

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

AHMED ALI,

Petitioner,

v.  
R.T.C. GROUNDS, et al.,

Respondents.

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.)<sup>1</sup> 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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<sup>1</sup> 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  
 29 territory, it was a common place for members of the O’Farrel Park and  
 30 Skyline Piru gangs to congregate. Those gangs were rivals of the Lincoln  
 31 Park gang. Some of the people fired upon at the College Avenue apartment  
 32 complex were members of the O’Farrell Park or Skyline Piru gangs.

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

41 After the disclosure from Freeman, police examined the ballistics  
 42 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,  
 4 2008 shooting scenes.

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

16 Ali was tried for one count of murder based on Lumpkin's death  
 17 (§ 187, subd. (a)); four counts of attempted murder based on the chest  
 18 wound to McElwee and the shots fired at the three victims in the car at the  
 19 Harbor View apartments (§§ 187, subd. (a), 664); two counts of shooting at  
 20 an inhabited structure or vehicle (§ 246); one count of being a convicted  
 21 felon in possession of a firearm (former § 12021, subd. (a)(1)); and one  
 22 count of unlawfully possessing a firearm (former § 12316, subd. (b)(1)).  
 23 The information also alleged firearm and criminal street gang enhancements  
 24 (§§ 12022.53, subds. (c), (d), (e)(1), 186.22, subd. (b)(1)).

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

28 Among the other evidence against Ali at trial was the testimony of  
 29 two eye witnesses. First, one of the men who came under fire at the College  
 30 Ave. apartments on July 22, 2008, testified that he picked Ali out from a  
 31 photographic lineup in February as one of the shooters, stating that he was  
 32 60 to 70 percent certain at the time of the identification. Second, a teenage  
 33 boy, James Gomez, who saw the shooters at the College Avenue apartments  
 34 before they opened fire identified Ali as one of the shooters.

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

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

44 (Lodgment No. 6 at 3-6.)

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### 1     **III. PROCEDURAL BACKGROUND**

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

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

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

27         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*  
 22 1997) 16 Cal.4th 153, 199, fn. 3, citing Evid. Code § 1201.)<sup>12</sup>

23 [FN 12: The statements by House that Ali sought to have  
 24 admitted contained two levels of hearsay. At the first level  
 25 was House's out-of-court statements to the defense  
 26 investigator. At the second level was Freeman's out-of-court  
 27 statements to House that he committed one of the July 22,  
 28 2008 shootings. To the extent Porter recounted Freeman's  
 admission to participating in bank robbery without Porter, that  
 statement is double hearsay.]

29 Ali argues that the hearsay exception for declarations against penal  
 30 interest applies to House's and Porter's statements, making them admissible.  
 31 Under that exception, "[e]vidence of a statement made by a declarant having  
 32 sufficient knowledge of the subject is not made inadmissible by the hearsay  
 33 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,  
 5 or social disgrace in the community, that a reasonable man in his position  
 6 would not have made the statement unless he believed it to be true." (Evid.  
 7 Code § 1230, italics added.)

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

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

21 Our Supreme Court has summarized the law applicable to the  
 22 declaration against penal interest to the hearsay rule. As it explained,  
 23 " '[t]he proponent of such evidence must show "that the declarant is  
 24 unavailable, that the declaration was against the declarant's penal interest,  
 25 and that the declaration was sufficiently reliable to warrant admission  
 26 despite its hearsay character.' . . . 'The focus of the declaration against  
 27 interest exception to the hearsay rule is the basic trustworthiness of the  
 28 declaration . . . In determining whether a statement is truly against interest  
 29 within the meaning of Evidence Code section 1230, and hence is sufficiently  
 30 trustworthy to be admissible, the court may take into account not just the  
 31 words but the circumstances under which they were uttered, the possible  
 32 motivation of the declarant, and the declarant's relationship to the  
 33 defendant.' . . . [I]n this context, assessing trustworthiness "requires the  
 34 court to apply to the peculiar facts of the individual case a broad and deep  
 35 acquaintance with the ways human beings actually conduct themselves in the  
 36 circumstances material under the exception.' " " (People v. Geier (2007)  
 37 41 Cal.4th 555, 584, citations omitted.) "Courts applying [Evidence Code]  
 38 section 1230 to determine the basic trustworthiness of a proffered  
 39 declaration are . . . to 'consider all the surrounding circumstances to  
 40 determine if a reasonable person in [the declarant's] position would have  
 41 made the statements if they weren't true.' " (People v. Duarte (2000) 24  
 42 Cal.4th 603, 618 (Duarte).)

43 . . . .

44 a. *House's Statements*

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

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

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

In addition, the trustworthiness of House's statement must be viewed in the entire context of the gang-related environment in which it was made. House was a member of the Lincoln Park gang and could be expected to take actions to help other gang members in good standing. Ali was a fellow gang-member, giving House a motive to help him by implicating Freeman, who was a "snitch" against the gang and therefore out of favor. It is reasonable to infer, as did the trial court, that House's statements about Freeman may have been fabricated for the benefit of his fellow gang member Ali, and were therefore not trustworthy enough to qualify for admission as declarations against interest.<sup>13</sup> (*People v. Frierson* (91) 53 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  
 3 evidence of Porter's statements.

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

14 Further, even if Porter's statements should have been admitted, their  
 15 exclusion was not prejudicial. (See *Duarte, supra*, 24 Cal.4th at p. 619  
 16 [evaluating whether it is "'reasonably probable that a result more favorable  
 17 to defendant would have been reached'" had evidence been admitted under  
 18 the hearsay exception for a declaration against interest].) The value to the  
 19 defense of Porter's statements about Freeman's participation in bank  
 20 robberies was to call into question Freeman's credibility by showing he lied  
 21 to authorities when denying involvement in the robberies. However, the  
 22 same impeaching evidence was admitted during the trial through another  
 23 defense witness — Tiano Durham — who testified Freeman committed a  
 24 bank robbery with him. Because the excluded evidence was cumulative of  
 25 other evidence, its admission would not have been reasonably probable to  
 26 change the outcome of the trial. Ali also cannot demonstrate prejudice from  
 27 exclusion of Porter's statement that Freeman took more than his share of the  
 28 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.

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

20 Ali first contends that AEDPA deference does not apply to this claim because the  
 21 state appellate court did not directly address the federal constitutional claim raised by Ali,  
 22 but rather decided the claim solely on state law grounds. (Mem. of P. & A. Supp. Am.  
 23 Pet. at 25-27; Traverse at 2-3.) "In *Harrington v. Richter*, 562 U.S. \_\_, 131 S. Ct. 770  
 24 [citations omitted] (2011), the Supreme Court held that a reviewing federal court should  
 25 presume that the last reasoned decision of the state court adjudicated all raised claims on  
 26 the merits and is entitled to deference pursuant to . . . AEDPA . . . ." *Phillips v.*  
 27 *Herndon*, 730 F.3d 733, 775 (9th Cir. 2013.) In *Johnson v. Williams*, \_\_ U.S. \_\_, 133 S.  
 28 Ct. 1088 (2013), the Supreme Court recognized an exception to this rule where "a state  
 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,  
 16 26 L.Ed.2d 489 (1970). A number of exceptions have developed over the  
 17 years to allow admission of hearsay statements made under circumstances  
 18 that tend to assure reliability and thereby compensate for the absence of the  
 19 oath and opportunity for cross-examination. Among the most prevalent of  
 20 these exceptions is the one applicable to declarations against interest — an  
 21 exception founded on the assumption that a person is unlikely to fabricate  
 22 a statement against his own interest at the time it is made.

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

24 In *Chambers*, the defense sought to introduce evidence that another person,  
 25 McDonald, had confessed to the crime. *Id.* at 291. McDonald had confessed to three  
 26 different people, then recanted. The trial court excluded the evidence on the ground that  
 27 it was hearsay and prevented the defense from questioning McDonald as an adverse  
 28 witness under a state rule preventing counsel from impeaching his own witness. *Id.* at  
 292. The Supreme Court concluded that the state court had "mechanistically" applied  
 30 state evidentiary rules to exclude the evidence, violating *Chambers*' due process rights.  
 31 The circumstances of the confession — McDonald had spontaneously confessed to three  
 32 separate people, other evidence in the case corroborated McDonald's confession, and,  
 33 most tellingly, McDonald was available for cross-examination — indicated it was  
 34 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  
 28       ///

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. Hornbeck*, 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

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

(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.

28 | // /

### 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  
23 pinpoint instruction on third party culpability. (*Hartsch, supra*, 49 Cal.4th  
24 at p. 504; *People v. Ledesma*, (2006) 39 Cal.4th 641, 720-721; *People v.*  
25 *Earp* (1999) 20 Cal.4th 826, 887 (*Earp*).) In those cases, as here, the  
26 proposed instruction, would have stressed that the defendant was not  
27 required to *prove* third party culpability, and would have informed the jury  
28 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  
resolved on the basis that if error existed, it was not prejudicial. Third party  
culpability instructions “add little to the standard instruction on reasonable  
doubt.” (*Hartsch*, at p. 504.) Moreover, “even if such instructions properly  
pinpoint the theory of third party liability, their omission is not prejudicial  
because the reasonable doubt instructions give defendants ample  
opportunity to impress upon the jury that evidence of another party’s

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

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

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

23 (Lodgment No. 6 at 27-29.)

24 "As a general proposition a defendant is entitled to an instruction as to any  
 25 recognized defense for which there exists evidence sufficient for a reasonable jury to find  
 26 in his favor." *Mathews v. United States*, 485 U.S. 58, 63 (1988), citing *Stevenson v.*  
 27 *United States*, 162 U.S. 313 (1896). The Ninth Circuit has noted that "[u]nder the Due  
 28 Process Clause of the Fourteenth Amendment, criminal prosecutions must comport with  
 1 prevailing notions of fundamental fairness . . . [which] require that criminal defendants  
 2 be afforded a meaningful opportunity to present a complete defense." *Bradley v. Duncan*,  
 3 315 F.3d 1091, 1098-99 (9th Cir. 2002) (citing *Mathews*, 485 U.S. at 63 and *California*  
 4 v. *Trombetta* , 467 U.S. 479, 485 (1984)). Thus, a "[f]ailure to instruct on the defense  
 5 theory of the case is reversible error if the theory is legally sound and evidence in the case  
 6 makes it applicable.'" *Clark v. Brown*, 450 F.3d 898, 904-05 (9th Cir. 2006) (quoting  
 7 *Beardslee v. Woodford*, 358 F.3d 560, 577 (9th Cir. 2004)); *Solis v. Garcia*, 219 F.3d  
 8 922, 929 (9th Cir. 2000); *Bashor v. Risley*, 730 F.2d 1228, 1240 (9th Cir. 1984) (stating  
 9 that "[a] criminal defendant is entitled to adequate instructions on his or her theory of

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

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

12 A state-court decision is "contrary to" our clearly established precedents if  
 13 it "applies a rule that contradicts the governing law set forth in our cases" or if it  
 14 "confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from our  
 15 precedent." *Williams v. Taylor*, 529 U.S. 362, 405-406, 120 S.Ct. 1495, 146  
 16 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.

17 *Early*, 537 U.S. at 8.

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

21 Ali's evidence of third party liability was as follows: As to the College Avenue  
 22 shooting, Canute Dawes testified that in early July of 2008, he got into an argument with  
 23 some women at the College Avenue apartments over Dawes having a red rag, a Blood  
 24 color, in his back pocket. One woman told Dawes the women were Crips and that  
 25 someone would come back for Dawes. (Lodgment No. 2, vol. 23 at 6617-21.) The next  
 26 day, a shooting occurred at the College Avenue apartments. A second shooting, one of  
 27 the shootings charged in this case, occurred on July 22, 2008, in which Larry Lumpkin  
 28 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

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

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

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

23 You have heard evidence that a person other than the defendant may  
 24 have committed the offense with which the defendant is charged. The  
 25 defendant is not required to prove the other person's guilty beyond a  
 26 reasonable doubt. Defendant is entitled to an acquittal if the evidence raises  
 27 a reasonable doubt in your minds as to the defendant's guilt. Such evidence  
 28 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

3 The reasonable doubt instruction mirrored this instruction, informing the jurors that  
 4 Ali was presumed innocent and they needed to find he was guilty beyond a reasonable  
 5 doubt:  
 6

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

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

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

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

25 (Id. at 0883.)

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

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  
 39 Black men or gang members.

40 The trial court denied the motion for a new trial based on juror  
 41 misconduct. As in connection with the motion to release juror information,  
 42 the trial court explained that many of Ali's juror misconduct allegations  
 43 were based on evidence made inadmissible by Evidence Code 1150, and  
 44 that the admissible evidence did not establish juror misconduct. Ali  
 45 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  
 29 at p. 141.) That is not what is described in the declarations. On the  
 30 contrary, Juror No. 5's comments about what Juror No. 6 said during  
 31 deliberations shows that he *was* participating in the deliberative process by  
 32 stating the reasons for his views. Further, although Juror No. 1 claimed that  
 33 other jurors had already made up their minds at the beginning of  
 34 deliberations, she also stated that they "discussed other possibilities with us"  
 35 and discussed that they believed the evidence "pointed to guilt." Those  
 36 comments show that the other jurors *did* participate in the deliberations.<sup>FN19</sup>

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

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

49 (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).<sup>2</sup> 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.*)

27  
 28       

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<sup>2</sup> 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

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

7 [THE COURT]: First of all, I watch the jurors during the trial. I  
 8 spend, in fact, the vast majority of my time either reading the live-note or  
 9 watching the jurors. The reason I do that is it is not uncommon for jurors,  
 10 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.

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

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

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

#### 21 7. *Statements About Racial Bias*

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

25 There was racism involved in our deliberations. In addition to the  
 26 fact that all 8 of those who voted immediately for guilt were white males,

27 I heard one of them describe Jesse Freeman as a "lazy loser." Another of  
 28 them responded, "Aren't they all?" I took that to mean he meant black men  
 or gang members, including the defendant.

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

30 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 made 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  
 4 allegations of fabrication of evidence and threatening witnesses as to Lynn  
 5 would be relevant in this case.

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

13 A defendant is entitled to discovery of a law enforcement officers'  
 14 confidential personnel records if those files contain information that is  
 15 potentially relevant to the defense. (*Pitchess v. Superior Court* (1974) 11  
 16 Cal.3d 537-583; Evid. Code, §§ 1043-1045.) The discovery procedure has  
 17 two steps. First, the defendant must file a motion seeking such records,  
 18 containing affidavits "showing good cause for the discovery or disclosure  
 19 sought [and] setting forth the materiality thereof to the subject matter  
 20 involved in the pending litigation." (Evid. Code, § 1043, subd. (b)(3).) If  
 21 good cause is shown, the trial court then reviews the records in camera to  
 22 determine whether any of them are relevant to the intended defense. (*Id.*,  
 23 § 1045, subd. (b).) A trial court's decision on the discoverability of material  
 24 in police personnel files is reviewable under an abuse of discretion standard.  
 25 (*People v. Breaux* (1991) 1 Cal.4th 281, 311-312.)

26 Following established procedure, "the records have been made part  
 27 of the record on appeal but have been sealed, and appellate counsel for  
 28 defendant have not been permitted to view them." (*People v. Hughes*  
 1 Cal.4th 287, 330; see also *People v. Mooc* (2001) 26 Cal.4th  
 2 1216, 1232.) We have independently examined the personnel files in  
 3 camera. Based on that review, we conclude that the trial court did not abuse  
 4 its discretion in refusing to disclose any further information from those files.

5 . . . .

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

9 We begin with the applicable statutory background. Under section  
 10 1054.7, the prosecution is required to provide discovery to the defense as  
 11 described in section 1054.1, "unless good cause is shown why a disclosure  
 12 should be denied, restricted, or deferred." (§ 1054.7.) Good cause is  
 13 statutorily limited to "threats or possible danger to the safety of a victim or  
 14 witness, possible loss or destruction of evidence, or possible compromise of  
 15 other investigations by law enforcement." (*Ibid.*) Similarly, under  
 16 Evidence Code section 1040, subdivision (b)(2), a public entity has a  
 17 privilege to refuse to disclose official information if "[d]isclosure of the  
 18 information is against the public interest because there is a necessity for  
 19 preserving the confidentiality of the information that outweighs the  
 20 necessity for disclosure in the interest of justice . . ." (Evid. Code, § 1040,  
 21 subd. (b)(2).) Both statutes involve the same balancing process by the trial  
 22 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*)).

1 (Lodgment No. 6 at 6-10.)

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

9 The Ninth Circuit has recognized that *Pitchess* is essentially a parallel procedure  
 10 to *Brady* for disclosing exculpatory material but that, under *Pitchess*, a defendant must  
 11 meet a lower threshold to satisfy his burden and will have access to a broader amount of  
 12 material if that threshold is met. *See Harrison v. Lockyer*, 316 F.3d 1063, 1065-66 (9th  
 13 Cir. 2003).

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.  
 15 [Citation.] Prejudice, in this context, focuses on 'the materiality of the  
 16 evidence to the issue of guilt and innocence.' [Citations.] Materiality, in  
 17 turn, requires more than a showing that the suppressed evidence would have  
 18 been admissible [citation], that the absence of the suppressed evidence made  
 19 conviction 'more likely' [citation], or that using the suppressed evidence to  
 20 discredit a witness's testimony 'might have changed the outcome of the  
 21 trial' [citation]. A defendant instead 'must show a "reasonable probability  
 22 of a different result."'" (*People v. Salazar* (2005) 35 Cal.4th 1031, 1043  
 23 (*Salazar*).) Thus, under *Brady*, "there is no 'error' unless there is also  
 24 'prejudice.''" (*In re Sassounian* (1995) 9 Cal.4th 535, 545, fn 7.) [FN 4  
 omitted.]

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

29 Because Ali has failed to discuss any specific discovery violations  
 30 that he contends warrant reversal, his appellate briefing is woefully  
 31 inadequate. "An appellate court is not required to examine underdeveloped  
 32 claims, nor to make arguments for parties." (*Paterno v. State of California*  
 33 (1999) 74 Cal.App.4th 68, 106.) Our role is to evaluate " 'legal argument  
 34 with citation of authorities on the points made.''" (*People v. Stanley* (1995)  
 35 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.

36 First, as we have explained, *Brady* applies only to evidence that is  
 37 " 'favorable to the accused, either because it is exculpatory, or because it is  
 38 impeaching.''" (*Salazar, supra*, 35 Cal.4th at p. 1043.) Because Ali does  
 39 not, in the course of his argument, identify any *specific* discovery violations  
 40 on which he premises his *Brady* argument, he has not attempted to establish,  
 41 as required by *Brady*, that the items of withheld or delayed discovery were  
 42 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.*  
*Lambert*, 283 F.3d 1040, 1052-53 (9th Cir. 2002) (citing *United States v. Bagley*, 473  
 27 U.S. 667, 676, 678 (1985) and *United States v. Agurs*, 427 U.S. 97, 110 (1976).)  
 28 “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).)

29           As he did in state court, Ali recounts the history of discovery proceedings in a  
 30 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.*)<sup>3</sup>
- 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

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26  
 27 <sup>3</sup> 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).<sup>4</sup>

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

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28 <sup>4</sup> 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.”

1 contrary to, nor an unreasonable application of, clearly established Supreme Court law,  
 2 nor was it based on an unreasonable determination of the facts. *Williams*, 528 U.S. at  
 3 412-13; 28 U.S.C. § 2254(d)(2). Ali is not entitled to relief as to this claim.

4 *G. Refusal to Grant Immunity*

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

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  
 16 state appellate court's decision denying the claim as the basis for its analysis. *Ylst*, 501  
 17 U.S. at 805-06. That court wrote:

18 Ali sought to call Marcus House and Hunter Porter as witnesses.  
 19 However, both men invoked their Fifth Amendment right not to testify on  
 20 the basis that their testimony might incriminate them. The trial court denied  
 21 Ali's request that it grant use immunity to House and Porter so that they  
 22 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  
 23 omitted].

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

26 Porter was a Lincoln Park gang member who was serving a 26-year  
 27 term for attempted murder and was charged as a defendant in a prosecution  
 28 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  
 27 127.) Indeed, it has "expressed reservations concerning [such] claims."  
 28 (*People v. Williams, supra*, 43 Cal.4th at p. 622.)

29 As Ali points out, our Supreme Court has in dicta, on several  
 30 occasions, acknowledged case law from the federal Third Circuit Court of  
 31 Appeals (*Government of Virgin Islands v. Smith* (3d Cir. 1980) 615 F.2d  
 32 964 (*Smith*)), which holds that a judicial grant of use immunity could be  
 33 required to preserve the defendant's constitutional right to a fair trial and  
 34 compulsory process in certain specific circumstances. (*Hunter, supra*, 49  
 35 Cal.3d at p. 974.) [FN 11 omitted]. In each case, our Supreme Court has  
 36 discussed the factors described in *Smith* and, in each case, has concluded  
 37 that if the factors were a correct statement of the law, they would not be  
 38 satisfied. (*People v. Cudjo* (1993) 6 Cal.4th 585, 619; *In re Williams, supra*,  
 39 7 Cal.4th at p. 610; *Lucas, supra*, 12 Cal.4th at p. 459; *People v. Stewart*  
 40 (2004) 33 Cal.4th 425, 568; *Samuels, supra*, 36 Cal.4th at p. 128.) Our  
 41 Supreme Court's discussion of the factors set forth in *Smith* was always  
 42 presented as dicta and was unnecessary to the decision.

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

1 (Lodgment No. 6 at 17-21.)

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

7 Ali cites *Government of Virgin Islands v. Smith*, 615 F.2d 964 (3d Cir. 1980) as  
 8 support for his contention that courts have the power to grant immunity to defense  
 9 witnesses. Although the Third Circuit subsequently abandoned judicial immunity as a  
 10 remedy for prosecutorial misconduct in *United States v. Quinn*, 728 F.3d 243, 257 (3d  
 11 Cir. 2013), the Ninth Circuit has adopted a similar rule in *Williams v. Woodford*, 384 F.3d  
 12 567 (9th Cir. 2004), a pre-AEDPA case. There, the Court stated:

13 [T]he prosecution's refusal to grant immunity to a defense witness denies  
 14 the defendant a fair trial only when (1) the witness's testimony would have  
 15 been relevant, and (2) the prosecution refused to grant the witness use  
 16 immunity with the deliberate intention of distorting the fact-finding process.  
 17 *See United States v. Westerdahl*, 945 F.2d 1083, 1086 (9th Cir.1991);  
 18 *United States v. Lord*, 711 F.2d 887, 891 (9th Cir.1983). To demonstrate  
 19 the prosecutorial misconduct of the second prong, Williams must show that  
 20 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*  
*21 States v. Duran*, 189 F.3d 1071, 1087 (9th Cir.1999).

22 *Id.* at 600.

23 Assuming without deciding that Ali meets the first prong of the test, i.e., that  
 24 House's and Porter's testimony was relevant, Ali argues the trial court's refusal to grant  
 25 them immunity "intentionally distorted the fact-finding process" by: (1) intentionally  
 26 causing House to invoke his Fifth Amendment rights, and (2) by selectively granting  
 27 immunity to Porter when it helped the government's case via the "free talk" Porter had  
 28 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  
8 Amendment applies. But we're not doing that today.

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

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

17 MS. FERAL: Yes.

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

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

21 THE COURT: He's in state custody?

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

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

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

26 MS. FERAL: Yes.

27 THE COURT: And I assume that somewhere during these questions  
28 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?

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

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

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

33 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  
 23 constitutional rights to due process and to confront witnesses were violated  
 24 by the admission at trial of Freeman’s preliminary hearing testimony. [FN  
 25 7 omitted.]

26       The confrontation clause of the Sixth Amendment guarantees a  
 27 criminal defendant the right to cross-examine witnesses against him.  
 28 (*Crawford v. Washington* (2004) 541 U.S. 36, 54) (*Crawford*).) Under  
 29 *Crawford*, “[a]n exception to the confrontation requirement exists where the  
 30 witness is unavailable, has given testimony at a previous judicial proceeding  
 31 against the same defendant, and was subject to cross-examination by that  
 32 defendant.” (*People v. Carter* (2005) 36 Cal.4th 1114, 1172.) The United  
 33 States Supreme Court has stated that when a witness is  
 34 not available at trial, “preliminary hearing testimony is admissible only if  
 35 the defendant had an *adequate* opportunity to cross-examine” the witness.  
 36 (*Crawford*, at p. 57, italics added.) For example, in *California v. Green*  
 37 (1970) 399 U.S. 149, 166, the high court noted that the preliminary hearing  
 38 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  
 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 witness’ 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

1 of an unavailable witness was inadmissible because defense counsel's  
 2 "cross-examination of [the witness] would have been different had the  
 3 impeaching information been known at the time he testified." (*Id.* at p.  
 4 293.) As our Supreme Court explained, " ' ' Both the United States  
 5 Supreme Court and this court have concluded that 'when a defendant has  
 6 had an opportunity to cross-examine a witness at the time of his or her prior  
 7 testimony, that testimony is deemed sufficiently reliable to satisfy the  
 8 confrontation clause requirement [citation], regardless whether subsequent  
 9 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.)

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

12 (Lodgment No. 6 at 13-17.)

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

15 Where nontestimonial hearsay is at issue, it is wholly consistent with  
 16 the Framers' design to afford the States flexibility in their development of  
 17 hearsay law — as does *Roberts*, and as would an approach that exempted  
 18 such statements from Confrontation Clause scrutiny altogether. Where  
 19 testimonial evidence is at issue, however, the Sixth Amendment demands  
 20 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.

21 *Id.* at 68.

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

12 The CALCRIM instructions do not contain a specific instruction  
 13 addressing how the jury should view witnesses who receive benefits from  
 14 the prosecution. Ali accordingly requested that the trial court give an  
 15 instruction based on a model instruction from the federal Ninth Circuit  
 16 Court of Appeals, which stated: “You have heard testimony that [the  
 17 witness] has received benefits, compensation, favored treatment, from the  
 18 government in connection with this case. You should examine [the  
 19 witness’s] testimony with greater caution than that of other witnesses. In  
 20 evaluating that testimony, you should consider the extent to which it may  
 21 have been influenced by the receipt of benefits from the government.” The  
 22 trial court declined to give the instruction, explaining (1) that the substance  
 23 of the requested instruction was covered by other instructions; and (2) as to  
 24 the Gomez family, there was no evidence of any benefit received.  
 25

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

30 First, we agree with the trial court’s conclusion that the evidence did  
 31 not support a finding that the Gomezes received any benefit from the  
 32 prosecution, as the evidence is that the district attorney investigator merely  
 33 provided information about the status of a police investigation but did not  
 34 influence the investigation in any way. Therefore, substantial evidence did  
 35 not support an instruction with regard to the Gomezes.  
 36

37 Second, with respect to the requested instruction being duplicative,  
 38 the jury was instructed with CALCRIM No. 226, which states: “In  
 39 evaluating a witness’s testimony, you may consider anything that  
 40 reasonably tends to prove or disprove the truth or accuracy of that  
 41 testimony. Among the factors you may consider are: [¶] . . . [¶] Was the  
 42 witness’s testimony influenced by a factor such as bias or prejudice, a  
 43 personal relationship with someone involved in the case, or a personal  
 44 interest in how the case is decided.” As the trial court pointed out, this  
 45 instruction sufficiently instructed the jury to consider a witness’s bias and  
 46 allowed the defense to argue that the witnesses were biased because of  
 47 benefits they received from the prosecution.  
 48

49 Third, the instruction proposed by defense counsel was improperly  
 50 argumentative in that it *required* an inference not supported by law.  
 51 Specifically, the instruction would have directed the jury that it *must* view  
 52 the witness’s testimony in a specific way, i.e., *with greater caution*.  
 53 However, there is no legal authority for such a requirement. Ali points to  
 54

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. Naugh’ten*, 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:

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

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

- 10                       . . .
- 11                       •            Was the witness's testimony influenced by a factor such  
 12                       as bias, or prejudice, a personal relationship with  
 13                       someone involved in the case, or a personal interest in  
 14                       how the case is decided?
- 15                                  . . .
- 16                       •            How reasonable is the testimony when you consider all  
 17                       the other evidence in the case?
- 18                       •            Did other evidence prove or disprove any fact about  
 19                       which the witness testified?
- 20                       •            Did the witness admit to being untruthful?
- 21                       •            Has the witness been convicted of a felony?
- 22                       •            Has the witness engaged in other conduct that reflects  
 23                       on his or her believability?
- 24                                  . . .

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

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

31            The jury was told that Freeman was given \$2,409.95, the majority of which was  
 32            for hotel and apartment expenses associated with relocating him for his safety.  
 33            (Lodgment No. 2, vol. 20 at 5325.) The jury also heard evidence about Freeman's  
 34            relationship with Lincoln Park and his desire to get out of the gang lifestyle. Freeman  
 35            testified he was "basically through with the gang-banging," and that "friends of [his]  
 36            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 Ali raised this claim in the petition for review he filed in the California Supreme  
 2 Court. (Lodgement No. 7.) That court denied the petition without analysis and without  
 3 citation of authority. (Lodgment No. 8.) Accordingly, this Court must “look through”  
 4 to the state appellate court’s decision denying the claim as the basis for its analysis. *Ylst*,  
 5 501 U.S. at 805-06. That court wrote:

6 Ali claims that the prosecutor committed misconduct during closing  
 7 argument and by engaging in the alleged discovery violations that we  
 discussed above. Prosecutorial misconduct exists “ ‘under state law only  
 8 if it involves “ ‘the use of deceptive or reprehensible methods to attempt to  
 9 persuade with the court or the jury.’ ” ’’’ (*Earp, supra*, 20 Cal.4th at p.  
 10 858.) Further, a defendant’s federal due process rights are violated when a  
 11 prosecutor’s misconduct “ ‘ ‘ ‘infects the trial with unfairness,’ ” ’’’ making  
 12 it fundamentally unfair. (*Ibid.*) A showing of bad faith on the part of the  
 13 prosecutor is not required to establish misconduct. (*People v. Hill* (1998)  
 14 17 Cal.4th 800, 822 (*Hill*).) However, “[t]o preserve for appeal a claim of  
 15 prosecutorial misconduct, the defense must make a timely objection at trial  
 16 and request an admonition . . . .” (*Earp*, at p. 858.) As an exception to this  
 17 rule, “[a] defendant will be excused from the necessity of either a timely  
 18 objection and/or a request for admonition if either would be futile.  
 19 [Citations.] In addition, failure to request the jury be admonished does not  
 20 forfeit the issue for appeal if “ ‘ ‘ ‘an admonition would not have cured the  
 21 harm caused by the misconduct.’ ” ” (*Hill*, at p. 820.)

22 First, we address Ali’s contention that the prosecutor’s alleged  
 23 discovery violations rose to the level of prosecutorial misconduct. It is well  
 24 settled that “in the absence of prejudice to the fairness of the trial,  
 25 prosecutor misconduct will not trigger reversal.” (*People v. Bolton*, (1979)  
 26 23 Cal.3d 208, 214.) Here, to support his argument, Ali simply refers back  
 27 to the argument concerning discovery violations that we have already  
 28 addressed above. As we explained in our earlier discussion, Ali failed to  
 establish the prejudice necessary to show a violation of his constitutional  
 rights based on purported discovery violations. That failure to establish  
 prejudice is also fatal to Ali’s attempt to obtain reversal based on  
 prosecutorial misconduct arising from the same purported discovery  
 violations.

22 Next, we turn to Ali’s contention that the prosecutor committed  
 23 misconduct during closing argument because “[t]he lack of direct  
 24 evidentiary references in the prosecutor’s initial closing argument deprived  
 25 [Ali] of the ability to make effective argument relating to the prosecutor’s  
 26 position on specific evidence.” Ali argues that “it is misconduct for the  
 27 prosecutor to structure closing argument in a manner designed to preclude  
 28 an effective defense reply. He relies on *People v. Robinson* (1995) 31  
 Cal.App.4th 494 (*Robinson*), in which the prosecutor improperly gave a  
 three and one-half page closing argument followed by a much longer rebuttal  
 argument of 35 pages, in which many issues were raised for the first time.  
 (*Id.* at p. 505 [“Section 1093, subdivision (e) permits the prosecutor to open  
 the argument and close the argument. It does *not* permit the prosecutor to  
 give a perfunctory (three and one-half reporter’s transcript pages) opening  
 argument designed to preclude effective defense reply, and then give a

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*,  
 6 20 Cal.4th at p. 858.) Indeed, Ali could have asked for the trial court to  
 7 remedy any unfairness by allowing defense counsel an additional  
 8 opportunity for surrebuttal.

9       The substance of Ali’s argument fails as well. The prosecutor’s  
 10 closing argument in this case was nothing like the perfunctory closing  
 11 argument in *Robinson* and did not preclude an effective defense reply. On  
 12 the contrary, the prosecutor’s closing argument consumed 38 pages of the  
 13 reporter’s transcript and — in a detailed manner — covered the evidence  
 14 presented at trial that the prosecutor viewed as establishing Ali’s guilt.  
 15 Defense counsel’s closing was a similar length, consuming 47 pages of the  
 16 reporter’s transcript. The prosecutor’s rebuttal argument was much shorter  
 17 — at 20 pages, and was directed at responding to issues raised during  
 18 defense counsel’s argument. We accordingly perceive no misconduct in the  
 19 way that the prosecutor handled closing argument.

20       (Lodgment No. 6 at 34-37.)

21       In order to find prosecutorial misconduct, “[i]t is not enough that the prosecutor’s  
 22 remarks [or actions] were undesirable or even universally condemned.” *Darden v.*  
 23 *Wainwright*, 477 U.S. 168, 181 (1986). Rather, a prosecutor commits misconduct when  
 24 his or her actions “so infect . . . the trial with unfairness as to make the resulting  
 25 conviction a denial of due process.” *Id.* (quoting *Donnelly v. DeChristoforo*, 416 U.S.  
 26 637 (1974).) “[T]he appropriate standard of review for such a claim on writ of habeas  
 27 corpus is ‘the narrow one of due process, and not the broad exercise of supervisory  
 28 power.’” *Id.* (quoting *Donnelly*, 416 U.S. at 642).)

29       Ali refers the Court to section five of his Memorandum of Points and Authorities,  
 30 detailed above in section IV(F) of this Report and Recommendation, as support for his  
 31 contention that discovery violations were so pervasive that he was denied a fair trial. As  
 32 discussed in Section IV(F) of this Report and Recommendation, there is no evidence to  
 33 support a contention that exculpatory evidence or impeachment evidence was suppressed  
 34 under *Brady*. And, as to other discovery issues, Ali provides only a historical recounting  
 35 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.

29 THE COURT: Overruled. Go ahead.

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

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

1       At the hearing on the motion for a new trial, defense counsel complained that the  
 2 prosecutor did not argue any inferences regarding the cell phones found at Ali's  
 3 residence, but then during rebuttal, argued that cell tower evidence supported the  
 4 prosecution's theory that Ali had committed the shootings. (Lodgment No. 2, vol. 28 at  
 5 8110.) But defense counsel first argued about the meaning of the cell phone records  
 6 during closing argument and how those records supported their theory that Freeman, not  
 7 Ali, committed the shootings. (*See id.* at 7321, 7326-30.)

8       A prosecutor may argue reasonable inferences drawn from the evidence presented  
 9 at the trial. *See Darden v. Wainwright*, 477 U.S. 168, 181-82 (1986); see also *Ceja v.*  
 10 *Stewart*, 97 F.3d 1246, 1253-54 (9th Cir. 1996) (quoting *United States v. Baker*, 10 F.3d  
 11 1374, 1415 (9th Cir. 1993) and stating that "counsel are given latitude in the presentation  
 12 of their closing arguments, and courts must allow the prosecution to strike hard blows  
 13 based on the evidence presented and all reasonable inferences therefrom"). A prosecutor  
 14 may also reply to comments by defense counsel during closing. *See Lawn v. United*  
 15 *States*, 355 U.S. 339, 359, n. 15 (1958); *United States v. Del Toro-Barboza*, 673 F.3d  
 16 1136, 1151 (9th Cir. 2012) citing *United States v. McChristian*, 47 F.3d 1499, 1508 (9th  
 17 Cir. 1995). Here, the prosecutor's argument did not "'so infect . . . the trial with  
 18 unfairness as to make the resulting conviction a denial of due process.'" *Darden*, 477  
 19 U.S. at 181. Accordingly, the state court's denial of this claim was neither contrary to,  
 20 nor an unreasonable application of, clearly established Supreme Court law. *Williams*,  
 21 529 U.S. at 412-13.

22       K. *Denial of Access to Juror Information*

23       In claim ten, Ali argues the state court erred when it denied his motion to disclose  
 24 juror information to pursue a motion for a new trial. (Mem. of P. & A. Supp. Am. Pet at  
 25 92-101.) Respondent contends the claim is not cognizable on federal habeas review  
 26 because it concerns only the application of state law. (Mem. of P & A. Supp. Answer at  
 27 35-36.)

28       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  
 27 amounting to prosecutorial misconduct. Based on that conclusion, we also  
 28 reject his argument that the trial court should have granted a new trial based  
 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. (Lodgment 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

1 927; *see also United States v. Frederick*, 78 F.3d 1370, 1381 (9th Cir. 1996) (stating that  
 2 where no single trial error in isolation is sufficiently prejudicial to warrant habeas relief,  
 3 “the cumulative effect of multiple errors may still prejudice a defendant”). Where “there  
 4 are a number of errors at trial, ‘a balkanized, issue-by-issue harmless error review’ is far  
 5 less effective than analyzing the overall effect of all the errors in the context of the  
 6 evidence introduced at trial against the defendant.” *Frederick*, 78 F.3d at 1381 (quoting  
 7 *United States v. Wallace*, 848 F.2d 1464, 1476 (9th Cir. 1988)). Cumulative error  
 8 warrants habeas relief only where the combined effect of the errors had a “substantial and  
 9 injurious effect or influence on the jury’s verdict.” *Parle*, 505 F.3d at 927 (quoting  
 10 *Brecht*, 507 U.S. at 637).

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

16 **V. CONCLUSION**

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

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

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

26 **IT IS FURTHER ORDERED** that any reply to the objections shall be filed with  
 27 the Court and served on all parties no later than **April 28, 2015**. The parties are advised  
 28 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).

3

4 IT IS SO ORDERED.

5 DATED: March 16, 2015

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7   
8 Hon. William V. Gallo  
U.S. Magistrate Judge

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