UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MICHAEL BARAKA MASON, Petitioner-Appellant, v. DANIEL PARAMO, Warden and KAMALA D. HARRIS, Attorney General, Respondents-Appellees.	No. 18-55803 D.C. No. 3:16-cv-01176-JLS-MDD Southern District of California, San Diego ORDER (Filed Feb. 28, 2019)

Before: TROTT and MURGUIA, Circuit Judges.

Appellant's motion for an extension of time to file a certificate of appealability (Docket Entry No. 5) is granted.

The request for a certificate of appealability (Docket Entry No. 4) is denied because appellant has not shown that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also* 28 U.S.C. § 2253(c)(2); *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012); *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Any pending motions are denied as moot.

DENIED.

[SEAL]

United States District Court
SOUTHERN DISTRICT OF CALIFORNIA

Michael Baraka Mason **Petitioner,** **V.** Warden Daniel Paramo; Kamala Harris **Respondent.**	**Civil Action No.** 16cv1176-JLS-MDD **JUDGMENT IN A CIVIL CASE**

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED:

The Court adopts Judge Dembin's Report and Recommendation, and denies Petitioner's Petition for Habeas Corpus.

CLERK OF COURT
JOHN MORRILL,
Clerk of Court

Date: 5/18/18

By: /s M. Lozano
M. Lozano, Deputy

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

MICHAEL BARAKA MASON, Petitioner, v. DANIEL PARAMO, Warden, et al., Respondents	Case No.: 16-CV-1176 JLS (MDD) **ORDER ADOPTING REPORT AND RECOMMENDATION RE PETITION FOR HABEAS CORPUS** (ECF No. 34)

Petitioner Michael Baraka Mason has filed a Petition for Writ of Habeas Corpus, ("Petition," ECF No. 1), to which Respondent Daniel Paramo has filed a Response, (ECF No. 30). Petitioner then filed a Traverse, (ECF No. 33). Magistrate Judge Mitchell D. Dembin issued a Report and Recommendation, recommending the Court deny Petitioner's Petition, ("R&R," ECF No. 34). Judge Dembin ordered objections to the R&R to be filed no later than April 13, 2018. Petitioner did not file objections.

Having considered the Parties' arguments and the law, as well as the underlying state court record, the Court **ADOPTS** Judge Dembin's Report and Recommendation, and **DENIES** Petitioner's Petition for Habeas Corpus.

BACKGROUND

Judge Dembin's R&R contains a thorough and accurate recitation of the factual and procedural histories underlying the instant Petition for Writ of Habeas Corpus (*See* R&R 2–11.) This Order incorporates by reference the background as set forth therein.

LEGAL STANDARD

Federal Rule of Civil Procedure 72(b) and 28 U.S.C. § 636(b)(1) set forth a district court's duties regarding a magistrate judge's report and recommendation. The district court "shall make a de novo determination of those portions of the report . . . to which objection is made," and "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1)(c); *see also United States v. Raddatz*, 447 U.S. 667, 673–76 (1980). In the absence of a timely objection, however, "the Court need only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation." Fed. R. Civ. P. 72 advisory committee's note (citing *Campbell v. U.S. Dist. Court*, 510 F.2d 196, 206 (9th Cir. 1974)).

ANALYSIS

I. Summary of the R&R Conclusion

On May 11, 2016, Petitioner filed a Petition for Writ of Habeas Corpus in this district. Petitioner was convicted in state court and challenges his conviction

on two grounds: (1) the trial court erred in admitting the preliminary hearing testimony of Hana Jabbar at trial; and (2) Petitioner received ineffective assistance of counsel when his attorney failed to challenge the trial court's decision to permit the guilty verdict to stand and the case to proceed to sentencing when Juror 4 expressed she had reasonable doubt after the verdict was given. (Petition 12–13.)[1] Respondent previously filed a Motion to Dismiss Petitioner's second claim, which the Court granted pursuant to a previous R&R. (*See* ECF No. 28.) Thus, only Petitioner's first claim remains.

As to his remaining claim, Petitioner's [sic] argues that the Court of Appeal erred by finding that the prosecution's efforts to find Ms. Jabbar demonstrated a good faith attempt to produce a witness. (Petition 12; Traverse 7.) Judge Dembin examined the Court of Appeal's conclusion that the prosecution made good faith and diligent efforts to locate Hana Jabbar. (R&R 20.) Judge Dembin surveyed the various efforts undertaken by Mr. Cahill to locate Ms. Jabbar including attempting to contact her, speaking with people close to her, and searching among the homeless population where Ms. Jabbar was reportedly residing. (*Id.*) Petitioner suggested additional, alternative search methods to locate Ms. Jabbar, but Judge Dembin found that the prosecution is not required to exhaust every possible action. Accordingly, Judge Dembin determined that the California Court of Appeal's decision was neither contrary

[1] Pin citations to docketed material refer to the CM/ECF numbers electronically stamped at the top of each page.

to, nor an unreasonable application of, clearly established Supreme Court precedent. (*Id.*)

Alternatively, Judge Dembin concluded that even if the trial court erred in allowing Ms. Jabbar's statement at trial, the error did not have a substantial and injurious effect on the jury's verdict. (*Id.*) There was additional evidence produced at trial include [sic] Petitioner's DNA on a cigarette at a crime scene, Mr. Bell admitted taking part in the shooting and said that Petitioner was likewise involved, and Petitioner's photo was twice identified on the television program America's Most Wanted. (*See id.* at 20–21.) Judge Dembin finds any potential error by the trial court to be harmless.

II. Court's Analysis

Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), this Court may grant habeas relief only if the state court's decision (1) "was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court . . . ; 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); *Early v. Packer*, 537 U.S. 3, 7–8 (2002).

Under § 2254(d)(1), federal law must be "clearly established" to support a habeas claim. Clearly established federal law "refers to the holdings, as opposed to the dicta, of [the United States Supreme] Court's

decisions." *Williams v. Taylor*, 529 U.S. 362, 412 (2000). A state court's decision may be "contrary to" clearly established Supreme Court precedent "if the state court applies a rule that contradicts the governing law set forth in [the Court's] cases" or "if the state court confronts a set of facts that are materially indistinguishable from a decision of [the] Court and nevertheless arrives at a result different from [the Court's] precedent." *Id.* at 406. A state court decision does not have to demonstrate an awareness of clearly established Supreme Court precedent, provided neither the reasoning nor the result of the state court decision contradict such precedent. *Early*, 537 U.S. at 8.

A state court decision involves an "unreasonable application" of Supreme Court precedent "if the state court identifies the correct governing legal rule from this Court's cases but unreasonably applies it to the facts of the particular state prisoner's case." *Williams*, 529 U.S. at 407. An unreasonable application may also be found "if the state court either unreasonably extends a legal principle from [Supreme Court] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." *Id.*; *see Wiggins v. Smith*, 539 U.S. 510, 520 (2003); *Clark v. Murphy*, 331 F.3d 1062, 1067 (9th Cir. 2003).

Relief under the "unreasonable application" clause of § 2254(d) is available "if, and only if, it is so obvious that a clearly established rule applies to a given set of facts that there could be no 'fairminded disagreement' on the question." *White v. Woodall*, 134 S. Ct. 1697,

1706–07 (2014) (quoting *Harrington v. Richter*, 562 U.S. 86, 103 (2011)). An unreasonable application of federal law requires the state court decision to be more than incorrect or erroneous. *Lockyer v. Andrade*, 538 U.S. 63, 76 (2003). Instead, the state court's application must be "objectively unreasonable." *Id.*; *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003). Even if a petitioner can satisfy § 2254(d), the petitioner must still demonstrate a constitutional violation. *Fry v. Pliler*, 551 U.S. 112, 119–22 (2007). With this general framework in mind, the Court turns to Petitioner's claim.

The Sixth Amendment's Confrontation Clause, applied to the States through the Fourteenth Amendment, *Pointer v. Texas*, 380 U.S. 400, 403–05 (1965), requires that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. There are occasions, however, where witness testimony may be presented without the opportunity to confront the witness. There are two requirements for presenting testimony without an available witness. First, *Barber v. Page*, 390 U.S. 719, 724–25 (1968), held that "a witness is not 'unavailable' for purposes of the . . . confrontation requirement unless the prosecutorial authorities have made a good-faith effort to obtain his presence at trial." Second, a court will allow only testimony that has sufficient "indicia of reliability" as to be trustworthy for admission. *Ohio v. Roberts*, 448 U.S. 56, 65 (1980) (quoting *Mancusi v. Stubbs*, 408 U.S. 204, 213 (1972)), *abrogated on other grounds by Crawford v. Washington*, 541 U.S. 36 (2004). Petitioner only argues

that the first element was not met; the prosecution failed to meet its good faith burden to find Ms. Jabbar. In *Roberts*, the Supreme Court revisited the good faith requirement and reiterated the "lengths to which the prosecution must go to produce a witness . . . is a question of reasonableness." *Id.* at 74 (alteration in original) (quoting *California v. Green*, 399 U.S. 149, 189 n.22 (1970) (Harlan, J., concurring)).[2]

Here, the California Supreme Court denied Petitioner's appeal without comment, (Lodgment No. 8, ECF No. 19-64), and the California Court of Appeal issued the last reasoned decision, (*see* Lodgment No. 6, ECF No. 19-62). In such cases, federal habeas courts apply the presumption that "[w]here 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." *Wilson v. Sellers*, 138 S. Ct. 1188, 1194 (2018) (quoting *Ylst v. Nunnemaker*, 501 U.S. 797, 803 (1991)). Therefore, the Court evaluates the California Court of Appeal's decision under 28 U.S.C. § 2254(d).

In evaluating Petitioner's witness unavailability claim, the California Court of Appeal cited *People v. Herrera*, 49 Cal. 4th 613, 622–23 (2010), which in turn explicitly relies on both *Barber* and *Roberts*. (Lodgment No. 6, at 15.) In *Herrera*, the California Supreme Court recognized that the California Evidence Code

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[2] Because Petitioner only contests the first prong of the two-part *Roberts*' standard, the Court does not address the second prong requiring "indicia of reliability."

demands a similar requirement for establishing a witness's unavailability as *Barber* and *Roberts.* 49 Cal. 4th at 622. Thus, the Court of Appeal correctly identified the controlling Supreme Court precedent to evaluate witness unavailability. The only remaining question is whether the court unreasonably applied the precedent to the facts of Petitioner's case. *Williams*, 529 U.S at 407.

The Court agrees with Judge Dembin that the California Court of Appeal's application of the holding to the facts in Petitioner's case was reasonable. Because this case falls under the "unreasonable application" clause of § 2254(d), Petitioner may prevail "if, and only if, it is so obvious that a clearly established rule applies to a given set of facts that there could be no 'fairminded disagreement' on the question." *Woodall*, 134 S. Ct. at 1706–07 (quoting *Richter*, 562 U.S. at 103).

The Supreme Court's decision in *Roberts* is instructive. There, the prosecutor attempted for four months to locate an unavailable witness. *Roberts*, 448 U.S. at 75. The prosecutor spoke to the witness' mother, who stated she did not know of her daughter's whereabouts and had no way to contact her. *Id.* The prosecutor served five subpoenas on the witness at her parents' home in the four months prior to trial. *Id.* The Court determined that the State had met its "duty of good faith effort" to establish witness unavailability. *Id.*

In *Hardy v. Cross*, 565 U.S. 65, 71–72 (2011) (per curiam), the Supreme Court reiterated that "the Sixth Amendment does not require the prosecution to

exhaust every avenue of inquiry, no matter how uncompromising." The Supreme Court applied that standard to the facts in *Hardy* where the Seventh Circuit faulted the prosecution for failing to contact the witness's current boyfriend, failing to make inquiries at the cosmetology school where the witness had once been enrolled, and neglecting to serve the witness a subpoena after she expressed fear about testifying at trial. *See id.* at 70–71. The Supreme Court disagreed that these additional, incremental steps were required. The Court concluded that "the deferential standard of review set out in 28 U.S.C. § 2254(d) does not permit a federal court to overturn a state court's decision on the question of unavailability merely because the federal court identifies additional steps that might have been taken." *Id.* at 72.

Here, the Court of Appeal surveyed the undisputed facts proffered by the prosecution to meet the good faith duty to find Ms. Hana Jabbar:

> [T]he facts surrounding the prosecution's efforts to secure Hana's attendance at trial are essentially undisputed. Cahill, the prosecution's investigator, spoke with Hana prior to Mason's trial and told her her testimony would be required. Later, Cahill attempted to contact Hana by cell phone, but she did not respond. Cahill spoke with the people closest to Hana about her whereabouts and determined she was homeless. Cahill went to the area where she was reportedly staying and showed her picture to other homeless people in an effort to find her. Cahill himself drove through

> the area multiple times looking for her. Cahill also reviewed a database of contacts with law enforcement and emergency personnel and found no mention of Hana.

(Lodgment No. 6, at 16.) The court also recognized that Ms. Jabbar's closest friends were not in contact with her and did not know her location. (*Id.*) The court concluded that the prosecution's efforts were reasonable under the circumstances.

In reaching this finding, the court did not credit Petitioner's argument, renewed in his habeas petition, that the prosecution could have secured Ms. Jabbar as a material witness pursuant to California Penal Code § 1332.[3] (*Id.* at 17.) The court reasoned that Mr. Cahill reached out to Ms. Jabbar after Morris's trial and Ms. Jabbar did not explicitly resist Cahill's admonition that she would have to testify at Petitioner's trial. (*Id.*)

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[3] Section 1332 provides, in pertinent part:

> (a) [W]hen the court is satisfied, by proof on oath, that there is good cause to believe that any material witness for the prosecution or defense . . . will not appear and testify unless security is required, at any proceeding in connection with any criminal prosecution . . . , the court may order the witness to enter into a written undertaking to the effect that he or she will appear and testify at the time and place ordered by the court or that he or she will forfeit an amount the court deems proper.
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> (b) If the witness required to enter into an undertaking to appear and testify . . . refuses compliance with the order for that purpose, the court may commit the witness, if an adult, to the custody of the sheriff . . . until the witness complies or is legally discharged.

Cal. Penal Code §1332(a)—(b).

The Court of Appeal recognized that confining a witness, who had not committed a crime, is a drastic measure that should be used sparingly. (*Id.* (citing *People v. Cogswell*, 48 Cal. 4th 467, 477 (2010)).) The court determined that Petitioner had not demonstrated that a drastic measure, such as confining Ms. Jabbar, would be warranted. (*Id.*)

Petitioner renews his argument that the prosecution could have taken additional available measures to secure Ms. Jabbar's presence at trial. (Traverse 8.) According to Petitioner, the prosecution should have issued a material witness warrant for Ms. Jabbar's arrest. (*Id.* (citing C. Penal Code § 1332; and *People v. Roldan*, 205 Cal. App. 4th 969, 978 (Ct. App. 2012)).) Petitioner would apply the Ninth Circuit's holding in *Daboul v. Craven*, 429 F.2d 164, 167 (9th Cir. 1970), which addressed a situation where the prosecution failed to use the Uniform Act to produce a witness. (Traverse 8.) Petitioner admits that the Uniform Act does not apply directly to his case, but argues the reasoning is persuasive. (*See id.*)

Daboul is distinguishable. That case relied on the Supreme Court's reasoning in *Barber* and stated "if the prosecution fails to make use of the Uniform Act [to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings], it has not made the required 'good faith effort' and cannot use the prior testimony." *Daboul*, 429 F.3d at 167 (citing *Barber*, 390 U.S. at 723–24). Yet, *Barber*'s holding does not require that the *per se* failure to use the Uniform Act (or a similar statute) is a constitutional violation. In *Barber*, the

Supreme Court noted the witness was in federal custody and the prosecution could have issued a writ of habeas corpus ad testificandum to compel the prisoner to testify at trial. 390 U.S. at 723–24. Instead, the prosecution "made absolutely no effort to obtain the presence of [the witness] at trial other than to ascertain he was in a federal prison outside Oklahoma." *Id.* at 723. Thus, *Barber* only held that the prosecution had to show a good faith effort to obtain a witness's personal appearance at trial and failed to do so because it made *no effort* to obtain the witness. Justice Marshall's opinion summarized the relevant inquiry and result as follows:

> In short, a witness is not 'unavailable' for purposes of the foregoing exception to the confrontation requirement unless the prosecutorial authorities have made a good-faith effort to obtain his presence at trial. The State made no such effort here, and, so far as this record reveals, the sole reason why Woods was not present to testify in person was because the State did not attempt to seek his presence. The right of confrontation may not be dispensed with so lightly.

Id. at 724–25. *Daboul* relied on the *Barber* court's dicta to support its conclusion, but this Court is only bound by Supreme Court holdings. As *Roberts* recognized, the relevant inquiry is one of reasonableness, not a *per se* rule that failure to use the Uniform Act (or similar measures) necessitates an unreasonable application of law.

Petitioner also cites *People v. Roldan*, 205 Cal. App. 4th at 978. There, the witness was held in custody for several months before a preliminary hearing and was the key witness for the prosecution. *Id*. at 980, 982. The Court of Appeal reasoned that the State's good faith requirement to produce a witness for trial included "the duty to use reasonable means to *prevent a present witness from becoming absent*." *Id*. at 980 (quoting *People v. Louis*, 42 Cal. 3d 969, 991 (1986)); and citing *United States v. Tirado–Tirado*, 563 F.3d 117, 124 (5th Cir. 2009)). Thus, *Roldan* rests on the fact that the key witness was in custody, the government knew the witness was material, and released the witness rather than continuing the detention until trial.

The dispositive fact here is that Ms. Jabbar, unlike the witnesses in *Barber* and *Roldan*, was not in custody. Moreover, the prosecution had no indication that she might not testify until she failed to appear for Morris's trial. Her failure to appear at Morris's trial was the earliest instance where the prosecution could have been on notice that Ms. Jabbar might not be available for trial. But, the State did not know her whereabouts. Even if the State issued a warrant for her arrest pursuant to California Penal Code § 1332, Petitioner does not explain how using section 1332 would have allowed the prosecution to find Ms. Jabbar. Mr. Cahill could not find Ms. Jabbar; he put her name in to the Officer Notification System and searched the "ARJIS" system, which would have indicated that Ms. Jabbar had contact with law enforcement or medical personnel. (*See* Lodgment No. 1-21, ECF No. 19-21, at 194–95 (trial

transcript).) Neither was successful. If Ms. Jabbar had no police contact how could have the prosecution detained her pursuant to § 1332? Petitioner's theory does not explain this question. Nor can it. This is not an instance where Ms. Jabbar was in a known location and the State failed to secure her—no one knew where she was. Thus, *Daboul* and *Roldan*'s logic is inapplicable here.

Petitioner's only other suggestion would be for Mr. Cahill to visit homeless shelters and contact operators of homeless shelters whether they saw Ms. Jabbar. (Traverse 9.) Petitioner contends that contacting homeless shelters would have required minimally more effort and there is a possibility that such a minimal but affirmative measure might have produced Ms. Jabbar. (*Id.*) Petitioner concludes that this further measure "is what the federal standard unquestionably requires." (*Id.*) Yet, Mr. Cahill testified that "[e]very day on my way in I'll swing through the East Village area, go up and down the streets, get out every now [sic] and talk to people, show her photo, see if any of the other homeless people recognize her or see her down there." (Lodgment No. 1-21, at 195.) Petitioner faults Mr. Cahill for not reaching out to homeless shelters, but not even Ms. Jabbar's own family knew her whereabouts. Petitioner's contention that the federal standard unquestionably required Mr. Cahill to contact homeless shelters is simply not supported by the law. As *Hardy* makes clear, "the Sixth Amendment does not require the prosecution to exhaust every

avenue of inquiry, no matter how uncompromising." 565 U.S. at 71–72.

Mr. Cahill's efforts were reasonable under the circumstances. Mr. Cahill repeatedly tried to reach Ms. Jabbar using the means he had previously used to contacted [sic] her. He reached out to her friends and family, searched areas where she was likely to be, and surveyed law enforcement databases. Mr. Cahill drove through the area where Ms. Jabbar was reported to be every day on his way to work. Of course, there will always be some further step the State possibly could have taken, but the prosecution is not required to "exhaust every avenue of inquiry." *Hardy*, 565 U.S. at 71–72.

Furthermore, a federal habeas court is not merely reviewing the reasonableness of the State's actions in a vacuum—this Court is reviewing the decision of the California Court of Appeal, which must be given further deference. "As a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Richter*, 562 U.S. at 103. Petitioner has not demonstrated such an error. In light of the foregoing, the Court **ADOPTS** the R&R and **DENIES** Petitioner's remaining habeas claim.

III. Evidentiary Hearing

The Court briefly addresses the issue of an evidentiary hearing. Petitioner's habeas Petition does not explicitly move for an evidentiary hearing. "In habeas proceedings, an evidentiary hearing is required when the petitioner's allegations, if proven, would establish the right to relief." *Totten v. Merkle*, 137 F.3d 1172, 1176 (9th Cir. 1998) (citing *Campbell v. Wood*, 18 F.3d 662, 679 (9th Cir. 1994); and *Townsend v. Sain*, 372 U.S. 293, 312 (1963)). "However, an evidentiary hearing is *not* required on issues that can be resolved by reference to the state court record." *Id.* (citing *Campbell*, 18 F.3d at 679; and *United States v. Moore*, 921 F.2d 207, 211 (9th Cir. 1990); and *United States v. Birtle*, 792 F.2d 846, 849 (9th Cir. 1986)).

The parties generally do not dispute the facts and Petitioner's arguments were for legal, not factual error. Accordingly, the issues Petitioner raised may be resolved to the state court record and an evidentiary hearing is not warranted.

IV. Certificate of Appealability

Petitioner does not request a certificate of appeal ability. When a district court enters a final order adverse to a petitioner in a habeas proceeding, it must either issue or deny a certificate of appealability, which is required to appeal a final order in a habeas corpus proceeding. *See* 28 U.S.C. § 2253(c)(1)(A). A petitioner seeking a writ of habeas corpus has no absolute entitlement to appeal a district court's denial of his

petition, but may only appeal in certain circumstances. *Miller–El*, 537 U.S. at 335–36. The federal rules governing habeas cases brought by state prisoners require a district court that dismisses or denies a habeas petition to grant or deny a certificate of appeal ability in its ruling. *See* Rule 11(a), Rules Governing § 2254 Cases, 28 U.S.C. foll. § 2254. For the reasons set forth above, Petitioner has not shown "that reasonable jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. [473], 484 (2000). Accordingly, the Court **DECLINES** to issue a certificate of appeal ability.

CONCLUSION

For the foregoing reasons, the Court **ADOPTS** the R&R, (ECF No. 18), and **DENIES** each claim of Petitioner's Petition for Habeas Corpus, (ECF No. 1). Because this Order concludes litigation in this matter, the Clerk **SHALL** close the file.

IT IS SO ORDERED.

Dated: May 18, 2018 /s/ Janis L. Sammartino
Hon. Janis L. Sammartino
United States District Judge

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

MICHAEL BARAKA MASON, Petitioner, v. DANIEL PARAMO, Warden, et al., Respondents.	Case No.: 16-CV-1176 JLS (MDD) **ORDER (1) ADOPTING REPORT AND RECOMMENDATION; AND (2) GRANTING IN PART MOTION TO DISMISS** (ECF No. 26)

Presently before the Court are: (1) Respondent Daniel Paramo's Motion to Dismiss the Petition for Writ of Habeas Corpus as a Mixed Petition, and Claim 2 as Unexhausted and Untimely, ("MTD," ECF No. 18); (2) Magistrate Judge Mitchell D. Dembin's Report and Recommendation ("R&R") advising that the Court should grant in part Respondent's MTD, (ECF No. 26); and (3) Petitioner's Objections to the R&R, ("R&R Objs.," ECF No. 27). Respondent did not file a reply to Petitioner's Objections. After considering the parties' arguments and the law, the Court (1) **OVERRULES** Petitioner's Objections, (2) **ADOPTS** the relevant portions of the R&R, and (3) **GRANTS IN PART** Respondent's Motion to Dismiss.

BACKGROUND

Judge Dembin's R&R contains a thorough and accurate recitation of the factual and procedural histories underlying the instant Petition for Writ of Habeas Corpus. (*See* R&R 2–4.) This Order incorporates by reference the background as set forth therein.

LEGAL STANDARD

Federal Rule of Civil Procedure 72(b) and 28 U.S.C. § 636(b)(1) set forth a district court's duties regarding a magistrate judge's report and recommendation. The district court "shall make a de novo determination of those portions of the report . . . to which objection is made," and "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1)(c); *see also United States v. Raddatz*, 447 U.S. 667, 673–76 (1980). In the absence of a timely objection, however, "the Court need only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation." Fed. R. Civ. P. 72 advisory committee's note (citing *Campbell v. U.S. Dist. Court*, 510 F.2d 196, 206 (9th Cir. 1974)).

ANALYSIS

I. Summary of the R&R Conclusion

On May 11, 2016 Petitioner filed a Petition for Writ of Habeas Corpus in this district. ("Petition," ECF No. 1.) Petitioner challenges his conviction on two

grounds: (1) the trial court erred in admitting the preliminary hearing testimony of Hana Jabbar at trial; and (2) Petitioner received ineffective assistance of counsel when his attorney failed to challenge the trial court's decision to permit the guilty verdict to stand and the case to proceed to sentencing when Juror 4 expressed she had reasonable doubt after the verdict was given. (R&R 2[1] (citing Petition 12–13).)

On October 25, 2016, Respondent Paramo filed a Motion to Dismiss the Petition. (ECF Nos. 18, 19.) Respondent conceded that ground one was exhausted and thus reviewable by this Court, but argued that ground two was unexhausted and untimely, thus counseling dismissal of both claims. (R&R 4 (citing ECF No. 18, at 9).) Petitioner acknowledged that ground two was unexhausted, but argued that the Court should stay the case pending exhaustion of ground two of the Petition, or, in the alternative, to dismiss only ground two. (*Id.* (citing ECF No. 25, at 8).)

Judge Dembin first concluded that the Petition was timely, (R&R 5), and next considered whether the Court should stay the Petition pending exhaustion of ground two in state court under either *Kelly v. Small*, 315 F.3d 1063 (9th Cir. 2002), *abrogated on other grounds by Robbins v. Carey*, 481 F.3d 1143 (9th Cir. 2007), or *Rhines v. Weber*, 544 U.S. 269 (2005). Judge

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[1] Pin citations to docketed material refer to the CM/ECF numbers electronically stamped at the top of each page.

Dembin first concluded that a stay under *Kelly*[2] would be futile "because the statute of limitations already expired and Petitioner is not entitled to toll the limitations period or to relate his unexhausted claim back to ground one of the Petition." (R&R 8.) Second, Judge Dembin concluded that a stay under *Rhines*[3] would be inappropriate because Petitioner did not demonstrate good cause for failing to raise his unexhausted claim in state court and that Petitioner's claim is not potentially meritorious. (*Id.* at 9–15.) Without any basis for a stay, Judge Dembin recommends that the Court partially grant Respondent's motion and dismiss ground two of the Petition with prejudice. (*Id.* at 16.)

II. Summary of Petitioner's Objections

Petitioner solely objects to Judge Dembin's conclusion that a stay is not warranted under *Rhines*. (R&R

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[2] "*Kelly* permits a district court to dismiss unexhausted claims and stay the remaining claims pending exhaustion of the dismissed claims. *Kelly*, 315 F.3d at 1070–71. The petitioner must seek to add the dismissed claims back in through amendment after exhausting them in state court before the AEDPA statute of limitations expires. *King v. Ryan*, 564 F.3d 1133, 1138–41 (9th Cir. 2009)." (R&R 6–7.)

[3] "*Rhines* permits a district court to stay a mixed petition in its entirety. *King*, 564 F.3d at 1139–40. To stay the entire mixed petition without dismissing unexhausted claims, the petitioner must show good cause for failing to exhaust the claims in state court before filing the federal petition and that the unexhausted claims are not 'plainly meritless.' *Rhines*, 544 U.S. at 277–78. A stay under *Rhines* is inappropriate where the petitioner has engaged in 'abusive litigation tactics or intentional delay.' *Id.*" (R&R 8–9.)

Objs. 2.) First, Petitioner argues that Judge Dembin erred in relying on the prejudice prong of the *Strickland*[4] standard, as applied to claims for ineffective assistance of counsel, because it has no bearing on the "good cause" determination under *Rhines*. (*Id.* at 3.) Second, as to the potential merit of Petitioner's claim, Petitioner argues that Judge Dembin's reliance on the *Strickland* prejudice standard improperly heightened the burden for ordering a stay. (*Id.* at 4.)

III. Court's Analysis

Given Petitioner's Objections, the Court will review, *de novo*, whether the Court should stay the Petition pending exhaustion of ground two pursuant to *Rhines*.

Rhines permits a district court to stay a mixed petition (i.e., a petition with exhausted and unexhausted claims) in its entirety. *King v. Ryan*, 564 F.3d 1133, 1139–40 (9th Cir. 2009). To stay the entire mixed petition without dismissing unexhausted claims, the petitioner must show (A) good cause for failing to exhaust the claims in state court before filing the federal petition, (B) that the unexhausted claims are not "plainly meritless," and (C) that the petitioner has not engaged in "abusive litigation tactics or intentional delay." *Rhines*, 544 U.S. at 277–78; *see also King*, 564 F.3d at 1139.

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[4] *Strickland v. Washington*, 466 U.S. 668 (1984).

A. Good Cause

The first factor in a *Rhines* analysis is whether Petitioner has demonstrated good cause for failing to raise his unexhausted claim in state court. "There is little authority on what constitutes good cause to excuse a petitioner's failure to exhaust." *Blake v. Baker*, 745 F.3d 977, 980 (9th Cir. 2014); *Pace v. DiGuglielmo*, 544 U.S. 408, 416–17 (2005). But the Ninth Circuit has recently explained that

> [t]he good cause element is the equitable component of the *Rhines* test. It ensures that a stay and abeyance is available only to those petitioners who have a legitimate reason for failing to exhaust a claim in state court. As such, good cause turns on whether the petitioner can set forth a reasonable excuse, supported by sufficient evidence, to justify that failure.

Blake, 745 F.3d at 982 (citing *Pace*, 544 U.S. at 416). Thus, the *Blake* Court held that ineffective assistance "by post-conviction counsel can be good cause for a *Rhines* stay" where a petitioner's showing of good cause is concrete and reasonable, not a bare allegation of ineffective assistance of counsel. *Id.* at 983.

As an initial matter, the Court agrees with Petitioner that a discussion of the merits of Petitioner's ineffective assistance of counsel ("IAC") claim should not be considered in the "good cause" portion of the *Rhines* analysis. Rather, the Court should simply determine whether Petitioner's excuse for failing to exhaust the

claim is reasonable and supported by sufficient evidence. *See Blake*, 745 F.3d at 982.

The Court finds that Petitioner has demonstrated good cause under *Rhines*. As background, part of Petitioner's IAC claim is that his appellate counsel failed to raise any issues regarding Juror 4 in his appeal. (R&R 11 (citing ECF No. 25, at 5; Lodg. Nos. 3, 5, 7).) Specifically, Juror 4 expressed she had "reasonable doubt . . . on certain counts" after the guilt phase and during the penalty phase of Petitioner's trial. (*Id.* at 10 (citing ECF No. 1, at 104).) After some discussion, Petitioner's trial counsel requested that the jury return to the jury room and reopen their deliberations or, in the alternative, a mistrial. (*Id.* at 10–11 (citing ECF No. 1, at 104–106; 157).) The trial court denied the requests. (*Id.* (citing ECF No. 101, at 127–176).) While Petitioner's *trial* counsel raised the issue, Judge Dembin found that Petitioner's *appellate* counsel failed to raise any issues regarding Juror 4. (R&R 11.) Importantly for the "good cause" analysis, Judge Dembin found that

> [t]he record supports Petitioner's argument that appellate counsel failed to raise any issues regarding Juror 4. (ECF No. 25 at 5; Lodg. Nos. 3, 5, 7). Appellate counsel did not include this claim in the appellate brief, reply brief or the petition for review in the California Supreme Court, despite the fact that the Reporter's Transcript includes approximately 65 pages on the issue. (Lodg. Nos. 3, 7; ECF No. 1 at 99–122, 127–152, 157–176). Petitioner has also shown that he relied upon the

> assurances of his trial and appellate counsel that they would raise any necessary claims for him. (*See* ECF No. 1 at 13) (indicating that Petitioner thought his attorney raised this issue in his Petition for Review). Petitioner has made a sufficient showing that his appellate attorney may have acted unreasonably because he had notice of the juror claim and failed to exhaust the claim by presenting it to the state's highest court.

(*Id.* at 11–12.) After a review of the record, the Court agrees with Judge Dembin's assessment and thus finds that Petitioner has adequately demonstrated good cause for failing to raise his unexhausted claim in state court (specifically, he demonstrated that he relied on his appellate counsel to raise such claims on his behalf). Nothing more is needed for this consideration. Thus, while Judge Dembin goes on to assess the merits of Petitioner's IAC claim in his "good cause" analysis, (*id.* at 12–15), and ultimately concludes that Petitioner has not shown "good cause" as a result of that assessment, that analysis is more appropriately presented under the claim merit analysis. Accordingly, the Court will consider that portion of Judge Dembin's analysis below, *infra* Part III.B.

B. Potential Merit of Petitioner's Claim

The second factor in a *Rhines* analysis is whether a petitioner's claims are "plainly meritless," *Rhines*, 544 U.S. at 277, or, stated differently, are "potentially meritorious," *id.* at 278.

As a threshold matter, the Court disagrees with Petitioner's argument that the Court cannot consider the prejudice prong of *Strickland* in assessing his IAC claim. As discussed below, prejudice is a required element of an IAC claim, and thus the Court must consider it to determine whether Petitioner's IAC claim has some merit. *See*, *e.g.*, *Gonzalez v. Wong*, 667 F.3d 965, 982 (9th Cir. 2011) (considering the prejudice/materiality prong of a potential *Brady v. Maryland*, 373 U.S. 83 (1963), violation in the context of a *Rhines* merits analysis). But Petitioner further argues that the second *Rhines* consideration, whether a claim is "plainly meritless" or "potentially meritorious," is a generous standard and thus does not require him to demonstrate that he will definitely prevail or even that he is likely to prevail on the merits. (R&R Objs. 4.) The Court agrees with Petitioner on this point, and notes that this approach is consistent with the Ninth Circuit's jurisprudence in *Rhines* analyses. *See*, *e.g.*, *Gonzalez*, 667 F.3d at 980 ("Our discussion below is only to demonstrate why we conclude that Gonzales has a colorable or potentially meritorious Brady claim such that a reasonable state court could find a Brady violation." (emphases added).) Accordingly, the Court conducts its analysis of Petitioner's IAC claim with this standard in mind.

"In order to establish ineffective assistance of counsel, a petitioner must prove both deficient performance by his counsel and prejudice caused by the deficiency." *Gonzalez*, 667 F.3d at 987. "To demonstrate deficient performance [Petitioner] must show that

counsel's performance 'fell below an objective standard of reasonableness' based on 'the facts of the particular case [and] viewed as of the time of counsel's conduct.'" *Id.* (citing *Strickland v. Washington*, 466 U.S. 668, 688–90 (1984)). "In order to establish prejudice [Petitioner] 'must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *Id.* (citing *Strickland*, 466 U.S. at 694).

As discussed, the crux of Petitioner's IAC claim is that his counsel—both trial and appellate—failed to inquire into the reason for Juror 4's doubt or raise the issue on appeal. (R&R Objs. 5; *see also* ECF No. 25, at 4–5; ECF No. 1, at 13.) Specifically, Petitioner argues that as a result of Juror 4's doubt, the jury's verdict was not unanimous, thus violating his constitutional rights to a unanimous jury verdict. (R&R 12; Objs 4–5; ECF No. 25, at 5; ECF No. 1, at 13.) Judge Dembin recounted the factual and procedural basis for Petitioner's IAC claim as follows:

> Petitioner focuses on circumstantial evidence showing that "counsel [failed] to raise any issues regarding Juror 4 [which shows] counsel's ineffective assistance [and] demonstrates good cause for failing to exhaust his claim." (ECF No. 25 at 5). In his Petition, Petitioner attaches a Reporter's Transcript where Juror 4 expressed she had "reasonable doubt . . . on certain accounts" after the guilt phase and during the penalty phase of the trial. (ECF

No. 1 at 104). The record reflects that the trial judge asked Juror 4 why she did not express her reasonable doubt when he polled the jury. (ECF No. 1 at 104–05). Juror 4 stated she had "basically overcome the doubt that [she] had. And it continued to come up in [her] mind [after the verdicts were returned and during the intervening time.]" (*Id.* at 105). Juror 4 then stated that at the time the verdict was given, she supported the verdict and it was her verdict, but that she still wanted to speak privately with the judge to discuss "very specific" allegations or charges. (*Id.* at 106). The trial judge asked whether Juror 4 understood what reasonable doubt means and whether she had done outside research. (*Id.* at 105–06). Juror 4 explained she understood what reasonable doubt means and that she had not done outside research. (*Id.*). The trial judge then explained that speaking privately with Juror 4 would be inappropriate and indicated that nothing Juror 4 said raised issues regarding juror misconduct. (*Id.*).

In response to Juror 4's statement, Petitioner's trial counsel requested "the jury be directed to return to the jury room and reopen their deliberations concerning issues in the guilt phase," or in the alternative, requested a mistrial. (*Id.* at 157). The People requested the court determine whether Juror 4 should be excused for cause. (*Id.* at 169). On November 16, 2012, the court permitted oral argument on the issues and ultimately concluded that "[t]here is nothing to correct at the present time. Those verdicts were polled and

> recorded. The fact she has now had some buyer's remorse, as suggested, that opens a pandora's box for incredible mischief." (*Id.* at 170). The court did not reopen jury deliberations, did not grant a mistrial and did not excuse Juror 4 for cause. (*Id.* at 127–176).

(R&R 10–11.)

As an initial matter, the Court agrees with Petitioner and Judge Dembin that, because his case was a capital case, Petitioner had a constitutional right to a unanimous jury under California law and possibly under Federal law as well. (R&R 12); *see also People v. Collins*, 17 Cal. 3d 687, 693 (1976) (California law requires unanimous jury verdict in criminal cases); *cf. Schad v. Arizona*, 501 U.S. 624, 634 n.5 (1991) ("[A] state criminal defendant, at least in noncapital cases, has no federal right to a unanimous jury verdict. . . ."). Nevertheless, Judge Dembin found that Petitioner had not made a well-argued claim of unanimous jury infringement or juror misconduct. (R&R 12.) Specifically, Judge Dembin found that

> [e]ven if a unanimous jury is constitutionally required, there was a unanimous jury verdict and, when individually polled, no juror expressed any equivocation or hesitation regarding the verdict. (Lodg. No. 1-48 at 7915–30). Specifically, the Court asked "Juror No. 4, were these and are these your personal verdicts as read by the court?" (*Id.* at 7929). Juror 4 responded "yes." (*Id.*). Additionally, Juror 4 told the court that she overcame her reasonable doubt before giving the verdict. (ECF No.

> 1 at 105). Accordingly, no right to a unanimous jury verdict was infringed in this case. *Leon v. Cate*, 617 Fed.Appx. 783, 783 (9th Cir. 2015) ("The jury returned a verdict, the clerk read it in open court, the jury collectively affirmed it without dissent, and it was recorded. . . . [T]he validity of the verdict was not subject to attack at that point unless [the petitioner] established that the jury committed prior misconduct in reaching the verdict."); *see Fuentes v. Adams*, No. SA CV 06-182-GW (CW), 2015 U.S. Dist. LEXIS 180156, at *47-48 (C.D. Cal. Sept. 2, 2015) (A Magistrate Judge's Report and Recommendation, which found no infringement of a unanimous jury verdict where the record showed that all jurors had been po[l]led and supported the verdict); *see also Fuentes v. Adams*, No. SA CV 06-182-GW (CW), 2016 U.S. Dist. LEXIS 98346 (adopting the Magistrate Judge's Report and Recommendation).

(R&R 12–13.)

But despite the appearance of a unanimous jury verdict, Petitioner's core objection to Judge Dembin's analysis is premised on unexplored potential juror misconduct. Specifically, Petitioner acknowledges that while the jury was unanimously polled, the "record reflects that Juror 4's statements raised serious questions regarding whether [Petitioner] had been deprived of a unanimous jury not influenced by juror misconduct [because] neither the trial court nor [Petitioner's] own trial counsel insisted on an adequate

inquiry to ensure that [Petitioner's] rights were protected." (R&R Objs. 4–5.)

Judge Dembin disagreed with this juror misconduct claim, finding that

> [a] unanimous verdict may still be attacked if the verdict was subject to juror misconduct prior to reaching the verdict. *Leon*, 617 Fed.Appx. at 783. Thus, the Court must consider whether the Sixth Amendment's guarantee of the right to a "fair trial by a panel of impartial, 'indifferent' jurors" to criminal defendants was infringed when Juror 4 expressed reasonable doubt after conviction. *Irvin v. Dowd*, 366 U.S. 717, 722 (1961); *see Dyer v. Calderon*, 151 F.3d 970, 973 (9th Cir. 1998).
>
> "If only one juror is unduly biased or prejudiced or improperly influenced, the criminal defendant is denied his Sixth Amendment right to an impartial panel." *United States v. Hendrix*, 549 F.2d 1225, 1227 (9th Cir. 1997). In the event of a jury misconduct or juror bias allegation, the court should hold a hearing with all interested parties. *See Remmer v. United States*, 347 U.S. 227, 229–30 (1954); *see also Smith v. Phillips*, 455 U.S. 209, 216–17 (1982). However, the "near-universal and firmly established common-law rule in the United States flatly prohibit[s]" the admission of juror testimony to impeach a verdict except where "an extraneous influence" affected the verdict. *Tanner v. United States*, 483 U.S. 107, 117 (1983) (citations omitted); *see also*

> *McDonald v. Pless*, 238 U.S. 264, 269 (1915) (generally, jurors may not impeach their own verdict). Both the Federal Rules of Evidence and the California Evidence Code prohibit the use of juror testimony to impeach a verdict when testimony relates to the internal mental process of the verdict. See FED. R. EVID. 606(b); CAL. EVID. CODE § 1150(a).
>
> The Court finds that there was no evidence of juror misconduct in this case. Juror 4's expression of reasonable doubt about specific allegations or charges after the verdict was given concerns her thought process and the jury's internal deliberations, as opposed to testimony regarding extrinsic influence or juror bias, which is "flatly prohibited" to impeach the jury's verdict. *See Tanner*, 483 U.S. at 117. Thus, Juror 4's statement does not constitute grounds for reversal of the verdict. *See Panella v. Marshall*, 434 Fed.Appx. 603, 605 (9th Cir. 2011); *see also Franklin v. McEwen*, No. SACV 12-1514-DDP (OP), 2013 U.S. Dist. LEXIS 180861, at *46-50 (C.D. Cal Sept. 26, 2013) (finding a juror's post-verdict statement apologizing for voting to convict the petitioner and explaining "that 'most of the jurors wanted to give defendant not guilty' " insufficient to reverse the verdict).

(R&R 14–15.)

Petitioner objects to this conclusion, arguing that without conducting any further inquiry of Juror 4, "it was impossible to determine whether the juror simply had 'buyer's remorse,' or whether her concerns were

based on some other factors such as having been coerced or having been influenced by impermissible juror conduct." (R&R Objs. 4–5.) In other words, Petitioner argues that this conclusion "fails to recognize the inadequacy of the inquiry conducted and trial counsel's ineffective representation. It is precisely due to the trial court's failure to conduct an adequate inquiry with respect to Juror 4, and trial counsel's ineffective failure to request such an inquiry, that the reasons for Juror 4's reasonable doubt remains unknown. Thus it is impossible to conclude that juror misconduct did not occur, and in fact the nature of Juror 4's approach to the trial court suggests that her concerns were indeed grounded in something other than her own state of mind." (*Id.* at 7–8.)

After a review of the record, the Court disagrees with Petitioner, and in particular Petitioner's suggestion that "it is impossible to conclude that juror misconduct did not occur, and in fact the nature of Juror 4's approach to the trial court suggests that her concerns were . . . grounded in something other than her own state of mind." (*Id.*) To the contrary, the record shows that the court questioned Juror 4 about her concerns and Juror 4 responded that her concerns were premised on her understanding of reasonable doubt, not any jury—or other—misconduct. Juror 4 wrote a note to the court stating that she "would like to address the court regarding reasonable doubt." (ECF No. 1, at 99–100.) Juror 4 asked to meet in private, and the court denied her request. (*Id.* at 103–104.) When asked what she wanted to address regarding reasonable

doubt, Juror 4 said she "wanted to address . . . just the idea of reasonable doubt. . . ." (*Id.* at 104.) The court asked if she did not understand the definition of reasonable doubt, and she replied "[n]o, no. I understand." (*Id.*) Juror 4 simply "wanted to address . . . the reasonable doubt that [she] had on certain counts." (*Id.*)

Then the following exchange took place:

> Q [court]: Why did you vote guilty then and find those allegations to be true? Why did you—when I looked you in the eye and polled the jurors individually and asked you, "Were these and are these your verdicts as I've just read them," why didn't you tell me you had some reasonable doubt?
>
> A [Juror 4]: Yeah, you know, I—I, ah, should have said it then.
>
> Q: Yes, you should have. Why didn't you?
>
> A: I—I didn't. I went with—we were—had been deliberating and—and, um, I thought that I could just—I thought I had, um, basically overcome the doubt that I had. And it continued to come up in my mind.
>
> Q: After the verdicts had been returned?
>
> A: Correct.
>
> Q: And during the intervening time?
>
> A: Correct.
>
> Q: Now you thought about it some more?
>
> A: Correct.

Q: So when you indicated those were and are your verdicts—

A: Yes.

Q: —they were?

A: Yes.

Q: They were your verdicts; is that correct?

A: Sure. Yes.

Q: Well, have you done some independent research then on reasonable doubt?

A: No. Just in thinking about it.

Q: What?

A: In thinking about it, in—

Q: Well, you understand the definition of reasonable doubt.

A: Yes.

Q: Is that a "yes"?

A: Yes.

Q: We—you heard that repeatedly throughout the trial here in the courtroom and you had that in writing, that definition.

A: I did.

Q: Intellectually, if you will, you understood what those words mean in the context of proof beyond a reasonable doubt?

A: Yes.

> Q: Okay. Step outside for a minute. Let me talk to counsel.
>
> A: Okay. And if I may, too, the purpose of this was—I mean, I thought I would be able to discuss more in detail, ah, about what may be—I don't know—with you in detail. But if that's impossible—
>
> Q: Well, the concerns you have relate to specific allegations or specific—
>
> A: Yes.
>
> Q: —charges?
>
> A: Yeah. I mean, very specific. It's totally specific.
>
> Q: Well, that may or may not be appropriate.
>
> A: Okay.
>
> Q: I don't think it's appropriate at this point.
>
> A: Okay.
>
> THE COURT: Um, all right. Why don't you step outside just for a moment.

(*Id.* at 105–07.) Viewing this exchange as a whole, the Court finds that, contrary to Petitioner's objections, Juror 4's concerns appeared to center on her internal struggle with reasonable doubt, particularly after she delivered her verdict. Such testimony is "flatly prohibited" to impeach the jury's verdict. *See Tanner*, 483 U.S. at 117. True, as Petitioner notes the court did not conduct a further inquiry into Juror 4's concerns or specifically ask why she wanted to meet privately with the

court. But there is nothing in her exchange with the court that suggests that such a request was to discuss juror—or other—misconduct that might otherwise have supported a further investigation into Juror 4's concerns. Nor does Petitioner provide any specific citation to the record that would so suggest. And, even then, not all allegations of juror misconduct are admissible. *See*, *e.g.*, *Franklin v. McEwen*, 2013 WL 6817662, at *18 (C.D. Cal. Dec. 20, 2013) (citing *Estrada v. Scribner*, 512 F.3d 1227, 1237 (9th Cir. 2008) (juror's declaration that he felt pressured to vote guilty inadmissible evidence of subjective mental process); *Panella v. Marshall*, 434 Fed.Appx. 603, 605 (9th Cir. 2011) (rejecting habeas claim that juror misconduct—foreperson's non-physical coercion of another juror to change her vote—warranted reversal of conviction where record supported state court's finding that allegations described no more than permissible "heated discussions that naturally occur at times during jury deliberations")).

In sum, the Court finds that Petitioner's claims that his right to a unanimous jury was infringed or that there was potential jury misconduct are not potentially meritorious. Consequently, his IAC claim premised on trial counsel's failure to conduct further investigation into Juror 4 and appellate counsel's failure to raise the issue on appeal is also not potentially meritorious (i.e., Petitioner suffered no prejudice based on his counsel's alleged failures in this regard). Thus, the Court concludes that a stay under *Rhines* is inappropriate. (*Cf.* R&R 14–15 ("Because Petitioner's right

to a unanimous jury was not infringed and there was no juror misconduct, any deficienc[ies] in failing to raise these issues on appeal or in state post-conviction applications for collateral relief were not prejudicial under *Strickland v. Washington*. This is inadequate to show ineffective assistance of counsel for purposes of a *Rhines* stay.").) Accordingly, the Court **OVERRULES** Petitioner's Objections.[5]

CONCLUSION

For the reasons stated above, the Court (1) **OVERRULES** Petitioner's Objections, (2) **ADOPTS** the relevant portions of Judge Dembin's R&R, and (3) **GRANTS IN PART** Respondent's Motion to Dismiss. Accordingly, the Court **DISMISSES WITH PREJUDICE** only ground two of the Petition. Petitioner may proceed with ground one of his Petition in this Court.

IT IS SO ORDERED.

Dated: June 6, 2017

/s/ Janis L. Sammartino
Hon. Janis L. Sammartino
United States District Judge

[5] For this reason the Court does not discuss the third factor of the *Rhines* analysis.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

MICHAEL BARAKA MASON, Petitioner, v. DANIEL PARAMO, et al., Respondents.	Case No.: 16cv1176-JLS-MDD **REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE RE: RESPONDENT'S MOTION TO DISMISS PETITION FOR WRIT OF HABEAS CORPUS** **[ECF No. 18]**

This Report and Recommendation is submitted to United States District Judge Janis L. Sammartino pursuant to 28 U.S.C. § 636(b)(1) and Local Civil Rule 72.1(c) of the United States District Court for the Southern District of California.

For the reasons set forth herein, the Court **RECOMMENDS** that Respondent's Motion to Dismiss be **GRANTED IN PART**.

I. PROCEDURAL HISTORY

A. Federal Proceedings

On May 11, 2016, Michael Baraka Mason ("Petitioner"), a state prisoner, constructively filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 in this district. (ECF No. 1). Petitioner challenges his conviction on two grounds: (1) the trial court erred in admitting the preliminary hearing testimony of Hana Jabbar at trial; and (2) Petitioner received ineffective assistance of counsel when his attorney failed to challenge the trial court's decision to permit the guilty verdict to stand and the case to proceed to sentencing when Juror 4 expressed she had reasonable doubt after the verdict was given. (*Id.* at 12-13).[1]

On October 25, 2016, Respondent Paramo ("Respondent")[2] filed a Motion to Dismiss the Petition, a Memorandum of Points and Authorities in support and lodgments. (ECF Nos. 18, 19). Petitioner filed an opposition on January 13, 2017. (ECF No. 25). In his opposition, Petitioner requests that the Court stay the case pending exhaustion of ground two of the Petition, or in the alternative, to dismiss only ground two. (*Id.* at 8).

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[1] All pincite page references refer to the automatically generated ECF page number, not the page number in the original document.

[2] Respondent Kamala Harris has not yet appeared in this action. (*See* Docket). For purposes of this Report and Recommendation "Respondent" will refer to Respondent Paramo only.

B. State Court Proceedings

On November 7, 2012, a jury convicted Petitioner of: (1) three counts of first degree murder and found true the special circumstances of robbery-murder and multiple murders as to each; (2) one count of attempted murder; (3) two counts of attempted robbery; (4) one count of burglary; (5) five counts of false imprisonment by violence; (6) one count of assault with a firearm; (7) two counts of shooting at an inhabited dwelling; and (8) four counts of possession of a firearm by a felon. (Lodg. No. 2-6 at 1465-502). The jury also found true several gang and firearms-related sentencing enhancements and Petitioner admitted two prior serious felony convictions and three "strike priors." (*Id.*). On April 4, 2013, the trial court sentenced Petitioner to nine consecutive terms of life imprisonment without the possibility of parole, an indeterminate term of 337 years and six months to life imprisonment, plus an additional 110 years. (Lodg. Nos. 2-7 at 1777-85; 1-49 at 7969-70).

On April 11, 2013, Petitioner constructively filed a Notice of Appeal. (Lodg. No. 2-7 at 1785). Petitioner argued: (1) the trial court erroneously admitted the prior testimony of Hana Jabbar; (2) the trial court erroneously admitted the out-of-court statements of informant Marquis Veal recounting statements made by Petitioner's accomplice; (3) the evidence does not support Petitioner's multiple convictions for possession of the same firearm on different days because that crime is a single, continuous offense; and (4) the life imprisonment without parole sentences should not have been

tripled under the Three Strikes law. (Lodg. Nos. 3 at 32-79; 6 at 3). The state appellate court reversed all but one of Petitioner's possession of a firearm convictions, modified the judgment to reflect a total of three life sentences without the possibility of parole and affirmed the judgment in all other respects. (Lodg. No. 6 at 13-30).

On January 14, 2015, Petitioner filed a Petition for Review in the California Supreme Court, arguing the trial court erroneously: (1) admitted the prior testimony of Hana Jabbar; and (2) admitted the out-of-court statements of informant Marquis Veal recounting statements made by Petitioner's accomplice. (Lodg. No. 7 at 3-23). On March 11, 2015, the California Supreme Court denied the Petition for Review. (Lodg. No. 8).

II. SCOPE OF REVIEW

This Petition is governed by 28 U.S.C. § 2254(a), which provides the scope of review for federal habeas corpus claims:

> The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in [sic] behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

28 U.S.C. § 2254(a) (2006 & Supp. 2016).

III. DISCUSSION

Respondent contends that the entire Petition should be dismissed because ground two of the Petition is unexhausted and untimely. (*See* ECF No. 18). Respondent acknowledges that ground one of the Petition is both exhausted and timely, but asserts that petitions with both exhausted and unexhausted claims must be dismissed. (*Id.* at 9).

Petitioner concedes that ground two of the Petition is unexhausted, but argues that the Court should stay the Petition and allow Petitioner to return to state court to exhaust ground two, or in the alternative, allow Petitioner to amend the Petition to proceed only on the first ground. (ECF No. 25 at 1, 8). Petitioner also asserts that the Petition is timely. (*Id.* at 6-8).

A. Statute of Limitations

The AEDPA imposes a one-year statute of limitations on federal petitions for writ of habeas corpus filed by state prisoners after April 24, 1996. 28 U.S.C. § 2244(d) (2006 & Supp. 2016). The one-year statute of limitations period applies to all habeas petitions filed by persons "in custody pursuant to the judgment of a State court." *Id.* at § 2244(d)(1). The one-year limitation period begins to run from the latest of:

> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

Id. at § 2244(d)(1)(A)-(D). The period of direct review in § 2244(d)(1)(A) includes the ninety-day period within which a petitioner can file a petition for a writ of certiorari regardless of whether the petitioner seeks such review. *Bowen v. Roe*, 188 F.3d 1157, 1158-59 (9th Cir. 1999). "AEDPA's one-year statute of limitations begins to run on the date the ninety-day period . . . expires." *Id.* at 1159.

On March 11, 2015, the California Supreme Court denied Petitioner's petition for review. (Lodg. No. 8). Petitioner did not file a writ of certiorari. Thus, the statute of limitations under AEDPA began to run on June 9, 2015 (ninety-days after the California Supreme Court denied Petitioner's petition for review), and expired on June 9, 2016. The instant action was constructively filed on May 11, 2016 – just under one

month before the statute of limitations expired. Thus, the Petition is timely.

B. Exhaustion and the Stay and Abeyance Procedure

Habeas petitioners who wish to challenge their state court conviction or the length of their confinement in state prison must first exhaust state judicial remedies. 28 U.S.C. § 2254(b)-(c); *Granberry v. Greer*, 481 U.S. 129, 133-34 (1987) ("[A]s a matter of [federal-state] comity, federal courts should not consider a claim in a habeas corpus petition until after the state courts have had an opportunity to act.") (citing *Ex Parte Royall*, 117 U.S. 241, 251 (1886)). Petitioner and Respondents agree that ground two of the federal petition is unexhausted and that the Petition is "mixed." *See Rose v. Lundy*, 455 U.S. 509, 510 (1982); (*See also* ECF Nos. 1, 18, 25). The Court cannot adjudicate the merits of a habeas petition containing any claim as to which state remedies have not been exhausted. *See id.* at 522; 28 U.S.C. § 2254(b)(2) (petition may be denied, but not granted, notwithstanding failure to exhaust). The Court can either dismiss a mixed petition in its entirety or grant a stay. *Rose*, 455 U.S. at 510; *Rhines v. Weber*, 544 U.S. 269, 277-78 (2005); *Kelly v. Small*, 315 F.3d 1063 (9th Cir. 2002). A stay may be appropriate under either *Kelly* or *Rhines*. *See Rhines*, 544 U.S. 269; *see also Kelly*, 315 F.3d 1063.

1. Stay Pursuant to *Kelly*

Kelly permits a district court to dismiss unexhausted claims and stay the remaining claims pending exhaustion of the dismissed claims. *Kelly*, 315 F.3d at 1070-71. The petitioner must seek to add the dismissed claims back in through amendment after exhausting them in state court before the AEDPA statute of limitations expires. *King v. Ryan*, 564 F.3d 1133, 1138-41 (9th Cir. 2009).

As discussed above, the statute of limitations expired on June 9, 2016 – about eight months ago. Because a federal habeas petition does not toll the limitations period, a stay pursuant to *Kelly* would preclude Petitioner from seeking habeas review for ground two in this Court as being untimely, unless Petitioner is entitled to statutory or equitable tolling, or ground two "relates back" to ground one. *See Duncan v. Walker*, 533 U.S. 167, 181-82 (2001); *Mayle v. Felix*, 545 U.S. 644, 659 (2005).

a. Tolling

Respondent argues that while the Petition itself is timely, ground two is not and Petitioner is neither entitled to statutory nor equitable tolling. (ECF No. 18 at 10-13). Petitioner does not address the issue of tolling the statute of limitations. (*See* ECF No. 25).

AEDPA tolls its limitations period for the "time during which a properly filed application for State post-conviction or other collateral review . . . is pending."

28 U.S.C. § 2244(d)(2); *Nino v. Galaza*, 183 F.3d 1003, 1005 (9th Cir. 1999) (overruled on other grounds by *Harris v. Carter*, 515 F.3d 1051, 1053 (9th Cir. 2008)). Petitioner did not seek state post-conviction relief or other collateral review. (ECF No. 18 at 11; Lodg. No. 10). As such, Petitioner is not entitled to statutory tolling. (ECF No. 18 at 11; Lodg. No. 10).

AEDPA's one-year statute of limitations is also subject to equitable tolling in appropriate cases. *Holland v. Florida*, 560 U.S. 631, 645 (2010). Equitable tolling is appropriate where a habeas petitioner demonstrates: "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way." *Id.* at 649. In this case, Petitioner did not argue that he is entitled to equitable tolling, and nothing in the record indicates that he is entitled to equitable tolling. (*See* ECF No. 25 at 5). Accordingly, the Court finds that the statute of limitations expired on June 9, 2016 and is not subject to statutory or equitable tolling. Under a *Kelly* stay, ground two of the Petition would be time-barred unless Petitioner can show that ground two relates back to his only other ground for relief.

b. Relation Back

"An amended habeas petition does not relate back (and thereby escape AEDPA's one-year time-limit) when it asserts a new ground for relief supported by facts that differ in both time and type from those the original pleading set forth." *Mayle*, 545 U.S. at 650. A

claim relates back when it shares a "common core of operative facts" with a timely claim. *Id.* at 659. A claim does not relate back to an existing claim simply because it arises from "the same trial, conviction or sentence." *Id.* at 663-64.

Here, Petitioner's first ground for relief concerns the trial court's admission of the prior testimony of a victim and ground two concerns counsel's ineffective assistance in failing to challenge the trial court's decision to permit the guilty verdict to stand where a juror expressed reasonable doubt after conviction. (ECF No. 1 at 12-13). Ground two of the petition does not relate back to ground one because the claims do not share a "common core of operative facts." *See Mayle*, 545 U.S. at 659.

c. Conclusion

As discussed herein, while the Petition itself is timely, ground two of the Petition is unexhausted. Dismissing ground two and staying ground one of the Petition under *Kelly* would be futile because the statute of limitations already expired and Petitioner is not entitled to toll the limitations period or to relate his unexhausted claim back to ground one of the Petition. Thus, this Court declines to permit a stay pursuant to *Kelly*.

2. Stay Pursuant to *Rhines*

Rhines permits a district court to stay a mixed petition in its entirety. *King*, 564 F.3d at 1139-40. To stay the entire mixed petition without dismissing unexhausted claims, the petitioner must show good cause for failing to exhaust the claims in state court before filing the federal petition and that the unexhausted claims are not "plainly meritless." *Rhines*, 544 U.S. at 277-78. A stay under *Rhines* is inappropriate where the petitioner has engaged in "abusive litigation tactics or intentional delay." *Id.*

a. Good Cause

The first factor in the *Rhines* analysis is whether Petitioner has demonstrated good cause for failing to raise his unexhausted claim in state court. Petitioner argues that he has good cause because his post-conviction counsel provided ineffective assistance when he failed to raise ground two of the federal Petition at trial, on appeal, or in a state habeas petition even though the claim was apparent from the record and is potentially meritorious. (ECF No. 25 at 5) Petitioner also argues he was "reasonably confused" and "was unaware of his counsel's failure to exhaust" ground two. (*Id.*).

The Supreme Court has not precisely articulated what constitutes "good cause" for purposes of granting a stay under *Rhines*. *Pace v. DiGuglielmo*, 544 U.S. 408, 416 (2005). The Ninth Circuit has held that ineffective assistance "by post-conviction counsel can be good

cause for a *Rhines* stay," where a petitioner's showing of good cause is not a bare allegation of ineffective assistance of counsel, but a concrete and reasonable excuse, which is supported by evidence that his state post-conviction counsel failed to discover, investigate and present to the state courts. *Blake v. Baker*, 745 F.3d 977, 983 (9th Cir. 2014). In *Blake*, the Ninth Circuit held:

> The good cause element is the equitable component of the *Rhines* test. It ensures that a stay and abeyance is available only to those petitioners who have a legitimate reason for failing to exhaust a claim in state court. As such, good cause turns on whether the petitioner can set forth a reasonable excuse, supported by sufficient evidence, to justify that failure. An assertion of good cause without evidentiary support will not typically amount to a reasonable excuse justifying a petitioner's failure to exhaust.

Id. at 982. To show good cause based on ineffective assistance of appellate counsel, therefore, Petitioner must provide a "concrete and reasonable" excuse and make more than a bare allegation that counsel acted unreasonably and that those actions prejudiced him. *Id.* at 983; *see Strickland v. Washington*, 466 U.S. 668, 692 (1984) (providing the standard for ineffective assistance of counsel).

Petitioner focuses on circumstantial evidence showing that "counsel [failed] to raise any issues regarding Juror 4 [which shows] counsel's ineffective

assistance [and] demonstrates good cause for failing to exhaust his claim." (ECF No. 25 at 5). In his Petition, Petitioner attaches a Reporter's Transcript where Juror 4 expressed she had "reasonable doubt . . . on certain accounts" after the guilt phase and during the penalty phase of the trial. (ECF No. 1 at 104). The record reflects that the trial judge asked Juror 4 why she did not express her reasonable doubt when he polled the jury. (ECF No. 1 at 104-05). Juror 4 stated she had "basically overcome the doubt that [she] had. And it continued to come up in [her] mind [after the verdicts were returned and during the intervening time.]" (*Id.* at 105). Juror 4 then stated that at the time the verdict was given, she supported the verdict and it was her verdict, but that she still wanted to speak privately with the judge to discuss "very specific" allegations or charges. (*Id.* at 106). The trial judge asked whether Juror 4 understood what reasonable doubt means and whether she had done outside research. (*Id.* at 105-06). Juror 4 explained she understood what reasonable doubt means and that she had not done outside research. (*Id.*). The trial judge then explained that speaking privately with Juror 4 would be inappropriate and indicated that nothing Juror 4 said raised issues regarding juror misconduct. (*Id.*).

In response to Juror 4's statement, Petitioner's trial counsel requested "the jury be directed to return to the jury room and reopen their deliberations concerning issues in the guilt phase," or in the alternative, requested a mistrial. (*Id.* at 157). The People requested the court determine whether Juror 4 should be excused

for cause. (*Id.* at 169). On November 16, 2012, the court permitted oral argument on the issues and ultimately concluded that "[t]here is nothing to correct at the present time. Those verdicts were polled and recorded. The fact she has now had some buyer's remorse, as suggested, that opens a pandora's box for incredible mischief." (*Id.* at 170). The court did not reopen jury deliberations, did not grant a mistrial and did not excuse Juror 4 for cause. (*Id.* at 127-176). Contrary to Petitioner's argument, the record shows that trial counsel did address the issue regarding Juror 4 by moving for a mistrial and moving to reopen jury deliberations. (*Id.*; *see* ECF No. 25 at 5).

The record supports Petitioner's argument that appellate counsel failed to raise any issues regarding Juror 4. (ECF No. 25 at 5; Lodg. Nos. 3, 5, 7). Appellate counsel did not include this claim in the appellate brief, reply brief or the petition for review in the California Supreme Court, despite the fact that the Reporter's Transcript includes approximately 65 pages on the issue. (Lodg. Nos. 3, 7; ECF No. 1 at 99-122, 127-152, 157-176). Petitioner has also shown that he relied upon the assurances of his trial and appellate counsel that they would raise any necessary claims for him. (*See* ECF No. 1 at 13) (indicating that Petitioner thought his attorney raised this issue in his Petition for Review).[3]

[3] Any argument that good cause cannot be predicated on Petitioner's mistaken belief that counsel raised the issues is inapplicable. While *Wooten v. Kirkland* held that the petitioner did not show good cause by arguing he was "under the impression" that his counsel raised all claims before the state court of appeal, the Court specifically noted that the petitioner did not attempt to

Petitioner has made a sufficient showing that his appellate attorney may have acted unreasonably because he had notice of the juror claim and failed to exhaust the claim by presenting it to the state's highest court.

In his opposition, Petitioner argues that Juror 4's statement indicates that the jury's verdict was not unanimous and appellate counsel provided ineffective assistance by failing to raise that issue on appeal or through a state habeas petition. (ECF No. 25 at 5; *see* ECF No. 1 at 13). Petitioner asserts that the juror issue is clear from the record and there was no reason for counsel's failure to raise these claims in the appeal, in the petition for review before the California Supreme Court, or in a state habeas petition. (*See* ECF No. 25).

The Court finds Petitioner has not adequately shown ineffective assistance of counsel for purposes of a *Rhines* stay because Petitioner has not made a well-argued claim of unanimous jury infringement or juror misconduct. Petitioner's case might be the type of "capital" case requiring a unanimous jury verdict – even though he was tried in bifurcated guilt and penalty proceedings and was ultimately not sentenced to death. *Cf. People v. Collins*, 17 Cal. 3d 687, 693 (1976) (California law requires unanimous jury verdict in criminal cases) *with Schad v. Arizona*, 501 U.S. 624, 634 n.5 ("a state criminal defendant, at least in non-capital cases, has no federal right to a unanimous jury

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establish ineffective assistance of appellate counsel. *Wooten v. Kirkland*, 540 F.3d 1019, 1024 n.2. As a result, Petitioner's "reasonable confusion" as to whether ground two was exhausted does not preclude a stay under *Rhines*. (*See* ECF No. 25 at 5).

verdict"); (*See* Lodg. No. 2-7 at 1701; Lodg. No. 1-49 at 7966-70). Even if a unanimous jury is constitutionally required, there was a unanimous jury verdict and, when individually polled, no juror expressed any equivocation or hesitation regarding the verdict. (Lodg. No. 1-48 at 7915-30). Specifically, the Court asked "Juror No. 4, were these and are these your personal verdicts as read by the court?" (*Id.* at 7929). Juror 4 responded "yes." (*Id.*). Additionally, Juror 4 told the court that she overcame her reasonable doubt before giving the verdict. (ECF No. 1 at 105). Accordingly, no right to a unanimous jury verdict was infringed in this case. *Leon v. Cate*, 617 Fed. App'x 783, 783 (9th Cir. 2015) ("The jury returned a verdict, the clerk read it in open court, the jury collectively affirmed it without dissent, and it was recorded. . . . [T]he validity of the verdict was not subject to attack at that point unless [the petitioner] established that the jury committed prior misconduct in reaching the verdict."); *see Fuentes v. Adams*, No. SA CV 06-182-GW (CW), 2015 U.S. Dist. LEXIS 180156, at *47-48 (C.D. Cal. Sept. 2, 2015) (A Magistrate Judge's Report and Recommendation, which found no infringement of a unanimous jury verdict where the record showed that all jurors had been pooled and supported the verdict); *see also Fuentes v. Adams*, No. SA CV 06-182-GW (CW), 2016 U.S. Dist. LEXIS 98346 (adopting the Magistrate Judge's Report and Recommendation).

A unanimous verdict may still be attacked if the verdict was subject to juror misconduct prior to reaching the verdict. *Leon*, 617 Fed. App'x at 783. Thus, the

Court must consider whether the Sixth Amendment's guarantee of the right to a "fair trial by a panel of impartial, 'indifferent' jurors" to criminal defendants was infringed when Juror 4 expressed reasonable doubt after conviction. *Irvin v. Dowd*, 366 U.S. 717, 722 (1961); *see Dyer v. Calderon*, 151 F.3d 970, 973 (9th Cir. 1998).

"If only one juror is unduly biased or prejudiced or improperly influenced, the criminal defendant is denied his Sixth Amendment right to an impartial panel." *United States v. Hendrix*, 549 F.2d 1225, 1227 (9th Cir. 1997). In the event of a jury misconduct or juror bias allegation, the court should hold a hearing with all interested parties. *See Remmer v. United States*, 347 U.S. 227, 229-30 (1954); *see also Smith v. Phillips*, 455 U.S. 209, 216-17 (1982). However, the "near-universal and firmly established common-law rule in the United States flatly prohibit[s]" the admission of juror testimony to impeach a verdict except where "an extraneous influence" affected the verdict. *Tanner v. United States*, 483 U.S. 107, 117 (1983) (citations omitted); *see also McDonald v. Pless*, 238 U.S. 264, 269 (1915) (generally, jurors may not impeach their own verdict). Both the Federal Rules of Evidence and the California Evidence Code prohibit the use of juror testimony to impeach a verdict when testimony relates to the internal mental process of the verdict. *See* FED. R. EVID. 606(b); CAL. EVID. CODE § 1150(a).

The Court finds that there was no evidence of juror misconduct in this case. Juror 4's expression of reasonable doubt about specific allegations or charges after the verdict was given concerns her thought process and

the jury's internal deliberations, as opposed to testimony regarding extrinsic influence or juror bias, which is "flatly prohibited" to impeach the jury's verdict. *See Tanner*, 483 U.S. at 117. Thus, Juror 4's statement does not constitute grounds for reversal of the verdict. *See Panella v. Marshall*, 434 Fed. App'x 603, 605 (9th Cir. 2011); *see also Franklin v. McEwen*, No. SACV 12-1514-DDP (OP), 2013 U.S. Dist. LEXIS 180861 at *46-50 (C.D. Cal Sept. 26, 2013) (finding a juror's post-verdict statement apologizing for voting to convict the petitioner and explaining "that 'most of the jurors wanted to give defendant not guilty' " insufficient to reverse the verdict).

Because Petitioner's right to a unanimous jury was not infringed and there was no juror misconduct, any deficiency in failing to raise these issues on appeal or in state post-conviction applications for collateral relief were not prejudicial under *Strickland v. Washington*. This is inadequate to show ineffective assistance of counsel for purposes of a *Rhines* stay.

b. Merit of Petitioner's Claim

For the reasons set forth in the previous section, this Court finds that Petitioner's claim is not potentially meritorious. *See Rhines*, 544 U.S. at 278 (stating that petitioner is entitled to a stay if "his unexhausted claims are potentially meritorious"). Petitioner cannot succeed on an ineffective assistance claim if the alleged deficiency – failing to raise any issue regarding Juror 4 – would not have prejudiced him. *See Strickland*, 466

U.S. at 692 (stating that counsel's alleged deficiencies must have prejudiced the client to prove ineffective assistance of counsel). Petitioner was not prejudiced because, as discussed above, the right to a unanimous jury was not infringed and there was no juror misconduct.

c. Abusive Litigation Tactics or Intentional Delay

The final consideration under *Rhines* is whether Petitioner's failure to exhaust is a result of intentionally dilatory litigation tactics. *Rhines*, 544 U.S. at 278. Respondent does not argue that Petitioner engaged in abusive litigation tactics or intentional delay and there is no indication in the record before this Court that Petitioner failed to exhaust for the purpose of delaying these proceedings. (*See* ECF No. 18). Accordingly, Petitioner satisfies the third *Rhines* consideration.

d. Conclusion

Petitioner has not adequately shown good cause for failing to exhaust ground two of his Petition nor that ground two is potentially meritorious. Thus, it is **RECOMMENDED** that the Court find Petitioner has not demonstrated the good cause required under *Rhines* to warrant a stay of Petitioner's only exhausted claim while Petitioner returns to state court to exhaust ground two of his Petition.[4] However, the Court finds it

[4] The Court recognizes the Ninth Circuit's recent decision in *Dixon v. Baker*, - F.3d -, No. 14-1664 (9th Cir. Feb. 2, 2017), which

inappropriate to dismiss the entire Petition. Accordingly, **IT IS FURTHER RECOMMENDED** that the Court **GRANT IN PART** Respondents' motion to dismiss by dismissing only ground two of the Petition.

IV. CONCLUSION

For the foregoing reasons, **IT IS HEREBY RECOMMENDED** that the District Court issue an Order: (1) Approving and Adopting this Report and Recommendation; (2) **GRANTING IN PART** Respondents' Motion to Dismiss; and (3) **DISMISSING** ground two of the Petition with prejudice.

IT IS HEREBY ORDERED that any written objections to this Report must be filed with the Court and served on all parties no later than **February 28, 2017**. The document should be captioned "Objections to Report and Recommendation."

IT IS FURTHER ORDERED that any reply to the objections shall be filed with the Court and served on all parties no later than **March 7, 2017**. The parties are advised that failure to file objections within the specified time may result in a waiver of the right to raise those objections on appeal of the Court's order.

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found that a state prisoner who did not have post-conviction counsel has shown "good cause" for a failure to exhaust state court remedies in connection to an unexhausted ineffective assistance of trial counsel claim due to his *pro se* status. *Dixon* is inapplicable to the instant case because Petitioner was represented by counsel in all post-conviction proceedings, with exception to the filing of the instant federal Petition. Petitioner obtained representation in this case on December 7, 2016. (ECF No. 20).

See Turner v. Duncan, 158 F.3d 449, 455 (9th Cir. 1998); *see also Martinez v. Ylst*, 951 F.2d 1153, 1156 (9th Cir. 1991).

IT IS SO ORDERED.

Dated: February 6, 2017

/s/ Mitchell D. Dembin
Hon. Mitchell D. Dembin
United States
Magistrate Judge