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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JAMES WILLIAM BRAMMER, Petitioner-Appellant, v. RAYMOND MADDEN, Warden, Respondent-Appellee.	No. 19-55113 D.C. No. 2:16-cv-07483-MWF-FFM Central District of California, Los Angeles ORDER

Before: FARRIS and McKEOWN, Circuit Judges.

The request for a certificate of appealability (Docket Entry No. 7) is denied because appellant has not made a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see also Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Any pending motions are denied as moot.

DENIED.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JAMES WILLIAM BRAMMER, Petitioner, v. RAYMOND MADDEN, Respondent.	CASE NO. CV 16-7483-MWF (FFM) ORDER ACCEPTING FINDINGS AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE

Pursuant to 28 U.S.C. § 636, the Court has reviewed the First Amended Petition, records on file, relevant pleadings, and the Report and Recommendation of United States Magistrate Judge. Further, the Court has engaged in a *de novo* review of those portions of the Report to which Petitioner has objected.

Most of the arguments that Petitioner makes in his objections are sufficiently addressed in the Magistrate Judge's Report. A few of his arguments, however, warrant further discussion. First, Petitioner contends that the Magistrate Judge erred in analyzing Petitioner's allegations of judicial misconduct. Specifically, Petitioner faults the Magistrate Judge for requiring Petitioner to identify some extrajudicial source of bias or partiality on the trial court's part in order to succeed on his judicial

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misconduct claims.[1] According to Petitioner, clearly established Supreme Court precedent does not require him to make any such showing. Instead, relying on the Supreme Court's opinion in *Rippo v. Baker*, __ U.S. __, 137 S. Ct. 905, 907, 197 L. Ed. 2d 167 (2017), Petitioner contends that he can succeed on his judicial misconduct claim provided he show that, objectively speaking, it is probable that the trial court was biased against him, regardless of whether he can, in fact, prove that the trial court was actually biased against him.

In *Rippo*, the Supreme Court held that recusal is required when, "objectively speaking, 'the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.'" 137 S. Ct. at 907 (citation omitted). Recognizing that actual bias cannot always be determined, the Supreme Court relies on an objective standard asking "whether, as an objective matter, 'the average judge in his position is likely to be neutral, or whether there is an unconstitutional potential for bias.'" *Williams v. Pennsylvania*, __ U.S. __, 136 S. Ct. 1899, 1905, 195 L. Ed. 2d 132 (2016).

Here, however, there is no evidence, "objectively speaking," to suggest that the trial court had any actual bias either against Petitioner or in favor of the prosecution. In an effort to show bias, Petitioner, by and large (though not exclusively), relies on numerous rulings that the trial court made that were adverse to Petitioner. But, as explained in the Magistrate's Report, such adverse rulings, in and of themselves, do

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[1] Petitioner's summary of the Magistrate Judge's Report, in this regard, is inaccurate. The Magistrate Judge did not state, as Petitioner suggests, that a habeas petitioner can never succeed on a judicial bias claim absent some affirmative proof of an extrajudicial source of bias. Rather, the Magistrate Judge correctly stated the following: "'In the absence of any evidence of some extrajudicial source of bias or partiality, neither adverse rulings nor impatient remarks are generally sufficient to overcome the presumption of judicial integrity, even if those remarks are critical or disapproving of, or even hostile to, counsel, the parties, or their cases.'" (Report at 9 (quoting *Larson v. Palmateer*, 515 F.3d 1057, 1067 (9th Cir. 2008) (quoting *Liteky v. United States*, 510 U.S. 540, 555, 114 S. Ct. 1147, 127 L. Ed. 2d 474 (1994)).)

not support the conclusion that the trial court was in any way biased against Petitioner, let alone the conclusion that there was an unacceptably high probability that the trial court was biased. *Compare Tumey v. Ohio*, 273 U.S. 510, 523-24, 47 S. Ct. 437, 71 L. Ed. 749 (1927) (holding that judge may not preside over case in which he has "direct, personal, substantial, pecuniary interest"). What is more, Petitioner's other attempts to show bias fail for the reasons explained in the Report. Thus, even under *Rippo*, Petitioner's judicial misconduct claims fail.

Second, Petitioner asserts that the Magistrate Judge did not review Petitioner's traverse or the record from Petitioner's trial. This assertion is belied by the Report, itself. Indeed, the Magistrate Judge's Report specifically references Petitioner's traverse no less than four different times. What is more, the Report directly quotes both Petitioner's Traverse and the trial record. (*See, e.g.*, Report at 28, 29, 31, 32, 48.) To be sure, in his fifty-nine page Report, the Magistrate Judge did not address many of the claims of error that Petitioner asserted in his Traverse. But that fact was not attributable to oversight; rather, it was attributable to the fact that Petitioner did not raise those claims in his First Amended Petition ("FAP"). Petitioner was explicitly admonished that the Court would not consider claims raised before this Court for the first time in a traverse. Moreover, as the Magistrate Judge noted, Petitioner's case had been pending for over a year by the time that he filed his traverse. And, in that time, Petitioner had already filed an amended petition. Furthermore, by the time Petitioner filed his traverse, Respondent had already filed a ninety-one page return to Petitioner's FAP. Given these facts, there is no reason to consider any claim that Petitioner raised in his traverse, but did not raise in his FAP.[2] *See Cacoperdo v. Demosthenes*, 37 F.3d

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[2] To the extent that Petitioner complains that the Magistrate Judge failed to address each and every purportedly erroneous ruling by the trial court that Petitioner identified in his traverse, Petitioner's complaint is not well-taken. Petitioner identified the purportedly erroneous rulings in an effort to substantiate his judicial bias claims.

(continued...)

504, 507 (9th Cir. 1994) (holding that traverse is not proper pleading in which to raise claim for first time); *Brown v. Roe*, 279 F.3d 742, 745 (9th Cir. 2002) (requiring courts to exercise discretion when deciding whether or not to consider claims not asserted in petition).

Finally, Petitioner alleges that the Magistrate Judge made numerous factually inaccurate statements in his Report. However, none of the purported inaccuracies cited by Petitioner impacts the soundness of how the Magistrate Judge resolved the grounds for relief that Petitioner raised in his FAP. Moreover, none of the purported inaccuracies in the Report change the fact that the evidence against Petitioner was overwhelming -- evidence that included (1) Petitioner's detailed confession regarding the numerous charged robberies;[3] (2) a covertly recorded phone call between Petitioner and his daughter in which he incriminated himself and tacitly admitted to committing at least one, if not more, of the charged robberies; (3) the results of a search of Petitioner's home that turned up several distinct items matching those that the perpetrator of the charged robberies used to disguise his appearance; (4) positive identifications (at one time or another) of Petitioner as the culprit from victims of each of the charged robberies; and (5) the fact that all robberies committed in the unique manner employed by the culprit in the charged robberies ceased after Petitioner's arrest. As such, regardless of any supposed factual inaccuracies in the Report, Petitioner cannot show the requisite prejudice to succeed on any of the grounds for

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[2](...continued)
However, as the Magistrate Judge noted, adverse ruling and impatient remarks are insufficient to establish judicial bias, absent evidence of some extrajudicial source of bias or partiality.

[3] In his Objections, as he did in his Traverse, Petitioner argues that his confession was obtained in violation of his Fifth Amendment right to an attorney. This argument fails for the reasons set forth in the Magistrate Judge's Report. (*See* Report at 53-56.)

relief asserted in his FAP. *See Brecht v. Abrahamson*, 507 U.S. 619, 623, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1993).

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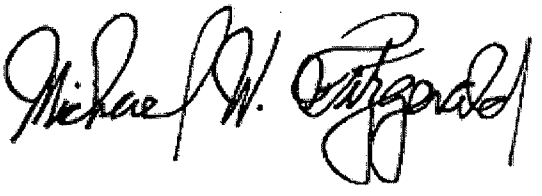
In sum, Petitioner's objections are not meritorious. The Court, therefore, accepts the findings and recommendations of the Magistrate Judge.

IT IS THEREFORE ORDERED that judgment be entered dismissing the Petition with prejudice.

DATED: December 21, 2018



MICHAEL W. FITZGERALD
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JAMES WILLIAM BRAMMER,

Petitioner,

v.

RAYMOND MADDEN,

Respondent.

No. CV 16-7483-MWF (FFM)

JUDGMENT

Pursuant to the Order Accepting Findings and Recommendations of United States Magistrate Judge,

IT IS ADJUDGED that the Petition is dismissed with prejudice.

DATED: December 21, 2018

MICHAEL W. FITZGERALD
United States District Judge

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JAMES WILLIAM BRAMMER, Petitioner, v. RAYMOND MADDEN, Respondent.	CASE NO. CV 16-7483-MWF (FFM) REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This Report and Recommendation is submitted to the Honorable Michael W. Fitzgerald, United States District Judge, pursuant to 28 U.S.C. § 636 and General Order 05-07 of the United States District Court for the Central District of California. For the reasons discussed below, it is recommended that the First Amended Petition be denied and the action be dismissed with prejudice.

I. PROCEEDINGS

Petitioner James William Brammer ("Petitioner"), a state prisoner in the custody of the California Department of Corrections, filed a Petition for Writ of Habeas Corpus by a Person in State Custody pursuant to 28 U.S.C. § 2254 on October 6, 2016.

He subsequently filed a First Amended Petition ("FAP") on December 15, 2016. Thereafter, on April 14, 2017, Respondent filed a return to the Petition. On November 20, 2017, Petitioner filed a traverse. The matter, thus, stands submitted.

II. PROCEDURAL HISTORY

A Los Angeles County Superior Court jury convicted Petitioner of thirteen counts of robbery and found that he used a deadly and dangerous weapon in the commission of each of those crimes. The trial court subsequently found that Petitioner had suffered numerous prior "strike" convictions pursuant to California's Three Strikes Law. The trial court then sentenced Petitioner to 369 years-to-life in state prison.

Petitioner appealed his conviction. On January 30, 2015, the California Court of Appeal filed an unpublished opinion affirming Petitioner's conviction in all material respects.

While his direct appeal was pending, Petitioner initiated a series of collateral attacks to his conviction, beginning with a petition for writ of habeas corpus that he filed in the Los Angeles County Superior Court. On April 24, 2013, the superior court denied the petition. Thereafter, on December 8, 2014, Petitioner filed a habeas petition in the California Court of Appeal, which dismissed the petition on December 24, 2014. Petitioner then filed a petition for review of the court of appeal's dismissal of his habeas petition. On March 11, 2015, the California Supreme Court granted the petition for review and ordered the court of appeal to reconsider Petitioner's habeas petition. Having reconsidered the case, the court of appeal denied the petition.

Meanwhile, on March 4, 2015, Petitioner filed a petition for review of the California Court of Appeal's opinion affirming his conviction on direct appeal. On April 15, 2015, the California Supreme Court denied the petition for review. Thereafter, on July 10, 2015, Petitioner filed a petition for writ of certiorari in the United States Supreme Court, which denied the petition on October 5, 2015.

Subsequently, on July 20, 2016, Petitioner filed a habeas petition in the California Supreme Court. That petition was summarily denied on October 12, 2016.

Petitioner then initiated this action.

III. FACTUAL BACKGROUND

Because Petitioner does not challenge the sufficiency of the evidence, the Court does not set forth the underlying facts here in detail. Rather than restate the evidence, the Court has attached hereto a copy of the California Court of Appeal's decision. That decision reviews the facts in detail. The following discussion includes those facts that are necessary to address the validity of Petitioner's claims herein.

IV. PETITIONER'S CLAIMS

1. Petitioner was deprived of his Sixth Amendment right to a fair trial and due process by "outrageous" judicial misconduct.

2. The California Court of Appeal's rejection of Petitioner's judicial misconduct claims on direct on appeal was unreasonable.

3. The trial court's "outrageous" judicial misconduct throughout the trial deprived Petitioner of his rights to due process, a fair trial, and an impartial tribunal.[1]

4. The prosecutor deprived Petitioner of his right to due process and a fair trial by presenting false testimony and altering evidence.

5. The trial court and the court reporter violated Petitioner's right to due process by omitting portions of the trial court record from the record on appeal.

6. Appellate counsel deprived Petitioner of his right to effective assistance of counsel on appeal by committing the following errors:

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[1] Although Petitioner alleges only three grounds of judicial misconduct, he asserts a plethora of misconduct claims that correspond to each of those grounds for relief.

(a) failing to augment the trial court record on appeal to include portions of the trial record that were omitted by the trial court;

(b) failing to argue on appeal that Petitioner's pre-trial confession was obtained after he had invoked his right to counsel; and

(c) failing to argue on appeal that the trial court applied the wrong Supreme Court precedent in denying Petitioner's motion to suppress the witnesses' in-court identifications.

7. The California Court of Appeal deprived Petitioner of his right to due process and equal protection by refusing to consider his *pro se* habeas corpus petition, his supplemental brief, and his request to augment the record.

8. The California Court of Appeal and the California Supreme Court violated Petitioner's right to due process and equal protection by denying Petitioner's request for transcripts to support his state habeas corpus petitions.

V. STANDARD OF REVIEW

The standard of review applicable to Petitioner's claims herein is set forth in 28 U.S.C. § 2254(d), as amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") (Pub. L. No. 104-132, 110 Stat. 1214 (1996)). *See* 28 U.S.C. § 2254(d); *see also Lindh v. Murphy*, 521 U.S. 320, 336, 117 S. Ct. 2059, 138 L. Ed. 2d 481 (1997). Under AEDPA, a federal court may not grant habeas relief on a claim adjudicated on its merits in state court unless that adjudication "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 "resulted in a decision that was based on an unreasonable determination of the facts in light of the

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evidence presented in the State court proceeding."[2] 28 U.S.C. § 2254(d); *see Williams v. Taylor*, 529 U.S. 362, 402, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000).

The phrase "clearly established Federal law" means "the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision."[3] *Lockyer v. Andrade*, 538 U.S. 63, 71-72, 123 S. Ct. 1166, 155 L. Ed. 2d 144 (2003). However, a state court need not cite the controlling Supreme Court cases in its own decision, "so long as neither the reasoning nor the result of the state-court decision contradicts" relevant Supreme Court precedent which may pertain to a particular claim for relief. *Early v. Packer*, 537 U.S. 3, 8, 123 S. Ct. 362, 154 L. Ed. 2d 263 (2002) (*per curiam*).

A state court decision is "contrary to" clearly established federal law if the decision applies a rule that contradicts the governing Supreme Court law or reaches a result that differs from a result the Supreme Court reached on "materially indistinguishable" facts. *Williams*, 529 U.S. at 405-06. A decision involves an "unreasonable application" of federal law if "the state court identifies the correct governing legal principle from [Supreme Court] decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 413. A federal habeas court may not overrule a state court decision based on the federal court's independent determination that the state court's application of governing law was incorrect,

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[2]In addition, under 28 U.S.C. § 2254(e)(1), factual determinations by a state court "shall be presumed to be correct" unless the petitioner rebuts the presumption "by clear and convincing evidence."

[3]Under AEDPA, the only definitive source of clearly established federal law is set forth in a holding (as opposed to dicta) of the Supreme Court. *See Williams*, 529 U.S. at 412; *see also Yarborough v. Alvarado*, 541 U.S. 652, 660-61, 124 S. Ct. 2140, 158 L. Ed. 2d 938 (2004). Thus, while circuit law may be "persuasive authority" in analyzing whether a state court decision was an unreasonable application of Supreme Court law, "only the Supreme Court's holdings are binding on the state courts and only those holdings need be reasonably applied." *Clark v. Murphy*, 331 F.3d 1062, 1069 (9th Cir. 2003).

erroneous, or even "clear error." *Lockyer*, 538 U.S. at 75. Rather, a decision may be rejected only if the state court's application of Supreme Court law was "objectively unreasonable." *Id.*

The standard of unreasonableness that applies in determining the "unreasonable application" of federal law under Section 2254(d)(1) also applies in determining the "unreasonable determination of facts in light of the evidence" under Section 2254(d)(2). *Taylor v. Maddox*, 366 F.3d 992, 999 (9th Cir. 2004). Accordingly, "a federal court may not second-guess a state court's fact-finding process unless, after review of the state-court record, it determines that the state court was not merely wrong, but actually unreasonable." *Id.*

Where more than one state court has adjudicated the petitioner's claims, the federal habeas court analyzes the last reasoned decision. *Barker v. Fleming*, 423 F.3d 1085, 1091 (9th Cir. 2005) (citing *Ylst v. Nunnemaker*, 501 U.S. 797, 803, 111 S. Ct. 2590, 115 L. Ed. 2d 706 (1991) for presumption that later unexplained orders, upholding judgment or rejecting same claim, rest upon same ground as the prior order). Thus, a federal habeas court looks through ambiguous or unexplained state court decisions to the last reasoned decision in order to determine whether that decision was contrary to or an unreasonable application of clearly established federal law. *Bailey v. Rae*, 339 F.3d 1107, 1112-13 (9th Cir. 2003).

VI. DISCUSSION

A. Judicial Misconduct

In his first three grounds for relief, Petitioner contends that the trial court committed numerous acts of misconduct and harbored bias against Petitioner. The state courts rejected each of these claims of judicial misconduct on their respective

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merits. As explained below, the state courts did not commit constitutional error in doing so.[4]

The Due Process Clause guarantees a criminal defendant the right to a fair trial before a judge with no actual bias against the defendant or interest in the outcome of his or her particular case. *Bracy v. Gramley*, 520 U.S. 899, 904, 117 S. Ct. 1793, 138 L. Ed. 2d 97 (1997); *In re Murchison*, 349 U.S. 133, 136, 75 S. Ct. 623, 99 L. Ed. 942 (1955); *Turney v. Ohio*, 273 U.S. 510, 523, 47 S. Ct. 437, 71 L. Ed. 749 (1927); *Lang v. Callahan*, 788 F.2d 1416, 1418 (9th Cir. 1986). The trial court "'must be ever mindful of the sensitive role [the court] plays in a jury trial and avoid even the appearance of advocacy or partiality.'" *Kennedy v. Los Angeles Police Dep't*, 901 F.2d 702, 709 (9th Cir. 1989)(quoting *United States v. Harris*, 501 F.2d 1, 10 (9th Cir. 1974)).

Nevertheless, the standard for reversing a verdict because of judicial misconduct during trial is stringent. Indeed, a claim of judicial misconduct by a state judge does not entitle a petitioner to habeas relief unless "the state trial judge's behavior rendered the trial so fundamentally unfair as to violate federal due process under the United States Constitution." *Duckett v. Godinez*, 67 F.3d 734, 740 (9th Cir. 1995). Moreover, to succeed on a claim of judicial bias, the petitioner must "overcome [the] presumption of honesty and integrity in those serving as adjudicators." *Withrow v. Larkin*, 421 U.S. 35, 47, 95 S. Ct. 1456, 43 L. Ed. 2d 712 (1975).

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[4] Although Petitioner does not identify in his FAP the specific acts of misconduct that the trial court purportedly committed, the Court assumes that Petitioner, in this action, seeks to raise the same claims of judicial misconduct that he raised in his direct appeal and in his habeas petition to the California Supreme Court. Indeed, Petitioner appears to address each of those claims in his Traverse.

1. Claims Raised on Direct Appeal[5]

Petitioner raised an inordinately large number of judicial misconduct claims on direct appeal. A review Petitioner's numerous allegations shows that each of his allegations of misconduct on the trial court's part pertains to one of the following three categories: (1) abandoning the court's role as an impartial judge and taking on the role of a second prosecutor;[6] (2) instructing the jury that Petitioner did not ask the investigating detective for an attorney's business card until after Petitioner had confessed to the crimes with which he was charged;[7] and (3) directing the jury to disregard certain aspects of Petitioner's testimony. Having reviewed the record and the California Court of Appeal's reasoned opinion rejecting Petitioner's allegations of judicial misconduct, the Court concurs that none of the actions taken by, or alleged to have been taken by, the trial court deprived Petitioner of his right to a fair trial. Each of the foregoing categories of the judicial misconduct is discussed in turn below.

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[5] The sheer number of judicial misconduct claims that Petitioner asserts is breathtaking. In order to bring some sense of organization to those claims, the Court divides them between the claims that Petitioner raised on direct review, which were denied in a reasoned opinion, and those that he raised in his state habeas petition, which was summarily denied by the California Supreme Court.

[6] To this end, Petitioner alleges numerous instances where the trial court allegedly disparaged Petitioner in front of the jury, posed questions or made comments showing that the trial court disbelieved Petitioner, interrupted Petitioner's examination of witnesses, and sustained its own objections to Petitioner's comments and questions.

[7] Although the trial court found that Petitioner did not invoke his right to counsel before confessing to the charged crimes, Petitioner repeatedly attempted at trial to elicit testimony suggesting that, in fact, he had invoked his right to counsel before confessing. Petitioner also attempted to elicit testimony showing that his confession was a sham. Petitioner, himself, testified that he was not actually confessing, but merely reading the relevant facts underlying the robberies from the detective's report so that the detective could "clear up" the robberies. According to Petitioner, he and the detective agreed beforehand that any statements regarding the robberies were "off the record," which, according to Petitioner, meant that the statements could not be used against him in court.

a. Abandoning the Court's Role as an Impartial Judge

"In the absence of any evidence of some extrajudicial source of bias or partiality, neither adverse rulings nor impatient remarks are generally sufficient to overcome the presumption of judicial integrity, even if those remarks are 'critical or disapproving of, or even hostile to, counsel, the parties, or their cases.'" *Larson v. Palmateer*, 515 F.3d 1057, 1067 (9th Cir. 2008) (quoting *Liteky v. United States*, 510 U.S. 540, 555, 114 S. Ct. 1147, 127 L. Ed. 2d 474 (1994)). As the Supreme Court has explained, "opinions 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." *Liteky*, 510 U.S. at 555.

Here, Petitioner has not shown that the trial court abandoned its role as an impartial judge. To be sure, there are numerous instances in the record where the trial court questioned witnesses, interrupted Petitioner's examination of witnesses, and admonished Petitioner to comply with basic rules of courtroom decorum. However, none of those instances arose from any preexisting bias on the trial court's part. Rather, they were a necessary response to Petitioner's antics throughout trial–antics that included refusing to comply with the trial court's orders, making disparaging comments about the trial court, and attempting to elicit irrelevant testimony in disregard of the trial court's orders. As such, they did not deprive Petitioner of his right to a fair trial.

Moreover, the trial court's questioning of witnesses, interrupting Petitioner's examination of the witnesses, and admonishing Petitioner were part and parcel of the trial court's duty to ensure the accurate and efficient presentation of testimony. The Supreme Court has recognized that a trial judge is "more than an umpire." *Duckett*, 67 F.3d at 739. Consequently, a trial judge has broad authority to explain and comment on the evidence at trial. *Quercia v. United States*, 289 U.S. 466, 469-70, 53 S. Ct. 698,

698-99, 77 L. Ed. 1321 (1933); *see United States v. Parker*, 241 F.3d 1114, 1119 (9th Cir. 2001) (stating that trial judge may "'participate in the examination of witnesses to clarify issues and call the jury's attention to important evidence'") (citation omitted).

Although Petitioner contends that the trial court's actions show bias, the record largely belies that contention. Indeed, as the court of appeal noted, the record is replete with instances of the trial court attempting to assist Petitioner, who elected to represent himself:

> [T]he court often assisted [Petitioner], who represented himself throughout the proceedings, in presenting his case and cautioned him about perils posed by his strategies and lines of inquiry. For example, the court coached [Petitioner] on when and how he could read prior testimony into the record, how to use a document to attempt to refresh a witness's memory, how to introduce a witness's prior inconsistent statement from a source other than prior testimony, how to refresh recollection with an otherwise inadmissible document, and how to address new matters in redirect testimony. The court also attempted to clarify [Petitioner's] questions when witnesses did not understand them, added parameters to questions [Petitioner] asked to eliminate vagueness, and asked questions to assist [Petitioner] in laying a foundation before asking a witness to refresh his recollection from a police report. Several times the court suggested [Petitioner] read additional testimony from the preliminary hearing that was potentially beneficial to his defense.

(FAP, Attach. A at 23-24.)

Notwithstanding these instances where the trial court assisted Petitioner, this Court, like the court of appeal, finds some of the trial court's actions troubling. For example, while questioning Petitioner about one of the robberies, the trial court flatly asked Petitioner, "You planned to rob it, didn't you, before you got there?" When Petitioner denied planning the robbery, the court asked, "And you were a parolee and you knew you couldn't own a deadly or dangerous weapon as opposed to a firearm." When Petitioner claimed he had no gun, the trial court asked, "What were you doing with a gun before the Frasier Market incident?" Petitioner explained that he had an airsoft gun that he used in war games with other people.

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At another point, the trial court questioned Petitioner about his claim regarding certain statements between Petitioner and the investigating detective before Petitioner confessed to the crime. Petitioner claimed that the alleged exchange occurred before the recording of the interrogation began. Displaying disbelief of Petitioner's testimony, the trial court asked Petitioner if he was "setting [the detective] up with a lie." Noting that the confession was videotaped and that the statements to which Petitioner testified were not on the videotape, the trial court stated, "So that's a convenient compartment, wouldn't you say, for anything you want this jury to believe? You tell them something was said off the record and that's downstairs." Petitioner replied that he had "physical evidence of that." The trial court responded, "To you do the means justify the ends as long as you get your way?" The court then questioned Petitioner about what the detective would have had to gain by eliciting a false confession from Petitioner.

In yet another instance cited by Petitioner, the trial court questioned Petitioner about the plausibility of Petitioner's claim that he had lied about committing the crimes to the investigating detective. Specifically, the trial court asked, ""How do we know you're not using us as your next Detective Richards with a story?" The trial court then rephrased the question as follows: "[H]ow do we know whether you're lying in this case as you lied in the previous matter to Richards?" When Petitioner attempted to answer that he planned to play the videotape of the interrogation during closing arguments, the trial court interrupted him, asking, "I want to know is there some criteria that we can employ to determine whether you're doing to us what you claim you did to Richards?" Petitioner replied he was "showing [the court] from the evidence of the transcript of how this is done and how it was documented." The trial court responded, "I understand, but you lied to [the detective]. You're admitting it now. You set him up. . . ."

Although these statements by the trial court give the Court pause, they nevertheless are not sufficient to show that the trial court was biased against

Petitioner. As stated above, a trial judge has broad authority to explain and comment on the evidence at trial. *Quercia*, 289 U.S. at 469-70. This authority, however, is not boundless. *Quercia*, 289 U.S. at 470-72. For example, when a trial judge draws the jury's attention to the parts of the evidence he or she thinks are important or expresses an opinion as to a witness's credibility, the judge must make it "clear to the jury that all matters of fact are submitted to [its] determination." *Id.* at 469.

Furthermore, although the judge is empowered to "analyze and dissect the evidence," he "may not either distort it or add to it." *Id.* at 470. In *Quercia*, the trial judge breached the boundary between the permissible and the impermissible by, among other things, informing the jury that "'wiping' one's hands while testifying was 'almost always an indication of lying'" and by stating that he believed that "'every single word'" the defendant had said was "'a lie,'" except when the defendant had agreed with the government's testimony. 289 U.S. at 468. The trial judge, according to the Supreme Court, violated the defendant's right to due process because the trial court judge did not simply "review the evidence to assist the jury in reaching the truth," but, rather, "in a sweeping denunciation[,] repudiated as a lie all that the accused had said in his own behalf. . . ." *Id.* at 468.

In determining whether a trial court's comments violate *Quercia*'s prohibition on a trial judge's adding to or distorting the testimony of a witness, the First Circuit's opinion in *United States v. Paiva*, 892 F.2d 148 (1st Cir. 1989), and the Sixth Circuit's opinion in *United States v. Pritchett*, 699 F.2d 317 (6th Cir. 1983), are instructive.[8] In *Paiva*, the trial judge in a cocaine distribution case exceeded his judicial role by explaining how police use "field tests" to determine the presence of drugs. 892 F.2d at 158 n.7. No witness testimony, other than the trial court's statements, was offered to explain what a field test was, nor was any witness testimony offered to establish that

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[8] The Court is, of course, aware that, for purposes of AEDPA, only the Supreme Court's holdings are binding on the state courts and only those holdings need be reasonably applied. *Williams*, 529 U.S. at 412.

the police had used a field test to determine the nature of the substance of which the defendant was found in possession. *Id.* at 159. In holding that the judge exceeded his authority, the First Circuit explained that the judge's comment "was not merely summarization or comment on testimony," but rather new evidence to which no other witness had testified. *Id.*

Similarly, in *Pritchett*, the trial judge impermissibly added to the evidence after the prosecution was unable to establish that an individual was a convicted cocaine dealer. 699 F.2d at 318-19. Noting the prosecutor's inability to establish the point, the presiding judge remarked to the jury that he, himself, had sentenced the individual in question. *Id.* at 319. The reviewing court characterized the judge's remark as "improper testimony" because it "confirmed what the prosecutor had unsuccessfully attempted to solicit" from the defendant himself. *Id.* at 320.

By contrast, the Tenth Circuit's opinion in *United States v. Jaynes*, 75 F.3d 1493 (10th Cir. 1996), illustrates a trial judge's permissible commentary on evidence. There, the defendant stood trial for forging her deceased grandmother's name on checks made payable to her grandmother. *Id.* at 1497-98. When cross-examining a government agent about two endorsements that appeared on the checks, defense counsel attempted to elicit an admission that the manner of the endorsements suggested that the defendant believed in good faith that she had the authority to sign her grandmother's signature. *Id.* at 1503. The prosecution objected to this line of questioning as intruding upon the jury's province. *Id.* In response, the trial court told the jury that the checks appeared to contain two endorsements, one by the defendant and one by her deceased grandmother. *Id.* The trial court noted that the endorsements appeared to have been made so that the checks could be properly deposited in the defendant's account. *Id.* The trial court then instructed the jury that it was free to conclude whether the endorsements suggested that the defendant intended to defraud by forging her grandmother's signature or whether she had signed both names mistakenly believing she was authorized to do so as her grandmother's agent. *Id.* On

these facts, the Tenth Circuit, applying *Quercia*, held that the trial judge's "comments on the evidence were well within the bounds of propriety." *Jaynes*, 75 F.3d at 1503.

Here, the court of appeal reasonably concluded that the trial court's comments were, likewise, within the bounds of propriety. To be sure, the trial court's questioning of Petitioner may have suggested that the court did not find credible Petitioner's accounts of his interactions with the investigating detective. What is more, the trial court questioned Petitioner in a manner that highlighted the fact that Petitioner claimed to have lied to the detective. And, the trial court left open the possibility that Petitioner was lying when he claimed that he had falsely confessed to committing the charged crimes. However, in doing so, the trial court did not assume the role of a witness. Nor did the trial court distort the evidence that was presented. On the contrary, if anything, the trial court clarified that evidence. Granted, in questioning Petitioner's about his purported statements to the investigating detective, the trial court may have expressed an opinion as to Petitioner's credibility. Nevertheless, the trial court's actions did not approximate the misconduct of the trial court in *Quercia*, which essentially told the jury that every statement to which the defendant had testified was a lie. And, importantly, the trial court in Petitioner's case emphasized to the jury that the jury–and not the trial court–was the factfinder and that the jury had the responsibility to evaluate the witnesses' testimony. Additionally, the trial court repeatedly instructed the jury not to take anything that the trial court said or did as an indication of the court's opinions as to the facts and witnesses or as to which verdict the jury should reach.

Given these facts, the court of appeal reasonably could have concluded that the trial court's comments did not deprive Petitioner of his right to a fair trial. Accordingly, the court of appeal's rejection of this aspect of Petitioner's judicial misconduct claim was neither an unreasonable application of, nor contrary to, clearly established federal law as determined by the Supreme Court.

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b. Testimony Regarding Petitioner's Interrogation

Prior to trial, the trial court ruled that Petitioner had not invoked his right to counsel before confessing to the charged crimes during a January 25, 2010 interrogation. Although Petitioner claimed that, before confessing, he had asked one of the investigating detectives to retrieve an attorney's business card, the detective testified that no such request was made before the confession. Moreover, the videotape of the interrogation did not support Petitioner's claim. Ultimately, the trial court found Petitioner's account to be not credible. Having ruled that Petitioner did not invoke his right to counsel prior to confessing, the trial court advised the jury on multiple occasions that the jury was required to accept the trial court's determination that Petitioner's statements during that interrogation were properly admitted into evidence.

Nevertheless, Petitioner repeatedly testified that he had requested that the investigating detective retrieve an attorney's business card before the January 25, 2010 interrogation commenced. Petitioner also questioned the investigating detective about Petitioner's purported request. The detective did not recall such a request. When Petitioner pressed the detective on the topic, the trial court questioned the relevancy of the proposed testimony, given that the court already had determined that Petitioner had not invoked his right to counsel. Although the trial court stated that Petitioner could elicit testimony to show that the confession was coerced, the court prohibited Petitioner from going into whether there was a *Miranda* violation. In doing so, the trial court stated:

> So we're not covering the card from an attorney. You did ask for it at the end of your interview after you talked to Detective Richards, and it's in the transcript that the Court will allow into evidence. The jury has already heard it. [¶] You did ask for a card after the entire interview was over, not before. That's the Court's ruling." [¶] "The reason I'm being so specific, I don't want the jury to be under the impression that this court is keeping something away from them that they should be able to consider. [¶] I want them to understand the dynamics of what's taking place in this particular courtroom and why the court is ruling as it did so that

> there is no suggestion that you have been deprived of any constitutional rights.

(FAP, Attach A. at 34.) Notwithstanding the trial court's admonition, Petitioner continued to question the detective about the timing of the request for the attorney's card. Accordingly, the trial court again admonished Petitioner about the boundaries of permissible questioning regarding the interrogation. Undaunted, Petitioner repeatedly continued to question the detective about the attorney's card, and the trial court repeatedly ruled that Petitioner could not explore that subject. In doing so, the trial court reiterated that it made its ruling regarding whether Petitioner had invoked his right to counsel before the interrogation and that Petitioner could not urge the jury to question that ruling.

At the end of that court day, the trial court stated the following to the jury:

> At this particular time I want to say this. There has been some discussion between defendant and counsel as to rulings that the court has made, and I hope none of you are embarrassed by the exchange between the parties. [¶] Welcome to the Superior Court. This happens often in court and in every court in the land every day. [¶] It's not like all nice fuzzy, touchy, feely, huggy stuff. It's real, stuff and this is what happens in a court of law. [¶] So don't hold the discussion that you heard between counsel and the court against either side. This takes place sometimes; and you know the case is wrapping up and tempers are getting short in connection with these proceedings. [¶] All I can say is you will rely upon the evidence that you heard from the mouth of witnesses and that have been marked as exhibits in this particular case and forget that there was an exchange. [¶] Normally what transpires, what happens is when there is a problem such as this, the court sends the jury out and then has the matter resolved between two counsel and then brings it back in. [¶] The way we were going today, the questions were being asked so often the court felt it was so repetitive that you would each have lost five pounds in the process of going to and from and going in and out. So we did it in open court. [¶] That's why I advise you not to hold it against anybody, the decibel level between counsel and the court or the nature of the objections that were made and the inability to refrain from asking the same question again.

(FAP, Attach. A at 36-37.)

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On appeal, as he does here, Petitioner argued that the trial court invaded the province of the jury by stating that it had ruled that he did not ask for the attorney's business card before the interview commenced. The California Court of Appeal rejected this claim on its merits. As explained below, the court of appeal did not commit constitutional error in doing so.

As an initial matter, the trial court properly prohibited Petitioner from eliciting testimony suggesting that his confession was inadmissible due to a purported *Miranda* violation. Questions of admissibility of evidence, including statements made by criminal defendants during pre-trial interrogations, are for a trial court to decide, not the jury. *Jackson v. Denno*, 378 U.S. 368, 386 n.13, 84 S. Ct. 1774, 12 L. Ed. 2d 908 (1964). Here, the trial court determined that Petitioner's pre-trial statements were admissible because Petitioner did not invoke his right to counsel before confessing to the charged crimes. Petitioner had no right to seek testimony undermining that legal determination.

Moreover, the trial court did not prohibit Petitioner from eliciting testimony casting doubt on the reliability of his pre-trial confession. To be sure, a trial court may not summarily foreclose a criminal defendant from challenging the reliability of a confession at trial, regardless of whether the trial court has determined that no *Miranda* violation occurred. *See Crane v. Kentucky*, 476 U.S. 683, 688, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986) ("[T]he Court has never questioned that 'evidence surrounding the making of a confession bears on its credibility' as well as its voluntariness.") (quoting *Jackson*, 378 U.S. at 386 n. 13); *see also Lego v. Twomey*, 404 U.S. 477, 485, 92 S. Ct. 619, 30 L. Ed. 2d 618 (1972) (noting that "the province or capacity of juries to assess the truthfulness of confessions" is unquestioned).

In *Crane*, the Supreme Court recognized that the environment and circumstances in which a confession is obtained, which in turn bear on its reliability and credibility, may be relevant to the ultimate factual determination of a defendant's guilt or innocence. 476 U.S. at 691. Thus, "because 'questions of credibility, whether

of a witness or of a confession, are for the jury,' the requirement that the court make a pretrial voluntariness determination does not undercut the defendant's traditional prerogative to challenge the confession's reliability during the course of the trial." *Id.* at 688 (quoting *Jackson*, 378 U.S. at 386 n. 13); *see also Lego*, 404 U.S. at 486 (noting that defendant remains free to "familiarize a jury with circumstances that attend the taking of his confession, including facts bearing upon its weight and voluntariness").

Here, Petitioner appears to argue that the trial court prohibited him from attacking the reliability of his confession by precluding him from questioning the detective about when, and under what circumstances, Petitioner purportedly asked the detective for the attorney's business card. This argument fails for several reasons. First, the jury heard the relevant testimony regarding the business card before the trial court restricted Petitioner from eliciting any further testimony on the subject. Indeed, by the time that the trial court restricted Petitioner from eliciting further testimony regarding the attorney's business card, Petitioner already had "testified *at least ten times at trial* that he told [the detective] to retrieve an attorney's business card from Petitioner's wallet after he had been taken out of his jail cell, but before the interrogation commenced." (FAP, Attach. A at 33 (*emphasis added*).) Moreover, Petitioner questioned the detective about the timing of Petitioner's purported request. In other words, the jury was well-aware that Petitioner maintained that he requested the attorney's business card before the interrogation began and that the detective denied that any such request occurred before Petitioner confessed.[9]

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[9] In a separate claim, Petitioner maintains that the trial court elicited false testimony from the detective regarding the facts surrounding Petitioner's request for the attorney's business card. This claim is meritless. A review of the record shows only that the trial court clarified the evidence regarding when the detective claimed to have seen the attorney's business card. Nothing in the record, other than Petitioner's self-serving account, demonstrates that the trial court's clarification as to when the detective claimed to have seen the attorney's card was false. On the contrary, it was supported by the detective's testimony.

Second, even though the trial court prohibited Petitioner from eliciting testimony designed to undermine the trial court's ruling that no *Miranda* violation occurred, the trial court explicitly permitted Petitioner to elicit any relevant testimony suggesting that his confession was either unreliable or coerced. Specifically, the trial court stated: "Only thing you can go into is the context in which you gave the statement as to whether or not it was forced, coerced[.]" When Petitioner persisted in questioning the detective about the timing of Petitioner's request for the attorney's business card, the trial court, again, stated that Petitioner could elicit testimony undercutting the reliability of the confession: "You can attack the validity and the credibility and believability of the statement you gave to [the detective]." And, later, when Petitioner continued to question the detective regarding the timing of Petitioner's request, the trial court, citing the Supreme Court's opinion in *Crane*, stated:

> I've made the ruling, which is binding; and unless and until a higher court makes a ruling my ruling is incorrect, it's going to stand for the purposes of this trial; and I am now ruling that you may not go into this subject matter. It's a legal issue which the court decided. [¶] You put your interpretation on why things happened during that interview, which I did allow because the Supreme Court of the United States [in *Crane*] has stated the jury is entitled to know the surrounding facts and circumstances that take place during an interview.

(FAP, Attach. A at 35-36.) As the trial court's statements make clear, Petitioner was permitted to elicit testimony suggesting that his confession was unreliable. Petitioner, instead, opted to focus his examination of the detective on facts designed to establish a *Miranda* violation. As that topic was not relevant to show that his confession was coerced or unreliable, the trial court committed no misconduct in prohibiting Petitioner from exploring the topic before the jury.

Third, any purported error in restricting Petitioner's ability to continue eliciting testimony regarding the timing of Petitioner's request for the attorney's business card was harmless. Indeed, there is little, if any, reason to believe that additional testimony regarding the timing of Petitioner's request would lead a reasonable juror to conclude

that Petitioner's confession was coerced or unreliable.[10] On the contrary, Petitioner, himself, initiated the contact with the detective. And, he did so after having invoked his right to counsel only one day earlier. Moreover, the jury saw the videotape of the interrogation, during which Petitioner appeared eager to provide details of his many crimes in the hopes of securing some kind of leniency in exchange. Further, Petitioner provided extensive details about his crimes and his general *modus operandi* in committing the crimes. Additionally, during the videotaped interrogation, Petitioner never mentioned wanting to speak to an attorney; rather, he stated "I could go *pro per* for right now."

What is more, there was ample evidence in the record corroborating the statements that Petitioner made during the January 25th interrogation. Indeed, he effectively confessed to committing the charged crimes when speaking to a detective at the preliminary hearing. In addition, during a search of Petitioner's residence, police recovered several items matching those that the perpetrator of the robberies used to disguise his appearance. Furthermore, during a recorded conversation between Petitioner and his daughter, Petitioner specifically confessed to committing at least one of the charged crimes and flatly admitted that he had committed ten other robberies. And, at least one victim from each of the charged robberies, at one point or another, identified Petitioner as the robber. Finally, as the court of appeal noted in rejecting this claim, all robberies committed in the unique manner employed by the culprit in the charged robberies ceased after Petitioner's arrest.

In short, there was no doubt that Petitioner's confession was reliable, and any attempt to undercut the reliability of his confession due to the timing of his request for his attorney's card would not have succeeded. Accordingly, the court of appeal's

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[10] The Court, again, notes that Petitioner repeatedly had testified about his purported request for an attorney's business card before the trial court prohibited him from eliciting any more such testimony. Petitioner also questioned the detective about the timing of the request. (*See supra.*)

rejection of this aspect of Petitioner's judicial misconduct claim was neither an unreasonable application of, nor contrary to, clearly established federal law as determined by the Supreme Court.

c. Directing the Jury to Disregard Certain Aspects of Petitioner's Testimony

The final category of Petitioner's direct appeal allegations of trial court error concerns the investigating detective's purported pre-trial statement that any confession that Petitioner made regarding the charged robberies would be "off the record." At trial, Petitioner attempted to argue to the jury that the term "off the record" meant that any statement made thereafter could not be used against the speaker in court. The trial court responded by instructing the jury to disregard Petitioner's interpretation of the legal meaning of the term. According to Petitioner, the trial court violated his right to a fair trial and to present a defense in doing so. The California Court of Appeal rejected this claim on the merits. As explained below, the court of appeal did not commit constitutional error in doing so.

(1) Factual Background

The following facts, which are derived from the California Court of Appeal's opinion, are relevant to this claim. At trial, Petitioner testified to his version of events regarding his January 25th interrogation during which he confessed to each of the charged crimes. Petitioner testified that, before he confessed to any crimes, he requested that the detective retrieve his attorney's business card so that Petitioner could consult with his attorney before making any statements to the detective. According to Petitioner, the investigating detective told Petitioner that their discussion would be "off the record" and that it could not be used against him in court. The detective, according to Petitioner, wanted Petitioner to "clean this stuff up," which would make the detective "look good." Petitioner testified that the detective assured Petitioner that the detective would "go to bat" for Petitioner in one of the charged crimes if Petitioner "helped [the detective] out." Petitioner further testified that,

based on these assurances, he did not contact counsel. According to Petitioner, the detective provided Petitioner information regarding each of the charged robberies, and Petitioner simply parroted back those facts. Petitioner testified that his entire confession was a "sham."[11]

Petitioner repeatedly testified at trial regarding both the detective's purported offer to speak "off the record" and Petitioner's understanding of the purported statement. Eventually, when Petitioner asserted that "off the record" meant that anything he said during the interrogation could not be used in a court of law, the trial court addressed the jury. The court stated that Petitioner had received *Miranda* warnings on January 24th, including an advisement that "anything you said would be used against you," and that he had invoked his rights. The court, further, stated that, on January 25th, Petitioner called the detective and said that he wanted to talk and that he would waive his *Miranda* rights. The court then addressed Petitioner as follows: "Did you interpret that as having no meaning at all?" Petitioner responded that he had not yet testified regarding that phone call, but that he was "going to." The court replied, "All right," and sent the jury home for the day.

Outside the presence of the jury, the trial court noted that Petitioner was "arguing to the jury legally speaking about what the *Miranda* implications are in this particular case, and [the court would not] permit that." The court then reminded Petitioner that a hearing already had been conducted on the admissibility of his pre-trial statements and that the court's ruling on that matter was final. Having done so, the trial court stated:

> The only thing that's in issue is if there is a different meaning that you can attribute to what's on the tape as opposed to what appears to be a confession to many of the crimes. [¶] So that's what you're doing on the stand now; but I'm not going to let you interrupt with impunity or interject with impunity your version of what the law says and what *Miranda* means and how it applies to this

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[11] A detailed summary of the facts regarding Petitioner's claims regarding the interrogation is set forth above in the factual background section. (*See supra.*)

> particular case. [¶] That's over. That's over. That's a legal issue that's been decided; and I know you know the difference. [¶] You're trying to get your best shot in, and I won't permit it; and every time you do it I'll correct it. I will interrupt and correct it so that the jury has it properly in context.

(FAP, Attach. A at 41.)

Testimony resumed the next day. Petitioner, again, repeatedly testified that the detective had assured Petitioner that his statements were "off the record," meaning that they could never be used against him in a court of law. After Petitioner did so several times, the trial court asked Petitioner if the detective had promised him anything in exchange for Petitioner's supposedly false confession. In response, Petitioner stated, "He said it was off the record." The court then asked why Petitioner "would . . . bother talking to [the detective] if [Petitioner was not] getting a promise as to anything that could be done to help [Petitioner]? Because [the detective] kept saying in the transcript of the [January] 25th [interrogation], which the jury has, [that] he [could not] promise [Petitioner] anything. That's up to the D.A. if they want to cut a deal." Petitioner acknowledged that fact, but insisted that the detective had said "it's off the record, and off the record I know what that means. That means it cannot be used against you in a court of law." The court responded, "Doesn't mean that necessarily." Defendant interrupted, saying, "It does mean that." The court replied, "I'm sorry. It doesn't, and the jury is to disregard your statement in that regard." The court then allowed Petitioner to continue testifying. When he did so, Petitioner stated, "That is why I proceeded in the way I proceeded. He told me it was off the record."

The trial court then questioned Petitioner regarding how the detective would have benefitted from a confession that could not be used in court. Petitioner replied, "Because he closed the books on [the robberies]. They do it all the time, your honor." The court then asked, "How do you know they do it all the time?" Petitioner replied, "Because I have experience with the law and I've seen it. There is a guy in this courthouse that did it." The court responded, "Okay, but nobody knows what the facts

and circumstances were. He may have pleaded to a murder and they excused a bunch of robberies." Petitioner replied, "It was a bunch of robberies." The court then stated, "[It's] all hearsay. [¶] I'm telling the jury to disregard what the defendant said as to they do it all the time. [¶] He's not an expert, and he has no idea what was being done in this particular case."

The next day, the prosecutor cross-examined Petitioner about his claim that the interrogation was off the record. For its part, the trial court asked Petitioner some questions about being given his *Miranda* rights, invoking those rights on January 24th, and being reminded of those rights on the 25th. The court then asked, "You knew at that time that part of the *Miranda* rights were anything you say could be used against you, correct?" Petitioner replied, "Nope, because he said it's off the record." The prosecutor then asked Petitioner, "What does 'off the record' mean to you?" Petitioner answered, "It means it's off the record. We're clearing the paperwork and it cannot be used against you." The prosecutor asked, "'Off the record' means clearing paperwork?" Petitioner responded, "Yeah. It's done all the time." Later that same day, Petitioner, again, testified that the detective had assured him that the conversation was "off the record" and that nothing Petitioner had said could be used against him.[12]

(2) Federal Legal Standard and Analysis

As set forth above, questions of admissibility of evidence, including statements made by criminal defendants during pre-trial interrogations, are for a trial court to decide, not the jury. *Jackson v. Denno*, 378 U.S. 368, 386 n.13, 84 S. Ct. 1774, 12 L. Ed. 2d 908 (1964). To the extent that Petitioner believes that he had a right to argue before the jury that his statements to the detective were inadmissible because they were purportedly made "off the record," he is mistaken. The trial court determined that the statements were admissible. The jury had no role in that determination and, in fact, was obligated to abide by that determination.

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[12] (FAP, Attach. A at 41-42.)

Moreover, the trial court's instruction to the jury to disregard Petitioner's statement as to the legal meaning of the term "off the record" did not deprive Petitioner of his right to present a defense. "Whether rooted directly in the Due Process Clause of the Fourteenth Amendment, or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" *Crane v. Kentucky*, 476 U.S. 683, 690, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986) (quoting *California v. Trombetta*, 467 U.S. 479, 485, 104 S. Ct. 2528, 81 L. Ed. 2d 413 (1984)) (citations omitted); *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973).

Here, Petitioner exercised his right to present a defense. Indeed, Petitioner repeatedly testified that his confession to the detective was a sham and that the only reason he confessed to the crimes was that he believed that his statements could not be used against him in court. Petitioner also repeatedly testified that the detective knew that Petitioner did not commit the charged crimes and that the detective wanted Petitioner to confess "off the record" in order to "clear" the cases and make the detective "look good." Put simply, the jury was aware of Petitioner's version of the events. As such, Petitioner was not deprived of his right to present a defense.[13]

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[13] Petitioner also complains that the trial court erred in instructing the jury to disregard his testimony that police elicited sham confessions "all the time" in order to clear cases. The trial court instructed the jury to disregard that testimony because Petitioner's testimony relayed hearsay statements and because Petitioner lacked the requisite expertise to opine as to police practices regarding efforts to obtain confessions. Petitioner's challenge to the court's ruling fails because the Ninth Circuit has made clear that state law issues of admissibility and foundation are not cognizable on federal habeas review. *See Johnson v. Sublett*, 63 F.3d 926, 931 (9th Cir. 1995) (denying habeas relief based on alleged inadmissibility of certain evidence because claim merely "present[ed] state-law foundation and admissibility" issues).

Finally, even assuming error, Petitioner can not show prejudice. Petitioner's claim that the detective agreed to have an "off the record" discussion with Petitioner about the charged crimes is inherently unbelievable and, moreover, was contradicted by the evidence at trial. As an initial matter, the detective denied making any statement to the effect that Petitioner's statements would be off the record. Further, contrary to Petitioner's beliefs, the detective would not have benefitted from eliciting a confession that could not be used against the person confessing. Moreover, Petitioner had already been advised one day prior that any statement he made could be used against him. And, in the videotape of the interview, the detective reminded Petitioner of his *Miranda* rights.

What is more, the record belies Petitioner's claim that the detective fed Petitioner information in order to benefit himself. Rather, the videotape of the interrogation shows that Petitioner was the person eager to secure a deal from the district attorney in exchange for a confession. And, Petitioner's claim about how he was able to recite the details of the charged crimes is implausible. Petitioner claims that, while he was providing details of the crimes, he was reading from the detective's police reports that were on the table at which they were seated. Aside from the fact that this activity is not evident from the video of the interrogation, Petitioner's claim is dubious because he maintains that he was able to read the reports even though they were upside down. Moreover, Petitioner, who wears glasses, did not have the benefit of those glasses when he purportedly read the upside down police reports.

For the foregoing reasons, the court of appeal's rejection of this aspect of Petitioner's judicial misconduct claim was neither an unreasonable application of, nor contrary to, clearly established federal law as determined by the Supreme Court.

2. Claims Raised in Petitioner's State Habeas Petition

In his third ground for relief, Petitioner contends that the trial court deprived him of his right to due process and a fair trial by committing "outrageous" misconduct "throughout" the trial. (FAP at 5.) In support of this contention, Petitioner alleges the

following facts: "[The trial court] was obsessed to obtain a conviction of Petitioner, entered into role of advasary [sic], cross-examining Petitioner during his trial testimony, instructed jurors to disregard the truth and instructed them to a lie. [The trial court] testified to jury, suborned perjury from LAPD detective, etc.[,] etc." (*Id.*) This claim fails because Petitioner provided no facts to support his conclusory allegations of misconduct. *See James v. Borg*, 24 F.3d 20, 26 (9th Cir. 1994) ("Conclusory allegations which are not supported by a statement of specific facts do not warrant habeas relief."); *Jones v. Gomez*, 66 F.3d 199, 205 (9th Cir. 1995) (habeas relief not warranted where claims for relief are unsupported by facts). The Court, however, assumes that, in this ground for relief, Petitioner meant to assert the same allegations of judicial misconduct that he asserted in the habeas petition that he filed in the California Supreme Court. Accordingly, the Court shall address those allegations.[14]

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[14] Petitioner identified countless allegations of judicial misconduct in his traverse. To the extent that those allegations mirror the allegations that he asserted in his state habeas petition to the California Supreme Court, the Court shall consider them. To the extent that those allegations differ from the allegations that Petitioner asserted in his state habeas petition to the California Supreme Court, the Court declines to consider them. A traverse is not the proper place to raise claims for the first time, and the Court may, in its discretion, decline to consider any such claims. *See Cacoperdo v. Demosthenes*, 37 F.3d 504, 507 (9th Cir. 1994) (holding that a traverse is not the proper pleading in which to raise a claim for the first time). In deciding whether to consider the newly presented claims, the district court must actually exercise its discretion rather than summarily deny the claims. *See Brown*, 279 F.3d at 745 (citing *United States v. Howell*, 231 F.3d 615, 621 (9th Cir. 2000)). Here, the Court, in its discretion, elects not to address any new allegations of judicial misconduct that Petitioner has raised in his traverse. Petitioner's case had been pending over a year before he filed his traverse. Moreover, in that time, Petitioner filed a FAP, which, as explained above, presents only conclusory allegations in support of his third ground for relief. Petitioner was also admonished that the Court would not consider claims asserted for the first time in a traverse. Furthermore, to the extent that Petitioner has raised new allegations of judicial misconduct in his traverse, those allegations would likely be unexhausted. In short, there is no reason to allow Petitioner to raise any new

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a. Actual Bias

In his state habeas petition, Petitioner cited numerous comments and actions by the trial court that, in his view, show that the trial court harbored bias against Petitioner. First, Petitioner cites the trial court's statement that it did not "like *pro pers*." Second, Petitioner claims that the trial court was angry at Petitioner because he filed ethics complaints against the trial court. Third, Petitioner maintains that the trial court was biased against Petitioner because, in the past, he successfully had vacated a criminal sentence that had been imposed against him. Fourth, Petitioner contends that the trial court harbored bias against him because he exposed the supposed fact that the trial court colluded with the prosecutor and the Los Angeles Police Department to ensure that Petitioner was convicted of the charged crimes.

None of Petitioner's allegations is sufficient to show that the trial court was biased against him. First, Petitioner's citation to the trial court's statement regarding *pro pers* is both incomplete and taken out of context. Indeed, the trial court's statement, when read in context, does not suggest that the court harbored ill will towards, or bias against, those who opted to represent themselves; rather, the trial court's statement expressed his view that *pro pers* deprived themselves of the benefit of a trained attorney. Specifically, the trial court stated:

> I don't like *pro pers* in my court. It makes life very difficult, and I think they cheat themselves out of a really terrific defense. [¶] I don't think any *pro per* can match the quality of the public defenders, the alternate public defenders and the bar panel lawyers that we appoint to handle these types of cases. They're one stride ahead of you. [¶] As smart as you may be, sir, they still have the edge. I don't want to see somebody hamstring themselves and mess up . . . .

(RT at J-86.) Moreover, to the extent that the trial court expressed concern about how Petitioner's *pro per* status might "make life difficult," that concern does not show that

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[14](...continued)
allegations of judicial misconduct for first time before this Court in his traverse.

the trial court was biased against Petitioner. *See Larson*, 515 F.3d at 1067 (remarks that revealed mild frustration with petitioner's *pro se* lawyering skills did not establish actual bias).

Second, there is no evidence to suggest that the ethics complaints that Petitioner filed against the trial court impacted the court's view of Petitioner or any ruling that the court made. Indeed, it is unclear if the trial court even saw the complaints. What is more, the trial court, in response to a statement of disqualification filed by Petitioner, submitted a verified answer in which the court stated, among other things, that it was not prejudiced or biased against any party in Petitioner's case. Morever, the trial court stated that all of its rulings had "been based upon facts and arguments officially presented to [it] and upon [its] understanding of the law." (CT 1629). Aside from conclusorily alleging that the ethics complaints angered the trial court, Petitioner presents no evidence to undermine the trial court's verified statements.

Third, there is no reason to believe that the trial court was biased against Petitioner because, in the past, he successfully had vacated a criminal sentence that had been imposed against him. On the contrary, the record shows that the trial court did not know the nature of the case to which Petitioner referred, nor did the trial court know which judge had presided over that case:

> You have been alleging that this Court is prejudiced against you because you caused convictions on other cases to be reversed on judges that I might know. You haven't spelled out what cases those are– [¶] . . . [¶] who the judges are, what my relationship with those judges are, and why I would be inclined in any way whatsoever to hold it against you if you were successful as an appellate jailhouse lawyer. It's just nonsense.

(RT 12323.)

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Moreover, Petitioner's allegation in this regard is premised on the unfounded assumption that the trial court had an interest in ensuring that criminal defendants were convicted, as opposed to ensuring the proper administration of the law.[15]

Fourth, there is no merit to Petitioner's outlandish theory that the trial court harbored bias against Petitioner because he exposed the supposed fact that the trial court colluded with the prosecutor and the Los Angeles Police Department to ensure that Petitioner was convicted. Put simply, the record shows no evidence that the trial court colluded with anyone to ensure that Petitioner was convicted.

In sum, Petitioner has failed to show that the trial court was biased against him. Accordingly, the California Supreme Court's rejection of this claim was neither an unreasonable application of, nor contrary to, clearly established law as determined by the Supreme Court.[16]

b. Adverse Rulings

Petitioner also alleged in his state habeas petition that the trial court's rulings and findings before and during trial show that the trial court was biased against Petitioner. In support of this claim, Petitioner cites a slew of adverse rulings by the trial court, as well as instances where the trial court either questioned Petitioner about the relevancy of proposed lines of questioning or restricted Petitioner's examination of witnesses. Petitioner also faults the trial court for consistently interrupting Petitioner and prohibiting him from making full arguments.

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[15] Petitioner claims that a public defender informed Petitioner that the trial court was, as a general matter, biased against criminal defendants. The public defender's statement is not competent evidence because it is hearsay. Moreover, the Court has no indication of the basis for the public defender's purported statement.

[16] Petitioner suggests that his decision to represent himself was invalid because he was unaware that the trial court would engage in unlawful and unconstitutional misconduct throughout trial. As explained herein, the trial court did no such thing. Accordingly, Petitioner's challenge to his decision to represent himself is meritless.

"In the absence of any evidence of some extrajudicial source of bias or partiality, neither adverse rulings nor impatient remarks are generally sufficient to overcome the presumption of judicial integrity, even if those remarks are 'critical or disapproving of, or even hostile to, counsel, the parties, or their cases.'" *Larson*, 515 F.3d at 1067 (quoting *Liteky*, 510 U.S. at 555). Because Petitioner has provided no evidence of the trial court's alleged bias outside of these rulings, his claim that he was denied a fair trial because of those rulings fails.[17]

c. Allowing Petitioner to Hear Recording of Pre-Trial Video

Petitioner contends that the trial court did not allow him to hear video recordings that were played during the suppression hearing pertaining to his pre-trial statements to the investigating detective. At the hearing, Petitioner requested that the prosecutor turn up the volume of a video that was being played. The record indicates that the prosecutor addressed Petitioner's concern. In fact, the prosecutor retrieved her own speakers and played the video with no further comment or objection from Petitioner. As such, there is no merit to Petitioner's claim that the trial court prevented him from hearing the recording.

d. Hearing Motions That Were Not on Calender

Petitioner contends that the trial court displayed bias and prejudice by taking up motions that were not on calender. The trial court did so, according to Petitioner, in order to "catch Petitioner off-guard." (Lodged Doc. No. 21 at 127.) This claim is not supported by the record. Although Petitioner, at one point, complained to the trial court that he was unprepared to defend his motion to suppress the eyewitnesses' identifications because the motion was not on calendar, the trial court corrected Petitioner by noting that the motion to suppress, in fact, was on calendar. (RT J-25.)

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[17] The Court, again, notes that the trial court filed a verified answer in which it stated that all of its rulings had "been based upon facts and arguments officially presented to [it] and upon [its] understanding of the law." (CT 1629). Petitioner presents no evidence undermining the veracity of the trial court's answer.

Regardless, the judge agreed to continue the motion to another day when Petitioner could be more prepared. (RT at J-39.) What is more, as explained above, the trial court often assisted Petitioner throughout the trial. (*See supra.*)

Accordingly, the California Supreme Court reasonably denied this claim.

e. Refusing to Show Petitioner Documents Relating to His Prior Convictions

Petitioner complains that the trial court sabotaged his motion to dismiss his prior conviction, which, according to Petitioner, was obtained without the benefit of counsel. (Lodged Doc. No. 21 at 156.) According to Petitioner, the trial court misrepresented the record regarding the prior conviction and refused to release to Petitioner relevant documents pertaining to the prior conviction.

This claim is meritless. A review of the record shows that, in resolving the motion, the trial court set forth the relevant facts and explained to Petitioner what he would have to do to show that the prior conviction was somehow invalid.[18] In doing so, the trial court quoted from transcripts in the prior case– transcripts that Petitioner provided to the court. At some point in the hearing, the prosecutor attempted to list out Petitioner's many prior convictions, and Petitioner requested that he wanted a copy of "anything [he had not] seen." (RT J-56.) There is no indication in the record that Petitioner was not provided with any such document. Indeed, there is no reason to believe that there were any such documents. Regardless, there is little, if any, reason to conclude that the trial court's resolution of the issue was erroneous or that, even if it were erroneous, the resulting error had any impact on the jury's verdict or the trial proceedings. More importantly, as discussed above, adverse rulings, like the trial

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[18] Petitioner argued that, in his prior conviction, he was unaware that he had the right to court-appointed counsel and that the trial court in the prior case forced him to defend himself *pro per*.

court's ruling regarding the prior conviction issue, are insufficient "to overcome the presumption of judicial integrity. . . ." *Larson*, 515 F.3d at 1067.[19]

f. Petitioner's Eyewitness Expert

Petitioner contends that the trial court falsely informed him that the eyewitness expert whom the court had appointed for Petitioner did not wish to accept the appointment. This claim fails for a variety of reasons. First, the record shows that the court clerk received a call from Petitioner's investigator stating that the expert did not wish to accept the appointment. Thus, contrary to Petitioner's claim, the trial court did not falsely report any statement from the expert; instead, Petitioner's investigator provided the statement that Petitioner contends was false. Notably, Petitioner has failed to provide a declaration from his investigator regarding whether or not the investigator relayed the statement pertaining to the expert's appointment. Second, during the eight weeks during which Petitioner's trial occurred, Petitioner never attempted to contact the expert to determine whether, in fact, the expert would be willing to accept the court's appointment. Third, Petitioner has presented no competent evidence suggesting that the investigator's statement regarding the expert was incorrect. Although Petitioner has submitted a declaration from someone who purports to relay a statement from the expert, that statement is inadmissible hearsay. Finally, when the trial court learned that the expert did not wish to accept the appointment, the court provided Petitioner with a list of alternate experts and stated that Petitioner could select another expert. To the extent that Petitioner believes he had a right to the specific expert that the court initially appointed, he is incorrect.

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[19] As he does throughout his myriad of judicial misconduct claims, Petitioner contends that the trial court acted as a second prosecutor in regards to Petitioner's motion to dismiss his prior conviction. That contention is not borne out by the record. Rather, the trial court explained what Petitioner had to prove in order to succeed on his motion.

Given these facts, the California Supreme Court reasonably rejected this allegation of judicial misconduct.

g. Petitioner's Telephone Privileges

Petitioner contends that the trial court ensured that Petitioner had no telephone privileges during trial. This claim is meritless. As an initial matter, Petitioner provides no documentation showing that, in fact, his telephone privileges were restricted during the relevant period–let alone that the trial court was responsible for any such restrictions. Moreover, when Petitioner brought this issue to the court's attention, the court made clear that no one associated with the court had impeded Petitioner's use of the telephone and that, in fact, the court had "constantly writ[ten] orders" providing money for Petitioner to use the telephone.

As such, the California Supreme Court reasonably rejected this allegation of judicial misconduct.

h. Petitioner's Subpoena Duces Tecum

Petitioner contends that the trial court restricted Petitioner's questioning of Detective Newell regarding a subpoena duces tecum that Petitioner evidently served on the detective. The following facts are relevant to this claim. After Detective Newell had completed his testimony on October 31, 2012, Petitioner, outside the presence of the jury, asked Detective Newell if he had received Petitioner's subpoena duces tecum about "the color photograph of the gun." In response, the trial court stated, "We're through for the day. The detective can leave whenever he wants. [¶] Court's in recess." (RT 7879.)

Contrary to Petitioner's claim, the court did not restrict Petitioner's questioning of Detective Newell. First, the trial court did not forbid Detective Newell from answering. Instead, the court presumably determined that his answer did not need to be on the record. Indeed, the court stated that Detective Newell "[could] leave whenever he wants." Second, this exchange did not occur in front of the jury and, therefore, had no impact on Petitioner's cross-examination of Detective Newell.

Third, Petitioner questioned Detective Newell about the photograph the following day, and Detective Newell testified that he had received a color photograph of the gun from Petitioner's investigator. Thus, the question of whether Detective Newell received Petitioner's subpoena duces tecum was irrelevant.

For the foregoing reasons, the California Supreme Court reasonably rejected this allegation of judicial misconduct.

i. Petitioner's Cross-Examination of Detective Newell

Petitioner contends that the trial court interfered with his cross-examination of Detective Newell. Specifically, Petitioner cites the following instances that he contends amount to misconduct: (1) asking Detective Newell what he meant to convey in his police report by stating that Petitioner was "confused"; (2) ruling that Petitioner's questioning about a photograph apparently taken from a 7-Eleven store was a "waste of time" under California Evidence Code section 352; (3) threatening to take away Petitioner's *pro se* status when he called the judge "crazy"; and (4) directing Petitioner to read into the record any of Detective Newell's pre-trial statements that Petitioner perceived to be inconsistent with the detective's trial testimony.

Each of these allegations is meritless. First, the trial court committed no misconduct in questioning Detective Newell about the meaning of the language used in his report. Indeed, a trial judge has broad authority to explain and comment on the evidence at trial. *Quercia*, 289 U.S. at 469-70; *see United States v. Parker*, 241 F.3d 1114, 1119 (9th Cir. 2001) (stating that trial judge may "'participate in the examination of witnesses to clarify issues and call the jury's attention to important evidence'") (citation omitted).

Second, the trial court acted within its discretion to rule the photograph from the 7-11 inadmissible under California Evidence Code section 352. The right to present relevant evidence is subject to reasonable restrictions, such as state evidentiary rules. *Moses v. Payne*, 555 F.3d 742, 757 (9th Cir. 2009); *see also LaJoie v. Thompson*, 217 F.3d 663, 668 (9th Cir. 2000) (observing that right to present evidence in criminal case

"'may, in appropriate circumstances, bow to accommodate other legitimate interests in the criminal trial process'") (quoting *Michigan v. Lucas*, 500 U.S. 145, 149, 111 S. Ct. 1743, 114 L. Ed. 2d 205 (1991)). Indeed, "state and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials. Such rules do not abridge an accused's right to present a defense so long as they are not 'arbitrary' *or* 'disproportionate to the purposes they are designed to serve.'" *Green v. Lambert*, 288 F.3d 1081, 1090 (9th Cir. 2002) (quoting *United States v. Scheffer*, 523 U.S. 303, 308, 118 S. Ct. 1261, 140 L. Ed. 2d 413 (1998)) (*emphasis in original*). The Supreme Court, moreover, has "indicated its approval of 'well-established rules of evidence [that] permit trial judges to exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury.'" *Moses*, 555 F.3d at 757 (quoting *Holmes v. South Carolina*, 547 U.S. 319, 326, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006)). Here, the trial court, in accordance with the discretion afforded to it under California law, determined that the questioning regarding the photograph would necessitate an undue consumption of time. The trial court committed no misconduct in doing so.

Third, the trial court had the authority to warn Petitioner that he could jeopardize his *pro se* status by directing *ad hominem* attacks at the court. The Supreme Court has made clear that the right of self-representation "'is not a license to abuse the dignity of the courtroom.'" *Id.* (quoting *Faretta v. California*, 422 U.S. 806, 819, n.46, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975)); *see also Peters v. Gunn*, 33 F.3d 1190, 1192 (9th Cir. 1994) (defendant's right to self-representation may be overridden if he demonstrates inability or unwillingness "'to abide by rules of procedure and courtroom protocol'") (quoting *McKaskle v. Wiggins*, 465 U.S. 168, 173, 104 S. Ct. 944, 948, 79 L. Ed. 2d 122 (1984)). Here, Petitioner abused the dignity of the courtroom by calling the trial court "crazy." In light of that transgression, the trial

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court was well within its authority to admonish Petitioner that he might lose his *pro se* status if he committed another such transgression.

Finally, the trial court committed no misconduct by directing Petitioner to read into the record any of Detective Newell's pre-trial statements that Petitioner perceived to be inconsistent with the detective's trial testimony. A review of the Reporter's Transcript shows that the trial court directed Petitioner to read into the record Detective Newell's pre-trial statements because Petitioner's preceding questioning of Newell involved oftentimes irrelevant and confusing matters. By instructing Petitioner to read into the record Detective Newell's pre-trial statements, the trial court merely was attempting to clarify the issues for the jury and keep the jury (as well as Petitioner) focused on relevant matters and to ensure the efficient presentation of evidence.

In short, none of the trial court's actions with regards to Petitioner's questioning of Detective Newell amounts to misconduct. The California Supreme Court, therefore, reasonably rejected this claim.

j. Petitioner's Investigator

Petitioner contends that the trial court committed the following acts of misconduct with regard to Petitioner's investigator: (1) having improper extra-judicial communications with the investigator during which the trial court turned the investigator against Petitioner; (2) being "overjoyed" when the investigator gave testimony that was detrimental to Petitioner's defense; (3) sabotaging Petitioner's attempts to prosecute a new trial motion by depriving him of the use of an investigator; and (4) instructing the investigator not to perform any investigations for Petitioner.

Each of these claims is meritless. First, there is no indication in the record that the trial court and Petitioner's investigator had any extra-judicial communications–let alone one in which the trial court interfered with the investigator's work on

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Petitioner's case. Accordingly, this claim fails for lack of evidence. *See James*, 24 F.3d at 26; *Jones*, 66 F.3d at 205 (*supra*).

Second, Petitioner cites no evidence that the trial court took any kind of delight when Petitioner's investigator offered testimony that was adverse to Petitioner's defense. Instead, the record shows that the investigator conceded the possibility that a fact that was adverse to Petitioner might be true. There is nothing in the record to suggest that the trial court had any emotional or verbal reaction one way or the other to this concession. *See James*, 24 F.3d at 26; *Jones*, 66 F.3d at 205.

Third, there is no merit to Petitioner's claim that the trial court sabotaged his attempts to prosecute a new trial motion by depriving him of the use of an investigator. To be sure, the trial court refused to appoint Petitioner a second investigator after the court learned that the investigator who originally had been appointed for Petitioner was unavailable. However, the record shows that, before doing so, the trial court inquired as to why Petitioner needed an investigator to file a new trial motion and that Petitioner was unable to articulate any valid reason as to why he needed an investigator. Moreover, Petitioner has alleged no facts suggesting that he would have succeeded on his new trial motion had the trial court appointed an investigator to assist him. Indeed, as discussed throughout this Report, the evidence of Petitioner's guilt was overwhelming. (*See supra*.) Under those circumstances, the trial court did not commit constitutional error in denying Petitioner's request for appointment of an investigator to aid Petitioner in filing a new trial motion.

Fourth, Petitioner's claim that the trial court instructed Petitioner's investigator not to perform any investigations for Petitioner is meritless. Like Petitioner's other allegations of judicial misconduct, this claim finds no factual support in the record. Accordingly, the California Supreme Court did not commit constitutional error in denying it.

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k. Instructing Petitioner Regarding Objections

In his next allegation of judicial misconduct, Petitioner faults the trial court for instructing him not to object in front of the jury. Presumably,[20] this claim involves the trial court's response to Petitioner's complaints about how he was being questioned by the prosecutor. (*See* RT 7830-31.) A review of the record shows only that the trial court was properly exercising its authority to ensure the efficient presentation of evidence. To that end, the trial court explained to Petitioner what he should do if he did not understand the prosecutor's questions. There is no indication in the record that the trial court took any action or made any statement that could be interpreted as an order preventing Petitioner from addressing any improper or confusing questions by the prosecutor.

l. Communicating Contempt for Petitioner to the Jury

In his next allegation of judicial misconduct, Petitioner contends that the trial court communicated its contempt for Petitioner to the jury. In particular, Petitioner faults the trial court for "mak[ing] faces of shock [and] disbelief, and at times shak[ing] his head, [and] inform[ing] jurors that [events] did not occur as [P]etitioner testified." (Lodged Doc. No. 21 at 127; *see also id. at* 215.) Petitioner also complains that the trial court made angry, disrespectful facial expressions when Petitioner objected.

This claim is meritless. As to Petitioner's claim that the trial court used facial expressions to convey its contempt for Petitioner, that claim fails for lack of evidence. Moreover, even if Petitioner could show frustration towards him on the trial court's part, that fact would not warrant habeas relief because Petitioner has cited no extrajudicial source for the trial court's frustration. *See Larson*, 515 F.3d at 1067 (quoting *Liteky*, 510 U.S. at 555) (*supra*). As the Supreme Court has explained:

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[20] In support of this claim, Petitioner cites two pages of the Reporter's Transcript that do not reflect any instruction by the trial court regarding Petitioner objecting in front of the jury. (*See* Lodged Doc. No. 21 at 215 (citing RT 7811-12).)

> Not establishing bias or partiality, however, are expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women, even after having been confirmed as federal judges, sometimes display. 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.

Moreover, Petitioner is not entitled to relief with respect to his allegation that the trial court informed jurors that events did not occur as Petitioner testified that they had. The only example Petitioner provides to support this claim is an instance where the trial court questioned whether Petitioner could read an upside-down police report without the benefit of his glasses. But a review of the record does not support Petitioner's claim that the trial court instructed the jury that Petitioner's account of the events was untrue. Rather, at most, the trial court expressed scepticism at Petitioner's ability to read the police report under such circumstances. Regardless, assuming that the trial court's questioning constitutes misconduct, it did not deprive Petitioner of a fair trial because the trial court repeatedly instructed the jury that the jury (not the trial court) was the factfinder and that the jury had the responsibility to evaluate the witnesses' testimony. (*See supra.*) Nor did the trial court's comments result in any cognizable prejudice, particularly in light of the fact that Petitioner confessed to committing the crimes with which he was charged and because that confession was corroborated on multiple levels. (*See supra.*)

Accordingly, the California Supreme Court reasonably rejected this claim.

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m. Motion to Disqualify Presiding Judge

In his final allegation of judicial misconduct, Petitioner claims that the trial court committed misconduct by failing to rule on a motion to disqualify the presiding judge that Petitioner filed March 8, 2012.[21]

Section 170.6 of the California Code of Civil Procedure "permits a party to an action or proceeding to disqualify a judge for prejudice based on a sworn statement, without having to establish prejudice as a fact to the satisfaction of a judicial body." *Stephens v. Superior Court*, 96 Cal. App. 4th 54, 59, 116 Cal. Rptr. 2d 616 (2002). Accordingly, when a section 170.6 motion is timely filed, "the court must accept it without further inquiry." *Id.* In criminal cases, a section 170.6 motion is timely filed if it is made "within 10 days after the all purpose assignment." Cal. Code of Civil Proc. § 170.6(a)(2). Irrespective of that ten-day period, a section 170.6 motion is untimely if it is made after the presiding judge has heard and ruled on contested issues of law or fact. *Swift v. Superior Court*, 172 Cal. App. 4th 878, 883, 91 Cal. Rptr. 3d 504 (2009).

Here, Petitioner cannot succeed with his judicial misconduct claim regarding the trial court's resolution (or the court's failure to resolve) Petitioner's motion for disqualification. First, assuming the March 8, 2012 motion to disqualify was timely filed, it would not have been granted because Petitioner had already filed section a 170.6 motion to disqualify the original presiding judge on June 7, 2011. (CT 727 (motion to disqualify Judge Daniel Feldstern).) Because Petitioner already had peremptorily challenged one presiding judge in his criminal action, he had no right to peremptorily challenge a second judge. *See Louis v. Superior Court*, 209 Cal. App. 3d 669, 683, 257 Cal. Rptr. 458 (2009).

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[21] Petitioner filed a motion to disqualify on February 22, 2012; however, that motion, according to Petitioner, was "defective." (Lodged Doc. No. 21 at 169.) Accordingly, he filed the March 8, 2012 motion to disqualify.

Second, to the extent that Petitioner believes that the trial court misapplied California law in addressing (or not addressing) the March 8, 2012 motion to disqualify, that claim is not cognizable on federal habeas review. "In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws or treaties of the United States." *Estelle v. McGuire*, 502 U.S. 62, 68, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991); *see also* 28 U.S.C. § 2254(a). Habeas relief is not available for an alleged error in the interpretation or application of state law. *Estelle*, 502 U.S. at 68.

Finally, contrary to Petitioner's allegations, there is no reason to believe that the presiding judge was biased against Petitioner. Indeed, as the court of appeal noted, the trial court oftentimes aided Petitioner throughout the trial. Although the trial court entered many rulings adverse to Petitioner, those rulings are insufficient to show bias. (*See supra.*) Accordingly, Petitioner cannot show that the trial court deprived Petitioner of his right to a fair trial by neglecting to rule on Petitioner's second motion to disqualify.

The California Supreme Court, therefore, reasonably rejected this claim.

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At bottom, Petitioner contends that the trial court was bent on ensuring that Petitioner be found guilty of the crimes with which he was charged. To that end, according to Petitioner, the trial court intentionally misapplied the law, distorted facts, and altered evidence in issuing rulings that were adverse to Petitioner. Moreover, Petitioner maintains that the trial court covered up its actions by omitting any evidence of its misdeeds from the record. Further, according to Petitioner, the trial court assumed the role of a second prosecutor during trial, whereby the trial court thwarted Petitioner's attempts to present exculpatory evidence and elicited false testimony from witnesses in order to secure Petitioner's conviction.

The Court has considered Petitioner's numerous allegations individually and collectively. Having done so, the Court concludes that none of those allegations is

supported by the record. Rather, the trial court exercised its proper role in applying the law, ensuring the efficient presentation of relevant evidence, and maintaining proper courtroom decorum. To the extent that the trial court committed errors in doing so, those errors do not establish bias or impartiality on the court's part. More importantly, Petitioner has not, and cannot, point to any extrajudicial source of bias or partiality that led to any purported errors in the trial court's rulings.

Accordingly, the state courts' rejection of Petitioner's numerous judicial misconduct allegations was neither an unreasonable application of, nor contrary to, clearly established federal law as determined by the Supreme Court. As such, Petitioner is not entitled to habeas relief as to any of his allegations of judicial misconduct.[22]

B. The Prosecutor's Conduct

In his fourth ground for relief, Petitioner contends that the prosecutor committed several acts of misconduct that deprived Petitioner of his right to a fair trial. First, Petitioner maintains that the prosecutor altered evidence regarding whether or not Petitioner was coerced into waiving his Fifth Amendment right to counsel. Specifically, Petitioner claims that the prosecutor altered a videotape of a January 24, 2010 interrogation of Petitioner. At the commencement of that interrogation, detectives informed Petitioner of his *Miranda* rights. After speaking with the

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[22] In connection with his allegations of judicial misconduct, Petitioner alludes to several errors committed by either the trial court or the various experts who were appointed to Petitioner. It is unclear if Petitioner intended to assert those various trial errors as independent claims. To the extent that he did, they fail because Petitioner cannot show that any of the purported errors had a substantial and injurious impact on the jury's verdict or on the trial proceedings in light of the overwhelming evidence of Petitioner's guilt–evidence that included, but was in no way limited to, Petitioner's detailed confession to the crimes, the recovery from Petitioner's home of items matching those used by the culprit of the charged robberies, and Petitioner's admissions during the recorded phone call between him and his daughter. *See Brecht v. Abrahamson,* 507 U.S. 619, 623, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1993).

detectives for approximately nine minutes, Petitioner requested counsel. The videotape of the interrogation shows that, thereafter, the detectives left the room and that Petitioner was sitting by himself. However, according to Petitioner, the end of the videotape was altered because he claims that one of the detectives, at some point, pounded his hand on the table at which Petitioner was seated and told Petitioner that there was no reason to talk to him because Petitioner had already been identified as the culprit. In an effort to substantiate this account, Petitioner notes that the videotape does not show the detective handing Petitioner a business card–a fact that was not in dispute. Citing this fact, Petitioner concludes that the videotape must have been altered and that his account of the detective's actions were accurate.

Second, Petitioner maintains that the prosecutor knowingly presented false testimony to secure Petitioner's conviction. This claim presumably involves a conversation that Petitioner initiated with Detective James Newell at Petitioner's preliminary hearing.[23] Newell testified at trial that, at Petitioner's request, he spoke with Petitioner during the preliminary hearing. According to Detective Newell, Petitioner complained that he was being charged with using a firearm during the robberies when, in fact, he only had used an "airsoft gun." Detective Newell took Petitioner's statement as an admission that Petitioner had committed the charged robberies. Detective Newell further testified that he later received a photograph from Petitioner's investigator depicting the airsoft gun that Petitioner claimed to have used in the robberies.

Petitioner asserts that Detective Newell fabricated this conversation. In an effort to prove that assertion, Petitioner notes that he was never actually charged with using a firearm and, as such, would have had no reason to concede to Detective

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[23] Petitioner did not specify in his FAP which portion of Newell's testimony was false. Presumably, however, he seeks to assert the same allegation that he asserted in his state habeas petition. To the extent that he does not, his claim fails because it is conclusory and lacks any factual support. *See James*, 24 F.3d at 26; *Jones*, 66 F.3d at 205 (*supra*).

Newell that he used an airsoft gun in committing the charged robberies. The California Supreme Court rejected both of the claims of prosecutorial misconduct on the merits. As explained below, the California Supreme Court did not commit constitutional error in doing so.

Prosecutorial misconduct does not rise to the level of a constitutional violation unless it "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, 91 L. Ed. 2d 144 (1986) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643, 94 S. Ct. 1868, 40 L. Ed. 2d 431 (1974)); *Comer v. Schriro*, 480 F.3d 960, 988 (9th Cir. 2007). "[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, 71 L. Ed. 2d 78 (1982). Assuming a petitioner can establish that the prosecutor engaged in misconduct, habeas relief is nevertheless unwarranted unless the petitioner can show that the misconduct had a substantial and injurious impact on the jury's verdict. *Karis v. Calderon*, 283 F.3d 1117, 1128 (9th Cir. 2002).

The knowing use of false evidence by the state, or the failure to correct false evidence, violates due process. *Napue v. Illinois*, 360 U.S. 264, 269, 79 S. Ct. 1173, 3 L. Ed. 2d 1217 (1959). In *Napue*, the Supreme Court made clear that this prohibition against using false testimony applies even when the testimony in question is relevant only to a witness's credibility. 360 U.S. at 269. A claim under *Napue* will succeed when "'(1) the testimony (or evidence) was actually false, (2) the prosecution knew or should have known that the testimony was actually false, and (3) the false testimony was material.'" *Jackson v. Brown*, 513 F.3d 1057, 1071-72 (9th Cir. 2008) (quoting *Hayes v. Brown*, 399 F.3d 972, 984 (9th Cir. 2005) (*en banc*)). For purposes of a *Napue* violation, evidence is "material" if there is "'*any* reasonable likelihood that the false testimony could have affected the judgment of the jury.'" *Jackson*, 513 F.3d at 1076 (emphasis in original) (citation omitted).

Here, neither of Petitioner's allegations of prosecutorial misconduct warrants habeas relief. First, Petitioner's claim that the prosecutor altered the videotape of Petitioner's initial interrogation fails for lack of evidence. Although Petitioner insists that the prosecutor edited the portion of the video in which the detective slammed his fist against the table, nothing in the record supports this version of events. And, indeed, the videotape of the interview undermines it. Petitioner maintains that the detective became angry and slammed his fist because Petitioner invoked his right to counsel. However, the videotape of the interview shows no such thing. Rather, it shows that Petitioner invoked his right to counsel and that, thereafter, the detectives left Petitioner alone for several minutes. The videotape then ends. If, as Petitioner contends, the detective became angered by Petitioner's invocation of his right to counsel, the videotape would have shown that. Instead, it shows that the detectives left Petitioner alone.

Moreover, the fact that the videotape does not show the detective handing Petitioner a business card does not prove that the videotape was altered.[24] As the trial court noted, the videotape ends with Petitioner sitting alone in the room. The detective likely handed Petitioner his card after the tape ended.[25] In any event, there is no evidence whatsoever to support Petitioner's contention that the prosecutor altered

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[24] The detective testified that, in fact, he gave Petitioner a business card sometime after Petitioner invoked his right to counsel. The detective did so, according to his testimony, because Petitioner was "getting pretty emotional" and the detective believed that Petitioner wanted to talk. (RT C-156.) The detective was never questioned, either by Petitioner or the prosecutor, as to when the detective gave Petitioner the card.

[25] To be sure, one could argue the same thing with respect to Petitioner's claim that the detective slammed his fist against the table. However, that scenario is unlikely because the videotape shows that Petitioner was left alone in the room for several minutes after he invoked his right to counsel. Presumably, if the detective were so angered by Petitioner's invocation of his right to counsel that the detective violently reacted to it, the detective would have done so when Petitioner invoked his right to counsel–not several minutes later after having left Petitioner's presence.

the tape, nor is there any evidence to support Petitioner's wild conspiracy theory that the prosecutor and trial court conspired to cover up the fact that the videotape was altered.

Second, there is no merit to Petitioner's claim that the prosecutor knowingly presented false testimony from Detective Newell about Petitioner's statements during the preliminary hearing. To be sure, Petitioner denies that the conversation at the preliminary hearing ever took place. However, Petitioner's denial merely challenges Detective Newell's testimony: it does not prove that testimony false. *United States v. Brown*, 634 F.2d 819, 827 (5th Cir. 1981) (explaining that, to establish prosecutorial misconduct based on knowing use of perjured testimony, "it is not enough that the testimony is challenged by another witness or is inconsistent with prior statements").

Furthermore, the fact that Petitioner was not charged with using a firearm when he made his incriminating statement does not prove that Detective Newell's testimony was false. When the conversation occurred, Petitioner may have anticipated being charged with using a gun and, therefore, wanted to assure law enforcement that, in fact, he only had used an airsoft gun. And, in fact, Petitioner ultimately was alleged to have used a deadly and dangerous weapon in committing each of the charged crimes. What is more, the jury found that allegation to be true. Thus, Petitioner has not shown that Detective Newell's testimony was false.

In short, Petitioner has not shown that the prosecutor committed misconduct. Accordingly, the California Supreme Court's rejection of Petitioner's prosecutorial misconduct claims was neither an unreasonable application of, nor contrary to, clearly established federal law as determined by the Supreme Court.

C. Record of Petitioner's Trial

In his next claim for relief, Petitioner maintains that the trial court violated his right to a fair trial by failing to have portions of the trial court's proceedings recorded and made part of the official record on appeal. Specifically, Petitioner complains that the record on appeal omitted the following two portions of the trial court proceedings:

(1) one of two pre-trial hearings that occurred on April 9, 2012; and (2) portions of the proceedings that occurred on February 27, 2013.

The April 9, 2012 hearing, according to Petitioner, was critical because, during that hearing, the trial court refused to preserve the integrity of a recording of Petitioner's pre-trial interrogation with police. During that interrogation, according to Petitioner, one of the investigating detectives slammed his fist on the table in anger when Petitioner invoked his right to counsel. Although the recording of the interrogation that was played in court did not capture any such incident, Petitioner maintains that the recording that was played in court was altered. Moreover, he appears to suggest that the transcript of the hearing from April 9, 2012 would somehow prove that the recording was altered.

Petitioner also contends that the trial court intentionally omitted from the record a portion of the February 27, 2013 proceeding. According to Petitioner, the missing portion of the proceeding reflects Petitioner calling the presiding judge a "blatant liar and a fabricator." (Traverse at 64.) The California Supreme Court rejected both of these claims on their respective merits. As explained below, the California Supreme Court did not commit constitutional error in doing so.

The Supreme Court has never held that a verbatim record is necessary to allow a criminal defendant to challenge his conviction. On the contrary, the Supreme Court has stated that a "'record of sufficient completeness' *does not translate automatically into a complete verbatim transcript.*" *Mayer*, 404 U.S. at 194 (*emphasis added*).

To satisfy the constitutional guaranties of due process and equal protection, the state must provide a defendant with a "record of sufficient completeness to permit proper [appellate] consideration of his claims." *Mayer v. City of Chicago*, 404 U.S. 189, 193-94, 92 S. Ct. 410, 30 L. Ed. 2d 372 (1971); *Britt v. North Carolina*, 404 U.S. 226, 227, 92 S. Ct. 431, 30 L. Ed. 2d 400 (1971) ("[T]here can be no doubt that the State must provide an indigent defendant with a transcript of prior proceedings when

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that transcript is needed for an effective defense or appeal."); *Griffin v. Illinois*, 351 U.S. 12, 19, 76 S. Ct. 585, 100 L. Ed. 891 (1956).

Moreover, assuming a habeas petitioner can show that he was not provided a record of sufficient completeness, habeas relief nevertheless is unwarranted unless he can establish prejudice from the incomplete record. *See Kennedy v. Lockyer*, 379 F.3d 1041, 1054-55 (9th Cir. 2004) (reviewing record to determine if denial of transcript had a substantial and injurious effect on jury's verdict); *Madera v. Risley*, 885 F.2d 646, 649 (9th Cir. 1989) (finding no prejudice to petitioner where portions of petitioner's trial proceedings were not recorded in official transcript); *see also United States v. Anzalone*, 886 F.2d 229, 232 (9th Cir. 1989) ("[E]ven assuming there were omissions in the transcripts, appellant cannot prevail without a showing of specific prejudice.").

Here, assuming error,[26] Petitioner can show no prejudice with respect to the purportedly deficient record on appeal. First, the missing April 9, 2012 hearing was not necessary for Petitioner to challenge what he claims to be the altered recording of his pre-trial interrogation. Indeed, Petitioner, to this day, has failed to show how that transcript would support his challenge to the authenticity of the recording of his pre-trial interrogation. What is more, Petitioner did, in fact, assert a challenge both in state court and in this Court to the authenticity of the recording. (*See supra.*) Moreover, aside from possibly memorializing Petitioner's claim that the recording was altered, there is no reason to believe that the content of the missing hearing would have impacted Petitioner's challenge to the authenticity of the recording. And, even without the hearing in question, the trial record contains Petitioner's repeated challenges to the authenticity of the recording, as well as the trial court's responses to

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[26] Respondent concedes that the trial record does not contain the April 9, 2012 hearing about which Petitioner complains. According to the court reporter, that hearing–one of two that occurred that day–was inadvertently omitted from the trial court record.

Petitioner's challenges. Finally, as explained in connection with Petitioner's prosecutorial misconduct claim, there is simply no evidence to support Petitioner's claim that the recording of the interrogation was altered.[27]

Second, there is no merit with respect to Petitioner's claims regarding the February 27, 2013 proceeding. As an initial matter, there is no evidence, other than Petitioner's self-serving allegations, to suggest that, in fact, any portion of the February 27, 2013 proceeding was omitted. Putting that aside, the purportedly omitted portion of the proceeding was not necessary to allow Petitioner to challenge his conviction and sentence. Indeed, according to Petitioner, the omitted portion of the transcript reflected Petitioner labeling the presiding judge a "blatant liar and a fabricator." There is no reason to believe–and Petitioner provides no explanation as to how–those statements would have aided Petitioner's challenges to his conviction. Thus, Petitioner has not shown that he would have succeeded with any appellate challenge even if he had access to the purportedly omitted portion from the February 27, 2103 hearing.

For the foregoing reasons, the California Supreme Court's rejection of this claim was neither an unreasonable application of, nor contrary to, clearly established federal law as determined by the Supreme Court.

D. Appellate Counsel's Performance

In his next claim for relief, Petitioner contends that his appellate counsel failed to provide effective assistance of counsel on appeal by committing the following errors in connection with Petitioner's direct appeal: (1) failing to augment the trial court record on appeal to include the missing April 9, 2012 hearing transcript; (2)

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[27] Petitioner asserted a corresponding judicial misconduct claim alleging that the trial court and court reporter conspired to deprive Petitioner of an adequate record for review by intentionally omitting his objections and the parties' discussions. That claim fails for the same reasons as those cited above.

failing to argue on appeal that Petitioner's confession was obtained after he had invoked his right to counsel; and (3) failing to argue on appeal that the trial court applied the wrong Supreme Court precedent in denying Petitioner's motion to suppress the witnesses' in-court identifications. The California Supreme Court rejected each of these allegations of attorney error. As explained below, the California Supreme Court did not commit constitutional error in doing so.

The standards for assessing the performance of trial and appellate counsel are the same. *Evitts v. Lucey*, 469 U.S. 387, 395-99, 105 S. Ct. 830, 83 L. Ed. 2d 821 (1985); *Cockett v. Ray*, 333 F.3d 938, 944 (9th Cir. 2003). As to each allegation of error, petitioner bears the burden of establishing both components of the standard set forth in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Under the first prong of that test, the petitioner must prove that his attorney's representation fell below an objective standard of reasonableness. *Id.* at 687-88. To establish deficient performance, the petitioner must show his counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 687; *Williams v. Taylor*, 529 U.S. 362, 391, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000). In reviewing trial counsel's performance, however, courts "strongly presume[] [that counsel] rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Strickland*, 466 U.S. at 690; *Yarborough v. Gentry*, 540 U.S. 1, 8, 124 S. Ct. 1, 157 L. Ed. 2d 1 (2003). Only if counsel's acts and omissions, examined within the context of all the surrounding circumstances, were outside the "wide range" of professionally competent assistance, will petitioner meet this initial burden. *Kimmelman v. Morrison*, 477 U.S. 365, 386, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986); *Strickland*, 466 U.S. at 690. In applying that standard, courts must be mindful that an

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appellate counsel has no constitutional duty to raise every issue, where, in the attorney's judgment, the issue has little or no likelihood of success. *McCoy v. Wisconsin*, 486 U.S. 429, 436, 108 S. Ct. 1895, 100 L. Ed. 2d 440 (1988).

Under the second part of *Strickland*'s two-prong test, the petitioner must show that he was prejudiced by demonstrating a reasonable probability that, but for his counsel's errors, the result would have been different. 466 U.S. at 694. The errors must not merely undermine confidence in the outcome of the trial or the appeal, but must result in a proceeding that was fundamentally unfair. *Williams*, 529 U.S. at 393 n.17; *Lockhart*, 506 U.S. at 369. The petitioner must prove both deficient performance and prejudice. A court need not, however, determine whether counsel's performance was deficient before determining whether the petitioner suffered prejudice as the result of the alleged deficiencies. *Strickland*, 466 U.S. at 697.

Here, none of Petitioner's allegations of attorney error warrants relief. First, assuming error on counsel's part, Petitioner can show no prejudice with respect counsel's failure to augment the trial court record to include the April 9, 2012 hearing. As explained above, there is no reason to believe that the contents of that hearing would have impacted the appellate court's consideration of Petitioner's claims on appeal. (*See supra.*)

Second, Petitioner's other two challenges to counsel's performance fail because they involve counsel's strategic decisions as to which claims to assert on appeal. In a fifteen-page letter written to Petitioner, appellate counsel stated why he was not challenging either the admissibility of Petitioner's pre-trial statements to police or the case law that the trial court applied in rejecting Petitioner's challenges to the witnesses' in-court identifications. (*See* Lodged Doc. No. 21 at 698-713.) Counsel's fifteen-page letter to Petitioner provides detailed explanations as to counsel's approach, generally, to deciding whether or not to assert a claim on appeal, as well as providing detailed explanations, specifically, regarding the claims that counsel declined to assert in Petitioner's direct appeal. (*See id.*) In other words, the record is

clear that counsel was aware of the issues that Petitioner wished to assert on appeal, but made an informed, strategic decision against asserting those claims. That decision cannot be second-guessed on federal habeas review. *See Strickland*, 466 U.S. at 690 (stating that "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable"); *see also Silva v. Woodford*, 279 F.3d 825, 844 (9th Cir. 2002) (noting United States Supreme Court precedent dictates that counsel commits no error when he or she makes an informed strategic decision) (citing *Burger v. Kemp*, 483 U.S. 776, 107 S. Ct. 3114, 97 L. Ed. 2d 638 (1987)).

Moreover, counsel's decision was sound under the circumstances. As appellate counsel noted, any challenge to the admission into evidence of Petitioner's pre-trial statements to police would have failed because Petitioner did not make an unequivocal request for counsel. A suspect who is subject to custodial interrogation has the right to remain silent and the right to speak with an attorney. *Miranda v. Arizona*, 384 U.S. 436, 444-79, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966); *see also Dickerson v. United States*, 530 U.S. 428, 442, 120 S. Ct. 2326, 147 L. Ed. 2d 405 (2000). Consequently, once a suspect requests counsel, questioning must stop until an attorney is present. *See Davis v. United States*, 512 U.S. 452, 458, 114 S. Ct. 2350, 2356, 129 L. Ed. 2d 362 (1994). Questioning need not cease, however, where the suspect's request for counsel is ambiguous. *Id.* at 459.

Courts engage in an "objective inquiry" to determine whether the suspect has made "some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney." *Id.* "'Although a suspect need not speak with the discrimination of an Oxford don, he must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney.'" *Garcia v. Long*, 808 F.3d 771, 777 (9th Cir. 2015 (quoting *Davis*, 512 U.S. at 459).

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The Supreme Court's opinion in *Davis* illustrates how this objective inquiry works in practice. In *Davis*, the suspect, after being advised of his *Miranda* rights, agreed to submit to police questioning. 512 U.S. at 2351. After about an hour and a half of questioning, however, the suspect stated, "Maybe I should talk to a lawyer." *Id.* Rather than cease questioning, the officers asked the suspect if he was requesting a lawyer, and the suspect relayed that he was not. Questioning then resumed and the suspect made several incriminating statements, which he later sought to have excluded from trial because they came after he requested, but was not provided, counsel. *Id.* Under these facts, the Supreme Court held that the suspect's statement was, at best, an ambiguous request for counsel. *Id.* at 462. Consequently, it was insufficient to require the officers to cease questioning, and, moreover, it provided no grounds to suppress the suspect's subsequent statements. *Id.*; *see also Clark v. Murphy*, 331 F.3d 1062, 1069 (9th Cir. 2003) (holding that petitioner's statement that "I think I would like to talk to a lawyer" was not unequivocal request for counsel and, therefore, did not require police questioning to cease), *overruled in part on other grounds by Lockyer v. Andrade*, 538 U.S. 63, 123 S. Ct. 1166, 155 L. Ed. 2d 144 (2003).

By contrast, a criminal defendant unambiguously and unequivocally invokes his right to counsel where his request leaves no question that he wants legal representation, even if, in requesting counsel, he shows deference to the interrogating detective. *See, e.g.*, *Mays v. Clark*, 807 F.3d 968, 978-79 (9th Cir. 2015) (finding no ambiguity or equivocation regarding petitioner's invocation of right to counsel where petitioner asked police if he could call his father "and have my lawyer come down here"); *Sessoms v. Grounds*, 776 F.3d 615, 618 n.3 (9th Cir. 2015) (*en banc*) (finding that petitioner unequivocally invoked right to counsel by stating "There wouldn't be any possible way that I could have a–a lawyer present while we do this?" and stating "Yeah, that's what my dad asked me to ask you guys . . . uh, give me a lawyer.").

Here, Petitioner did not make an unambiguous request for counsel. Instead, the record shows that Petitioner, himself, initiated discussions with law enforcement after

having been advised of his *Miranda* rights. Although (at some point) he asked for one of the investigating detectives to retrieve his defense counsel's business card (among other things), Petitioner never requested that he, in fact, wished to have his lawyer present. The Court is aware of no precedent suggesting that a criminal defendant's mere request that he have access to his attorney's business constitutes an unequivocal request for counsel. And, it is noteworthy that Petitioner had already demonstrated an ability to unequivocally invoke his right for counsel. Indeed, the conversation that Petitioner hoped to suppress occurred after Petitioner had invoked his right to counsel and then reinitiated contact with law enforcement by contacting them by telephone the very next day.

More importantly, the trial court made a finding of fact that Petitioner did not request his counsel's business card until after having admitted to the crimes of which Petitioner was accused. The trial court based this factual finding on the account provided by the detective in question and on the videotape of the interview. Because the trial court's factual findings were reasonable under the circumstances and were made based on its own observations of the witnesses, this Court is bound by the trial court's findings of facts. *See Snyder v. Louisiana*, 552 U.S. 472, 477, 128 S. Ct. 1203, 170 L. Ed. 2d 175 (2008) (stating that "determinations of credibility and demeanor lie 'peculiarly within a trial judge's province'" and are entitled to deference "'in the absence of exceptional circumstances'") (citation omitted). Accordingly, any challenge to the admission of Petitioner's pre-trial statements would have failed.

Petitioner's challenge to the precedent on which the trial court relied in rejecting his motion to suppress the witnesses' in-court identifications was, likewise, doomed to fail. At bottom, Petitioner believes that the trial court erroneously relied on the Supreme Court's opinion in *Perry v. New Hampshire*, 565 U.S. 228, 132 S. Ct. 716, 181 L. Ed. 2d 694 (2012), in rejecting his motion to suppress. The court's reliance on *Perry* was erroneous, according to Petitioner, because *Perry* was decided after Petitioner committed the charged crimes. However, the Supreme Court in *Perry* did

not announce a new rule of law. Rather, the Supreme Court applied its existing precedent in rejecting the challenge at issue in that case: "*Finding no convincing reason to alter our precedent*, we hold that the Due Process Clause does not require a preliminary judicial inquiry into the reliability of an eyewitness identification when the identification was not procured under unnecessarily suggestive circumstances arranged by law enforcement."[28] *Id.* at 248 (*emphasis added*).

For the foregoing reasons, the California Supreme Court's rejection of this ground for relief was neither an unreasonable application of, nor contrary to, clearly established federal law as determined by the Supreme Court.

E. Habeas Proceedings

In his final two claims for relief, Petitioner asserts two claims involving his attempts to collaterally challenge his conviction. First, he contends that he was deprived of due process and equal protection by the California Court of Appeal's refusal to consider his *pro se* habeas corpus petition, supplemental brief, and augmentation request. Second, he maintains that the California Supreme Court and the California Court of Appeal violated his due process and equal protection rights by denying him access to transcripts that were necessary to prove his allegations in his state habeas petitions.

Neither of these claims is cognizable on federal habeas review. Federal habeas relief is not available to redress errors in state post-conviction proceedings. *Franzen v. Brinkman*, 877 F.2d 26, 26 (9th Cir. 1989) (*per curiam*) (holding that "a petition

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[28] Moreover, the Court notes that there is no Supreme Court precedent supporting the premise of Petitioner's challenge to the witnesses' in-court identifications–namely, that they were tainted because, before trial, the witnesses identified Petitioner at his preliminary hearing at which he was wearing a prison jumpsuit. In any event, even if the witnesses' identifications were suppressed, there is no reason to believe that the jury would have reached a different result because, among other things, Petitioner repeatedly confessed to committing the charged crimes and because police recovered items from Petitioner's home matching the disguise that the robber used in committing the charged robberies.

alleging errors in the state post-conviction review process is not addressable through habeas corpus proceedings"); *see also Cooper v. Neven*, 641 F.3d 322, 331 (9th Cir. 2011) (due process claim challenging trial court's failure to conduct in camera inspection of file during post-conviction evidentiary hearing was not cognizable on federal habeas review); *Ortiz v. Stewart*, 149 F.3d 923, 939 (9th Cir. 1998) (claim alleging bias by post-conviction relief judge was not cognizable in federal habeas proceeding). Instead, habeas relief is only available where the petitioner shows that his detention violates the United States Constitution, a federal statute, or a treaty. *Franzen*, 877 F.2d at 26; 28 U.S.C. § 2254(a). An attack on the petitioner's state post-conviction proceedings "is an attack on a proceeding collateral to the detention and not the detention itself." *Nicholas v. Scott*, 69 F.3d 1255, 1275 (5th Cir. 1995) (citation omitted). Thus, although the federal claims that Petitioner presented in his various state habeas petitions may be cognizable in this action, the manner in which the state courts resolved those claims does not constitute a separate basis for habeas relief.

Moreover, as discussed above, Petitioner's challenge to the adequacy of his trial record is meritless. Put simply, Petitioner has failed to show that the trial record that he was provided was not sufficiently complete to allow him to challenge his conviction and sentence. Accordingly, even if Petitioner's challenge to the state courts' refusal to augment his trial record were cognizable, it nevertheless would fail. (*See supra*).

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VII. RECOMMENDATION

The Magistrate Judge therefore recommends that the Court issue an order: (1) approving and adopting this Report and Recommendation; and (2) directing that judgment be entered denying the First Amended Petition on the merits with prejudice.

DATED: March 21, 2018

/S/ Frederick F. Mumm
FREDERICK F. MUMM
UNITED STATES MAGISTRATE JUDGE

NOTICE

Reports and Recommendations are not appealable to the Court of Appeals, but are subject to the right of any party to timely file Objections as provided in the Local Rules Governing the Duties of the 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.

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