened. It was my father. He used to get drunk, and he would hit my mother. She didn't stay with him that long, so she divorced him, but I still remember him because I used to tell her that I remember that he did that.
>
> The Court: *But your mother didn't kill him?*
>
> Prospective Juror No. 22: No, she didn't kill him.
>
> The Court: All right.

(RT 54 (*emphasis added*).)

The court, thereafter, questioned Prospective Juror No. 22, and another juror, about whether they could be fair. At that point, trial counsel voiced concern about the court's remark to Prospective Juror No. 22, calling it "very prejudicial." Although reluctant to do so at first, counsel asked for a mistrial.

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[8](...continued)
because, even under *de novo* review, this claim fails on its merits. *See Lambrix v. Singletary*, 520 U.S. 518, 524-25, 117 S. Ct. 1517, 137 L. Ed. 2d 771 (1997) (holding that, in interests of judicial economy, federal courts may address merits of allegedly defaulted habeas claim if issue on claim's merits is clear but the procedural default issues are not).

The trial court did not explicitly deny the request for a mistrial, but instead engaged in the following exchange with Prospective Juror No. 22:

> The Court: It's been brought to my attention that I made an inappropriate comment a few minutes ago to one of the jurors in response to -- I believe that was Juror No. 22 where you said that your father used to beat up your mother, and I made a comment, 'He didn't kill her.' That is an inappropriate comment. Sometimes we misspeak, but I don't imply anything one way or another. I don't know what the facts in this case are going to show. I don't have any idea whether the killing in this case was justified or not. There are homicides where the killing is justified. It might very well be the case in this instance. Will you disregard my comment? Do you think you are capable of doing that?
>
> Prospective Juror No. 22: Yes.
>
> The Court: Any of you [other prospective jurors] think that I made any implication one way or another because of this comment? If you do, I want you to accept my apologies. Counsel is that --
>
> Trial Counsel: That's fine, your honor. Thank you.

(RT 58-59.)

2. Federal Legal Standard and Analysis

The Sixth Amendment guarantees every criminal defendant a right to an impartial jury. *Duncan v. Louisiana*, 391 U.S. 145, 149, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968); *Cook v. LaMarque*, 593 F.3d 810, 826 (9th Cir. 2010). Accordingly, "[e]ven if only one juror is unduly biased or prejudiced, the defendant is denied his constitutional right to an impartial jury." *United States v. Eubanks*, 591 F.2d 513, 517 (9th Cir. 1979) (internal quotation marks omitted).

Additionally, the Due Process Clause of the Constitution requires a "fair trial in a fair tribunal" before a judge with no actual bias against the defendant or interest in the outcome of his or her particular case. *Bracy v. Gramley*, 520 U.S. 899, 904, 117 S. Ct. 1793, 138 L. Ed. 2d 97 (1997). However, a trial judge is more than simply an umpire or referee. Consequently, a trial judge may participate in the examination of witnesses to clarify evidence, confine counsel to

evidentiary rulings, ensure the orderly presentation of evidence, and prevent undue repetition. *Duckett v. Godinez*, 67 F.3d 734, 739 (9th Cir. 1995). A claim of judicial misconduct by a state judge does not entitle a petitioner to habeas relief unless "the state trial judge's behavior rendered the trial so fundamentally unfair as to violate federal due process under the United States Constitution." *Id.* at 740. To sustain a claim of judicial misconduct on habeas review, there must be an "extremely high level of interference" by the trial judge that creates a "pervasive climate of partiality and unfairness." *Id.*

Here, Petitioner cannot show that the trial court's challenged statement deprived her of her right to a fair trial by an impartial jury. First, it is doubtful that the trial court committed any misconduct in making the challenged statement. Indeed, as Petitioner tacitly concedes, questioning the jurors regarding their experiences with (or their close family members' experiences with) domestic violence was a relevant line of inquiry to determine juror bias. Given that fact, there is no reason to believe that a question about whether any of those experiences resulted in the victim killing the aggressor would not, likewise, be a relevant line of inquiry. Thus, there is no reason to accept the premise of Petitioner's argument -- namely, that the trial court committed misconduct in making the challenged statement.

Second, even assuming that the trial court's statement was improper, Petitioner cannot show that, under the circumstances of the case, the challenged statement deprived her of her right to a fair trial. The trial court's purported misconduct was by no means pervasive. Rather, the supposed misconduct was isolated, comprising only six words in a Reporter's Transcript that spanned ten volumes.[9] And, although a trial court surely can prejudice a criminal defendant in

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[9] In truth, the Reporter's Transcript spanned eleven volumes, but only ten of (continued...)

six words or fewer, there is no reason to believe that the six words uttered by the court in this case were prejudicial. On the contrary, the record is devoid of any indication that, in making the challenged comment, the trial court expressed any scepticism regarding the battered woman's syndrome defense.

To the extent that Petitioner argues that the trial court's isolated statement sent a "clear message" to the jury that the trial court believed that the murder in this case was not justified (SAP at 17-18), that argument is meritless. Indeed, that argument ignores the trial court's statements both preceding and following the challenged statements. Immediately before making the challenged statement, the trial court clearly stated, "I don't know anything about the facts of this case, and please do not imply anything by any question I ask or anything I say. . . ." (RT 54.) Given this statement, it is unlikely that the jury took the court's question that came on the heels of that statement to mean that the court harbored any opinion as to whether the killing in this case was justified.

More importantly, shortly after making the challenged statement, the trial court took affirmative steps to alleviate any potentially prejudicial effects of the challenged statement. Absent extraordinary circumstances, a jury is presumed to follow an instruction to disregard irrelevant or improper comments to which it is exposed. *See Greer v. Miller*, 483 U.S. 756, 766 n.8, 107 S. Ct. 3102, 97 L. Ed. 2d 618 (1987). Courts, therefore, have repeatedly recognized that, generally, a trial court's curative instruction or admonition eliminates the prejudicial impact of an improper comment. *See id.* at 765-66 (noting that sequence of single comment, immediate objection, and curative instructions "clearly" indicated that improper comment did not violate due process); *Turner v. Marshall*, 63 F.3d 807, 817 (9th Cir. 1995) (noting that curative actions by trial court when confronted by

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[9](...continued)
those eleven volumes concerned pre-verdict proceedings.

improper comments "are usually presumed to neutralize damage such that any error was harmless"), *overruled on other grounds by Tolbert v. Page*, 182 F.3d 677 (9th Cir. 1999) (*en banc*).

Here, the trial court's curative action ensured that no juror believed that the court had had any opinion as to whether the killing underlying Petitioner's conviction was justified. Indeed, the court deemed its prior comment as "inappropriate" and went on to state that it had no "idea whether the killing in this case was justified or not." (RT 58.) The court then noted that some homicides are justified and that, in fact, the homicide in this case "might very well be" justified. (*Id.*) Further, the court asked Prospective Juror No. 22 -- who ultimately did not serve on Petitioner's jury -- whether she could disregard the challenged statement, and the juror stated that she could do so. What is more, the court addressed the other prospective jurors and stated that its comment was not intended to imply that the court had any opinion as to the facts of Petitioner's case. Given this sequence of events, there is no reason to believe that the trial court's isolated comment deprived Petitioner of her right to a fair trial. That conclusion is, moreover, bolstered by the fact that trial counsel indicated that he, himself, was satisfied with the curative steps taken by the trial court.

For the foregoing reasons, Petitioner is not entitled to habeas relief with respect to her claim that the trial court's voir dire comment deprived her of her right to a fair trial by an unbiased jury.

D. Peremptory Strike

In her final claim for relief, Petitioner contends that the trial court violated her right to an impartial jury by refusing to allow Petitioner's trial counsel to exercise a peremptory strike against one of the potential jurors. According to Petitioner, the trial court's decision was erroneous because it was based on an incomplete record. Specifically, Petitioner faults the trial court for refusing to allow trial counsel to supplement his initial reason for striking the juror. Had the

trial court allowed counsel to do so, according to Petitioner, counsel would have shown that he struck the juror in question for reasons having nothing to do with the juror's race or gender. The California Court of Appeal rejected this claim on its merits. As explained below, the court of appeal did not commit constitutional error in doing so.

1. Factual Background

This claim arises from trial counsel's attempt to exercise a peremptory strike against Juror No. 9. Juror No. 9 was an "older white male." He had been an attorney, but had retired from the practice of law. When trial counsel stated that he wanted to excuse Juror No. 9, the prosecutor asked to address the trial court. The following exchange took place at sidebar:

> Prosecutor: I am going to make a *Wheeler* motion. Defense has excused -- what excuse was that? What number was that? Was that 13 or 14?
>
> The Court: He's the lawyer, Caucasian white lawyer.
>
> Prosecutor: He's kicked -- eight of his peremptories have been against male whites.
>
> Trial counsel: We don't have any blacks. You kicked the black.
>
> Prosecutor: The victim in this case is male white. [Trial counsel] has exercised eight of his 15.
>
> The Court: I am going to find good cause for you to tell me the reason why you want to excuse this juror.
>
> Prosecutor: I'm talking about all of them. We're starting number 1, number 2, 6, 8, 9, 10, 11, 12.
>
> The Court: They've gone.
>
> Prosecutor: I keep notes. I think there's a pattern now. I wasn't sure at first, but now there is no reason for kicking these people.
>
> Trial Counsel: You kicked off -- She's kicking off women.
>
> The Court: You can't just -- wait a second. You can't just kick people off because they are male whites for no other reason. Would you have any reason why you want

to get rid of him other than he's a male white?

Trial Counsel: Because of the answers that they gave.

The Court: What answer did this juror give?

Trial counsel: I feel that he would not be appropriate for this particular charge.

The Court: Why?

Trial Counsel: Because he is an older white male.

Prosecutor: That's a *Wheeler* violation right there.

Trial counsel: I don't think so, because the victim --

The Court: I'm not going to grant your excuse if that's the only reason.

Trial counsel: Well, let me look at my notes and see.

The Court: Well, you already stated why. You don't have to look at your notes. You are telling me that because he's a male white, that's not a valid reason.

Trial Counsel: Because --

The Court: What did he say? What did he do? Give me some reason for not granting this. If you can't --

Trial counsel: I am going to object because she now when I've already said that I wanted him to be off, and now he's going to be prejudiced towards the defense.

Prosecutor: *Wheeler* specifically allows this as a remedy if the court is ruling.

The Court: I am going to deny your peremptory based on *Wheeler*. I could actually discharge this whole jury and start from the beginning.

Prosecutor: I would ask the court to do the lesser remedy of just not excusing the one juror under the case of *People v. Wheeler*.

The Court: I hadn't noticed that this was occurring. Okay. I'm going to grant that.

Trial Counsel: To what?

The Court: You can't excuse them -- you haven't stated any reason except that he's a male and he's white.

(RT 419-21.)

Juror No. 9 was sworn in as a member of the trial jury the next day. The jury was then excused until four days later, when the selection of alternate jurors was scheduled to take place. On that date, a previously sworn juror was excused for cause, and the parties agreed that selection of the first twelve jurors would be re-opened. Both sides examined additional jurors and exercised additional peremptory challenges. During the supplemental juror selection, an unrelated prosecution *Wheeler* motion was denied. At sidebar, trial counsel returned to the subject of his attempt to exercise a peremptory strike to Juror No. 9. The following exchange took place:

> Trial Counsel: I want to know because I want to challenge Juror No. 9, and that was the white male from last week, but I did not look -- I wanted to go back and look at my notes.
>
> The Court: Sir, you have already established the reason why you wanted to excuse him, so I'm not going to allow you to --
>
> Trial Counsel: He's an attorney, and I knew there was a reason. That's the reason I asked.
>
> The Court: I denied your *Wheeler* as to him, and you have already articulated that the reason you wanted him off was because he was a white male. That's impermissible. Now you are going back and trying to pedal back and backtrack, and that doesn't ring true to me.

(RT 652.) After a break, the trial court advised both counsel that it had conducted some research on the *Wheeler* issue. The court then resumed the discussion regarding Juror No. 9:

> The Court: But do not exercise a peremptory again as to the one juror that you candidly admitted to me you were dismissing because he was a white male.
>
> Trial Counsel: I understand, your honor.
>
> The Court: That at that point, you gave me no option.
>
> Trial Counsel: I also indicated I did want to go back and look at notes, and you said you could not do that.
>
> The Court: No, you can't. Because when you told me

> that on the record, you told me what you had thought due process was at that time. You can't go back there and change your mind and now exercise it on a different grounds.
>
> Trial Counsel: Okay, your honor. With all due respect, I think I indicated that after I asked to look at notes.
>
> The Court: All right. Real fine.

(*Id.* at 657-58.)

2. Federal Legal Standard and Analysis

Petitioner's challenge to the trial court's refusal to allow her to exercise a peremptory strike against Juror No. 9 fails for a variety of reasons. First, the trial court could not have deprived Petitioner of any constitutional right by disallowing the peremptory strike because "peremptory challenges are not constitutionally protected fundamental rights." *Georgia v. McCollum*, 505 U.S. 42, 112 S. Ct. 2348, 120 L. Ed. 2d 33 (1992). They are, instead, "but one state-created means to the constitutional end of an impartial jury and a fair trial." *Id.* Consequently, as the Supreme Court "repeatedly has stated, "the right to a peremptory challenge may be withheld altogether without impairing the constitutional guarantee of an impartial jury and a fair trial." *Id.; see also Rivera v. Illinois*, 556 U.S. 148, 158, 129 S. Ct. 1446, 173 L. Ed. 2d 320 (2009) ("Because peremptory challenges are within the States' province to grant or withhold, the mistaken denial of a state-provided peremptory challenge does not, without more, violate the Federal Constitution"); *United States v. Martinez-Salazar*, 528 U.S. 304, 311, 120 S. Ct. 774, 145 L. Ed. 2d 792 (2000) ("[P]eremptory challenges are not of federal constitutional dimension.").

Second, even if Petitioner had a constitutional right to exercise peremptory challenges, that right would not entitle her to strike a juror for the reasons advanced by her trial counsel. Purposeful discrimination on the basis of race or gender in the exercise of peremptory challenges violates the Equal Protection Clause of the United States Constitution. *Batson v. Kentucky*, 476 U.S. 79, 85,

106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 130-43, 114 S. Ct. 1419, 128 L. Ed. 2d 89 (1994). The prohibition on this type of purposeful discrimination applies equally to the prosecution and the defendant in a criminal trial. *McCollum*, 505 U.S. at 54-55. This law forecloses Petitioner's challenge to the trial court's refusal to allow her to strike Juror No. 9. Indeed, when confronted with the accusation that he was striking jurors based on their gender and race, trial counsel offered explanations implicating only race and gender. (*See* RT 419-20 (trial counsel stating "We don't have any blacks. You kicked the black" and "[the prosecutor] is kicking off women").) And, when asked directly why he believed that Juror No. 9 would not be an appropriate juror to sit on Petitioner's jury, trial counsel candidly answered, "[b]ecause he is an older white male." (*Id.* at 420.) In other words, trial counsel attempted to do precisely what the Equal Protection Clause forbids -- namely, strike a juror because of the juror's race and gender.

Moreover, there is no merit to Petitioner's claim that her trial counsel was deprived of the opportunity to refer to his notes in order to articulate a race-neutral reason for striking Juror No. 9. As an initial matter, trial counsel was provided that opportunity when the challenge to the peremptory strike was made. Indeed, even after trial counsel flatly stated that he struck the juror because of the juror's race and gender, the trial court offered trial counsel an opportunity to state a race-neutral reason for exercising the challenged peremptory strike. (*See id.* at 421 (trial court stating, "What did he say? What did he do? Give me some reason for not granting this")). In response, trial counsel did not refer to his notes or request time to do so; instead, he argued that allowing Juror No. 9 to remain on the jury would be prejudicial because the juror was aware that trial counsel had attempted to strike him.

It is, furthermore, of no consequence that, four days after the trial court denied the peremptory strike, trial counsel identified a race-neutral reason for

attempting to strike Juror No. 9. Counsel could not articulate a race-neutral reason when the strike was challenged. His inability to do so undercuts the credibility of his after-the-fact justification for exercising the strike. And, his purported race-neutral reason for striking the juror -- that is, because the juror was an attorney -- was discussed when the strike was challenged. Indeed, when the prosecutor challenged trial counsel's peremptory strike, the trial court described the juror as follows: "He's the lawyer, Caucasian white lawyer." (*Id.* at 419.) Accordingly, if counsel truly struck the juror because the juror was an attorney, counsel could have articulated that reason when the challenge was made.

Regardless, even if the juror's former occupation played a part in trial counsel's decision to strike the juror, the record is clear that trial counsel nevertheless attempted to purposefully discriminate on the basis of race and gender. To show purposeful discrimination in regards to a peremptory strike, the opponent of the strike must show that the decision to strike the challenged juror was "'motivated in substantial part by discriminatory intent.'" *Cook v. LaMarque*, 593 F.3d 810, 814 (9th Cir. 2010). Here, there is no doubt that the strike was motivated in substantial part by discriminatory intent. Indeed, trial counsel repeatedly and exclusively referred to the other prospective jurors' race and gender when confronted with the challenge to the peremptory strike. Trial counsel, moreover, unequivocally cited Juror No. 9's race and gender when asked why the juror was not appropriate to serve on Petitioner's jury. He cited no other basis for that conclusion until four days later. Given this fact, there is no doubt that trial counsel attempted to purposefully discriminate on the basis of race and gender. Because the Equal Protection Clause prohibits such discrimination, Petitioner cannot show that the trial court erred in refusing to allow trial counsel to exercise the challenged peremptory strike.

Finally, Petitioner has offered no reason to believe that disallowing her to strike Juror No. 9 deprived her of an impartial jury and a fair trial. There is, of

course, no basis to believe, as trial counsel stated, that older white males are incapable of being impartial in cases involving the battered woman's syndrome defense. And, even crediting trial counsel's after-the-fact explanation for attempting to strike Juror No. 9, there is no reason to believe that an attorney cannot be impartial in such cases. Thus, the fact that Juror No. 9 was not stricken could not have deprived Petitioner of her right to an impartial jury.

For the foregoing reasons, the court of appeal's rejection of Petitioner's challenge to the trial court's refusal to allow her to exercise a peremptory strike against Juror No. 9 was neither an unreasonable application of, nor contrary to, clearly established federal law as determined by the Supreme Court. Accordingly, Petitioner is not entitled to habeas relief as to this claim.

VII. RECOMMENDATION

The Magistrate Judge therefore recommends that the Court issue an order: (1) approving and adopting this Report and Recommendation; and (2) directing that judgment be entered denying the Petition on the merits with prejudice.

DATED: December 19, 2016

/S/ FREDERICK F. MUMM
FREDERICK F. MUMM
United States Magistrate Judge

NOTICE

Reports and Recommendations are not appealable to the Court of Appeals, but are subject to the right of any party to timely file Objections as provided in the Local Rules Governing the Duties of the Magistrate Judges, and review by the District Judge whose initials appear in the docket number. No Notice of Appeal pursuant to the Federal Rules of Appellate Procedure should be filed until entry of the Judgment of the District Court.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JUANITA CELIA GARCIA, Petitioner, v. DEBORAH K. JOHNSON, Warden, Respondent.	Case No. CV 13-6864 JFW (FFM) ORDER ACCEPTING FINDINGS, CONCLUSIONS AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE

Pursuant to 28 U.S.C. § 636, the Court has reviewed the entire record in this action, the attached Report and Recommendation of United States Magistrate Judge ("Report"), and the objections to the Report. Good cause appearing, the Court concurs with and accepts the findings of fact, conclusions of law, and recommendations contained in the Report after having made a de novo determination of the portions to which objections were directed.

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

DATED: April 6, 2017

JOHN F. WALTER
United States District Judge

JS-6

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JUANITA CELIA GARCIA, Petitioner, v. DEBORAH K. JOHNSON, Warden, Respondent.	No. CV 13-6864 JFW (FFM) JUDGMENT

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

IT IS ADJUDGED that the Petition is dismissed with prejudice.

DATED: April 6, 2017

JOHN F. WALTER
United States District Judge