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FOR: U.S. SUPREME COURT

"STATE APPEAL COURT"
DECISION

EXHIBIT

EX. "A"

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

GREGORY SERNAL LAMB, et al.,

Defendants and Appellants.

B174549

(Los Angeles County
Super. Ct. No. BA253928)

APPEAL from judgments of the Superior Court of Los Angeles County, Barbara R. Johnson, Judge. Affirmed in part, reversed in part, and remanded.

Melissa J. Kim, under appointment by the Court of Appeal, for Defendant and Appellant Gregory Lamb.

Susan K. Keiser, under appointment by the Court of Appeal, for Defendant and Appellant Lawone W. Wilkenson.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Margaret E. Maxwell and Deborah J. Chuang, Deputy Attorneys General, for Plaintiff and Respondent.

Defendants and appellants Lawone Wade Wilkenson and Gregory Sernal Lamb appeal from the judgments entered following a jury trial that resulted in Wilkenson's convictions for attempted murder, second degree robbery, assault with a firearm, and making criminal threats, and Lamb's convictions for second degree robbery, assault with a firearm, and acting as an accessory to assault with a firearm. Wilkenson was sentenced to a prison term of 37 years. Lamb was sentenced to a prison term of 16 years, 8 months.

Both appellants contend the trial court erred by: (1) admitting evidence of prior uncharged misconduct; (2) failing to instruct on lesser included offenses; and (3) making sentencing errors. Additionally, Wilkenson contends the evidence was insufficient to support his conviction for attempted murder. We reverse Lamb's convictions for assault with a firearm and order portions of Wilkenson's sentence stayed pursuant to Penal Code section 654.[1] In all other respects, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Facts.*

a. *Prosecution's case.*

Viewed in accordance with the usual rules governing appellate review (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11; *People v. Johnston* (2003) 113 Cal.App.4th 1299, 1303-1304), the evidence relevant to the issues on appeal established the following. Ruben and Manuel Monterroso,[2] who were brothers, co-owned Ruben's Auto Electric, an automobile repair shop.

On September 19, 2003, at approximately 9:00 a.m., appellants brought Lamb's 1978 Ford Econoline van into the Monterrosos' shop for service. Wilkenson requested a complete service, including a brake job, major tune up, and transmission service, for a cost of $380. He stated that he needed the work completed by 5:00 p.m.

At approximately 5:00 p.m., appellants returned to the shop and headed for the van, which was parked at the back of the garage with the keys in the ignition. Wilkenson

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1 All further undesignated statutory references are to the Penal Code.

2 For ease of reference, the Monterroso brothers will hereinafter be referred to by their first names.

told Lamb to start the car and "back it out." Manuel stated they could not take the van until they had paid for the service. Wilkenson told Manuel they wished to take the van for a road test. When Manuel refused, Wilkenson stated that it was his neighborhood, and threatened to burn the shop down. Manuel and Wilkenson argued. Wilkenson stated that he could "just get rid" of Manuel and Ruben. Wilkenson referred to the brothers as "mother fuckers." Meanwhile, Lamb drove the van across the lot slowly and indecisively. Manuel telephoned 9-1-1.

Wilkenson stated that he owned a white car which was also on the repair lot (hereinafter "the white car"), and proposed Manuel take that vehicle as a deposit. Manuel declined, because Manuel knew the white car did not belong to Wilkenson.[3] Another customer arrived at the shop and parked behind the van, blocking its exit. Manuel again telephoned 9-1-1.

Wilkenson's argumentative behavior escalated, with Wilkenson arguing "right in [Manuel's] face" and continuing to threaten Manuel and assert that he was taking the van. Manuel refused to back down and returned Wilkenson's insults. Manuel informed Wilkenson of the shop's policy to fix any problems if a customer was unsatisfied with the work after paying for it. Wilkenson yelled, "I'll kill you, mother fucker." Manuel responded, "When you do that, make sure you point good at me," because "if you don't, then the one ending up dead is going to be you, depending on who's faster."

Eventually Wilkenson entered the van and emerged wearing a long, black silk jacket, despite the warm weather. Manuel suspected Wilkenson had a weapon in the jacket, and was frightened. Wilkenson continued to repeat his threats to kill Manuel and burn the shop down. He paced in front of the office for approximately eight more minutes.

Concerned, Manuel placed two guns on top of the desk inside the office, and again called police. Wilkenson continued to pace in front of the office, yelling threats and

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[3] Indeed, while Manuel and Wilkenson were arguing, the wife of the vehicle's owner arrived and, after Manuel explained the situation to her, confirmed that the white car belonged to her husband.

insults. Manuel responded with similar insults. Lamb exited the van, yelled, "there is a gun," and ran off the lot. Manuel did not have a gun in his hand. Wilkenson, who was approximately 12 to 15 feet away from Manuel, pulled a gun from his jacket and pointed it at Manuel's upper body. Wilkenson fired a single shot. Manuel moved behind the office door, just in time to dodge the bullet. Manuel pulled one of his guns from the office desk. Wilkenson attempted to fire again, but the gun jammed. Wilkenson unsuccessfully attempted to repair the gun. Manuel pointed his gun at Wilkenson. Ruben intervened, stating, "no shooting," or words to that effect.

Wilkenson moved between parked cars and called to Lamb. Together they pushed the car that was blocking the van out of the way. Ruben began to close the gate to prevent appellants from leaving. Wilkenson, who was "furious," ran towards Ruben, placed a gun against his ribs, and threatened to kill him if he closed the gate. Wilkenson ordered Lamb into the van. With the gun still pressed against Ruben's ribs, Wilkenson shook Ruben's hand and said, "I'm going to pay you." Lamb drove off in the van, and Wilkenson ran in the same direction.

A few days later, Lamb and Wilkenson were stopped by police. Lamb was driving the van; Wilkenson was a passenger. Appellants never paid for the repairs.

The People presented evidence that the night before the charged incident, appellant Lamb, driving the van, engaged in hostile and provocative driving maneuvers vis a vis another motorist, Omar Freeman. Lamb blocked Freeman's path with his vehicle, whereupon an unidentified male passenger exited the van and pointed a gun at Freeman.[4]

b. *Defense case.*

Wilkenson testified in his own defense. Wilkenson admitted taking the van to the repair shop with Lamb, to have it "checked out." They returned at approximately 5:00 p.m. Lamb and Manuel argued, with Lamb arguing he had not authorized, and would not pay for, repairs to his vehicle. Manuel called police. Manuel and Wilkenson became

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[4] The evidence of this incident is discussed in more detail where relevant *infra*.

embroiled in further argument, during which each called the other names. Lamb attempted to back the car out, but was blocked when another customer pulled in. Lamb and Ruben argued, with Lamb complaining that he had not authorized work on the van and did not owe money. Wilkenson put on his long black jacket because he was chilly. He paced, and he and Manuel continued to swear at each other.

Manuel entered the office, and Lamb yelled, "He got a gun [*sic*]." Wilkenson saw Manuel holding a small gun in his hand. Manuel pointed it first at Lamb and then at Wilkenson. Lamb ran toward the exit. Wilkenson grabbed Manuel's gun from his hands. Wilkenson took a few steps and the gun went off accidentally. He attempted to disable the gun by separating the clip. When he turned, Manuel was holding another gun. Wilkenson ducked behind a car and yelled, "Don't shoot." Manuel said, "I could still kill him." Ruben stated, "No shooting."

Wilkenson told Ruben, "Your friend tried to kill us," and attempted to give Ruben the gun. Ruben refused to take it. Wilkenson stated that they would have paid had they owed any money. Ruben then shook his hand. Wilkenson threw Manuel's gun and clip in the driveway when he and Lamb drove away. Wilkenson denied threatening Manuel or Ruben and denied having a gun.

Wilkenson admitted suffering convictions for forgery in 2000 and being a felon in possession of a firearm in 2002.

Lamb did not testify or present evidence.

c. *People's rebuttal.*

In rebuttal, the People presented evidence that Manuel had prepared a work authorization form prior to making the repairs, and the $380 estimate was not challenged by Wilkenson. Manuel also denied that Wilkenson had attempted to take a gun from him, or that the shooting was accidental.

2. *Procedure.*

Trial was by jury. Wilkenson was convicted of two counts of assault with a firearm (§ 245, subd. (a)(2)), two counts of making criminal threats (§ 422), attempted murder (§§ 664, 187, subd. (a)), and two counts of second degree robbery (§ 211). The

jury found true allegations that Wilkenson personally used a firearm, and that a principal was armed with a firearm, during commission of the assaults, attempted murder, robberies, and criminal threats (§§ 1203.06, subd. (a)(1), 12022, subd. (a)(1), 12022.5, subd. (a)); personally discharged a firearm during commission of the attempted murder and robberies (§ 12022.53, subd. (c)); and personally used a firearm during the robbery of Ruben and the attempted murder (§ 12022.5, subd. (a)). In a bifurcated proceeding, the trial court found true allegations that Wilkenson had served three prior prison terms within the meaning of section 667.5, subdivision (b). Wilkenson was sentenced to a term of 37 years in prison.

Lamb was convicted of two counts of assault with a firearm (§ 245, subd. (a)(2)), two counts of second degree robbery (§ 211), and being an accessory after the fact to assault with a firearm (§§ 32, 245, subd. (a)(2).) The jury further found true allegations that a principal was armed with a firearm during commission of the assaults and robberies (§ 12022, subd. (a)(1)). Lamb was acquitted of attempted murder. In a bifurcated proceeding, the trial court found true allegations that Lamb had suffered a prior serious felony conviction for robbery (§§ 211, 1170.12, subds. (a)-(d), 667, subds. (a)–(i)). Lamb was sentenced to 16 years, 8 months in prison.

The trial court imposed restitution fines, suspended parole revocation fines, and victim restitution orders as to both defendants.

DISCUSSION

1. *Admission of evidence of the prior uncharged "road rage" incident involving Lamb was error.*

Appellants contend admission of the "road rage" incident referenced *supra*, purportedly as evidence of Lamb's intent pursuant to Evidence Code section 1101, subdivision (b), was prejudicial error. We agree admission of the evidence was improper, and conclude the error requires reversal of Lamb's assault convictions.

a. *Additional facts.*

During several discussions between the parties and the trial court, the People proposed to admit the testimony of Omar Freeman regarding the traffic altercation

occurring the night before the charged crimes. Initially, the trial court opined that the prior incident would be inadmissible unless it was shown that Wilkenson was the gunman in the traffic incident. After hearing argument, the trial court changed its mind and allowed admission of the evidence on the issue of Lamb's intent in the charged crimes. The trial court reasoned, "I would say it would be very probative and relevant to show that Mr. Lamb had knowledge and intent and a plan. I mean, if it worked the day before and he scared the daylights out of somebody," then "it is probative of what happened the following day. . . . It happened one day, and then the next day the same type of activity happened. There was a person driving a van. Another person in the van got out with a gun."

Accordingly, Freeman testified as follows. At approximately 6:45 p.m. on September 18, 2003, Freeman was driving westbound on Jefferson. Lamb's van was driving very slowly in front of Freeman, and Freeman attempted to pass. Lamb would not allow Freeman or another nearby vehicle to pass. Freeman eventually managed to get by Lamb, although the van "drifted" into Freeman's lane. Freeman motioned to the van's occupants as he passed, in a gesture meant to query, "what are you guys doing?" He saw a woman and Lamb in the van. Lamb pulled the van up on Freeman's left side and suddenly crossed over the lanes in front of Freeman, cutting off traffic for both lanes and stopping with the van perpendicular to traffic. When the van stopped, a man jumped from the right side with a gun in his hand and pointed the gun at Freeman. Freeman ducked. He had a camera in his vehicle and took a picture, but the photograph only depicted the van's license plate, not the gunman. Freeman turned and accelerated into oncoming traffic to escape.

The jury was instructed that Freeman's testimony could be considered only as evidence of intent, not as evidence of Lamb's bad character or disposition to commit crimes.[5] It was further instructed that "Evidence has been admitted against defendant,

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5 The instruction provided Freeman's testimony "is evidence that has been introduced for the purpose of showing that the defendant, Mr. Lamb, committed a crime or crimes other than that for which he is on trial. [¶] Except as you will otherwise be

Mr. Lamb, and not admitted against the other. [¶] At the time this evidence was admitted you were instructed that it could not be considered by you against the other defendant. [¶] Do not consider this evidence against the other defendant."

During argument, the prosecutor urged: "[T]he day before [Lamb is] helping an individual use a firearm, the very day before, using this same van. And the evidence on that could not have been more clear. [¶] . . . [¶] Now, the purpose of that evidence is to show you that the day before defendant Lamb took an action that facilitated somebody else's use of a firearm. And the very next day, what are the chances that he's accompanied by somebody who uses a firearm and he did not intend to facilitate that either?" Later the prosecutor reiterated: "When you got Mr. Lamb taking actions to facilitate somebody else's use of a firearm the day before, that tells you something about what his intent [was] when one of his confederates uses a firearm the very next day."

b. *Discussion.*

(i) *Applicable legal principles.*

Evidence that a defendant committed misconduct other than that currently charged is inadmissible to prove he or she has a bad character or a disposition to commit the charged crime. (Evid. Code, § 1101, subd. (a); *People v. Kipp* (1998) 18 Cal.4th 349, 369; *People v. Scheer* (1998) 68 Cal.App.4th 1009, 1017.) However, such evidence is admissible if it is relevant to prove, among other things, intent, knowledge, identity, or the existence of a common design or plan. (Evid. Code, § 1101, subd. (b); *People v. Catlin* (2001) 26 Cal.4th 81, 145-146; *People v. Ewoldt* (1994) 7 Cal.4th 380, 400; *People v. Kipp, supra*, at p. 369.) " 'The admissibility of other crimes evidence depends on (1) the materiality of the facts sought to be proved, (2) the tendency of the uncharged

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instructed, this evidence, if believed, may not be considered by you to prove that the defendant is a person of bad character or that he has a disposition to commit crimes. It may be considered by you only for the limited purpose of determining if it tends to show: [¶] . . . The existence of the intent which is a necessary element of the crime that he is charged with; [¶] For the limited purpose for which you may consider such evidence, you must weigh it in the same manner as you do all other evidence in the case. You are not permitted to consider such evidence for any other purpose."

crimes to prove those facts, and (3) the existence of any rule or policy requiring exclusion of the evidence.' [Citation.]" (*People v. Steele* (2002) 27 Cal.4th 1230, 1243.)

Although a lesser degree of similarity is required to prove intent than to prove identity or common plan or scheme, similarity between the charged and uncharged offenses is nonetheless required. (*Id.* at p. 1244; *People v. Ewoldt, supra,* at pp. 402-403.) " '*In order to be admissible to prove intent, the uncharged misconduct must be sufficiently similar to support the inference that the defendant "probably harbor[ed] the same intent in each instance.*" [Citations.]' [Citation.]" (*People v. Ewoldt, supra,* at p. 402, italics added.)

Even if the evidence of other crimes is relevant to prove matters other than the defendant's character or disposition, it is inadmissible unless its probative value is substantial and is not outweighed by the probability that its admission would create a serious danger of undue prejudice, of confusing the issues, or of misleading the jury. (*People v. Kipp, supra*, 18 Cal.4th at p. 371; *People v. Ewoldt, supra*, 7 Cal.4th at p. 404; *People v. Scheer, supra*, 68 Cal.App.4th at p. 1018.) Because evidence relating to uncharged misconduct may be highly prejudicial, its admission requires careful analysis. (*People v. Ewoldt, supra,* at p. 404.)

The admission of evidence of a prior offense, and the evaluation of prejudice under Evidence Code section 352, is entrusted to the sound discretion of the trial court and its ruling will not be overturned except upon a finding of manifest abuse. (*People v. Jennings* (2000) 81 Cal.App.4th 1301, 1314; *People v. Waidla* (2000) 22 Cal.4th 690, 724; *People v. Kipp, supra*, at p. 369.)

(ii) *Application here.*

Applying these principles here, it is apparent the trial court abused its discretion by admitting evidence of the "road rage" incident to prove Lamb's intent in the charged crimes. First, the two incidents were dissimilar. The charged crimes revolved around appellants' robbery, i.e., the taking of the van without paying for repairs. The prior incident involved Lamb's aggressive, hostile driving maneuvers and the brandishing of a gun to intimidate another motorist, not a robbery. Lamb's intent was different in the two

incidents: in one, he intended to steal, whereas in the other he intended to intimidate and harass. The charged offenses appeared preplanned; the prior incident appears to have been impulsive. The charged offense involved a dispute with a business over services performed; the prior offense involved a random altercation with a motorist unknown to Lamb. The prior incident involved Lamb, a female passenger, and an unknown male passenger; there was no showing Wilkenson was involved. Lamb did not engage in the same behavior in the two incidents. In the traffic incident, Lamb drove provocatively and blocked a motorist's path so the gunman could threaten the motorist. In the charged offense, he assisted only by driving the van off the lot; he did not block the victims. The People's argument -- that the incidents were similar because they both involved Lamb's disputes with other persons, and in each incident Lamb's companions used a gun to assault the other party – is not persuasive. If Evidence Code section 1101, subdivision (b)'s similarity requirement is read this broadly, it becomes meaningless.

Nor was the traffic incident probative of Lamb's intent during the charged crimes. Lamb was charged with second degree robbery, assault with a firearm, and attempted murder, all on an aiding and abetting theory, and of acting as an accessory after the fact. "[A]n aider and abettor is a person who, 'acting with (1) knowledge of the unlawful purpose of the perpetrator; and (2) the intent or purpose of committing, encouraging, or facilitating the commission of the offense, (3) by act or advice aids, promotes, encourages or instigates, the commission of the crime.' [Citation.]" (*People v. Prettyman* (1996) 14 Cal.4th 248, 259; *People v. Hill* (1998) 17 Cal.4th 800, 851.)

To be guilty of robbery, a defendant must, inter alia, take property with the specific intent permanently to deprive the possessor of it. (§ 211; *People v. Young* (2005) 34 Cal.4th 1149, 1176-1177; *People v. Marshall* (1997) 15 Cal.4th 1, 34; see also CALJIC No. 9.40.) Lamb's aggressive behavior against Freeman, not involving a robbery attempt, said nothing about whether he intended to deprive Ruben and Manuel of the money owed for their work.

The crime of acting as an accessory after the fact required proof that Lamb, with knowledge a felony had been committed, harbored, concealed, or aided Wilkenson with

the specific intent that Wilkenson escape arrest. (§ 32; *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 104; *People v. Campbell* (1994) 25 Cal.App.4th 402, 412; CALJIC No. 6.40.) Lamb's hostile driving behavior in an unrelated, dissimilar incident did not tend to prove he intended that Wilkenson escape arrest.

To be guilty of attempted murder as an aider and abettor, a defendant must share the actual perpetrator's intent to kill. (*People v. McCoy* (2001) 25 Cal.4th 1111, 1117-1118.) Assault is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another. (*People v. Williams* (2001) 26 Cal.4th 779, 785.) Assault is a general intent crime and does not require a specific intent to injure the victim. (*Id.* at p. 788.) Therefore, for Lamb to be guilty of assault as an aider and abettor he must have known of, and intended to facilitate, Wilkenson's attempt to commit a violent injury on Manuel. Certainly, if Wilkenson had been the gunman in the road rage incident, the evidence would have been probative to show Lamb knew Wilkenson had a gun and was not afraid to threaten people with it, which could have tended to show he acted with knowledge of Wilkenson's unlawful purpose to assault or kill. However, absent any evidence Wilkenson was the gunman in the road rage incident, the prior offense had little bearing on the issues of Lamb's knowledge of Wilkenson's gun possession, propensity to use the gun, criminal purpose, or Lamb's intent. The evidence of the prior incident was probative to show Lamb's intent only if the jury used the evidence to infer Lamb was aggressive, short-tempered and violent, and associated with gun-toting individuals who did not hesitate to commit assaults with firearms. This, however, amounted to prohibited use to prove Lamb's bad character and propensity to commit the charged crimes.

Finally, weighed against the lack of probative value, the prejudicial effect of the evidence was significant. The traffic incident demonstrated Lamb to be a hostile, aggressive individual who, in association with a gun-toting cohort, harassed a motorist for the most trivial of reasons. In sum, we are forced to conclude the evidence was admitted in error.

(iii) *Prejudice.*

Accordingly, we turn next to the question of prejudice. Both appellants urge that admission of the evidence was prejudicial error. The erroneous admission of evidence of uncharged misconduct is evaluated under the *Watson*[6] test. (*People v. Welch* (1999) 20 Cal.4th 701, 749-750; *People v. Whitson* (1998) 17 Cal.4th 229, 251; *People v. Felix* (1993) 14 Cal.App.4th 997, 1007-1008.)

The erroneous admission of the evidence was harmless in regard to Wilkenson. As noted, Freeman identified Lamb as the driver of the van, but was unable to identify the man who pointed the gun at him. Because Wilkenson was not identified as being involved in the road rage incident, the evidence did not constitute improper evidence of his character or criminal disposition, and did not tend to inculpate him. The jury was instructed about the limited purposes for which the evidence could be used, i.e., as evidence of Lamb's intent. It was further told it could not consider the evidence against Wilkenson. We presume jurors followed the trial court's instructions. (*People v. Waidla, supra,* 22 Cal.4th at p. 725 ["The presumption is that limiting instructions are followed by the jury."]; *People v. Mickey* (1991) 54 Cal.3d 612, 689, fn. 17; *People v. Williams* (2000) 79 Cal.App.4th 1157, 1171.) Therefore, because the evidence did not implicate Wilkenson and because the jury was provided with appropriate limiting instructions, there was no reasonable probability the outcome would have been more favorable for Wilkenson had the evidence been excluded.

Likewise, we believe the erroneous admission of the evidence was harmless in regard to Lamb's robbery and accessory convictions. Evidence Lamb aided and abetted the robbery was overwhelming and essentially undisputed. He drove the van off the repair shop lot without paying for the repairs. He was present and must have heard Wilkenson's threats and demands, and seen Wilkenson push his gun into Ruben's ribs to prevent Ruben from closing the gate. Lamb clearly acted to facilitate the robbery with clear knowledge of Wilkenson's unlawful purpose to take the van without paying.

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6 *People v. Watson* (1956) 46 Cal.2d 818, 836.

Similarly, as to the accessory conviction, the evidence overwhelmingly demonstrated Lamb knew Wilkenson had committed a felony, but nonetheless assisted his escape by pushing a car out of the way and driving the van off the lot. There is no likelihood the jury would have rendered a more favorable verdict for Lamb on these counts even had the evidence been excluded.

However, admission of the evidence was prejudicial in regard to the assault with a firearm convictions.[7] The evidence that Lamb knew of, and intended to facilitate, the assaults with a firearm was weak. There was no direct evidence Lamb knew Wilkenson had a gun or intended to commit a violent injury to Manuel. To the contrary, the duo appears to have intended to simply drive the van off the lot, using the "test drive" ruse. Lamb was in the van the majority of the time Wilkenson was arguing with Manuel and did not participate in the argument. According to Ruben, the People's witness, Lamb yelled "there's a gun," (apparently after observing Manuel's guns in the office), and ran off the repair shop lot, *before* Wilkenson fired. The jury's acquittal of Lamb on the attempted murder charge suggests it concluded Lamb did not share Wilkenson's intent to kill Manuel. It is, therefore, reasonably probable Lamb would have achieved a more favorable result on the assault charges had the evidence of the prior incident been excluded.

2. *The evidence was sufficient to support Wilkenson's conviction for attempted murder.*

Wilkenson next argues the evidence was insufficient to support his conviction for attempted murder, because there was no evidence he had the intent to kill. We conclude the evidence was sufficient.

When determining whether the evidence was sufficient to sustain a conviction, "our role on appeal is a limited one." (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) "[T]he test of whether evidence is sufficient to support a conviction is 'whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of

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7 As noted, Lamb was acquitted of attempted murder.

fact could have found the essential elements of the crime beyond a reasonable doubt.' [Citations.]" (*People v. Holt* (1997) 15 Cal.4th 619, 667.) "We draw all reasonable inferences in support of the judgment." (*People v. Wader* (1993) 5 Cal.4th 610, 640.) Reversal is not warranted unless it appears that " 'upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].' " (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

Attempted murder requires proof of the specific intent to kill, plus a direct but ineffectual act toward commission of the murder. (*People v. Lee* (2003) 31 Cal.4th 613, 623; *People v. Ramos* (2004) 121 Cal.App.4th 1194, 1207-1208.) "Generally, the question whether the defendant harbored the required intent must be inferred from the circumstances of the shooting." (*People v. Ramos, supra,* at pp. 1207-1208.)

Here, both Manuel and Ruben testified that Wilkenson was extremely angry and threatened to kill Manuel. Both saw Wilkenson point a gun at Manuel. Manuel moved behind the office door just before the shot was fired. Ruben saw Wilkenson shoot the gun directly toward the office, where Manuel was hiding. Ruben saw Wilkenson attempt to fire again, but the gun jammed. When he fired the shot, Wilkenson was no more than 15 feet away from the office where Manuel was positioned.

This evidence was more than sufficient to support the conviction. There can be no dispute that the shooting constituted a direct but ineffectual act towards accomplishing the killing. Wilkenson's threats to kill Manuel provided direct evidence of his murderous intent. (See, e.g., *People v. Swain* (1996) 12 Cal.4th 593, 600.) Likewise, the intent to kill can readily be inferred from Wilkenson's actions of shooting a gun directly at the area where Manuel was standing, from a short distance away. Wilkenson's attempt to fire an additional shot further supports the jury's finding. As explained in *People v. Lashley* (1991) 1 Cal.App.4th 938, 945, "The fact that the shooter may have fired only once and then abandoned his efforts out of necessity or fear does not compel the conclusion that he lacked the animus to kill in the first instance. Nor does the fact that the victim may have escaped death because of the shooter's poor marksmanship necessarily establish a less culpable state of mind." (*Ibid.*) Indeed, the very act of firing

a gun toward a victim "at a range and in a manner that could have inflicted a mortal wound had the bullet been on target is sufficient to support an inference of intent to kill . . . ." (*Ibid.*)

In arguing the evidence was insufficient, Wilkenson relies upon cases addressing whether the evidence was sufficient to prove premeditation and deliberation. (E.g., *People v. Herrera* (1999) 70 Cal.App.4th 1456, 1462.) Wilkenson, however, was not charged with or convicted of premeditated attempted murder, and intent may be shown although premeditation is absent. (See generally *People v. Koontz* (2002) 27 Cal.4th 1041, 1080 ["A verdict of deliberate and premeditated first degree murder requires more than a showing of intent to kill."]; *People v. Parks* (2004) 118 Cal.App.4th 1, 4, fn. 3 ["attempted murder requires intent to kill [citation], but does not require premeditation."].) Likewise, Wilkenson's reliance upon cases involving instructional error is unpersuasive, because the standard of review for a sufficiency of the evidence claim differs from the determination of prejudice relevant to claims of instructional error. The evidence was sufficient to support the attempted murder conviction.

3. *Trial court's failure to instruct, sua sponte, on lesser included offenses.*

a. *Applicable legal principles.*

A defendant has a constitutional right to have the jury determine every material issue presented by the evidence. (*People v. Benavides* (2005) 35 Cal.4th 69, 102.) A trial court must therefore "instruct fully on all lesser necessarily included offenses supported by the evidence." (*People v. Breverman* (1998) 19 Cal.4th 142, 148-149; *People v. Benavides, supra,* at p. 102; *People v. Heard* (2003) 31 Cal.4th 946, 980.) "On the other hand, the court is not obliged to instruct on theories that have no such evidentiary support." (*People v. Breverman, supra,* at p. 162.) " ' " 'Substantial evidence is evidence sufficient to "deserve consideration by the jury," that is, evidence that a reasonable jury could find persuasive.' " ' [Citation.]" (*People v. Benavides, supra,* at p. 102; *People v. Heard, supra,* at p. 981.)

b. *The omission of an instruction on attempted voluntary manslaughter was harmless error.*

Wilkenson contends the trial court erred by failing to instruct the jury, sua sponte, on attempted voluntary manslaughter on an unreasonable self-defense theory, a lesser included offense to attempted murder.[8] The omission of the instruction, he urges, requires reversal of the attempted murder count. We disagree that omission of the instruction requires reversal.

"An unlawful killing involving either an intent to kill or a conscious disregard for life constitutes voluntary manslaughter, rather than murder, when the defendant acts upon an actual but unreasonable belief in the need for self-defense. [Citations.]" (*People v. Stitely* (2005) 35 Cal.4th 514, 551; see also *People v. Blakeley* (2000) 23 Cal.4th 82, 87-89; *People v. Barton* (1995) 12 Cal.4th 186, 199.) " ' "The defendant's fear must be of *imminent* danger to life or great bodily injury.' " [Citations.]" (*People v. Stitely, supra,* at p. 551; *People v. Humphrey* (1996) 13 Cal.4th 1073, 1082; *In re Christian S.* (1994) 7 Cal.4th 768, 783.)

In *People v. Barton, supra,* 12 Cal.4th 186, the California Supreme Court found the trial court properly instructed the jury on voluntary manslaughter. (*Id.* at p. 190.) The defendant's 20-year-old daughter, Andrea, had an unpleasant traffic encounter with the victim, Sanchez. Upset, Andrea and her father located Sanchez's car in a nearby

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8 Wilkenson contends the trial court should have instructed with CALJIC No. 5.17, the standard instruction on imperfect self-defense. CALJIC No. 5.17 provides: "A person who kills another person in the actual but unreasonable belief in the necessity to defend against imminent peril to life or great bodily injury, kills unlawfully but does not harbor malice aforethought and is not guilty of murder. This would be so even though a reasonable person in the same situation seeing and knowing the same facts would not have had the same belief. Such an actual but unreasonable belief is not a defense to the crime of [voluntary] [or] [involuntary] manslaughter. [¶] As used in this instruction, an "imminent" [peril] [or] [danger] means one that is apparent, present, immediate and must be instantly dealt with, or must so appear at the time to the slayer. [¶] [However, this principle is not available, and malice aforethought is not negated, if the defendant by [his] [her] [unlawful] [or] [wrongful] conduct created the circumstances which legally justified [his] [her] adversary's [use of force], [attack] [or] [pursuit].]"

shopping center parking lot and found Sanchez in one of the stores. An argument ensued. Sanchez, followed by defendant and Andrea, went to his parked car. There was evidence the defendant threatened to kill Sanchez, and told him to drop a knife; there was also evidence Sanchez made an abrupt movement. (*Id.* at pp. 191-192.) Defendant shot Sanchez, killing him. A psychiatrist called by the defense opined that the defendant fired reflexively in fear of his life in response to Sanchez's sudden movement. The defendant, however, claimed the shooting was an accident; the gun had gone off accidentally when he stepped back in response to Sanchez's sudden movement. He denied any intent to shoot. (*Id.* at pp. 192-193.)

Over the defendant's objection, the trial court instructed on voluntary manslaughter. *Barton* concluded the evidence supported the instruction, despite the defendant's testimony the shooting was an accident. "[T]he jury could reasonably conclude that Sanchez was unarmed, but that defendant, his judgment clouded by his anger, unreasonably believed that Sanchez was armed and trying to attack him, and that defendant deliberately fired his gun in response to this perceived threat. Although defendant claimed that the gun discharged accidentally, the jury could reasonably discount this self-serving testimony" in light of evidence suggesting the gun did not fire accidentally. (*Id.* at pp. 202-203.)

Here, as in *Barton,* there was evidence from which the jury could have concluded Wilkenson shot in the unreasonable belief Manuel was going to shoot him. The two men had been embroiled in a vituperative argument, during which Wilkenson threatened to kill Manuel and Manuel admittedly responded, at one point, "When you do that, make sure you point good at me," because "if you don't, then the one ending up dead is going to be you, depending [on] who's faster." Manuel had, indeed, placed two guns on top of the office desk. Just before the shooting, Manuel was in the office near the weapons while Wilkenson paced outside the open office door, and the two men were hurling insults at each other. Just before the shooting, Lamb yelled, "There's a gun," or words to that effect. Based upon this evidence the jury could have rejected Wilkenson's self-

serving story about the gun firing accidentally, but believed Wilkenson had an honest but unreasonable belief Manuel was about to shoot.

However, omission of the instruction was harmless. Omission of a lesser included instruction is harmless where the factual question posed by the omitted instruction was necessarily resolved unfavorably to the defendant under other instructions. (*People v. Coffman and Marlow, supra,* 34 Cal.4th at pp. 97-98; *People v. Sedeno* (1974) 10 Cal.3d 703, 721, overruled in part on other grounds in *People v. Breverman, supra,* at p. 149, and disapproved on other grounds in *People v. Flannel* (1979) 25 Cal.3d 668, 684, fn. 12.) Here, the jury found true the allegation that Wilkenson personally and intentionally used and discharged a firearm during the robbery of Manuel, as well as during commission of the assaults, criminal threat offenses, and attempted murder. Thus, the jury necessarily concluded that Wilkenson's discharge of the gun was committed *as part of the robbery*, i.e., as part of the taking with force or fear, not as a misguided attempt at self-defense.

c. *The trial court did not err by failing to instruct on theft as a lesser included offense of robbery.*

The trial court instructed on the elements of robbery, and gave CALJIC No. 9.40.2, regarding "after-acquired intent" to steal.[9] However, Lamb, joined by Wilkenson, contends the trial court should also have instructed on theft, a lesser included offense to robbery. We disagree.

Theft is a lesser included offense of robbery, which does not require the additional element of force or fear. (*People v. Combs* (2004) 34 Cal.4th 821, 856; *People v. Turner* (1990) 50 Cal.3d 668, 690; *People v. Reeves* (2001) 91 Cal.App.4th 14, 51.) To support a robbery conviction, the evidence must show that the requisite intent to steal arose either before or during commission of the act of force. (*People v. Marshall, supra,* 15 Cal.4th

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9 CALJIC No. 9.40.2 provided: "To constitute the crime of robbery, the perpetrator must have formed the specific intent to permanently deprive an owner of his property before or at the time that the act of taking the property occurred. If this intent was not formed until after the property was taken from the person or immediate presence of the victim, the crime of robbery has not been committed."

at p. 34; *People v. Reeves, supra,* at p. 53.) Thus, if property is taken without the use of force or fear, the offense is theft, not robbery. (*People v. Reeves, supra,* at pp. 52-53.) Likewise, if intent to take the property arises only *after* force or fear is applied, the offense is theft. (*People v. Sakarias* (2000) 22 Cal.4th 596, 620.)

Appellants offer two theories in support of the claim the trial court should have instructed on theft. First, they assert the taking occurred before any force was used, in that Lamb had already moved the van and had control of it before Wilkenson used the gun. We are unpersuaded that the evidence was substantial on this point. "Circumstances otherwise constituting a mere theft will establish a robbery where the perpetrator peacefully acquires the victim's property, but then uses force to retain or escape with it." (*Miller v. Superior Court* (2004) 115 Cal.App.4th 216, 222.)

People v. Anderson (1966) 64 Cal.2d 633 and *People v. Phillips* (1962) 201 Cal.App.2d 383, are instructive. In *People v. Anderson,* at the defendant's request a pawn shop employee gave him a rifle to examine. The defendant stated he wanted to purchase the rifle and asked to see a box of shells. The defendant then began loading the gun with the shells over the employee's protest, explaining he wanted to see if they fit. (*Id.* at p. 636.) The defendant then shot one of the employees and barricaded himself in the pawnshop. On appeal, the defendant argued the evidence was insufficient to prove robbery. *Anderson* rejected the claim, reasoning: "a robbery is not completed at the moment the robber obtains possession of the stolen property . . . . [¶] Accordingly, if one who has stolen property from the person of another uses force or fear in removing, or attempting to remove, the property from the owner's immediate presence . . . the crime of robbery has been committed." (*Id.* at p. 638.)

Similarly, in *People v. Phillips, supra,* 201 Cal.App.2d 383, a gas station attendant pumped gasoline into the defendant's car. After the car was filled, and without paying for the gasoline, one of the defendants threatened the attendant with a gun and another engaged in a struggle with him. Although no force or fear had been used by the robbers in obtaining possession of the gasoline, the evidence was held sufficient to prove robbery. (*Id.* at pp. 385-387; cf. *Miller v. Superior Court, supra,* 115 Cal.App.4th at pp. 222-224

[immediate presence requirement for robbery is met when the defendant steals property out of the victim's presence, is then confronted by the victim, and uses force on the victim to retain the property].)

Given these principles, it is clear a theft instruction was not warranted. As a matter of law, the fact initial control of the van was obtained without force or fear did not change the crime to theft.

Second, Lamb argues there was substantial evidence he had no intent to commit a taking until *after* Wilkenson used force. In support of this theory, he argues he had ample opportunity to drive the van away before the shooting, but did not do so; and before the shooting, there were no "words or actions" evidencing an intent to take the van without paying. To the contrary, the overwhelming evidence suggested appellants intended to take the van without paying for the repairs from the moment they arrived at the auto shop. Appellants headed straight for the van upon their arrival; Lamb entered and started the van, contrary to the usual practice of settling the bill first; and almost immediately, Wilkenson began threatening Manuel when Manuel refused to release the van without payment. That Lamb did not actually drive off the lot, although he had some opportunity to do so before the van's path was blocked, appears due to appellants' hope they could con and bully their way into getting the van before applying force. To accept appellants' theory, the jury would have had to have believed Lamb had the intent to take the van when they arrived (based on appellants' actions), speculated he lost the intent while driving in the lot, and then regained the intent to steal after the shooting. (See *People v. Sakarias, supra,* 22 Cal.4th at pp. 620-621.) Such speculation is not a valid basis upon which to give a lesser included offense instruction. (*Ibid.*)

Finally, assuming arguendo the evidence warranted an instruction on the lesser included offense of theft, omission of the instruction was harmless. As we have explained, any evidence suggesting appellants did not initially have the intent to take the van was extremely weak, and there is therefore no reasonable probability the result would have been more favorable for them had the instruction been given. (*People v.*

Breverman, supra, 19 Cal.4th at p. 149; *People v. Sakarias, supra,* at p. 621; *People v. Reeves, supra,* 91 Cal.App.4th at p. 53.)

4. *Application of section 654 to appellants' sentences.*

a. *Applicable legal principles.*

Section 654, subdivision (a), provides that "[a]n act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." Section 654 therefore " 'precludes multiple punishment for a single act or for a course of conduct comprising indivisible acts. "Whether a course of criminal conduct is divisible . . . depends on the intent and objective of the actor." [Citations.] "[I]f all the offenses were merely incidental to, or were the means of accomplishing or facilitating one objective, defendant may be found to have harbored a single intent and therefore may be punished only once." [Citation.]' [Citation.]" (*People v. Spirlin* (2000) 81 Cal.App.4th 119, 129; *People v. Latimer* (1993) 5 Cal.4th 1203, 1207-1208; *Neal v. State of California* (1960) 55 Cal.2d 11, 19.) If the defendant harbored " 'multiple or simultaneous objectives, independent of and not merely incidental to each other, the defendant may be punished for each violation committed in pursuit of each objective even though the violations share common acts or were parts of an otherwise indivisible course of conduct. [Citation.]' " (*People v. Jones* (2002) 103 Cal.App.4th 1139, 1143; *People v. Cleveland* (2001) 87 Cal.App.4th 263, 267-268; *People v. Solis* (2001) 90 Cal.App.4th 1002, 1021; *People v. Alvarado* (2001) 87 Cal.App.4th 178, 196.)

Whether section 654 applies in a given case is a question of fact for the trial court, which is vested with broad latitude in making its determination. (*People v. Hutchins* (2001) 90 Cal.App.4th 1308, 1312; *People v. Herrera, supra,* 70 Cal.App.4th at p. 1466.) Its findings will not be reversed on appeal if there is any substantial evidence to support them. (*People v. Hutchins, supra,* at p. 1312; *People v. Herrera, supra,* at p. 1466; *People v. Nichols* (1994) 29 Cal.App.4th 1651, 1657.) We review the trial court's determination in the light most favorable to the respondent and presume the existence of

every fact the trial court could reasonably deduce from the evidence. (*People v. Hutchins, supra,* at pp. 1312-1313.)

b. *Wilkenson's sentence on count 2 must be stayed.*

Appellants contend the trial court should have stayed sentence on counts 1 and 2, assault of the Monterroso brothers with a firearm, pursuant to section 654.

As we have already concluded Lamb's convictions for assault must be reversed, this contention is moot as to him. As to Wilkenson, the trial court stayed sentence pursuant to section 654 on count 1, the assault of Manuel with a firearm. The People concede Wilkenson's sentence on count 2, for the assault of Ruben with a firearm, must be stayed pursuant to section 654. We agree.

The trial court found the imposition of multiple sentences proper because the incidents were separate crimes, "either the 245 was completed before the robbery or the robbery was completed before the assault," and neither crime was necessary to complete the other. The trial court's reasoning was flawed. As the People acknowledge, Wilkenson put a gun to Ruben's ribs to prevent him from closing the gate, so appellants could remove the car from the lot. The evidence is susceptible to only one interpretation: that the assault was committed with the sole objective of committing the robbery of Ruben. The assault was therefore incidental to, and was the means of accomplishing, one objective, i.e., the robbery of Ruben. Therefore, section 654 requires that Wilkenson's sentence for the assault of Ruben must be stayed.

c. *Wilkenson's sentence on count 6 must be stayed pursuant to section 654.*

Wilkenson next argues that his sentence for the robbery of Manuel (count 6) must be stayed because the attempted murder was carried out only to effectuate the robbery of Manuel, and the two crimes were committed with a single intent and objective. We agree with Wilkenson.

The evidence showed Wilkenson acted with a single intent and objective: to take the van without paying for the repairs. Lamb and Wilkenson initially attempted to accomplish that end by conning Manuel into letting them take the van for a "test drive." When that failed, Wilkenson attempted to intimidate Manuel into letting the van go.

When Manuel placed his guns on the counter, Wilkenson shot to force Manuel's compliance and cooperation in releasing the van. Immediately thereafter, he and Lamb moved the car blocking the van's path, and drove the van off the lot, without further violence toward Manuel. Indeed, the jury found Wilkenson discharged the gun in the commission of the robbery.

The trial court did not make a specific finding that a distinct, separate intent and objective motivated the attempted murder. As noted, in regard to the assaults the court stated only that the assaults were individual acts, completed separately and apart from the robberies, and the robbery and the assault were unnecessary to each other. It is true that California courts have repeatedly held gratuitous violence against a helpless, unresisting victim is not incidental to robbery for purposes of section 654. (*People v. Nguyen* (1988) 204 Cal.App.3d 181, 190-191 [collecting cases]; *People v. Cleveland, supra,* 87 Cal.App.4th at p. 272 [gratuitous beating of elderly, nonresisting robbery victim was not carried out with same objective as the robbery].) "[A]t some point the means to achieve an objective may become so extreme they can no longer be termed "incidental" and must be considered to express a different and a more sinister goal than mere successful commission of the original crime." (*People v. Nguyen, supra,* at p. 191.) Likewise, courts have held that violence or other crimes committed *after* the loot has been obtained, is unnecessary to facilitate the robbery and may be separately punished. (See, e.g., *In re Jesse F.* (1982) 137 Cal.App.3d 164, 171 ["When there is an assault *after* the fruits of the robbery have been obtained, and the assault is committed with an intent other than to effectuate the robbery, it is separately punishable."]; *People v. Foster* (1988) 201 Cal.App.3d 20, 27.)

Here, however, it appears the shooting *was* necessary to the robbery, in that Manuel had pulled his guns out, implying he would use them to prevent the taking of the van. The van had not been removed from the lot, and Manuel was essentially still uncooperative, when Wilkenson committed the shooting. The trial court did not articulate any separate and distinct objective for the shooting. On these facts, substantial evidence does not support the trial court's conclusion that section 654 was inapplicable.

Accordingly, we hold the sentence for the robbery of Manuel, count 6, must be stayed pursuant to section 654.[10]

DISPOSITION

Lamb's convictions for assault with a firearm (counts 1 and 2) are reversed. Wilkenson's sentence for the assault of Ruben with a firearm (count 2) and the robbery of Manuel (count 6) are ordered stayed pursuant to section 654. In all other respects, the judgments are affirmed. In regard to Wilkenson, the clerk of the superior court is directed to prepare an amended abstract of judgment and forward a copy to the Department of Corrections. In regard to Lamb, the matter is remanded for further proceedings consistent with the opinions expressed herein.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ALDRICH, J.

We concur:

KLEIN, P.J.

CROSKEY, J.

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10 Given our reversal of Lamb's assault convictions and our conclusion that section 654 bars imposition of sentence on Wilkenson's conviction for the assault of Ruben and robbery of Manuel, we need not reach appellants' contention that *Blakely v. Washington* (2004) 524 U.S. 296, required the jury decide whether consecutive sentences should be imposed and whether section 654 prohibited punishment.

PROOF OF SERVICE BY MAIL

BY PERSON IN STATE CUSTODY

I, LAWONE WILKINSON, declare:

I am over 18 years of age and a party to this action. I am a resident of California Correctional Institution Prison, in the county of KERN, State of California. My prison address is: P.O. BOX, 1905 Tehachapi, Calif. 93581.

On 1-8-2020 (DATE),

I served the attached: 2254 Habeas Petition (Pgs. 1-40) EX. A: CALif. Appeal court decision (Pgs. 1-24) + EX. 1-6: B.A.R'S LAWS letters EX. B: Federal District court Report (Pgs. 1-73) (DESCRIBE DOCUMENT)

on the parties herein by placing true and correct copies thereof, enclosed in a sealed envelope, with postage thereon fully paid, in the United States Mail in a deposit box so provided at the above-named correctional institution in which I am presently confined. The envelope was addressed as follows:

"Attorney General"
300 South Spring st.
1st FLOOR
Los Angeles, Calif. 90013

"Governor's office"
State Capitol
Legal Affairs
Sacramento, Calif. 95814

"DIRECTOR"
Department Consumer Affairs
1625 N. Market Blvd.
Suite N-112
Sacramento, Calif. 95834

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on 1-8-2020 (DATE)

Lawone Wilkinson (DECLARANT'S SIGNATURE)

Lawone Wilkinson

GOD LOVES

Lawone Wilkinson
C.D.C.R. # T-47584
C.C.I (prison)
P.O. Box. 1905
Tehachapi, Calif. 93581

FOR: U.S. SUPREME COURT

"UNITED STATES DISTRICT" COURT REPORT

EXHIBIT

EX. "B"

O

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

LAWONE W. WILKINSON, Petitioner, v. J. SULLIVAN, WARDEN Respondent.	NO. CV 07-2658-DOC (MAN) REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This Report and Recommendation is submitted to the Honorable David O. Carter, United States District Judge, pursuant to 28 U.S.C. § 636 and General Order No. 05-07 of the United States District Court for the Central District of California.

INTRODUCTION

On April 23, 2007, Petitioner, a state prisoner, filed a habeas petition pursuant to 28 U.S.C. § 2254 ("Petition"). Respondent thereafter filed an Answer to the Petition and lodged the pertinent portions of the state record ("Lodg."), and Petitioner then filed a Reply.

Briefing in this action is deemed completed. Thus, the matter is under submission to the Court for decision.

PRIOR PROCEEDINGS

In January 2004, Petitioner and co-defendant Gregory Sernal Lamb ("Lamb") were convicted following a jury trial in the Los Angeles Superior Court.[1] Petitioner was convicted of two counts of assault with a firearm, two counts of making criminal threats, one count of attempted murder, and two counts of second degree robbery. The jury also found true various firearm enhancement allegations. (Lodg. No. 1, Clerk's Transcript ("CT") 182-90, 194-96, 200-04.) Subsequently, Petitioner was sentenced to a total prison term of 37 years. (CT 288-92, 295-97.)

Petitioner appealed. (CT 300; Lodg. Nos. 3-7.) On July 29, 2005, in a written, reasoned decision, the California Court of Appeal affirmed Petitioner's conviction in full, although it stayed his sentences on two counts.[2] (Lodg. No. 8.) Petitioner filed a petition for review in the California Supreme Court. (Lodg. No. 9.) On November 2, 2005, the California Supreme Court summarily denied review. (Lodg. No. 10.)

On August 9, 2006, Petitioner filed a habeas petition in the trial court, which raised a version of the claim alleged as Ground One in the

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[1] Lamb's separate Section 2254 habeas action is pending in this Court as Case No. CV 08-440-DOC (MAN).

[2] As a result, on September 2, 2005, an amended abstract of judgment issued setting forth Petitioner's total prison term of 27 years. (Lodg. No. 11.)

instant Petition. (Lodg. No. 12.) On August 25, 2006, Petitioner filed another habeas petition, which he characterized as an amendment or supplement to the earlier-filed petition, raising versions of the claims alleged as Grounds One and Two in the instant Petition. (Lodg. No. 14.) On August 28, 2006, the trial court denied relief on the merits. (Lodg. No. 15.) On September 2, 2006, Petitioner filed another habeas petition in the trial court, which essentially duplicated the petition filed on August 25, 2006. (Lodg. No. 16.) On October 17, 2006, the trial court denied the petition on the ground that it was repetitious. (Lodg. No. 17.)

On September 20, 2006, Petitioner filed a habeas petition in the California Supreme Court, which raised versions of the claims alleged as Grounds One through Three of the instant Petition. (Lodg. No. 18.) On October 3, 2006, Petitioner filed an amended habeas petition in the state high court, which added the claim alleged as Ground Four of the instant Petition. (Lodg. No. 19.) On March 28, 2007, the California Supreme Court denied relief without comment or citation to authority. (Lodg. No. 20.)

SUMMARY OF THE EVIDENCE AT TRIAL

The Court has reviewed the record in this case, as well as the California Court of Appeal's summary of the evidence in its opinion on direct appeal. The state court's summary is consistent with the Court's own review of the record. Accordingly, the Court has quoted it below, to provide an initial factual overview, and will discuss the relevant portions of the trial record as needed in connection with its analysis

of Petitioner's claims.[3]

a. *Prosecution's case.*

Viewed in accordance with the usual rules governing appellate review . . ., the evidence relevant to the issues on appeal established the following. Ruben and Manuel Monterroso,[4] who were brothers, co-owned Ruben's Auto Electric, an automobile repair shop.

On September 19, 2003, at approximately 9:00 a.m.,

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[3] In affirming the judgment against Petitioner, the California Court of Appeal discussed and summarized the evidence presented at trial in a section entitled "Factual and Procedural Background." (Lodg. No. 8 at 2-5.) On federal habeas review, "a determination of a factual issue made by a State court shall be presumed to be correct" unless rebutted by the petitioner by clear and convincing evidence. 28 U.S.C. § 2254(e)(1). *See also* Schriro v. Landrigan, 550 U.S. 465, 473-74, 127 S. Ct. 1933, 1939-40 (2007)("AEDPA also requires federal habeas courts to presume the correctness of state courts' factual findings unless applicants rebut this presumption with 'clear and convincing evidence.'")(*citing* Section 2254(e)(1)); Pollard v. Galaza, 290 F.3d 1030, 1033, 1035 (9th Cir. 2002)(statutory presumption of correctness applies to findings by both trial courts and appellate courts); Dubria v. Smith, 224 F.3d 995, 1000 (9th Cir. 2000)(*en banc*).

The Section 2254(e)(1) presumption has not been shown to be inapplicable to the state appellate court's description of the evidence presented at Petitioner's trial. Accordingly, in the above summary, the Court has quoted the pertinent portions of the state court's decision. *See* Vasquez v. Kirkland, 572 F.3d 1029, 1031 n.1 (9th Cir. 2009)(relying on and presuming the correctness of the state appellate court's summary of the evidence at trial, when such findings had not been shown to be erroneous under Section 2254(e)(1)); Moses v. Payne, 555 F.3d 742, 746 n.1 (9th Cir. 2009)(same).

[4] Footnote 2 in original: "For ease of reference, the Monterroso brothers will hereinafter be referred to by their first names."

appellants brought Lamb's 1978 Ford Econoline van into the Monterrosos' shop for service. Wilkenson[5] requested a complete service, including a brake job, major tune up, and transmission service, for a cost of $380. He stated that he needed the work completed by 5:00 p.m.

At approximately 5:00 p.m., appellants returned to the shop and headed for the van, which was parked at the back of the garage with the keys in the ignition. Wilkenson told Lamb to start the car and "back it out." Manuel stated they could not take the van until they had paid for the service. Wilkenson told Manuel they wished to take the van for a road test. When Manuel refused, Wilkenson stated that it was his neighborhood, and threatened to burn the shop down. Manuel and Wilkenson argued. Wilkenson stated that he could "just get rid" of Manuel and Ruben. Wilkenson referred to the brothers as "mother fuckers." Meanwhile, Lamb drove the van across the lot slowly and indecisively. Manuel telephoned 9-1-1.

Wilkenson stated that he owned a white car which was also on the repair lot (hereinafter "the white car"), and proposed Manuel take that vehicle as a deposit. Manuel declined, because Manuel knew the white car did not belong to

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[5] Throughout the state record, Petitioner's last name is spelled "Wilkenson." However, in this case, he spells his last name as "Wilkinson." The spelling variation makes no difference to the habeas issues involved here.

Wilkenson.[6] Another customer arrived at the shop and parked behind the van, blocking its exit. Manuel again telephoned 9-1-1.

Wilkenson's argumentative behavior escalated, with Wilkenson arguing "right in [Manuel's] face" and continuing to threaten Manuel and assert that he was taking the van. Manuel refused to back down and returned Wilkenson's insults. Manuel informed Wilkenson of the shop's policy to fix any problems if a customer was unsatisfied with the work after paying for it. Wilkenson yelled, "I'll kill you, mother fucker." Manuel responded, "When you do that, make sure you point good at me," because "if you don't, then the one ending up dead is going to be you, depending on who's faster."

Eventually Wilkenson entered the van and emerged wearing a long, black silk jacket, despite the warm weather. Manuel suspected Wilkenson had a weapon in the jacket, and was frightened. Wilkenson continued to repeat his threats to kill Manuel and burn the shop down. He paced in front of the office for approximately eight more minutes.

Concerned, Manuel placed two guns on top of the desk inside the office, and again called police. Wilkenson

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[6] Footnote 3 in original: "Indeed, while Manuel and Wilkenson were arguing, the wife of the vehicle's owner arrived and, after Manuel explained the situation to her, confirmed that the white car belonged to her husband."

continued to pace in front of the office, yelling threats and insults. Manuel responded with similar insults. Lamb exited the van, yelled, "there is a gun," and ran off the lot. Manuel did not have a gun in his hand. Wilkenson, who was approximately 12 to 15 feet away from Manuel, pulled a gun from his jacket and pointed it at Manuel's upper body. Wilkenson fired a single shot. Manuel moved behind the office door, just in time to dodge the bullet. Manuel pulled one of his guns from the office desk. Wilkenson attempted to fire again, but the gun jammed. Wilkenson unsuccessfully attempted to repair the gun. Manuel pointed his gun at Wilkenson. Ruben intervened, stating, "no shooting," or words to that effect.

Wilkenson moved between parked cars and called to Lamb. Together they pushed the car that was blocking the van out of the way. Ruben began to close the gate to prevent appellants from leaving. Wilkenson, who was "furious," ran towards Ruben, placed a gun against his ribs, and threatened to kill him if he closed the gate. Wilkenson ordered Lamb into the van. With the gun still pressed against Ruben's ribs, Wilkenson shook Ruben's hand and said, "I'm going to pay you." Lamb drove off in the van, and Wilkenson ran in the same direction.

A few days later, Lamb and Wilkenson were stopped by police. Lamb was driving the van; Wilkenson was a passenger. Appellants never paid for the repairs.

The People presented evidence that the night before the charged incident, appellant Lamb, driving the van, engaged in hostile and provocative driving maneuvers vis a vis another motorist, Omar Freeman. Lamb blocked Freeman's path with his vehicle, whereupon an unidentified male passenger exited the van and pointed a gun at Freeman. [fn. om.]

b. *Defense case.*

Wilkenson testified in his own defense. Wilkenson admitted taking the van to the repair shop with Lamb, to have it "checked out." They returned at approximately 5:00 p.m. Lamb and Manuel argued, with Lamb arguing he had not authorized, and would not pay for, repairs to his vehicle. Manuel called police. Manuel and Wilkenson became embroiled in further argument, during which each called the other names. Lamb attempted to back the car out, but was blocked when another customer pulled in. Lamb and Ruben argued, with Lamb complaining that he had not authorized work on the van and did not owe money. Wilkenson put on his long black jacket because he was chilly. He paced, and he and Manuel continued to swear at each other.

Manuel entered the office, and Lamb yelled, "He got a gun [*sic*]." Wilkenson saw Manuel holding a small gun in his hand. Manuel pointed it first at Lamb and then at Wilkenson. Lamb ran toward the exit. Wilkenson grabbed Manuel's gun from his hands. Wilkenson took a few steps and the gun went

off accidentally. He attempted to disable the gun by separating the clip. When he turned, Manuel was holding another gun. Wilkenson ducked behind a car and yelled, "Don't shoot." Manuel said, "I could still kill him." Ruben stated, "No shooting."

Wilkenson told Ruben, "Your friend tried to kill us," and attempted to give Ruben the gun. Ruben refused to take it. Wilkenson stated that they would have paid had they owed any money. Ruben then shook his hand. Wilkenson threw Manuel's gun and clip in the driveway when he and Lamb drove away. Wilkenson denied threatening Manuel or Ruben and denied having a gun.

Wilkenson admitted suffering convictions for forgery in 2000 and being a felon in possession of a firearm in 2002.

Lamb did not testify or present evidence.

c. *People's rebuttal.*

In rebuttal, the People presented evidence that Manuel had prepared a work authorization form prior to making the repairs, and the $380 estimate was not challenged by Wilkenson. Manuel also denied that Wilkenson had attempted to take a gun from him, or that the shooting was accidental.

(Lodg. No. 8 at 2-5.)

PETITIONER'S HABEAS CLAIMS

Ground One: Petitioner's trial counsel provided ineffective assistance by failing to: (1) object to the consecutive sentences imposed for Counts Two and Six on the ground that they violated Petitioner's Sixth Amendment right to a jury trial; (2) request that CALJIC No. 2.07 be modified; (3) obtain and introduce into evidence the black jacket Petitioner wore during the incident; (4) file a motion to preserve the black jacket; and (5) move to sever Petitioner's trial from that of co-defendant Lamb.

Ground Two: The prosecutor committed misconduct by: (1) presenting perjured testimony by witness Manuel Monterroso; (2) suppressing the black jacket worn by Petitioner during the incident; and (3) violating a trial court order directing the parties to refrain from presenting prior act evidence until the court ruled on its admissibility.

Ground Three: Judicial misconduct and bias, based on the trial judge's: (1) failure to instruct, *sua sponte*, on attempted voluntary manslaughter as a lesser included offense of the attempted murder charge; (2) finding that California Penal Code § 654 did not preclude the imposition of consecutive sentences based on Counts 2 and 6; (3) remark that interfered with the attorney-client relationship; (4) admission of evidence pursuant to California Evidence Code § 1101(b); and (5) failure to address Petitioner's complaint at sentencing about a potential conflict of interest with his attorney.

Ground Four: The Equal Protection Clause has been violated, because: there is no evidence that the Monterroso brothers possessed a valid business license; there is no evidence that the two firearms possessed by the Monterroso brothers at the time of the incident were registered and licensed; and the prosecutor failed to charge Manuel Monterroso with crimes based on the incident.

STANDARD OF REVIEW

The Petition is governed by 28 U.S.C. § 2254, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). Under Section 2254(d), a state prisoner whose claim has been "adjudicated on the merits" cannot obtain federal habeas relief unless that adjudication: "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."

Petitioner raised his claims through a habeas petition filed in the California Supreme Court, which was denied without comment or citation to authority. The state high court's "silent" denial is considered to be "on the merits." *See* Pinholster v. Ayers, 590 F.3d 651, 663 (9th Cir. 2009)(*en banc*), *cert granted sub nom.* Cullen v. Pinholster, 130 S. Ct. 3410 (U.S. June 14, 2010)(No. 09-1088); Hunter v. Aispuro, 982 F.2d 344, 347-48 (9th Cir. 1992). Accordingly, the Section 2254(d) standard of review applies to the Court's review of these claims. *See* Lambert

v. Blodgett, 393 F.3d 943, 966-69 (9th Cir. 2004)(Section 2254(d) applies when the state court has denied a claim based on its substance, rather than on the basis of a procedural or other rule precluding state court review of the merits).

With respect to Section 2254(d)(1) review, "clearly established Federal law" "refers to the holdings, as opposed to the dicta, of [the Supreme] Court's decisions as of the time of the relevant state-court decision." Williams v. Taylor, 529 U.S. 362, 412, 120 S. Ct. 1495, 1523 (2000); *see also* Thaler v. Haynes, ___ U.S. ___, 130 S. Ct. 1171, 1173 (2010)(*per curiam*)("A legal principle is 'clearly established' within the meaning of [Section 2254(d)(1)] only when it is embodied in a holding of this Court."); Carey v. Musladin, 549 U.S. 70, 74, 127 S. Ct. 649, 653 (2006); Lockyer v. Andrade, 538 U.S. 63, 71, 123 S. Ct. 1166, 1172 (2003); Stokes v. Schriro, 465 F.3d 397, 401-02 (9th Cir. 2006)(this statutory language "refers to Supreme Court precedent at the time of the last-reasoned state court decision"). Section 2254(d)(1) "plainly restricts the source of clearly established law to the Supreme Court's jurisprudence." Lambert, 393 F.3d at 974; *see also* Plumlee v. Masto, 512 F.3d 1204, 1210 (9th Cir. 2008)(*en banc*)("What matters are the holdings of the Supreme Court, not the holdings of lower federal courts."), *cert. denied*, 128 S. Ct. 2885 (2008). However, although "[o]nly Supreme Court precedents are binding on state courts under AEDPA," Ninth Circuit "precedents may be pertinent to the extent that they illuminate the meaning and application of Supreme Court precedents." Campbell v. Rice, 408 F.3d 1166, 1170 (9th Cir. 2005)(*en banc*); *see also* Mendez v. Knowles, 556 F.3d 757, 767 (9th Cir. 2009).

Under the first prong of Section 2254(d)(1), a state court decision is "contrary to" federal law if the state court applies a rule that contradicts the governing law as stated by the Supreme Court or reaches a different conclusion than that reached by the high court on materially indistinguishable facts. Price v. Vincent, 538 U.S. 634, 640, 123 S. Ct. 1848, 1853 (2003). This includes "use of the wrong legal rule or framework." Frantz v. Hazey, 533 F.3d 724, 734 (9th Cir. 2008)(*en banc*). The second prong of Section 2254(d)(1) is met when a state court identifies the correct governing legal principle from the Supreme Court's decisions but unreasonably applies it to the facts of the petitioner's case. Williams, 529 U.S. at 412-13, 120 S. Ct. at 1523.

With respect to the Section 2254(d)(1) second prong, the "unreasonable application" inquiry is an objective one, and the standard is not satisfied simply by showing error or incorrect application of the governing federal law. Andrade, 538 U.S. at 75, 123 S. Ct. at 1174; Woodford v. Visciotti, 537 U.S. 19, 25, 123 S. Ct. 357, 360 (2002)(*per curiam*); Williams, 529 U.S. at 409, 120 S. Ct. at 1521. "The question under AEDPA is not whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable - a substantially higher threshold." Landrigan, 550 U.S. at 473, 127 S. Ct. at 1939; *see also* Renico v. Lett, ___ U.S. ___, 130 S. Ct. 1855, 1866 (2010)(concluding that "whether or not" the state court's decision was "*correct*," because "it was clearly *not unreasonable*," habeas relief was not available under Section 2254(d)(1))(emphasis in original). "AEDPA thus imposes a 'highly deferential standard for evaluating state-court rulings' . . ., and 'demands that state-court decisions be given the benefit of the doubt.'"

Id. at 1862 (citations omitted).

"[I]n the absence of a Supreme Court decision that 'squarely addresses the issue' in the case before the state court . . ., or establishes a general principle that 'clearly extends' to the case," it cannot be said that clearly established federal law exists for purposes of either prong of Section 2254(d)(1), and a federal court must defer to the state court decision. Moses, 555 F.3d at 760 (*citing* Wright v. Van Patten, 552 U.S. 120, 123-26, 128 S. Ct. 743, 745-47 (2008)(*per curiam*); Musladin, 549 U.S. at 76, 127 S. Ct. at 654; and Panetti v. Quarterman, 551 U.S. 930, 953, 127 S. Ct. 2842, 2858 (2007)); *see also* Knowles v. Mirzayance, ___ U.S. ___, 129 S. Ct. 1411, 1419 (2009)(under Supreme Court precedent, it is not an unreasonable application of clearly established federal law "for a state court to decline to apply a specific legal rule that has not been squarely established by" the Supreme Court); Holley v. Yarborough, 568 F.3d 1091, 1097-98 (9th Cir. 2009)("[c]ircuit precedent may not serve to create established federal law on an issue the Supreme Court has not yet addressed," and "[w]hen there is no clearly established federal law on an issue, a state court cannot be said to have unreasonably applied the law as to that issue").

The Section 2254(d)(2) standard of review applies when an "intrinsic analysis" of the state court's fact-finding process is implicated, *i.e.*, "where petitioner challenges the state court's findings based entirely on the state record." Taylor v. Maddox, 366 F.3d 992, 999-1000 (9th Cir. 2004); *see also* Weaver v. Palmateer, 455 F.3d 958, 963 n.6 (9th Cir. 2006). A federal habeas court may not grant relief under Section 2254(d)(2) unless "it determines that the state

court was not merely wrong, but actually unreasonable." Taylor, 366 F.3d at 999. "In *Taylor v. Maddox*, we observed that what § 2254(d)(2) 'teaches us is that, in conducting this kind of intrinsic review of a state court's processes, we must be particularly deferential to our state-court colleagues.'" Weaver, 455 F.3d at 963 n.6; *see also* Lambert, 393 F.3d at 972. To grant relief under Section 2254(d)(2), the Court "must be convinced that an appellate panel, applying the normal standards of appellate review, could not reasonably conclude that the finding is supported by the record." Taylor, 366 F.3d at 1000.

While Section 2254(d) governs this Court's review of the state court decision in issue (the California Supreme Court's summary denial of relief), because there is no reasoned state court decision resolving the instant claims, "a review of the record is the only means of deciding whether the state court's decision was objectively unreasonable" with respect to the federal issues raised by these claims. Greene v. Lambert, 288 F.3d 1081, 1088 (9th Cir. 2002). Even though a federal habeas court independently reviews the record in these circumstances, it still "defer[s] to the state court's ultimate decision." Pirtle v. Morgan, 313 F.3d 1160, 1167 (9th Cir. 2002); *see also* Libberton v. Ryan, 583 F.3d 1147, 1161 (9th Cir. 2009)(same), *cert. denied*, 130 S. Ct. 3412 (2010); Allen v. Ornoski, 435 F.3d 946, 955 (9th Cir. 2006). The independent review called for here is not the equivalent of *de novo* review, "but rather is a style of review which views the" California Supreme Court's decision denying Petitioner's claims "through the 'objectively reasonable' lens ground" of Williams v. Taylor, *supra*. *Id.*

DISCUSSION

I. PETITIONER IS NOT ENTITLED TO HABEAS RELIEF BASED ON THE ASSERTED INEFFECTIVE ASSISTANCE OF HIS TRIAL COUNSEL.

By Ground One, Petitioner complains that his trial counsel provided ineffective assistance in the five respects discussed below.

A. The Clearly Established Federal Law

The Sixth Amendment guarantees the effective assistance of counsel at trial. *See* Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 2063 (1984). When a petitioner claims that his counsel's performance violated the Sixth Amendment, "[i]n addition to the deference granted to the state court's decision under AEDPA, [federal habeas courts] review ineffective assistance of counsel claims in the deferential light of" Strickland. Brown v. Ornoski, 503 F.3d 1006, 1011 (9th Cir. 2007); *see also* Mirzayance, 129 S. Ct. at 1420 (review of a Strickland claim pursuant to Section 2254(d)(1) is "doubly deferential").

To establish ineffective assistance by his trial counsel, Petitioner must demonstrate both that: (1) counsel's performance was deficient; and (2) the deficient performance prejudiced his defense. Strickland, 466 U.S. at 688-93, 104 S. Ct. at 2064-68; *see also* Mirzayance, 129 S. Ct. at 1420 ("*Strickland* requires a defendant to establish deficient performance and prejudice"); Yarborough v. Gentry, 540 U.S. 1, 5, 124 S. Ct. 1, 4 (2003)(*per curiam*)(the Sixth Amendment

right "is denied when a defense attorney's performance falls below an objective standard of reasonableness and thereby prejudices the defense"). As both prongs of the Strickland test must be satisfied to establish a constitutional violation, failure to satisfy either prong mandates the denial of an ineffective assistance claim. *See* Strickland, 466 U.S. at 697, 104 S. Ct. at 2069 (no need to address deficiency of performance if prejudice is examined first and found lacking); Rios v. Rocha, 299 F.3d 796, 805 (9th Cir. 2002)("[f]ailure to satisfy either prong of the *Strickland* test obviates the need to consider the other"); Siripongs v. Calderon, 133 F.3d 732, 737 (9th Cir. 1998)(no need to address prejudice when petitioner cannot establish deficient performance).

The first prong of the Strickland test -- deficient performance -- requires a petitioner to establish that, in view of all of the circumstances, counsel's performance was "outside the wide range of professionally competent assistance." Strickland, 466 U.S. at 690, 104 S. Ct. at 2066; *see also* Mirzayance, 129 S. Ct. at 1420 ("'[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms'"; *quoting* Strickland). The relevant inquiry under Strickland is not what defense counsel could have done, but whether counsel's choices were reasonable. *See* Babbitt v. Calderon, 151 F.3d 1170, 1173 (9th Cir. 1998). Judicial scrutiny of counsel's performance "must be highly deferential," and this Court must guard against the distorting effects of hindsight and evaluate the challenged conduct from counsel's perspective at the time in issue. Strickland, 466 U.S. at 689, 104 S. Ct. at 2065; *see also* Gentry, 540 U.S. at 8, 124 S. Ct. at 6 (even inadvertent, as opposed to tactical, attorney

omissions do not automatically guarantee habeas relief, because "[t]he Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight"); Wiggins v. Smith, 539 U.S. 510, 523, 123 S. Ct. 2527, 2536 (2003)(the first Strickland prong is a "context-dependent consideration of the challenged conduct as seen 'from counsel's perspective at the time'"). A habeas reviewing court can "'neither second-guess counsel's decisions, nor apply the fabled twenty-twenty vision of hindsight' . . . but rather, will defer to counsel's sound trial strategy." Murtishaw v. Woodford, 255 F.3d 926, 939 (9th Cir. 2001)(*quoting* Strickland); *see also* Brown v. Uttrecht, 530 F.3d 1031, 1036 (9th Cir. 2008)(if counsel utilized sound trial strategy, "it doesn't matter" that the reviewing court disagrees with that strategy), *cert. denied*, 129 S. Ct. 1005 (2009).

Due to the difficulties inherent in making this evaluation, there is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Strickland, 466 U.S. at 689, 104 S. Ct. at 2065. A habeas petitioner "must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Id.* (*internal quotation marks and citation omitted*); *see also* Matylinsky v. Budge, 577 F.3d 1083, 1091 (9th Cir. 2009)(the petitioner "bears the burden of proving that [counsel's] trial strategy was deficient"), *cert. denied*, 130 S. Ct. 1154 (2010); Murtishaw, 255 F.3d at 939 (the petitioner "bears the heavy burden of proving that counsel's assistance was neither reasonable nor the result of sound trial strategy").

The second prong of the Strickland test -- prejudice -- requires

a showing of a "reasonable probability that, but for counsel's unprofessional errors, the result of the [trial] would have been different." Strickland, 466 U.S. at 694, 104 S. Ct. at 2068. A reasonable probability is a probability "sufficient to undermine confidence in the outcome." *Id.*; *see also* Visciotti, 537 U.S. at 22, 123 S. Ct. at 359. "Only those habeas petitioners who can prove under *Strickland* that they have been denied a fair trial by the gross incompetence of their attorneys will be granted the writ and will be entitled to retrial." Kimmelman v. Morrison, 477 U.S. 365, 382, 106 S. Ct. 2574, 2586-87 (1986).

Finally, for a petitioner to succeed on an ineffective assistance of counsel claim governed by Section 2254(d), "it is not enough" to persuade a federal court that the Strickland test would be satisfied if his claim "were being analyzed in the first instance." Bell v. Cone, 535 U.S. 685, 698-99, 122 S. Ct. 1843, 1852 (2002). It also "is not enough to convince a federal habeas court that, in its independent judgment, the state-court decision applied *Strickland* incorrectly." *Id.* Rather, the petitioner must show that the state courts "applied *Strickland* to the facts of his case in an objectively unreasonable manner." *Id.*; *see also* Gentry, 540 U.S. at 5, 124 S. Ct. at 4; Visciotti, 537 U.S. at 24-25, 123 S. Ct. at 360. "[B]ecause the *Strickland* standard is a general standard, a state court has even more latitude to reasonably determine that a defendant has not satisfied that standard." Mirzayance, 129 S. Ct. at 1420.

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B. Subclaim (1)

In the first Subclaim of Ground One, Petitioner contends that his counsel performed ineffectively by failing to object to the Count 2 and 6 consecutive sentences on the ground that the sentences violated Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348 (2000), and Petitioner's Sixth Amendment right to a jury trial. Petitioner argues that the deficient nature of counsel's performance is proven by Respondent's argument on appeal -- in response to the claim raised by Petitioner and Lamb that the imposition of consecutive sentences for Counts 2 and 6 violated the Apprendi rule and the right to a jury trial[7] -- that the defendants had forfeited their Apprendi claim due to their failure to raise this federal constitutional objection at the time of sentencing. (Petition at 6, *citing* Lodg. No. 5 at 45-47; Petitioner's amended California Supreme Court habeas petition attached to the Petition ("CSC Pet.")[8] at 3.)

There is no dispute that Petitioner's trial counsel did not raise

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[7] The federal constitutional argument raised on appeal by Petitioner and Lamb was secondary to their principal state claim of state law error, namely, that the sentences on these two counts should have been stayed, pursuant to California Penal Code § 654, and the trial court erred in concluding otherwise. (*See* Lodg. No. 3 at 57-73; Lodg. No. 4 at 24-43.)

[8] In Grounds One through Four, Petitioner cross-references the counterpart discussion of his claims set forth in his amended California Supreme Court habeas petition, a copy of which is appended to the Petition and separately lodged by Respondent as Lodg. No. 19. Thus, in considering Petitioner's claims, the Court has looked to both the allegations of the Petition and those of the state habeas petition. For ease of reference, the Court's "CSC Pet." citations will utilize the handwritten pagination Petitioner has applied to the copy of the state petition appended to the Petition.

an Apprendi/right to jury trial objection when, at sentencing, the trial judge ordered that the sentences for Counts 2 and 6 were to run consecutively. (Lodg. No. 2, Reporter's Transcript ("RT") 3001-13.) On appeal, the California Court of Appeal concluded that it need not reach the Apprendi/right to jury trial argument, because it found that California Penal Code § 654 barred the imposition of consecutive sentences for Counts 2 and 6. (Lodg. No. 8 at 21-24 & n.10.) As a result, Petitioner's sentences on those two counts were stayed, and he is not serving consecutive sentences on these counts.

Whether or not trial counsel's performance in this respect satisfies the first Strickland prong, the Court plainly cannot find that the second Strickland prong is satisfied. Under the "case or controversy" requirement of Article III, Section 2 of the United States Constitution, federal courts may not issue advisory opinions. *See* Princeton University v. Schmid, 455 U.S. 100, 102, 102 S. Ct. 867, 869 (1981). Under this constitutional provision, federal courts are barred from hearing matters, including habeas petitions, in the absence of a live case or controversy. *See, e.g.*, Spencer v. Kemna, 523 U.S. 1, 7, 118 S. Ct. 978, 983 (1998); *see also* North Carolina v. Rice, 404 U.S. 244, 246, 92 S. Ct. 402, 404 (1971)(*per curiam*)("federal courts are without power to decide questions that cannot affect the rights of litigants in the case before them"). In the context of a Section 2254 habeas action, the actual "controversy" to be resolved is whether the petitioner is entitled to have the conviction or sentence imposed by the state court set aside. Calderon v. Ashmus, 523 U.S. 740, 118 S. Ct. 1694, 1698 (1998).

Any "prejudice" Petitioner initially may have suffered as a result of counsel's failure to raise a federal constitutional objection to the imposition of consecutive sentences on Counts 2 and 6 has been remedied entirely, and thus, Petitioner's ineffective assistance claim has been mooted. As the consecutive sentences imposed for Counts 2 and 6 have been stayed by order of the California Court of Appeal, the case or controversy requirement cannot be satisfied in this case, because there no longer exists "an actual injury" that can be "redressed by a favorable judicial decision." Spencer, 523 U.S. at 17, 118 S. Ct. at 983.

The California Supreme Court's rejection of this claim on habeas review, following the California Court of Appeal's order affording Petitioner the relief requested, was a correct application of the Strickland test. Accordingly, the state court's decision is entitled to deference and Subclaim (1) of Ground One must be denied.

C. Subclaim (2)

The second subclaim of Ground One stems from a jury instruction given in connection with certain prior act evidence admitted at Petitioner's trial. Because many of the Petition's claims relate to this prior act evidence, the Court will recount the portions of the record relating to this prior act evidence in detail below before turning to the specific claim raised by Subclaim (2).

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1. The 1101(b) Evidence

Prior to trial, the prosecutor advised the defense attorneys that, pursuant to California Evidence Code § 1101(b), he intended to call a witness (Omar Freeman) to testify about an incident that occurred on the day before the charged crimes (the "1101(b) Evidence"). Although the defense attorneys objected to the admission of the 1101(b) Evidence, the trial court concluded that Petitioner and Lamb had received adequate notice of the evidence for it to be admissible. (RT 4-14.)

During trial and before Freeman was to testify, defense counsel asked for a California Evidence Code § 402 hearing regarding Freeman's testimony and, in particular, regarding whether he recognized Petitioner as one of the men involved in the prior incident. After hearing argument (RT 918-25), the trial court initially indicated that the 1101(b) Evidence would be inadmissible unless Freeman testified that he recognized Petitioner as the man with the gun. (RT 932.) After hearing further argument (RT 932-41), the trial court concluded that the 1101(b) Evidence was admissible, because it was probative of Lamb's knowledge, intent, and plan with respect to the charged crimes and, thus, would be relevant as to Lamb. (RT 924, 944.) Freeman then testified as follows:

In the early evening of September 18, 2003, Freeman was driving westbound on Jefferson Boulevard, in the left lane. A blue Ford van was driving slowly in front of him. Freeman attempted to pass the van by moving into the right lane; the van, however, moved into the right lane in front of him. When Freeman attempted to pass the van on its left side, the van moved into the center of the two lanes, so that no car

could pass it. (RT 947-49.) The van continued to drive slowly, Freeman "backed off," and the van moved into the left lane. When Freeman again tried to pass the van using the right lane, the van started drifting to the right. (RT 950-51.) Freeman looked into the van's window, saw the driver, who he identified as Lamb, and a young woman in the passenger's seat, and Freeman made a motion to the effect of "what are you doing?" (RT 951-52.) The driver looked at Freeman, as did the female passenger. (RT 965-66.) To avoid hitting either the parked cars on the righthand side or the van on the lefthand side of his vehicle, Freeman accelerated and drove away. (RT 951-52.)

Freeman continued driving westbound on Jefferson Boulevard in the right lane, and he prepared to stop at a red light. The van drove up on the left side of Freeman's car and suddenly swung to the right and crossed in front of Freeman's car, stopped, and cut off traffic in two lanes. (RT 953-55.) Freeman braked hard to avoid hitting the van. (RT 955-56.) A man jumped out of the right side of the van, through the sliding door. The man had a gun in his hand. When the man raised the gun up, Freeman ducked down in his seat. Freeman keeps a digital camera in his car, and while he was ducked down, he raised the camera and took a photograph, hoping to capture the man and the van. (RT 956-59, 968, 969, 970-73.) The picture he took depicted the van and its license plate, but not the man with the gun. (RT 961, People's Ex. 1.) Freeman then turned his car wheel to the left, accelerated, and drove onto the wrong side of Jefferson, *i.e.*, into oncoming traffic. Freeman raised his head up and saw that the van was behind him. (RT 959.) Freeman only saw the man with the gun for five seconds or less and did not get a good look at his face. When asked if he saw the man in the courtroom,

Freeman said, "No, I can't recognize the person." (RT 956.)

At a sidebar conference following Freeman's testimony, Petitioner's counsel asked the trial judge if she was going to give a limiting instruction regarding the testimony. (RT 974, 976.) Lamb's counsel offered to locate the standard instruction and identified it as CALJIC No. 2.50. (RT 975-76.) The trial judge said she would "print" the standard instruction so that counsel could highlight the language to be excluded. (RT 977.) The trial court observed that the 1101(b) Evidence was relevant to prove intent and knowledge and was more probative than prejudicial and, thus, was admissible under California Evidence Code § 352. (RT 978.) The trial judge circled the portions of CALJIC No. 2.50 she intended to read to the jury, Petitioner's counsel asked that the reference in the instruction to "Defendant" be changed to read "Mr. Lamb," and the trial court and the parties agreed on the version of the instruction to be given. (RT 978-80.) The trial court then read to the jury the following version of CALJIC No. 2.50:

> Ladies and Gentlemen, Mr. Freeman was the last person that testified in this case.
>
> His testimony is evidence that has been introduced for the purpose of showing that the defendant, Mr. Lamb, committed a crime or crimes other than that for which he is on trial.
>
> Except as you will otherwise be instructed, this evidence, if believed, may not be considered by you to prove

that the defendant is a person of bad character or that he has a disposition to commit crimes. It may be considered by you only for the limited purpose of determining if it tends to show:

The existence of the intent for which a necessary element of the crime charged -- the existence of the intent which is a necessary element --

Okay. I read that wrong. Sorry.

-- only for the limited purpose of determining if it tends to show:

The existence of the intent which is a necessary element of the crime that he is charged with;

For the limited purpose for which you may consider such evidence, you must weigh it in the same manner as you do all other evidence in the case. You are not to consider such evidence for any other purpose.

(RT 980-81.)

At the close of evidence, the trial judge again read this instruction to the jurors, and they received it in written form. (RT 1254-55, 1259; CT 127.) In addition, the jurors were instructed with CALJIC No. 2.07, which provided:

EVIDENCE LIMITED TO ONE DEFENDANT ONLY

Evidence has been admitted against defendant, Mr. Lamb, and not admitted against the other.

At the time this evidence was admitted you were instructed that it could not be considered by you against the other defendant.

Do not consider this evidence against the other defendant.

(CT 118; *see also* RT 1251-52.)

The jurors further were instructed with CALJIC No. 2.09, which provided:

EVIDENCE LIMITED AS TO PURPOSE

Certain evidence was admitted for a limited purpose.

At the time this evidence was admitted you were instructed that it could not be considered by you for any purpose other than the limited purpose for which it was admitted.

Do not consider this evidence for any purpose except the limited purposes for which it was admitted.

(CT 119; *see also* RT 1251.)

On appeal, both Petitioner and Lamb argued that the 1101(b) Evidence should not have been admitted. The California Court of Appeal concluded that the trial court abused its discretion in admitting this evidence, but found that its admission was harmless error with respect to all of the counts of which Petitioner was convicted and two of the three crimes of which Lamb was convicted.[9] As to Petitioner, the state appellate court reasoned:

> The erroneous admission of the evidence was harmless in regard to Wilkenson. As noted, Freeman identified Lamb as the driver of the van, but was unable to identify the man who pointed the gun at him. Because Wilkenson was not identified as being involved in the road rage incident, the evidence did not constitute improper evidence of his character or criminal disposition, and did not tend to inculpate him. The jury was instructed about the limited purposes for which the evidence could be used, i.e., as evidence of Lamb's intent. It was further told it could not consider the evidence against Wilkenson. We presume jurors followed the trial court's instructions. . . . Therefore, because the evidence did not implicate Wilkenson and because the jury was provided with

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[9] The California Court of Appeal applied the harmless error test established by People v. Watson, 46 Cal. 2d 818, 836, 299 P.2d 243, 254 (1956) (Lodg. No. 8 at 12), which is "is the equivalent of the *Brecht* standard under federal law." Bains v. Cambra, 204 F.3d 964, 971 n.2 (9th Cir. 2000)(referring to Brecht v. Abrahamson, 507 U.S. 619, 637, 113 S. Ct. 1710, 1722 (1993)).

appropriate limiting instructions, there was no reasonable probability the outcome would have been more favorable for Wilkenson had the evidence been excluded.

(Lodg. No. 8 at 12; citations omitted.)

2. No Sixth Amendment Violation Has Been Shown

By Subclaim (2), Petitioner contends that his trial counsel performed ineffectively with respect to the jury instructions given about Freeman's testimony in two respects. First, Petitioner argues that, immediately after Freeman testified and his counsel asked that a limiting instruction be given, his counsel allowed Lamb's attorney to select CALJIC No. 2.50 as the instruction to be read to the jury at that time, rather than CALJIC No. 2.07. Petitioner contends that: his attorney should not have permitted a co-defendant's counsel to select the instruction to be given; and the CALJIC No. 2.50 instruction prejudiced Petitioner, because it failed to instruct the jurors that the 1101(b) Evidence could not be considered with respect to Petitioner. (Reply at 5; CSC Pet. at 4.)

Second, Petitioner argues that, even though CALJIC No. 2.07 subsequently was given to the jury, his counsel performed ineffectively by failing to request that "clarifying and amplifying language" be added to CALJIC No. 2.07. (Petitioner at 9; Reply at 5.) Petitioner, however, does not identify any language that his counsel should have asked be added to CALJIC No. 2.07. Rather, he appears to contend that the jury would not have understood that CALJIC No. 2.07 related to the

1101(b) Evidence due to its prefatory "At the time" reference, and thus, the jury would not have followed the instruction. Petitioner reasons that: CALJIC No. 2.50, as read to the jurors following Freeman's testimony, stated that the testimony was introduced for the purpose of showing that Lamb committed a prior crime and to show his intent; when the instruction was first read to the jury, the trial court failed to indicate explicitly that the 1101(b) Evidence could not be considered with respect to Petitioner; when CALJIC No. 2.07 was later given to the jurors, it included the phrase, "At the time this evidence was admitted you were instructed that it could not be considered by you against the other defendant"; because no such statement was made by the trial court "at the time" Freeman testified, the jurors would not have believed that CALJIC No. 2.07 applied to Freeman's testimony; and thus, the jury would not have applied CALJIC No. 2.07 to the 1101(b) Evidence and would have believed that Freeman's testimony could be used against Petitioner, *i.e.*, to find that Petitioner was the man who got out of the van and raised a gun toward Freeman. (Petition at 9; Reply at 5-7.)[10]

Petitioner's argument rests on the assumption that the jurors at his trial were unable to comprehend the instructions given to them.

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[10] Petitioner also complains that his counsel's ineffective assistance in this respect rendered his appeal "inadequate." (Petition at 7.) On appeal, Petitioner argued briefly that CALJIC No. 2.50, as given, was flawed, because it failed to identify the particular crimes to which the 1101(b) Evidence pertained. (Lodg. No. 3 at 28.) In response, Respondent argued that Petitioner had waived this contention by failing to object to CALJIC No. 2.50 at trial. (Lodg. No. 5 at 23 n.10.) In his appeal, Petitioner did not raise his present arguments regarding CALJIC No. 2.07, and thus, there is no basis for finding his appeal to have been "inadequate" based on trial counsel's alleged errors in connection with *that* instruction.

Immediately after Freeman testified, the jurors were told, by the CALJIC No. 2.50 instruction, that the evidence had been admitted to show that "Mr. Lamb" committed a prior act and was to be considered "only" for the limited purpose of whether or not the evidence proved Lamb's intent. (RT 981.) Any rational juror would have understood this instruction to mean that Freeman's testimony could be considered only with respect to whether Lamb acted with the requisite intent in connection with the charged crimes. While the trial court certainly could have noted that Freeman's testimony was not to be considered with respect to the question of Petitioner's guilt, the failure to provide such an additional comment was hardly fatal given that the instruction implicitly so advised the jurors, and shortly thereafter,[11] they were instructed with both CALJIC No. 2.07 and CALJIC No. 2.09, which further confirmed that Freeman's testimony applied *only* to Lamb. Indeed, if the jurors believed that CALJIC No. 2.07 could not have applied to Freeman's testimony -- as Petitioner argues -- then to what evidence would that instruction have pertained? The 1101(b) Evidence was the only evidence at trial which, the jurors were told, was introduced for a limited purpose and pertained only to one of the defendants. To accept Petitioner's argument requires finding that the jurors would have assumed that CALJIC Nos. 2.07 and 2.09 did not relate to any evidence presented at trial and were surplusage that could be ignored -- a

[11] Immediately after Freeman testified and the jury was instructed with CALJIC No. 2.50, Petitioner testified that same afternoon. (RT 981-1032.) Petitioner's cross-examination continued the next morning (RT 1206-22), both defendants rested (RT 1222-23), Manuel Monterroso testified as a rebuttal witness (ER 1223-38), and the jury was instructed that afternoon (RT 1243-90).

conclusion that would be nonsensical.[12]

The jurors at Petitioner's trial received the appropriate limiting instructions with respect to the 1101(b) Evidence, namely, CALJIC Nos. 2.07, 2.09, and 2.50, as the California Court of Appeal found. (Lodg. No. 8 at 12.) Moreover, as the state court also found, the jurors at Petitioner's trial are presumed to have followed those instructions. (*Id.*) That finding is entitled to deference here, given that it comports with clearly established federal law[13] and there is nothing in

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R+R AT 32

Petitioner argues that the jurors would have disregarded CALJIC Nos. 2.07, 2.09, and 2.50 based on the prosecutor's closing argument, in which "the JURY was directed to 'improperly infer' that co-defendant and defendant Wilkinson acted together in this 1101(B) evidence." (Petition at 8, *citing* RT 1529-31, 1591; emphasis in original.) Petitioner, however, mischaracterizes the prosecutor's argument.

The prosecutor argued that the jury could infer that Lamb knew that Petitioner had a gun when the two men went to the crime scene, because based on Freeman's testimony, the jury knew that: on the evening before, Lamb "help[ed] an individual use a firearm . . . using this same van"; "the day before defendant Lamb took an action that facilitated somebody else's use of a firearm"; "the very next day, what are the chances that he's accompanied by somebody who uses a firearm and he did not intend to facilitate that either?"; and "[w]hen you got Mr. Lamb taking actions to facilitate somebody else's use of a firearm the day before, that tells you something about what his intent is when one of his confederates uses a firearm the very next day. That is why that [1101(b)] evidence is there. The instructions say that it's proper on the issue of intent." (RT 1529-31, 1591.) The prosecutor's argument did not ask the jurors to infer anything about Petitioner. Rather, the prosecutor argued that, because Lamb had facilitated *someone's* use of a gun the day before, it was likely that he had done so again in connection with the charged crimes. Nothing about this argument would have caused any rational juror to disregard the limiting instructions they received with respect to the 1101(b) Evidence.

[13] *See, e.g.*, Penry v. Johnson, 532 U.S. 782, 799, 121 S. Ct. 1910, 1922 (2001)("We generally presume that jurors follow their instructions."); Weeks v. Angelone, 528 U.S. 225, 234, 120 S. Ct. 727,

the state record to show that the jurors experienced any confusion about the effect of Freeman's testimony or did not, as they are presumed to have done, follow the above-described instructions.[14]

With the benefit of hindsight, it is easy to conclude that, once Freeman testified, Petitioner's counsel could have asked that CALJIC No. 2.07 be given in conjunction with CALJIC No. 2.50. However, this type of after-the-fact second-guessing is precisely the type of analysis that Strickland instructs is inappropriate. Strickland, 466 U.S. at 689, 104 S. Ct. at 2065; Murtishaw, 255 F.3d at 939. Given that the version of CALJIC No. 2.50 read to the jury following Freeman's testimony clued the jurors in to the fact that the evidence was introduced "only" for the purpose of showing Lamb's intent and it was clear to counsel that the other pertinent limiting instructions would be given later (*see* RT 976-77), the Court does not find counsel's failure to insist that CALJIC No. 2.07 be given at that moment to have been so unreasonable and outside the wide range of professionally competent assistance that it constituted deficient performance. In addition, it is not reasonably probable that the result of Petitioner's trial would have been different had counsel objected to the giving of CALJIC No. 2.50 following Freeman's testimony and/or insisted that CALJIC No. 2.07 be given at that time, rather than later. Accordingly, the prejudice prong of

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733 (2000)("A jury is presumed to follow its instructions.").

[14] The jury deliberated for approximately ten hours. (CT 91, 95, 103-04, 194.) The jury submitted three questions, none of which remotely implicated, or indicated any confusion based on, the 1101(b) Evidence. (CT 92, 97, 175.)

Strickland is not satisfied.[15] The state court's rejection of Subclaim (2) of Ground One, therefore, was reasonable, and the claim does not warrant federal habeas relief.

D. Subclaims (3) and (4)[16]

As noted earlier, Manuel Monterroso testified that, during the incident, Petitioner retrieved a long black silk jacket and put it on, even though it was a hot day. Manuel believed that Petitioner was hiding a weapon in the jacket. (RT 620-21.) Manuel saw Petitioner "put his hand in the jacket" and then Manuel "saw a weapon." (RT 634.) The prosecutor asked Manuel to demonstrate the motion made by Petitioner. After Manuel did so, the prosecutor stated, "when Mr. Monterroso described defendant Wilkenson reaching into his jacket he made a motion with his right hand across his body as if he were reaching onto an

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[15] The Court reaches its conclusion that prejudice is lacking based on its own independent review of the record. However, the Court additionally notes that, given the above-quoted state court finding that the admission of the 1101(b) Evidence, in and of itself, was harmless error, a finding of prejudice -- based on counsel's failure in connection with the jury instructions given regarding that evidence -- effectively would be precluded if that state court finding were accorded deference under Section 2254. Petitioner argues that the state court's harmless error finding should be disregarded, because the state court applied the Watson test. As noted earlier, however, the state law Watson test is the equivalent of the federal Brecht standard for harmless error review. Given that the state court was assessing whether the admission of the 1101(b) Evidence constituted harmless error, its use of a standard equivalent to Brecht was correct. Petitioner's complaint that the California Court of Appeal applied the wrong standard of review on appeal is unavailing and not a basis for habeas relief, whether in connection with Ground One or otherwise.

[16] The nature and substance of these two claims are interrelated, and thus, the Court discusses them together.

inside pocket of the jacket and then pulling out a weapon"; the prosecutor then asked, "Is that accurate," and Manuel responded, "Correct." (RT 634-35.)

Petitioner testified that, while Ruben Monterroso and Lamb were arguing about whether Lamb owed money for work done on the van, Petitioner told Lamb that he was going to get his jacket from the van. The jacket was black and waist-length, with a Warner Bros. logo, and was similar to a windbreaker. Petitioner retrieved the jacket and put it on. (RT 1003-04, 1031-32.) Petitioner did not have a weapon, and he put the jacket on because he was cold. (RT 1031.) Petitioner was wearing the same black jacket when he was arrested. (RT 1032.)

After he was sentenced on April 7, 2004, Petitioner asked the trial court to have the black jacket "preserved" while he pursued an appeal. (RT 3006-07.) However, because the jacket had not been entered into evidence, the trial court could not order it "preserved." (RT 3007.) Petitioner stated that: the jacket was in the custody of the Sheriff's Department; and "when the witness testified, [Petitioner's attorney] told [Petitioner] that he couldn't get it." (*Id.*) The trial court advised Petitioner to sign the necessary documents to have the jacket released to whichever third party he designated. When Petitioner asserted that he had "no one" to release the jacket to, the trial judge observed: "Well, it can't be released to me. It can't be released to you. You have to have somebody to release it to." (*Id.*) Petitioner asked if the trial court could order that the jacket be preserved on Petitioner's behalf; the court clerk indicated that property is kept for some period of time, but that a "motion" had to be filed to release the

property back to the defendant or someone else. (*Id.*) The trial court suggested that Petitioner ask his attorney to file a motion to have the jacket preserved, and Petitioner's counsel said he would do so. (RT 3007-08.)

Two days later, on April 9, 2004, the Sheriff's Department sent Petitioner a "Sentenced Inmate Notification Clothing and Property Disposition" notice. (Petition at 14, copy of notice; *see also* Petition, attached CSC Pet. at 6, in which Petitioner admitted that he received the notice two days after he was sentenced.) The notice advised Petitioner that any property being held by the Sheriff's Department would not be sent to prison with Petitioner, and it was his "responsibility" to provide a third party with a Sheriff's Department release form and/or authorization letter and to "arrange" for that third party to come to the Inmate Reception Center to pick up Petitioner's clothing and personal property. (*Id.*) The notice further expressly advised that clothing would be stored for only one month after Petitioner was transported to prison, and "[a]t the end of that time, if your items have not been retrieved, they will be destroyed." (*Id.*) Petitioner apparently did not make any such arrangements and provide anyone, including his trial counsel, with the required release or authorization letter to retrieve his jacket.[17]

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[17] Petitioner has appended to the Petition (at 13-14) a copy of an August 17, 2006 letter he wrote to the Sheriff's Department, which attached a copy of the April 9, 2004 notice sent to Petitioner. In his letter, Petitioner asks what happened to his clothing (and, in particular, his jacket) and noted that his attorney had failed to move to have the jacket preserved. The Sheriff's Department responded on August 25, 2006, and advised that clothing is stored for only one month and the time frame for storing clothing had expired. (Petition at 15.)

By Subclaim (3), Petitioner contends that his trial attorney provided ineffective assistance by failing to present the black jacket as evidence at trial. Petitioner alleges that, after Manuel testified, Petitioner told his counsel that: the black jacket did not have an inside pocket; he had been wearing the jacket when he was arrested; and the Sheriff's Department was holding the jacket. Petitioner alleges that his attorney responded that he "'could not get it.'" (Petition, attached CSC Pet. at 5.) Petitioner contends that, had the jurors seen the jacket and observed that it lacked an inside pocket, he would have been acquitted, because the jury would have believed Petitioner's testimony that the "GUN came from Manuel Monterrosos [*sic*] HANDS." (Reply at 9 (emphasis in original); Petition at 10-11 and attached CSC Pet. at 5.)

By Subclaim (4), Petitioner contends that his trial counsel provided ineffective assistance by failing, following sentencing, to file a motion to preserve the black jacket while Petitioner's appeal was pending. Petitioner complains that the record on appeal does not contain any indication that his attorney filed such a motion. (Petition at 12.)

With respect to counsel's failure to present the black jacket into evidence, Petitioner's claim is premised on the theory that, had the jury learned that the black jacket lacked internal pockets, the jury would have believed that it was not possible Petitioner had a gun. Petitioner thus argues that the black jacket was critical "exonerating" evidence -- because it lacked an inside pocket -- that would have established Petitioner's innocence. (*See* Petition at 11.)

Significantly, Petitioner sat through Manuel's testimony both at the preliminary hearing and trial, in which Manuel consistently indicated that Petitioner reached into his jacket and pulled out a gun. (*See* July 13, 2007 Lodgment by Respondent (preliminary hearing transcript) ("PHT") at 1, 12; RT 634.) Yet, when Petitioner testified in his defense and described his black jacket in some detail, he did not mention that it lacked any internal pocket. (RT 1004, 1031-32.) When asked, "you claim that you had no gun in your black jacket?," Petitioner simply responded that he didn't have any "weapon at all." Petitioner did not indicate that he could not have had a weapon in his jacket due to its lack of inside pockets. (RT 1031.) Moreover, on the day after Manuel testified at trial, the trial court held a *Marsden* hearing. At the hearing, Petitioner complained that his attorney would not accede to Petitioner's direction to ask a prosecution witness about whether or not a bullet had been found in a particular location or ask other questions Petitioner wanted to have posed to prosecution witnesses. Petitioner, did not, however, complain that he had asked his attorney to present the black jacket as evidence and counsel had declined to do so or had said he could not obtain it. (*See* Lodgment by Respondent of July 10, 2007, *Marsden* transcript, *passim*.)

Thus, Petitioner's assertion that he believed the black jacket (with its lack of internal pockets) to be critical evidence, and so advised his attorney, rings hollow. Even assuming that counsel was so advised, the prejudice requirement is not satisfied. Even if the jacket lacked internal pockets in which to hold a gun, this would not have precluded the jury from believing that Petitioner possessed a gun. Indeed, even if the jury had the assertedly pocketless jacket in front

of it, the jury could have believed that Petitioner had a gun and placed it in his waistband, which he concealed by putting on the jacket, and when he reached inside his jacket, he pulled the gun from his waistband. Such a conclusion would be fully consistent with Manuel's testimony -- including his additional testimony that, after Petitioner retrieved the jacket from the van and put it on, he "was fixing the jacket up" before he walked back towards Manuel (RT 631) -- regardless of the fact that the jacket lacked pockets. Moreover, given that the jury was aware that Petitioner, unlike Manuel, had two prior felony convictions (for forgery and being a felon in possession of a firearm) (RT 1000-01) and had been instructed that a witness's prior felony conviction is a factor that may be considered in assessing that witness's credibility (CT 122, 125), the jacket's lack of pockets was not a sufficient reason for a rational juror to discredit Manuel's testimony and, instead, to believe Petitioner's testimony. It is not reasonably probable, therefore, that the outcome of Petitioner's trial would have been different had counsel presented the black jacket as a defense exhibit.

With respect to counsel's failure, after sentencing, to file a motion to "preserve" the jacket, notwithstanding counsel's representation that he would do so, the jacket was not trial evidence and, thus, could not be ordered preserved pursuant to a granted motion. While it may have been improvident for counsel to indicate that he would make a motion that was unwarranted, within two days' time, Petitioner learned not only that any such motion would be unavailing but also that *he* was required to take a simple step to ensure that his jacket would not be destroyed. Petitioner admits that he received the Sheriff's Department notice, explicitly advising him that his clothing would not

be kept for any longer than a month, and that it was his obligation to provide a third party with a release or authorization letter, so that the jacket could be picked up from the Sheriff's Department. The notice Petitioner received was extremely clear in this respect. Petitioner had the ability to obtain his jacket from the Sheriff's Department before it was destroyed, had he wished to do so.[18] Accordingly, especially when coupled with the Court's finding that the failure to present the jacket at trial was not prejudicial, the Court cannot find that trial counsel prejudiced Petitioner by failing to file a post-sentencing "motion" to "preserve" the jacket.

As the required prejudice cannot be found for either Subclaim (3) or Subclaim (4) of Ground One, the state court's rejection of these claims was not an unreasonable application of Strickland and its progeny. Accordingly, these two claims cannot warrant federal habeas relief.

E. Subclaim (5)

After the prosecutor made his opening statement, counsel for Lamb gave her opening statement. Lamb's attorney indicated that she essentially agreed with the prosecutor's description of what occurred,

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[18] Petitioner notes that, in his 2006 letter to the Sheriff's Department, he complained that his counsel "was not responding" to Petitioner's letters. (petition at 13.) Petitioner argues that his attorney could have taken any of those letters to the Sheriff's Department to obtain the jacket. (Reply at 13.) Petitioner, however, was on notice, as of August 4, 2002, that his jacket would be destroyed within a month or so unless *he* made the appropriate arrangements. Letters sent to counsel after that one-month period had passed, whether in 2006 or some time earlier, were futile.

except that she believed the evidence would show that Lamb merely asked to test drive his car before paying for the work done. Lamb's attorney asserted that Lamb had no knowledge of Petitioner's intent and that Petitioner acted on his own, without Lamb's assistance. She argued that Lamb did nothing to further, encourage, or facilitate the "nasty and illegal and criminal and violent things" Petitioner did, and the only thing Lamb was guilty of was making a poor choice of friends and associates. (RT 316-17.) In her closing argument, Lamb's attorney principally argued that the evidence did not support finding that Lamb had an intent to aid and abet the charged crimes. (RT 1541-60.) She argued that the purpose of the aiding and abetting law was not to punish people who were present and did nothing when something bad happened or to punish people "for hanging out with jerks or hanging out with bad people." (RT 1560.) On two occasions, Lamb's attorney noted that she did not know what the jurors would make of Petitioner's testimony, *i.e.*, whether they would believe it or not.[19] (RT 1553, 1556.) In concluding her argument, Lamb's attorney noted that "unfortunately," Lamb went with Petitioner to the Monterrosos' repair shop and Lamb "hangs out with bozos" and "some people who might be up to no good," but nothing Lamb did showed that he was guilty of the charged crimes. (RT 1566.)

By Subclaim (5), Petitioner argues that his attorney provided ineffective assistance by failing to move to sever Petitioner's trial from Lamb's trial. Petitioner implies (although he cites no supporting

[19] In his responding argument on closing, the prosecutor observed that, while Petitioner's attorney argued that Petitioner was credible, the prosecutor was not "sure that the attorney for Mr. Lamb really believes that Mr. Wilkinson is credible." (RT 1578.)

evidence) his attorney was aware, prior to trial, that Lamb's attorney "had a defence [*sic*] of an accusatory manner towards" Petitioner, and thus, counsel should have "asked for separate trials." (CSC Pat. at 6.) Petitioner argues that, because counsel failed to file a severance motion, the foregoing argument by Lamb's counsel prejudiced him.

To prevail on a claim that an attorney's failure to file a motion violated the Sixth Amendment, a petitioner must show that the omitted motion was meritorious. *See, e.g.*, Kimmelman, 477 U.S. at 375, 106 S. Ct. at 2583. Petitioner must show not only that his trial counsel's failure to file a severance motion constituted deficient performance -- *i.e.*, was "out of 'the wide range of professionally competent assistance'" -- but also that it was prejudicial -- *i.e.*, "had counsel so moved, there is a reasonable probability that the motion would have been granted." Styers v. Schriro, 547 F.3d 1026, 1030 (9th Cir. 2008), *cert. denied*, 130 S. Ct. 379 (2009). Further, "[g]enerally, a defendant claiming ineffective assistance of counsel for failure to file a particular motion must not only demonstrate a likelihood of prevailing on the motion, but also a reasonable probability that the granting of the motion would have resulted in a more favorable outcome in the entire case." *Id.* (*citing* Kimmelman, 477 U.S. at 390-91, 106 S. Ct. 2574). These required showings have not been made here.

The Supreme Court has opined as to the benefits of joint trials, observing that they "play a vital role in the criminal justice system." Zafiro v. United States, 506 U.S. 534, 537, 113 S. Ct. 933, 937 (1993). Joint trials "promote efficiency and 'serve the interests of justice by avoiding the scandal and inequity of inconsistent verdicts.'" *Id.*

(citation omitted). As the Supreme Court further observed, in view of these laudable goals, few cases are reversed based on a failure to sever, even when defenses are antagonistic. *Id.* at 538, 113 S. Ct. at 537. As a result, a defendant is not entitled to severance unless he shows "there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." Lambright v. Stewart, 191 F.3d 1181, 1186 (9th Cir. 1999)(*en banc*)(quoting Zafiro).

California law is consistent. "Under Penal Code section 1098, a trial court must order a joint trial as the 'rule' and may order separate trials only as an 'exception.'" People v. Alvarez, 14 Cal. 4th 155, 190, 58 Cal. Rptr. 2d 385, 405 (1996)(citation omitted). "A classic case for joint trial is presented when defendants are charged with common crimes involving common events and victims." People v. Pinholster, 1 Cal. 4th 865, 932, 4 Cal. Rptr. 2d 765, 796 (1992)(citation and internal punctuation omitted). Severance is not required simply because co-defendants have conflicting defenses. Alvarez, 14 Cal. 4th at 190, 58 Cal. Rptr. 2d at 405; *see also* People v. Cummings, 4 Cal. 4th 1233, 1286, 18 Cal. Rptr. 2d 796, 830 (1993)("[a]ntagonistic defenses alone do not compel severance"). "That defendants have inconsistent defenses and may attempt to shift responsibility to each other does not compel severance of their trials." *Id.* at 1287, 18 Cal. Rptr. 2d at 831; *see also* Pinholster, 1 Cal. 4th at 933, 4 Cal. Rptr. 2d at 796 ("we have made it clear that a defendant's natural tendency to shift blame onto a codefendant is not in itself a sufficient ground for severance").

Here, Petitioner and Lamb were charged with "common crimes involving common events and victims," which, under California law, militated against severance. Pinholster, 1 Cal. 4th at 932, 4 Cal. Rptr. 2d at 796. Petitioner does not "provide any account of how [a severance] motion could have been granted in the face of the stringent legal standards for severance." United States v. Rodriguez-Ramirez, 777 F.3d 454, 458 (9th Cir. 1985). Given that California law would have counseled against severing Petitioner's trial and Lamb's trial, there is no basis for finding that the Sixth Amendment required counsel to move for severance. In addition, there is no basis for concluding that, had Petitioner's counsel moved to sever Petitioner's trial from Lamb's, any such motion would have been granted.

Critically, the Court could not find the requisite prejudice even if there were a basis for finding that the omitted motion should have been made and would have been granted. Lamb did not testify or present any evidence, and thus, he did not attempt to shift blame to Petitioner or engage in finger-pointing. The above-described argument of Lamb's counsel cannot fairly be characterized as an antagonistic defense or attempt to inculpate Petitioner. Rather, Lamb's counsel's argument was that, regardless of whether or not the jury believed that Petitioner was guilty of the bad conduct of which he was accused, there was no evidence that Lamb shared Petitioner's intent and aided and abetted him. Her argument did not expose Petitioner to any greater risk of liability than he already faced; it merely sought to have Lamb avoid being convicted if Petitioner was convicted. The fact that the jury found Lamb guilty of several of the same crimes as Petitioner shows that it rejected his counsel's argument that Lamb was, in effect, an innocent bystander, who

merely associated with the wrong person.

Significantly, even had a severance motion been made and granted and Petitioner had been tried on his own, the evidence presented would have been exactly the same -- a fact that, on its own, plainly dooms finding the required prejudice. Petitioner has not raised a federal habeas challenge to the sufficiency of the evidence underlying any of his convictions. In the state courts, he challenged only the sufficiency of the evidence underlying one of his convictions (for attempted murder) and the state courts found the evidence to be sufficient to support the conviction. (*See* Lodg. No. 8 at 13-15.) That unchallenged state court ruling is entitled to deference here. As the evidence of record was sufficient to convict Petitioner even had he been tried on his own, there is, and can be, no basis for finding that counsel's failure to file a severance motion had any prejudicial effect.

The state court's rejection of Subclaim (5) of Ground One was a reasonable application of the Strickland standard. Accordingly, this claim does not warrant federal habeas relief.

II. PETITIONER IS NOT ENTITLED TO FEDERAL HABEAS RELIEF BASED ON ASSERTED PROSECUTORIAL MISCONDUCT.

By Ground Two, Petitioner contends that the prosecutor committed misconduct in three respects.

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A. Subclaim (1)

By his first subclaim, Petitioner alleges a Napue claim. It is well-established that a prosecutor's knowing presentation of false evidence violates a defendant's right to due process. Napue v. People of State of Ill., 360 U.S. 264, 269, 79 S. Ct. 1173, 1177 (1959). "[A] conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." United States v. Agurs, 427 U.S. 97, 103, 96 S. Ct. 2392, 2397 (1976)(citations omitted). Under Napue, "the knowing use of false testimony to obtain a conviction violates due process regardless of whether the prosecutor solicited the false testimony or merely allowed it to go uncorrected when it appeared." United States v. Bagley, 473 U.S. 667, 679 n.8, 105 S. Ct. 3375, 3382 n.8 (1985).

A petitioner seeking relief based on the presentation of assertedly false testimony by a prosecution witness must show not only that the witness testified falsely but also that the prosecution knew or should have known that the witness testified falsely. *See, e.g.*, Hovey v. Ayers, 458 F.3d 892, 916 (9th Cir. 2006); Hayes v. Brown, 399 F.3d 972, 984 (9th Cir. 2005)(*en banc*); Murtishaw, 255 F.3d at 959; United States v. Necoechea, 986 F.2d 1273, 1281 (9th Cir. 1993). Additionally, the petitioner must show there is a reasonable likelihood that the false testimony affected the jury's decision. Bagley, 473 U.S. at 679 n.9, 105 S. Ct. at 3382 n.9.

Petitioner avers that, at the preliminary hearing, his counsel

asked Manuel Monterroso whether a work order had been filled out for the van and provided to either Petitioner or Lamb, and Manuel responded, "No." (Petition at 18; CSC Pet. at 7; *see also* Reply at 16: Manuel "made it CLEAR at Preliminary testimony that there was 'NO' work order filled out with co-defendant or defendant Wilkinson.") Petitioner testified at trial that no work order was filled out.[20] (RT 1206, 1221-22.) Through rebuttal evidence at trial, Manuel testified that it was his shop's custom and practice to fill out a work order, have the customer sign it, leave a white copy on a vehicle's dashboard (so the mechanic would know what work to perform), and provide a yellow copy to the customer. (RT 1226-27.) Manuel testified that he filled out a work order and gave it to Petitioner, which had an estimate of $380 on it, and Manuel placed the white copy of the work order on the van's dashboard. (RT 1227-28.) Manuel did not possess a copy of that work order, however, because the shop's white copy was on the van's dashboard

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[20] Petitioner also complains that the "prosecutor had the trial court give a cautionary instruction regarding the lack of a work order, which improperly discredited [Petitioner's] testimony. (*See* Pet. at 18, relying on RT 1201-08 and Petitioner's testimony at RT 1221-22.) This assertion is disingenuous and mischaracterizes what occurred. At the conference between the trial court and counsel cited by Petitioner, the prosecutor asserted that a limiting instruction should be given regarding Petitioner's testimony that Lamb told Manuel Monterroso that he had not ordered work to be performed on the van. The prosecutor argued that the jury should be told that this hearsay testimony should not be taken for the truth of the matter asserted, and instead, it should be considered for the purpose of explaining Petitioner's actions. (RT 1201-04.) The trial court initially refused to give such an instruction. (RT 1202-05.) When Petitioner subsequently testified that he heard Lamb say to Manuel that the van might need a tune-up and to "just check it out," the prosecutor made a hearsay objection; the trial judge overruled it, but stated to the jury that "his answer is being offered not to show that what he says is true, but to show what his reaction was to it." (RT 1208.) This instruction did not "discredit" Petitioner's testimony but, rather, dealt with its hearsay nature.

when Lamb drove the van away at the end of the incident. (RT 1228-29.)

Petitioner argues that, because Manuel allegedly testified at the preliminary hearing that no work order was prepared, then Manuel testified falsely at trial when he stated that he had prepared a work order and provided it to Petitioner. Petitioner alleges that, due to the preliminary hearing testimony purportedly given by Manuel, the prosecutor knew that Manuel testified falsely at trial regarding the work order.

Subclaim (1) necessarily fails, because it rests on a false premise. Petitioner has not provided any citation to the record to support his contention that, at the preliminary hearing, Manuel testified that no work order was prepared and provided to the defendants. The Court has carefully reviewed the preliminary hearing testimony of both Manuel Monterroso and Ruben Monterroso, and neither man testified as Petitioner alleges. Neither Manuel nor Ruben was asked if a work order was prepared (or not), and neither witness testified, *sua sponte*, about the issue. (*See* PHT 3-33 (Manuel's testimony) and 33-54 (Ruben's testimony). The question of whether or not a work order was filled out was *not* the subject of any testimony or argument by counsel at the preliminary hearing, and Petitioner's assertions in this case that such preliminary hearing testimony was given are untrue. (*See* PHT, *passim*.)

As a result, Petitioner's contention that there was a discrepancy between Manuel's preliminary history testimony and his trial testimony regarding whether a work order was prepared is factually baseless.

Petitioner has not shown that any false testimony was given by Manuel at trial regarding the work order issue, much less that the prosecutor knowingly presented false evidence through Manuel's trial testimony that a work order was prepared. Petitioner, therefore, has not established a Napue violation or any other prosecutorial misconduct in connection with Manuel's trial testimony about the work order. Accordingly, the state courts correctly rejected Subclaim (1) of Ground Two.

B. Subclaim (2)

By his second subclaim, Petitioner alleges a Brady violation. In Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), the Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Id.* at 87, 83 S. Ct. at 1196-97. Impeachment evidence, as well as exculpatory evidence, falls within the Brady rule, and the prosecutor is obligated to disclose both, even in the absence of a specific discovery request. *See* United States v. Bagley, 473 U.S. 667, 676-77, 105 S. Ct. 3375, 3380-81 (1985). "There are three components of a true *Brady* violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." Strickler v. Greene, 527 U.S. 263, 281-82, 119 S. Ct. 1936, 1948 (1999).

Petitioner contends that the prosecutor "suppressed" Petitioner's

earlier-discussed black jacket by: failing to ask the officer who testified about the circumstances of Petitioner's arrest about the black jacket; failing to ask Petitioner further questions about the black jacket after Petitioner testified that he was wearing it when he was arrested; and failing to "interject himself into the questioning" at the sentencing hearing discussion about the black jacket. (Petition at 19; CSC Pet. at 7-8.) In his Return, Respondent asserts that defense counsel was fully aware of both the existence of the black jacket and its location, given Petitioner's testimony that he was wearing it when he was arrested, and thus, there was no suppression. (RT 1032.) In his Reply, Petitioner concedes Respondent's point but argues that a Brady violation occurred nonetheless, because the prosecutor was obligated to: retrieve the black jacket from the Sheriff's Department "and hand it over to defense counsel"; and present the black jacket as prosecution evidence at trial on the ground that it was "material to the charge." (Reply at 20; emphasis in original.)

Petitioner's assertions are unavailing. Petitioner's contention that the prosecutor had a duty to present the black jacket as part of the prosecution's case at trial and/or to ask prosecution witnesses about it is specious. The prosecutor was entitled to utilize whatever evidence he believed established the prosecution's case, and he had no obligation to proffer as evidence, or question any witness about, an item -- fully known to the defense -- that allegedly supported the defense case. Similarly, given that Petitioner and his counsel were aware of the location of the black jacket, the prosecutor was not obligated to intervene in the discussion between the sentencing judge, Petitioner, and Petitioner's counsel regarding the preservation of the

black jacket during Petitioner's appeal.

Further, suppression by the government is a necessary element of a Brady claim. *See* Moore v. Illinois, 408 U.S. 786, 794-95, 92 S. Ct. 2562, 2568 (1972). As discussed earlier, according to Petitioner's own allegations, his trial counsel was told by Petitioner about the importance of the black jacket and that it was in the possession of the Sheriff's Department. Neither the prosecutor or any other government agency suppressed the black jacket, because Petitioner and his counsel were fully aware of the jacket and its location and had the ability to obtain it. As the record shows: Petitioner could have authorized a third party to retrieve the jacket from the Sheriff's Department; and if any such effort was unsuccessful, defense counsel could have filed a motion in the ongoing case to have the jacket turned over to him, on the ground that it was exculpatory evidence to be presented at trial as part of Petitioner's defense. There simply was no suppression here within the meaning of the Brady doctrine.

Petitioner has not established that any exculpatory evidence based on the black jacket was suppressed or that the prosecution committed any misconduct related to the jacket. Petitioner's Brady claim, thus, fails for lack of this critical element. Accordingly, the state court's rejection of Subclaim (2) of Ground Two was not unreasonable, and the claim does not provide any basis for federal habeas relief.

C. Subclaim (3)

By his third subclaim, Petitioner contends that the prosecutor

violated an order of the trial court by proffering a photograph of the van involved in the prior incident described by Freeman. Specifically, citing RT 325-27, Petitioner alleges that the trial court "'asked'" the prosecutor to refrain from mentioning the 1101(b) Evidence until there was further discussion and a ruling on its admissibility. (Petition at 21.) During the prosecutor's direct examination of Manuel Monterroso, the prosecutor asked Manuel if, on the date of the incident, he had done "some work on a 1978 Ford Econoline van, license number 1M32796," and Manuel responded, "That's correct." (RT 603.) Without objection by either defense counsel, the prosecutor then marked a photograph "of the back of the van" as People's Exhibit 1, showed it to Manuel, and Manuel confirmed that the van depicted was the van on which his shop had performed work. (RT 603-04.) After the trial court subsequently ruled that Freeman was permitted to testify, the prosecutor showed Freeman People's Exhibit 1, and Freeman identified it as the photograph he had taken. (RT 961.)

Habeas relief based on prosecutorial misconduct will be granted only when the misconduct "'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" Darden v. Wainwright, 477 U.S. 168, 181, 106 S. Ct. 2464, 2471 (1986)(quoting Donnelly v DeChristoforo, 416 U.S. 637, 643, 94 S. Ct. 1868, 1871 (1974)); *see also* Sassounian v. Roe, 230 F.3d 1097, 1106 (9th Cir. 2000) "Th[is] standard allows a federal court to grant relief when the state-court trial was fundamentally unfair but avoids interfering in state-court proceedings when errors fall short of constitutional magnitude." Drayden v. White, 232 F.3d 704, 713 (9th Cir. 2000). "To constitute a due process violation, the prosecutorial misconduct must

be 'of sufficient significance to result in the denial of the defendant's right to a fair trial.'" Greer v. Miller, 483 U.S. 756, 765, 107 S. Ct. 3102, 3109 (1987)(citation omitted). "[T]he touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor." Smith v. Phillips, 455 U.S. 209, 219, 102 S. Ct. 940, 947 (1982).

Petitioner argues that the prosecutor violated an order of the trial court when he asked Manuel about the picture of the van. The record, however, does not support Petitioner' characterization of the prosecutor's use of the photograph as a violation of a court order. The record indicates that, prior to opening statements, the trial court asked the prosecutor to refrain from mentioning that Freeman would testify for the prosecution; the record also shows that the prosecutor did not mention Freeman or the 1101(b) Evidence in his opening statement. (RT 311-16, 325.) After opening statements and before the prosecutor presented his first witness, the prosecutor reminded the trial court that the question of whether or not Freeman could testify remained open. After Lamb's attorney argued vigorously that Freeman's testimony should be disallowed, the trial court responded that "there should be more discussion" on the issue, and they would revisit it later. (RT 325-27.) The prosecutor questioned Manuel, and showed him the photograph of the van, before the trial court issued its ruling regarding the 1101(b) Evidence. However, the prosecutor did not mention anything about when or where the photograph was taken, who took it, or how the prosecution obtained it, nor did the prosecutor reference the prior incident in which Freeman was involved in any manner. Rather, the prosecutor simply asked Manuel if the van in the photograph looked like

the van on which Manuel's shop had performed work and, when Manuel responded affirmatively, moved on to another line of questioning. (RT 603-04.)

The manner in which the prosecutor utilized the photograph did not violate any trial court order. There was nothing about the prosecutor's conduct that would have caused any juror to infer or assume that the photograph pertained to any other incident. While the prosecutor had been directed to refrain from discussing the prior incident itself, as well as Freeman's anticipated testimony, the prosecutor plainly did not contravene that direction, given the brief and neutral use made of the photograph. The prosecutor, thus, did not act unfairly or commit misconduct.

Moreover, even if there was anything inappropriate about the prosecutor's use of the photograph before the trial court had expressly ruled that Freeman could testify -- and the Court does not believe there was any impropriety in this respect -- the trial court thereafter ruled that Freeman's testimony about the prior incident was relevant, and such testimony, including Freeman's identification of the photograph, was admitted. In short, the photograph of the van would have been in evidence and before the jurors even had the prosecutor not shown it to Manuel. Thus, because the photograph was properly in evidence at Petitioner's trial as a part of the prosecution's case,[21] there can be

[21] While Petitioner complains that the photograph was not relevant, and thus, the prosecutor acted wrongly in utilizing it, neither defense counsel interposed any objection to its use in connection with the testimony of Manuel and Freeman. Given the trial court's conclusion that the 1101(b) Evidence was relevant, Petitioner's

no basis for finding that its introduction prior to the trial court's ruling regarding the 1101(b) Evidence resulted in any unfairness, much less the required denial of due process.

The state court's rejection of Subclaim (3) of Ground Two was a reasonable application of the foregoing clearly established federal law. Accordingly, this subclaim cannot warrant federal habeas relief.

III. PETITIONER'S JUDICIAL BIAS CLAIMS DO NOT WARRANT FEDERAL HABEAS RELIEF.

By Ground Three, Petitioner contends that he is entitled to habeas relief based on five instances of alleged judicial misconduct and bias. In subclaim (1), Petitioner complains about the trial judge's failure to instruct the jury, *sua sponte*, on attempted voluntary manslaughter as a lesser included offense of the attempted murder charge. In subclaim (2), Petitioner complains about a sentencing error that was reversed on appeal, *i.e.*, the trial judge's conclusion that California Penal Code § 654 did not bar the imposition of consecutive sentences for Counts 2 and 6. In subclaim (3), Petitioner complains about a comment the trial judge made, which Petitioner contends "interfered" with the relationship between Petitioner and his attorney. In subclaim (4), Petitioner complains about the trial judge's decision to allow the 1101(b) Evidence to be presented at trial. As subclaim (5), Petitioner complains that, during the sentencing hearing, the judge failed to make

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after-the-fact complaints regarding relevancy are not sufficient to establish that the prosecutor's conduct was wrongful.

an adequate inquiry when Petitioner mentioned a potential conflict of interest with his attorney. (Petition at 23-29; CSC Pet. at 13-15.) Petitioner contends that these five events demonstrate that the trial judge was biased.

A. Subclaims (2) and (4)

Due process requires a "'fair trial in a fair tribunal,' . . . before a judge with no actual bias against the defendant or interest in the outcome of his particular case." Bracy v. Gramley, 520 U.S. 899, 904-05, 117 S. Ct. 1793, 1797 (1997)(quoting Withrow v. Larkin, 421 U.S. 35, 46, 95 S. Ct. 1456, 1464 (1975)). To succeed on a judicial bias or misconduct claim, a petitioner must "overcome a presumption of honesty and integrity in those serving as adjudicators." Withrow, 421 U.S. at 47, 95 S. Ct. at 1464.

Bias or misconduct can "almost never" be demonstrated solely on the basis of a judicial ruling alone. Liteky v. United States, 510 U.S. 540, 555, 114 S. Ct. 1147, 1157 (1994). As the Supreme Court has made clear:

> Almost invariably, [judicial rulings] are proper grounds for appeal, not for recusal. [O]pinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible. Thus, judicial

> remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge . . . [unless] they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible. . . . A judge's ordinary efforts at courtroom administration -- even a stern and short-tempered judge's ordinary efforts at courtroom administration -- remain immune.

Liteky, 510 U.S. at 555-56, 114 S. Ct. at 1157 (citations omitted). "[J]udicial rulings alone almost never constitute a valid basis" for establishing bias or partiality. *Id.* at 555, 114 S. Ct. at 1157. "[J]udicial rulings, routine trial administration efforts, and ordinary admonishments (whether or not legally supportable) to counsel and to witnesses" do not evidence judicial bias "that would render fair judgment impossible." *Id.* at 556, 114 S. Ct. at 1157.

The asserted sentencing error underlying Petitioner's second subclaim -- namely, the consecutive sentences imposed on Counts 2 and 6 -- has been addressed earlier, and as noted above, the Court has concluded that Petitioner's complaint about this now rectified sentencing error does not give rise to any basis for habeas relief. That the imposition of consecutive sentences may have been reversible error, when viewed with the benefit of hindsight, does not mean that such error, *ipso facto*, equates to bias on the part of the trial judge. Absent proof of the trial judge's actual bias -- which requires something more than the simple fact that the judge's sentencing decision was reversed on appeal -- the Court must presume the trial judge's

honesty and integrity. Withrow, 421 U.S. at 47, 95 S. Ct. at 1464. Petitioner has not adduced any evidence that the trial judge's sentencing decision was motivated by bias and has not shown that the sentencing constituted misconduct. Thus, subclaim (2) is nothing more than an ill-disguised challenge to a judicial ruling -- and one that already has been made successfully on state appeal -- and the claim necessarily fails.

Petitioner's fourth subclaim -- that the trial judge was biased because she admitted the 1101(b) Evidence -- also fails on its face. Petitioner complains that the trial judge failed to assess the potential prejudice to Petitioner adequately, as required by California Evidence Code § 352, before admitting the 1101(b) Evidence, and thus, she acted arbitrarily and abused her discretion. Whether or not the trial court conducted an adequate Section 352 assessment, subclaim (4) necessarily resolves to nothing more than a claim based on Petitioner's disagreement with the trial court's evidentiary ruling. Petitioner's allegations do not identify conduct by the trial judge that went beyond the normal administration of a case, in which trial judges make evidentiary and other rulings, some of which may be reversed on appeal. The fact that a party received an adverse ruling, on its own, cannot serve as a predicate for finding judicial bias. Liteky, 510 U.S. at 555, 114 S. Ct. at 1157. Petitioner's complaints about the allegedly prejudicial effect of the 1101(b) Evidence -- an issue resolved adversely to him in his state appeal -- and his disagreement with the trial court's evidentiary decision do not, and cannot, suffice to show judicial bias or misconduct. Indeed, if allegations of the type presented by subclaim (4) were considered adequate to establish judicial misconduct, every

aggrieved prisoner unhappy at the fact of his conviction would be entitled to habeas relief simply by complaining that the trial judge had made an erroneous evidentiary ruling.

Subclaims (2) and (4) fail to present any basis for finding judicial bias or misconduct. Accordingly, the state court's rejection of these claims cannot support federal habeas relief under Section 2254(d).

B. Subclaim (1)

Petitioner's first subclaim involves the trial judge's failure to instruct the jury, *sua sponte*, on attempted voluntary manslaughter on an unreasonable self-defense theory. Petitioner contends that the "trial judge was BIAS for 'NOT PAYING ATTENTION.'" (Petition at 23.) Even if, as the California Court of Appeal concluded, there was evidence to support such an instruction, and thus, the instruction should have been given (Lodg. No. 8 at 15-18),[22] the trial court's mere error in this respect does not rise to the level of constitutional violation.

Petitioner has not shown any conduct by the trial judge

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[22] The California Court of Appeal further concluded that the omission of this jury instruction was harmless error, because: under California law, the omission of a lesser included offense instruction is harmless when the factual issue to be resolved by the instruction necessarily was resolved unfavorably to the defendant based on other instructions and charges; the jury found that Petitioner personally and intentionally discharged a firearm during the robbery and other charged crimes; and thus, the jury necessarily concluded that Petitioner's discharge of the gun was committed as a part of the robbery, not as an attempt at self-defense. (Lodg. No. 8 at 18.)

establishing or tending to establish that the failure to instruct the jury, *sua sponte*, on a lesser included offense was motivated by bias. Petitioner's assertions evidence, at most, a judicial oversight or mistake. Like all human beings, including attorneys and defendants, judges make mistakes; the existence of appellate courts clearly contemplates this possibility. The mere fact of a trial error, even if (unlike in this case) it ultimately is found to warrant reversal, is insufficient to prove that the judge who made the error was biased. Petitioner has not presented any basis for disregarding the presumption of the trial judge's honesty and integrity (Withrow, 421 U.S. at 47, 95 S. Ct. at 1464) in this regard. Accordingly, the state court correctly rejected subclaim (1).

C. Subclaim (5)

The fifth subclaim of Ground Three rests on the following colloquy at the sentencing hearing:

> THE DEFENDANT: May I say something?
> THE COURT: I don't know. You need to ask your attorney.
> MR. LEONARD: You can say something.
> THE DEFENDANT: With the notice of appeal being filed, right, I have a problem and I wanted to know if the court can help me. The problem is when they testified about the jacket that I was wearing --
> THE COURT: Okay. No. I don't want to hear that because that goes to the facts. That's what you talk

about in your appeal when your attorney contacts you.

(RT 3006-07.) As discussed earlier, Petitioner then advised the trial court of his desire to obtain his black jacket from the Sheriff's Department and asserted that, during the trial, his counsel had indicated to Petitioner that counsel "couldn't get it." (RT 3007-08.)

Petitioner contends that the above comments placed the trial judge on notice that "defense counsel did not present material evidence to the jury" and that, therefore, a "potential conflict of interest" existed. (Petition at 29.) Petitioner asserts that the trial judge was under an obligation to ask trial counsel why he failed to present the black jacket as defense evidence at trial and to take steps herself to preserve the jacket on Petitioner's behalf during the appellate process, and that the judge's failure to do so demonstrates that she was biased. (Petition at 29; CSC Pet. at 15.)

Petitioner's assertions are unpersuasive. The colloquy in issue took place *after* Petitioner had been convicted, sentenced, and advised of his right to appeal. No motion for a new trial had been made, and the criminal case had moved past the trial stage and was in the appellate stage. Even if, as Petitioner contends, his comments to the judge reflected Petitioner's dissatisfaction with the fact that his trial counsel did not obtain and present the jacket as evidence at trial, this was not an issue for the trial judge to consider or resolve given the posture of the case at that time. As the trial judge correctly noted, any complaint Petitioner had in this respect would have

to be raised with his appellate attorney. Moreover, Petitioner's comments, at most, expressed his belief that his counsel had been ineffective in this respect, not that a conflict of interest existed. In any event, even if there had been some indication that a conflict of interest had arisen post-conviction, this was not an issue to be resolved by the trial judge. Finally, to the extent that Petitioner complains about the trial judge's failure to obtain and preserve the jacket on Petitioner's behalf and her indication that Petitioner's counsel could file any necessary request with the Sheriff's Department, Petitioner again is relying on nothing more than a judicial ruling -- an inadequate basis for establishing bias.

There is no basis presented for finding that the trial judge was biased based on her failure to inquire about a "potential conflict of interest" and/or to obtain the black jacket on Petitioner's behalf. The state court's rejection of Subclaim (5) was consistent with the clearly established federal law.

D. Subclaim (3)

The third subclaim of Ground Three stems from two colloquies that followed the conclusion of police officer testimony. After the Officer Leininger completed answering the last question and all three attorneys indicated they had nothing further, the following colloquy occurred:

DEFENDANT WILKENSON: Yes, your Honor. I want to talk.

THE COURT: Wait a minute, sir.

DEFENDANT WILKENSON: Your Honor.

THE COURT: We'll give you an opportunity, sir, in a minute.

You may call your next witness.

[THE PROSECUTOR]: Thank you, your Honor.

DEFENDANT WILKENSON: Yes, your Honor. This is pertaining to the witness that's leaving.

THE COURT: He'll be on call, and you may have a statement or whatever you want in a minute. He's not going anywhere.

(RT 912.)

After the next witness (Officer Hernandez) testified, the trial court held a sidebar conference related to a different issue. (RT 918-24.) At the conclusion of that discussion, the following colloquy occurred outside the presence of the jury:

THE COURT: Now, what is your -- what did you client want to say when he raised his hand?

[PETITIONER'S COUNSEL]: I would assume my client is going to tell you he wanted me to ask the question of that police officer Leininger whether or not he checked for a bullet hole. And I told him I wasn't going to do it.

And I think it boils down to a Marsden type of hearing. I don't think I really want to go and say why in front of the D.A. But that's what it's going to boil down to.

THE COURT: Did you explain to him why you didn't want to?

[PETITIONER'S COUNSEL]: I explained to him. He disagrees. But he's telling me how to run the show. So that's where we are.

(RT 924.)

The trial court then addressed issues related to Freeman's upcoming testimony and, before concluding the sidebar conference, stated:

> Meanwhile, I'm just going to excuse the jury. I don't expect [Freeman's] testimony to be that long. I don't really want to waste time. So let me excuse the jury for about five minutes, seven minutes, so that we can explain to Mr. Wilkenson why I'm not going to allow him to run Mr. Leonard's case.

(RT 925-26.) The trial court then held the *Marsden* hearing described previously. (RT 927.)

Petitioner complains that the trial judge's comment last quoted

above evidenced bias. Petitioner contends that he should have been "'allowed' to work this case with Attorney Mr. Leonard" and that the judge's comment "interfered" with the attorney-client relationship and allowed Petitioner's counsel, instead of Petitioner, to run the case. (Petition at 23, 26.) Petitioner's arguments are meritless.

Generally, questions of trial strategy are "committed to the judgment of the attorney and not the client." Schell v. Witek, 218 F.3d 1017, 1026 and n.8 (9th Cir. 2000)(*en banc*)(further noting that "'[A] lawyer may properly make a tactical determination of how to run a trial even in the face of his client's incomprehension or even explicit disapproval,'" quoting Brookhart v. Janis, 384 U.S. 1, 8, 86 S. Ct. 1245 (1966)); *see also* United States v. Corona-Garcia, 210 F.3d 973, 977 n.2 (9th Cir. 2000)("trial tactics are clearly within the realm of powers committed to the discretion of defense counsel"); United States v. Wadsworth, 830 F.3d 1500, 1509 (9th Cir. 1987)("appointed counsel, and not his client, is in charge of the choice of trial tactics and the theory of defense"). The trial judge's comment simply reflected this rule, namely, that the scope of cross-examination during Petitioner's trial was a tactical decision to be made by defense counsel, not Petitioner. There was nothing inappropriate or biased about the comment, and nothing about it interfered with Petitioner's attorney-client relationship. Indeed, given Petitioner's above-quoted repeated interruptions at trial, in front of the jury, it plainly was correct for the trial judge to advise Petitioner why such outbursts were inappropriate. *See* Liteky, 510 U.S. at 555, 114 S. Ct. at 1157 ("A judge's ordinary efforts at courtroom administration" are "immune" from serving as a basis for finding judicial bias).

Subclaim (3) lacks any evidentiary support for Petitioner's contention that the trial judge's comment was biased or interfered with Petitioner's relationship with his attorney. The state court's rejection of this subclaim was neither contrary to nor an unreasonable application of the foregoing clearly established federal law. Thus, federal habeas relief is unwarranted based on this subclaim.

IV. PETITIONER'S EQUAL PROTECTION CLAIM DOES NOT WARRANT FEDERAL HABEAS RELIEF.

By Ground Four, Petitioner argues that his conviction violates the Equal Protection Clause, because: there was no evidence presented by the prosecutor to establish that the Monterrosos possessed a valid business license for their vehicle repair shop; there was no evidence presented by the prosecutor that the firearms Manuel Monterroso described owning and using were registered and licensed; and the prosecutor failed to charge Manuel Monterroso with making a criminal threat. (Petition at 30; CSC Pet. at 18-20.) With respect to the latter contention, Petitioner speculates: "Could it be that [Petitioner] is black that he got charged and M. Monterroso didn't[?]" (*Id.* at 20.)

The Equal Protection Clause of the Fourteenth Amendment "is essentially a direction that all persons similarly situated should be treated alike." City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 439, 105 S. Ct. 3249, 3254 (1985). The *sine qua non* of an equal protection claim is dissimilar treatment of persons similarly situated. *See id.* To prove an equal protection claim, a showing must be made that

the State has adopted a classification that affects two or more similarly situated groups in an unequal manner. Clements v. Fashing, 457 U.S. 957, 962-63, 102 S. Ct. 2836, 2841 (1982); *see also* In re Eric J., 25 Cal. 3d 522, 530, 159 Cal. Rptr. 317, 325 (1989)(an equal protection violation lies only where similarly situated parties are treated disparately). In addition, Petitioner must prove "intentional unlawful discrimination" or "facts that are at least susceptible of an inference of discriminatory intent." Monteiro v. Tempe Union High Sch. Dist., 158 F.3d 1022, 1026 (9th Cir. 1998); *see also* Barren v. Harrington, 152 F.3d 1193, 1194-95 (9th Cir. 1998)(to establish an equal protection violation, there must be purposeful discrimination against someone based on his membership in a protected class). Thus, Petitioner must prove that the prosecutor failed to charge Manuel Monterroso and/or to present evidence of licensing issues with respect to the Monterrosos' business and guns, because the prosecutor had the intent or purpose to discriminate against Petitioner based upon Petitioner's membership in a protected class. Lee v. City of Los Angeles, 250 F.3d 668, 687 (9th Cir. 2001).

Petitioner's first two contentions do not implicate any equal protection concerns. Petitioner does not contend that *he* operated an unlicensed vehicle repair shop, and unlike the Monterrosos, he was prosecuted based on a failure to possess a valid business license. Even if, *arguendo*, the Monterrosos did not possess a valid business license,[23] Petitioner and the Monterrosos were not similarly situated in

[23] There is no basis for concluding that the Monterrosos' repair shop was unlicensed. In any event, the licensing status of their shop is wholly irrelevant.

this respect and did not receive different treatment. In addition, the right of the State to prosecute Petitioner for committing crimes based on acts of violence he committed against the Monterrosos was not dependent on whether or not his victims possessed valid business licenses. For the jury to convict Petitioner of the charged crimes, the jurors did not need to find, and the prosecutor had no obligation to prove, that the Monterrosos were in compliance with licensing requirements for vehicle repair businesses. Petitioner's first equal protection contention is specious.

Petitioner's second contention is equally without merit. Petitioner was not charged with possessing an unlicensed firearm. Thus, even if, *arguendo*, the guns used by Manuel were not registered or licensed,[24] Petitioner and the Monterrosos were not similarly situated, and did not receive different treatment, in this respect. Moreover, whether or not the two firearms Manuel described in his testimony were registered and licensed was irrelevant to Petitioner's guilt for the charged crimes. The prosecutor had no obligation to show that the guns Manuel testified he owned and placed on his desk, one of which he ultimately pointed at Petitioner, were validly owned, registered, or licensed, given that proving the crimes with which Petitioner was charged did not hinge on Manuel possessing a valid registration and license for such guns. There simply is no equal protection issue here.

With respect to his third contention, Petitioner speculates that

[24] There is no evidence that the guns were not registered or were unlicensed.

the prosecutor failed to charge Manuel with making a criminal threat, because unlike Petitioner, Manuel is not African-American. Petitioner has not presented *any* evidence to support such speculation. Moreover, Petitioner fails to show that he and the Monterrosos were similarly situated with respect to the criminal threat charge brought against Petitioner. The version of the incident described by the Monterrosos plainly indicated that they were the victims, and Petitioner was the aggressor. Manuel testified that: he was unarmed when Petitioner pulled a gun and pointed it at Manuel; Petitioner shot at Manuel as Manuel was retreating into his office; Manuel realized that Petitioner's gun had jammed, retrieved one of the guns from his office, and pointed it at Petitioner; but Manuel then "controlled" himself and went back into his office. (RT 636, 639-44, 655-56, 658-60.) With respect to the purported "criminal threat" made by Manuel on which Petitioner relies,[25] the statement by Manuel was made in response to Petitioner's repeated, direct, and express threats to kill Manuel. Pursuant to California Penal Code § 422, it is a crime to make threats of death or great bodily injury that are unequivocal and unconditional and convey an immediate prospect of the harm being threatened. *See, e.g.*, People v. Toledo, 26 Cal. 4th 221, 227-28, 109 Cal. Rptr. 2d 315, 320 (2001); People v. Maciel, 113 Cal. App. 4th 679, 682-83, 6 Cal. Rptr. 3d 628, 632 (2003). Petitioner's threats were specific, unconditional, and imminent, to wit, repeated assertions of "I'll kill you, you mother fucker." In contrast, Manuel's responding threat was conditional and not immediate, namely,

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[25] Petitioner cites Manuel's testimony that, after Petitioner had repeatedly threatened to kill Manuel, he said to Petitioner: "When you do that [i.e., attempt to kill Manuel], make sure you point good at me, . . . because if you don't, then the one ending up dead is going to be you, depending who's faster." (RT 620.)

it was only that, if Petitioner followed through on his threat to attempt to kill Manuel, then Manuel would respond in kind. Given the conditional nature of Manuel's response to Petitioner's threats of death, the prosecutor reasonably could have believed that no violation of Section 422 had been committed by Manuel, but that Petitioner had violated this criminal statute. Thus, the two men were not similarly situated for purposes of the prosecutor's decision to charge Petitioner with a Section 422 violation.[26]

No Equal Protection Clause violation has been shown, because Petitioner not alleged facts indicating, much less proven, that he was similarly situated to the Monterroso brothers yet was treated disparately due to the prosecutor's discriminatory intent. The state court's rejection of Petitioner's equal protection claim was neither contrary to nor an unreasonable application of the clearly established federal law. Accordingly, Ground Four does not warrant federal habeas relief.

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[26] Petitioner's reliance (Reply at 24) on Boddie v. Connecticut, 431 U.S. 371, 91 S. Ct. 780 (1971), is unavailing. That case addressed a claim that the Due Process Clause was violated by a state's policy requiring indigents to pay for court filing fees and costs when seeking a divorce. The decision has nothing to do with the equal protection claim alleged in Ground Four.

RECOMMENDATION

For all of the foregoing reasons, IT IS RECOMMENDED that the District Judge issue an Order: (1) approving and adopting the Report and Recommendation; (2) denying the Petition; and (3) directing that Judgment be entered dismissing this action with prejudice.

DATED: September 7, 2010.

Margaret A. Nagle

MARGARET A. NAGLE
UNITED STATES MAGISTRATE JUDGE

NOTICE

Reports and Recommendations are not appealable to the Court of Appeals, but may be subject to the right of any party to file objections as provided in the Local Rules Governing the Duties of Magistrate Judges and review by the District Judge whose initials appear in the docket number. No notice of appeal pursuant to the Federal Rules of Appellate Procedure should be filed until entry of the judgment of the District Court.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

LAWONE W. WILKINSON, Petitioner, v. J. SULLIVAN, WARDEN, Respondent.	NO. CV 07-2658-DOC (MAN) ORDER ADOPTING FINDINGS, CONCLUSIONS, AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE

Pursuant to 28 U.S.C. § 636, the Court has reviewed the Petition for Writ of Habeas Corpus, all of the records herein, the Report and Recommendation of United States Magistrate Judge ("Report"), and Petitioner's Objections to the Report. The Court has conducted a *de novo* review of those matters to which Objections have been stated. Having completed its review, the Court accepts and adopts the Report and ~~the findings of fact, conclusions of law, and recommendations therein.~~

IT IS ORDERED that the Petition is DENIED, and Judgment shall be entered dismissing this action with prejudice.

IT IS FURTHER ORDERED that the Clerk shall serve copies of this Order and the Judgment herein on all parties.

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED: October 20, 2010.

David O. Carter

DAVID O. CARTER
UNITED STATES DISTRICT JUDGE

PROOF OF SERVICE BY MAIL

BY PERSON IN STATE CUSTODY

I, LAWONE WILKINSON, declare:

I am over 18 years of age and a party to this action. I am a resident of California Correctional Institution Prison, in the county of KERN, State of California. My prison address is: P.O. BOX, 1905, Tehachapi, Calif. 93581.

On 1-8-2020 (DATE),

I served the attached: 2254 Habeas Petition (Pgs. 1-40) EX. A: CALif. Appeal court decision (Pgs. 1-24) & EX. 1-6: B.A.R'S LAWS letters EX. B: Federal District court Report (Pgs. 1-73) (DESCRIBE DOCUMENT)

on the parties herein by placing true and correct copies thereof, enclosed in a sealed envelope, with postage thereon fully paid, in the United States Mail in a deposit box so provided at the above-named correctional institution in which I am presently confined. The envelope was addressed as follows:

"Attorney General"
300 South Spring st.
1st FLOOR
Los Angeles, Calif. 90013

"Governor's office"
State Capitol
Legal Affairs
Sacramento, Calif. 95814

"DIRECTOR"
Department Consumer Affairs
1625 N. Market Blvd.
Suite N-112
Sacramento, Calif. 95834

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on 1-8-2020 (DATE) Lawone Wilkinson (DECLARANT'S SIGNATURE)

Lawone Wilkinson

GOD LOVES

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