

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

AHMED ALI, <div style="text-align: right;">Petitioner,</div>	v.	R.T.C. GROUNDS, et al., <div style="text-align: right;">Respondents.</div>
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Civil No. 14-0898 BAS (WVG)

**REPORT AND
RECOMMENDATION RE:
DENYING PETITION FOR WRIT
OF HABEAS CORPUS**

I. INTRODUCTION

Petitioner Ahmed Ali, a state prisoner represented by counsel, has filed a First Amended Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254, challenging his conviction in San Diego County Superior Court Case No. SCD215890 for murder, attempted murder, shooting at an inhabited structure or vehicle, being a felon in possession of a firearm, unlawful possession of a firearm and various firearm and gang enhancements. (Am. Pet. at 6, ECF No. 1; Lodgment No. 1, vol. 7 at 1586-88.)¹ The Court has reviewed the Amended Petition, the Answer and Memorandum of Points and Authorities in Support of the Answer, the Traverse, the lodgments, the record, and all the

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¹ Page numbers for docketed materials cited in this Report and Recommendation refer to those imprinted by the Court's electronic case filing system.

1 supporting documents submitted by both parties. For the reasons discussed below, the
2 Court recommends the Petition be **DENIED**.

3 **II. FACTUAL BACKGROUND**

4 This Court gives deference to state court findings of fact and presumes them to be
5 correct; Petitioner may rebut the presumption of correctness, but only by clear and
6 convincing evidence. *See* 28 U.S.C. § 2254(e)(1) (West 2006); *see also Parle v. Fraley*,
7 506 U.S. 20, 35-36 (1992) (holding findings of historical fact, including inferences
8 properly drawn from these facts, are entitled to statutory presumption of correctness).
9 The following facts are taken from the California Court of Appeal opinion:

10 On the night of July 22, 2008, shootings occurred at two different
11 locations in San Diego.

12 The first shooting occurred around 9:30 p.m. when two men walked
13 up to and shot at a car that was driving out of the Harbor View apartment
14 complex. The apartment complex was known as a location where members
15 of the Neighborhood Crip gang congregated. One witness described the
16 apartment complex as a “war zone” between the Neighborhood Crip gang
17 and the nearby Lincoln Park gang. Three men were riding in the targeted
18 car, at least two of whom were affiliated with the Neighborhood Crip gang.
19 Before shooting at the car, one of the shooters said, “What’s up, cuz,” with
20 “cuz” being a term that refers to Crip gang members. Bullets struck the car,
21 but no one in the car was shot or seriously injured. A bullet also entered a
22 nearby residence.

23 The second shooting, which occurred at an apartment complex on
24 College Avenue, was reported to police shortly before 11:00 p.m. Two men
25 approached a group of people congregating by the stairs at the apartment
26 complex and opened fire. Larry Lumpkin was fatally shot in the head.
27 Maurice McElwee sustained a minor gunshot wound to his chest. Although
28 the College Avenue apartment complex was not in any particular gang’s
territory, it was a common place for members of the O’Farrell Park and
Skyline Piru gangs to congregate. Those gangs were rivals of the Lincoln
Park gang. Some of the people fired upon at the College Avenue apartment
complex were members of the O’Farrell Park or Skyline Piru gangs.

On August 7, 2008, the police received information about both
shootings when a member of the Lincoln Park gang, Jesse Freeman, spoke
to police after being arrested on an unrelated offense. Freeman told police
that a fellow Lincoln Park gang member, Ali, claimed to have committed
both of the July 22, 2008 shootings along with someone named “L” or
“Lex.” Freeman also gave police information about other crimes, including
bank robberies, committed by different Lincoln Park gang members.
Freeman made similar disclosures to police in subsequent interviews.

After the disclosure from Freeman, police examined the ballistics
evidence from the two July 22, 2008 shootings and discovered that the

1 same firearm was used in both incidents. Police next searched Ali's
 2 apartment and found a shell casing that was shown through forensic analysis
 3 to have been discharged from a gun that was fired at both of the July 22,
 2008 shooting scenes.

4 Police arrested Ali in connection with the July 22, 2008 shootings.
 5 Freeman testified at a preliminary hearing held on November 14, 2008,
 6 describing Ali's admission to committing the shootings. According to
 7 Freeman's testimony, Ali told him that he carried out the shootings to "put
 8 in some work" for the Lincoln Park gang and get at members of rival
 9 gangs. Because Freeman was in danger from having testified against a
 10 fellow gang member, the police relocated Freeman to Arizona after the
 11 preliminary hearing. Freeman was found dead under a freeway overpass in
 12 Arizona on November 22, 2008, having suffered blunt force head trauma.
 13 Local police investigation into Freeman's death was inconclusive as to
 14 whether the death was a homicide, a suicide or an accident.

15 Ali was tried for one count of murder based on Lumpkin's death
 16 (§ 187, subd. (a)); four counts of attempted murder based on the chest
 17 wound to McElwee and the shots fired at the three victims in the car at the
 18 Harbor View apartments (§§ 187, subd. (a), 664); two counts of shooting at
 19 an inhabited structure or vehicle (§ 246); one count of being a convicted
 20 felon in possession of a firearm (former § 12021, subd. (a)(1)); and one
 21 count of unlawfully possessing a firearm (former § 12316, subd. (b)(1)).
 22 The information also alleged firearm and criminal street gang enhancements
 23 (§§ 12022.53, subds. (c), (d), (e)(1), 186.22, subd. (b)(1)).

24 Because Freeman was no longer alive at the time of trial, his
 25 preliminary hearing testimony was read into the record at trial. The jury
 26 also heard recordings of Freeman's interviews with police.

27 Among the other evidence against Ali at trial was the testimony of
 28 two eye witnesses. First, one of the men who came under fire at the College
 Ave. apartments on July 22, 2008, testified that he picked Ali out from a
 photographic lineup in February as one of the shooters, stating that he was
 60 to 70 percent certain at the time of the identification. Second, a teenage
 boy, James Gomez, who saw the shooters at the College Avenue apartments
 before they opened fire identified Ali as one of the shooters.

Ali presented testimony from friends and family members, who said
 they were with Ali at his apartment at the time of the shootings. Defense
 counsel argued that instead of Ali committing the shootings, Freeman or
 some other Lincoln Park gang member could have committed them and
 could have framed Ali, or the shootings could have been committed by
 someone associated with different gang.

The jury convicted Ali on all counts, and the trial court sentenced him
 to prison for an indeterminate term of 135 years to life, plus a determinate
 term of 60 years.

(Lodgment No. 6 at 3-6.)

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III. PROCEDURAL BACKGROUND

On July 14, 2010, the San Diego County District Attorney's Office filed an Amended Information charging Ahmed Ali with one count of murder, a violation of California Penal Code (Penal Code) § 187(a) (count one), four counts of attempted murder, a violation of Penal Code §§ 187(a)/664 (counts two, four, five and six); two counts of shooting at an inhabited structure or vehicle, a violation of Penal Code § 246 (counts three and seven), being a felon in possession of a firearm, a violation of former Penal Code § 12021(a)(1) (count 8); and one count of unlawful possession of a firearm, a violation of former Penal Code § 12316(b)(1). (Lodgment No. 1 at 12-16.) The Amended Information also alleged that Ali committed counts one through seven for the benefit of, at the direction of, and in association with a criminal street gang, within the meaning of Penal Code § 186.22(b)(1). (*Id.*) In addition, the Amended Information alleged that as to counts one through six, Ali was a principal in the commission of the offense and at least one principal personally used and discharged a firearm, within the meaning of Penal Code § 12022.53(c), (d), and (e)(1). (*Id.*) Finally, the Amended Information alleged that the attempted murders charged in counts two, four, five and six were willful, deliberate and premeditated. (*Id.*)

Following a jury trial, Ali was convicted of all counts and the jury found all the firearm and gang enhancement allegations to be true. (Lodgment No. 2, vol. 26 at 7519-26.) He was sentenced to 135 years-to-life plus 60 years in prison. (Lodgment No. 1, vol. 7 at 1586-87.)

Ali filed a direct appeal of his conviction in the California Court of Appeal, Fourth Appellate District, Division One. (Lodgment Nos. 3-5.) The state appellate court affirmed Ali's convictions in an unpublished written opinion. (Lodgment No. 6.) Ali then filed a petition for review in the California Supreme Court, which denied the petition without citation of authority. (Lodgment Nos. 7-8.)

On April 15, 2014, Ali filed a pro se petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 in this Court [ECF No. 1]. He filed an amended petition on June 9,

1 2014, and at that time was represented by counsel [ECF No. 6]. Respondent filed an
2 Answer and Memorandum of Points and Authorities in Support of the Answer on August
3 7, 2014 [ECF No. 10]. Ali filed a Traverse on August 23, 2014 [ECF No. 11].

4 **IV. DISCUSSION**

5 Ali raises twelve claims in his Amended Petition. First, Ali argues the trial court
6 violated his due process rights when it excluded statements by Marcus House and Hunter
7 Porter. Second, he claims the trial court erred when it refused to instruct the jury on third-
8 party culpability. In claim three, Ali contends he did not receive a fair trial because of
9 juror misconduct. Fourth, Ali argues his due process rights were violated when the trial
10 court reviewed evidence in camera, then declined to turn it over to the defense. Fifth, he
11 contends the prosecution failed to turn over exculpatory evidence. Sixth, he claims his
12 federal constitutional rights were violated when the trial court refused to grant immunity
13 to House and Porter. Seventh, Ali argues his Sixth Amendment confrontation rights were
14 violated when the trial court permitted the introduction of Jesse Freeman's preliminary
15 hearing testimony. In claim eight, Ali contends the trial court improperly refused to
16 instruct the jury regarding benefits received by certain witnesses. Ninth, he claims the
17 prosecutor committed misconduct. Tenth, Ali argues the trial court incorrectly refused
18 to disclose juror information. Eleventh, Ali contends the trial court erroneously denied
19 his motion for a new trial. And finally, in claim twelve, Ali argues the cumulative effect
20 of all the errors at his trial rendered it unfair. (Mem. of P. & A. Supp. Am. Pet. at 1-105,
21 ECF No. 6.)

22 Respondent argues the state courts' resolution of claims one through eleven was
23 neither contrary to, nor an unreasonable application of, clearly established Supreme Court
24 law. (Mem. of P. & A. Supp. Answer at 15-42, ECF No. 10.) Respondent also argues
25 claims 10-12 do not state a cognizable federal claim, and claim nine is procedurally
26 defaulted. (*Id.* at 42-43.)

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1 A. *Standard of Review*

2 This Petition is governed by the provisions of the Antiterrorism and Effective
3 Death Penalty Act of 1996 (“AEDPA”). *See Lindh v. Murphy*, 521 U.S. 320 (1997).
4 Under AEDPA, a habeas petition will not be granted with respect to any claim
5 adjudicated on the merits by the state court unless that adjudication: (1) resulted in a
6 decision that was contrary to, or involved an unreasonable application of clearly
7 established federal law; or (2) resulted in a decision that was based on an unreasonable
8 determination of the facts in light of the evidence presented at the state court proceeding.
9 28 U.S.C. § 2254(d); *Early v. Packer*, 537 U.S. 3, 8 (2002). In deciding a state prisoner’s
10 habeas petition, a federal court is not called upon to decide whether it agrees with the
11 state court’s determination; rather, the court applies an extraordinarily deferential review,
12 inquiring only whether the state court’s decision was objectively unreasonable. *See*
13 *Yarborough v. Gentry*, 540 U.S. 1, 4 (2003); *Medina v. Hornung*, 386 F.3d 872, 877 (9th
14 Cir. 2004).

15 A federal habeas court may grant relief under the “contrary to” clause if the state
16 court applied a rule different from the governing law set forth in Supreme Court cases,
17 or if it decided a case differently than the Supreme Court on a set of materially
18 indistinguishable facts. *See Bell v. Cone*, 535 U.S. 685, 694 (2002). The court may grant
19 relief under the “unreasonable application” clause if the state court correctly identified
20 the governing legal principle from Supreme Court decisions but unreasonably applied
21 those decisions to the facts of a particular case. *Id.* Additionally, the “unreasonable
22 application” clause requires that the state court decision be more than incorrect or
23 erroneous; to warrant habeas relief, the state court’s application of clearly established
24 federal law must be “objectively unreasonable.” *See Lockyer v. Andrade*, 538 U.S. 63,
25 75 (2003).

26 Where there is no reasoned decision from the highest state court the claim was
27 presented to, the Court “looks through” to the last reasoned state court decision and
28 presumes it provides the basis for the higher court’s denial of a claim or claims. *See Ylst*

1 v. *Nunnemaker*, 501 U.S. 797, 805-06 (1991). If the dispositive state court order does not
 2 “furnish a basis for its reasoning,” federal habeas courts must conduct an independent
 3 review of the record to determine whether the state court’s decision is contrary to, or an
 4 unreasonable application of, clearly established Supreme Court law. *See Delgado v.*
 5 *Lewis*, 223 F.3d 976, 982 (9th Cir. 2000) (*overruled on other grounds by Andrade*, 538
 6 U.S. at 75-76); *accord Himes v. Thompson*, 336 F.3d 848, 853 (9th Cir. 2003). However,
 7 a state court need not cite Supreme Court precedent when resolving a habeas corpus
 8 claim. *See Early*, 537 U.S. at 8. “[S]o long as neither the reasoning nor the result of the
 9 state-court decision contradicts [Supreme Court precedent,]” *id.*, the state court decision
 10 will not be “contrary to” clearly established federal law. *Id.* Clearly established federal
 11 law, for purposes of § 2254(d), means “the governing principle or principles set forth by
 12 the Supreme Court at the time the state court renders its decision.” *Andrade*, 538 U.S.
 13 at 72.

14 B. *Exclusion of House’s and Porter’s Statements*

15 Ali contends in claim one that his federal constitutional right to present a complete
 16 defense was violated when the trial court excluded statements made by Marcus House
 17 and Hunter Porter. (Mem. of P. & A. Supp. Am. Pet. at 23-35; Traverse at 3-5.) Ali
 18 wanted House to testify, as House told a defense investigator, that he gave Freeman a
 19 nine millimeter handgun before the July 22, 2008 shootings, that Freeman told House he
 20 committed the College Avenue shooting with Lamont Edwards, known as “L,” and that
 21 Freeman described how the shooting took place. (Lodgment No. 1, vol. 3 at 0540-41.)
 22 Ali wanted Porter to testify to matters bearing on Freeman’s credibility. Porter was being
 23 prosecuted for a series of bank robberies. During a “free talk” with the District
 24 Attorney’s Office, Porter implicated Freeman in several bank robberies Porter, Freeman
 25 and others had committed and said he suspected Freeman had cheated his co-participants
 26 out of proceeds from those robberies; Freeman had denied participating in any bank
 27 robberies during his conversations with the prosecution about Ali’s involvement in the

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1 College Avenue and Harbor View shootings. (Lodgment No. 2, vol. 10 at 2439-44, vol.
2 19 at 5211-15.)

3 House asserted his Fifth Amendment right against self-incrimination. (Lodgment
4 No. 2, vol. 8 at 2103.) The trial court ruled the Fifth Amendment did not apply to
5 House's statements, but House refused to testify anyway. (Lodgment No. 2, vol. 11 at
6 2538.) Ali then attempted to have House's statements admitted via a defense
7 investigator's testimony; the trial court excluded that testimony. (Lodgment No. 2, vol.
8 7 at 1943-44.) The trial court excluded Porter's out-of-court statements as well. It found
9 that while Porter's statements regarding his participation in the robberies with Freeman
10 were against his own penal interests, Freeman's statements to Porter were not against
11 Freeman's penal interests. (Lodgment No. 2, vol. 22 at 6412.) Porter's statements about
12 what Freeman said were therefore simply hearsay and inadmissible. (*Id.*)

13 Ali raised his claim about the exclusion of House's and Porter's testimony in the
14 petition for review he filed in the California Supreme Court. (Lodgment No. 7.) That
15 court denied the petition without analysis or citation of authority. (Lodgment No. 8.)
16 Accordingly, this Court must "look through" to the state appellate court's decision
17 denying the claim as the basis of its analysis. *Ylst*, 501 U.S. at 805-06. The state
18 appellate court agreed with the trial court's rulings:

19 Hearsay is generally inadmissible unless an exception applies. (Evid.
20 Code § 1200). "The admission of multiple hearsay is permissible where
21 each hearsay level falls within a hearsay exception." (*People v. Williams*
(1997) 16 Cal.4th 153, 199, fn. 3, citing Evid. Code § 1201.)¹²

22 [FN 12: The statements by House that Ali sought to have
23 admitted contained two levels of hearsay. At the first level
24 was House's out-of-court statements to the defense
25 investigator. At the second level was Freeman's out-of-court
statements to House that he committed one of the July 22,
2008 shootings. To the extent Porter recounted Freeman's
admission to participating in bank robbery without Porter, that
statement is double hearsay.]

26 Ali argues that the hearsay exception for declarations against penal
27 interest applies to House's and Porter's statements, making them admissible.
28 Under that exception, "[e]vidence of a statement made by a declarant having
sufficient knowledge of the subject is not made inadmissible by the hearsay
rule if the declarant is *unavailable* as a witness

1 and the statement, when made, was so far contrary to the declarant's
 2 pecuniary or proprietary interest, or so far subjected him to the risk of civil
 3 or criminal liability, or so far tended to render invalid a claim by him against
 4 another, or created such a risk of making him an object of hatred, ridicule,
 or social disgrace in the community, that a reasonable man in his position
 would not have made the statement unless he believed it to be true." (Evid.
 Code § 1230, italics added.)

5 Based on the statute, the first requirement for the application of the
 6 declaration against interest exception is the unavailability of the declarant.
 7 There is no dispute that the unavailability requirement of Evidence Code
 8 section 1230 is met here. House and Porter were both unavailable because
 9 they invoked their Fifth Amendment right not to testify. (Evid. Code. § 240,
 10 subd. (a)(10.) Further, to the extent that a second level of hearsay involving
 11 Freeman's statements is at issue, Freeman was unavailable because he was
 12 dead. (*Id.*, § 240, subd. (a)(3).)

Turning to the remaining elements of the declaration against interest
 exception, the issue in dispute is whether the statements "so far subjected
 [the speaker] to the risk of . . . criminal liability . . . that a reasonable man
 in his position would not have made the statement unless he believed it to
 be true." (Evid. Code, § 1230.)

Our Supreme Court has summarized the law applicable to the
 declaration against penal interest to the hearsay rule. As it explained,
 " '[t]he proponent of such evidence must show "that the declarant is
 unavailable, that the declaration was against the declarant's penal interest,
 and that the declaration was sufficiently reliable to warrant admission
 despite its hearsay character." ' . . . 'The focus of the declaration against
 interest exception to the hearsay rule is the basic trustworthiness of the
 declaration . . . In determining whether a statement is truly against interest
 within the meaning of Evidence Code section 1230, and hence is sufficiently
 trustworthy to be admissible, the court may take into account not just the
 words but the circumstances under which they were uttered, the possible
 motivation of the declarant, and the declarant's relationship to the
 defendant.' . . . [I]n this context, assessing trustworthiness "requires the
 court to apply to the peculiar facts of the individual case a broad and deep
 acquaintance with the ways human beings actually conduct themselves in the
 circumstances material under the exception.' " " (*People v. Geier* (2007)
 41 Cal.4th 555, 584, citations omitted.) "Courts applying [Evidence Code]
 section 1230 to determine the basic trustworthiness of a proffered
 declaration are . . . to 'consider all the surrounding circumstances to
 determine if a reasonable person in [the declarant's] position would have
 made the statements if they weren't true.' " (*People v. Duarte* (2000) 24
 Cal 4th 603, 618 (*Duarte*).)

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a. *House's Statements*

House's statements to the defense investigator describing Freeman's
 admission to the July 22, 2008 shooting did not subject House to a risk of
 civil or criminal liability, as the statements did not implicate House in the
 shooting. According to the defense investigator, as House described the

1 situation, he learned about the shooting from Freeman several weeks *after*
2 it happened.

3 Ali argues that House made a statement against his penal interest
4 because he told the defense investigator that he had given Freeman the gun
5 that was used in the shooting. However, as the trial court reasonably
6 concluded, that statement was not — under the circumstances — so far
7 against House's penal interest that it rendered House's entire statement to
8 the defense investigator sufficiently trustworthy to fall within the hearsay
9 exception. Specifically, House did not state that he gave Freeman a gun
10 with the knowledge that it would be used to commit a specific crime, which
11 might subject House to aider and abettor liability. Further, at the time
12 House made the statement, he was already serving a 20-year prison sentence
13 and was charged with bank robberies. The trial court reasonably concluded
14 that the risk that House might be prosecuted and punished for any crime
15 possibly committed in supplying a firearm to Freeman would not have been
16 significant to House in light of the sentence he was already serving, or faced
17 with serving, for the bank robberies.

18 In addition, the trustworthiness of House's statement must be viewed
19 in the entire context of the gang-related environment in which it was made.
20 House was a member of the Lincoln Park gang and could be expected to
21 take actions to help other gang members in good standing. Ali was a fellow
22 gang-member, giving House a motive to help him by implicating Freeman,
23 who was a "snitch" against the gang and therefore out of favor. It is
24 reasonable to infer, as did the trial court, that House's statements about
25 Freeman may have been fabricated for the benefit of his fellow gang
26 member Ali, and were therefore not trustworthy enough to qualify for
27 admission as declarations against interest.¹³ (*People v. Frierson* (91) 53
28 Cal.3d 730, 745 ["The court could reasonably find [the witness] wanted to
aid his friend at little risk to himself, and thus the statement was
insufficiently trustworthy."].)

[FN 13: Because the first level of hearsay — consisting of
House's statements — did not qualify for an exception to the
hearsay rule as a declaration against House's interest, we need
not discuss the second level of hearsay. Further, we note that
Ali has argued that House's statement was admissible as
evidence of third party culpability. Ali's argument is
misplaced. There is no dispute that Freeman's admission to
the shooting at the College Avenue apartment complex, if not
excluded under the hearsay rule, would be relevant and
admissible as evidence of third party culpability. The reason
that the evidence was excluded was because it is hearsay, not
because it failed to qualify as third party culpability evidence.]

In sum, the trial court did not abuse its discretion in excluding
evidence of House's statements to the defense investigator.

b. *Porter's Statements*

Porter's statements consisted of (1) his description of Freeman taking
part in bank robberies, based both on his commission of the robberies with
Freeman and Freeman's claim to have committed another robbery; and (2)
his description of Freeman having taken more than his share of the proceeds

1 from a robbery. The trial court determined that the declaration against
2 interest exception to the hearsay rule did not apply, and it therefore excluded
evidence of Porter's statements.

3 The trial court was within its discretion in excluding Porter's
4 statements. The statements were made as part of a "free talk" agreement
5 with the district attorney that the statements would *not* be used in the
6 prosecution's case-in-chief in the bank robbery case. Therefore, the
7 adverse penal consequences to Porter of making the statements were
8 significantly diminished. Further, the statements could be considered to be
insufficiently trustworthy to fall within the declaration against interest
exception because Porter was also a Lincoln Park gang member and, like
House, had a motivation to help his fellow gang member, Ali, while placing
the blame on disfavored gang member Freeman.

9 Further, even if Porter's statements should have been admitted, their
10 exclusion was not prejudicial. (See *Duarte, supra*, 24 Cal.4th at p. 619
11 [evaluating whether it is "'reasonably probable that a result more favorable
12 to defendant would have been reached'" had evidence been admitted under
the hearsay exception for a declaration against interest].) The value to the
13 defense of Porter's statements about Freeman's participation in bank
14 robberies was to call into question Freeman's credibility by showing he lied
15 to authorities when denying involvement in the robberies. However, the
16 same impeaching evidence was admitted during the trial through another
17 defense witness — Tiano Durham — who testified Freeman committed a
bank robbery with him. Because the excluded evidence was cumulative of
other evidence, its admission would not have been reasonably probable to
change the outcome of the trial. Ali also cannot demonstrate prejudice from
exclusion of Porter's statement that Freeman took more than his share of the
proceed from a bank robbery. That evidence was not necessary to establish
Freeman's disloyalty to fellow gang members as it was clear that Freeman
had shown disloyalty to the gang by "snitching" to the police about Ali and
the bank robberies.

18 (Lodgment No. 6 at 21-27.)

19 Ali first contends that AEDPA deference does not apply to this claim because the
20 state appellate court did not directly address the federal constitutional claim raised by Ali,
21 but rather decided the claim solely on state law grounds. (Mem. of P. & A. Supp. Am.
22 Pet. at 25-27; Traverse at 2-3.) "In *Harrington v. Richter*, 562 U.S. ___, 131 S. Ct. 770
23 [citations omitted] (2011), the Supreme Court held that a reviewing federal court should
24 presume that the last reasoned decision of the state court adjudicated all raised claims on
25 the merits and is entitled to deference pursuant to . . . AEDPA" *Phillips v.*
26 *Herndon*, 730 F.3d 733, 775 (9th Cir. 2013.) In *Johnson v. Williams*, __ U.S. ___, 133 S.
27 Ct. 1088 (2013), the Supreme Court recognized an exception to this rule where "a state
28 court rejects a federal claim without expressly addressing that claim." *Id.* at 1096. In

1 such circumstances, “a federal habeas court must presume that the federal claim was
 2 adjudicated on the merits — but that presumption can in some limited circumstances be
 3 rebutted.” *Id.*

4 As Respondent points out, the Supreme Court has stated that “if the state-law rule
 5 subsumes the federal standard — that is, if it is at least as protective as the federal
 6 standard — then the federal claim may be regarded as having been adjudicated on the
 7 merits.” *Id.*; *see also Phillips*, 730 F.3d at 775. Respondent correctly notes that the
 8 Ninth Circuit has concluded that California Evidence Code § 1230 “is at least as
 9 protective as the federal standard.” *See id.* at 777.

10 Petitioner argues the presumption has not been rebutted because the state appellate
 11 court, in footnote 13 of its opinion, expressly addressed only the state evidentiary law
 12 question by stating that “Ali has argued that House’s statement was admissible as
 13 evidence of third party culpability There is no dispute that Freeman’s
 14 admission . . . would be relevant and admissible as evidence of third party culpability.”
 15 (Mem. of P. & A. Supp. Am. Pet at 25-27; Traverse at 2-3.) Petitioner’s argument fails
 16 for two reasons. First, footnote 13 does not encompass the totality of the state appellate
 17 court’s analysis of this claim. Indeed, in both the body of the opinion and the rest of the
 18 footnote, it is clear the state court considered the question whether House’s statement was
 19 admissible hearsay, not just evidence of third party culpability. Second, the cases cited
 20 by the appellate court in the body of its opinion clearly indicate the state court considered
 21 Ali’s federal constitutional claim. *People v. Geier*, 41 Cal. 4th 555, 584 (2007), cited by
 22 the state court, cites to *People v. Cudjo*, 6 Cal. 4th 585, 609 (1993) and to *People v.*
 23 *Duarte*, 24 Cal. 4th 603, 614 (2000); both *Cudjo* and *Duarte* discuss the interplay
 24 between the Sixth Amendment and rules against the admission of hearsay; *Cudjo*
 25 specifically discusses the application of *Chambers v. Mississippi*, 410 U.S. 284, 294
 26 (1973), a leading Supreme Court case on this issue. (Lodgment No. 6 at 22-25.) The
 27 state court also cited *Duarte*, and *People v. Frierson*, 53 Cal. 3d 730, 745 (1991), which
 28 cited *Green v. Georgia*, 442 U.S. 95 (1979), a case regarding whether the exclusion of

1 a hearsay statement violated a defendant's federal due process rights. (*Id.* at 25.) Thus,
2 even though the state appellate court did not expressly resolve the federal constitutional
3 claim presented, its citation of these cases shows the court "understood itself to be
4 deciding a question with federal constitutional dimensions." *Johnson*, 133 S. Ct. at 1098.
5 Accordingly, this Court concludes the last reasoned state court decision, the state
6 appellate court's opinion on direct review, is entitled to AEDPA deference.

7 Clearly established federal law holds that the right to present evidence and
8 witnesses is essential to due process and is guaranteed by the compulsory process clause
9 of the Sixth Amendment. *Taylor v. Illinois*, 484 U.S. 400, 409 (1988); *Chambers*, 410
10 U.S. at 294; *Washington v. Texas*, 388 U.S. 14, 19 (1967); *Dunham v. Deeds*, 954 F.2d
11 1501, 1503 (9th Cir. 1992). "The defendant's right to present evidence[, however,]. . . is
12 not absolute," *Perry v. Rushen*, 713 F.2d 1447, 1450 (9th Cir. 1983), and there exists no
13 "unfettered right to offer testimony that is incompetent, privileged, or otherwise
14 inadmissible under standard rules of evidence." *Taylor*, 484 U.S. at 410; *see also Tinsley*
15 *v. Borg*, 895 F.2d 520 (9th Cir. 1990). A defendant "must comply with established rules
16 of procedure and evidence designed to assure both fairness and reliability in the
17 ascertainment of guilt and innocence." *Chambers*, 410 U.S. at 302. The exclusion of
18 defense evidence is error only if it renders the state proceeding so fundamentally unfair
19 as to violate due process. *Estelle v. McGuire*, 502 U.S. 62, 67 (1991); *Bueno v. Hallahan*,
20 988 F.2d 86, 87 (9th Cir. 1993).

21 The Ninth Circuit employs "a balancing test to determine whether the exclusion
22 of evidence in the trial court violated petitioner's due process rights, weighing the
23 importance of the evidence against the state's interest in exclusion." *Chia v. Cambra*,
24 360 F.3d 997, 1003. (9th Cir. 2004); *see also Duhaime v. Ducharme*, 200 F.3d 597, 600
25 (2000) (finding that "[Ninth Circuit] cases may be persuasive authority for purposes of
26 determining whether a particular state court decision is an 'unreasonable application' of
27 Supreme Court law. . . .") Five factors are to be considered when deciding whether a
28 court's exclusion of defense evidence violates the constitution: "(1) the probative value

1 of the excluded evidence on the central issue; (2) its reliability; (3) whether it is capable
 2 of evaluation by the trier of fact; (4) whether it is the sole evidence on the issue or merely
 3 cumulative; and (5) whether it constitutes a major part of the defense.” *Miller v. Stagner*,
 4 757 F.2d 988, 994-95 (9th Cir. 1985); *Tinsley*, 895 F.2d at 530. The importance of the
 5 evidence must then be balanced against the state’s interest in exclusion. *Tinsley*, 895
 6 F.2d at 530. To overcome the state’s strong interest in the administration of its trials, the
 7 circumstances of the exclusion must be “unusually compelling.” *Perry*, 713 F.2d at 1452.

8 1. *House’s Statements*

9 According to a defense investigator, House claimed Freeman admitted to
 10 committing the College Avenue shooting with another individual, “L,” and described
 11 how the shooting occurred. (Lodgment No. 1, vol. 2 at 540-41.) House also said he gave
 12 Freeman a nine millimeter handgun before the shooting. (*Id.*) House’s first two
 13 statements were very probative of the central issue of whether Ali or Freeman committed
 14 the College Avenue shooting, a main component of Ali’s defense. House’s third
 15 statement was less probative on the issue because while the prosecution’s evidence
 16 established the gun used at the shooting was a nine millimeter gun, there was no evidence
 17 establishing the gun House claims he gave to Freeman with the gun used at the shooting.
 18 House’s statements were not very reliable, however. As the state court pointed out,
 19 House had a strong motive to exonerate Ali, a fellow Lincoln Park gang member in good
 20 standing, and incriminate Freeman, a fellow Lincoln Park gang member who became a
 21 snitch. And, as the state court thoroughly discussed, House’s statements also did not
 22 have sufficient indicia of trustworthiness because they were not significantly against his
 23 penal interest. House was already serving a significant sentence having been convicted
 24 in another case, and his statement about giving the gun to Freeman did not implicate him
 25 in the murder since he did not have prior knowledge of Freeman’s intent. Moreover,
 26 the jury would have had difficulty evaluating House’s statements and the possible
 27 motivation behind them. Unlike the statements the defendant in *Chambers* sought to
 28 admit, House refused to testify after the trial judge determined he could not validly assert

1 his Fifth Amendment right not to incriminate himself. Thus, the jury would not have
 2 been able to assess House's credibility via live testimony and cross-examination.
 3 House's testimony was, however, the sole direct evidence implicating Freeman in the
 4 College Avenue murders, which constituted a major part of Ali's defense.

5 The state's interest in excluding hearsay and properly applying any exceptions to
 6 the hearsay rule, however, was also very strong. As the Court noted in *Chambers*:

7 The hearsay rule, which has long been recognized and respected by
 8 virtually every State, is based on experience and grounded in the notion that
 9 untrustworthy evidence should not be presented to the triers of fact.
 10 Out-of-court statements are traditionally excluded because they lack the
 11 conventional indicia of reliability: they are usually not made under oath or
 12 other circumstances that impress the speaker with the solemnity of his
 13 statements; the declarant's word is not subject to cross-examination; and he
 14 is not available in order that his demeanor and credibility may be assessed
 15 by the jury. *California v. Green*, 399 U.S. 149, 158, 90 S.Ct. 1930, 1935,
 26 L.Ed.2d 489 (1970). A number of exceptions have developed over the
 years to allow admission of hearsay statements made under circumstances
 that tend to assure reliability and thereby compensate for the absence of the
 oath and opportunity for cross-examination. Among the most prevalent of
 these exceptions is the one applicable to declarations against interest — an
 exception founded on the assumption that a person is unlikely to fabricate
 a statement against his own interest at the time it is made.

16 *Chambers*, 410 U.S. at 298.

17 In *Chambers*, the defense sought to introduce evidence that another person,
 18 McDonald, had confessed to the crime. *Id.* at 291. McDonald had confessed to three
 19 different people, then recanted. The trial court excluded the evidence on the ground that
 20 it was hearsay and prevented the defense from questioning McDonald as an adverse
 21 witness under a state rule preventing counsel from impeaching his own witness. *Id.* at
 22 292. The Supreme Court concluded that the state court had “mechanistically” applied
 23 state evidentiary rules to exclude the evidence, violating *Chambers*' due process rights.
 24 The circumstances of the confession — McDonald had spontaneously confessed to three
 25 separate people, other evidence in the case corroborated McDonald's confession, and,
 26 most tellingly, McDonald was available for cross-examination — indicated it was
 27 sufficiently reliable and should have been admitted. *Id.* at 298-99.

1 In *Washington v. Texas*, 388 U.S. 14, 19 (1967), Washington tried to call a
2 codefendant, Fuller, who had already been convicted, to testify that Washington had left
3 the murder scene before the fatal shot was fired. The trial court excluded the testimony
4 because a local rule prevented accomplices from testifying in behalf of each other. *Perry*,
5 713 F.3d at 1452 (citing *Washington*, 388 U.S. at 21.) The Supreme Court found that,
6 on balance, the exclusion violated Washington's due process rights. *Id.* The procedural
7 rule excluded an entire class of witnesses because they were ostensibly more likely to lie.
8 The prosecution, however, used these same witnesses in their cases in chief. Thus, the
9 Supreme Court found the rule was arbitrary, unfair and did not serve a legitimate state
10 interest. The defendant's due process rights were therefore violated by the exclusion of
11 the testimony. *Id.*

12 Despite a surface similarity to the facts in *Chambers*, House's statements are not
13 the kind of "unusually compelling" evidence contemplated by *Perry* and do not reach the
14 level of reliability that the statements in *Chambers* did. First, two levels of hearsay were
15 involved in the admission of House's statements. One level of hearsay was from
16 Freeman to House, and a second level of hearsay was from House to the investigator. In
17 *Chambers*, only one level of hearsay was involved, and the individuals who allegedly
18 heard McDonald's confessions were subject to cross-examination. Second, the exclusion
19 of the evidence in Ali's case was not based on a "mechanistic" application of the hearsay
20 rule. Rather, both the state trial court and the state appellate court carefully analyzed the
21 statements and the circumstances surrounding the statements for indicia of reliability.
22 Both courts concluded that while Freeman's statement to House was against Freeman's
23 penal interest and therefore may have possessed a level of trustworthiness, House's
24 statement to the defense investigator was not. House did not admit to giving Freeman the
25 gun with the knowledge it was to be used in a murder, and House was already serving
26 twenty years in prison for other crimes. Moreover, House had a motive to help Ali, a
27 Lincoln Park gang member in good standing, as opposed to Freeman, a Lincoln Park

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1 gang member who had become a snitch. As the Ninth Circuit noted in *Perry*, 713 F.2d
2 1447 (9th Cir. 1983):

3 Due process draws a boundary beyond which state rules cannot stray;
4 it does not displace the law of evidence with a constitutional balancing test.
5 State rules are designed not to frustrate justice, but to promote it. Our
6 common rules of evidence — testimonial privileges, the hearsay rule —
7 have been justified by long experience. *Chambers*, 410 U.S. at 298, 93
8 S.Ct. at 1047; *Washington*, 388 U.S. at 24, 87 S.Ct. at 1926 (Harlan, J.,
9 concurring). The state interests which they embody have already been
10 weighed and found to be compelling; only the most urgent considerations,
11 such as those in *Chambers*, can outweigh them. A defendant must show that
12 his interest clearly outweighs the state's before we will interfere with
routine procedural matters. *Accord Britton v. Rogers*, 631 F.2d 572, 580
(8th Cir. 1980), cert. denied, 451 U.S. 939, 101 S.Ct. 2021, 68 L.Ed.2d 327
(1981). Thus, a separate consideration of due process will rarely be needed
in day-to-day application of the rules of evidence. Particularly crucial and
reliable evidence, such as the excluded confession of *Chambers*, will serve
as a warning flag to trial judges to weigh the fairness of their decision.
Evidence of little importance, whether merely cumulative or of little
probative value, will almost never outweigh the state interest in efficient
judicial process.

13 *Perry*, 713 F.3d at 1453.

14 Here, the exclusion of House's statements was a thoughtful and thorough
15 application of state evidentiary laws, and not a rigid or mechanistic application, as Ali
16 claims.

17 Ali cites *Lunbery v. Hornbeak*, 605 F.3d 754 (9th Cir. 2010) as support for his
18 claim. (Mem. of P. & A. Supp. Am. Pet. at 28-34; Traverse at 4-5.) In *Lunbery*, the
19 defendant was charged with the murder of her husband and sought to introduce evidence
20 of a confession by a person who was dead at the time of trial. *Lunbery*, 605 F.3d at 757.
21 The house where the murder occurred had been previously occupied by a drug dealer and
22 his ex-wife, Frank Delgado and Cindy Ellis. Three days after the murder, a confidential
23 informant told law enforcement that he thought the killer had murdered the wrong person,
24 and that the intended victim was Delgado because Delgado had "ripped off several people
25 in town over drug dealings." *Id.* Another person interviewed by law enforcement, Oney
26 Rhoades, said he had seen Delgado and Henry Garza "in possession of 'dope' worth
27 \$40,000." *Id.* In addition, a neighbor saw a car linked to Garza and Delgado in the early
28 morning hours before the murder. *Id.* And, about three weeks after the murder, Rory

1 Keim told law enforcement that Garza, after hearing Keim and others discussing the
2 murder at a pizza parlor, came over to their table and said, “That’s a bummer. My
3 partners blew away the wrong dude.” *Id.* Nine years later, Lunbery was arrested for the
4 murder, and after several hours of interrogation, she confessed. Garza was dead by the
5 time of trial, and the trial court excluded Keim’s testimony about Garza’s statement. *Id.*
6 at 758-59. The Ninth Circuit concluded the exclusion of the evidence of Garza’s
7 statement was an unreasonable application of *Chambers*. *Id.* at 762.

8 *Lunbery* is distinguishable from the present case. In *Lunbery*, Garza’s statement
9 was made spontaneously three days after the murder. Garza’s involvement in the murder
10 was corroborated by three separate pieces of evidence: a confidential informant’s
11 statement to police that he thought the killer the intended victim was Delgado because of
12 Delgado’s drug dealing, Rhoades’ statement to law enforcement that he seen Delgado and
13 Henry Garza “in possession of ‘dope’ worth \$40,000,” and a neighbor who saw a car
14 linked to Garza in the early morning hours before the murder *Id.* The evidence
15 corroborating House’s statements was not nearly as strong. According to the defense
16 investigator, House stated he gave Freeman a nine millimeter before the shooting, the
17 same caliber as casings found at the scene. (Lodgment No. 1, vol. 3 at 0623.) But no
18 evidence establishes the gun House allegedly gave Ali was the same gun used during the
19 shootings. House also claimed Freeman described the College Avenue apartment
20 complex where the shooting occurred and the location of the victims. (Lodgment No. 1,
21 vol. 3 at 0540-41.) But House also admitted he was familiar with the College Avenue
22 complex and “had been there on occasion.” (*Id.* at 0623-2.) In addition, Freeman
23 claimed it was House who told Ali to go to the College Avenue complex to shoot rival
24 gang members. (*Id.* at 0619.) Thus, House could have gained his knowledge of the
25 complex and the location of the shooting from Ali, then told investigators it was Freeman
26 who gave him that information.

27 As the *Lunbery* court noted, “depending on the facts and circumstances of the case,
28 at times a state’s rules of evidence cannot be mechanistically applied and must yield in

1 favor of due process and the right to a fair trial.” *Lunbery*, 605 F.3d at 762. But the
 2 circumstances of Ali’s case are not of the quality contemplated by *Chambers* and
 3 *Lunbery*. The state court’s determination that House’s statements, as testified to by
 4 investigators, was not sufficiently reliable or exculpatory was consistent with Supreme
 5 Court precedent on this issue.

6 2. *Porter’s Statements*

7 As noted above, Ali sought to admit evidence of Porter’s statement to a District
 8 Attorney investigator during a “free talk” in which Porter said Freeman lied to law
 9 enforcement about not being involved in bank robberies. (Lodgment No. 2, vol. 19 at
 10 5211.) Porter also said he believed Freeman had stolen money from “the take,” that is,
 11 the money stolen during the bank robberies, leaving less for the other participants. (*Id.*)
 12 This evidence, according to Ali, would have impeached Freeman’s credibility, calling
 13 into question Freeman’s statement to police that Ali committed the shootings and, in
 14 conjunction with House’s statements, supported the defense theory that Freeman, not Ali,
 15 was the shooter. (Mem. of P. & A. Supp. Am. Pet. at 31.) The trial court excluded
 16 Porter’s statements, finding that Porter’s statements to the investigator were against his
 17 own penal interest, but that Freeman’s statements to Porter were not against Freeman’s
 18 interests. (Lodgment No. 2, vol. 22 at 6412.)

19 During a hearing on the admissibility of Porter’s testimony, defense attorney Funk
 20 read an email he had received from the prosecutor. Porter told district attorney
 21 investigator Billy Cahill the following:

22 [BY MR. FUNK]: “Between minute 22:00 and 33:00 in the
 23 paperwork you guys have, Jesse is lying, saying that he never robbed a
 24 bank. When we rallied up to go, this was my first one. Jesse said it was his
 25 second.” Between minute 36 and 39, talks about the second bank robbery
 26 he was involved in and mentions all the players, including Jesse Freeman.
 27 And minute 46, he was asked if he knew that Jesse Freeman was dead. He
 28 stated he’d heard rumors. Minute 46.25, reference their third bank robbery
 together, stated Jesse got scared. Minute 53.45, Freeman contacts him and
 tells him he wants to talk with him. Goes over to Freeman’s mother’s
 house. Also present in Tonicka. Freeman states he wants to be the man
 now. He wants to take it out of town. Minute 59:10, “I believe Jesse stole
 some money from the take, giving everyone else a smaller cut.” At one

1 hour 50 seconds, mentions the police report, say[s] the reports are all wrong.
2 And that's it.

3 (Lodgment No. 2, vol. 19 at 5211.)

4 As the state court noted, because Porter's statements were part of a "free talk"
5 during which Porter was assured what he said would not be used to prosecute him, they
6 were not sufficiently against Porter's penal interest to support their trustworthiness. In
7 addition, like House, Porter was a Lincoln Park gang member. He had an interest in
8 protecting fellow Lincoln Park gang member Ali by pointing the finger at Freeman, an
9 out-of-favor Lincoln Park gang member, who he knew was dead at the time he made the
10 statements. Porter's statements are nothing like the explicitly exculpatory statements
11 found to be admissible hearsay in *Chambers*, *Washington*, and *Lunbery*.

12 In any event, even if Porter's statements were wrongly excluded, the error did not
13 had a substantial injurious effect on the jury's verdict. *Brecht v. Abrahamson*, 507 U.S.
14 619, 637 (1993). Although the statements would have impeached Freeman's credibility,
15 as the state court noted, the jury already knew Freeman was a Lincoln Park gang member
16 who had committed robberies through the testimony of Tiano Durham, who testified he
17 committed bank robberies with Freeman. (Lodgment No. 2, vol. 24 at 6974-76.)
18 Freeman also admitted to meeting House at a gas station after House had committed a
19 robbery and looking over the proceeds with House, (Lodgment No. 1, vol. 5 at 1146), and
20 to selling drugs. (*Id.* at 1147.) The jury was well aware of Freeman's credibility
21 problems and the reasons why he knew so much about criminal activity.

22 For the foregoing reasons, the Court concludes that the state court's exclusion of
23 House's and Porter's testimony did not violate Ali's due process rights, and the state
24 appellate court's decision upholding the exclusion was thus neither contrary to, nor an
25 unreasonable application of clearly established Supreme Court law, nor an unreasonable
26 determination of the facts. *Williams*, 529 U.S. at 412-13; 28 U.S.C. 2254(d)(2). Ali is
27 not entitled to relief as to this claim.

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1 C. *Third Party Culpability*

2 Next, Ali argues his due process and fair trial rights were violated when the trial
3 court refused to give jury instructions on third party culpability. (Mem. of P. & A. Supp.
4 Am. Pet. at 36-40; Traverse at 5-7.) Respondent contends the state court's rejection of
5 this claim was neither contrary to, nor an unreasonable application of, clearly established
6 Supreme Court law. (Mem. of P. & A. Supp. Answer at 30-33.)

7 Ali raised this claim in the petition for review he filed in the California Supreme
8 Court. (Lodgement No. 7.) That court denied the petition without analysis or citation of
9 authority. (Lodgment No. 8.) Accordingly, this Court must "look through" to the state
10 appellate Court's decision denying the claim as the basis for its analysis. *Ylst*, 501 U.S.
11 at 805-06. That court wrote:

12 First, Ali contends that the trial court violated his right to due process
13 and a jury trial when it refused to instruct the jury with a requested pinpoint
instruction on third party culpability.

14 As the Attorney General acknowledges, there was arguably some
15 evidence of third party culpability presented at trial. Accordingly, Ali
16 requested the following pinpoint instruction on third party culpability: "You
17 have heard evidence that a person other than the defendant may have
18 committed the offense with which the defendant is charged. The defendant
19 is not required to prove the other person's guilt beyond a reasonable doubt.
20 Defendant is entitled to an acquittal if the evidence raises a reasonable doubt
in your mind as to the defendant's guilt. However, its weight and
significance, if any, are matters for your determination. If after
consideration of this evidence, you have a reasonable doubt that the
defendant committed this offense, you must give the defendant the benefit
of the doubt and find [him] [her] not guilty." The trial court denied the
instruction.

21 On several occasions, our Supreme Court has considered and rejected
22 arguments that a trial court prejudicially erred by not giving a requested
pinpoint instruction on third party culpability. (*Hartsch, supra*, 49 Cal.4th
23 at p. 504; *People v. Ledesma*, (2006) 39 Cal.4th 641, 720-721; *People v.*
Earp (1999) 20 Cal.4th 826, 887 (*Earp*).) In those cases, as here, the
24 proposed instruction, would have stressed that the defendant was not
required to *prove* third party culpability, and would have informed the jury
25 that the inquiry remained whether the defendant raised a reasonable doubt
as to his own guilt. (*Earp*, at p. 887; *Hartsch*, at p. 504.) Those cases were
26 resolved on the basis that if error existed, it was not prejudicial. Third party
culpability instructions "add little to the standard instruction on reasonable
27 doubt." (*Hartsch*, at p. 504.) Moreover, "even if such instructions properly
pinpoint the theory of third party liability, their omission is not prejudicial
28 because the reasonable doubt instructions give defendants ample
opportunity to impress upon the jury that evidence of another party's

liability must be considered when weighing whether the prosecution has met its burden of proof.” (*Ibid.*) “It is hardly a difficult concept for the jury to grasp that acquittal is required if there is a reasonable doubt as to whether someone else committed the charged crimes,” especially when as in this case, “[t]he closing argument focused the jury’s attention on that point.” (*Ibid.*)

Ali argues that his proposed third party culpability instruction was required because “a juror’s natural inclination would be to decide whether evidence proved a third party was guilty.” Viewing the entire charge to the jury, however, we find no merit to this argument. The trial court instructed the jury pursuant to CALCRIM No. 220 that a “defendant in a criminal case is presumed to be innocent. This presumption requires that the People prove a defendant guilty beyond a reasonable doubt. Whenever I tell you the People must prove something, I mean they must prove it beyond a reasonable doubt unless I specifically tell you otherwise.” The jury could not have understood from the instructions given that Ali was required to prove that someone else committed the crimes.

In light of the fact that the jury was instructed with the standard reasonable doubt instruction in this case, and that defense counsel stressed the concept of third party culpability during closing argument, we find the well-established approach of our Supreme Court to be applicable here. We therefore conclude that any error in not instructing the jury with Ali’s requested third party culpability instruction was harmless.

(Lodgment No. 6 at 27-29.)

“As a general proposition a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor.” *Mathews v. United States*, 485 U.S. 58, 63 (1988), citing *Stevenson v. United States*, 162 U.S. 313 (1896). The Ninth Circuit has noted that “[u]nder the Due Process Clause of the Fourteenth Amendment, criminal prosecutions must comport with prevailing notions of fundamental fairness . . . [which] require that criminal defendants be afforded a meaningful opportunity to present a complete defense.” *Bradley v. Duncan*, 315 F.3d 1091, 1098-99 (9th Cir. 2002) (citing *Mathews*, 485 U.S. at 63 and *California v. Trombetta*, 467 U.S. 479, 485 (1984)). Thus, a “[f]ailure to instruct on the defense theory of the case is reversible error if 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) (quoting *Beardslee v. Woodford*, 358 F.3d 560, 577 (9th Cir. 2004)); *Solis v. Garcia*, 219 F.3d 922, 929 (9th Cir. 2000); *Bashor v. Risley*, 730 F.2d 1228, 1240 (9th Cir. 1984) (stating that “[a] criminal defendant is entitled to adequate instructions on his or her theory of

defense”) (quoting *James v. Reese*, 546 F.2d 325, 327 (9th Cir. 1976).) When determining whether error occurred, the Court must consider the jury instructions as a whole. *Estelle*, 502 U.S. at 72. Jury instruction error is subject to harmless error analysis, that is, if error is found, relief can only be granted if it had a substantial and injurious effect on the jury’s verdict. *California v. Roy*, 519 U.S. 2, 6 (1996); *Brecht*, 507 U.S. at 637.

Ali argues the state court’s rejection of his proposed third party liability pinpoint instruction was contrary to *Mathews* because it did not specifically apply *Mathews*’ “two-factor standard for determining whether due process requires a defense instruction.” (Mem. of P. & A. Supp. Am. Pet. at 39; Traverse at 5-6.) The Supreme Court has held, however, as follows:

A state-court decision is “contrary to” our clearly established precedents if it “applies a rule that contradicts the governing law set forth in our cases” or if it “confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from our precedent.” *Williams v. Taylor*, 529 U.S. 362, 405-406, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). Avoiding these pitfalls does not require citation of our cases – indeed, it does not even require awareness of our cases, so long as neither the reasoning nor the result of the state-court decision contradicts them.

Early, 537 U.S. at 8.

Ali’s argument that the state court’s decision was “contrary to” clearly established Supreme Court law simply because it does not specifically cite or apply a two-factor test from *Mathews* fails.

Ali’s evidence of third party liability was as follows: As to the College Avenue shooting, Canute Dawes testified that in early July of 2008, he got into an argument with some women at the College Avenue apartments over Dawes having a red rag, a Blood color, in his back pocket. One woman told Dawes the women were Crips and that someone would come back for Dawes. (Lodgment No. 2, vol. 23 at 6617-21.) The next day, a shooting occurred at the College Avenue apartments. A second shooting, one of the shootings charged in this case, occurred on July 22, 2008, in which Larry Lumpkin was killed. (*Id.* at 6621-23.) Dawes testified he thought the early July and the July 22,

1 2008 shootings were connected to his altercation with the women. (*Id.* at 6645-48.)
2 During closing argument, the defense argued one of its theories, that members of the Crip
3 gang had committed the July 22, 2008 shooting at the College Avenue apartments.
4 (Lodgment No. 2, vol. 25 at 7330-32.)

5 As to the Harbor View shooting, Jermaine Simpson testified he saw a person walk
6 up to his brother Arcelon Osborne's car, and say "What's up, cuz?," a typical greeting
7 from one Crip to another. According to Ali, this pointed to a Crip committing the
8 shooting, not a Blood like Ali. Finally, there was evidence presented that Freeman had
9 the opportunity to commit the Harbor View shooting. Freeman was at Ali's apartment
10 on July 22, but, according to Ali's sister Ayan, left the apartment for between 30 minutes
11 to an hour or more; notably, Ayan did not state *when* Freeman was out of the apartment,
12 and indeed stated that he was "in and out" during the day and evening. (Lodgment No.
13 2, vol. 22 at 6434-35.) Other evidence presented connecting Freeman to the Harbor View
14 shooting was the fact that Freeman sometimes slept in Ali's bed, which could account for
15 the police finding a nine millimeter shell casing under Ali's mattress. (Lodgment No. 2,
16 vol 11 at 2590; vol. 21 at 6170-21; vol. 22 at 6379-80.) During closing, the defense
17 argued Freeman committed the Harbor View shooting. (Lodgment No. 2, vol. 25 at
18 7313-23.)

19 The state court's rejection of Ali's third party liability instruction was not an
20 unreasonable application of *Mathews*. In order for a defendant to be entitled to a specific
21 instruction, *Mathews* requires that there be "evidence sufficient for a reasonable jury to
22 find in his favor." *Mathews*, 485 U.S. at 63. The evidence Ali presented to support a
23 third party liability defense was based on speculation. Dawes did not see the July 22,
24 2008 shooting, and only believed Crips were responsible for the College Avenue shooting
25 because of his own "common sense" related to gang rivalries. Although the victims of
26 the College Avenue shooting stated the shooters said a Crip gang greeting, "What's up,
27 cuz?" shortly before they opened fire, Simpson testified that Crips would not open fire
28 on other Crips, but that sometimes, members of rival gangs will use the greeting, "What's

up, cuz?” so as not to tip the victim off. (Lodgment No. 2, vol. 13 at 3660.) According to Osborne, the shooter said the phrase in an aggressive manner. (*Id.* at 3714.) Gang detective Shane Lynn testified he believed, based on his expertise, that Crips would not fire on Crips. (Lodgment No. 2, vol. 20 at 5438.) As to Freeman, there was no evidence presented, other than speculation, that he committed either shooting. Ali did not present “evidence sufficient for a reasonable jury to find in his favor.” *Mathews*, 485 U.S. at 63.

Even if the failure to instruct the jury with the pinpoint instruction was error, however, its omission did not have a substantial and injurious effect on the jury’s verdict. *Brecht*, 507 U.S. at 637. The reasonable doubt instruction, combined with the eyewitness identification instruction adequately informed the jury that they were to find Ali guilty of the crimes charged only if they concluded, beyond a reasonable doubt, that it was Ali who had committed those crimes. (Lodgment No. 1, vol. 4 at 0883, 0895.) In addition, CALCRIM No. 373 instructed the jury that “[t]he evidence shows that another person may have been involved in the commission of the crime[s] charged against the defendant,” and that their “duty was to decide whether the defendant on trial here committed the crimes charged.” (*Id.* at 0907.)

Ali contends that affidavits submitted by two jurors indicate that, had the pinpoint instruction been given, those jurors would not have voted to convict Ali. (Mem. of P. & A. Supp. Am. Pet. at 40-41; Traverse at 6-7.) Assuming those affidavits can be considered by the Court, they do not show the failure to instruct with the pinpoint instruction had a substantial and injurious effect on the jury’s verdict. The proposed instruction read as follows:

You have heard evidence that a person other than the defendant may have committed the offense with which the defendant is charged. The defendant is not required to prove the other person’s guilty beyond a reasonable doubt. Defendant is entitled to an acquittal if the evidence raises a reasonable doubt in your minds as to the defendant’s guilt. Such evidence may by itself raise a reasonable doubt as to the defendant’s guilt. However, its weight and significance, if any, are matters for your determination. If after consideration of this evidence, you have a

reasonable doubt that the defendant committed this offense, you must give the defendant the benefit of the doubt and find [him] [her] not guilty.

1 (Lodgment No. 1, vol. 4 at 0875.)

2 The reasonable doubt instruction mirrored this instruction, informing the jurors that
3 Ali was presumed innocent and they needed to find he was guilty beyond a reasonable
4 doubt:

5 The fact that a criminal charge has been filed against the defendant
6 is not evidence that the charge is true. You must not be biased against the
7 defendant just because he was arrested, charged with a crime, or brought to
8 trial.

8 A defendant in a criminal case is presumed to be innocent. This
9 presumption requires that the People prove a defendant guilty beyond a
10 reasonable doubt. Whenever I tell you the People must prove something,
11 I mean they must prove it beyond a reasonable doubt [unless I specifically
12 tell you otherwise].

11 Proof beyond a reasonable doubt is proof that leave you with an
12 abiding conviction that the charge is true. The evidence need not eliminate
13 all possible doubt because everything in life is open to some possible or
14 imaginary doubt.

14 In deciding whether the People have proved their case beyond a
15 reasonable doubt, you must impartially compare and consider all the
16 evidence that was received throughout the entire trial. Unless the evidence
17 proves the defendant guilty beyond a reasonable doubt, he is entitled to an
18 acquittal and you must find him not guilty.

16 (*Id.* at 0883.)

17 In her affidavit, Juror No. 1 stated that she “felt Mr. Ali was innocent, but did not
18 see the evidence to prove it,” and that other jurors were “adamant that we could only
19 consider the evidence in front of us, and that it pointed to guilt.” Juror No. 2 stated that
20 he believed he could “only consider the evidence that was presented to me which pointed
21 to Mr. Ali’s guilt,” and that he was “unaware that I could find Mr. Ali not guilty without
22 having a reason to justify my decision.” Both jurors’ affidavits suggest difficulties with
23 an understanding of reasonable doubt, not third party liability. Moreover, both the
24 proposed and given instructions told the jury that the burden of proof was on the
25 prosecution to prove Ali was guilty beyond a reasonable doubt. (*Compare* proposed
26 instruction, “The defendant is not required to prove the other person’s guilt beyond a
27 reasonable doubt. Defendant is entitled to an acquittal if the evidence raises a reasonable
28 doubt in your minds as to the defendant’s guilt,” *with* given instruction “A defendant in

1 a criminal case is presumed to be innocent. This presumption requires that the People
 2 prove a defendant guilty beyond a reasonable doubt.”) Both instructions told jurors to
 3 consider all of the evidence in determining guilt. (*Compare* proposed instruction,
 4 “[Evidence another person committed the crimes] may by itself raise a reasonable doubt
 5 as to the defendant’s guilt. However, its weight and significance, if any, are matters for
 6 your determination. If after consideration of this evidence, you have a reasonable doubt
 7 that the defendant committed this offense, you must give the defendant the benefit of the
 8 doubt and find [him] [her] not guilty,” *with* given instruction “[Y]ou must impartially
 9 compare and consider all the evidence that was received throughout the entire trial.
 10 Unless the evidence proves the defendant guilty beyond a reasonable doubt, he is entitled
 11 to an acquittal and you must find him not guilty.”)

12 Given the above, the Court concludes the refusal to give the proposed instruction
 13 did not have a substantial and injurious effect on the jury’s verdict. *Brecht*, 507 U.S. at
 14 637. The state court’s rejection of this claim was neither contrary to, nor an unreasonable
 15 application of, clearly established Supreme Court law, nor was it based on an
 16 unreasonable determination of the facts. *Williams*, 529 U.S. at 412-13; 28 U.S.C.
 17 § 2254(d)(2). Ali is not entitled to relief as to this claim.

18 D. Juror Misconduct and Admissibility of Juror Affidavits

19 In claim three, Ali argues his Sixth and Fourteenth Amendment rights were
 20 violated by jurors’ misconduct, and the state court should have permitted jurors’
 21 affidavits regarding juror deliberations to be considered as part of this inquiry. (Mem.
 22 of P. & A. Supp. Am. Pet. at 41-50; Traverse at 7-10.) Respondent contends the state
 23 court’s resolution of this claim was neither contrary to, nor an unreasonable application
 24 of, clearly established Supreme Court law. (Mem. of P. & A. Supp. Answer at 35-42.)

25 Ali raised this claim in the petition for review he filed in the California Supreme
 26 Court. (Lodgement No. 7.) That court denied the petition without analysis or citation of
 27 authority. (Lodgment No. 8.) Accordingly, this Court must “look through” to the state
 28 appellate court’s decision denying the claim as the basis for its analysis. *Ylst*, 501 U.S.

1 at 805-06. That court wrote:

2 In support of his juror misconduct claim, Ali submitted a new
 3 declaration from Juror No. 1, similar to the declaration we have already
 4 discussed above, along with declarations from Juror No. 2 and Juror No.
 5.^{FN 18}

6 [FN 18: Ali also submitted a declaration from the defense
 7 investigator, who described statements made by Juror No. 9
 8 when talking to defense counsel after the verdict. According
 9 to the defense investigator, Juror No. 9 stated that, due to the
 10 wounds on Freeman's hands, he was unsure whether Freeman
 11 committed suicide. The totality of the statement by Juror No.
 12 9 — as described by the defense investigator — constitutes
 13 hearsay and was accordingly not admissible in connection with
 14 the motion for a new trial. (*People v. Williams* (1988) 45
 15 Cal.3d 1268, 1318 ["It is settled . . . that 'a jury verdict may
 16 not be impeached by hearsay affidavits.'"].) Moreover, to the
 17 extent Juror No. 9 was describing his thought process during
 18 jury deliberations, that statement is inadmissible under
 19 Evidence Code section 1150.]

20 Juror No. 2's declaration made three points: (1) he was "unaware that
 21 [he] could find [Ali] not guilty without have a reason to justify [his]
 22 decision"; (2) he felt time pressure to finish deliberating because some of
 23 the jurors would have to be replaced by alternates if deliberations continued
 24 into the next week; and (3) two jurors were "pressured" into voting guilty
 25 by other jurors who "no longer had the patience to deliberate."

26 Juror No. 5 stated: (1) Juror No. 6 seemed "sleepy" and "dazed" and
 27 seemed to not be paying attention during the trial; (2) at the beginning of
 28 deliberations Juror No. 6 said he was voting guilty because the District
 Attorney knew what he was doing, and "if [the District Attorney] had
 enough evidence to say he was guilty, then he must be guilty," and then
 Juror No. 6 didn't say anything else during deliberations; and (3) jurors felt
 under time pressure because if deliberations continued into the next week,
 deliberations would have to start over with alternates.

29 Juror No. 1's declaration was similar to the declaration filed to
 30 support the motion for release of juror information. Juror No. 1 stated: (1)
 31 she felt Ali was innocent "but did not see the evidence to prove it"; (2) she
 32 felt time pressure because if deliberations continued into the next week,
 33 alternates would have to be called in; (3) eight jurors seemed to have their
 34 minds made up at the beginning of deliberations although "[t]hey discussed
 35 other possibilities"; (4) Juror No. 4 was "scoffed at" by other jurors when
 36 he carefully reviewed the telephone records; and (5) two jurors had a
 37 conversation, with one describing Freeman as a " 'lazy loser,' " and the
 38 other saying " 'Aren't they all,' " which Juror No. 1 took to refer either to
 Black men or gang members.

39 The trial court denied the motion for a new trial based on juror
 40 misconduct. As in connection with the motion to release juror information,
 41 the trial court explained that many of Ali's juror misconduct allegations
 42 were based on evidence made inadmissible by Evidence Code 1150, and
 43 that the admissible evidence did not establish juror misconduct. Ali
 44 contends the trial court erred.

1 In evaluating a motion for a new trial based on juror misconduct,
 2 “[t]he trial court must undertake a three-step process The trial court
 3 must first ‘determine whether the affidavits supporting the motion are
 4 admissible. (Evid. Code, § 1150.)’ . . . [¶] Second, ‘If the evidence is
 5 admissible, the trial court must determine whether the facts establish
 6 misconduct. . . .’ [¶] ‘“Lastly, assuming misconduct, the trial court must
 7 determine whether the misconduct was prejudicial.”’ (Barboni v. Tuomi
 8 (2012) 210 Cal.App.4th 340, 345, citations omitted.) “‘We review a trial
 9 court’s ruling on a motion for a new trial under a deferential abuse-of-
 10 discretion standard.” [Citations.] “‘A trial court’s ruling on a motion for a
 11 new trial is so completely within that court’s discretion that a reviewing
 12 court will not disturb the ruling absent a manifest and unmistakable abuse
 13 of that discretion.” ’ ” (People v. Thompson (2010) 49 Cal.4th 79, 140
 14 (Thompson).)

15 Applying the first step of the analysis, we agree with the trial court
 16 that many of the statements in the three jurors’ declarations submitted in
 17 support of the new trial motion were inadmissible under Evidence Code
 18 section 1150. First, all three declarations describe the feeling of being under
 19 time pressure to reach a verdict because of impatience from other jurors or
 20 because alternates would have to be substituted if deliberations carried on
 21 in the next week. Those statements plainly describe the jurors’ mental state
 22 during deliberations and are inadmissible under Evidence Code section
 23 1150. (Cox, supra, 53 Cal.3d at p. 695 [statements regarding the effect on
 24 some jurors from complaints about slow pace of deliberations is
 25 inadmissible under Evid. Code, § 1150].) Second, Juror No. 5’s and Juror
 26 No. 1’s statements suggesting that they wanted to find Ali not guilty but did
 27 not do so because they couldn’t support the verdict with evidence is clearly
 28 a description of their thought processes. Third, the statement by Juror No.
 29 6 — as reported by Juror No. 5 — that he was voting guilty because the
 30 District Attorney knew what he was doing, is a statement of the mental
 31 process by which Juror No. 6 reached a verdict, and is not admissible.
 32 Therefore, the trial court properly excluded these statements from its
 33 consideration of the new trial motion. (See Steele, supra, 27 Cal.4th at p.
 34 1264 [“The trial court correctly refused to consider evidence of the jurors’
 35 subjective thought processes. Accordingly, did not abuse its discretion in
 36 denying the new trial motion to the extent it was based on this evidence.”].)

37 The remaining issue is whether the trial court was within its discretion
 38 to determine that the *admissible* evidence in the three jurors’ declarations
 39 was insufficient to establish juror misconduct for the purpose of the motion
 40 for a new trial.

41 The first admissible evidence we consider is the possible racially-
 42 directed comments from Juror No.1 heard from two other jurors (i.e.,
 43 Freeman was a “‘lazy loser,’” with the response “‘Aren’t they all.’”). As
 44 the trial court correctly pointed out, Juror No. 1’s interpretation that her
 45 fellow jurors harbored racial bias was speculative and subjective. The

46 statements she described were ambiguous, and she admitted in her
 47 declaration that the comments could have been referring to the gang
 48 members with whom Ali associated rather than constituting racially-biased
 49 comments. Further, as we have explained, even if the comments were
 50 directed at Freeman’s race, there is no indication that the racial stereotypes
 51 entered into any prejudgment of Ali’s guilt. Therefore, we agree with the

1 trial court that no juror misconduct was established by the portion of Juror
2 No. 1's declaration describing possible racially-biased comments.

3 Next, we consider whether Juror No. 5's description of Juror No. 6's
4 inattention during trial established misconduct. Although our Supreme
5 Court has held that *extreme* inattentiveness during trial will constitute
6 misconduct, it has recognized that "[e]ven the most diligent juror may reach
7 the end of his attention span at some point during a trial and allow his mind
8 to wander temporarily from the matter at hand." (*Hasson v. Ford Motor Co.*
9 (1982) 32 Cal.3d 388, 418.) Thus only inattentiveness rising to the level of
10 actually sleeping during trial or diverting one's complete attention by
11 activities such as reading a novel or doing crossword puzzles constitutes
12 misconduct. (*Id.* at pp. 411-412 [holding crossword puzzle working and
13 novel reading constituted misconduct and observing that, in general, cases
14 "decline to order a new trial in the absence of convincing proof that the
15 jurors were actually asleep during material portions of the trial."].) Here,
16 the inattentiveness described by Juror No. 5 did not rise to that level.
17 Moreover, the trial court expressly stated that it had closely watched the
18 jurors during the trial, and it had observed nothing except normal periodic
19 wandering of attention in Juror No. 6's demeanor. Accordingly, the trial
20 court was well within its discretion to deny the portion of the new trial
21 motion premised on supposed juror inattention.

22 Finally, we consider the statement by Juror No. 1 and Juror No. 5 that
23 some of the other jurors refused to engage in meaningful deliberations
24 because they made up their minds at the beginning of the discussion. A
25 perception by one juror that another juror has refused to deliberate will
26 establish juror misconduct only if there has been an "objective failure to
27 deliberate, such as jurors who turned their backs or otherwise objectively
28 segregated themselves from deliberations." (*Thompson, supra*, 49 Cal.4th
at p. 141.) That is not what is described in the declarations. On the
contrary, Juror No. 5's comments about what Juror No. 6 said during
deliberations shows that he *was* participating in the deliberative process by
stating the reasons for his views. Further, although Juror No. 1 claimed that
other jurors had already made up their minds at the beginning of
deliberations, she also stated that they "discussed other possibilities with us"
and discussed that they believed the evidence "pointed to guilt." Those
comments show that the other jurors *did* participate in the deliberations.^{FN19}

[FN 19: It is unclear what sort of misconduct Juror No. 1
meant to indicate by stating that other jurors "scoffed" when
Juror No. 4 went carefully through the telephone records. If
the incident is supposed to show a failure to deliberate, it does
not succeed in doing so and instead demonstrates a dialogue
and expression of opinion between jurors during
deliberations.]

In sum, the trial court was well within its discretion to conclude that
much of the jurors' statements supporting the motion for a new trial were
inadmissible and that the balance of the statements did not establish
misconduct. The trial court thus did not abuse its discretion in denying the
motion for a new trial.

(Lodgment No. 6 at 44-49.)

1 The first question this Court must answer is what evidence it can consider in
 2 determining whether juror misconduct occurred. Ali contends the juror affidavits were
 3 admissible under Federal Rule of Evidence 606(b) because they do not concern the jury's
 4 mental processes, statements made, or incidents which occurred during deliberations, or
 5 the effect of any such statements or incidents on an individual juror's mental process. *See*
 6 Fed.R. Evid. 606(b).² Consistent with Rule 606(b), clearly established Supreme Court
 7 law states that, except for "extraneous influences," juror testimony that impeaches a
 8 verdict is "flatly prohibited." *Tanner v. United States*, 483 U.S. 107, 117 (1987).
 9 Excluded evidence, evidence extrinsic to the trial, and other outside influences such as
 10 threats and bribes have been found to be "extraneous influences." *Mattox v. United*
 11 *States*, 146 U.S. 140, 148-53 (1892); *United States v. Henley*, 238 F.3d 1111, 1115-18
 12 (9th Cir. 2001). By contrast, recounting personal experiences, discussions of the
 13 defendant's failure to testify, jurors' ability to see and comprehend evidence, and
 14 allegations that jurors were under the influence or incompetent are considered internal
 15 processes and are not to be considered by a court faced with a motion for a new trial due
 16 to juror misconduct. *Tanner*, 483 U.S. at 120-21. The Court will consider each of the
 17 statements made by the jurors in their affidavits for admissibility.

18 1. *Statements About Feeling Pressure to Reach a Verdict*

19 Juror Nos. 1 and 2 stated in their affidavits that they and other jurors felt
 20 "pressured" and "compelled" to reach a verdict because other jurors had vacations
 21 scheduled and the jury would have to begin deliberations over if alternates were
 22 substituted. (Lodgment No. 1, vol. 4 at 1000, 1003-04.) Juror No. 5 stated that two other
 23 jurors, who were undecided, were told by another juror that if they did not reach a verdict
 24 that day, he would not return on Monday and the jury would have to start over. (*Id.* at
 25 0998.) Juror No. 5 also stated that Juror No. 7 "paced behind the two undecided jurors,
 26 sighing and giving them impatient looks." (*Id.*)

28 ² Federal Rule of Evidence 606(b) applies to federal habeas proceedings. *See Capps v. Sullivan*,
 921 F.2d 260, 262 (10th Cir. 1990).

1 The state court's conclusion that these statements described the jurors' internal
 2 thought processes and mental state during deliberations was not unreasonable. *See*
 3 *Warger v. Shauers*, ___ U.S. ___, 135 S. Ct. 521, 529-30 (2014). Descriptions of how
 4 jurors felt about the deliberation process, statements made by jurors and jurors' reactions
 5 to those statements, as the state court noted, "plainly describe the jurors' mental state
 6 during deliberations," and as such are inadmissible under federal law. *Id.* at 530, citing
 7 *Tanner*, 483 U.S. at 118; *United States v. Rutherford*, 371 F.3d 634, 640 (9th Cir. 2004);
 8 Fed.R.Evid. 606(b). Thus, they are inadmissible.

9 2. *Statements About the Burden of Proof and Weight of the Evidence*

10 Next are statements made by Juror Nos. 1 and 2 about their decision to find Ali
 11 guilty. Juror No. 1 stated that "[a]t the time of the verdict, [she] felt Mr. Ali was
 12 innocent, but did not see the evidence to prove it." (Lodgment No. 1, vol. 4 at 1000).
 13 She also stated that she "was not left with an abiding conviction that Mr. Ali was guilty,"
 14 and that she believed both the trial and the deliberations were "unfair." (*Id.*) Juror No.
 15 2 stated that at the time of deliberations, "[he] believed . . . that [he] could only consider
 16 the evidence that was presented to me which pointed to Mr. Ali's guilt," and that he was
 17 "unaware that [he] could find Mr. Ali not guilty without having a reason to justify my
 18 decision." (*Id.* at 1003.) Again, as the state court concluded these statements were
 19 "clearly a description of [the jurors'] thought processes," i.e., how they interpreted and
 20 applied the instructions to Ali's case, their assessment of the evidence, and the process
 21 by which they arrived at their decision. *See, e.g., Rutherford*, 371 F.3d at 640 (holding
 22 that jury's consideration of defendant's failure to testify is inadmissible evidence of
 23 internal thought process of the jury). They, too, are inadmissible. *Warger*, 135 S. Ct. at
 24 529-30; *Tanner*, 483 U.S. at 118; Fed.R.Evid. 606(b).

25 3. *Statement by Juror No. 1 about Juror No. 4 Reviewing Phone Records*

26 Juror No. 1 asserted in her affidavit that "Juror 4, Justin, went through the phone
 27 records carefully, and some of the others scoffed at him, asking why he would bother
 28 doing that." (Lodgment No. 1, vol. 4 at 1001.) The state court's determination that this,

1 too, was evidence only of the internal influences and thought processes of the jurors
 2 during deliberations was reasonable. Similar to the allegations that jurors were
 3 “pressured” or “compelled” to reach a verdict by fellow jurors’ statements regarding
 4 vacations and the substitution of alternate jurors, these allegations describe Juror No. 1's
 5 perceptions of fellow jurors’ thoughts about and approaches to the evidence and their
 6 roles as jurors, and their consideration is thus prohibited by state and federal law.
 7 *Warger*, 135 U.S. at 529-30; *Tanner*, 483 U.S. at 118; Fed.R.Evid. 606(b).

8 4. *Statement by Juror No. 6 About the District Attorney*

9 Juror No. 5 alleged in his affidavit that Juror No. 6 told fellow jurors as
 10 deliberations began that he was “voting for guilt . . . [because] he figured the District
 11 Attorney knew what he was doing, and that if he had enough evidence to say he was
 12 guilty, then he must be guilty.” (Lodgment No. 1, vol. 4 at 0997.) The state court
 13 reasonably concluded this evidence was “a statement of the mental process by which
 14 Juror No. 6 reached a verdict, and is not admissible.” (Lodgment No. 6 at 47.) As with
 15 the preceding evidence, the statement concerns the internal thought process by which
 16 Juror No. 6 considered the evidence, applied the law, and rendered his verdict.

17 5. *Statements About Jurors Refusing to Deliberate*

18 Juror No. 5 alleged in his affidavit that Juror No. 6 began deliberations by stating
 19 he was voting for guilt because the District Attorney must know what he was doing; Juror
 20 No. 5 stated Juror No. 6 “never said another word.” (Lodgment No. 1, vol. 4 at 0998.)
 21 Juror No. 1 alleged in her affidavit the following: “Eight out of the twelve jurors began
 22 deliberations with their minds already made up. They said Mr. Ali was guilty. They
 23 discussed other possibilities with us, but were adamant the we could only consider the
 24 evidence in front of us, and that it pointed to guilt.” (*Id.* at 1001.)

25 A refusal to deliberate can constitute misconduct. *See Williams v. Cavazos*, 646
 26 F.3d 626, 648 (9th Cir. 2011), *reversed on other grounds by Johnson*, 133 S. Ct. 1088
 27 (2013); *United States v. Boone*, 458 F.3d 321, 329 (3d Cir. 2006). This Court agrees,
 28 however, with the state court’s conclusion that statements made by Juror Nos. 1 and 5 do

1 not establish that other jurors refused to deliberate. Juror No. 5's allegation that Juror
 2 No. 6 "never said another word" after stating that he was voting guilty because the
 3 District Attorney knew what he was doing presupposes Juror No. 6 ignored the
 4 discussions other jurors were having about the evidence and the effect those discussions
 5 may have had on his internal decision making and thought processes. In addition, Juror
 6 No. 1's allegations, as the state court noted, showed that the "eight out of twelve jurors"
 7 she referred to were in fact deliberating by "discussing other possibilities" than guilt,
 8 while at the same time insisting (correctly) that the jury was only to consider the evidence
 9 in front of them, and, finally, concluding that the evidence presented had convinced them
 10 of Ali's guilt.

11 6. *Statements About Inattentive Juror*

12 Juror No. 5 stated in his affidavit that Juror No. 6 "was not paying attention," at
 13 times "seemed sleepy," and "had a dazed look like he was thinking about other things."
 14 (Lodgment No. 1, vol. 4 at 0097.) According to Juror No. 5, Juror No. 6 told him he
 15 wasn't paying attention during the trial. (*Id.*) The state court found this evidence to be
 16 admissible, presumably because it did not concern statements or mental processes during
 17 deliberations, but rather during the presentation of evidence. (Lodgment No. 6 at 48.)

18 The state appellate court noted that under California law, "only inattentiveness
 19 rising to the level of actually sleeping during trial or diverting one's complete attention
 20 by activities such as reading a novel or doing crossword puzzles constitutes misconduct."
 21 (Lodgment No. 6 at 48.) There is no clearly established Supreme Court law, however,
 22 that states inattentiveness during testimony establishes juror misconduct. Indeed, cases
 23 suggest the opposite conclusion. *See Warger*, 135 S. Ct. at 529-30; *Tanner*, 483 U.S. at
 24 125-26 (stating that, assuming Rule 606(b) permitted a "post-verdict inquiry of juror
 25 incompetence," a showing by defendant that "several of the jurors fell asleep at times
 26 during the afternoons" was insufficient to establish juror incompetency); *United States*
 27 *v. Zepeda*, 506 Fed. Appx. 536 at *2 (9th Cir. 2013) (stating that "Zepeda failed to
 28 demonstrate that the juror's inattention 'deprived him of his right to an impartial jury, and

more generally, to a fair trial’ because the record reflects that the juror was asleep during key testimony that incriminated him”); *United States v. Olano*, 62 F.3d 1180, 1189 (9th Cir. 1995) (stating that “the presence of a sleeping juror during trial does not, per se, deprive a defendant of a fair trial). In addition, as the state court noted, the trial judge make explicit factual findings regarding Juror No. 5’s allegations and the attentiveness of the jury:

[THE COURT]: First of all, I watch the jurors during the trial. I spend, in fact, the vast majority of my time either reading the live-note or watching the jurors. The reason I do that is it is not uncommon for jurors, particularly elderly jurors, to sometimes doze off. And there are various ways I deal with that. Oftentimes, I’ll have another juror poke them so I avoid any type of embarrassment to them. That never happened here. I did not see Juror No. 6 dozing or not paying attention.

Like all jurors, like everybody, at different times depending on where we were in the evidence, he was looking around the room. Attorneys do that. Everybody does that. But I certainly didn’t see him quote/unquote not paying attention.

(Lodgment No. 2, vol. 28 at 8117-18.)

Given the state of federal law, the factual findings made by the trial court, and the deference this Court must afford the state appellate court’s decision, the Court concludes the state court’s resolution of this claim was neither contrary to, nor an unreasonable application of, clearly established Supreme Court law, nor was it an unreasonable determination of the facts. *Williams*, 529 U.S. at 412-13; 28 U.S.C. § 2254(d)(2).

7. *Statements About Racial Bias*

The most troubling allegation of misconduct was Juror No. 1’s claim that two jurors made potentially racist comments during deliberations. Juror No. 1 alleged in her affidavit the following:

There was racism involved in our deliberations. In addition to the fact that all 8 of those who voted immediately for guilt were white males, I heard one of them describe Jesse Freeman as a “lazy loser.” Another of them responded, “Aren’t they all?” I took that to mean he meant black men or gang members, including the defendant.

(Lodgment No. 1, vol. 4 at 1001.)

Ali cites *United States v. Henley*, 238 F.3d 1111 (9th Cir. 2001) as support for his

1 contention that Rule 606(b) does not apply to statements made by jurors during
2 deliberations that illustrate racial bias. (Mem. of P. & A. Supp. Am. Pet. at 31-34.) In
3 *Henley*, a former juror who had been excused from the jury, Michael Malachowski, told
4 the court after trial that one of the jurors, Sean O'Reilly, had made racist statements while
5 carpooling and from trial, including the statement, "All the niggers should hang." *Henley*,
6 238 F.3d at 1112-13. Malachowski also alleged a juror, Brian Quihuis, had tried to extort
7 money from the defendant, Henley, in exchange for a not guilty vote. *Id.* at 1113. An
8 investigation was begun, revealing that Malachowski, not Quihuis, had initiated an
9 ultimately unsuccessful bribery attempt of Quihuis. *Id.* An evidentiary hearing was held
10 regarding the juror misconduct allegations, which included drug use by Quihuis and
11 discussions of the evidence before deliberations began by Quihuis, O'Reilly, and
12 Malachowski. *Id.* Evidence at the hearing was contradictory regarding the racist remarks
13 allegedly make by O'Reilly. *Id.* at 1113-14.

14 Defendants ultimately contended they were denied a fair trial because the jury was
15 tainted by racial bias which they claimed was an "extraneous influence" not prohibited
16 by Rule 606(b) from consideration, or, in the alternative, that they were denied a fair trial
17 because O'Reilly lied during voir dire about his racist beliefs. *Id.* at 1119. The Ninth
18 Circuit conceded that "a powerful case can be made that Rule 606(b) is wholly
19 inapplicable to racial bias because, as the Supreme Court has explained, '[a] juror may
20 testify concerning any mental bias in matters *unrelated to the specific issues that the juror*
21 *was called upon to decide. . . .*' [citations omitted]." *Id.* at 1120. The Court further stated
22 that "[i]t would seem, therefore, to be consistent with the text of the rule, as well as with
23 the broad goal of eliminating racial prejudice from the judicial system, to hold that
24 evidence of racial bias is generally not subject to Rule 606(b)'s prohibitions against juror
25 testimony." *Id.* The Court ultimately concluded, however, that they "need not decide
26 today whether or to what extent the rule prohibits juror testimony concerning racist
27 statements made during deliberations or, as in this case, outside of deliberations, but
28 during the course of the trial." *Id.* at 1121. The Court rested its decision to remand the

1 case for further evidentiary proceedings on the ground that the evidence suggested
2 O'Reilly had lied during voir dire about his racist beliefs, and, had those beliefs been
3 known, he would have been challenged for cause and would not have served on the jury.
4 *Id.* at 1121.

5 The Supreme Court's decision in *Warger* seriously undermines, if not totally
6 abrogates, *Henley*. Moreover, even if this Court were to apply the logic of *Henley* and
7 find that Rule 606(b) does not prevent this Court from considering the "racially tinged"
8 statements, the state court's decision that this did not constitute juror misconduct was not
9 unreasonable. Juror No. 1's statement that "[t]here was racism involved in our
10 deliberations," was, as the state court found, speculative. It was Juror No. 1's personal
11 perspective that "[i]t was not a coincidence that the [eight jurors who initially said Ali
12 was guilty] were all white males." The statement that Freeman was a "lazy loser," and
13 the other juror's response, "Aren't they all?" is troubling. It is not clear if the "they" in
14 the statement refers to gang members, black men, or both, and thus it is not clear whether
15 the juror harbored any racial animus. Given the Supreme Court's recent decision in
16 *Warger*, and the deference this Court must afford the state court's decision, however, the
17 Court cannot conclude it was unreasonable for the state court to find no juror misconduct.
18 *Williams*, 529 U.S. at 412-13.

19 Finally, Ali cites *Irwin v. Dowd*, 366 U.S. 717 (1961) as support for his contention
20 that Ali did not receive a fair trial. (Mem. of P. & A. Supp. Am. Pet. at 41-43; Traverse
21 at 9-10.) *Irwin* involved a case in which a massive amount of pre-trial publicity tainted
22 the jury pool and the eventual jury members. *Irwin* stands for the very broad proposition
23 the Constitution guarantees "the right to a fair trial by a panel of impartial, 'indifferent'
24 jurors." *Id.* at 722. In *Irwin*, the pretrial publicity was so extensive and biased against
25 the defendant that the individuals who were eventually selected for the jury were so
26 prejudiced against the defendant, who ultimately received the death penalty, that "[e]ight
27 out of the 12 thought petitioner was guilty" before deliberations even began. *Id.* at 727.
28 The Supreme Court stated that "[w]here one's life is at stake — and accounting for the

1 frailties of human nature — we can only say in the light of the circumstances here the
2 finding of impartiality does not meet constitutional standards.” *Id.* at 728.

3 The broad strokes of *Irwin* do not compel the conclusion that the jury in Ali’s case
4 was impartial or that the verdicts were not based on the evidence presented. Indeed, the
5 facts and circumstances of *Irwin* and Ali’s case are not alike. There is no evidence in the
6 record establishing extensive pretrial publicity that tainted the jury pool or the jury itself,
7 as in *Irwin*. Rather, Ali asks this Court to explore the motivations and reasons jurors had
8 for rendering their verdicts. This is not permitted. Moreover, Ali’s claim that his trial
9 violated *Irwin*’s requirement that a verdict must be based only on “the evidence presented
10 at trial” fails. *Irwin*’s pronouncement was made within the context of a jury pool so
11 compromised by pretrial publicity that it amounted to an external influence on the jury.
12 Here, no such external influences were present. Accordingly, the state court’s denial of
13 the claim was not an unreasonable application of *Irwin*.

14 8. *Unreasonable Determination of the Facts*

15 Ali also argues the state court’s decision was based on an unreasonable
16 determination of the facts because the state court’s conclusion that Juror No. 6 was
17 deliberating despite his admission he believed Ali “must be guilty” because “the District
18 Attorney knew what he was doing” was objectively unreasonable. (Mem. of P. & A.
19 Supp. Am. Pet at 36-37.) Juror No. 6 allegedly stated that he was voting for guilt *because*
20 the District Attorney knew what he was doing and if the District Attorney had enough
21 evidence to say Ali was guilty, then he was guilty. As the state court concluded, Juror
22 No. 6 gave his reasons for his views, and the deliberative process he used to arrive at his
23 conclusion. Given the deference this Court must afford the state court’s decision, it was
24 not objectively unreasonable to so conclude.

25 For the foregoing reasons, the Court finds that the state court’s resolution of Ali’s
26 juror misconduct claim was neither contrary to, nor an unreasonable application of,
27 clearly established Supreme Court law. *Williams*, 529 U.S. at 412-13; 29 U.S.C.
28 § 2254(d)(1). Nor was it based on an unreasonable determination of the facts in light of

1 the evidence presented. 28 U.S.C. § 2254(d)(2). Accordingly, Ali is not entitled to relief
2 as to this claim.

3 E. *In Camera Review of Documents*

4 Ali next claims his due process rights were violated by the state court's *in camera*
5 review of police personnel records pursuant to the state procedure outlined in *Pitchess*
6 *v. Superior Court*, 11 Cal. 3d 531 (1974) and the withholding of information pursuant to
7 the "official information" exception of California Evidence Code § 1040. (Mem. of P.
8 & A. Supp. Am. Pet. at 50-51.) Respondent contends the state court's rejection of this
9 claim was neither contrary to, nor an unreasonable application of, clearly established
10 Supreme Court law. (Mem. of P. & A. Supp. Answer at 15-16.)

11 *Pitchess* provides a mechanism by which California defendants are permitted
12 access to information contained in an officer's personnel file if that information is
13 "pertinent to the defense." *Eulloqui v. Superior Court*, 181 Cal. App. 4th 1055, 1064
14 (2010). Once a sufficient showing has been made, the officer's personnel file is reviewed
15 *in camera* by the trial judge who makes a determination as to whether there is any
16 pertinent, discoverable information in the file. *Id.* California Evidence Code § 1040
17 permits the District Attorney's office to withhold certain confidential information if the
18 need for confidentiality outweighs the need for disclosure. Evid. Code § 1040.
19 Information such as the identity of a confidential informant is a typical subject of request
20 to disclose or an assertion of privilege under § 1040. *See People v. Acevedo*, 209 Cal.
21 App. 4th 1040, 1053 (2012). A similar *in camera* proceeding is employed. Evidence
22 Code § 1042(d). The state appellate court concluded the trial court conducted the
23 appropriate *in camera* proceedings and its decisions regarding the confidential
24 information in the police personnel files and other documents were correct. The court
25 wrote:

26 Prior to trial, Ali made motions for discovery of information in the
27 personnel files of (1) San Diego Police Detective Duane Malinowski; and
28 (2) San Diego District Attorney Investigator Shane Lynn. Malinowski was
the arresting officer on Ali's case, and Lynn was heavily involved in
investigating the shootings for which Ali was convicted. Specifically, Ali
sought evidence from Malinowski's and Lynn's personnel files,

1 encompassing — among other things — evidence of dishonesty and
 2 excessive use of force or aggression. The trial court determined that
 3 evidence showing a pattern harassing gang members as to Malinowski and
 allegations of fabrication of evidence and threatening witnesses as to Lynn
 would be relevant in this case.

4 The trial court reviewed the relevant personnel records in camera for
 5 the purpose of determining whether they contained such items and found
 6 no discoverable material. On appeal, Ali requests that we review the
 7 personnel records provided to the trial court in camera to determine whether
 the trial court abused its discretion in determining that no information from
 Malinowski and Lynn's records should be provided. The Attorney General
 does not oppose this request.

8 A defendant is entitled to discovery of a law enforcement officers'
 9 confidential personnel records if those files contain information that is
 10 potentially relevant to the defense. (*Pitchess v. Superior Court* (1974) 11
 Cal.3d 537-583; Evid. Code, §§ 1043-1045.) The discovery procedure has
 11 two steps. First, the defendant must file a motion seeking such records,
 12 containing affidavits "showing good cause for the discovery or disclosure
 13 sought [and] setting forth the materiality thereof to the subject matter
 14 involved in the pending litigation." (Evid. Code, § 1043, subd. (b)(3).) If
 good cause is shown, the trial court then reviews the records in camera to
 determine whether any of them are relevant to the intended defense. (*Id.*,
 § 1045, subd. (b).) A trial court's decision on the discoverability of material
 in police personnel files is reviewable under an abuse of discretion standard.
 (*People v. Breaux* (1991) 1 Cal.4th 281, 311-312.)

15 Following established procedure, "the records have been made part
 16 of the record on appeal but have been sealed, and appellate counsel for
 17 defendant have not been permitted to view them." (*People v. Hughes*
 18 (2002) 27 Cal.4th 287, 330; see also *People v. Mooc* (2001) 26 Cal.4th
 1216, 1232.) We have independently examined the personnel files in
 camera. Based on that review, we conclude that the trial court did not abuse
 its discretion in refusing to disclose any further information from those files.

19

20 Ali also requests that we review sealed records to determine whether
 21 the trial court abused its discretion in determining that good cause had been
 shown for the prosecution to withhold confidential information in discovery.

22 We begin with the applicable statutory background. Under section
 23 1054.7, the prosecution is required to provide discovery to the defense as
 24 described in section 1054.1, "unless good cause is shown why a disclosure
 25 should be denied, restricted, or deferred." (§ 1054.7.) Good cause is
 26 statutorily limited to "threats or possible danger to the safety of a victim or
 27 witness, possible loss or destruction of evidence, or possible compromise of
 28 other investigations by law enforcement." (*Ibid.*) Similarly, under
 Evidence Code section 1040, subdivision (b)(2), a public entity has a
 privilege to refuse to disclose official information if "[d]isclosure of the
 information is against the public interest because there is a necessity for
 preserving the confidentiality of the information that outweighs the
 necessity for disclosure in the interest of justice" (Evid. Code, § 1040,
 subd. (b)(2).) Both statutes involve the same balancing process by the trial
 court, in which the trial court has the "task of weighing the government's

1 claim of privilege against the defendant's constitutional right to present a
 2 defense," taking into account "the consequences to the public of disclosure
 3 and the consequences to the litigant of nondisclosure'" (*People v. Jackson*
 4 (2003) 110 Cal.App.4th 280, 290-291 (*Jackson*).)

5 Section 1054.7 states that the trial court must conduct an in camera
 6 proceeding to consider whether the prosecution has made a showing of good
 7 cause to deny or regulate disclosure of confidential information, and
 8 provides that if the trial court grants relief "the entire record of the showing
 9 shall be sealed." (§ 1054.7; see also Evid. Code, §915, subd. (b) [providing
 10 for in-chambers hears to determine privilege claimed under Evid. Code,
 11 § 1040].)

12 These statutory provisions were applied in this case, when, on several
 13 occasions, the trial court considered whether the prosecution had shown
 14 good cause to redact or withhold certain items of evidence. According to
 15 the statutory procedures, the trial court sealed the record of those
 16 proceedings. Ali and the People agree that we should conduct a review of
 17 the sealed records to determine whether the trial court abused its discretion.
 18 (See *Jackson, supra*, 110 Cal.App.4th at pp. 290-291 [reviewing whether
 19 the trial court abused its discretion in ruling that the prosecution could
 20 withhold certain confidential discovery].) [FN 3 omitted.]

21 We have reviewed the sealed transcripts contained in the appellate
 22 record and have determined, based on the testimony reported therein, that
 23 the trial court did not abuse its discretion in finding good cause for the
 24 prosecution to withhold discovery of certain confidential information. The
 25 evidence supports a finding that release of the confidential information
 26 would compromise ongoing law enforcement investigations, and that it did
 27 not contain any material that was favorable to the defense. (See *Brady v.*
 28 *Maryland* (1963) 373 U.S. 83 (*Brady*).)

(Lodgment No. 6 at 6-10.)

29 *Pitchess* and Evidence Code § 1040 are state provided rights of discovery of
 30 certain records under state law, and as such, any errors in the application of the
 31 procedures outlined in *Pitchess* and Evidence Code § 1040 are not cognizable on federal
 32 habeas review. *Estelle*, 502 U.S. at 67-68. Nevertheless, Ali claims his federal due
 33 process rights were violated because the trial court conducted an in camera review of the
 34 material, as required by *Pitchess* and Evidence Code § 1040, and he was not permitted
 35 to access to it to make an independent determination of materiality.

36 The Ninth Circuit has recognized that *Pitchess* is essentially a parallel procedure
 37 to *Brady* for disclosing exculpatory material but that, under *Pitchess*, a defendant must
 38 meet a lower threshold to satisfy his burden and will have access to a broader amount of
 39 material if that threshold is met. See *Harrison v. Lockyer*, 316 F.3d 1063, 1065-66 (9th

1 Cir. 2003). Here, Ali may contend that his federal due process rights were violated when
2 he was denied access to exculpatory and impeachment material, but in a federal habeas
3 corpus proceeding, the standard for determining whether such a violation has occurred
4 is *Brady*. Whether Ali has a valid *Brady* claim is discussed in Section IV(F) of this
5 Report and Recommendation, *infra*.

6 As to his claim that denial of access to Evidence Code § 1040 materials violated
7 his due process rights, the Supreme Court noted in *Roviaro v. United States*, 353 U.S. 53
8 (1957) that when a defendant seeks evidence helpful and relevant to his defense, and the
9 government seeks to protect information vital to such things as ongoing investigations
10 or the safety of an informant, “no fixed rule with respect to disclosure is justifiable.” *Id.*
11 at 62. Rather, a court must balance the interests of the government and the defendant’s
12 right to prepare a defense. *Id.* The California Evidence Code procedure outlined in §
13 1042 and which the trial court employed, is consistent with the mandate of *Roviaro*.
14 Accordingly, the state appellate court’s denial of this claim was neither contrary to, nor
15 an unreasonable application of, clearly established Supreme Court law. *Williams*, 529
16 U.S. at 412-13.

17 F. *Withholding of Exculpatory Evidence*

18 In claim five, Ali contends the prosecutor withheld exculpatory and impeachment
19 material, which resulted in violations of Ali’s fair trial, confrontation, and due process
20 rights as well as his right to effective assistance of counsel. (Mem. of P. & A. Supp. Am.
21 Pet. at 51-64.) Respondent argues the state court’s resolution of this claim was neither
22 contrary to, nor an unreasonable application of, clearly established Supreme Court law.
23 (Mem. of P. & A. Supp. Answer at 16-19.)

24 Ali raised this claim in the petition for review he filed in the California Supreme
25 Court. (Lodgement No. 7.) That court denied the petition without analysis or citation of
26 authority. (Lodgment No. 8.) Accordingly, this Court must “look through” to the state
27 appellate Court’s decision denying the claim as the basis for its analysis. *Ylst*, 501 U.S.
28 at 805-06. That court wrote:

1 Ali's final discovery-related argument is that the prosecution engaged
2 in certain discovery violations and thereby infringed his constitutional
3 rights.

4 We first review the legal standards applicable to Ali's claim that his
5 constitutional rights were infringed when the prosecutor failed to provide
6 discovery. "Under the federal Constitution's due process clause, as
7 interpreted by the high court in *Brady v. Maryland*, *supra*, 373 U.S. [at page
8 87], the prosecution has a duty to disclose to a criminal defendant evidence
9 that is "both favorable to the defendant and material on either guilt or
10 punishment." " (In re *Bacigalupo* (2012) 55 Cal.4th 312, 333.) "There
11 are three components of a true *Brady* violation: The evidence at issue must
12 be favorable to the accused, either because it is exculpatory, or because it is
13 impeaching; that the evidence must have been suppressed by the State,
14 either willfully or inadvertently; and prejudice must have ensued.'
[Citation.] Prejudice, in this context, focuses on 'the materiality of the
evidence to the issue of guilt and innocence.' [Citations.] Materiality, in
turn, requires more than a showing that the suppressed evidence would have
been admissible [citation], that the absence of the suppressed evidence made
conviction 'more likely' [citation], or that using the suppressed evidence to
discredit a witness's testimony 'might have changed the outcome of the
trial' [citation]. A defendant instead 'must show a 'reasonable probability
of a different result.' " (People v. *Salazar* (2005) 35 Cal.4th 1031, 1043
(*Salazar*)). Thus, under *Brady*, "there is no 'error' unless there is also
'prejudice.' " (In re *Sassounian* (1995) 9 Cal.4th 535, 545, fn 7.) [FN 4
omitted.]

15 Ali contends that the prosecutor violated the obligation to provide
16 discovery under *Brady*. But instead of focusing on any specific items, Ali
17 claims that "[t]here was a pervasive failure to provide material discovery to
18 the defense . . .," and he "was prejudiced at every turn." In a portion of
19 Ali's argument that is separate from his discussion of legal principals, Ali
20 reviews the long history of discovery proceedings in this case. [FN 5
omitted.] However, Ali does not take the necessary step of developing his
21 appellate argument to explain which items of withheld or delayed discovery
22 were material and created prejudice.

23 Because Ali has failed to discuss any specific discovery violations
24 that he contends warrant reversal, his appellate briefing is woefully
25 inadequate. "An appellate court is not required to examine underdeveloped
26 claims, nor to make arguments for parties." (*Paterno v. State of California*
27 (1999) 74 Cal.App.4th 68, 106.) Our role is to evaluate " 'legal argument
28 with citation of authorities on the points made.' " (People v. *Stanley* (1995)
10 Cal.4th 764, 793 (*Stanley*)). Specifically, as applied to Ali's claim that
the prosecutor violated the obligation to provide discovery under *Brady*,
Ali's inadequate briefing causes two fatal deficiencies in his legal argument.

29 First, as we have explained, *Brady* applies only to evidence that is
30 " 'favorable to the accused, either because it is exculpatory, or because it is
31 impeaching.' " (*Salazar, supra*, 35 Cal.4th at p. 1043.) Because Ali does
32 not, in the course of his argument, identify any *specific* discovery violations
33 on which he premises his *Brady* argument, he has not attempted to establish,
34 as required by *Brady*, that the items of withheld or delayed discovery were
35 favorable to the accused.

1 Second, to establish a *Brady* violation, Ali must establish prejudice
 2 by showing “a reasonable probability of a different result.” (*Salazar*,
 3 *supra*, 35 Cal.4th at p. 1043.) Ali has not attempted to explain how any
 4 specific discovery violation caused prejudice in this case. Indeed, Ali relies
 5 solely on generalized statements such as that “every item of withheld or
 6 delayed discovery impacted adversely the directly the ability of defense
 7 counsel to prepare for the preliminary hearing and trial, to challenge the
 8 prosecution witnesses’ credibility, and to raise doubt about the reliability of
 9 the prosecution’s case,” and that he was “deprived of a reasonable time to
 10 analyze the evidence against him and mount a thorough, well prepared,
 11 cohesive defense.” [FN 6 omitted.] Ali’s “generalized statements are
 12 insufficient to demonstrate prejudice.” (*People v. Verdugo* (2010) 50
 13 Cal.4th 281-282), and stand in sharp contrast to the case that Ali relies on,
 14 which discusses *specific* items of withheld discovery that were relevant to
 15 the defense. (*People v. Johnson* (2006) 142 Cal.App.4th 776, 782-786.)

16 We accordingly conclude that Ali has failed to establish that his
 17 constitutional rights were violated by the prosecutor’s purported discovery
 18 violations during the course of this action.

19 (Lodgment No. 6 at 10-13.)

20 As correctly stated by the state court, “[t]he suppression by the prosecution of
 21 evidence favorable to an accused upon request violates due process where the evidence
 22 is material either to guilt or punishment, irrespective of the good faith or bad faith of the
 23 prosecution.” *Brady*, 373 U.S. at 87. In order to establish a *Brady* violation, a defendant
 24 must establish three things: (1) the evidence was suppressed by the prosecution, either
 25 willfully or inadvertently, (2) the withheld evidence was either exculpatory or
 26 impeachment material, and (3) the evidence was material to the defense. *Benn v.*
 27 *Lambert*, 283 F.3d 1040, 1052-53 (9th Cir. 2002) (citing *United States v. Bagley*, 473
 28 U.S. 667, 676, 678 (1985) and *United States v. Agurs*, 427 U.S. 97, 110 (1976).)
 “Evidence is deemed prejudicial, or material, only if it undermines confidence in the
 outcome of the trial. *Benn*, 283 F.3d at 1053 (citing *Bagley*, 473 U.S. at 676; *Agurs*, 427
 U.S. at 111-12). “Moreover, we analyze all of the suppressed evidence together, using
 the same type of analysis that we employ to determine prejudice in ineffective assistance
 of counsel cases.” *Id.* (citing *Bagley*, 473 U.S. at 682 and *United States v. Shaffer*, 789
 F.2d 682, 688-89 (9th Cir. 1986).)

 As he did in state court, Ali recounts the history of discovery proceedings in a
 lengthy section comprising over ten pages. (Mem. of P. & A. Supp. Am. Pet. at 50-62.)

1 Much of those pages simply recount what occurred in terms of discovery, allegations of
 2 discovery violations, actions taken and rulings by the trial court without sufficient
 3 explanation as to how the allegedly suppressed information was exculpatory or material,
 4 and how Ali was prejudiced by that alleged suppression. In Ali's Memorandum of Points
 5 and Authorities in Support of the Amended Petition addressing this claim, the following
 6 allegations are specific enough for this Court to address:

- 7 1. The prosecution failed to turn over audio tape recordings of witnesses
 8 until six months after they were in possession of the prosecutor. (*Id.* at 57.)
- 9 2. The passage of 18 months between the crimes and the trial resulted in the
 10 defense being unable to locate witnesses. (*Id.* at 58.)
- 11 3. Witnesses Tiffany Patton and Donald Robinson became uncooperative
 12 with the defense after speaking to the prosecutor's investigator. (*Id.*)
- 13 4. The prosecution failed to turn over information on their cell phone tower
 14 expert until three weeks before trial. (*Id.* at 59.)
- 15 5. The prosecution failed to turn over information about the Arizona
 16 investigation into Freeman's death until three weeks before trial. (*Id.*)³
- 17 6. The prosecution discovered late in the trial that one of the seized cell
 18 phones was not locked as previously thought and sought to introduce
 19 contact information from the phone. (*Id.* at 60.)
- 20 7. The prosecution "sat on" information concerning Freeman's conduct and
 21 state of mind after he went to Arizona, by claiming it was irrelevant." The
 22 trial court then accused the prosecution of "hiding" behind Evidence Code
 23 § 1040. (*Id.*)
- 24 8. The prosecution failed to provide discovery on police officer Scott
 25 Holden of the gang suppression unit who testified about "gang encounters

26
 27 ³ Ali also claims the prosecution delayed charging Marcus House until three years after he
 28 committed the crimes with which he was charged, and that the purpose of this delay was to "prevent
 House from testifying for Mr. Ali by forcing House to exercise his Fifth Amendment privilege." This
 is an allegation of prosecutorial misconduct, not a *Brady* violation, and will be addressed in Section
 IV(J) of this R&R.

1 with Ali and about gangs generally.” (*Id.* at 60-61.)

2 9. The prosecution did not provide discovery on the personal knowledge
3 of the gang expert who testified regarding the predicate acts for the gang
4 enhancements or on the “underlying factual basis for the predicate gang
5 acts.” (*Id.* at 62.)

6 10. The prosecution presented testimony from District Attorney
7 investigator Shane Lynn about threats to two prosecution witnesses without
8 providing discovery on those witnesses. (*Id.* at 61.)

9 11. The prosecution withheld impeachment evidence on defense witness
10 Lula Ali who testified Ali was at home on the day and evening of the
11 shootings. (*Id.* at 62.)

12 12. The prosecution withheld 80 CD’s of interviews and by the time they
13 were disclosed, the witnesses were unavailable. (*Id.*)

14 Assuming without deciding that Ali has established the prosecution suppressed
15 this evidence, the state court’s conclusion that Ali has not established the other two
16 prongs of a *Brady* violation — materiality and prejudice — was not unreasonable. *See*
17 *Brady*, 373 U.S. at 87; *Benn*, 283 F.3d at 1052-53. Ali does not allege any *specific facts*
18 as to what exculpatory or impeaching information was in the audio tape recordings
19 (incident no. 1), information about the cell phone expert (incident no. 4), the Arizona
20 investigation into Freeman’s death (incident no. 5), the testimony about “gang encounters
21 with Ali and gangs generally” by Holden (incident no. 8), the testimony about his
22 personal knowledge of gangs and the predicate gang acts by Detective Malinowski
23 (incident no. 9), the testimony by investigator Lynn about threats to prosecution
24 witnesses (incident no. 10), and the 80 CD’s of interviews that were turned over late
25 (incident no. 12), or what specific witnesses and exculpatory evidence was lost as a result
26 of the 18 month delay in beginning the trial (incident no. 2). He only alleges violations
27 of state discovery statutes and generalized “unfairness.” That is not sufficient to satisfy
28 *Brady*. As to Ali’s allegation that the prosecution was obligated to disclose impeachment

1 information regarding defense witness Lulu Ali, *Brady* applies to impeachment
2 information of prosecution witnesses, not defense witnesses, and there is no clearly
3 established Supreme Court law that requires the prosecution to turn over evidence that
4 impeaches a defense witness, or that such evidence would be considered “favorable to the
5 accused.” *See Malone v. Felker*, 453 Fed. Appx. 754 (9th Cir. 2011).⁴

6 In any event, Ali does not specify what prejudice he suffered as a result of any
7 delayed discovery or lack of discovery. Evidence is material for purposes of *Brady* only
8 if it undermines confidence in the outcome of the trial. *Benn*, 283 F.3d at 1053. Ali does
9 not explain how any of the allegedly delayed or missing evidence would have resulted
10 in a different outcome in the face of the evidence presented at trial. Freeman testified Ali
11 confessed to the July 22, 2008 shootings. (Lodgment No. 2, vol. 11 at 2618-22, 2625-
12 29.) Forensic and ballistic evidence connecting Ali with the gun used in both shootings.
13 (Lodgment No. 2, vol. 16 at 4537, 4551-52, 4558, 4581.) James Gomez testified he saw
14 Ali walk by him right before the College Avenue shooting. (Lodgment No. 2, vol. 12 at
15 2766.) Ali does not explain what suppressed or delayed evidence would have
16 successfully countered the prosecution’s evidence.

17 Further Ali’s allegations that Tiffany Patton and Donald Robinson became
18 uncooperative with the defense after talking to the District Attorney’s investigator does
19 not state a *Brady* claim. Ali provides no support for his claim that the prosecution
20 suppressed any evidence related to Patton or Robinson or that the prosecution was
21 connected to their change of heart. As to Ali’s allegation the previously-thought-to-be-
22 locked phone, the trial court excluded that information from the prosecution’s case in
23 chief. (Lodgment No. 2, vol. 15 at 4207-08.) Since there is no *Brady* violation, there is
24 insufficient support for Ali’s claim that he was denied effective assistance of counsel as
25 a result of *Brady* violations.

26 For all the foregoing reasons, the state court’s resolution of this claim was neither
27

28 ⁴ Pursuant to Ninth Circuit Rule 36-3(c), “Unpublished decisions and orders of [the Ninth Circuit] issued on or after January 1, 2007 may be cited to the courts of this circuit in accordance with FRAP 32.1.”

contrary to, nor an unreasonable application of, clearly established Supreme Court law, nor was it based on an unreasonable determination of the facts. *Williams*, 528 U.S. at 412-13; 28 U.S.C. § 2254(d)(2). Ali is not entitled to relief as to this claim.

G. *Refusal to Grant Immunity*

In claim six, Ali contends the state trial judge violated his due process, confrontation, and compulsory process rights when he refused to grant immunity to two defense witnesses, Marcus House and Hunter Porter, after the prosecution declined to grant immunity. (Mem. of P. & A. Supp. Am. Pet. at 64-73.) Respondent argues there is no clearly established Supreme Court law that establishes a trial court has such authority. (Mem. of P. & A. Supp. Answer at 28-30.) In the alternative, Respondent notes that even under Ninth Circuit authority which provides for such immunity in certain cases, the facts of Ali's case do not warrant relief. (*Id.*)

Ali raised this claim in the petition for review he filed in the California Supreme Court. (Lodgement No. 7.) That court denied the petition without analysis or citation of authority. (Lodgment No. 8.) Accordingly, this Court must "look through" to the state appellate court's decision denying the claim as the basis for its analysis. *Ylst*, 501 U.S. at 805-06. That court wrote:

Ali sought to call Marcus House and Hunter Porter as witnesses. However, both men invoked their Fifth Amendment right not to testify on the basis that their testimony might incriminate them. The trial court denied Ali's request that it grant use immunity to House and Porter so that they could testify without danger of being prosecuted based on their testimony. [FN 8 omitted]. Ali contends that, in doing so, the trial court erred. [FN 9 omitted].

Before analyzing Ali's argument, we provide an overview of House's and Porter's expected testimony.

Porter was a Lincoln Park gang member who was serving a 26-year term for attempted murder and was charged as a defendant in a prosecution for a series of bank robberies. He participated in an interview with district attorney investigators in June 2010, during which he made some statements about Freeman. Most significantly, according to Porter, Freeman had participated in bank robberies with him. Porter also stated that on one occasion Freeman had stolen some of the proceeds of the robberies from other participants. In seeking immunity for Porter, defense counsel argued that Porter's statement that Freeman committed bank robberies would have value in impeaching Freeman's credibility because Freeman had claimed in his interviews with law enforcement that he did *not* participate in any of the

1 Lincoln Park bank robberies. Further, if Freeman had stolen robbery
 2 proceeds from fellow gang members, that fact would suggest that Freeman
 3 was also willing to double-cross Ali by framing him for the July 22, 2008
 4 shootings.

5 House, who was also a Lincoln Park gang member, was serving a 20-
 6 year prison sentence and had been charged with several bank robberies
 7 along with Porter. House spoke to defense counsel and defense counsel's
 8 investigator in April 2010, telling them that Freeman claimed to have
 9 committed the July 22, 2008 shooting at the College Avenue apartments,
 10 together with someone called "L." House also claimed to have given
 11 Freeman a gun used in the July 22, 2008 shooting.

12 We next turn to the legal principles applicable to Ali's contention that
 13 the trial court was required to grant use immunity to House and Porter. No
 14 California statute or case authorizes a trial court to grant immunity to a
 15 witness when not requested to do so by the prosecutor. Indeed, granting
 16 immunity to a witness "is an executive function." (*People v. Williams*,
 17 *supra*, 43 Cal.4th at p. 622.) "[T]he decision to seek immunity is an integral
 18 part of the *charging* process, and it is the prosecuting attorneys who are to
 19 decide what, if any, crime is to be charged." (*In re Weber* (1974) 11 Cal.3d
 20 703, 720.) In accordance with this view, our Supreme Court has noted "the
 21 Courts of Appeal of this state have uniformly rejected the notion that trial
 22 court has the inherent power . . . to confer use immunity upon a witness
 23 called by the defense." (*People v. Hunter* (1989) 49 Cal.3d 957, 973
 24 (*Hunter*).) [FN 10 omitted.] Further, our Supreme Court has
 25 "characterized as 'doubtful' the 'proposition that the trial court [possesses
 26 inherent authority to grant immunity.]"' (*Samuels, supra*, 36 Cal. 4th at

27 p. 127.) Indeed, it has "expressed reservations concerning [such] claims."
 28 (*People v. Williams, supra*, 43 Cal.4th at p. 622.)

As Ali points out, our Supreme Court has in dicta, on several
 occasions, acknowledged case law from the federal Third Circuit Court of
 Appeals (*Government of Virgin Islands v. Smith* (3d Cir. 1980) 615 F.2d
 964 (*Smith*)), which holds that a judicial grant of use immunity could be
 required to preserve the defendant's constitutional right to a fair trial and
 compulsory process in certain specific circumstances. (*Hunter, supra*, 49
 Cal.3d at p. 974.) [FN 11 omitted]. In each case, our Supreme Court has
 discussed the factors described in *Smith* and, in each case, has concluded
 that *if* the factors were a correct statement of the law, they would *not* be
 satisfied. (*People v. Cudjo* (1993) 6 Cal.4th 585, 619; *In re Williams, supra*,
 7 Cal.4th at p. 610; *Lucas, supra*, 12 Cal.4th ap. p. 459; *People v. Stewart*
 (2004) 33 Cal.4th 425, 568; *Samuels, supra*, 36 Cal.4th at p. 128.) Our
 Supreme Court's discussion of the factors set forth in *Smith* was always
 presented as dicta and was unnecessary to the decision.

We join our colleagues in the First District in *Cooke* and "decline
 appellant's invitation to declare a doctrine of judicial use immunity for
 defense witnesses in criminal cases . . . [N]o California Court of Appeal or
 Supreme Court case has ever granted such immunity to a defense witness,
 and we will not do so now. The relief which appellant here requests should
 be granted, if at all, by our state's highest court." (*Cooke, supra*, 16
 Cal.App.4th at p. 1371.) We accordingly reject Ali's contention that the
 trial court was required to grant use immunity to House and Porter.

(Lodgment No. 6 at 17-21.)

As Respondent notes, and Ali implicitly acknowledges, there is no clearly established Supreme Court law which establishes a trial court has the authority to grant use immunity, much less under what circumstances such immunity must be granted to protect a defendant's constitutional rights. This alone precludes relief for Ali. *See Carey v. Musladin*, 549 U.S. 70, 77 (2006).

Ali cites *Government of Virgin Islands v. Smith*, 615 F.2d 964 (3d Cir. 1980) as support for his contention that courts have the power to grant immunity to defense witnesses. Although the Third Circuit subsequently abandoned judicial immunity as a remedy for prosecutorial misconduct in *United States v. Quinn*, 728 F.3d 243, 257 (3d Cir. 2013), the Ninth Circuit has adopted a similar rule in *Williams v. Woodford*, 384 F.3d 567 (9th Cir. 2004), a pre-AEDPA case. There, the Court stated:

[T]he prosecution's refusal to grant immunity to a defense witness denies the defendant a fair trial only when (1) the witness's testimony would have been relevant, and (2) the prosecution refused to grant the witness use

immunity with the deliberate intention of distorting the fact-finding process. *See United States v. Westerdahl*, 945 F.2d 1083, 1086 (9th Cir.1991); *United States v. Lord*, 711 F.2d 887, 891 (9th Cir.1983). To demonstrate the prosecutorial misconduct of the second prong, Williams must show that the prosecution intentionally caused a defense witness to invoke the Fifth Amendment right against self-incrimination, or that the prosecution granted immunity to a government witness in order to obtain that witness's testimony, but denied immunity to a defense witness whose testimony would have directly contradicted that of the government witness. *See United States v. Duran*, 189 F.3d 1071, 1087 (9th Cir.1999).

Id. at 600.

Assuming without deciding that Ali meets the first prong of the test, i.e., that House's and Porter's testimony was relevant, Ali argues the trial court's refusal to grant them immunity "intentionally distorted the fact-finding process" by: (1) intentionally causing House to invoke his Fifth Amendment rights, and (2) by selectively granting immunity to Porter when it helped the government's case via the "free talk" Porter had with prosecutors but denying it when it helped the defendant. (Mem. of P. & A. Supp. Am. Pet. at 70-72.)

1 Ali alleges it was the prosecutor's "intervention" during an ex parte hearing that
 2 triggered House's invocation of his Fifth Amendment rights. (*Id.* at 66-67.) The record
 3 supports a conclusion, however, that it was Ms. Feral, House's counsel, who advised
 4 House to invoke his Fifth Amendment rights because of concern regarding gang
 5 allegations in a criminal case that was pending against House at the time:

6 THE COURT: All right. At this point, then, there's a couple
 7 determinations that we need to make, including whether or not the Fifth
 Amendment applies. But we're not doing that today.

8 MS. FERAL: I can proffer, just based on the gang allegations and
 9 based on Mr. House's new case that he was arraigned on on Monday, there
 10 is a gang allegation attached to each and every one of the counts in that new
 11 case pending. And, apparently, on of Mr. House's prior felony convictions
 is being used in this case as a predicate offense for — to prove up the 186
 in this case. So just based on that alone, it's a Fifth Amendment.

12 THE COURT: All right. So, basically, based on — he is currently in
 custody; correct?

13 MS. FERAL: Yes.

14 THE COURT: If it's pimping and pandering, why is he in federal
 custody?

15 MR. FUNK: He's not in federal custody.

16 THE COURT: He's in state custody?

17 MR. FUNK: It's Mr. Coombs you're thinking of.

18 MR. PANISH: His new case is a 211 [robbery] series.

19 THE COURT: And he's got, obviously — just so we're clear, he's
 20 got the pending 211's with a gang allegation?

21 MS. FERAL: Yes.

22 THE COURT: And I assume that somewhere during these questions
 23 somebody's going to ask him about his — either his current case or the gang
 allegation? Certainly the gang allegation would have to come up; correct?

24 MS. FERAL: Or his status in the gang. So that will include a lot of
 25 other questions. So just based on that alone.

26 THE COURT: All right. All right. Well, I think we're done with Mr.
 House for right now. We can go on with our other matters and sort out.

27 (Lodgment No. 2, vol. 6 at 1561-62.)

28 It appears that prosecutors informed the Court during the ex parte hearings of the

1 pending case against House and the fact that he would need to be represented by counsel
2 before any testimony. Ali suggests the timing of the charges against House were
3 designed to force him to exercise his Fifth Amendment privilege. But, there is simply no
4 evidence in the record, beyond speculation, that prosecutors engaged in any nefarious
5 dealings during the ex parte hearing, the charging process, or at any other time which
6 “distorted the fact-finding process” with regard to House. *Williams*, 384 F.3d at 600.

7 Porter was House’s co-defendant in the pending robbery case. (Lodgment No. 2,
8 vol. 10 at 2437.) Porter engaged in a “free talk” with prosecutors during which he agreed
9 to provide evidence on his pending case as well as other cases in the hopes of reducing
10 his criminal liability. (*Id.* at 2438.) Any information provided in that “free talk” would
11 not be used against him. (*Id.*) Ali argues this is essentially “use immunity,” and that the
12 refusal of prosecutor to grant immunity for Porter to testify “distorted the fact-finding
13 process” or granted immunity selectively. (Mem. of P. & A. Supp. Am. Pet at 71-72.)
14 Neither conclusion is supported by the record. District Attorney investigator William
15 Cahill testified it was Porter’s attorney who approached law enforcement offering to give
16 information about his own and other cases in the hope of obtaining some benefit.
17 (Lodgment No. 2, vol. 10 at 2438.) Prosecutors did not seek out Porter and seem to have
18 been taken by surprise that Porter had any information about Ali’s case or Freeman. (*Id.*
19 at 2438-46.) Moreover, prosecutors did not enter into a formal immunity agreement with
20 Porter, nor did they grant immunity to government witnesses while denying it to defense
21 witnesses. *See Williams*, 384 F.3d at 600.

22 There is no clearly established Supreme Court law which holds a trial court can
23 grant immunity to a defense witness. To the extent that Ninth Circuit law so holds, the
24 record does not support a finding that prosecutors in Ali’s case “refused to grant the
25 witness use immunity with the deliberate intention of distorting the fact-finding process,”
26 “intentionally caused a defense witness to invoke the Fifth Amendment right against
27 self-incrimination”, or “granted immunity to a government witness in order to obtain that
28 witness's testimony, but denied immunity to a defense witness whose testimony would

1 have directly contradicted that of the government witness.” *See id.* Accordingly, Ali is
 2 not entitled to relief as to this claim. *Williams*, 529 U.S. at 412-13.

3 H. *Introduction of Jesse Freeman’s Preliminary Hearing Testimony*

4 Ali argues the introduction of Freeman’s preliminary hearing testimony violated
 5 his Sixth Amendment confrontation clause rights because defense counsel did not have
 6 all of the discovery requested and could therefore not properly cross-examine Freeman.
 7 (Mem. of P. & A. Supp. Am. Pet. at 74-77.) Specifically, Ali complains he did not have
 8 the statements by House and Porter, made months after the preliminary hearing, about
 9 Freeman’s alleged confession to the College Avenue shooting, or Freeman’s alleged
 10 involvement in bank robberies, and was therefore unable to question him about them.
 11 (*Id.*) Respondent counters that the state court’s resolution of this claim was consistent
 12 with clearly established Supreme Court law. (Mem. of P. & A. Supp. Answer at 22-24.)

13 Ali raised this claim in the petition for review he filed in the California Supreme
 14 Court. (Lodgement No. 7.) That court denied the petition without analysis or citation of
 15 authority. (Lodgment No. 8.) Accordingly, this Court must “look through” to the state
 16 appellate court’s decision denying the claim as the basis for its analysis. *Ylst*, 501 U.S.
 17 at 805-06. That court wrote:

18 As we have explained, Freeman testified at the preliminary hearing,
 19 describing Ali’s admission to the two July 2008 shootings. Freeman died
 20 eight days later, making him unavailable at trial. The trial court denied
 21 Ali’s motion to exclude Freeman’s preliminary hearing testimony and
 22 allowed Freeman’s testimony to be read to the jury. Ali contends that his
 constitutional rights to due process and to confront witnesses were violated
 by the admission at trial of Freeman’s preliminary hearing testimony. [FN
 7 omitted.]

23 The confrontation clause of the Sixth Amendment guarantees a
 24 criminal defendant the right to cross-examine witnesses against him.
 25 (*Crawford v. Washington* (2004) 541 U.S. 36, 54) (*Crawford*.) Under
 26 *Crawford*, “[a]n exception to the confrontation requirement exists where the
 27 witness is unavailable, has given testimony at a previous judicial proceeding
 28 against the same defendant, and was subject to cross-examination by that
 defendant.” (*People v. Carter* (2005) 36 Cal.4th 1114, 1172.) The United
 States Supreme Court has stated that when a witness is
 not available at trial, “preliminary hearing testimony is admissible only if
 the defendant had an *adequate* opportunity to cross-examine” the witness.
 (*Crawford*, at p. 57, *italics added*.) For example, in *California v. Green*
 (1970) 399 U.S. 149, 166, the high court noted that the preliminary hearing
 testimony of an unavailable witness was admissible, in part, because

1 “counsel does not appear to have been significantly limited in any way in
 2 the scope or nature of his cross-examination of the witness . . . at the
 3 preliminary hearing.” The high court has explained, however, that “in all
 4 but . . . extraordinary cases, no inquiry into ‘effectiveness’ [of cross-
 5 examination] is required.” (*Ohio v. Roberts* (1980) 448 U.S. 56, 73, fn. 12.)
 As described by the Supreme Court, an “extraordinary case” would be one
 in which defense counsel who conducted the prior cross-examination had
 already been determined to have provided ineffective assistance at that
 hearing. (*Ibid.*)

6 In California, “Evidence Code section 1291 codifies this traditional
 7 exception” to the confrontation clause described in *Crawford* for an
 8 unavailable witness who has been previously cross-examined. (*People v.*
 9 *Friend* (2009) 47 Cal.4th 1, 67.) “ ‘Evidence Code section 1291,
 10 subdivision (a)(2) provides that former testimony is not rendered
 11 inadmissible as hearsay if the declarant is ‘unavailable as a witness,’ and
 12 “[t]he party against whom the former testimony is offered was a party to the
 action or proceeding in which the testimony was given and had the right and
 opportunity to cross-examine the declarant with an interest and motive
 similar to that which he has at the hearing.” ’ ” (*Friend*, at p. 67.) “ ‘When
 the requirements of Evidence Code section 1291 are met, ‘admitting former
 testimony in evidence does not violate a defendant’s right of confrontation
 under the federal Constitution.’ ” (*Ibid.*)

13 Here, defense counsel extensively cross-examined Freeman at the
 14 preliminary hearing, with the cross-examination consuming 57 pages of the
 15 reporter’s transcript. According to our review of that transcript, the cross-
 16 examination was thorough and well-executed. Further, defense counsel had
 17 the same motivation in cross-examining Freeman during the preliminary
 18 hearing as would have been the case at trial, namely to discredit Freeman’s
 19 claim that Ali had admitted to the July 22, 2008 shootings. Defense counsel
 had an added incentive to perform a thorough cross-examination at the
 preliminary hearing because both defense counsel and the prosecutor
 acknowledged at the preliminary hearing that Freeman might not be
 available at trial, in that he was being threatened even while in protective
 custody and had a history of avoiding contact with the authorities who were
 trying to locate him.

20 Ali contends that defense counsel’s cross-examination of Freeman
 21 was nevertheless inadequate to satisfy the confrontation clause because of
 22 the prosecution’s failure to provide discovery that could have been used to
 23 cross-examine Freeman at the preliminary hearing. Specifically, Ali points
 24 to a statement given by Marcus House to the defense investigator and
 counsel in April 2010 — a year and a half *after* the preliminary hearing.
 According to House, who was in prison, Freeman had claimed that he
 committed the July 22, 2008 shooting at the College Avenue apartments, not
 Ali.

25 Ali’s argument is unpersuasive. First, the discovery that Ali contends
 26 the prosecution did not provide prior to Freeman’s preliminary hearing
 27 testimony *did not yet exist*, and consisted of a witnesses statement elicited
 28 many months later by the *defense*, not by the prosecution. Second, the
 availability of new information to impeach a witness *after* cross-
 examination concludes does not render the cross-examination ineffective for
 the purposes of the confrontation clause. In *People v. Valencia* (2008) 43
 Cal.4th 268, our Supreme Court rejected the argument that prior testimony

of an unavailable witness was inadmissible because defense counsel's "cross-examination of [the witness] would have been different had the impeaching information been known at the time he testified." (*Id.* at p. 293.) As our Supreme Court explained, "Both the United States Supreme Court and this court have concluded that 'when a defendant has had an opportunity to cross-examine a witness at the time of his or her prior testimony, that testimony is deemed sufficiently reliable to satisfy the confrontation clause requirement [citation], regardless whether subsequent circumstances bring into question the accuracy or the completeness of the earlier testimony.'" (*Id.* at p. 294.) "Admission of the former testimony of an unavailable witness . . . does not offend the confrontation clauses of the federal or state Constitutions — not because the opportunity to cross-examine the witness at the preliminary hearing is considered an exact substitute for the right of cross-examination at trial [citation], but because the interests of justice are deemed served by a balancing of the defendant's right to effective cross-examination against the public's interest in effective prosecution." (*People v. Zapien* (1993) 4 Cal.4th 929, 975.)

In sum, there is no merit to Ali's contention that the trial court improperly admitted Freeman's preliminary hearing testimony.

(Lodgment No. 6 at 13-17.)

Crawford v. Washington, 541 U.S. 36 (2004) is the clearly established law that applies to this claim. In *Crawford*, the Supreme Court stated:

Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law — as does *Roberts*, and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether. Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination. Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations. These are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed.

Id. at 68.

The *Crawford* court also noted, however, that "[t]estimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine." *Id.* at 59. The Supreme Court has stated that an "the Confrontation Clause guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986) quoting *Delware v. Fensterer*, 474 U.S. 15, 20 (1985).

1 Ninth Circuit cases have consistently held that sworn testimony, when given at a
 2 preliminary hearing and subject to cross-examination, is admissible under *Crawford* and
 3 *California v. Green*, 399 U.S. 149, 165 (1970), when the declarant is unavailable. *See*
 4 *e.g. Smith v. Harrison*, 378 Fed. Appx. 767, 768 (9th Cir. 2010); *Rust v. Hall*, 346 Fed.
 5 Appx. 163, 165 (9th Cir. 2009); *Magdaleno v. Giurbino*, 292 Fed. Appx. 528, 529 (9th
 6 Cir. 2008); *Bolton v. Knowles*, 225 Fed. Appx. 487 (9th Cir. Mar. 15, 2007). Given this
 7 authority, the state court's resolution of this claim cannot be said to have been contrary
 8 to, nor an unreasonable application of, clearly established Supreme Court law. *Williams*,
 9 529 U.S. 412-13. Nor has Ali established the resolution of this claim was based on an
 10 unreasonable determination of the facts. 28 U.S.C. § 2254(d)(2). Ali is not entitled to
 11 relief as to this claim.

12 I. *Jury Instructions*

13 Ali contends the trial court violated his right to a fair trial and his due process
 14 rights when it refused to give a special jury instruction regarding benefits given to
 15 Freeman, Omar and the Gomez family and how those benefits may have influenced their
 16 testimony. (Mem. of P. & A. Supp. Am. Pet. at 77-88.) Respondent contends there is
 17 no clearly established Supreme Court law that requires such an instruction, and so the
 18 state court's denial of this claim was neither contrary to, nor an unreasonable application
 19 of, clearly established Supreme Court law. (Mem. of P. & A. Supp. Answer at 33-35.)

20 Ali raised this claim in the petition for review he filed in the California Supreme
 21 Court. (Lodgement No. 7.) That court denied the petition without analysis or citation of
 22 authority. (Lodgment No. 8.) Accordingly, this Court must "look through" to the state
 23 appellate court's decision denying the claim as the basis for its analysis. *Ylst*, 501 U.S.
 24 at 805-06. That court wrote:

25 Ali contends that the trial court erred by failing to give a requested
 26 pinpoint instruction informing the jury that in assessing the testimony of
 27 certain witnesses, it should consider the benefits that those witnesses
 28 received from the prosecution. As necessary factual background, we
 observe that Ali's request for the jury instruction related to the testimony of
 four witnesses. The first witness, Ahmed Omar, was Ali's neighbor, who
 described how Ali had given him bullets to keep in his apartment. The jury
 heard evidence that Omar received threats and was relocated by the district

1 attorney to a different state, receiving monthly payments for his living
 2 expenses. The second witness was Freeman (presented through his
 3 preliminary hearing testimony), who was relocated by authorities to
 4 Arizona, receiving benefits totaling \$2,409 before his death. The final two
 5 witnesses were the teenage boy (James Gomez), who saw Ali at the College
 6 Avenue apartments during the shooting; and his mother (Yvonne Gomez),
 7 who testified about what her son had told her about his identification of Ali.
 8 Evidence was presented at trial that a district attorney investigator had
 9 assisted Yvonne Gomez by checking on the status of a police investigation
 10 concerning another of her sons.

11 The CALCRIM instructions do not contain a specific instruction
 12 addressing how the jury should view witnesses who receive benefits from
 13 the prosecution. Ali accordingly requested that the trial court give an
 14 instruction based on a model instruction from the federal Ninth Circuit
 15 Court of Appeals, which stated: “You have heard testimony that [the
 16 witness] has received benefits, compensation, favored treatment, from the
 17 government in connection with this case. You should examine [the
 18 witness’s] testimony with greater caution than that of other witnesses. In
 19 evaluating that testimony, you should consider the extent to which it may
 20 have been influenced by the receipt of benefits from the government.” The

21 trial court declined to give the instruction, explaining (1) that the substance
 22 of the requested instruction was covered by other instructions; and (2) as to
 23 the Gomez family, there was no evidence of any benefit received.

24 As we have explained, “ ‘a trial court need not give a pinpoint
 25 instruction if it is argumentative [citation], merely duplicates other
 26 instructions [citation], or is not supported by substantial evidence [citation].’
 27 ” (*Hartsch, supra*, 49 Cal.4th at p. 500.) All three considerations are
 28 relevant here.

First, we agree with the trial court’s conclusion that the evidence did
 not support a finding that the Gomezes received any benefit from the
 prosecution, as the evidence is that the district attorney investigator merely
 provided information about the status of a police investigation but did not
 influence the investigation in any way. Therefore, substantial evidence did
 not support an instruction with regard to the Gomezes.

Second, with respect to the requested instruction being duplicative,
 the jury was instructed with CALCRIM No. 226, which states: “In
 evaluating a witnesses testimony, you may consider anything that
 reasonably tends to prove or disprove the truth or accuracy of that
 testimony. Among the factors you may consider are: [¶] . . . [¶] Was the
 witness’s testimony influenced by a factor such as bias or prejudice, a
 personal relationship with someone involved in the case, or a personal
 interest in how the case is decided.” As the trial court pointed out, this
 instruction sufficiently instructed the jury to consider a witness’s bias and
 allowed the defense to argue that the witnesses were biased because of
 benefits they received from the prosecution.

Third, the instruction proposed by defense counsel was improperly
 argumentative in that it *required* an inference not supported by law.
 Specifically, the instruction would have directed the jury that it *must* view
 the witness’s testimony in a specific way, i.e., *with greater caution*.
 However, there is no legal authority for such a requirement. Ali points to

1 authority requiring greater caution when considering the testimony of
 2 accomplices or in-custody informants. (§§ 1111, 1127a). However, no such
 3 authority exists for witnesses provided relocation services, just as no
 4 authority exists for an instruction requiring a juror to view the testimony of
 5 an immunized witness with greater caution. (*Hunter, supra*, 49 Cal.3d at
 6 pp. 977-978.) As our Supreme Court has explained in that context, “[t]he
 7 general rule, of course, is that the jury decides all questions of fact,
 8 including the credibility of witnesses A cautionary instruction, by
 9 obligating the jury to view with skepticism the testimony of an immunized
 10 witness, impinges on the jury’s otherwise unfettered power to determine the
 11 witness’s credibility.” (*Vines, supra*, 51 Cal.4th at p. 883, citation omitted.)
 12 The instruction therefore fails as unduly argumentative because without
 13 legal basis, it “ ‘invite[d] the jury to draw inferences favorable to one of the
 14 parties from specified items of evidence.’ ” (*People v. Mincey* (1992) 2
 15 Cal.4th 408, 437.)

16 In sum, we reject Ali’s argument that the trial court erred by refusing
 17 to instruct the jury on benefits received from the prosecution by certain
 18 witnesses.

19 (Lodgment No. 6 at 31-34.)

20 Instructional error can form the basis for federal habeas corpus relief only if it is
 21 shown that “ ‘the ailing instruction by itself so infected the entire trial that the resulting
 22 conviction violates due process.’ [citation omitted].” *Murtishaw v. Woodford*, 255 F.3d
 23 926, 971 (9th Cir. 2001) (citing *Cupp v. Naughten*, 414 U.S. 141, 146 (1973));
 24 *Henderson v. Kibbe*, 431 U.S. 145, 154 (1977). The allegedly erroneous jury instruction
 25 cannot be judged in isolation, however. *Estelle*, 502 U.S. at 72. Rather, it must be
 26 considered in the context of the entire trial record and the instructions as a whole. *Id.*

27 The jury instruction proposed by Ali was modeled after Ninth Circuit Criminal
 28 Jury Instruction 4.10 which applies to informants and accomplices. (*See* Lodgment No.
 1, vol. 4 at 869-71.) The proposed instruction stated as follows:

29 You have heard testimony that _____, a witness, has received
 30 (benefits, compensation, favored treatment, etc.) from the government in
 31 connection with this case. You should examine _____’s testimony with
 32 greater caution than that of ordinary witnesses. In evaluating that
 33 testimony, you should consider the extent to which it may have been
 34 influenced by the receipt of (e.g., benefits) from the government.

35 (Ninth Cir. Crim. Jury Instr. 4.10 (1997).)

36 Although the requested instruction was not given, the jury was instructed with a
 37 general admonition regarding witnesses:

You alone, must judge the credibility or believability of the witnesses. In deciding whether testimony is true and accurate, use your common sense and experience. You must judge the testimony of each witness by the same standards, setting aside any bias or prejudice you may have. You may believe all, part or none of any witness's testimony. Consider the testimony of each witness and decide how much of it you believe.

In evaluating a witness's testimony, you may consider anything that reasonably tends to prove or disprove the truth or accuracy of that testimony. Among the factors that you may consider are:

• • • •

- Was the witness's testimony influenced by a factor such as bias, or prejudice, a personal relationship with someone involved in the case, or a personal interest in how the case is decided?

• • • •

- How reasonable is the testimony when you consider all the other evidence in the case?
- Did other evidence prove or disprove any fact about which the witness testified?
- Did the witness admit to being untruthful?
- Has the witness been convicted of a felony?
- Has the witness engaged in other conduct that reflects on his or her believability?

• • • •

If you decide that a witness deliberately lied about something significant in this case, you should consider not believing anything that witness says. Or, if you think the witness lied about some things, but told the truth about others, you may simply accept the part that you think is true and ignore the rest.

(Lodgment No. 1, vol. 4 at 0888-89.)

The jury was told that Freeman was given \$2,409.95, the majority of which was for hotel and apartment expenses associated with relocating him for his safety. (Lodgment No. 2, vol. 20 at 5325.) The jury also heard evidence about Freeman’s relationship with Lincoln Park and his desire to get out of the gang lifestyle. Freeman testified he was “basically through with the gang-banging,” and that “friends of [his] knew of a guy that was going to kill me . . . [but] nobody told [him] anything.”

1 (Lodgment No. 2, vol. 11 at 2630.) He testified that because of his testimony his life was
2 in danger and he could no longer go back to the neighborhood in which he was raised.
3 (*Id.* at 2632.) Freeman also testified on cross-examination that “L,” the person with
4 whom Freeman alleged Ali committed the shootings, had threatened to kill Freeman. (*Id.*
5 at 2662.) Freeman further admitted that he told police during his initial interviews that
6 he had “information on a lot of shit, pretty much whatever you need,” and that police
7 should “tell [him] whatever I need to give today so that I can get up out of here, and I will
8 give it to you.” (*Id.* at 2665.) And, Freeman testified that Detective Opplinger told him
9 that in exchange for information, law enforcement could “offer him a showcase” of
10 benefits, “start [him] on a new life for [him] and his family,” and that his basic living
11 needs — expenses such as utilities, rent, food, clothing, and some spending money —
12 would be supported by law enforcement until the case against Ali had concluded. (*Id.* at
13 2676, 2680-82.)

14 The jury was instructed to use “common sense and experience” and “anything that
15 reasonably tends to prove or disprove the truth or accuracy” in its evaluation of
16 Freeman’s testimony, as well as factors such as “bias, or prejudice, a personal
17 relationship with someone involved in the case, or a personal interest in how the case is
18 decided.” (Lodgment No. 1, vol. 4 at 0888-89.) “Common sense” would surely have led
19 the jury to consider the real possibility that Freeman gave information implicating Ali and
20 testified against him because he was biased (his desire to leave the gang lifestyle and
21 possible revenge on “L”), and had a personal interest in the outcome of the case (further
22 relocation money and other assistance from law enforcement.)

23 Omar also received benefits from law enforcement. Shortly after his apartment
24 was searched and he told law enforcement about Ali giving him the sock full of bullets
25 to hide, he asked the district attorney’s office to be relocated. (Lodgment No. 2, vol. 13
26 at 3762-63.) He testified he was afraid for his family’s safety and that someone had told
27 him not to testify. (*Id.* at 3766-67.) The district attorney’s office paid for some of his
28 moving and relocation expenses, and he had received assistance with his rent in the

1 amount of \$500 per month since October of 2008, a period of about 20 months, for a total
2 of \$10,000. (*Id.* at 3767-69, 3794.) In addition, Omar admitted he possessed marijuana,
3 that officers had found marijuana in his home, and that he was never prosecuted for
4 possession of marijuana. (*Id.* at 3782, 3785.)

5 As with Freeman, the jury instructions that were given adequately advised the jury
6 to consider the payments made to Omar in evaluating his testimony. Any reasonable
7 juror using his or her “common sense and experience” would consider what effect the
8 payment of \$10,000 and a failure to prosecute for possession of marijuana had on Omar’s
9 truthfulness and how the \$10,000 payment and lack of prosecution “reasonably tend[ed]
10 to prove or disprove the truth or accuracy of that testimony.” (Lodgment No. 1, vol. 4
11 at 0888.) In addition, trial counsel argued during closing argument that Freeman and
12 Omar were motivated to testified against Ali by the benefits the prosecution gave them.
13 (Lodgment No. 2, vol. 25 at 7312-13; 7321-25.)

14 Finally, with regard to the Gomezes, the state court found there was no evidence
15 supporting a conclusion they received any benefits, and thus the proposed jury instruction
16 was inapplicable to them. (Lodgment No. 6 at 33.) This was not an unreasonable
17 determination of the facts. *See* 28 U.S.C. § 2254(d)(2). James, who did not identify Ali
18 during police interviews or during the preliminary hearing, later identified Ali as being
19 present at the College Avene shooting and so testified at the trial. (Lodgment No. 2, vol.
20 12 at 2766.) James testified he did not identify Ali initially because he was scared. (*Id.*
21 at 2768-69.) Defense counsel tried to suggest that James’ testimony changed as a result
22 of his brother, Jesse, getting in a fight and promises allegedly made by law enforcement
23 not to prosecute Jesse for that fight. (*Id.* at 2797-98.) Counsel asked James whether D.A.
24 Investigator Lynn assured him that Jesse would not be prosecuted for his involvement in
25 the fight, and James did not recall any such conversation. (*Id.* at 2799-2801.) Yvonne
26 Gomez also testified about interactions with the District Attorney’s office regarding
27 Jesse. Unable to get information about what, if anything, was happening with regard to
28 the incident and whether charges were going to be pressed against Jesse for the fight,

1 Yvonne called Lynn for information. (*Id.* at 2835-36.) Lynn testified that no benefits
2 were given to the Gomez family. (Lodgment No. 2. vol. 20 at 5354.)

3 Given the above, there was no basis for the trial court to give the requested
4 instruction with regard to the Gomezes because they received no benefits, compensation
5 or favored treatment. And, as with Freeman and Omar, the instructions sufficiently
6 advised the jury to consider any possible bias James Gomez might have in its evaluation
7 of James' credibility.

8 Ali cites general principles of due process and fair trial rights in support of his
9 claim, but in the absence of a more specific mandate, the state appellate court's decision
10 cannot be said to have been an unreasonable application of those general principles.
11 *Musladin*, 549 U.S. at 77. Ali also cites *Banks v. Dretke*, 540 U.S. 668 (2004) and *Cool*
12 *v. United States*, 409 U.S. 100 (1972), but those cases are inapposite.

13 In *Banks*, one of the main informants, Farr, testified falsely that he had not received
14 any money or promises from law enforcement. In fact, Farr was a paid informant who
15 told police Banks would be driving to Dallas to obtain a gun; police arrested Banks en
16 route. *Banks*, 540 U.S. at 679-80. Farr also falsely testified at the penalty phase.
17 Prosecutors knew of Farr's false testimony and in closing argument, argued Farr's
18 credibility. *Id.* The Court noted how this *Brady* violation affected Banks' due process
19 and fair trial rights because "[t]he jury . . . did not benefit from the customary, truth-
20 promoting precautions that generally accompany the testimony of informants." *Id.* at
21 701. In contrast, the prosecution in Ali's case did not hide the roles Freeman, Omar, and
22 the Gomezes played in the shooting investigation, nor the benefits they received for their
23 roles. Indeed, as discussed above, the money and benefits Freeman and Omar received
24 were thoroughly discussed at trial.

25 In *Cool*, three individuals were arrested for possession counterfeit money. One of
26 the three, Voyles, testified he possessed the counterfeit money but that Cool only gave
27 him a ride and did not know about the counterfeit money. *Cool*, 409 U.S. at 101. After
28 warning the jury that accomplice testimony is "open to suspicion," the trial judge

1 instructed the jury that it could only consider Voyles testimony if they believed it beyond
2 a reasonable doubt, which placed an improper burden on the defense and permitted the
3 jury to find Cool guilty without finding proof beyond a reasonable doubt. *Id.* at 102-03.
4 Ali argues the failure to give the pinpoint instruction as requested similarly reduced the
5 burden of proof on the prosecution because it did not advise the jury to view the
6 testimony of Freeman, Omar and the Gomezes with suspicion. But, as discussed above,

7 ///

8 the instructions that were given adequately informed the jury of their duty to consider any
9 biases those witnesses might have had.

10 The instructions given to the jury in Ali's case adequately informed them to
11 consider the benefits Freeman and Omar received as a result of the testimony. The
12 subject of Freeman's and Omar's motivations, the benefits they received, and the effect
13 such benefits may have had on their testimony were thoroughly presented to the jury and
14 argued at closing argument. As such, the state court's determination that there was no
15 error was neither contrary to, nor an unreasonable application of, clearly established
16 Supreme Court law, nor was it an unreasonable determination of the facts. *Williams*, 529
17 U.S. at 412-13. 28 U.S.C. § 2254(d)(2). Moreover, even if the failure to give the
18 pinpoint instruction was error, it did not, by itself "so infect the entire trial that the
19 resulting conviction violates due process." *Murtishaw*, 255 F.3d at 971. Accordingly,
20 Ali is not entitled to relief as to this claim.

21 *J. Prosecutorial Misconduct*

22 Next, Ali contends the prosecutor committed misconduct by failing to comply with
23 discovery obligations and during closing argument. (Mem. of P. & A. Supp. Am. Pet.
24 at 88-92.) Respondent contends the state court's resolution of Ali's claim that the
25 prosecution committed misconduct when it violated discovery obligations was neither
26 contrary to, nor an unreasonable application of, clearly established Supreme Court law.
27 (Mem. of P. & A. Supp. Answer at 19-21.) Respondent argues Ali's claim of
28 prosecutorial misconduct during closing argument is procedurally defaulted. (*Id.* at 21.)

1 ‘rebuttal’ argument — immune from defense reply — 10 times longer (35
2 reporter’s transcript pages) that his opening argument.”].)

3 We note initially that Ali has not preserved this claim of prosecutorial
4 misconduct because he did not object in the trial court, and an objection
5 would not have been futile. (*Hill, supra*, 17 Cal.4th at p. 820; *Earp, supra*,
20 Cal.4th at p. 858.) Indeed, Ali could have asked for the trial court to
remedy any unfairness by allowing defense counsel an additional
opportunity for surrebuttal.

6 The substance of Ali’s argument fails as well. The prosecutor’s
7 closing argument in this case was nothing like the perfunctory closing
argument in *Robinson* and did not preclude an effective defense reply. On

8 the contrary, the prosecutor’s closing argument consumed 38 pages of the
9 reporter’s transcript and — in a detailed manner — covered the evidence
10 presented at trial that the prosecutor viewed as establishing Ali’s guilt.
11 Defense counsel’s closing was a similar length, consuming 47 pages of the
12 reporter’s transcript. The prosecutor’s rebuttal argument was much shorter
— at 20 pages, and was directed at responding to issues raised during
defense counsel’s argument. We accordingly perceive no misconduct in the
way that the prosecutor handled closing argument.

13 (Lodgment No. 6 at 34-37.)

14 In order to find prosecutorial misconduct, “[i]t is not enough that the prosecutor’s
15 remarks [or actions] were undesirable or even universally condemned.” *Darden v.*
16 *Wainwright*, 477 U.S. 168, 181 (1986). Rather, a prosecutor commits misconduct when
17 his or her actions “so infect . . . the trial with unfairness as to make the resulting
18 conviction a denial of due process.” *Id.* (quoting *Donnelly v. DeChristoforo*, 416 U.S.
19 637 (1974).) “[T]he appropriate standard of review for such a claim on writ of habeas
20 corpus is ‘the narrow one of due process, and not the broad exercise of supervisory
21 power.’” *Id.* (quoting *Donnelly*, 416 U.S. at 642).)

22 Ali refers the Court to section five of his Memorandum of Points and Authorities,
23 detailed above in section IV(F) of this Report and Recommendation, as support for his
24 contention that discovery violations were so pervasive that he was denied a fair trial. As
25 discussed in Section IV(F) of this Report and Recommendation, there is no evidence to
26 support a contention that exculpatory evidence or impeachment evidence was suppressed
27 under *Brady*. And, as to other discovery issues, Ali provides only a historical recounting
28 of the discovery proceedings and court rulings. He does not make specific allegations as

1 to what effect on the defense any of the alleged instances of withholding discovery had,
2 such as witnesses or defenses that were lost, specific impeachment material that was not
3 obtained, or evidence that would have helped Ali's defense. He makes only generalized
4 allegations of unfairness. His showing is insufficient to establish that any conduct by the
5 prosecutor, assuming it was improper, "so infect[ed] . . . the trial with unfairness as to
6 make the resulting conviction a denial of due process.'" *Darden*, 477 U.S. at 181.

7 Ali also claims the prosecutor committed misconduct during closing argument by
8 "making a perfunctory, initial closing argument" and a more thorough rebuttal argument,
9 thereby preventing the defense from effectively countering the prosecutor's argument.
10 (Mem. of P. & A. Supp. Am. Pet at 90-92.) Respondent argues the claim is procedurally
11 defaulted because, as the state appellate court noted, counsel failed make a
12 contemporaneous objection. (Mem. of P.& A. Supp. Answer at 21; Lodgment No. 6 at
13 36.)

14 The Ninth Circuit has held that because procedural default is an affirmative
15 defense, Respondent must first "adequately [plead] the existence of an independent and
16 adequate state procedural ground" *Bennett v. Mueller*, 322 F.3d 573, 586 (9th Cir.
17 2003). In order to place the defense at issue, Ali must then "assert[] specific factual
18 allegations that demonstrate the inadequacy of the state procedure" *Id.* The
19 "ultimate burden" of proving procedural default, however, belongs to the state. *Id.* If the
20 state meets its burden under *Bennett*, federal review of the claim is foreclosed unless Ali
21 can "demonstrate cause for the default and actual prejudice as a result of the alleged
22 violation of federal law, or demonstrate that failure to consider the claims will result in
23 a fundamental miscarriage of justice." *Coleman v. Thompson*, 501 U.S. 722, 750 (1991).

24 A state procedural rule is "independent" if the state law basis for the decision is not
25 interwoven with federal law. *Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983); *Harris*
26 *v. Reed*, 489 U.S. 255, 265 (1989). A ground is "interwoven" with federal law if the state
27 has made application of the procedural bar dependent on an antecedent ruling on federal
28 law such as the determination of whether federal constitutional error has been committed.

1 *See Ake v. Oklahoma*, 470 U.S. 68, 75 (1985). “To qualify as an ‘adequate’ procedural
2 ground, a state rule must be ‘firmly established and regularly followed.’” *Walker v.*
3 *Martin*, 562 U.S. 307, 131 S. Ct. 1120, 1127-28 (2011) (quoting *Beard v. Kindler*, 558
4 U.S. 60-61 (2009).)

5 Respondent has met his initial burden under *Bennett* by citing *Melendez v. Pliler*,
6 288 F.3d 1120 (9th Cir. 2002) for the proposition that the contemporaneous objection rule
7 is independent and adequate. *See id.* at 1125 (stating that “[w]e held more than twenty
8 years ago that the rule is consistently applied when a party has failed to make any
9 objection to the admission of evidence” and citing *Garrison v. McCarthy*, 653 F.2d 374,
10 377 (9th Cir. 1981)). The burden therefore shifts to Ali to establish the rule is not
11 independent or adequate. *Bennett*, 322 F.3d at 586. He has not presented any evidence
12 or argument demonstrating the rule is not independent or adequate. Accordingly, he has
13 failed to meet his burden under *Bennett*. *Id.*

14 Nor has he established either cause or prejudice sufficient to excuse the default.
15 Cause is satisfied if Ali can demonstrate some “objective factor” that precluded him from
16 raising his claims in state court, such as interference by state officials or constitutionally
17 ineffective counsel. *McClesky v. Zant*, 499 U.S. 467, 493-94 (1991). He has not done
18 so.

19 “Prejudice [sufficient to excuse procedurally barred claims] is actual harm resulting
20 from the alleged error.” *Vickers v. Stewart*, 144 F.3d 613, 617 (9th Cir. 1998). Ali has
21 failed to establish any prejudice would result from the refusal to address the merits of this
22 claim because, as discussed below the claim is meritless.

23 Finally, Ali has also not demonstrated that failure to consider the claims will result
24 in a fundamental miscarriage of justice. *See Coleman*, 501 U.S. at 750. The Supreme
25 Court has limited the “miscarriage of justice” exception to petitioners who can show that
26 “a constitutional violation has probably resulted in one who is *actually* innocent.” *Schlup*
27 *v. Delo*, 513 U.S. 298, 327 (1995) (emphasis added). “Actual innocence” means factual
28 innocence, not simply legal insufficiency; a mere showing of reasonable doubt is not

1 enough. *See Wood v. Hall*, 130 F.3d 373, 379 (9th Cir. 1997). Although Ali argues there
 2 were errors committed at his trial, he has not presented evidence sufficient to establish
 3 he is actually and factually innocent of the charges of which he was convicted. Thus, the
 4 claims are procedurally defaulted. *Schlup*, 513 U.S. at 327; *Cooper*, 641 F.3d at 327.

5 In any event, Ali's claim that the prosecutor committed misconduct by making a
 6 perfunctory closing argument fails on the merits. The motion for a new trial cites an
 7 instance during closing argument, not rebuttal, in which prosecutor Panish referred to a
 8 shell casing found in Ali's bedroom and stated, "There's no way the defense can get
 9 around that piece of evidence." (Lodgment No. 1, vol. 4 at 0991.) Ali alleged the
 10 statement shifted the burden of proof. (*Id.*) But, taken in context, it was merely a
 11 statement about the strength of that particular piece of evidence:

12 [THE PROSECUTOR]: Circumstantial evidence in the case, shell
 13 casings. Make no mistake about it, ladies and gentlemen, it was the same
 14 gun that fired the shots at 47th Street. It was the same gun that fired the
 15 shot at College Avenue. It was the same gun that was at the defendant's
 16 apartment, and it was the same shell casing that was under the defendant's
 17 bed. There is no doubt about that.

18 You heard from Mr. Loznycky. There is no doubt about that. He is
 19 an expert in the field. He examined this with a microscope. He testifies as
 20 an expert. He doesn't come in here just to say, oh, they are a match,
 21 because he wants to close a case. That's not what he does. He does
 22 scientific experiments, and Mr. Reizen had a very lengthy examination of
 23 him with the powerpoint to explain exactly what he did in this case.

24 And that is the most powerful piece of evidence in this case. *There*
 25 *is no way the defense can get around that piece of evidence.* Casing at 47th
 26 Street, casing at College, casing at defendant's house. They cannot get
 27 around that.

28 MR. FUNK: Shifting burden, *Griffin* error.

THE COURT: Overruled. Go ahead.

MR. PANISH: Circumstantial evidence. So the only way they can
 attack it is the interpretation. Okay? Because it is how you interpret the
 fact. Their interpretation, their theory, is Jesse Freeman. That's their
 interpretation, and I'm here to tell you that's an unreasonable one based on
 all of the evidence and all of the facts. They can't get around that fact. That
 circumstantial evidence is the most powerful thing in the case, no doubt
 about it, cannot get around it.

(Lodgment No. 2, vol. 25 at 7269-70) (emphasis added.)

At the hearing on the motion for a new trial, defense counsel complained that the prosecutor did not argue any inferences regarding the cell phones found at Ali's residence, but then during rebuttal, argued that cell tower evidence supported the prosecution's theory that Ali had committed the shootings. (Lodgment No. 2, vol. 28 at 8110.) But defense counsel first argued about the meaning of the cell phone records during closing argument and how those records supported their theory that Freeman, not Ali, committed the shootings. (*See id.* at 7321, 7326-30.)

A prosecutor may argue reasonable inferences drawn from the evidence presented at the trial. *See Darden v. Wainwright*, 477 U.S. 168, 181-82 (1986); see also *Ceja v. Stewart*, 97 F.3d 1246, 1253-54 (9th Cir. 1996) (quoting *United States v. Baker*, 10 F.3d 1374, 1415 (9th Cir. 1993) and stating that "counsel are given latitude in the presentation of their closing arguments, and courts must allow the prosecution to strike hard blows based on the evidence presented and all reasonable inferences therefrom"). A prosecutor may also reply to comments by defense counsel during closing. *See Lawn v. United States*, 355 U.S. 339, 359, n. 15 (1958); *United States v. Del Toro-Barboza*, 673 F.3d 1136, 1151 (9th Cir. 2012) citing *United States v. McChristian*, 47 F.3d 1499, 1508 (9th Cir. 1995). Here, the prosecutor's argument did not "so infect . . . the trial with unfairness as to make the resulting conviction a denial of due process." *Darden*, 477 U.S. at 181. Accordingly, the state court's denial of this claim was neither contrary to, nor an unreasonable application of, clearly established Supreme Court law. *Williams*, 529 U.S. at 412-13.

K. *Denial of Access to Juror Information*

In claim ten, Ali argues the state court erred when it denied his motion to disclose juror information to pursue a motion for a new trial. (Mem. of P. & A. Supp. Am. Pet at 92-101.) Respondent contends the claim is not cognizable on federal habeas review because it concerns only the application of state law. (Mem. of P & A. Supp. Answer at 35-36.)

A support for this claim, Ali cites two Supreme Court cases, *Bollenbach v. United*

1 *States*, 326 U.S. 607 (1946) and *Lowenfield v. Phelps*, 484 U.S. 231 (1988). Both
 2 *Bollenbach* and *Lowenfield* addressed situations where the trial judge make remarks to
 3 the jury that indicated they were under time pressure to reach a verdict. *Bollenbach*, 326
 4 U.S. at 612-13; *Lowenfield*, 484 U.S. at 237-39. That is not what occurred here. Rather,
 5 the only evidence of time pressure is Juror No. 1 and 2's affidavits, which, as discussed
 6 in section IV(D) of this Report and Recommendation, are not admissible under Rule
 7 606(b).

8 The essence of Ali's argument is that the trial court's determination Ali had not
 9 presented a prima facie showing of good cause under California Code of Civil Procedure
 10 §§ 206(g) and 237 for the disclosure of juror information was improper and a
 11 misinterpretation of those code provisions, and, as a result, he was denied the opportunity
 12 to obtain information to support a motion for a new trial based on juror misconduct.
 13 (Mem. of P. & A. Supp. Am. Pet. at 96-101.) Whether the trial court denied the motion
 14 disclosure of juror information because it misapplied §§ 206(g) and 237 is solely of a
 15 challenge to the state court's application of its own law, and is therefore not cognizable
 16 on federal habeas review. *See Estelle*, 502 U.S. at 67-68. And, in any event, as
 17 discussed in section IV(D) of this Report and Recommendation, Ali has not shown any
 18 of the juror information that would have been disclosed would be admissible under Rule
 19 606(b) in this proceeding.

20 For the reasons discussed above, the state court's denial of this claim was neither
 21 contrary to, nor an unreasonable application of, clearly established Supreme Court law.
 22 *Williams*, 529 U.S. at 412-13. Nor was it based on an unreasonable determination of the
 23 facts. 28 U.S.C. § 2254(d)(2). The trial court determined that any evidence that jurors
 24 felt time pressure, misunderstood the burden of proof, or "referred to racial stereotypes
 25 during their discussions of the evidence . . . would have concerned the jurors' thought
 26 processes and would not have been admissible in a motion to impeach the verdict."
 27 (Lodgment No. 6 at 42.) The Supreme Court's decision in *Warger* supports a conclusion
 28 that such determination was not unreasonable. *Williams*, 529 U.S. at 412-13; 28 U.S.C.

1 § 2254(d)(2).

2 *L. Denial of the Motion for a New Trial*

3 Ali contends the state court's denial of his motion for a new trial based on
4 prosecutorial misconduct was improperly denied. (Mem. of P. & A. Supp. Am. Pet. at
5 101-102.) Respondent contends this claim is not cognizable on federal habeas review
6 because it involves only the application of state law. (Mem. of P. & A. Supp. Answer at
7 21-22.)

8 Ali raised this claim in the petition for review he filed in the California Supreme
9 Court. (Lodgement No. 7.) That court denied the petition without analysis or citation of
10 authority. (Lodgment No. 8.) Accordingly, this Court must "look through" to the state
11 appellate court's decision denying the claim as the basis for its analysis. *Ylst*, 501 U.S.
12 at 805-06. That court wrote:

13 We first consider the portion of the motion for a new trial based on
14 prosecutorial misconduct. Although Ali set forth several theories of
15 prosecutorial misconduct in the motion for a new trial, on appeal he
discusses only two theories. We accordingly limit our discussion to those
theories.

16 First, Ali's appellate brief argues that the trial court should have
17 granted a new trial based on the prosecutor's purported misconduct during
18 closing argument, incorporating by reference the argument we have already
19 considered and rejected in part II.D., ante. This argument fails. As we have
20 explained, the prosecutor did not commit misconduct during closing
21 argument because the prosecutor did not, as Ali claims, wait until the
22 rebuttal to discuss the evidence presented at trial. In addition, Ali did not
23 identify the prosecutor's purportedly belated reference to evidence during
closing argument as one of the bases for his new trial motion, and he
therefore cannot complain on appeal that the motion was not granted on that
basis. (*People v. Masotti* (2008) 163 Cal.App.4th 504, 508 ["A motion for
new trial may be granted only upon a ground raised in the motion . . .," and
a defendant "waives his right to a new trial upon all [statutory] grounds . . .
unless he specifies the grounds upon which he relies in his application
therefore," (citation omitted)].)

24 Second, Ali argues that he should have been granted a new trial
25 because of the prosecutor's alleged misconduct during discovery. However,
26 as we have discussed, Ali has failed to establish any discovery violations
amounting to prosecutorial misconduct. Based on that conclusion, we also
27 reject his argument that the trial court should have granted a new trial based
28 on the prosecutor's purported discovery-related misconduct. (*People v. Zambrano* (2007) 41 Cal.4th 1082, 1188 [court cites lack of merit to
prosecutorial misconduct argument as a ground for rejecting appeal of
ruling on new trial motion based on the same assertion of prosecutorial
misconduct].)

1 (Lodgment No. 6 at 42-44.)

2 As in the previous claim, to the degree Ali challenges the state court's application
3 of its own state law, he is not entitled to relief. *Estelle*, 502 U.S. at 67-68. In addition,
4 as this Court has already concluded in Section IV(J) of this Report and Recommendation
5 that the prosecutor did not commit misconduct; thus, a denial of a motion for a new trial
6 based on that ground has no merit. Ali is not entitled to relief as to this claim. *Williams*,
7 529 U.S. at 412-13.

8 M. *Cumulative Error*

9 Finally, Ali contends the cumulative effect of all the errors that occurred in his case
10 denied him a fair trial. (Mem. of P. & A. Supp. Am. Pet. at 102-04; Traverse at 10.)
11 Respondent counters that there is no clearly established Supreme Court law establishing
12 the doctrine of cumulative error, and that therefore, the claim is not cognizable on federal
13 habeas review. (Mem. of P. & A. Supp. Answer at 42-44.) Further, Respondent contends
14 that even if such a claim existed, Ali has failed to establish cumulative error. (*Id.* at 44.)

15 Ali raised this claim in the petition for review he filed in the California Supreme
16 Court. (Lodgement No. 7.) That court denied the petition without analysis or citation of
17 authority. (Lodgment No. 8.) Accordingly, this Court must "look through" to the state
18 appellate court's decision denying the claim as the basis for its analysis. *Ylst*, 501 U.S.
19 at 805-06. That court stated that since "none of Ali's claims of error, considered
20 separately, has merit, we reject his contention that cumulative error requires reversal.
21 (See *People v. McWhorter*, (2009) 47 Cal.4th 318, 377.)" (Lodgment No. 6 at 49-50.)

22 The Ninth Circuit has stated "[t]he Supreme Court has clearly established that the
23 combined effect of multiple trial court errors violates due process where it renders the
24 resulting trial fundamentally unfair." *Parle v. Runnels*, 505 F.3d 922, 927 (9th Cir. 2007)
25 (citing *Chambers v. Mississippi*, 410 U.S. 284, 298 (1973)); see also *Whelchel v.*
26 *Washington*, 232 F.3d 1197, 1212 (9th Cir. 2000). "The cumulative effect of multiple
27 errors can violate due process even where no single error rises to the level of a
28 constitutional violation or would independently warrant reversal." *Parle*, 505 F.3d at

927; *see also United States v. Frederick*, 78 F.3d 1370, 1381 (9th Cir. 1996) (stating that where no single trial error in isolation is sufficiently prejudicial to warrant habeas relief, “the cumulative effect of multiple errors may still prejudice a defendant”). Where “there are a number of errors at trial, ‘a balkanized, issue-by-issue harmless error review’ is far less effective than analyzing the overall effect of all the errors in the context of the evidence introduced at trial against the defendant.” *Frederick*, 78 F.3d at 1381 (quoting *United States v. Wallace*, 848 F.2d 1464, 1476 (9th Cir. 1988)). Cumulative error warrants habeas relief only where the combined effect of the errors had a “substantial and injurious effect or influence on the jury’s verdict.” *Parle*, 505 F.3d at 927 (quoting *Brecht*, 507 U.S. at 637).

This Court has found that none of the claims Ali presents was error. Because no errors occurred, no cumulative error is possible. *Hayes v. Ayers*, 632 F.3d 500, 523-24 (9th Cir. 2011) (stating that “[b]ecause we conclude that no error of constitutional magnitude occurred, no cumulative prejudice is possible”). Accordingly, Ali is not entitled to relief for his cumulative error claim. *Williams*, 529 U.S. at 412-13.

V. CONCLUSION

The Court submits this Report and Recommendation to United States District Judge Cynthia A. Bashant under 28 U.S.C. § 636(b)(1) and Local Civil Rule 72.1(d)(4) of the United States District Court for the Southern District of California.

Further, **IT IS HEREBY RECOMMENDED** that the Court issue an order: (1) approving and adopting this Report and Recommendation, and (2) directing that Judgment be entered **DENYING** the Amended Petition for Writ of Habeas Corpus.

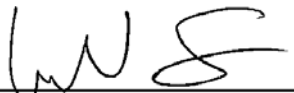
IT IS ORDERED that no later than **April 14, 2015**, any party to this action may file written objections with the Court and serve a copy on all parties. The document should be captioned “Objections to Report and Recommendation.”

IT IS FURTHER ORDERED that any reply to the objections shall be filed with the Court and served on all parties no later than **April 28, 2015**. The parties are advised that failure to file objections within the specified time may waive the right to raise those

1 objections on appeal of the Court's order. *See Turner v. Duncan*, 158 F.3d 449, 455 (9th
2 Cir. 1998); *Martinez v. Ylst*, 951 F.2d 1153, 1156 (9th Cir. 1991).

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4 IT IS SO ORDERED.

5 DATED: March 16, 2015

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8 Hon. William V. Gallo
9 U.S. Magistrate Judge
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