APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

MAY 22 2019

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

TOMMY COLE,

Petitioner-Appellant,

v.

R.J. RACKLEY,

Respondent-Appellee.

No. 18-56264

D.C. No. 2:16-cv-07437-SJO-RAO
Central District of California,
Los Angeles

ORDER

Before: BYBEE and BEA, Circuit Judges.

The request for a certificate of appealability is denied because appellant has not made a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see also Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Any pending motions are denied as moot.

DENIED.

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Petitioner-Appellant,

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D.C. No. 2:16-cv-07437-SJO-RAO
Central District of California,
Los Angeles

ORDER

Before: IKUTA and N.R. SMITH, Circuit Judges.

Appellant's motion to extend time (Docket Entry No. 6) is granted.

Appellant's motion for reconsideration en banc (Docket Entry No. 7) is deemed timely filed, and is denied on behalf of the court. *See* 9th Cir. R. 27-10; 9th Cir. Gen. Ord. 6.11.

No further filings will be entertained in this closed case.

APPENDIX B

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

TOMMY COLE,

Petitioner,

v.

RICK HILL,

Respondent.

Case No. CV 16-07437 SJO (RAO)

JUDGMENT

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

IT IS ORDERED AND ADJUDGED that the Petition is denied, and this action is dismissed with prejudice.

DATED: August 30, 2018.

S. James Otero

S. JAMES OTERO
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

TOMMY COLE,

Petitioner,

v.

RICK HILL,

Respondent.

Case No. CV 16-07437 SJO (RAO)

ORDER ACCEPTING FINDINGS, CONCLUSIONS, AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE

Pursuant to 28 U.S.C. § 636, the Court has reviewed the Petition, all of the records and files herein, and the Magistrate Judge's Report and Recommendation issued on August 3, 2018 (the "Report"). The Court has further engaged in a *de novo* review of those portions of the Report to which Petitioner has objected.

The Court acknowledges that Petitioner has appealed the Report. "The filing of a notice of appeal is an event of jurisdictional significance—it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal." *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58, 103 S.Ct. 400, 74 L.Ed.2d 225 (1982) (per curiam). However, a notice of appeal from a nonappealable order will not divest the district court of jurisdiction. *Estate of Conners by Meredith v. O'Connor*, 6 F.3d 656, 658 (9th Cir. 1993); *see also Ruby v. Secretary of the Navy*, 365 F.2d 385, 389 (9th Cir.

1966) (en banc). "When a Notice of Appeal is defective in that it refers to a non-appealable interlocutory order, it does not transfer jurisdiction to the appellate court, and so the ordinary rule that the district court cannot act until the mandate has issued on the appeal does not apply." *Nascimento v. Dummer*, 508 F.3d 905, 908 (9th Cir. 2007) (citing *Ruby*, 365 F.2d at 388-89); *see also Thomas v. Perez*, No. 1:07-CV-1185 AWI DLB PC, 2009 WL 722588, at *1 (E.D. Cal. Mar. 17, 2009). Because Petitioner is attempting to appeal the Report, which is not a final appealable order of the Court, Petitioner's filing of a notice of appeal did not deprive the Court of jurisdiction.

Accordingly, the Court hereby accepts and adopts the findings, conclusions, and recommendations of the Magistrate Judge.

IT IS HEREBY ORDERED that the Petition is denied, the Motion to Amend is denied, and Judgment shall be entered dismissing this action with prejudice.

DATED: 8/30/18

S. James Otero

S. JAMES OTERO
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

TOMMY COLE, Petitioner, v. RICK HILL,[1] Warden, Respondent.	Case No. CV 16-7437 SJO (RAO) REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This Report and Recommendation is submitted to the Honorable S. James Otero, United States District Judge, pursuant to 28 U.S.C. § 636 and General Order 05-07 of the United States District Court for the Central District of California.

I. INTRODUCTION

In 2013, a jury in the Los Angeles County Superior Court convicted Tommy Cole ("Petitioner") of second-degree murder and found true the special allegation that he discharged a firearm that inflicted great bodily injury and death. (Clerk's Transcript ("CT") 173.) The trial court sentenced him to state prison for a term of forty years to life. (CT 219, 221.)

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[1] Petitioner is currently incarcerated at the Folsom State Prison in Represa, California. Rick Hill is acting warden at that prison and, accordingly, is substituted as the Respondent herein. *See* FED. R. CIV. P. 25(d).

Petitioner appealed his conviction and sentence. (Lodg. No. 9.) The California Court of Appeal affirmed the judgment in a reasoned decision. (Lodg. No. 1.) Petitioner then filed a petition for review, which was summarily denied by the California Supreme Court. (Lodg. Nos. 2-3.)

Petitioner collaterally attacked his conviction and sentence in separate state court proceedings. He filed multiple habeas petitions in the Los Angeles Superior Court, the California Court of Appeal, and the California Supreme Court, which were all denied. (Lodg. Nos. 11-17, 20-22.)

On October 4, 2016, Petitioner, a California state prisoner proceeding *pro se*, filed a Petition for Writ of Habeas Corpus by a Person in State Custody ("Petition"), pursuant to 28 U.S.C. § 2254, and a Motion for Stay and Abeyance on the ground that he needed time to file a writ of habeas corpus with the state courts. (Dkt. Nos. 1, 3.) On January 12, 2017, Respondent filed a Motion to Dismiss on the ground that the Petition contained an unexhausted claim. (Dkt. No. 18.) On February 1, 2017, the Court issued an order to show cause regarding dismissal due to an unexhausted claim and gave Petitioner four options to address the defects. (Dkt. No. 25.) On February 13, 2017, Petitioner requested a stay under *Kelly*, but on March 27, 2017, Petitioner filed a First Amended Petition for Writ of Habeas Corpus ("FAP"). (Dkt. Nos. 28-29.)

On April 25, 2017, Respondent filed a status report confirming that the motions for a stay and dismissal were moot because Petitioner had recently exhausted his claims in the California Supreme Court. (Dkt. No. 31.) On that same date, the Court received from Petitioner another Petition for Writ of Habeas Corpus. (Dkt. No. 33.) The Court ordered that the filing be docketed but remarked that it was unclear if Petitioner was seeking to further amend his petition in this action. (Dkt. No. 32.) Petitioner submitted a letter stating that the filing was intended to be a new, separate habeas petition, so the Court ordered Respondent to submit briefing on how the filing should be treated. (Dkt. Nos. 34-35.) Respondent filed a

statement arguing that the new petition should be construed as a motion to amend the operative petition in this action, and that the Court should deny that motion. (Dkt. No. 36.) Petitioner responded with a new request for a stay, which reiterated Petitioner's intention not to amend his petition in this action but rather to institute a separate habeas action. (Dkt. No. 37.) On June 5, 2017, the Court issued an order denying as moot Petitioner's motions for stay and Respondent's Motion to Dismiss, granting Petitioner's motion to amend his Petition (the FAP being the operative petition), and requesting briefing. (Dkt. No. 35.)

On July 12, 2017, the Court construed Petitioner's new petition as a motion to amend his FAP and granted that motion; ordered Petitioner to file a Second Amended Petition ("SAP") including all of his claims; ordered Respondent to file an Answer or Motion to Dismiss the SAP; and denied Petitioner's request for a stay as moot. (Dkt. No. 38.)

On July 27, 2017, Petitioner filed a SAP, the operative petition. (Dkt. No. 39.) On October 16, 2017, Respondent filed an Answer to the SAP ("Answer"). (Dkt. No. 42.) On December 7, 2017, Petitioner filed a Traverse ("Traverse"). (Dkt. No. 49.)

On February 26, 2018, the Court received and rejected a Third Amended Petition filed by Petitioner. (Dkt. No. 51.) The denial was based on lack of a proof of service and the fact that Petitioner had not been granted leave to file a Third Amended Petition. (*Id.*)

On March 30, 2018, Petitioner filed a Motion to Amend Petition and lodged a Third Amended Petition. (Dkt. No. 52.)

II. PETITIONER'S CLAIMS

The SAP raises the following grounds for relief:

1. Trial counsel was ineffective for failing to object to the admission of evidence, failing to cross-examine witnesses, failing to present evidence, failing to

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investigate, and because counsel identified Petitioner during closing argument. (SAP at 5, 17-30, 32.)

2. The prosecutor committed misconduct by allowing a witness to give false testimony and by tampering with the evidence. (SAP at 5, 31, 33.)

3. The California Court of Appeal erred when it relied on information outside of the record. (SAP at 6, 35.)

4. The cumulative effect of trial counsel's errors denied Petitioner a fair trial. (SAP at 6, 34.)

5. California's second degree murder statute is vague and unconstitutional. (SAP at 6, 37-39.)

6. Appellate counsel was ineffective for failing to raise a claim for ineffective assistance of trial counsel and cumulative effect of trial counsel error on appeal. (SAP at 36.)

In the lodged Third Amended Petition, Petitioner attempts to amend the SAP to add a claim that the trial court failed to instruct fully on all lesser necessarily included offenses, namely, voluntary manslaughter. (Dkt. No. 52 at 6, 17-19.)

III. FACTUAL SUMMARY

The following factual summary is taken from the California Court of Appeal's decision on direct appeal. Because Petitioner has not rebutted these facts with clear and convincing evidence, they are presumed to be correct. 28 U.S.C. § 2254(e)(1).

> In the early morning hours of March 29, 2009, Brown was eating and conversing with an unidentified woman in the parking lot of the Black Silk Club, an after-hours nightclub in Los Angeles, when he was approached by Melvin Falley, a longtime acquaintance. Moments later, [Petitioner] also approached and began to argue with Falley. Falley then left, entering the club, and [Petitioner] continued the argument with Brown, shouting angry insults at him. [Petitioner] then

took a few steps back, and 20 or 30 seconds later fired several shots at Brown, killing him.

The events were witnessed by Marcus Whitaker-Jackson,[2] an employee of the club, who saw [Petitioner] argue with Brown and step away, and then heard the gunshots. Whitaker-Jackson saw the hand that held the gun but could not definitively state it was [Petitioner] who fired the shots because his view was partially blocked.

Someone inside the club called 911 at 3:43 a.m., and paramedics arrived at 3:53 a.m.

[Petitioner] was wearing a GPS monitor that showed he was near the club at the time of the shooting, and Whitaker-Jackson identified him from a photo array.

Police recovered VHS security footage from a business next door to the club that depicted a series of still images from five cameras scrolling in sequence. Only one of the cameras captured events occurring in the club parking lot. A forensic video analyst working for the scientific investigation division of the Los Angeles Police Department (LAPD) digitized the video, extracted the parking lot images, enlarged the images and made contrast and color adjustments to improve their quality, and transferred them onto a DVD in a time lapse scrolling format. The resulting video was of such poor quality that individuals depicted in the images could not be identified from the video alone. The images were neither date- nor time-stamped, but showed the shooter's arrival, the shooting, and the arrival of paramedics approximately 10 minutes later.

(Lodg. No. 1 at 2-3.)

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[2] The appellate court erroneously referred to Marcus Jackson-Whitaker as Marcus Whitaker-Jackson.

IV. STANDARD OF REVIEW

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") "bars relitigation of any claim 'adjudicated on the merits' in state court, subject only to the exceptions in §§ 2254(d)(1) and (d)(2)." *Harrington v. Richter*, 562 U.S. 86, 98, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011). In particular, this Court may grant habeas relief only if the state court adjudication was contrary to or an unreasonable application of clearly established federal law as determined by the United States Supreme Court or was based upon an unreasonable determination of the facts. *Id.* at 100 (citing 28 U.S.C. § 2254(d)). "This is a difficult to meet and highly deferential standard for evaluating state-court rulings, which demands that state-court decisions be given the benefit of the doubt[.]" *Cullen v. Pinholster*, 563 U.S. 170, 181, 131 S. Ct. 1388, 179 L. Ed. 2d 557 (2011) (internal citation and quotations omitted).

A state court's decision is "contrary to" clearly established federal law if: (1) the state court applies a rule that contradicts governing Supreme Court law; or (2) the state court confronts a set of facts that are materially indistinguishable from a decision of the Supreme Court but nevertheless arrives at a result that is different from the Supreme Court precedent. *See Lockyer v. Andrade*, 538 U.S. 63, 73, 123 S. Ct. 1166, 155 L. Ed. 2d 144 (2003) (citing *Williams v. Taylor*, 529 U.S. 362, 412-13, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000)). A state court need not cite or even be aware of the controlling Supreme Court cases "so long as neither the reasoning nor the result of the state-court decision contradicts them." *Early v. Packer*, 537 U.S. 3, 8, 123 S. Ct. 362, 154 L. Ed. 2d 263 (2002).

A state court's decision is based upon an "unreasonable application" of clearly established federal law if it applies the correct governing Supreme Court law but unreasonably applies it to the facts of the prisoner's case. *Williams*, 529 U.S. at 412-13. A federal court may not grant habeas relief "simply because that court concludes in its independent judgment that the relevant state-court decision

applied clearly established federal law erroneously or incorrectly. Rather, that application must also be *unreasonable*." *Id.* at 411 (emphasis added).

In determining whether a state court decision was based on an "unreasonable determination of the facts" under 28 U.S.C. § 2254(d)(2), such a decision is not unreasonable "merely because the federal habeas court would have reached a different conclusion in the first instance." *Wood v. Allen*, 558 U.S. 290, 301, 130 S. Ct. 841, 175 L. Ed. 2d 738 (2010). The "unreasonable determination of the facts" standard may be met where: (1) the state court's findings of fact "were not supported by substantial evidence in the state court record"; or (2) the fact-finding process was deficient in some material way. *Hibbler v. Benedetti*, 693 F.3d 1140, 1146 (9th Cir. 2012) (citing *Taylor v. Maddox*, 366 F.3d 992, 999-1001 (9th Cir. 2004), *abrogated on other grounds by Murray v. Schriro*, 745 F.3d 984, 999-1000 (9th Cir. 2014)).

In applying these standards, a federal habeas court looks to the "last reasoned decision" from a lower state court to determine the rationale for the state courts' denial of the claim. *See Cannedy v. Adams*, 706 F.3d 1148, 1156 (9th Cir. 2013) (citing *Ylst v. Nunnemaker*, 501 U.S. 797, 803, 111 S. Ct. 2590, 115 L. Ed. 2d 706 (1991)). There is a presumption that a claim that has been silently denied by a state court was "adjudicated on the merits" within the meaning of 28 U.S.C. § 2254(d), and that AEDPA's deferential standard of review therefore applies, in the absence of any indication or state-law procedural principle to the contrary. *See Johnson v. Williams*, 568 U.S. 289, 298, 133 S. Ct. 1088, 185 L. Ed. 2d 105 (2013) (citing *Richter*, 562 U.S. at 99). Where a higher state court has silently denied a claim, a federal habeas court "looks through" such a silent denial to the last reasoned decision on the merits from a lower state court to determine the rationale for the state courts' denials of the claim. *Wilson v. Sellers*, —U.S.—, 138 S. Ct. 1188, 1193 (2018) (concluding "federal habeas law employs a 'look through' presumption").

Here, Petitioner raised Grounds One through Four and Ground Six in the Los Angeles Superior Court, the California Court of Appeal, and the California Supreme Court on state habeas review. (Lodg. Nos. 12, 13, 17.) The Los Angeles Superior Court denied Petitioner's claims on the merits in a reasoned opinion, and the California Court of Appeal and the California Supreme Court denied the claims without comment or citation. (Lodg. No. 12, 14, 20.) Accordingly, under the "look through" doctrine, Grounds One through Four and Ground Six are deemed to have been denied for the reasons given in the Los Angeles Superior Court's decision. *Wilson*, 138 S. Ct. at 1193. AEDPA deference applies to these claims.

Petitioner raised Ground Five in the California Court of Appeal and the California Supreme Court on state habeas review. (Lodg. Nos. 15, 21.) Both courts denied the claim without comment or citation. (Lodg. Nos. 16, 22.) Because no reasoned state court decision exists as to the denial of this claim, this Court must conduct an independent review of the record to determine whether the California courts were objectively unreasonable in applying controlling federal law. *Walker v. Martel*, 709 F.3d 925, 939 (9th Cir. 2013). Although the federal habeas court independently reviews the record, it must "still defer to the state court's ultimate decision." *Libberton v. Ryan*, 583 F.3d 1147, 1161 (9th Cir. 2009) (internal quotations and citation omitted).

V. DISCUSSION

A. Ground One: Ineffective Assistance of Trial Counsel

In Ground One, Petitioner contends that trial counsel was ineffective for failing to object to the admission of evidence, failing to cross-examine witnesses, failing to present evidence, failing to investigate, and because counsel identified Petitioner during closing argument. (SAP at 5, 17-30, 32.)

1. Federal Law

Allegations of ineffective assistance of trial counsel are governed by the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct.

2052, 80 L. Ed. 2d 674 (1984). To establish a claim for ineffective assistance of counsel, Petitioner must prove: (1) counsel's performance was deficient in that it fell below an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Id.* at 687-88, 694.

An attorney's performance is deemed deficient if it is objectively unreasonable under prevailing professional norms. *Id.* at 687-88. The Court, however, must review counsel's performance with "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance[.]" *Id.* at 689.

With respect to the prejudice component, a petitioner need only show whether, in the absence of counsel's particular errors, there is a "reasonable probability" that "the result of the proceeding would have been different." *Id.* at 694. But in making the determination, the Court "must consider the totality of the evidence before the judge or jury." *Id.* at 695.

The Court may reject an ineffective assistance claim upon finding either that counsel's performance was reasonable or the claimed error was not prejudicial. *See, e.g., id.* at 700 ("Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim."); *Gentry v. Sinclair*, 705 F.3d 884, 889 (9th Cir. 2013) (noting that failure to meet either prong is fatal to an ineffective assistance claim).

2. Analysis

As an initial matter, Petitioner has failed to offer a declaration or affidavit from trial counsel. As a result, Petitioner's claim about trial counsel's alleged failures is supported only by Petitioner's own self-serving statements, which are insufficient to show ineffective assistance. *See Womack v. Del Papa*, 497 F.3d 998, 1004 (9th Cir. 2007) (absent corroborating evidence, self-serving and conclusory statements are insufficient to show ineffective assistance). To the extent

Petitioner's claim relies on conclusory assertions unsupported by specific facts, it does not provide a basis for habeas relief. *James v. Borg*, 24 F.3d 20, 26 (9th Cir. 1994). In any event, as discussed below, Petitioner has failed to show that trial counsel's tactical decisions fell so far below the standard of reasonableness as to violate his constitutional rights or that he was prejudiced.

a. Failure to Make Objections

Petitioner contends that trial counsel was ineffective because she failed to object to the admission of the security videotape and to the testimony of Detective Doster. (SAP at 5, 17, 18.)

The Los Angeles County Superior Court on state habeas review denied Petitioner's ineffective assistance of trial counsel claims for failure to make objections on the ground that he raised both claims on direct appeal and the California Court of Appeal rejected the claims as meritless. (Lodg. No. 1 at 6-7; Lodg. No. 12 at 5.)

Here, trial counsel did object at trial to the admission of the security videotape. In a 402 hearing, trial counsel objected because the video was not in "real time", and there was no date or time stamp on the video. (RT 302.) The trial court ruled that the video could be played, explaining, "Nobody is asserting that it is a real time video or a complete portrayal of what happened. It is a compilation of stills." (RT 305.) The trial court stated that defense counsel could explain that the video is a compilation of stills and could argue the weakness of it.[3] (*Id.*)

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[3] To the extent Petitioner is claiming that trial counsel should have objected to the admission of the video on *Kelly* grounds, the claim is meritless. As the California Court of Appeal reasonably concluded, any such objection by trial counsel would have been without merit because a *Kelly* analysis was not warranted for the video, which did not utilize a new scientific technique. (Lodg. No. 1 at 6.) *See Juan H. v. Allen*, 408 F.3d 1262, 1273 (9th Cir. 2005) ("[T]rial counsel cannot have been ineffective for failing to raise a meritless objection.").

Petitioner's claim that trial counsel was ineffective for failing to object to the testimony of Detective Doster also fails. At the 402 hearing, trial counsel argued that Detective Doster should not be allowed to give an opinion as to who the individuals in the video are. (RT 302.) The trial court agreed that Detective Doster could not identify the people in the video. (RT 305.) During Detective Doster's testimony, trial counsel objected when Detective Doster and the prosecutor started referring to the person in the video as Petitioner. (RT 1016.) The trial court admonished the prosecution to tell Detective Doster not to identify the person in the video as Petitioner, but rather to testify assuming the person in the video is Petitioner. (RT 1017.) Regarding Detective Doster's testimony about the rate at which the stills were taken, Petitioner's claim fails because any objection would have been meritless. As the California Court of Appeal reasonably found, Detective Doster's lay opinion regarding the time elapsed between each frame was proper because the determination was "a matter of simple arithmetic" based on the evidence. (Lodg. No. 1 at 6-7.)

Petitioner fails to show that trial counsel's performance was deficient with respect to an alleged failure to make objections.

b. Failure to Cross-Examine

Petitioner contends that trial counsel was ineffective for failing to cross-examine forensic analyst Shawn Khacherian, LAPD custodian of records Lourdes Varas, and GPS analyst Steve Reinhart. (SAP at 5, 19-21.)

The Los Angeles Superior Court on state habeas review denied Petitioner's ineffective assistance of trial counsel claims for failure to cross-examine on the following grounds: (1) trial counsel did cross-examine Mr. Khacherian; (2) Petitioner failed to demonstrate how his defense was prejudiced by trial counsel's decision not to cross-examine Ms. Varas; and (3) Petitioner failed to include the documentary evidence to support his claim regarding Mr. Reinhart. (Lodg. No. 12 at 5-6.)

Here, Petitioner's claim fails because trial counsel cross-examined Mr. Khacherian, Ms. Varas, and Mr. Reinhart, and Petitioner fails to show that trial counsel's cross-examination of those witnesses was objectively unreasonable and that additional cross-examination would have led to a different result. (RT 697-98, 975-76, 1238-39.) Regarding Mr. Khacherian, Petitioner argues that trial counsel failed to cross-examine Mr. Khacherian, a "crucial" witness for the defense, who "testified that you could not put a time and date on the videotape, and you can not [sic] count the frames from the [b]ottom[;] if you do[,] it's not going to give you an accurate depiction of how many frames per seconds the video is playing at." (SAP at 19.) On direct examination, Mr. Khacherian testified that when he looked at the VHS videotape, he saw several different camera angles in a series of still images. (RT 1235.) He could not tell the time lapse between the images without having something to correlate it to. (RT 1235, 1237.) He extracted a portion of the VHS videotape and put it on a DVD. (RT 1235.) Exhibit 34 is a still frame extracted from the VHS videotape, which he enlarged and improved the contrast and color. (RT 1238.) During cross-examination, trial counsel emphasized that Mr. Khacherian "manipulated" Exhibit 34 and did "something" to it to "enhance the quality." (RT 1238-39.) Petitioner fails to show that trial counsel's performance was deficient. "[C]ounsel's tactical decisions at trial, such as refraining from cross-examining a particular witness or from asking a particular line of questions, are given great deference and must similarly meet only objectively reasonable standards." *Dows v. Wood*, 211 F.3d 480, 487 (9th Cir. 2000); *see also Gustave v. United States*, 627 F.2d 901, 904 (9th Cir. 1980) ("Mere criticism of a tactic or strategy is not in itself sufficient to support a charge of inadequate representation.")

Regarding Ms. Varas, Petitioner contends that trial counsel should have cross-examined her because her testimony at a previous trial contradicted Detective Doster's testimony regarding the time the 911 call was dispatched, which allegedly undermines the prosecution's case. (SAP at 20.) Petitioner argues that in a

previous trial, Ms. Varas testified that the 911 call came in at 3:43 a.m. and was dispatched at 3:48 a.m. because there was confusion on the location. (*Id.*) On direct examination during Petitioner's most recent trial, Ms. Varas testified that the 911 call was received at 3:43 a.m. and the first responders arrived at the scene at 3:53 a.m. (RT 973-75.) Detective Doster testified that according to the GPS, Petitioner was last in front of the club at 3:43 a.m. and the first responders arrived at the scene or pushed the button at 3:53. (RT 1027-28.) He did not testify regarding the time the 911 call was dispatched. On cross-examination of Ms. Varas, trial counsel emphasized that the 3:53 time only tells what time a particular officer pressed the button or voiced arrival via his radio. (RT 975.)

Regarding Mr. Reinhart, Petitioner contends that trial counsel should have cross-examined him because his testimony at a previous trial that Petitioner was placed no closer to the club than four blocks away was "crucial" to the defense. (SAP at 21.) On direct examination during Petitioner's most recent trial, Mr. Reinhart testified about the GPS tracking data for Petitioner on the date of the incident. (RT 684-96.) On cross-examination, trial counsel emphasized that when a dot is depicted on the GPS map, it represents the individual, who can be anywhere within fifty feet of where the dot is depicted. (RT 697.)

Petitioner fails to show that trial counsel's performance was deficient with respect to an alleged failure to cross-examine Mr. Khacherian, Ms. Varas, and Mr. Reinhart.

c. Failure to Present Evidence

Petitioner contends that trial counsel was ineffective for failing to present evidence regarding a 911 call incident re-call sheet and a text message. (SAP at 5, 22, 26). Petitioner also contends that trial counsel should not have redacted "the phone recording" the prosecution introduced into evidence. (SAP 29.) In addition, Petitioner contends that trial counsel should not have stipulated to the prosecution's

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changes to the videotape and should have obtained an expert regarding the videotape. (SAP 32.)

The Los Angeles Superior Court on state habeas review denied Petitioner's ineffective assistance of counsel claim that trial counsel failed to present evidence on the following grounds: (1) the information contained within the 911 call incident re-call sheet was introduced at trial; (2) Petitioner failed to submit documentary evidence supporting his claim that would allow the court to discern what trial counsel did or did not attempt to present at trial regarding a text message; (3) the trial court ordered the prosecution to redact the transcript of a phone call, and Petitioner failed to demonstrate how these redactions prejudiced his defense in light of the other evidence presented against him at trial; and (4) Petitioner failed to show how trial counsel's stipulation prejudiced his defense. (Lodg. No. 12 at 7-8.)

Here, Petitioner's claim fails. Petitioner argues that trial counsel failed to present the 911 call incident re-call sheet that purportedly shows what time the LAPD patrol officers received the 911 call and the arrival time of the ambulance at the scene of the crime. (SAP at 22.) According to Petitioner, the evidence was "crucial" because it supported Ms. Varas's testimony that the 911 call was dispatched at 3:48 a.m. and undermines Detective Doster's testimony that the 911 call was dispatched at 3:43 a.m. (*Id.*) Petitioner is incorrect. Ms. Varas testified that the 911 call was made at 3:43 a.m., which is consistent with the GPS evidence and Detective Doster's testimony. (RT 688, 692-94, 972, 1025, 1260.) She also testified that based on the incident re-call report, the officers arrived at the scene at 3:53 a.m. (RT 974-75.) Trial counsel could not have been ineffective for failing to present the purported 911 call incident re-call sheet because it did not particularly bolster Ms. Varas's testimony or undermine Detective Doster's testimony.

Petitioner argues that trial counsel failed to present an alleged text message sent by witness Marcus Jackson-Whitaker to Detective Doster, which read: "U [sic] ACT LIKE U [sic] CAN'T DO NOTHING FOR ME . . . . WELL NEITHER

CAN I . . . . YOUR [sic] PUTING [sic] ME IN A POSITION TO SAY SOMETHING I PERSONALLY DID'NT [sic] SEE." (SAP at 26.) According to Petitioner, the text message shows that Mr. Jackson-Whitaker gave false testimony and was asking for money. (*Id.*) Petitioner refers to Exhibit G, which allegedly shows a printout of the text message. (*Id.*) As Respondent argues, even assuming the text message is authentic, the message is vague and does not establish that Mr. Jackson-Whitaker testified falsely. (Answer at 24.) In any event, trial counsel did cross-examine Mr. Jackson-Whitaker on a text message he sent to Detective Doster on October 27, 2009, telling him that he felt he was being put in a position to say something he did not personally see. (RT 673.)

Petitioner argues that trial counsel erred by redacting a phone recording of a call Petitioner made to a friend relaying what his attorney had told him about some bullets that were found in his brother's carport. (SAP at 29.) According to Petitioner, trial counsel redacted the recording as follows: "BECAUSE THEY FOUND SOME BULLETS YOU KNOW WHAT I'M SAYING, SOME 45 CALIBER BULLETS AND SHIT, SO THEY TRYING TO SEE IF THAT'S THE BULLET THAT-THAT THAT COMMITTED THE HOMICIDE. BUT I TOLD HER 'WELL THAT'S GOING TO BE SQUASHED OUT THE WAY.[']" (*Id.*) The record reflects that after trial counsel objected to the admission of the phone recording and the introduction of the bullets found at Petitioner's brother's house on relevancy and attorney-client privilege grounds, the trial court ordered the prosecutor to redact references to "she" in the phone call and allowed the statement regarding the bullets being found. (RT 307-16.) As trial counsel objected to the introduction of the recording, any additional objection would have been futile. The failure to raise a futile objection does not constitute ineffective assistance of counsel. *James*, 24 F.3d at 27.

Petitioner argues that trial counsel should not have stipulated to the prosecution's changes to the videotape and should have obtained an expert

regarding the videotape. (SAP at 32.) Specifically, Petitioner argues that the prosecution changed the black and white DVD into a color DVD that he made on his laptop computer over the lunch hour. (*Id.*) Petitioner refers to Exhibit K, which appears to be a transcript from not the current trial, but a previous trial in October 2012. (*See* Lodg. No. 18 at 50-56.) Even assuming the stipulation were relevant to the current trial, which it is not, Petitioner fails to explain how he was prejudiced by the playing of a true and accurate copy of the video off the prosecutor's laptop rather than the DVD, which was apparently not working. (*Id.*) Moreover, Petitioner's assertion about the change from black and white to color is not supported by Exhibit K. (*Id.*)

In sum, Petitioner fails to show that trial counsel's performance was deficient with respect to an alleged failure to present evidence.

d. Failure to Investigate

Petitioner contends that trial counsel was ineffective because she failed to interview Ronald Jackson, a percipient witness, and LAPD officers C. Wecker and L. Calle. (SAP at 5, 23-25.) Specifically, Petitioner argues that the description of the shooter that Mr. Jackson gave "would have suggested to a reasonable attorney that [J]ackson might make a statement[] in an interview that would have exculpate[d] [P]etitioner or at least raise doubts as to [P]etitioner['s] guilt." (*Id.* at 23.) In addition, Petitioner argues that trial counsel should have interviewed Officers Wecker and Calle, who allegedly would have testified that they received the 911 call at 3:48 a.m., which, in Petitioner's view, would have supported Ms. Varas's testimony and contradicted Detective Doster's testimony. (*Id.* at 25.)

The Los Angeles Superior Court on state habeas review denied Petitioner's claim on the ground that: (1) Petitioner failed to show that trial counsel did not interview Mr. Jackson, and even if she did not interview him, Petitioner failed to show how Mr. Jackson's testimony would have been exculpatory or used to impeach Mr. Jackson-Whitaker; and (2) Petitioner failed to show that trial counsel

did not interview Officers Wecker and Calle, and that the officers' testimony regarding the time that they received the dispatch call would have been cumulative to Ms. Varas's testimony. (Lodg. No. 12 at 9-10.)

Defense counsel has a "duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691. "'A lawyer who fails adequately to investigate, and to introduce into evidence, information that demonstrates his client's factual innocence, or that raises sufficient doubts as to that question to undermine confidence in the verdict, renders deficient performance.'" *Reynoso v. Giurbino*, 462 F.3d 1099, 1112 (9th Cir. 2006) (quoting *Lord v. Wood*, 184 F.3d 1083, 1093 (9th Cir. 1999)). The Ninth Circuit has found, however, "the duty to investigate and prepare a defense is not limitless: it does not necessarily require that every conceivable witness be interviewed." *Hendricks v. Calderon*, 70 F.3d 1032, 1040 (9th Cir. 1995) (citation and internal quotation marks omitted).

Here, as the Los Angeles Superior Court found, Petitioner failed to show that trial counsel did not interview Mr. Jackson and Officers Wecker and Calle. Even assuming trial counsel did not interview them, as Petitioner claims, Petitioner's ineffective assistance claim fails because Petitioner does not show that the information the potential witnesses had would have demonstrated his factual innocence or raised sufficient doubts as to the verdict. His claim is entirely speculative as to what the alleged witnesses would have testified to. *See Bragg v. Galaza*, 242 F.3d 1082, 1088 (9th Cir. 2001) (petitioner's mere speculation that, had a witness been interviewed, he might have given helpful information, is not enough to establish ineffective assistance). Even if Mr. Jackson had testified consistently with Exhibit E, which appears to be notes from an interview between the detectives and Mr. Jackson, Petitioner would not have been exonerated. According to Exhibit E, Mr. Jackson described the suspect a little differently than Mr. Jackson-Whitaker, but did not witness the murder, unlike Mr. Jackson-

Whitaker, who was at the doorway. (Lodg. No. 18 at 22.) Mr. Jackson's testimony likely would have bolstered Mr. Jackson-Whitaker's testimony, which was already supported by other evidence. Regarding Officers Wecker and Calle, even if they had testified that they were notified of the 911 call at 3:48 a.m., Ms. Varas testified that the call initially came in at 3:43 a.m., which was supported by Detective Doster's testimony.

Petitioner fails to show that trial counsel's performance was deficient with respect to an alleged failure to investigate.

e. Closing Argument

Petitioner contends that trial counsel was ineffective because she acknowledged in her closing argument that Petitioner was the person depicted in the videotape. (SAP at 5, 27.)

The Los Angeles Superior Court on state habeas review denied Petitioner's claim on the ground that the admission that Petitioner was the person in the video was a reasonable tactic to show that he could not be the shooter given conflicts between the video and witness testimony. (Lodg. No. 12 at 11.)

Here, during closing argument, trial counsel conceded that Petitioner was at the scene of the shooting and on the security video, but argued that Petitioner could not have been the shooter. (RT 1277, 1280-83.) Trial counsel's approach was a reasonable tactical decision, given that Petitioner appeared on the video and had a GPS tracking device on him that indicated he was present that night. (RT 1277.) "Tactical decisions that are not objectively unreasonable do not constitute ineffective assistance of counsel." *Hensley v. Crist*, 67 F.3d 181, 185 (9th Cir. 1995). Rather than lose credibility with the jury, trial counsel focused on the identification by Mr. Jackson-Whitaker, the lack of physical evidence connecting Petitioner to the shooting, and the overall weaknesses in the prosecution's case. (RT 1269-79.)

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Petitioner fails to show that trial counsel's performance was deficient with respect to an alleged error in the closing argument. *See Dows*, 211 F.3d at 487; *Gustave*, 627 F.2d at 904.

Even if trial counsel were deficient in any of the claimed areas, Petitioner can show no *Strickland* prejudice. The jury heard strong evidence of Petitioner's guilt. Mr. Jackson-Whitaker identified Petitioner as the shooter. (RT 633, 635, 637-38, 640-41.) GPS tracking information placed Petitioner at the scene of the murder between 3:42 a.m. and 3:43 a.m., which was around the same time that the 911 call came in. (RT 692-94, 973.) The prosecution also presented evidence that Petitioner had a motive to kill the victim, and Petitioner confronted the victim outside the club moments before shooting him. (RT 621-28, 635, 640, 642, 660, 704-07, 910-11, 1003, 1008-12.) Petitioner also implicated himself in several phone conversations that were recorded while he was in custody. (Exhibit 33 (CT at 160-62, 164-68)). There is no reasonable probability that the result of the proceeding would have been different but for trial counsel's alleged errors. *Strickland*, 466 U.S. at 694.

The state courts' rejection of Petitioner's ineffective assistance of counsel claims was neither an unreasonable application of, nor contrary to, clearly established federal law as determined by the United States Supreme Court. Nor was it based on an unreasonable determination of the facts in light of the evidence presented. Accordingly, Petitioner is not entitled to habeas relief on this claim.

B. Ground Two: Prosecutorial Misconduct

In Ground Two, Petitioner contends that the prosecutor committed misconduct by allowing a witness to give false testimony and for tampering with evidence. (SAP at 5, 31, 33.) Specifically, Petitioner argues that prosecutorial misconduct occurred when Detective Doster was allowed to present "fabricated" testimony regarding the timing of the shooting and the identity of Petitioner as the shooter; and when the prosecutor "tamper[ed]" with the video recording when he

changed it from black and white to color, adding "something to the suspect hand that was not there in the [b]lack and [w]hite video (DVD)." (SAP at 5-6, 31, 33.)

1. Background

At trial, Detective Doster testified that he obtained a VHS videotape of the scene of the incident that contained still images from multiple cameras from a neighboring business that were not in a viewable format. (RT 992.) The VHS videotape was made available to Petitioner. (RT 993.) Detective Doster sent the VHS videotape to the LAPD scientific investigation division to make it into a viewable format, which resulted in a video that was an accurate part of the entire VHS videotape. (RT 993, 1014.) Then, comparing the video to time-stamped GPS tracking data from Petitioner's GPS device and 911 call records showing when the first responders arrived at the scene, Detective Doster figured out that the real time between frames on the videotape was five seconds per frame. (RT 1013, 1015, 1021-24, 1027-28.) During his testimony, Detective Doster illustrated how he matched up the timing of the still images on the videotape with the evidence. (RT 1015, 1021-24, 1027-28.)

In a 402 hearing prior to Detective Doster's testimony, the trial court ruled that Detective Doster was not permitted to identify the people in the videotape. (RT 305.) During his testimony, Detective Doster testified that he correlated "the amount of seconds that the defendant is in the frame . . . with the amount of time that the GPS gave." (RT 1015.) The prosecutor followed-up with a question that stated, "So let's assume here . . . that the person we see . . . walk into the screen is [Petitioner]." (RT 1016.) A recording was played, and the prosecutor asked, "So if we're counting the seconds that we saw [Petitioner] in the frame east-facing from 36 [seconds], so we have an even number, let's say to a minute and 16, that would be, what, about 40 seconds?" (*Id.*) Defense counsel then objected for lack of foundation and asked to approach the bench. (*Id.*) She argued that despite the trial court's ruling that Detective Doster not be permitted to make the conclusion that it

was Petitioner in the footage, Detective Doster identified Petitioner in the footage and the prosecutor "has been following up on that, identifying [Petitioner]." (RT at 1017.) The trial court told the prosecutor to make sure his questions and Detective Doster's testimony referred to Petitioner as the person assumed to be the defendant in the video, not as the defendant. (*Id.*) The trial court asked if defense counsel was satisfied with the prosecutor telling Detective Doster not to refer to the person in the video as the defendant, only as the person he is assuming to be the defendant. (*Id.*) Defense counsel said she was satisfied with that. (*Id.*) The trial court asked for clarification on the basis of the defense objection, pointing out that there was no evidence presented to suggest that the person in the video was not Petitioner. (RT 1018.) Defense counsel stated, "It's still based on hearsay. Him saying that that's my client is still based on hearsay. It's still based on information that he received from other people during the subsequent interviews." (*Id.*) The trial court agreed with defense counsel "technically." (RT 1019.)

Detective Doster then testified that assuming that the person in the video is Petitioner, Petitioner is seen in front of the Black Silk Social Club until 3:26 a.m. and then again at 3:42 a.m. to 3:43 a.m. (RT 1022-25.) At 3:44 a.m., Petitioner was four blocks north of the Black Silk Social Club. (RT 1025.) At 3:53, the first responders arrived. (RT 1027-28.)

At trial, Shawn Khacherian from the LAPD scientific investigation division testified that he received the VHS videotape from Detective Doster. (RT 1234.) When he looked at the VHS videotape, he saw several different camera angles in a series of still images and could not tell the time lapse just by looking at the videotape. (RT 1235.) He extracted a portion of the videotape and put it on a DVD. (RT 1235.) He testified that he could not tell the real time between frames because he had nothing to correlate it to. (RT 1236-37.) He also testified that Exhibit 34 is a still image that he extracted from the VHS videotape. (RT 1238.) Because "[t]he quality was pretty poor to begin with in this little VHS tape, . . . [he]

enlarge[d] it a little bit and improve[d] the contrast and color." (*Id.*) On cross-examination, defense counsel asked, "And then in order to enhance the quality [of Exhibit 34], you had to actually do something to it; correct?" (RT 1238-39.) Mr. Khacherian replied, "Correct." (RT 1239.)

2. The Los Angeles Superior Court Opinion

In denying Petitioner's claim of prosecutorial misconduct on state habeas review, the Los Angeles Superior Court found that Petitioner failed to show that Detective Doster's testimony or the prosecutor's actions infected his trial with unfairness or somehow used deceptive or reprehensible persuasion tactics. (Lodg. No. 12 at 13-14.)

In examining Petitioner's claim regarding Detective Doster's testimony, the superior court found that "[t]he jury was free to disregard Detective Doster's explanation of when the murder occurred if the jury believed that it conflicted with Forensic Analyst Kha[]cherian's testimony and Custodian of Records Varas's testimony." (*Id.* at 13.) Regarding the alleged tampering of the video recording, the superior court found Petitioner's claim speculative and without evidence that showed the video was "tamper[ed] with." (*Id.* at 13-14.)

3. Federal Law and Analysis

Prosecutors must "refrain from improper methods calculated to produce a wrongful conviction." *Berger v. United States*, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 1314 (1935), *overruled on other grounds by Stirone v. United States*, 361 U.S. 212, 80 S. Ct. 270, 4 L. Ed. 2d 252 (1960). The appropriate standard of review for prosecutorial misconduct is the narrow one of due process and not the broad exercise of supervisory power. *Darden v. Wainwright*, 477 U.S. 168, 181, 106 S. Ct. 2464, 91 L. Ed.2d 144 (1986). Accordingly, a defendant's due process rights are violated when a prosecutor's misconduct renders a trial "fundamentally unfair." *Id.* at 183 (internal quotations omitted); *see also Smith v. Phillips*, 455 U.S. 209, 219, 102 S. Ct. 940, 71 L. Ed.2d 78 (1982) ("[T]he touchstone of due process

analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor.").

On habeas review, a federal court will not disturb a conviction for prosecutorial misconduct unless the misconduct had a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 637-38, 113 S. Ct. 1710, 123 L. Ed.2d 353 (1993) (citation and internal quotations omitted); *see also Tobey v. Uttecht*, 601 F. App'x 498, 499 (9th Cir. 2015).

In order to prevail on a prosecutorial misconduct claim premised on the alleged presentation of false evidence, Petitioner must establish that his conviction was obtained by the use of false evidence that the prosecutor knew at the time to be false or later discovered to be false and allowed to go uncorrected. *See Napue v. Illinois*, 360 U.S. 264, 269, 79 S. Ct. 1173, 3 L. Ed. 2d 1217 (1959). In order to state a claim under *Napue*, Petitioner must show that the testimony was actually false, that the prosecutor knew or should have known that it was false, and that the falsehood was material to the case. *Jackson v. Brown*, 513 F.3d 1057, 1071-72 (9th Cir. 2008) (citation omitted). A *Napue* violation is material if there is any reasonable likelihood that the false testimony could have affected the jury's decision. *Libberton v. Ryan*, 583 F.3d 1147, 1164 (9th Cir. 2009).

Here, Petitioner has not shown that Detective Doster's testimony regarding the time of the shooting was false, that the prosecutor knew or should have known that it was false, and that the alleged falsehood was material to the case. Detective Doster thoroughly explained how he correlated the stills on the video to the GPS and 911 reports to figure out the rate at which the frames were taken. Even assuming that Detective Doster's testimony about the timing of the shooting were false, there is no reasonable likelihood that the allegedly false testimony could have affected the jury's decision because they already heard about the timing of the shooting based on the GPS and 911 records. Evidence was presented that GPS

tracking information placed Petitioner at the scene of the murder between 3:42 a.m. and 3:43 a.m., which was around the same time that someone at the club placed a call to 911. (RT 692-94, 973.)

Regarding Petitioner's claim that the prosecutor committed misconduct by allowing Detective Doster to identify Petitioner as the shooter, the claim fails. Detective Doster was asked to assume that Petitioner was the person in the video in front of the Black Silk Social Club. (RT 1022.) He then testified that Petitioner was in front of the Black Silk Social Club between 3:42 a.m. and 3:43 a.m. (RT 1022-25.) Even if Detective Doster had identified Petitioner (opposed to someone assumed to be Petitioner) as the shooter and the testimony was known by the prosecutor to be false, the alleged falsehood was not material to the case. The jury heard testimony from a witness who identified Petitioner as the shooter, was presented with GPS tracking data showing Petitioner at the scene of the murder at the time of the murder, and was presented with evidence of Petitioner's motive to shoot the victim. (RT 633, 635, 637-38, 640-41.) There is no reasonable likelihood that the alleged falsehood could have affected the jury's decision. And, as the Los Angeles Superior Court found, any discrepancies with Detective Doster's testimony was challenged at trial through cross-examination and during counsel's closing argument.

Petitioner's claim regarding alleged tampering fails because there was no evidence of such tampering. Mr. Khacherian testified that the "something" he did to enhance the quality of the still frame was to enlarge it and improve the contrast and color. (RT 1238-39.) There is no evidence that he did anything beyond that. There is also no evidence that the prosecutor did any "tamper[ing]" with the videotape.

For these reasons, the state courts' rejection of this claim was not contrary to, or an unreasonable application of clearly established federal law. Nor was it based

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on an unreasonable determination of the facts in light of the evidence presented. Accordingly, Petitioner is not entitled to federal habeas relief on this claim.

C. Ground Three: Court of Appeal Error

In Ground Three, Petitioner contends that the California Court of Appeal erred in relying on information outside of the record in violation of his constitutional rights. (SAP at 6, 35.) Specifically, Petitioner argues that Mr. Khacherian, the LAPD forensic video analyst, never testified that he did what Respondent represented he did to extract the footage from the VHS videotape and never described his activities as routine. (SAP at 6.) Further, Petitioner argues that Respondent's representation of what Mr. Khacherian did as a recognized and accepted procedure is not supported by reference to a single California case. (*Id.*) Petitioner argues that because the appellate court "relied on information that was not in the record . . . , [his] due process rights to a fair trial w[ere] violated." (SAP at 35.)

1. Background

On direct appeal, Petitioner contended that the process by which the security stills were reformatted was new and untested, and therefore should have been evaluated for reliability pursuant to *People v. Kelly*, 17 Cal. 3d 24, 130 Cal. Rptr. 144, 549 P.2d 1240 (1976); and that Detective Doster was unqualified to opine that the footage, which was neither date nor time stamped, corresponded in time with the shooting. (Lodg. No. 1 at 2.) The California Court of Appeal rejected both contentions. (*Id.*)

After finding that Petitioner had forfeited his claims by failing to object at trial, alternatively, the appellate court found that "the isolation and transfer of selected images from a series [of images on a VHS videotape to a DVD] is not a new scientific technique requiring *Kelly* analysis." (*Id.* at 6.) From Mr. Khacherian's testimony that the original VHS videotape comprised a "video" that depicted "a series of still images" and "from the common nature and purpose of

security footage," the appellate court "infer[red] the original video depicted a series of still images in sequence, not hundreds of still images superimposed on one another." (*Id.*)

2. The Los Angeles Superior Court Opinion

The Los Angeles Superior Court on state habeas review denied Petitioner's claim of California Court of Appeal error, citing lack of jurisdiction over the appellate court. (Lodg. No. 12 at 14.)

3. Federal Law and Analysis

"In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States." *Estelle v. McGuire*, 502 U.S. 62, 67-68, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991) (citations omitted). Here, Petitioner's claim that the California Court of Appeal erred in relying on information outside of the record or summarizing facts is not cognizable on federal habeas review because it does not raise a constitutional issue.

Petitioner cannot transform a state claim into a federal constitutional violation by adding the words "in violation of due process." *See Langford v. Day*, 110 F.3d 1380, 1389 (9th Cir. 1996) (petitioner may not "transform a state-law issue into a federal one merely by asserting a violation of due process"); *see also Gryger v. Burke*, 334 U.S. 728, 68 S. Ct. 1256, 92 L. Ed. 1683 (1948) (holding federal reviewing courts "cannot treat a mere error of state law, if one occurred, as a denial of due process; otherwise, every erroneous decision by a state court on state law would come here as a federal constitutional question").

Accordingly, Petitioner is not entitled to federal habeas relief on this claim.

D. Ground Four: Cumulative Error

In Ground Four, Petitioner contends that the cumulative effect of trial counsel's errors denied him of a fair trial. (SAP at 6, 34.)

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1. The Los Angeles Superior Court Opinion

The Los Angeles Superior Court on state habeas review denied Petitioner's claim that trial counsel's errors resulted in cumulative error, finding that "[s]ince this court has rejected all of Petitioner's claims, this court will perforce reject this contention as well." (Lodg. No. 12 at 11) (citation and internal quotation marks omitted).

2. Federal Law and Analysis

"Cumulative error applies where, although no single trial error examined in isolation is sufficiently prejudicial to warrant reversal, the cumulative effect of multiple errors may still prejudice a defendant." *Mancuso v. Olivarez*, 292 F.3d 939, 957 (9th Cir. 2002) (internal quotations omitted), *overruled on other grounds by Slack v. McDaniel*, 529 U.S. 473, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000); *see also Parle v. Runnels*, 505 F.3d 922, 928 (9th Cir. 2007) ("[T]he Supreme Court has clearly established that the combined effect of multiple trial errors may give rise to a due process violation if it renders a trial fundamentally unfair, even where each error considered individually would not require reversal."). Habeas relief may be granted on a cumulative-error claim if the errors together "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Hein v. Sullivan*, 601 F.3d 897, 917 (9th Cir. 2010) (citation and internal quotation marks omitted).

Here, Petitioner has not demonstrated any single instance of constitutional error in his underlying claims, let alone multiple errors that combined to prejudice the outcome of his trial. For this reason, Petitioner's claim of cumulative error necessarily fails. *See Hayes v. Ayers*, 632 F.3d 500, 524 (9th Cir. 2011) ("Because we conclude that no error of constitutional magnitude occurred, no cumulative prejudice is possible."); *Mancuso*, 292 F.3d at 957 ("Because there is no single constitutional error in this case, there is nothing to accumulate to a level of a constitutional violation.").

Accordingly, habeas relief is not warranted on Petitioner's claim of cumulative error.

E. Ground Five: California's Second Degree Murder Statute

In Ground Five, Petitioner contends that California's second degree murder statute is unconstitutionally vague under the Sixth and Fourteenth Amendments. (SAP at 6, 37-39) (citing *Johnson v. United States*, — U.S. —, 135 S. Ct. 2551 (2015) and *People v. Watson*, 30 Cal. 3d 290, 179 Cal. Rptr. 43, 637 P.2d 279 (1981)).

A criminal law is vague when it fails to give ordinary people fair notice of the conduct it punishes, or is so standardless that it invites arbitrary enforcement. *Johnson*, 135 S. Ct. at 2556 (citing *Kolender v. Lawson*, 461 U.S. 352, 357-58 (1983)). The prohibition against vagueness in criminal statutes "is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law and a statute that flouts it violates the first essential of due process." *Johnson*, 135 S. Ct. at 2556-57 (citation and internal quotation marks omitted).

In *Johnson*, a residual clause of the Armed Career Criminal Act ("ACCA") that permitted more severe punishment for defendants with prior convictions for a "violent felony" was found to be unconstitutionally vague because it did not explain how to estimate the risk caused by a crime, and it left too much uncertainty about the degree of risk required to qualify as a violent felony. *See id.* at 2557-58. There are no similarities between the residual clause of the ACCA at issue in *Johnson* and California second degree murder. *Keller v. Hatton*, Case No. CV 16-8709-CJC (RAO), 2017 WL 2771529, at *4 (C.D. Cal. May 19, 2017).

Under California law, second degree murder is the unlawful killing of a human being with malice aforethought, but without additional elements that would support a conviction for first degree murder. *See People v. Chun*, 45 Cal. 4th 1172, 1181, 91 Cal. Rptr. 3d 106, 203 P.3d 425 (2009). Malice may be express or

implied. CAL. PENAL CODE § 188 (stating that "malice" as to murder is "implied, when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart."). "Malice is implied when a person willfully does an act, the natural and probable consequences of which are dangerous to human life, and the person knowingly acts with conscious disregard for the danger to life that the act poses." *People v. Beltran*, 56 Cal. 4th 935, 941-42, 157 Cal. Rptr. 3d 503, 301 P.3d 1120 (2013) (citation omitted); *see also Watson*, 30 Cal. 3d at 300 ("[M]alice may be implied when defendant does an act with a high probability that it will result in death and does it with a base antisocial motive and with a wanton disregard for human life.") (citations omitted). Implied malice requires that the accused "actually appreciated the risk [to human life] involved, i.e., a subjective standard." *Watson*, 30 Cal. 3d at 296-97 (citation omitted).

Although Petitioner's argument is not entirely clear, Petitioner appears to argue that California's implied malice murder statute failed to correctly notify him of the conduct which was impermissible leading to his conviction, citing *Johnson* without discussion. (SAP 37-39.)

Respondent argues that *Johnson* is inapposite here, and the Court agrees. Petitioner's sentence was not enhanced due to a statute similar to the residual clause at issue in *Johnson*, and *Johnson* did not address California's implied malice standard. Instead, Petitioner challenges "a *state* statute[ ] that [ ] does *not* discuss any sentencing enhancements[ ] and [ ] does *not* require a wide-ranging inquiry into whether Petitioner's crimes posed any serious potential risk of physical injury to another [as in *Johnson*]." *Johnson v. Fox*, Case No. 16-9245-GW (JCG), 2016 WL 8738264, at *2-3 (C.D. Cal. Dec. 20, 2016) (emphasis in original). Further, the argument that *Johnson* invalidated California law on implied malice has been repeatedly rejected. *Vasquez v. Spearman*, Case No. CV 16-6333-JLS (JPR), 2017 WL 4011054, at *5 (C.D. Cal. June 26, 2017) (citing *Mendez v. Madden*, Case No.

CV 16-03637-JVS (AFM), 2017 WL 1073362, at *2 (C.D. Cal. Mar. 21, 2017) ("Petitioner's related argument that the doctrine of implied malice is unconstitutionally vague – because it does not provide adequate notice of when an act is performed with 'conscious disregard for human life' – is meritless"; citing *Johnson*); *Lopez v. Gastelo*, Case No.: 16-cv-00735-LAB (WVG), 2016 WL 8453921, at *3 (S.D. Cal. Dec. 5, 2016) ("[T]he [*Johnson*] holding regarding the ACCA is far afield from California's murder statute" because implied malice involves a factfinder's particularized consideration of the circumstances of a given case at the guilt phase rather than a "judicially imagined" abstraction used to determine sentencing enhancements.)); *see also Saucedo v. Hatton*, Case No. ED CV 16-1873 DSF (AFM), 2017 WL 4011883, at *9-10 (C.D. Cal. May 31, 2017) ("Petitioner's argument that the doctrine of implied malice is unconstitutionally vague – because it does not provide adequate notice of when the natural consequences of an act are dangerous to life – is meritless.") *Johnson*'s holding is "far afield from California's murder statute because implied malice involves a factfinder's particularized consideration of the circumstances of a given case at the guilt phase rather than a 'judicially imagined' abstraction used to determine sentencing enhancements." *Vasquez*, 2017 WL 4011054, at *5. Here, the jury need only apply the implied malice standard to Petitioner's actual conduct to decide whether he acted with implied malice.

To the extent that Petitioner argues that his constitutional rights are violated because *Watson*'s subjective standard for conscious disregard conflicts with Penal Code section 188, his claim fails. In *Watson*, the California Supreme Court restated the rule that malice aforethought may be implied for a conviction of second degree murder, and reaffirmed that a finding of implied malice depends on whether the defendant "actually appreciated the risk [to human life] involved," which is a subjective standard. *People v. Dellinger*, 49 Cal. 3d 1212, 1217, 264 Cal. Rptr. 841, 783 P.2d 200 (1989) (citing *Watson*, 30 Cal. 3d at 296-97).

Penal Code section 188 reads as follows:

> Such malice may be express or implied. It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature. It is implied, when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart.
>
> When it is shown that the killing resulted from the intentional doing of an act with express or implied malice as defined above, no other mental state need be shown to establish the mental state of malice aforethought. Neither an awareness of the obligation to act within the general body of laws regulating society nor acting despite such awareness is included within the definition of malice.

CAL. PENAL CODE § 188. The statute has been interpreted to mean that "[w]hen it is established that the killing was the result of an intentional act committed with express or implied malice, no other mental state need be shown in order to establish malice aforethought." *People v. Nieto Benitez*, 4 Cal. 4th 91, 103, 13 Cal. Rptr. 2d 864, 840 P.2d 969 (1992). Petitioner argues that a subjective awareness is excluded from the statute and that it thus conflicts with *Watson*. (SAP 39.) Rather, *Watson* attempted to clarify for the jury "section 188's cryptic 'abandoned and malignant heart' language." *Nieto Benitez*, 9 Cal. 4th at 113 (Mosk, J., concurring). "The fact that the Legislature has seen fit to eliminate the requirement that a defendant be aware of and able to comply with general social obligations in no way indicates that implied malice may be found without proof that the defendant was subjectively aware of the specific risks he was creating." *People v. James*, 196 Cal. App. 3d 272, 289 n.13, 241 Cal. Rptr. 691 (1987).

Finally, to the extent Petitioner claims that there was instructional error because the prosecution was relieved of its burden of proof of intent in CALJIC 8.31, his claim fails. Challenges to jury instructions based solely on alleged errors

of state law do not state cognizable claims in federal habeas corpus proceedings. *See Estelle*, 502 U.S. at 71-72 ("[T]he fact that [an] instruction was allegedly incorrect under state law is not a basis for habeas relief."); *see also Bradshaw v. Richey*, 546 U.S. 74, 76, 126 S. Ct. 602, 163 L. Ed. 2d 407 (2005) (per curiam). A claim of instructional error does not warrant federal habeas relief unless the error "so infected the entire trial that the resulting conviction violates due process[.]" *Waddington v. Sarausad*, 555 U.S. 179, 191, 129 S. Ct. 823, 172 L. Ed. 2d 532 (2009) (citation and internal quotation marks omitted). A claimed instructional error "must be considered in the context of the instructions as a whole and the trial record." *Estelle*, 502 U.S. at 72 (citation omitted). A habeas petitioner must show that there was a "reasonable likelihood that the jury has applied the challenged instruction in a way that violates the Constitution." *Middleton v. McNeil*, 541 U.S. 433, 437, 124 S. Ct. 1830, 158 L. Ed. 2d 701 (2004) (per curiam) (citations and internal quotation marks omitted). Even if a constitutional error occurred, federal habeas relief is unwarranted unless the error caused prejudice, i.e., the error had a substantial and injurious effect or influence in determining the jury's verdict. *Hedgpeth v. Pulido*, 555 U.S. 57, 61-62, 129 S. Ct. 530, 172 L. Ed. 2d 388 (2008) (per curiam) (citing *Brecht*, 507 U.S. at 623).

Here, to the extent Petitioner merely contends that instructing the jury with CALJIC 8.31 was incorrect under state law, his claim is not cognizable on federal habeas review. *See Estelle*, 502 U.S. at 71-72. How a state defines second degree murder is for the state to decide. To the extent Petitioner's claim presents a cognizable federal question, his claim fails. CALJIC 8.31 has been upheld by both federal and state courts against a constitutional challenge. *See, e.g., Masoner v. Thurman*, 996 F.2d 1003, 1007-08 (9th Cir. 1993); *Nieto Benitez*, 4 Cal. 4th at 106. The trial court also instructed on the burden of proof and the elements of the offenses with which Petitioner was charged. (RT 1243, 1254-56.) As such instructions were given, and as the allegedly flawed instruction did not lower, either

directly or indirectly, that burden of proof, Petitioner's claim of instructional error is denied.

Accordingly, habeas relief is not warranted on this claim.

F. Ground Six: Ineffective Assistance of Appellate Counsel

In Ground Six, Petitioner argues that appellate counsel was ineffective for failing to raise a claim for ineffective assistance of trial counsel and cumulative effect of trial counsel error on appeal. (SAP at 36.)

1. The Los Angeles Superior Court Opinion

The Los Angeles Superior Court on state habeas review denied Petitioner's ineffective assistance of appellate counsel claim, finding that appellate counsel did argue on appeal that trial counsel provided ineffective assistance. (Lodg. No. 12 at 11-12) ("In the alternative, he argues that to the extent his arguments on appeal are forfeited for lack of pertinent evidentiary objections below, his trial counsel provided ineffective assistance.").

2. Federal Law and Analysis

The standard for determining whether trial counsel rendered ineffective assistance applies equally to determining whether appellate counsel rendered ineffective assistance. *Smith v. Robbins*, 528 U.S. 259, 285, 120 S. Ct. 746, 145 L. Ed. 2d 756 (2000). A defendant "must show that counsel's advice fell below an objective standard of reasonableness . . . and that there is a reasonable probability that, but for counsel's unprofessional errors, [the petitioner] would have prevailed on appeal." *Miller v. Keeney*, 882 F.2d 1428, 1434 (9th Cir. 1989). Appellate counsel has no constitutional duty to raise every issue where, in the attorney's judgment, the issue has little or no likelihood of success. *Jones v. Barnes*, 463 U.S. 745, 751-53, 103 S. Ct. 3308, 77 L. Ed. 2d 987 (1983); *Pollard v. White*, 119 F.3d 1430, 1435 (9th Cir. 1997).

Here, as discussed above, Petitioner has not shown that trial counsel's performance was deficient or that Petitioner suffered prejudice. The failure of an

attorney to raise a meritless claim or take a futile action fails both elements of *Strickland*. *Rupe v. Wood*, 93 F.3d 1434, 1445 (9th Cir. 1996) ("failure to take a futile action can never be deficient performance"). It follows that appellate counsel was not ineffective for failing to raise an ineffective assistance of trial counsel claim regarding the issues in Grounds One and Four on appeal.

Accordingly, the state courts' rejection of Petitioner's ineffective assistance of appellate counsel claim was not objectively unreasonable,[4] and Petitioner is not entitled to relief on this claim.

G. Proposed Claim Regarding Failure to Instruct on Lesser Included Offense

On March 30, 2018, over three months after filing his Traverse, Petitioner filed a motion to amend the operative Second Amended Petition to add a new claim for failure to instruct on lesser included offense on the ground that his appellate attorney was eight months late in sending Petitioner the trial transcripts. (Dkt. No. 52.)

Motions for leave to amend a petition for writ of habeas corpus are governed by the same standards as motions to amend a complaint in other civil actions. A party may amend a pleading once as a matter of course at any time before a responsive pleading is served. FED. R. CIV. P. 15(a). Once a responsive pleading has been served, however, a party may amend the pleading only by leave of court or by written consent of the adverse party. *Id.*

"Leave to amend 'shall be freely given when justice so requires.'" *Caswell v. Calderon*, 363 F.3d 832, 837 (9th Cir. 2004) (quoting FED. R. CIV. P. 15(a)). A district court may deny leave to amend based on "the presence of any of four

[4] To the extent the Los Angeles Superior Court interpreted Petitioner's ineffective assistance of appellate counsel claim to contend that appellate counsel should have raised an ineffective assistance of trial counsel claim for failure to make pertinent evidentiary objections at trial rather than the broader claims in Grounds One and Four, Petitioner's claim still fails under independent review.

factors: bad faith, undue delay, prejudice to the opposing party, and/or futility." *Griggs v. Pace Am. Group, Inc.*, 170 F.3d 877, 880 (9th Cir. 1999). "Futility of amendment can, by itself, justify the denial of a motion for leave to amend." *United States v. Smithkline Beecham Clinical Labs.*, 245 F.3d 1048, 1052 (9th Cir. 2001); *see also Bonin v. Calderon*, 59 F.3d 815, 845 (9th Cir. 1995) (federal court need not allow a prisoner to amend a habeas petition under Rule 15 where the amended claim would be futile).

Although the Supreme Court has held that the failure of a state court to instruct on a lesser included offense in a capital murder case is constitutional error if there was evidence to support the instruction, the Supreme Court has not held that an instruction on lesser included offenses is required in a noncapital case. *Beck v. Alabama*, 447 U.S. 625, 638, 638 n.14, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980); *see also Gilmore v. Taylor*, 508 U.S. 333, 361, 113 S. Ct. 2112, 124 L. Ed. 2d 306 (1993) (Blackmun, J., dissenting) (observing that *Beck* left open the question of whether due process entitles criminal defendants in non-capital cases to have the jury instructed on lesser included offenses); *Solis v. Garcia*, 219 F.3d 922, 929 (9th Cir. 2000) (per curiam) (in non-capital case, failure of state court to instruct on lesser included offense does not alone present a federal constitutional question cognizable in a federal habeas corpus proceeding).

Nevertheless, "the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense." *Crane v. Kentucky*, 476 U.S. 683, 690, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986) (citations and internal quotation marks omitted). Failure to instruct on a defense theory will not constitute error, however, unless "the theory is legally sound and evidence in the case makes it applicable." *Clark v. Brown*, 450 F.3d 898, 904-05 (9th Cir. 2006) (citations and internal quotation marks omitted). A defendant is only entitled to jury instructions as to a defense "for which there exists evidence sufficient for a reasonable jury to find in

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his favor." *Mathews v. United States*, 485 U.S. 58, 63, 108 S. Ct. 883, 99 L. Ed. 2d 54 (1988).

Federal habeas courts essentially must determine "whether, under the instructions as a whole and given the evidence in the case, the failure to give the [omitted] instruction rendered the trial so fundamentally unfair as to violate federal due process." *Duckett v. Godinez*, 67 F.3d 734, 746 (9th Cir. 1995) (citing *Cupp v. Naughten*, 414 U.S. 141, 147 (1973)). Omitting an instruction that is not supported by the evidence does not constitute a due process violation. *See Hopper v. Evans*, 456 U.S. 605, 611, 102 S. Ct. 2049, 72 L.Ed.2d 367 (1982) (holding due process requires giving jury instruction "only when the evidence warrants such an instruction"); *Menendez v. Terhune*, 422 F.3d 1012, 1030 (9th Cir. 2005) (holding failure to give instruction on defense not supported by evidence as matter of state law does not constitute due process violation); *see also Solis*, 219 F.3d at 929 (holding that, while the failure to instruct the jury on voluntary and involuntary manslaughter might "constitute a cognizable habeas claim" where "those offenses are consistent with [petitioner's] theory of the case," petitioner was not entitled to habeas relief "because there was not substantial evidence to support either charge"). Even if the omission of a particular instruction was constitutionally erroneous, federal habeas relief is not available unless the error had a substantial and injurious effect or influence in determining the jury's verdict. *See Brecht*, 507 U.S. at 637; *see also Hedgpeth*, 555 U.S. at 61-62 (applying *Brecht* standard to habeas claims of instructional error).

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Here, putting aside any procedural bar issues, amendment would be futile.[5] Petitioner argues that a voluntary manslaughter instruction should have been given, despite the fact that trial counsel argued unsuccessfully for the instruction during the trial and in a motion for new trial.[6] (RT 1227-29; CT 193-95; Dkt. No. 51.) The trial court declined to give the voluntary manslaughter instruction because there was no evidence presented of provocation or that Petitioner was acting rashly under the influence of intense emotion. (RT 1227-29, 2103-04.) In denying the motion for new trial, the trial court reiterated its finding that there was no evidence of provocation: "In our case there was no evidence of provocation whatsoever.

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[5] According to the California Supreme Court docket for Petitioner's Petition for Writ of Habeas Corpus filed on October 16, 2017, which apparently raised the claim for failure to instruct on lesser included offense (per lodged Third Amended Petition at 6), the petition was denied with citations to *In re Clark*, 5 Cal. 4th 750, 767-69 (1993) (courts will not entertain habeas corpus claims that are successive); and *In re Dixon*, 41 Cal. 2d 756, 759 (1953) (courts will not entertain habeas corpus claims that could have been, but were not, raised on appeal). The *Clark* and *Dixon* bars have been held to qualify as adequate to bar federal habeas review. *See Johnson v. Lee*, — U.S. —, 136 S. Ct. 1802, 1806, 195 L. Ed. 2d 92 (2016) (holding the *Dixon* bar "qualifies as adequate to bar federal habeas review"); *Aguirre v. Sherman*, Case No. ED CV 15-02102-DMG (KES), 2016 WL 9752052, at *6 (C.D. Cal. Dec. 1, 2016) (holding the *Clark* bar against successive/abusive petitions qualifies as an adequate bar to federal habeas review) (citing *Flowers v. Foulk*, No. C 14-0589 CW, 2016 WL 4611554, *4 (N.D. Cal. Sept. 6, 2016) (determining that claims were procedurally defaulted because *Clark* bars on untimely petitions and successive petitions were both adequate and independent to precluded federal habeas review); *Rutledge v. Katavich*, No. C 08-5738 MMC (PR), 2012 WL 2054975, at *5 (N.D. Cal. June 5, 2012) (dismissing claim as procedurally barred due to California Supreme Court's rejection of petition with citation to *Clark*)). The Court declines to reach the issue of procedural default on its own because Petitioner's proposed claim fails on the merits. *See Lambrix v. Singletary*, 520 U.S. 518, 525, 117 S. Ct. 1517, 137 L. Ed. 2d 771 (1997) (court may consider and deny habeas petition on its merits notwithstanding procedural bar issues).

[6] The fact that Petitioner raised this claim during trial belies his apparent position that he did not find out about the claim until his appellate attorney sent him the trial transcripts "[e]ight [m]onth[s] [l]ate." (Dkt. No. 52.)

The evidence was that [Petitioner] approached both Mr. Falley – or initially just Mr. Falley, left the club, and then came back fifteen minutes later. And the video shows that he went straight for Mr. Brown and shot him." (RT 2104.)

The Court agrees that substantial evidence did not support the giving of a voluntary manslaughter instruction, given the lack of evidence of provocation and heat of passion; thus, Petitioner's trial was not rendered fundamentally unfair by the omission of the instruction. *See People v. Steele*, 27 Cal. 4th 1230, 1252 (2002) ("[F]or voluntary manslaughter, provocation *and* heat of passion must be affirmatively demonstrated.") (citations and internal quotation marks omitted). The provocation must be such that a "reasonable person in [the] defendant's position would have reacted with homicidal rage." *People v. Koontz*, 27 Cal. 4th 1041, 1086, 119 Cal. Rptr. 2d 859, 46 P.3d 335 (2002).

Even assuming that the trial court erred in not giving a lesser included offense instruction, any such error was harmless. In light of the evidence, the arguments, and the instructions as a whole, there is no reasonable probability Petitioner would not have been convicted of second degree murder had a lesser included offense instruction been given.

In sum, amendment would be futile because Petitioner's proposed claim fails. Accordingly, Petitioner's motion for leave to amend is denied.

H. Petitioner Is Not Entitled To An Evidentiary Hearing

Under AEDPA, this Court "is limited to the record that was before the state court that adjudicated the claim on the merits." *Pinholster*, 563 U.S. at 180. In any event, an evidentiary hearing on any of Petitioner's claims is unnecessary because Petitioner has not shown what the hearing might reveal of material import on his claims. *Perez v. Rosario*, 459 F.3d 943, 954 n.5 (9th Cir. 2006); *Griffin v. Johnson*, 350 F.3d 956, 966 (9th Cir. 2003). Further, even where an evidentiary hearing might be appropriate, it is not warranted where, as here, "the record refutes [Petitioner's] factual allegations or otherwise precludes habeas relief[.]" *Schriro v.*

Landrigan, 550 U.S. 465, 474, 127 S. Ct. 1933, 167 L. Ed. 2d 836 (2007). Accordingly, Petitioner is not entitled to an evidentiary hearing.

VI. RECOMMENDATION

For the reasons discussed above, IT IS RECOMMENDED that the District Court issue an Order (1) accepting and adopting this Report and Recommendation; and (2) directing that Judgment be entered denying the Petition and dismissing this action with prejudice.

DATED: August 3, 2018

Rozella A. Oliver

ROZELLA A. OLIVER
UNITED STATES MAGISTRATE JUDGE

NOTICE

Reports and Recommendations are not appealable to the Court of Appeals, but may be subject to the right of any party to file objections as provided in Local Civil Rule 72 and review by the District Judge whose initials appear in the docket number. No Notice of Appeal pursuant to the Federal Rules of Appellate Procedure should be filed until entry of the Judgment of the District Court.

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