appendix-B

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Appendix-B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

OCT 25 2019

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

EVARISTO TOSCANO,

Petitioner-Appellant,

v.

JOE A. LIZARRAGA, Warden,

Respondent-Appellee.

No. 18-17455

D.C. No. 3:17-cv-04060-WHA
Northern District of California,
San Francisco

ORDER

Before: O'SCANNLAIN and RAWLINSON, Circuit Judges.

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

Any pending motions are denied as moot.

DENIED.

Appendix-C

appendix-C

appendix-C.

United States District Court
For the Northern District of California

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

EVARISTO TOSCANO,

Petitioner,,

v.

JOE A. LIZARRAGA,

Respondent.

_____/

No. C 17-4060 WHA (PR)

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

INTRODUCTION

Petitioner, a California prisoner proceeding pro se, filed this action for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 challenging his conviction in state court. Respondent was ordered to show cause why the petition should not be granted. Respondent has filed an answer and petitioner has filed a traverse. For the reasons discussed below, the petition is **DENIED.**

STATEMENT

I. PROCEDURAL BACKGROUND

Petitioner was convicted in Alameda County Superior Court of second-degree murder and three attempted murders. The trial court sentenced him to a total of 87 years to life in state prison. His appeals were rejected by the California Court of Appeal in 2015 and 2016, and by the California Supreme Court in 2017. His state petitions for writ of habeas corpus were rejected by the California Court of Appeal and the California Supreme Court. Petitioner then filed this federal action for a writ of habeas corpus.

Petitioner claims that: (1) his Confrontation Clause rights were violated; (2) the police sergeant's loss of a DVD of three witness interviews violated petitioner's right to due process;

United States District Court
For the Northern District of California

(3) petitioner's out-of-court statement should have been excluded or his trial severed from the codefendant implicated by petitioner in that statement; (4) the judge's questions to the defense expert witness violated due process; and (5) trial counsel provided ineffective assistance in that he failed to investigate, impeach Sergeant Fleming, make a *Pitchess* motion, and urge that the codefendant was the shooter.

II. FACTUAL BACKGROUND

On the night of June 11, 2010, four young male relatives (*i.e.*, brothers Awad, Samey and Samier Ayesh, and their cousin Adham Ayesh) were closing up a discount store in East Oakland. Samey and Adham walked outside and saw teenagers Esteban Navarro and Alejandro Macias spray-painting graffiti on a truck in the parking lot. When confronted, Navarro spray-painted Adham on the arm and Adham responded by knocking Navarro to the ground and spray-painting one or both teenagers. Samey told the teens to leave, and they did. Navarro then returned and asked for a phone he had left behind; Samey threw it across the street, and Navarro left again. The Ayeshes finished cleaning, locked the store, and were readying to leave when they saw four men walking toward them. One of the men kicked a van in the store's parking lot. Another one of the men in the group lifted a gun and fired several shots, hitting Samier. Samier died at the scene from a gunshot wound to his chest. The man who kicked the van was later identified as Hector Vilchis, who was dating graffiti-vandal Macias' cousin. The man who fired the shots was later identified as petitioner, who was dating Macias' sister.

ANALYSIS

I. STANDARD OF REVIEW

Pursuant to the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), a federal court may entertain a petition for writ of habeas corpus "in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). The petition may not be granted with respect to any claim adjudicated on the merits in state court unless the state court's adjudication of the claim: "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the

United States District Court
For the Northern District of California

Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d).

"Under the 'contrary to' clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by [the United States Supreme] Court on a question of law or if the state court decides a case differently than [the] Court has on a set of materially indistinguishable facts." *Williams (Terry) v. Taylor*, 529 U.S. 362, 412-13 (2000). "Under the 'unreasonable application' clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from [the] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 413. "[A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." *Id.* at 411. A federal habeas court making the "unreasonable application" inquiry should ask whether the state court's application of clearly established federal law was "objectively unreasonable." *Id.* at 409.

When there is no reasoned opinion from the highest state court to consider the petitioner's claims, the federal habeas court looks to the last reasoned opinion from the state courts. *See Wilson v. Sellers*, 138 S. Ct. 1188, 1192 (2018). When the state court has rejected a claim on the merits without explanation, this court "must determine what arguments or theories supported or . . . could have supported, the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of [the U.S. Supreme] Court." *Harrington v. Richter*, 562 U.S. 86, 102 (2011).

II. CLAIMS FOR RELIEF

A. Graffiti Vandal's Statement to the Police

All agree that petitioner's Confrontation Clause rights were violated when the trial court permitted a police sergeant to testify to statements made by the graffiti vandals. The parties dispute whether that error was harmless beyond a reasonable doubt.

United States District Court
For the Northern District of California

The evidence at issue came from Sergeant Sean Fleming, who testified that Navarro (one of the graffiti vandals) told him that Macias (the other graffiti vandal) had sent a text message to Navarro stating that it was "Risk or Rask that went over to [the murder scene] and was shooting" (Exh. 4, Reporter's Transcript ("RT") 1030; ECF No. 7-7 at 262). Sergeant Fleming already had learned through his investigation that petitioner's nickname was Risk or Rask (RT 1441; ECF No. 7-8 at 328). Sergeant Fleming did not testify as to how Macias came to learn the information that Macias sent in the text message to Navarro. The trial court overruled a defense hearsay objection, finding that the statement was not being offered for the truth but instead to show what the sergeant did subsequently in his investigation (RT 1030; ECF No. 7-7 at 262).

The Confrontation Clause of the Sixth Amendment gives a defendant the right to confront and cross-examine witnesses who provide testimonial statements against him. *See Crawford v. Washington*, 541 U.S. 36, 50-51 (2004). A Confrontation Clause violation is subject to harmless error analysis. *See Hernandez v. Small*, 282 F.3d 1133, 1144 (9th Cir. 2002). On direct appeal, "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Chapman v. California*, 386 U.S. 18, 24 (1967). When, as here, the state court has found the constitutional error harmless, federal habeas relief is not available for the error "'unless *the harmlessness determination itself* was unreasonable.'" *Davis v. Ayala*, 135 S. Ct. 2187, 2199 (2015) (quoting *Fry v. Pliler*, 551 U.S. 112, 119 (2007)). In other words, a federal court may grant relief only if the state court's harmlessness determination "'was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.'" *Ibid.* (quoting *Harrington*, 562 U.S. at 103).

The California Court of Appeal determined that the admission of Sergeant Fleming's testimony violated petitioner's rights under the Confrontation Clause because Navarro could not be located to testify at trial and Navarro's statement about the text conversation was testimonial in that it was given to an investigating officer about a completed crime. *People v. Toscano*, 2016 WL 7058991 (Cal. Ct. App. Dec. 5, 2016) ("*Toscano II*"), *4. The state appellate court

United States District Court
For the Northern District of California

further determined that the Confrontation Clause violation was harmless beyond a reasonable doubt under the standard from *Chapman*, 386 U.S. at 24. *Toscano II*, at *1. Under the *Chapman* test, applicable when a constitutional error is found on direct review, "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Chapman*, 386 U.S. at 24.

In determining that the Confrontation Clause violation was harmless, the state appellate court relied on several factors. *First,* there was "abundant evidence supporting Toscano's guilt," including petitioner's acknowledgment to police on the day of his arrest that he drove to and was present at the murder scene; the selection of petitioner from a photo lineup by the victim's cousin, who also identified petitioner before trial as having had a gun, and identified him at trial as the person who shot the victim; and identification of petitioner as having been involved on the night of the murder by the victim's two brothers. *Toscano II*, at *5.

Second, the erroneously admitted text-message exchange played merely a bit part at trial. The text message was only briefly mentioned during the presentation of evidence and was not mentioned during the prosecutor's closing argument. *Ibid.*

Third, the evidence was covered by limiting jury instructions. At the time the evidence was admitted, a jury instruction was given that the evidence was not being offered for the truth of the matter asserted; the general jury instructions reminded jurors that evidence admitted for a limited purpose could not be considered for any other purpose; and the court's response to a jury note reminded the jury again that the statement was not to be considered for the truth of the matter asserted. *Ibid.* The appellate court presumed the jury followed the trial court's repeated limiting instructions. *Ibid.*

Fourth, the appellate court rejected the view that the multi-day jury deliberations showed the error harmful. While acknowledging that the jury sent two notes asking for further guidance because jurors were "'feeling stuck about a verdict'" and "'cannot agree on any charges,'" the appellate court disagreed with petitioner's contention that these notes "conclusively" showed that the case against petitioner was a close one. *Toscano II,* at *5. The appellate court observed that some of the length of the deliberations could be explained by the

United States District Court
For the Northern District of California

fact that the jury had asked to see all exhibits and have readbacks of various witnesses' testimonies, "which means some of their time 'was not actually deliberating the case, but was [devoted to] listening to the testimonies.'" *Ibid.* (alteration in original) (citation omitted). The appellate court also noted that the jury had sought clarifications of various jury instructions, suggesting they were going over their instructions to make sure they were properly carrying out their duties. Moreover, the jury was deliberating charges against *two* defendants and deadlocked on the codefendant, "making it even more difficult to determine how they were dividing their time. In light of all these circumstances, we cannot conclude that the length and nature of jury deliberations mandate reversal." *Ibid.*

Petitioner's main argument for habeas relief is that the California Court of Appeal erred by applying a sufficiency-of-the-evidence test instead of the *Chapman* harmless-error test requiring a finding of harmlessness beyond a reasonable doubt. The appellate court specifically called out the correct standard when it "conclude[d] that the double hearsay violated the confrontation clause but that the error was harmless beyond a reasonable doubt under *Chapman v. California* (1967) 386 U.S. 18." *Toscano II,* at *1. Moreover, the State's appellate brief (like petitioner's brief) had correctly identified the *Chapman* standard, rather than a sufficiency-of-the-evidence standard, as controlling the harmlessness determination (Exh. 15, Suppl. Resp. Brief 7, 9; ECF No. 7-10 at 394, 396). Petitioner snatches a phrase out of context, pointing to where the California Court of Appeal observed that "there was sufficient evidence" without the improperly admitted evidence to support the conviction. That statement, however, was made in the context of distinguishing a different state-court case where (unlike here) the improperly admitted evidence was "essential to prove an element" of a charge. *Toscano II,* at *5. Petitioner focuses on that one phrase while ignoring the rest of the court's analysis. When the entirety of the analysis is examined, it is clear that the California Court of Appeal did much more than simply examine whether the other evidence was sufficient to support the conviction. The court did mention the other evidence against petitioner, but that was a permissible and normal part of a harmless-error analysis because one of the tools for considering whether improperly admitted evidence made a difference is to consider that evidence in the context of

the other trial evidence. "[C]ourts do review all the state's evidence to determine whether error had a substantial and injurious effect on the jury's verdict." *Sims v. Brown*, 425 F.3d 560, 571 (9th Cir. 2005).

The California Court of Appeal's harmless-error determination was not unreasonable. The court reasonably considered the improperly admitted evidence to be just a small part of the state's evidence against petitioner, as it was mentioned just once and was not part of the prosecutor's closing argument. Also, Sergeant Fleming's testimony about the text message did not go completely unchallenged: Macias testified that he did not send a text message that petitioner was involved in the crime and testified that he did not know to whom the nickname "Risk" referred (RT 937; ECF No. 7-7 at 151). Even Sergeant Fleming admitted that he would not necessarily believe the information provided by Navarro and that he was unable to verify whether such a text message actually was sent (RT 1031; ECF No. 7-7 at 263). The California Court of Appeal also reasonably relied on the fact that the jury repeatedly was instructed not to consider Sergeant Fleming's testimony about the text message for the truth of the matter, and saw no reason to depart from the presumption that the jury followed the court's instructions. This was consistent with the widely recognized presumption that jurors follow their instructions. *See Richardson v. Marsh*, 481 U.S. 200, 206 (1987) (referring to "the almost invariable assumption of the law that jurors follow their instructions").

It was also not unreasonable for the California Court of Appeal to determine that the multi-day jury deliberations did not show the error to have been harmful in light of the factors discussed above and the circumstances of the deliberations, even though the general rule is that "'[l]onger jury deliberations weigh against a finding of harmless error because lengthy deliberations suggest a difficult case.'" *United States v. Lopez*, 500 F.3d 840, 846 (9th Cir. 2007) (quoting *United States v. Velarde-Gomez*, 269 F.3d 1023, 1036 (9th Cir. 2001)). Here, the jury reached a verdict on the sixth day of deliberations, but the jury deliberated for only about 20 hours during that time, due to numerous breaks and readbacks of testimony (Exh. 1, Clerk's Transcript ("CT") 682, 684, 690, 697, 705, 706; ECF No. 7-2 at 155, 157, 163, 170, 178, 179). Also suggesting that it was not necessarily the closeness of the case against petitioner that

United States District Court
For the Northern District of California

led to the six-day deliberations were these facts: the jury had requested to see all the exhibits, which suggested additional time was devoted to reviewing the evidence; the jury asked several questions about the jury instructions; the jury was considering charges against *two* defendants and deadlocked on all charges against the codefendant; and the jury was deliberating after a trial that had started more than a month before deliberations began. Although the jury did send two notes indicating an inability to reach a verdict, the judge did not give coercive instructions in response to those notes and instead simply directed the jury to break for the rest of the day and resume deliberations the next court day. The day after sending the second note, the jury sent another note that it "made progress today in deliberations [and] would like to continue tomorrow"; the jury reached a verdict on petitioner the next day (CT 723; ECF No. 196). Given all these circumstances, it was not unreasonable for the state appellate court to determine that the length of the jury deliberations did not show that the error was harmful.

Petitioner also urges that the admission of the statement about the text message was not harmless because it identified him by the "inflammatory moniker, 'Risk.'" Exh. 17, Pet. for Review 12; ECF No. 7-10 at 429. The use of the nickname does not show the error to have been harmful because the nickname does not itself suggest petitioner was the shooter.

The state appellate court's harmlessness determination was not "'so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.'" *Davis*, 135 S. Ct. at 2199 (quoting *Harrington*, 562 U.S. at 103). Petitioner is not entitled to the writ on this claim.

B. Failure to Preserve Evidence

Petitioner claims that his right to due process was violated because the police lost DVDs containing witness interviews during which each of the Ayeshes identified one of the graffiti vandals, Navarro, as a shooter.

The Ayeshes were interviewed several times by the police: on June 12, 2010, just hours after the shooting; on August 6, 2010; in February 2011; and in March 2011. In the August 6 interviews, the Ayeshes falsely reported that the older teenager, Navarro, returned to the store with a group and shot Samier. At the time of the August 6 interviews, the theory was that there

United States District Court
For the Northern District of California

United States District Court
For the Northern District of California

were multiple shooters, but forensic evidence at trial later showed that only one gun was fired. The Ayeshes admitted in later interviews and at trial that they had coordinated making the false report on August 6 that Navarro was the shooter because they wanted someone to pay for Samier's murder and knew that, although he was not the shooter, Navarro had some involvement with the crime.

Sergeant Fleming, who had conducted the interviews, put the DVDs containing the August 6 interviews into the case file but failed to comply with Oakland Police Department policy that required an additional copy of DVDs of witness interviews be put in the central evidence section at the police department. During discovery, Sergeant Fleming could not locate the DVDs that he thought he placed in the case file. The defense attorneys were told in June 2011 that the August 6 DVDs could not be located. DVDs containing the other interviews, as well as the written reports prepared by Sergeant Fleming and another officer for the August 6 interviews, were provided to the defense. In addition to losing the August 6 DVDs, Sergeant Fleming had lost two of the six photo-lineup cards he had shown to the Ayeshes on March 2, 2011, but petitioner does not argue that the lost lineup cards had any bearing on him.

A failure to preserve evidence violates a defendant's right to due process if the evidence possessed "exculpatory value that was apparent before the evidence was destroyed, and [is] of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." *California v. Trombetta*, 467 U.S. 479, 489 (1984). If the evidence is only potentially useful, rather than apparently exculpatory, the defendant must demonstrate that the police acted in bad faith in failing to preserve the evidence. *Arizona v. Youngblood*, 488 U.S. 51, 58 & n.* [unnumbered] (1988).

The California Court of Appeal gave two reasons for rejecting petitioner's due process claim. *First,* there was no violation of the constitutional duty to preserve evidence because petitioner could and did obtain comparable evidence by other means. "The evidence that mattered to Toscano was the fact that the Ayeshes lied during the interviews, and this fact was obtained by comparable means when the Ayeshes admitted and were cross-examined about it." *People v. Toscano*, 2015 WL 9126562 (Cal. Ct. App. Dec. 16, 2015) ("*Toscano I*"), *4. *Second,*

United States District Court
For the Northern District of California

Sergeant Fleming did not engage in bad faith; the DVDs had been lost due to "'sloppy'" work by the overworked police officer but the loss "'certainly was not intentional.'" *Id.* at *5.

The California Court of Appeal's determination that petitioner's claim failed because he had access to comparable evidence was a reasonable application of *Trombetta.* The two interviewing officers had written notes of the interviews, which were made available to the defense. Sergeant Fleming testified about the August 6 interviews (RT 1072-77; ECF No. 7-7 at 304-09). The Ayeshes had testified at the preliminary hearing; two of them were questioned about the August 6 interview (CT 72-73, 104-05, 111, 247-48, 254; ECF No. 7-1 at 80-81, 112-13, 119, 255-56, 262). The Ayeshes' testimony and the officers' written notes provided comparable evidence to the lost DVDs. *See, e.g., United States v. Drake*, 543 F.3d 1080, 1090 (9th Cir. 2008) (no due process violation because fourteen still images of the robbery were preserved and the officers were available to testify to the contents of the surveillance video that had been lost); *United States v. Rivera-Relle*, 333 F.3d 914, 922 (9th Cir. 2003) (no due process violation where border patrol dispatch tape was recycled and no longer available at trial because comparable evidence was available: the border patrol agents recorded on the tape "were available to testify, and did testify, about whatever conversations were on the tape."). Moreover, the loss of the DVDs was made known to the defense more than fifteen months before the trial took place, giving the defense plenty of time to formulate a strategy to deal with the information that the witnesses had lied during the August 6 interviews and to attack the shoddiness of the police investigator's work. Defense counsel made use of the comparable evidence by cross-examining the Ayeshes before the jury about the lies they told on August 6, and by arguing in closing that the lies and lost DVDs were just part of the pile of tainted evidence that undermined the credibility of the entirety of the prosecution's case against petitioner.

Petitioner argues that there was not adequate comparable evidence to the lost DVDs because "the recordings would have been useful for the defense in further discrediting the Ayeshes at trial" (Pet. for Review 19; ECF No. 7-10 at 437). Petitioner does not know exactly what was on the lost DVDs and only speculates that there might have been something that

United States District Court
For the Northern District of California

would allow further impeachment of the witnesses beyond that allowed by the interviewing officers' written notes, the Ayeshes' admission before trial that they had fabricated their statements on August 6, and the cross-examination of the Ayeshes at trial. In these circumstances, his speculation that the recordings might have been even more damaging isn't persuasive.

The California Court of Appeal's conclusion that there was no due process violation because there was adequate comparable evidence to the DVDs was neither contrary to nor an unreasonable application of clearly established federal law from the United States Supreme Court. Because the first reason offered by the California Court of Appeal to reject the claim precludes habeas relief, that court's second reason need not be considered.

C. Admission of Petitioner's Redacted Statement

Petitioner urges that his rights under the Confrontation Clause and the Due Process Clause were violated when trial court admitted his out-of-court statement to the police that had been redacted to omit his codefendant's name. He makes a related argument that his rights to confront witnesses and to due process were violated by the trial court's refusal to sever the trials of petitioner and his codefendant so that the unredacted statement could be used at petitioner's trial. In his view, his statement that positively identified the person who did the shooting would have had a stronger exculpatory power for him than a statement that simply said "another guy" did the shooting.

The statement in question was made when petitioner was interviewed by the police on the day of his arrest. Although he initially denied being present at the shooting, petitioner eventually told the police that he was present at the shooting along with several other people and that Vilchis was the shooter. The prosecution sought admission of the statement in redacted form in accordance with *Bruton v. United States*, 391 U.S. 123 (1968). The defense objected to the use of the redacted statement, arguing that it should be admitted or excluded in its entirety or the court should sever petitioner's trial from that of Vilchis. The trial court allowed the prosecution to introduce petitioner's statement in redacted form, with Vilchis' name redacted and replaced with generic descriptors, such as "another guy" and "somebody."

United States District Court
For the Northern District of California

The Sixth Amendment grants the defendant a right "to be confronted with the witnesses against him." "'[T]he right of cross-examination is included in the right of an accused in a criminal case to confront the witnesses against him.'" *Bruton*, 391 U.S. at 126 (quoting *Pointer v. Texas*, 380 U.S. 400, 404 (1965)). A defendant is deprived of his right to confront when a facially incriminating confession of a nontestifying codefendant is introduced at their joint trial. *Ibid.* A limiting instruction to the jury to consider the evidence only as to a nontestifying codefendant is not sufficient to avoid a violation of the defendant's Confrontation Clause rights. *Id.* at 135-36.

The California Court of Appeal rejected petitioner's challenge to the trial court's decision to admit the redacted statement, focusing on state law principles. Under state law, severance was necessary when a defendant's confession could not be redacted to protect a codefendant's rights without prejudicing the defendant, as may occur "when the editing of his statement distorts [the defendant's] role or makes an exculpatory statement inculpatory." *Toscano I*, at *8. The appellate court noted that Confrontation Clause concerns required the redaction of petitioner's statement to replace Vilchis' name with "another guy," and determined that severance was not necessary to avoid prejudicial error because the redaction did not distort petitioner's role or transform his exculpatory statement into an inculpatory statement. A severance also was not necessary because the two codefendants' defenses were not antagonistic to each other.

The California Court of Appeal's rejection of petitioner's claim was not contrary to, or an unreasonable application of clearly established federal law, as set forth by the U.S. Supreme Court. The admission of the redacted statement did not violate petitioner's rights under the Confrontation Clause. Petitioner cites *Bruton* as the Supreme Court authority for his assertion that his right to confront witnesses was violated, but he conflates the rights of defendants and codefendants under *Bruton* and fails to appreciate that the person who made a statement is in a different posture than the person who wants to confront the person who made the statement. In *Bruton,* the trial court admitted the nontestifying codefendant's confession that he and the defendant committed the robbery and instructed the jury that the evidence was only to be

United States District Court
For the Northern District of California

considered as to the codefendant. The Supreme Court held that there was a violation of the defendant's confrontation rights, not a violation of the confessing codefendant's confrontation rights. Petitioner has not identified any Supreme Court decision holding that a defendant has a right under *Bruton* not to have his own statement admitted in evidence. This is not surprising because the Confrontation Clause is not even implicated by use of a defendant's own statement against him. *See United States v. Romo-Chavez*, 681 F.3d 955, 961 (9th Cir. 2012) (Sixth Amendment right to confront witness "not implicated" because officer's Spanish-to-English translation of defendant's statement was properly construed as defendant's own statement); *United States v. Moran*, 759 F.2d 777, 786 (9th Cir. 1985) ("Since the out of court statements introduced through [letters and deposit slips signed by defendant] were made by [defendant] himself, he can claim no confrontation clause violation."). Here, if anyone had a Confrontation Clause concern based on the admission of petitioner's statement to the police, it would have been Vilchis rather than petitioner.

The trial court prevented petitioner from introducing an unredacted version of his statement to police at the joint trial of petitioner and Vilchis in order to preserve the Confrontation Clause rights of Vilchis under *Bruton*. The California Court of Appeal reasonably could have concluded that limiting the evidence petitioner could present in order to accommodate his codefendant's Confrontation Clause rights did not violate petitioner's right to due process. This was consistent with the Supreme Court's determination that the Confrontation Clause does not prevent a trial judge from imposing "reasonable limits" on cross-examination. *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986).

The California Court of Appeal's rejection of petitioner's argument that a severance was required was not contrary to, or an unreasonable application of, clearly established federal law from the U.S. Supreme Court, as is required for relief in this case governed by AEDPA. There is no "clearly established" Supreme Court precedent that sets the standards for severance when defendants present mutually antagonistic defenses. *Collins v. Runnels*, 603 F.3d 1127, 1131 (9th Cir. 2010). The Supreme Court has discussed severance principles in *Zafiro v. United States*, 506 U.S. 534 (1993), but only as required by the Federal Rules of Criminal Procedure

United States District Court
For the Northern District of California

and not as a matter of constitutional law. *Collins*, 603 F.3d at 1131. The Supreme Court also has observed that, with regard to federal defendants, misjoinder rises to the level of a constitutional violation "'if it results in prejudice so great as to deny a defendant his Fifth Amendment right to a fair trial,'" but this was only dicta and not the holding of the case. *Collins*, 603 F.3d at 1132 (quoting *United States v. Lane*, 474 U.S. 438, 446 n.8 (1986)).

Even if the *Zafiro* and *Lane* cases could be considered, notwithstanding AEDPA's requirement that the federal habeas court look only to Supreme Court holdings, the California Court of Appeal's decision did not run afoul of either of them. *Zafiro* observed that "[m]utually antagonistic defenses are not prejudicial *per se*." 506 U.S. at 538. It was not inconsistent with *Zafiro* for the state appellate court to determine that the codefendants' defenses were not so antagonistic to one another that severance was necessary for a fair trial. The prosecutor's theory was that both petitioner and Vilchis were present and that petitioner was the shooter. Petitioner admitted being at the scene but denied being the shooter. Petitioner's defense was not inconsistent with Vilchis' defense that he (Vilchis) was not present at the scene. Although the redaction of petitioner's statement made him unable to name Vilchis as the shooter (unless petitioner testified, which he chose not to do), his redacted statement indicated that there were at least three other people at the shooting, so he could point to any one of them as being the shooter. Indeed, defense counsel argued in closing that the jury should consider everyone who was at the scene to determine who was the actual shooter. Accepting petitioner's defense that petitioner was not the shooter was not mutually antagonistic with Vilchis' defense that Vilchis was not present at the shooting because at least three other people besides petitioner were present and were possible shooters. Even if petitioner is correct that his statement might have had a more powerful exculpatory force if that statement specifically named Vilchis as the shooter, "it is well settled that defendants are not entitled to severance merely because they may have a better chance of acquittal in separate trials." *Id.* at 540. The California Court of Appeal recognized the critical facts: redacting Vilchis' name did not distort petitioner's role or transform an exculpatory statement into an inculpatory statement for petitioner. The California Court of

United States District Court
For the Northern District of California

Appeal's rejection of petitioner's failure-to-sever claim was not contrary to or an unreasonable application of clearly established law as set forth by the U.S. Supreme Court.

Petitioner also argues that the trial court erroneously determined that any severance request was untimely (Pet. 11; ECF No. 1 at 17). This argument is a nonstarter because the California appellate court found that the trial court "never ruled that any such request was untimely," *Toscano I*, at *8, and petitioner has not overcome the presumption of correctness for this factual determination. *See* 28 U.S.C. § 2254(e)(1) (factual determination of state court is "presumed to be correct" and can only be set aside if the petitioner carries the "burden of rebutting the presumption of correctness by clear and convincing evidence.").

Finally, petitioner states in passing that the use of the redacted statement and refusal to sever also violated his Fifth Amendment right against self-incrimination (Pet. 17; ECF No. 1 at 23). He does not allege any facts suggesting a compelled self-incrimination problem and does not offer any argument in support of his claim. He is not entitled to the writ based on his conclusory assertion of a Fifth Amendment violation.

D. Trial Judge's Comments and Questions to Expert Witness

Petitioner contends that his rights to due process and a trial by jury were violated when the trial judge made a brief comment on the defense expert witness' fee and asked the expert several questions about identification procedures that purportedly conveyed to the jury the trial judge's disapproval of the expert.

The California Court of Appeal determined that the claims were procedurally barred because the defense had not raised a timely objection at trial. *Toscano I*, *10, *13. The court also rejected the claims on the merits, finding that the trial judge's comments and questions did not result in an unfair trial or unduly prejudice petitioner. *Id.* at *10-13. Respondent argues that this court should honor the procedural bar imposed by the California Court of Appeal and decline to consider the merits of these claims.

A federal court will not review questions of federal law decided by a state court if the state court's decision rests on a state law ground that is independent of the federal question and adequate to support the judgment. "The [independent and adequate state grounds] doctrine

United States District Court
For the Northern District of California

applies to bar federal habeas when a state court declined to address a prisoner's federal claims because the prisoner had failed to meet a state procedural requirement. In these cases, the state judgment rests on independent and adequate state procedural grounds." *Coleman v. Thompson*, 501 U.S. 722, 729–30 (1991).

The Ninth Circuit has recognized and applied the California contemporaneous objection rule in affirming the denial of a federal petition for procedural default where there was a complete failure to object at trial. *See Vansickel v. White*, 166 F.3d 953, 957-58 (9th Cir. 1999) (barring review of challenge to denial of peremptory challenges because no contemporaneous objection); *Inthavong v. Lamarque*, 420 F.3d 1055, 1058 (9th Cir. 2005) (federal habeas challenge to the admission of a confession was barred because state appellate court ruled the claim was procedurally defaulted due to failure to challenge the admission of the confession at trial). Petitioner's failure to object during trial when the trial judge questioned and commented on the defense expert resulted in a procedural default that, unless excused, precludes federal habeas consideration of his claims.

A petitioner may avoid the procedural default doctrine by showing cause for the default and prejudice. *See Sawyer v. Whitley*, 505 U.S. 333, 338 (1992). The cause standard requires the petitioner to show that "some objective factor external to the defense" or constitutionally ineffective assistance of counsel impeded his efforts to comply with the state's procedural rule. *See Murray v. Carrier*, 477 U.S. 478, 488 (1986). To satisfy the prejudice part of the cause-and-prejudice test, the petitioner must show actual prejudice resulting from the errors of which he complains. *See McCleskey v. Zant*, 499 U.S. 467, 494 (1991). A petitioner also may avoid the procedural default doctrine if he can show actual innocence. *See Schlup v. Delo*, 513 U.S. 298, 327 (1995).

Petitioner makes no effort to show that his procedural default was caused by constitutionally ineffective assistance of counsel or any other circumstance external to the defense. He also does not show that he is actually innocent of the crimes of which he was convicted. He thus does not show any reason that the procedural bar should not apply to him.

Petitioner's habeas claims that the trial judge's comment about, and questions to, the defense expert witness violated petitioner's rights to due process and trial by jury are procedurally defaulted from federal habeas review. Because of this conclusion, respondent's alternative argument that these claims lack merit need not be addressed.

United States District Court
For the Northern District of California

United States District Court
For the Northern District of California

E. Assistance of Trial Counsel

Petitioner contends that trial counsel provided ineffective assistance when he failed to: (1) conduct certain investigations; (2) use the preliminary-examination transcript from another case to cross-examine the investigating officer; (3) file a motion for discovery of the investigating officer's personnel file; and (4) present a defense that Vilchis was the shooter. His ineffective-assistance claims were rejected by the California Court of Appeal and California Supreme Court without discussion.

In order to succeed on a claim that he has received ineffective assistance of counsel, a petitioner must satisfy the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668, 687 (1984), which requires him to show deficient performance and prejudice. Under the deficient-performance prong, a petitioner "must show that counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. Judicial review of the performance of defense counsel must be "highly deferential," taking into account that there is a "wide range of reasonable professional conduct" and a "strong presumption" that counsel's conduct fell within that range. *Id.* at 689. Under the prejudice prong of the *Strickland* test, a petitioner must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

Not only does *Strickland* command some deference to counsel's choices, an even more deferential review is needed because the claim is being reviewed in a federal habeas action. When, as here, Section 2254 applies, a "doubly" deferential judicial review is appropriate. *See Cullen v. Pinholster*, 563 U.S. 170, 202 (2011). The "question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland's* deferential standard." *Harrington*, 562 U.S. at 105.

1. The Investigations Not Done

Petitioner claims that trial counsel was ineffective in not interviewing Adham, Awad and Samey Ayesh. He offers no explanation as to what helpful information trial counsel would have learned from interviewing these men. He also concedes that the Ayeshes refused to speak

United States District Court
For the Northern District of California

to petitioner's appellate/habeas counsel, which suggests that the Ayeshes would not have spoken with anyone connected with petitioner. As with several of his ineffective-assistance claims, petitioner just points to the perceived mistake and makes no effort to show how the error worked to his detriment, but that approach falls far short of the showing needed to support habeas relief.

Petitioner also claims that counsel erroneously failed to locate and interview the six or seven other young men who went with petitioner to the murder scene. When asked about this alleged failure, trial counsel told habeas counsel that an investigation would have done more harm than good based on what petitioner had told trial counsel in confidence "about his involvement in the shooting and his direct implication of other [sic] of his immediate family members in the case" (Trujillo Decl. ¶ 5; ECF No. 1-1 at 3 (alteration in original)). Petitioner does not identify who these other young men were, describe what they would have told counsel if counsel had been able to find them, or explain how their statements would have helped him. Without any information as to what these men would have added to petitioner's defense, it was quite consistent with *Strickland* for the state court to reject this claim for ineffective assistance. *See Davis v. Woodford*, 384 F.3d 628, 650 (9th Cir. 2004) (rejecting claim that counsel should have called 15 witnesses because allegations about the additional information they might have provided were conclusory).

Petitioner also contends that counsel should have interviewed four family members who were willing to testify about his good character. According to petitioner's sister, counsel knew of the relatives' desire to provide character testimony but said that such testimony was "'useless,' didn't make a difference, and that all the jury cared about was 'evidence'" (Sylvia Toscano Decl. ¶ 4; ECF No. 1-1 at 31). Defense counsel may have been harsh in his words but reasonable in his decision not to call the character witnesses. As respondent points out, it is very easy to impeach family members for bias. Although these close relatives wanted to testify as to petitioner's impeccable character, their glowing references could be undermined with evidence that he had been kicked out of high school, went to jail for possession of ecstasy, consumed alcohol and got high while hanging out with some sordid people, and had an attempted burglary

arrest and/or conviction in his past – all of which he reported to Sergeant Fleming during his post-arrest interview (CT 352, 357, 367, 397; ECF No. 7-1 at 362, 367, 377, 407). Counsel also reasonably could have been concerned about calling family members to testify, given petitioner's statement to counsel implicated other members of his immediate family in the case. Given the very limited value of family members' character evidence and the potential negatives it carried in this case, the rejection of this ineffective-assistance claim by the state court was not an unreasonable application of *Strickland.*

Petitioner also contends that trial counsel should have interviewed and presented testimony from his sister. His sister wanted to rebut evidence from Vilchis' girlfriend, who initially told police she saw a gun in Vilchis' closet but stated at trial that she had been mistaken and that the object she saw was a tool. Petitioner's sister wanted to testify that a friend of Vilchis' girlfriend told petitioner's sister that Vilchis' girlfriend said the object was a gun. Such testimony would have been inadmissible hearsay and, in any event, corresponded with what the girlfriend initially told police. Petitioner's sister also wanted to testify that "it was known and understood by everybody in our community that Hector Vilchis had a gun" (Sylvia Toscano Decl. ¶¶ 7-8; ECF No. 1-1 at 32). But petitioner fails to show how he would have overcome foundational and hearsay objections to that proposed testimony. Given the evidentiary problems with the sister's statements, the state court reasonably could have determined that petitioner failed to show deficient performance or resulting prejudice in counsel's failure to call her as a witness.

To obtain habeas relief, petitioner must show both deficient performance and resulting prejudice for each alleged failure to investigate. It is not enough to simply point to the perceived mistake and make no effort to show how the error worked to his detriment, yet that is the approach taken by petitioner. The state habeas court reasonably could have rejected these ineffective-assistance claims based on a determination that petitioner failed to show that trial counsel engaged in deficient performance and failed to show that prejudice resulted from counsel failing to undertake these particular investigations.

United States District Court
For the Northern District of California

United States District Court
For the Northern District of California

2. The Transcript Not Used

Petitioner contends that trial counsel should have used a transcript from a preliminary hearing in an unrelated murder case to impeach Sergeant Fleming about his loss of the DVDs containing witness interviews in petitioner's case. The transcript included Fleming's testimony that he failed to download an interview of one witness and did not know the location of the two other recordings of interviews of two other witnesses in that other unrelated murder case. Petitioner argues that using the transcript from the unrelated case would have bolstered his motions in limine to dismiss the action or to exclude the in-court identification by the Ayeshes, and would have been helpful to impeach Fleming at trial. When asked about this evidence, trial counsel told petitioner's habeas counsel that he was aware of Fleming's loss of documents in the unrelated case but chose not to pursue that angle and instead was "'quite comfortable allowing [Fleming's] ineptitude [to] play out in front of the jury'" (Trujillo Decl. ¶ 6; ECF No. 1-1 at 4).

The information about Fleming's other instance of failing to preserve evidence had been presented to the court during an in limine hearing in petitioner's case when Vilchis' attorney informed the trial court that she had learned that Fleming had lost "'a significant number'" of witness interviews in another murder case. *Toscano I*, at *3. (In both cases, written notes of the interviews were available even though the recordings had been lost.) The trial court had denied the defense in limine motion for dismissal or sanctions, finding the conduct by Fleming to be "'very sloppy work probably due to workload," and negligent, but "'certainly was not intentional.'" *Id.* at *4.

In reviewing the ineffective-assistance claim, the state court reasonably could have determined that petitioner failed to show *Strickland* prejudice. There is no reasonable probability that producing the transcript from the preliminary hearing in the unrelated case would have led to a different result since the court was already made aware of the key point: Fleming had lost recordings in more than one case. The state court also reasonably could have determined that not using the transcript during cross-examination of Sergeant Fleming in front of the jury was a reasonable tactical decision by counsel and did not result in any prejudice because the defense made a similar point through questioning that showed that Fleming had not

United States District Court
For the Northern District of California

followed police department protocols in handling the records, had a far-from-meticulous approach to keeping track of evidence, and had lost the DVDs (RT 1378-1400; ECF No. 7-8 at 265-87).

3. The *Pitchess* Motion Not Made

Petitioner contends that counsel should have filed a motion under *Pitchess v. Superior Court*, 11 Cal. 3d 531 (Cal. 1974), to obtain Sergeant Fleming's personnel records.

Under California's *Pitchess* procedure, a criminal defendant has a limited right to discovery of a peace officer's personnel records, specifically, a right to see complaints made against the officer. *See* Cal. Penal Code §§ 832.7, 832.8; Cal. Evid. Code §§ 1043-1045.

Petitioner fails to show what evidence would have been found if the motion had been granted or how that evidence would have made any difference in his case. The existence of information that Fleming had lost evidence in one other case was already known to defense counsel, so the possibility that Fleming's personnel records included information about that case does not show that obtaining personnel records would have made a difference in petitioner's case. Also, the trial court was aware of Sergeant Fleming's loss of evidence in this case as well as in the unrelated case, yet had concluded that Sergeant Fleming's loss of evidence was due to negligence rather than done in bad faith. The state habeas court reasonably could have rejected the claim that counsel was ineffective in not filing a *Pitchess* motion for lack of a showing of deficient performance or prejudice, or both. *See Rupe v. Wood*, 93 F.3d 1434, 1445 (9th Cir. 1996) ("the failure to take a futile action can never be deficient performance").

4. The Line of Defense Not Pursued

Finally, petitioner contends that counsel was ineffective in that he failed to take the position at trial that Vilchis was the shooter. He contends that arguing that Vilchis was the shooter was important "because the evidence pointed to one shooter, and there was evidence tending to show that either petitioner or Vilchis was the shooter" (Pet. 20; ECF No. 1 at 26).

Petitioner does not show that the approach chosen by defense counsel was constitutionally deficient. There are "'countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the

same way.'" *Harrington*, 562 U.S. at 106 (quoting *Strickland*, 466 U.S. at 689). The theory of the defense pursued by petitioner's counsel was that the case was about the identity of the shooter and that petitioner was not the shooter. Consistent with this approach, defense counsel highlighted the various factors that might tend to raise a reasonable doubt that he was the shooter, *e.g.*, bad lighting that impeded the witnesses' view of the shooter; photo lineups that were unreliable for various reasons; petitioner's denial that he was the shooter; Sergeant Fleming's sloppy police work that cast doubt on the identification process and the overall investigation; and the admissions by the Ayeshes that they had lied to police at least once. Although counsel did not focus on Vilchis specifically, trial counsel did argue at trial that someone else present at the scene was the shooter and Vilchis was logically included in this argument as he was one of the several people present at the murder.

In his closing argument, defense counsel methodically went through statements of the Ayeshes, arguing that their identification of petitioner was not to be believed because their statements had inexplicably evolved over the months from being unable to see the shooter or the gun, to lying to try to frame one of the graffiti vandals as a shooter, to one of them eventually identifying petitioner as the shooter. Defense counsel also highlighted that Sergeant Fleming had made numerous mistakes in the lineup procedures and had lost the interview recordings. Defense counsel urged that these many problems "pil[ed] up" to create such a negative taint that the prosecution case was not a credible one (RT 1733; ECF No. 7-9 at 153). The closing argument by defense counsel was coherent, had a good theme, and was a very good use of the trial evidence. Had counsel pursued a theory that Vilchis was the shooter, defense counsel would have had to make the awkward argument that the Ayeshes were not to be believed at all because they did not see the shooter and that Sergeant Fleming was wrong about everything – except that Vilchis was the shooter. The state habeas court reasonably could have determined that there was no reasonable likelihood that adding an argument that Vilchis was the shooter would have resulted in a different outcome for petitioner because such an argument would have detracted from the coherence and persuasive value of the rest of counsel's argument for which there was more evidentiary support.

United States District Court
For the Northern District of California

United States District Court
For the Northern District of California

It was not an unreasonable application of *Strickland* for the state court to conclude that the methods used by defense counsel reflected reasonable tactical decisions. It was not unreasonable for defense counsel to pursue an "it's not me" defense rather than an "it's him" defense, especially because the latter defense might have prompted Vilchis to more vigorously argue that petitioner was the shooter. The state court also reasonably could have rejected the claim that counsel was ineffective in not arguing that Vilchis was the shooter for lack of prejudice, as petitioner offers no convincing case that pointing to Vilchis as the shooter would have been any better than suggesting that the shooter was someone else in the group in which Vilchis was a member.

CONCLUSION

For the foregoing reasons, the petition is **DENIED**.

A certificate of appealability will not issue because reasonable jurists would not "find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Petitioner may seek a certificate of appealability from the United States Court of Appeals.

The clerk shall enter judgment in favor of respondent, and close the file.

IT IS SO ORDERED.

Dated: November 28, 2018.

WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE

Other Orders/Judgments

3:17-cv-04060-WHA Toscano v. Lizarraga

HABEAS,ProSe

U.S. District Court

California Northern District

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Case Name: Toscano v. Lizarraga
Case Number: 3:17-cv-04060-WHA
Filer:
Document Number: 12

Docket Text:
ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS; DENYING CERTIFICATE OF APPEALABILITY. Signed by Judge William Alsup on 11/28/2018. The deputy clerk hereby certifies that on 11/28/2018, a copy of this order was served by sending it via first-class mail to the address of each non-CM/ECF user listed on the Notice of Electronic Filing. (tlhS, COURT STAFF) (Filed on 11/28/2018)

3:17-cv-04060-WHA Notice has been electronically mailed to:

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3:17-cv-04060-WHA Please see Local Rule 5-5; Notice has NOT been electronically mailed to:

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United States District Court
For the Northern District of California

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

EVARISTO TOSCANO,

Petitioner,

v.

JOE A. LIZARRAGA,

Respondent.

/

No. C 17-4060 WHA (PR)

JUDGMENT

The petition for writ of habeas corpus is denied.

IT IS SO ORDERED AND ADJUDGED.

Dated: November 28, 2018.

WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE

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