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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN FRANKLIN KENNEY, Petitioner-Appellant, v. P. D. BRAZELTON, Warden, Respondent-Appellee.	No. 18-15077 D.C. No. 5:13-cv-02562-LHK Northern District of California, San Jose ORDER

Before: TROTT and MURGUIA, Circuit Judges.

The motion for reconsideration (Docket Entry No. 15) is denied. *See* 9th Cir. R. 27-10.

No further filings will be entertained in this closed case.

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JOHN FRANKLIN KENNEY, Petitioner-Appellant, v. P. D. BRAZELTON, Warden, Respondent-Appellee.	No. 18-15077 D.C. No. 5:13-cv-02562-LHK Northern District of California, San Jose ORDER

Before: FARRIS and LEAVY, Circuit Judges.

The request for a certificate of appealability (Docket Entry No. 7) is deemed timely filed. The request is denied. 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.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

JOHN FRANKLIN KENNEY,

Petitioner,

v.

P.D. BRAZELTON,

Respondent.

Case No. 13-CV-02562 LHK (PR)

ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS; DENYING CERTIFICATE OF APPEALABILITY

Petitioner, a state prisoner proceeding *pro se*, seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2254. In 2014, the court screened petitioner's petition, issued an order to show cause, and granted petitioner a stay so that he could return to state court to exhaust his state court remedies. Dkt. Nos. 8, 15. On February 2, 2015, petitioner returned to this court and filed an amended petition. Dkt. No. 20. On May 15, 2015, the court re-opened this case, and issued an order to respondent to show cause why the amended petition should not be granted. Dkt. No. 21. On July 14, 1015, respondent filed a motion to dismiss Claims 6, 7, and 8 of petitioner's amended petition as untimely. Dkt. No. 22. On December 14, 2015, the court granted respondent's motion to dismiss Claims 6, 7, and 8 as untimely, and directed respondent to file an answer to the

remaining claims, i.e. Claims 1-5. Dkt. No. 29.

On April 2, 2016, respondent filed an answer and lodged exhibits in support of respondent's memorandum of points and authorities. After receiving numerous extensions, on April 28, 2017, and July 31, 2017, petitioner filed a traverse and amended traverse.[1] Dkt. Nos. 77, 81. In May, August, September, October, and November 2017, petitioner filed exhibits in support of his amended petition. Dkt. Nos. 78, 82-92.

Having reviewed the briefs and the underlying record, the court concludes that petitioner is not entitled to relief, DENIES the amended petition, and DENIES a certificate of appealability.

BACKGROUND

The following was taken from the California Court of Appeal's opinion.

> Defendant was charged by information with two counts of first degree murder (§ 187, subd. (a)). The information further alleged that defendant personally and intentionally discharged a firearm during the commission of the offenses (§ 12022.53, subd. (d)), that he committed the offenses while lying in wait (§ 190.2, subd. (a)(15)), and that he committed multiple murders (§ 190.2, subd. (a)(3)).
>
> Defendant moved in limine to exclude all books, tapes, CDs and DVDs seized from his home. The prosecutor opposed the motion as to the DVD titled "First and Finish Moves." After viewing tracks 2, 3 and 4 of the DVD, the court found those tracks of the DVD admissible.
>
> **The People's Case**
> Defendant was seen and examined by a psychiatric nurse at a hospital psychiatric unit on June 12, 2005. Defendant reported at that time that he had been assaulted by a neighbor the day before and that he was fearful of going home because he lived alone. He was anxious and irritable. He answered no when he was asked whether he had firearms in his home. The nurse recommended that defendant be discharged home with anti-anxiety medication, with follow-up therapy at the VA clinic.
>
> Some time in the year before January 2007, defendant contacted the First Alarm security company requesting information about security matters for his home. Michael Morrison,

[1] Petitioner's motion for leave to file an amended traverse is granted. Dkt. No. 81.

the Monterey County branch manager of First Alarm, met with defendant at his home. Morrison recommended that defendant install motion detectors and cameras outside his home and an alarm system. As far as Morrison knows, defendant did not do any of this.

On October 23, 2006, defendant and his attorney Nick Cvietkovich met with Sheriff John Michael Kanalakis regarding a mutual restraining order defendant had with the Grimeses, and defendant's desire to erect a barrier on his property. Undersheriff Nancy Cuffney was also present during the meeting. Kanalakis testified that he suggested that defendant request a civil standby if he needed to make sure the erection of the barrier occurred without violence. Cuffney testified that defendant asked whether the Grimeses had turned in their weapons as required by the restraining order. Kanalakis testified that he does not remember defendant asking that question, and Cuffney testified that she does not remember what the sheriff told defendant in response to the question.

On January 24, 2007, defendant purchased a boulder from a nursery to be delivered to his home. He told the nurseryman that he wanted the boulder to prevent his neighbors from coming onto his property. He originally said that he wanted the boulder delivered on the morning of January 29, 2007, but he called back later and asked that it be delivered after 3:00 p.m., because police officers were going to be present then. Defendant, Morrison, and Cvietkovich were present when the nursery's driver delivered the boulder, and defendant signed for the delivery. Morrison told defendant and Cvietkovich that Mr. Grimes was going to have a "shit fit" about the placement of the boulder. Morrison told defendant that he should stay inside his home and call Morrison or for law enforcement help if the Grimeses became upset when they came home. Morrison left before the Grimeses came home.

Around 2:40 p.m. on January 29, 2007, Deputy Sheriff Mark Flores responded to a request for a civil standby at defendant's address. Around 3:05 p.m., before the deputy reached defendant's driveway, he stopped the delivery truck driver as the driver was leaving the driveway. The deputy asked the driver if anybody had complained about the delivery, or whether there was any disturbance whatsoever, and the driver said no. The deputy advised dispatch that the delivery had been made without any disturbance and then he resumed his patrol duties.

The parties stipulated that "[t]here was a property dispute between Mr. Kenney and the Grimes[es] over the area of land where Mr. Kenney placed the boulder. The Grimes[es] believed they had an easement or right to access their carport across the defendant's property. In this case, who was actually right about this property dispute is not necessary for the jury to decide, and therefore, that issue is not for you, the jurors, to determine."

Elizabeth called 911 at 5:38 p.m. on January 29, 2007. During the first minute of her call, Elizabeth said that her neighbor had blocked her driveway and she asked the dispatcher to

"send somebody right away." The dispatcher said okay, and asked Elizabeth to stay on the line. Deputy Sheriff Brian Irons was dispatched at 5:38 p.m., due to the report of a civil dispute over a boulder that had been placed in a driveway. Two minutes into Elizabeth's 911 call, she said that she was going to defendant's house. Defendant is heard on the 911 recording telling Elizabeth to get off his property, and telling Melvin to "[l]eave that alone," and Elizabeth is heard repeatedly asking the dispatcher to send someone out. Three minutes 35 seconds into the call, a female scream is heard, Elizabeth says "Get off," and another female scream is heard. Three minutes 41 seconds into the call, Elizabeth says "He's got a gun." During the following 20 seconds, five gunshots and male and female screams are heard on the 911 recording. During the next four minutes, the dispatcher repeatedly says hello, but gets no response.

Defendant called 911 at 5:44 p.m. on January 29, 2007. During his call, defendant said that he had been assaulted and battered by his next door neighbors and that he had been injured. When asked if he needed an ambulance, he responded no. When asked what had happened, he said "they rushed at me and tried to assault me." "Um, that's as much as I – I think I should say right now." Defendant hung up the phone as the dispatcher was saying that he needed more information; defendant did not tell the dispatcher that the Grimeses had been shot or that they needed medical assistance. Captain Eric Ulwelling and Firefighter Spencer Reade, paramedics with the Carmel Valley Fire Protection District, were dispatched to defendant's address for an unknown emergency at 5:45 p.m.

At 5:47 p.m., defendant left a voice mail message for Morrison. At 5:49 p.m., defendant called First Alarm and left another message for Morrison. During the second call, defendant told the person taking the message that "I've had major trouble out here. Uh, I've been injured. I've been assaulted. I defended myself. Um, he needs to come out right away."

When the paramedics and Deputy Irons arrived at defendant's address around 5:52 p.m., the paramedics saw defendant standing in his driveway with his arms behind his back, staring straight ahead. Defendant, who Captain Ulwelling described as "approximately six-feet tall [and] relatively heavy set," did not approach the paramedics or say anything to them. Elizabeth was lying on the ground between the roadway and a boulder, on her left side in a semi-fetal position, facing Melvin and the boulder, and with her back to the passenger side of the ambulance. She had a significant amount of blood on her chest, but she was conscious and talking. Melvin was dead.

A sledgehammer was found at the scene, and there was a cordless phone several feet below Elizabeth's feet. Her sweater was bunched up, exposing her midriff. Captain Ulwelling moved her onto her back, and asked her what had happened. She replied, "We were shot." Ulwelling asked her who did it, and she replied, "My neighbor." Ulwelling asked her if that was the man standing at the top of the driveway, and she said yes. Ulwelling told the

deputy what he had learned.

Deputy Irons approached defendant and asked him what had happened. Defendant asked Irons if he was the same deputy who had been out earlier, and Irons responded no. Defendant said that Sheriff Kanalakis was going to assign a deputy to handle an ongoing problem between defendant and his neighbors, and that the boulder that had been delivered was on his property. Irons again asked defendant what had happened. Defendant responded that he did not want to say anything until his lawyer arrived, and that his lawyer was on his way. Irons asked defendant if he had any injuries. Defendant did not say anything but he showed Irons an injury to his right thumb. Defendant had no other injuries. Irons told defendant that, unless he told the deputy his side of the story, all the deputy had to go on is what the other people involved had to say. Irons said that there was a woman who had blood on her and he asked defendant how she got that way. Defendant paused and then said calmly, "She did it to herself." Irons told defendant that he was being detained and would be placed in the patrol car. Defendant said that he wanted to lock his residence, and Irons had to physically block defendant from doing so. Defendant glared at Irons and then walked with him to the patrol car, but he refused to get inside. Irons had to place defendant in a control hold to handcuff him and place him in the patrol car.

Captain Ulwelling rolled Elizabeth back on her side, removed her sweater, and cut off her camisole and bra. Firefighter Reade stripped off Elizabeth's jeans, boots, and socks. Reade did not see or remove a pearl necklace before he placed a neck brace on Elizabeth. Elizabeth had gunshot wounds in her chest and back. She deteriorated rapidly; although she was transported from the scene in an ambulance and was airlifted to a hospital, she died in flight. Before Elizabeth died, Reade asked her what had happened and she replied, "My neighbor shot me." He asked her why and she replied, "Because . . . he's an ass hole."

Elizabeth was 55 years old, 5' tall, and weighed 116 pounds at the time of her death. She had a blood-alcohol level of 0.06 percent. She had been shot once in her upper right arm, and the bullet continued through her arm, entered her body in front of her armpit, and lodged in her small intestine. She would have had to have her shoulder raised and to be hunched forward in order for the bullet to have followed the path it did. The bullet was recovered from her body. Elizabeth had been shot a second time in the center of her mid-back, just right of the spinal column, and the bullet exited her body in her upper abdomen, grazing her breast and bruising her left inner thigh through her jeans. She also had small bruising on the front of her shins. Her jeans had a concentration of dirt or mud in the knee areas which was embedded in the clothing. Based on her injuries and the state of her clothing, it was determined that Elizabeth was hunched forward and her sweater was rolled up when she was shot in the back. A criminalist determined that Elizabeth was probably shot both times from approximately three feet away. The two pieces of a pearl necklace recovered from the scene near Elizabeth's clothing had blood on them near their frayed

ends. It appeared that the necklace had been broken rather than cut.

Melvin was 58 years old, 5' 9" tall, and weighed 165 pounds at the time of his death. He had had two stents in his coronary arteries due to narrowing of the arteries, but his heart disease did not cause his death. He had been shot once in the back of the left arm near the shoulder, and the bullet exited the arm, entered the chest inside the armpit, and exited the chest below the right armpit without hitting his right arm. He would have had to have his arms raised at the shoulder in order for the bullet to have followed the path it did. Melvin was shot a second time in the right lower chest, and the bullet exited the right back. A criminalist determined that Melvin was probably shot once from approximately three feet away and once from a greater distance. Melvin also had a deep abrasion on his left cheek that was consistent with being hit in the face by the rear sight of the .45-caliber handgun recovered at the scene.

The .45-caliber handgun containing a magazine, a live round, and a spent casing, was seized from the stairway inside defendant's house. There was blood on the gun. Both Melvin's and defendant's DNA were found on the rear sight area of the gun. A live round of ammunition was found on the ground by Melvin's body, and a spent bullet was found embedded about four inches into the ground under where Elizabeth had been lying. The casings and bullets found at the scene and recovered from Elizabeth's body were fired by the gun. In the bottom drawer of a filing cabinet near defendant's desk, investigators found a .45-caliber magazine clip containing live ammunition, and a DVD titled "First and Finish Moves."

A person can injure his or her thumb when firing a gun like the .45 found at the scene. If a shooter had a thumb on the back of the slide when he or she depressed the trigger, the thumb could be cut when the slide reciprocated backwards. Defendant's blood was found on the front deck of defendant's house and on the driveway, on and near a desk on the first floor of his house, and in his bathroom. His blood was also found on one of his shoes, and on both the front abdomen area and the lower right back of his sweater.

The Defense Case

Defendant testified in his own defense. He was 72 years old on January 29, 2007, and he might have weighed over 200 pounds. As a teenager he served in the army during the Korean conflict and saw combat action. Thereafter, he obtained college and graduate degrees, and was a college professor. His specialty is theoretical physics and he has worked with the petroleum industry and with the United States government. He splits his time between his residences in France and in Carmel Valley, but his wife and two daughters live in France.

Defendant purchased his Carmel Valley home in 1999. He did not realize that the preliminary title report for the property stated that there was an easement on the property

for a road "and incidents thereto." He bought the .45-caliber handgun in 2003 from a neighbor. In 2004, defendant had a flower garden in the disputed area on his property, and the Grimeses destroyed it when they graded the area and built a carport on their property.

On June 11, 2005, defendant was attacked by Elizabeth and received a concussion. Two days earlier, Melvin had poured concrete over the disputed area. Defendant's lawyer wrote Melvin a letter ordering him to remove the concrete and to not drive across defendant's property. Melvin broke up the concrete with a sledgehammer. On the morning of June 11, 2005, defendant and a neighbor planted ferns where the concrete had been. That afternoon, as defendant was heading back to the nursery, Elizabeth positioned herself in front of his car. Melvin then ran to the Grimeses car and drove back and forth over the ferns defendant had just planted. Defendant took a camera from his shirt pocket in order to take pictures of what Melvin was doing. Elizabeth first tried to block defendant's view and then she ran to the side of defendant's car and grabbed the camera out of his hands. Because the camera's nylon cord was around defendant's neck, his head jerked forward and was slammed against the car window. The cord broke and Elizabeth was able to pull the camera away. She said, "How do you like that?" Defendant demanded his camera back. Melvin approached them and said to defendant, "If you ever attack my wife again, I'm going [to] finish you." He then told Elizabeth to return the camera to defendant, so Elizabeth threw the camera into the back seat of defendant's car. Defendant returned home and called his attorney and 911. After hearing both Elizabeth's and defendant's accounts, the responding deputies refused to arrest Elizabeth. Defendant was treated for trauma injuries and a concussion as a result of the incident and he sued the Grimeses for damages. The suit was still pending at the time of the Grimeses' deaths.

Defendant requested a restraining order against the Grimeses, and they requested one against him. Defendant was required to turn in any firearms he possessed prior to receiving his restraining order. Although the box was checked on defendant's request form indicating that he did not possess any guns, his attorney had filled out the form and he signed it without reading it.

Three days after the camera incident, defendant went to a bible study class at his church. During the class, Elizabeth barged into the room. She said that defendant is a terrible person who was always harassing them. She said that defendant broke her finger when he attacked her three days earlier. She also said, "If you people call yourself Christians, what are you doing having this fellow." The people in the class told Elizabeth to leave, and somebody escorted her out.

Defendant was advised by his lawyers as early as 2005 to position a barrier in order to keep the Grimeses from driving over the disputed property, but his lawyers advised him to give the Grimeses at least 24-hours notice before he did so. Defendant sent the Grimeses an email notice a couple weeks before the boulder was delivered, but he could not produce

a copy of the email because his computer has since crashed. Cvietkovich, Morrison, and a neighbor, Steve Radford, were all present when the boulder was delivered. Defendant had earlier learned that the restraining order he had had against the Grimeses was no longer in effect, so somebody from the sheriff's department was supposed to be present, but was not. Radford, Cvietkovich, and Morrison left shortly after the boulder was delivered.

Later that day, as defendant was preparing his dinner, he heard a noise at his side door. He grabbed from his bedside stand the gun he has kept there since the spring of 2005 and stuck it into his belt. He ran out his front door and saw Elizabeth at the corner of his house. He did not see a phone in her hand, and he did not see Melvin. He asked Elizabeth what she wanted and she used some "foul mouth" language. He approached her and she backed off the deck onto the driveway. He told her to get off his property while making a sweeping motion with his right arm. As she continued to back up, he continued to step forward towards her.

Defendant then saw Melvin striking the boulder with a sledgehammer. Defendant walked past Elizabeth to Melvin and told him to stop and to get off his property. Melvin kept striking the boulder. As defendant was repeating his command, Elizabeth came up behind him and hit him in the back of the head. Defendant spun around and pushed her away. In his peripheral vision, he saw Melvin coming towards him with the sledgehammer raised "as a battering ram." Defendant felt trapped. He drew the gun, pointed it at the ground, and drew back the receiver to load a round in the chamber. Because the gun was already loaded, it ejected an unused round. Defendant could see Melvin coming at him so he tried to dodge out of the way, but Melvin slammed into him and the sledgehammer hit him on his left arm. When Melvin pulled the sledgehammer back for a second strike, defendant hit him in the face with the gun.

Melvin was "knocked . . . off his pins" and he dropped the sledgehammer. Defendant then fired once at Melvin and once at Elizabeth. He paused for a moment and then shot Melvin again. After another pause he shot Elizabeth again. Melvin stood up, stepped across Elizabeth, and fell to the ground to the side of her. Defendant's hands shook so badly that his thumb slipped off the hammer, the gun fired again, the bullet went into the ground, and the slide ripped a big gash in his thumb. While he was returning to his house to call 911, he looked back and saw that both Melvin and Elizabeth were moving and speaking. After calling 911, Morrison, and Cvietkovich, defendant cleaned his thumb in the bathroom and returned outside to wait for the 911 responders.

Deputy Irons asked defendant to tell him what happened, but defendant said that he wanted to wait for his lawyer to arrive before he said anything. The deputy asked him if he was injured and defendant said that he had a cut thumb and had lost a lot of blood. The deputy asked defendant if there was a weapon in the house, and defendant told him about the .45. Defendant denied making any other statements to the deputy. The deputy told defendant

that he was being detained, took him by the elbow, and walked him to the patrol car. When they got to the car, "suddenly, without warning," the deputy slammed defendant against the car, seized his wrist and threw it into a hammerlock, pressed him up against the car, handcuffed him, and shoved him into the car.

Segolene Kenney, defendant's daughter; Steve Radford, defendant's neighbor; Jennifer Garbarino, another neighbor; Stefan Youngs, a former neighbor; Thomas Brattin, defendant's life-long friend; Rene Burgess, a friend of defendant's who lived on the east coast; Larry Thurman, a friend of defendant's who lived in Texas; Richard Petty, a friend of defendant's who lived in Boston; Dean Koontz, a pastor at defendant's church; Kim Williams, a member of defendant's church; David Hughes, a member of defendant's church's bible study group; Norman McBride, another member of the bible study group; and three of defendant's civil attorneys testified about their involvement in and/or what defendant told them about the incidents involving the Grimeses that defendant testified about.

Dr. Daniel Chatel, a clinical neuropsychologist with the Department of Veterans Affairs, testified that he saw defendant between June 2005 and October 2006. Dr. Chatel felt that defendant had an adjustment disorder, and that he had likely suffered a mild concussion and had a post-concussive disorder. During their sessions, defendant intermittently showed apprehension about possible physical harm from the Grimeses, but he never expressed any violent thoughts or plans. Dr. Kris Mohandie, a psychologist, testified about the "fight or flight response," which is a triggered instinctual reaction that a person may have to a threat or a fear of being harmed by another person. During a fight or flight response, a person may have "tunnel vision" and "tunnel hearing," so that he or she does not see or hear everything that is happening and he or she may not have an ability to recall certain events. Most people who experience this response will either fight or run, but a small percentage will do nothing.

Steve Rosnack, Elizabeth's brother, testified that he spoke to Elizabeth on the phone at 5:29 p.m. on the evening she was shot. At that time, Elizabeth was relaxed and happy about the results of the appointment Melvin had had earlier that day regarding his heart condition. Dr. Gregory Tapson testified that Elizabeth was the office manager where he worked. In his opinion, Elizabeth had a reputation for dishonesty. Kenneth Allen Marks, a forensic toxicologist, testified that, generally, people with a 0.06 blood-alcohol level talk more loudly than normal and they increase their risk-taking.

Steven Yawn, a former neighbor of defendant's, testified that he sold defendant a .45-caliber automatic handgun in late 2003 or early 2004 because other homes in the neighborhood had been broken into. Magaly Vasquez, who cleaned defendant's house, testified that sometimes when she took the sheets off defendant's bed, she found a gun under a pillow. When defendant had already removed the sheets before her arrival, the gun

was in the closet.

Dr. Terri Haddix, a consulting forensic pathologist, testified that in May 2008, she examined the clothing worn by Elizabeth at the time of her death, and the forensic reports. In Dr. Haddix's opinion, the wound on Elizabeth's left leg was not caused by the same bullet that went through Elizabeth's back. She is not sure what caused Elizabeth's leg injury.

Verdicts and Sentencing

On September 17, 2008, the jury found defendant guilty of the second degree murder of Melvin Grimes, Jr. (count 1) and the first degree murder of Elizabeth Ellington Grimes (count 2). The jury further found that defendant intentionally discharged a firearm in the commission of both offenses (§ 12022.53, subd. (d)), and that he committed multiple murders (§ 190.2, subd. (a)(3)). The jury found not true the allegation that the murder of Elizabeth was committed by means of lying in wait (§ 190.2, subd. (a)(15)).

On November 3, 2008, the court sentenced defendant to life in prison without the possibility of parole consecutive to 25 years to life on count 2, with a concurrent sentence of 15 years to life consecutive to 25 years to life on count 1. The court also ordered defendant to pay a $10,000 restitution fine and a suspended $10,000 restitution fine under section 1202.45 as to each count.

People v Kenney, 2012 WL 1320123, at *1-*7 (Cal. App. April 17, 2012).

STANDARD OF REVIEW

This court may entertain a petition for writ of habeas corpus "in 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). The petition may not be granted with respect to any claim that was adjudicated on the merits in state court unless the state court's adjudication of the claim: "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d).

"Under the 'contrary to' clause, a federal habeas court may grant the writ if the state court

arrives at a conclusion opposite to that reached by [the U.S. Supreme] Court on a question of law or if the state court decides a case differently than [the] Court has on a set of materially indistinguishable facts." *Williams v. Taylor*, 529 U.S. 362, 412-13 (2000). "Under the 'reasonable application clause,' a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from [the] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 413.

"[A] federal habeas court may not issue the writ simply because the court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, the application must also be unreasonable." *Id.* at 411. A federal habeas court making the "unreasonable application" inquiry should ask whether the state court's application of clearly established federal law was "objectively unreasonable." *Id.* at 409.

The only definitive source of clearly established federal law under 28 U.S.C. § 2254(d) is in the holdings (as opposed to the dicta) of the U.S. Supreme Court as of the time of the state court decision. *Id.* at 412. Clearly established federal law is defined as "the governing legal principle or principles set forth by the [United States] Supreme Court." *Lockyer v. Andrade*, 538 U.S. 63, 71-72 (2003).

DISCUSSION

Petitioner raises the following claims in his amended federal habeas petition: (1) the trial court erred when it instructed the jury with CALCRIM No. 3471 on mutual combat or initial aggressor, and CALCRIM No. 3472 on pretextual self-defense; (2) the trial court had a sua sponte duty to define "mutual combat" once the jury was instructed on it; (3) the trial court erred when it failed to instruct the jury with CALCRIM No. 3475 on "defense of property," and counsel was ineffective when he agreed to the withdrawal of CALCRIM No. 3475; (4) the trial court erred when it admitted into evidence a DVD entitled "First and Finish Moves"; and (5) the trial court

erred when it instructed the jury with CALCRIM No. 362, which permitted the jury to infer a consciousness of guilt from petitioner's false statements. The court addresses each claim below.

I. Instructions on mutual combat or initial aggressor and pretextual self-defense

Petitioner argues that the trial court erred in giving instructions on mutual combat or initial aggressor, *see* CALCRIM No. 3471, and pretextual self-defense, *see* CALCRIM No. 3472, because there was insufficient evidence to support those instructions. Petitioner also argues that those instructions violated petitioner's right to present a defense because they tended to mislead the jury and undermined petitioner's theory of self-defense. Am. Pet. at 72-81.

As given by the trial court, CALCRIM No. 3471 stated:

> "A person who engages in mutual [combat], or who is the first to use physical force, has a right to use self-defense only if (1) he actually, and in good faith, tries to stop fighting, and (2) he indicates, by word or conduct, to his opponent, in a way that a reasonable person would understand, that he wants to stop fighting and he has stopped fighting, and [(3)] he gives his opponent a chance to stop fighting. If a person meets these requirements, he, then, has a right to self-defense if the opponent continues to fight. If you decide that the defendant started the fight using non deadly force, and the opponent responded with such sudden and deadly force that the defendant could not withdraw from the fight, then, the defendant has the right to defend himself with deadly force and was not required to stop fighting."

People v. Kenney, No. H033590, 2012 WL 1320123, at *8 (Cal. App. April 17, 2012). CALCRIM No. 3472 states: "A person does not have the right to self-defense if he provokes a fight or quarrel with the intent to create an excuse to use force." *Id.*

On direct appeal, the California Court of Appeal rejected petitioner's claim. It concluded that the record contained substantial evidence from which a jury could determine that petitioner was the initial aggressor, which supported instructing the jury with CALCRIM No. 3471. *Id.* at *9. It also concluded that there was substantial evidence from which a jury could have inferred that petitioner provoked a fight with the victims with the intent to create an excuse to use force. *Id.* at *10. The state appellate court noted that the jury was also instructed on self-defense and

imperfect self-defense, as well as CALCRIM No. 200, which advised the jury that it was possible that not all of the given instructions were applicable, depending on the jury's fact-findings. *Id.* Finally, the California Court of Appeal concluded that even if these instructions had no application to the facts of the case, which would only violate state law, any error was harmless. *Id.* at *9-*10.

To obtain federal collateral relief for errors in the jury charge, a petitioner must show that the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process. *See Estelle v. McGuire*, 502 U.S. 62, 71-72 (1991); *see also Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974) ("'[I]t must be established not merely that the instruction is undesirable, erroneous or even "universally condemned," but that it violated some [constitutional right].'"). The instruction may not be judged in artificial isolation, but must be considered in the context of the instructions as a whole and the trial record. *See Estelle*, 502 U.S. at 72. The inquiry is not how reasonable jurors could or would have understood the instruction as a whole; rather, the court must inquire whether there is a "reasonable likelihood" that the jury has applied the challenged instruction in a way that violates the Constitution. *Id.* at 72 & n.4. In other words, the court must evaluate jury instructions in the context of the overall charge to the jury as a component of the entire trial process. *United States v. Frady*, 456 U.S. 152, 169 (1982) (citing *Henderson v. Kibbe*, 431 U.S. 145, 154 (1977)).

Here, petitioner does not argue that the instructions were incorrect statements of the law. Rather, he argues that the evidence did not support providing CALCRIM Nos. 3471 (mutual combat or initial aggressor) or 3472 (pretextual self-defense) to the jury. Whether evidence is sufficient to support a jury instruction is not a federal constitutional question. *Cf. Griffin v. United States*, 502 U.S. 46, 56-57, 60 (1991) ("if the evidence is insufficient to support an alternative legal theory of liability, it would generally be preferable for the court to give an instruction removing that theory from the jury's consideration. The refusal to do so, however, does not

provide an independent basis for reversing an otherwise valid conviction."); *People v. Guiton*, 4 Cal. 4th 1116, 1129-30 (1993) (recognizing that it is a state law error to give a jury instruction that is legally correct, but unsupported by evidence in the record). The state court's decision to give CALCRIM Nos. 3471 and 3472, therefore, was not contrary to or an unreasonable application of U.S. Supreme Court precedent, and did not involve an unreasonable determination of the facts.

In addition, viewing the instructions as a whole, it is clear that the challenged instructions did not "so infect[] the entire trial that the resulting conviction violate[d] due process." *Estelle*, 502 U.S. at 72. That is, petitioner has not demonstrated that there is a "reasonable likelihood" that the jury misapplied the instructions. *Id.* Petitioner's argument is based on the application of his own version of the facts, and fails to take into consideration evidence that the prosecution set forth, which the jury clearly credited. The jury instructions, as given by the trial court, also included CALCRIM No. 505 on self-defense or defense of another; CALCRIM No. 571 on the reduction of murder to voluntary manslaughter due to imperfect self-defense; CALCRIM No. 3474 on limiting the right to use force in self-defense only as long as the danger exists; and CALCRIM No. 200 which informs the jurors that some of the instructions might not apply, and that they should only follow the instructions that do apply. *Kenney*, 2012 WL 1320123, at *8, *10.

Even assuming that CALCRIM Nos. 3471 and 3472 were not supported by the evidence presented at trial, the trial court's decision to give the challenged instructions did not deprive petitioner of his right to a fair trial. Neither CALCRIM No. 3471 nor CALCRIM No. 3472 precluded the jury from finding that petitioner acted in self-defense, imperfect or otherwise. Rather, they stated only that under specified circumstances, petitioner could not legitimately claim self-defense. If, as petitioner believes, the evidence did not fit those specified circumstances, then the jury could have disregarded the challenged instructions, as they were so directed in CALCRIM

No. 200. CALCRIM No. 200 instructed the jury to follow only the instructions that applied to the facts of the case.

After a review of the relevant record, this court concludes that the instruction of the jury with CALCRIM Nos. 3471 and 3472 in the context of this case did not violate petitioner's federal constitutional rights. Under the facts presented here, these two instructions did not so infect the trial with unfairness as to deny due process of law. For the detailed reasons set forth in the decision of the California Court of Appeal, the facts of this case fairly support providing both jury instructions to the jury. There was ample evidence to support the prosecution's theory that petitioner was the initial aggressor, and to support the instruction that petitioner provoked an argument with the intent to create an excuse to use force.

Alternatively, even assuming that providing CALCRIM Nos. 3471 or 3472 violated the U.S. Constitution, given petitioner's actions, any error could not have had a "substantial and injurious effect or influence" in determining the jury's verdict in this case. *See Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993). A review of the record shows that petitioner admitted during his own testimony that after he struck Mr. Grimes with the gun and as Mr. Grimes was falling toward the ground, petitioner fired the first gunshot at Mr. Grimes. Dkt. No. 43-1, RT 5893. After petitioner shot Mr. Grimes, petitioner then shot at Mrs. Grimes, who may have been down on the ground already, but petitioner did not remember. *Id.*, RT 5894. A few seconds passed before petitioner fired a third and fourth shot. Dkt. No. 43-2, RT 6006. When petitioner fired his third shot, it was directed at Mr. Grimes, who had turned onto his stomach and was trying to push himself up. Dkt. No. 43-1, RT 5897. Petitioner waited another few seconds before firing his fourth shot. Dkt. No. 43-2, RT 6006. Petitioner's fourth shot hit Mrs. Grimes, and the trajectory of the bullet wound was consistent with a close range shot in the back while Mrs. Grimes was hunched over and on the ground. Dkt. No. 42-7, RT 5604-05. Given these facts, as

well as the circumstantial evidence, even if there was instructional error, the error did not have a substantial and injurious effect on the jury. That is, the jury still would have found that petitioner's use of deadly force was not warranted under either a self-defense or imperfect self-defense theory.

The decision of the California Court of Appeal denying petitioner's first claim for relief was not contrary to or an unreasonable application of federal law. Accordingly, petitioner is not entitled to federal habeas relief on this claim.

II. Duty to define "mutual combat"

Petitioner argues that once the trial court gave CALCRIM No. 3471 about "mutual combat," the trial court had a duty to sua sponte define that term for the jury. Am. Pet. at 81.

The California Court of Appeal rejected this claim. It stated that CALCRIM No. 3471 "is written in the disjunctive; it applies when a person is engaged in mutual combat or is the initial aggressor." *Kenney*, 2012 WL 1320123, at *9 (emphasis in original). The state appellate court went on to state that there was evidence presented in this case from which the jury could find that petitioner was the initial aggressor. *Id.* In addition, the jury was instructed with CALCRIM No. 200, which stated, "[s]ome of these instructions may not apply, depending upon your findings about the facts in this case," and that the jury should "follow the instructions that do apply to the facts, as you, the jurors, find them." *Id.* at *10. The prosecutor did not argue that petitioner engaged in mutual combat in closing argument; rather, the prosecutor argued that petitioner was the initial aggressor. *Id.* The California Court of Appeal found that there was no error in failing to define "mutual combat," and that even assuming there was an error, it was harmless. *Id.*

In a federal habeas proceeding, the omission of an instruction is less likely to be prejudicial than a misstatement of the law. *See Walker v. Endell*, 850 F.2d 470, 475-76 (9th Cir. 1987). Thus, a habeas petitioner whose claim involves a failure to give a particular instruction bears an

"'especially heavy burden.'" *Villafuerte v. Stewart*, 111 F.3d 616, 624 (9th Cir. 1997) (quoting *Henderson v. Kibbe*, 431 U.S. 145, 155 (1977)). The significance of the omission of such an instruction may be evaluated by comparison with the instructions that were given. *Murtishaw v. Woodford*, 255 F.3d 926, 971 (9th Cir. 2001).

As an initial matter, petitioner has not provided, and the court has not found, any clearly established federal right to have a trial court sua sponte define terms in an instruction to the jury. On that basis alone, petitioner is not entitled to habeas relief on this claim because the state court's decision rejecting petitioner's claim that the trial court should have sua sponte defined "mutual combat" was not contrary to or an unreasonable application of U.S. Supreme Court precedent, and did not involve an unreasonable determination of the facts.

In addition, even if it was erroneous to not define "mutual combat" to the jury, the court finds that the error did not have a "substantial and injurious effect or influence" in determining the jury's verdict in this case. *See Brecht*, 507 U.S. at 637. Regardless of whether the jury was confused about "mutual combat," the jury was also instructed on CALCRIM No. 3474, which states, "The right to use force in self-defense continues only as long as the danger exists or reasonably appears to exist. When the attacker withdraws or no longer appears capable of inflicting any injury, then, the right to use force ends." Based on the 911 recording, the testimony of the criminalist regarding the trajectories of both bullets in both victims, and petitioner's own testimony that he paused before shooting at each victim a second time, even if the trial court had defined "mutual combat," it could not have had a substantial or injurious effect on the jury's verdict as there was substantial evidence that petitioner continued to use force even after any danger appeared to exist.

The decision of the California Court of Appeal denying petitioner's second claim for relief was not contrary to or an unreasonable application of federal law. Accordingly, petitioner is not

entitled to federal habeas relief on this claim.

III. Defense of property instruction

Petitioner claims that the trial court erred by failing to instruct the jury with CALCRIM No. 3475,[2] the right to eject a trespasser from real property, and that trial counsel rendered ineffective assistance for agreeing to the withdrawal of that instruction because there was no tactical basis to do so. Petitioner argues that after counsel agreed to withdraw CALCRIM No. 3475, the trial court nevertheless had a duty to give that instruction.

The California Court of Appeal rejected petitioner's claim. It stated, "CALCRIM No. 3475 would have informed the jury that a lawful occupant may use reasonable force to eject a trespasser who poses a threat to the property or occupants, and would have defined reasonable force as that reasonably necessary to protect the property or occupants. However, the record discloses that defense counsel made a tactical decision prior to trial to not present to the jury a defense-of-property theory of defense based on defendant believing that he was the lawful occupant and the Grimeses were the trespassers to the disputed property, but to present instead a defense theory of self-defense or imperfect self-defense." *Kenney*, 2012 WL 1320123, at *12. Knowing that the defense theory was not "defense of property, and understanding that both

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[2] CALCRIM No. 3475, as proposed, stated: "The (owner/lawful occupant) of a (home/property) may request that a trespasser leave the (home/property). If the trespasser does not leave within a reasonable time and it would appear to a reasonable person that the trespasser poses a threat to (the (home/property)/ or the (owner/or occupants)[]], the (owner/lawful occupant) may use reasonable force to make the trespasser leave. [¶] Reasonable force means the amount of force that a reasonable person in the same situation would believe is necessary to make the trespasser leave. [¶] If the trespasser resists, the (owner/lawful occupant) may increase the amount of force he or she uses in proportion to the force used by the trespasser and the threat the trespasser poses to the property. [¶] When deciding whether the defendant used reasonable force, consider all the circumstances as they were known to and appeared to the defendant and consider what a reasonable person in a similar situation with similar knowledge would have believed. If the defendant's beliefs were reasonable, the danger does not need to have actually existed. [¶] The People have the burden of proving beyond a reasonable doubt that the defendant used more force than was reasonable. If the People have not met this burden, you must find the defendant not guilty of _____ <insert crime>." *Kenney*, 2012 WL 1320123, at *11.

petitioner and the victims believed they each had the lawful right to the disputed property, the trial court told the parties that it wanted the parties to resolve the property dispute prior to opening statements. *Id.* Ultimately, the parties agreed to the following stipulation, "There was a property dispute between Mr. Kenney and the Grimes[es] over the area of land where Mr. Kenney placed the boulder. The Grimes[es] believed they had an easement or right to access their carport across the defendant's property. In this case, who was actually right about this property dispute is not necessary for the jury to decide, and therefore, that issue is not for you, the jurors, to determine." *Id.* at *13. The state appellate court ruled that because the withdrawal of CALCRIM No. 3475 was a tactical choice by trial counsel, it was not error for the trial court not to sua sponte give the instruction, nor was it deficient performance for counsel to withdraw the instruction.

Petitioner has not provided, and the court has not found, any clearly established federal right that a trial court must sua sponte give non-requested instructions to the jury. Thus, the state court's decision rejecting petitioner's claim that the trial court should have sua sponte given CALCRIM No. 3475 over defense counsel's decision to withdraw it, was not contrary to or an unreasonable application of U.S. Supreme Court precedent, and did not involve an unreasonable determination of the facts.

In addition, a state trial court's refusal to give an instruction does not alone raise a claim cognizable in a federal habeas corpus proceeding. *See Dunckhurst v. Deeds*, 859 F.2d 110, 114 (9th Cir. 1988). Rather, the error must so infect the trial that the defendant was deprived of the fair trial guaranteed by the Fourteenth Amendment. *See id.* Due process requires that "'criminal defendants be afforded a meaningful opportunity to present a complete defense.'" *Clark v. Brown*, 450 F.3d 898, 904 (9th Cir. 2006) (quoting *California v. Trombetta*, 467 U.S. 479, 485 (1984)).

Here, defense counsel agreed to withdraw CALCRIM No. 3475 because it was not relevant to the determinative issue of whether petitioner had a right to defend himself. If the trial court had

instructed the jury with CALCRIM No. 3475 over defense counsel's deliberate decision not to request it, the instruction would have conflicted with defense counsel's chosen defense strategy. Thus, petitioner's claim that the trial court violated petitioner's right to present a meaningful defense by failing to give CALCRIM No. 3475 is unpersuasive.

With respect to petitioner's claim that counsel was ineffective for agreeing to withdraw CALCRIM No. 3475, the California Court of Appeal rejected that assertion as well. It stated that counsel made a reasonable and tactical choice to pursue a self-defense or imperfect self-defense theory rather than a defense of property theory. In making this strategic choice, defense counsel agreed to a stipulation so that the issue of "who was the lawful occupier and who was the trespasser was not before the jury." *Kenney*, 2012 WL 1320123, at *13. Thus, the state appellate court concluded that counsel did not render deficient performance.

A claim of ineffective assistance of counsel is cognizable as a claim of denial of the Sixth Amendment right to counsel, which guarantees not only assistance, but effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686 (1984). In order to prevail on a Sixth Amendment ineffectiveness of counsel claim, petitioner must establish two things. First, he must establish that counsel's performance was deficient, i.e., that it fell below an "objective standard of reasonableness" under prevailing professional norms. *Strickland*, 466 U.S. at 687-88. Second, he must establish that he was prejudiced by counsel's deficient performance, i.e., that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.*

"There is a 'strong presumption' that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than 'sheer neglect.'" *Harrington v. Richter*, 131 S. Ct. 770, 790 (2011) (citations omitted); *Cullen v. Pinholster*, 131 S. Ct. 1388, 1407 (2011) ("*Strickland*

specifically commands that a court must indulge [the] strong presumption that counsel made all significant decisions in the exercise of reasonable professional judgment."). The absence of evidence that counsel gave constitutionally inadequate advice cannot overcome the presumption that counsel's conduct was within the range of reasonable professional advice. *Burt v. Titlow*, 134 S. Ct. 10, 17 (2013) (concluding that without any evidence demonstrating that counsel gave inadequate advice regarding withdrawal of a guilty plea, there is a strong presumption that counsel's performance was not deficient).

A trial attorney has wide discretion in making tactical decisions, including forgoing jury instructions inconsistent with the defense trial theory. *See Butcher v. Marquez*, 758 F.2d 373, 377 (9th Cir. 1985) (finding counsel was not ineffective for failing to request a manslaughter instruction when defense was based on alibi and noting that "[d]efense counsel need not request instructions inconsistent with its [sic] trial theory"). Here, because defense counsel did not want the jury to focus on or decide who had the right over the property upon which the attack occurred, defense counsel agreed to the stipulation that there was a property dispute. Removing from the jury the issue of whether petitioner was the lawful occupier made CALCRIM No. 3475 irrelevant.

Petitioner has not provided evidence that counsel's decision was deficient. Thus, petitioner has not overcome the presumption that counsel's conduct was within the range of reasonable professional advice. *See Burt*, 134 S. Ct. at 17. The decision of the California Court of Appeal denying petitioner's third claim for relief was not contrary to or an unreasonable application of federal law. Accordingly, petitioner is not entitled to federal habeas relief on this claim.

IV. Admission of "First and Finish Moves" DVD

Petitioner claims that the trial court erred in allowing the prosecution to admit into evidence portions of a DVD entitled "First and Finish Moves" that was found in a drawer in

petitioner's house, along with a .45-caliber magazine clip containing live ammunition which fit the .45-caliber gun found at the scene. Am. Pet. at 87-89. Petitioner argued that the admission of portions of the DVD into evidence was more prejudicial than probative, and violated his right to a fair trial.[3]

The state appellate court stated, "The DVD shown to the jury shows a man demonstrating 'action versus reaction' by showing how somebody reaching for a gun can get to it before somebody reacting to the reach, even though the person reacting is closer to it. It also shows a man stating that the best self-defense after an attack is to attack back. It ends with the narrator stating, 'Once again, the key to the entire thing is to act first, have a good first move.'" *Kenney*, 2012 WL 1320123, at *14. The California Court of Appeal concluded that any prejudice from the admission of the DVD was minimal, and that the DVD was relevant to show petitioner's planning and premeditation. *Id.* Finally, the court stated, "The DVD was circumstantial evidence that defendant purposefully took his gun with him when he left his home in order to attempt to have the upper hand when he confronted the Grimeses. The DVD also bolstered the prosecution's claim that defendant was the initial aggressor, and it was therefore probative of defendant's guilt on the charges of murder and on his inability to claim self-defense." *Id.* at *15.

The admission of evidence is not subject to federal habeas review unless a specific constitutional guarantee is violated or the error is of such magnitude that the result is a denial of the fundamentally fair trial guaranteed by due process. *See Henry v. Kernan*, 197 F.3d 1021, 1031 (9th Cir. 1999). Importantly, the U.S. Supreme Court "has not yet made a clear ruling that admission of irrelevant or overtly prejudicial evidence constitutes a due process violation

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[3] In petitioner's traverse, petitioner alleges that the DVD was "false" evidence and petitioner's conviction was obtained by the "knowing use of false evidence." Not only is this allegation improperly raised in a traverse, *see Cacoperdo v. Demosthenes*, 37 F.3d 504, 507 (9th Cir.1994), but the court previously dismissed this claim as time-barred. Dkt. No. 29. Accordingly, the court will not address it.

sufficient to warrant issuance of the writ." *Holley v. Yarborough*, 568 F.3d 1091, 1101 (9th Cir. 2009) (finding that trial court's admission of irrelevant pornographic materials was "fundamentally unfair" under Ninth Circuit precedent but not contrary to, or an unreasonable application of, clearly established Supreme Court precedent under § 2254(d)); *see, e,g., Zapien v. Martel*, 849 F.3d 787, 794 (9th Cir. 2015) (because there is no U.S. Supreme Court case establishing the fundamental unfairness of admitting multiple hearsay testimony, *Holley* bars any such claim on federal habeas review). Therefore, the court cannot find that the state court's evidentiary ruling was an unreasonable application of clearly established federal law under 28 U.S.C. 2254(d)(1). *See Holley*, 568 F.3d at 1101.

Alternatively, the due process inquiry in federal habeas review is whether the admission of evidence was arbitrary or so prejudicial that it rendered the trial fundamentally unfair. *Walters v. Maass*, 45 F.3d 1355, 1357 (9th Cir. 1995). Only if there are no permissible inferences that the jury may draw from the evidence can its admission violate due process. *See Jammal v. Van de Kamp*, 926 F.2d 918, 920 (9th Cir. 1991). Here, the admission of portions of the DVD was relevant to show that petitioner was the initial aggressor and had purposefully taken the gun with him when he went outside to confront the victims as one of the DVD's messages was to act first rather than wait to react.

Thus, the decision of the California Court of Appeal denying petitioner's fourth claim for relief was not contrary to or an unreasonable application of federal law. Accordingly, petitioner is not entitled to federal habeas relief on this claim.

V. CALCRIM No. 362

Petitioner claims that the trial court improperly gave CALCRIM No. 362 to the jury in violation of petitioner's right to due process and petitioner's right to testify. CALCRIM No. 362 stated, "If the defendant made a false or misleading statement relating to the charged crime,

knowing the statement was false or intending to mislead, that conduct may show he was aware of his guilt of the crime, and you, the jurors, may consider it in determining his guilt. You, the jurors, may not consider the statement in deciding any other defendant's guilt. If you conclude that the defendant made the statement, it is up to you to decide its meaning and importance. However, evidence that the defendant made such a statement cannot prove guilt by itself."

At trial, defense counsel objected to this instruction and argued that no false or misleading statements from petitioner were presented at trial. Therefore, argued counsel, giving CALCRIM No. 362 was inapplicable and misleading. The prosecutor argued that the instruction was proper because when an officer asked petitioner how Mrs. Grimes got blood all over her, petitioner responded, "she did it to herself." *Kenney*, 2012 WL 1320123, at *16.

The California Court of Appeal recognized that the statement, "she did it to herself," presented a factual dispute because the statement itself was ambiguous and petitioner testified that he did not make that statement at all. *Id.* Petitioner argued, as he does here, that he meant that Mrs. Grimes bore responsibility for what had happened. The state appellate court rejected petitioner's argument and concluded that because the jury had to determine whether petitioner made the statement, and what petitioner meant by the statement, the trial court properly instructed the jury with CALCRIM No. 362, "which informed the jury that it could consider the statement as evidence of defendant's consciousness of guilt if it determined, based on all of the evidence, that defendant made the statement and that he did so with the intent to mislead." *Id.* at *17.

As previously stated, to obtain federal collateral relief for errors in the jury charge, a petitioner must show that the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process. *See Estelle v. McGuire*, 502 U.S. at 72. Further, a state court's determination that the evidence is sufficient to support a particular jury instruction is entitled to a presumption of correctness. *See Menendez v. Terhune*, 422 F.3d 1012, 1029-30 (9th

Cir. 2005).

Again, the trial court also provided CALCRIM No. 200, which informed the jury that it may find some instructions inapplicable to the facts, and if so, the jury should disregard that instruction. Moreover, petitioner does not argue that the instruction is an incorrect statement of law, or otherwise inaccurate. He merely argues that it "unfairly burden[ed] a testifying defendant," and violated petitioner's right to testify.[4]

The right to testify on one's own behalf at a criminal trial has sources in several provisions of the Constitution. It is one of the rights that is "essential to due process of law in a fair adversary process." *Rock v. Arkansas*, 483 U.S. 44, 51 (1987) (citing *Faretta v. California*, 422 U.S. 806, 819, n.15 (1975)). The necessary ingredients of the Fourteenth Amendment's guarantee that no one shall be deprived of liberty without due process of law include a right to be heard and to offer testimony. *See Rock*, 483 U.S. at 51. The right to testify is also found in the Compulsory Process Clause of the Sixth Amendment, which grants a defendant the right to call "witnesses in his favor." *See id.* at 52. Logically included in the accused's right to call witnesses is a right to testify himself, should he decide it is in his favor to do so. *See id.* There is no justification for a rule that denies an accused the opportunity to offer his own testimony. Rather, his veracity can be tested adequately by cross-examination. *See id.* A defendant's opportunity to conduct his own defense by calling witnesses is incomplete if he may not present himself as a witness. *See id.* The opportunity to testify is also a necessary corollary to the Fifth Amendment's guarantee against compelled testimony. *See id.* Every criminal defendant is privileged to testify in his own defense,

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[4] Petitioner raises for the first time in his traverse that if he did say, "she did it to herself," the statement was taken in violation of *Miranda v. Arizona*, 384 U.S. 486 (1966). Am. Traverse at 14. Petitioner also mentions for the first time in his traverse that the arresting deputy committed perjury, and trial and appellate counsel rendered ineffective assistance for failing to challenge the deputy's testimony and the prosecutor's introduction of false evidence. *Id.* at 15. Because these allegations have surfaced for the first time in a traverse, they have been improperly raised, and the court declines to address them. *See Cacoperdo v. Demosthenes*, 37 F.3d 504, 507 (9th Cir. 1994).

or to refuse to do so. *See id.*

Here, petitioner testified at trial. It is unclear why petitioner believes CALCRIM No. 362 infringed upon his right to testify. Rather than explain at trial what he meant by the statement, "she did it to herself," petitioner instead testified that he never made such a statement. Dkt. No. 43-2, RT 6056-57. Petitioner does not allege that his right to be heard or to offer testimony was limited or curtailed by this instruction. The court finds no merit to petitioner's claim that CALCRIM No. 362 violated his right to testify.

Thus, the decision of the California Court of Appeal denying petitioner's final claim for relief was not contrary to or an unreasonable application of federal law. Accordingly, petitioner is not entitled to federal habeas relief on this claim.

CONCLUSION

The petition for a writ of habeas corpus is DENIED. The clerk shall terminate all pending motions and close the file.

Petitioner 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 [or] 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). Accordingly, a certificate of appealability is DENIED.

IT IS SO ORDERED.

DATED: 12/18/2017

Lucy H. Koh

LUCY H. KOH
UNITED STATES DISTRICT JUDGE

United States District Court
Northern District of California

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

JOHN FRANKLIN KENNEY,

Petitioner,

v.

P. D. BRAZELTON,

Respondent.

Case No.13-CV-02562-LHK (PR)

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on 12/18/2017, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

John Franklin Kenney ID: G-39748
R. J. Donovan State Prison
480 Alta Road
San Diego, CA 92179

Dated: 12/18/2017

Susan Y. Soong
Clerk, United States District Court

By:_____
Irene Mason, Deputy Clerk to the
Honorable LUCY H. KOH

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