APPENDIX

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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MICHAEL ANTHONY CERVANTES, Petitioner-Appellant, v. W. L. MONTGOMERY, Acting Warden, Respondent-Appellee.	No. 18-56029 D.C. No. 2:15-cv-08911-AG-JDE Central District of California, Los Angeles ORDER

Before: LEAVY and W. FLETCHER, Circuit Judges.

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

Any pending motions are denied as moot.

DENIED.

UNITED STATES COURT OF APPEALS

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MICHAEL ANTHONY CERVANTES, Petitioner-Appellant, v. W. L. MONTGOMERY, Acting Warden, Respondent-Appellee.	No. 18-56029 D.C. No. 2:15-cv-08911-AG-JDE Central District of California, Los Angeles ORDER

Before: TALLMAN and NGUYEN, Circuit Judges.

Appellant's motion for reconsideration (Docket Entry No. 9) is denied. *See* 9th Cir. R. 27-10.

No further filings will be entertained in this closed case.

PROOF OF SERVICE BY MAIL

BY PERSON IN STATE CUSTODY

(Fed. R. Civ. P. 5; 28 U.S.C. § 1746)

I, MICHAEL A. CERVANTES, declare:

I am over 18 years of age and a party to this action. I am a resident of HIGH DESERT P.O. BOX 3030, SUSANVILLE, CA 96127 Prison, in the county of LASSEN, State of California. My prison address is: P.O. BOX 3030, SUSANVILLE, CA 96127.

On FEB. 17, 2020 (DATE),

I served the attached: PETITION FOR WRIT OF CERTIORARI TO SUPREME COURT OF THE UNITED STATES, & LEAVE TO PROCEED IN FORMA PAUPERIS (DESCRIBE DOCUMENT)
on the parties herein by placing true and correct copies thereof, enclosed in a sealed envelope, with postage thereon fully paid, in the United States Mail in a deposit box so provided at the above-named correctional institution in which I am presently confined. The envelope was addressed as follows:

U.S. SUPREME COURT BUILDING
1 FIRST STREET NE
WASHINGTON, DC
20543

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

Executed on FEB. 17, 2020 (DATE)

(DECLARANT'S SIGNATURE)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

MICHAEL A. CERVANTES, Petitioner, v. W. L. MONTGOMERY, Warden, Respondent.	Case No. CV 15-08911-AG (JDE) REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This Report and Recommendation is submitted to the Honorable Andrew J. Guilford, United States District Judge, under 28 U.S.C. § 636 and General Order 05-07 of the United States District Court for the Central District of California.

I.

PROCEEDINGS

On November 16, 2015, Petitioner Michael A. Cervantes ("Petitioner") filed a pro se Petition for Writ of Habeas Corpus by a Person in State Custody ("Petition"), asserting six grounds for relief. Following a stay to permit Petitioner to exhaust certain grounds for relief that Petitioner conceded were unexhausted, on December 23, 2016, Petitioner informed the Court that the California Supreme Court had denied his state habeas petition. Accordingly,

the stay was vacated and Petitioner was ordered to file a motion for leave to proceed with any newly exhausted claims, along with a proposed amended petition. On January 30, 2017, Petitioner lodged the operative First Amended Petition ("FAP"), which was ordered filed on June 7, 2017. Respondent filed an Answer to the FAP, together with a Memorandum of Points and Authorities ("Ans. Mem."), on November 3, 2017. Petitioner filed his Traverse ("Trav.") on March 7, 2018. The Court also received Petitioner's addendum to Exhibit D of the Traverse, which the Court has considered.

The matter is now ready for decision. For the reasons discussed below, the Court recommends that the Petition be denied and the action dismissed.

II.

PROCEDURAL HISTORY

On August 13, 2012, a Los Angeles County Superior Court jury found Petitioner guilty of attempted robbery, carjacking, unlawful taking or driving of a vehicle, and robbery. The jury also found true the criminal street gang and firearm enhancement allegations. (2 Clerk's Transcript on Appeal ["CT"] 392-96.) On October 12, 2012, the trial court sentenced Petitioner to an aggregate indeterminate term of 25 years to life in state prison. (2 CT 414-17.)

Petitioner appealed his conviction and sentence to the California Court of Appeal. (Respondent's Notice of Lodging and Supplemental Notice of Lodging ["Lodg."] No. 10.) On September 8, 2014, the California Court of Appeal affirmed the judgment. (Lodg. No. 1.) Petitioner's Petition for Review was denied on November 12, 2014. (Lodg. Nos. 13-14.)

Thereafter, Petitioner sought to collaterally attack his conviction, filing a habeas petition in the Los Angeles County Superior Court on November 19, 2015. (Lodg. No. 2.) That petition was denied on December 29, 2015. (Lodg. No. 3.) Petitioner then filed a habeas petition in the California Court of Appeal, which was denied on August 10, 2016. (Lodg. Nos. 4-5.) Finally,

Petitioner filed a habeas petition in the California Supreme Court, which was summarily denied on November 30, 2016. (Lodg. Nos. 6-7.)

III.

SUMMARY OF THE EVIDENCE PRESENTED AT TRIAL

Based on the Court's independent review of the record, the Court finds the following summary from the "Factual Background" section of the California Court of Appeal decision fairly and accurately summarizes the evidence presented at trial. See Nasby v. McDaniel, 853 F.3d 1049, 1052-53 (9th Cir. 2017); Jones v. Wood, 114 F.3d 1002, 1008 (9th Cir. 1997). Petitioner does not contest the California Court of Appeal's summary of the underlying facts, nor has he attempted to overcome the presumption of correctness accorded to it. See Tilcock v. Budge, 538 F.3d 1138, 1141 (9th Cir. 2008) (explaining that state court's factual findings are presumed correct unless the petitioner "rebuts that presumption with clear and convincing evidence").

> *September 19, 2010.*[FN1]
>
> [FN1] At trial, [Petitioner] was acquitted of robbery and carjacking counts relating to these events involving Bugarin (counts 7 and 8), but because these facts are relevant to a subsequent crime for which [Petitioner] was convicted (joyriding, count 4), we briefly summarize them here.
>
> At about 3:20 a.m. on September 19, 2010, Cesar Bugarin was leaving work in his red 2003 Dodge Ram truck when a silver Avalanche with four passengers inside pulled up in front of Bugarin and blocked his path. Two bald Hispanic males between the ages of 17 and 19 wearing big loose shirts got out of the Avalanche and approached Bugarin. Based on their appearance, Bugarin believed they were gang members. One pointed a "silver chrome plated" gun to Bugarin's temple and told him to get out of the truck. The men

took Bugarin's cell phone, hat, credit cards and $800 in cash and drove away in Bugarin's truck.

September 24, 2010.

At about 8:30 a.m. on September 24, 2010, Christopher Hall was listening to music on his iPod while sitting at a bus stop in front of the animal hospital where his cousin worked. A red Dodge Ram truck with two male Hispanic teenagers inside pulled up beside Hall. [Petitioner]—the driver—wore an Atlanta Braves baseball cap with an "A" on it.[FN2] [Petitioner] and his passenger started "throwing 'A' " gang signs at Hall and saying "What's up nigger, fuck niggers," and "[g]ive me everything you got." The passenger had trouble getting out of the truck for some reason so Hall was able to run to the animal hospital.

> [FN2] On September 30, 2010, when a police officer showed Hall a six-pack photographic lineup, Hall identified [Petitioner] as the driver of the truck. At trial (two years later), he initially testified [Petitioner] was the passenger but then acknowledged his memory of the incident was better on September 30, 2010 than at the time of trial.

A woman inside the animal hospital (Veronica Aparicio) heard the commotion, saw the red truck and then saw Hall run to the door, saying he was "getting robbed." She came outside and wrote down the red truck's license plate number when it circled back around the block. As she spoke with the 9–1–1 operator to report what had happened, one of the truck's occupants called out something threatening like, "'I know where you work at[,'] like trying to say he's going to come back."

September 25, 2010.

The following day, at about 11:50 a.m., Michael Murillo and

his two friends Juan Cazares and Emilio Gomez were installing a stereo in Murillo's Honda Accord. Murillo went inside his house to grab a screwdriver, but as he walked back out, he saw two Hispanic males with guns had approached Cazares and Gomez and were asking where they were from, which they understood to mean a request for their gang affiliation. They said, "Nowhere," meaning "We don't gang bang." One of the gunmen said, "Avenues[,]" and "I know Highland Park lives here in this house."[FN3] Murillo and his friends said "No one from Highland Park lives here."

[FN3] At trial, Cazares and Gomez explained Highland Park and Avenues are rival gangs in Murillo's neighborhood.

One of the men pointed a "silver-ish" colored handgun at Murillo and directed him and his friends to empty their pockets. That man and the other one with a revolver then told Murillo and his friends to take off their pants. When Cazares "backed away a little bit," the one with the handgun "pistol whipped" Cazares, hitting him across the side of his face. The same gunman directed Murillo and his friends to put the speakers in the trunk of Murillo's car, and they complied. Then the two gunmen got into Murillo's car and drove off.

Murillo called 9–1–1 (twice), and two officers arrived at his home about 40 minutes later. Murillo told Officer Gabriel Rivas and his partner the person with the handgun was "Buster from Avenues, Carlos'[s] brother." Murillo said he had gone to high school with [Petitioner's] brother Carlos. Murillo's car was recovered a few houses away from [Petitioner's] residence.

September 27, 2010.

At about 1:20 a.m. on September 27, 2010, Los Angeles Police Department Officers Fernando Salcedo and Francisco Serrano were

on patrol when a red Dodge truck caught their attention. In "roll call" that evening, they had just been "briefed" about a red Dodge truck taken at gunpoint so they checked the truck's license plate and verified that it was the same truck (belonging to Cesar Bugarin) involved in the prior carjacking. Officer Serrano requested additional units to assist with a traffic stop while Officer Salcedo drove, following the red truck. After a few blocks, the red truck sped up and then turned onto a smaller street where it stopped at an angle, blocking all traffic. [Petitioner] and a female passenger jumped out of the truck and ran in different directions. [Petitioner] looked directly at Officer Serrano. The female passenger was found hiding in a yard nearby and taken into custody, but the officers were unable to find [Petitioner] that night.

When the officers impounded Bugarin's red Dodge truck, they also recovered a digital camera inside which contained photographs of [Petitioner] in Bugarin's truck and wearing Bugarin's hat.

. . . .

At trial, the People presented evidence of the facts summarized above. Murillo's two 9–1–1 calls were played for the jury.

Los Angeles Police Department Officer Juan Aguilar, assigned to the gang enforcement detail in Northeast division, testified regarding his investigation of the crimes involving Bugarin, Hall and Murillo, Gomez and Cazares.

On October 4, 2010, about a week after the crimes involving Murillo, Officer Aguilar testified he went to Murillo's workplace with a six-pack photographic lineup and asked Murillo whether he saw one of the men who had pointed a gun at him and his friends in the lineup. Murillo grabbed it, pointed to [Petitioner's] picture and said,

"That's him, that's Buster." When Officer Aguilar asked Murillo to circle the photograph of the man he had identified, Murillo said, "I don't want to go to court. If I circle, do I have to go to court?" When Officer Aguilar responded, "Yes[,] you're identifying the guy that robbed you [,]" Murillo said, "I don't want to go to court. I don't want to circle it. That's him. If I go to court, I might see his brother and that's not going to be good." Murillo said he was afraid for his safety and the safety of his family.

Then, on October 12, 2010, Officer Aguilar testified, he showed Gomez (Murillo's friend) a six-pack photographic lineup at Gomez's home. Gomez told Officer Aguilar, "Well[,] I know it's not five of those guys . . . . [W]ell[,] it looks like this guy, but . . . it's not him, it's not him." Officer Aguilar told Gomez to "just write what you just [said]." Gomez circled [Petitioner's] picture and wrote "looks like him, but it's not him."[FN5]

[FN5] At trial, Gomez testified he did not circle [Petitioner's] picture; Officer Aguilar did.

Officer Aguilar was unable to interview Cazares because Cazares had provided contact information that was not up to date. (According to Cazares's testimony, at the time of the initial investigation, he had given the police the information on his identification, but he had already moved from that address at the time of the events at Murillo's house.)

Officer Aguilar testified he had known [Petitioner] for five or six years and had interacted with him about 20 times. [Petitioner] had told Aguilar he ([Petitioner]) was an Avenues gang member. In 2007, [Petitioner] used the gang moniker "Buster." In 2010, he used the moniker "Knuckles." According to Officer Aguilar, gang members

often changed their monikers. He also testified that in his 8- to 10-years' experience working with Avenues gang members, [Petitioner] was the only "Buster" he knew, and [Petitioner] remained an active Avenues gang member.

Based on a hypothetical tracking the evidence presented to the jury, Officer Aguilar opined the attempted robbery, robberies, carjackings and joyriding were committed for the benefit of, in association with or at the direction of the Avenues gang with the specific intent to promote, further and assist in the gang activity of the gang's members. He testified Avenues gang members would often steal cars in order to commit other crimes without being detected and commit robberies so the gang is more feared in the community, enabling them to commit further crimes without being reported. According to Officer Aguilar's testimony, victims and witnesses of such crimes "will not come forward and if they do come forward, they're not going to come forward a hundred percent . . . [because] at some point the intimidation factor takes [e]ffect . . . the fear of them being victims of another crime [--] being shot and killed."

[Petitioner] testified in his own defense. According to [Petitioner's] testimony, he was "courted in" to the Avenues gang when he was 16 because his brother Carlos (in prison at the time of trial) was a member. His gang moniker was "Knuckles" but he had the moniker "Buster" "before[.]" [Petitioner] acknowledged he had reported the name "Buster" as his moniker to Officer Aguilar; he said his family had given him the name "Buster"—"in Spanish it will be [']Travieso[], like trouble making."

[Petitioner] testified he had gotten all of his gang tattoos at once, when he was 17, because he "wanted to be cool" but regretted

them now. He said his life had changed in late 2009 when he had a baby girl so he was no longer active in the gang at the time of the 2010 crimes with which he was charged. He said he got shot in 2009 when he told his friends he "didn't want to be from the gang no more." According to [Petitioner], he was told "there's no way you're going to get out" but he could be "active" "back stage" "by selling drugs." Although [Petitioner] had testified he was no longer active in the gang and denied involvement in any crimes after 2009, he acknowledged on cross-examination he was convicted of entering someone else's pickup truck with "one of [his] homeys" and trying to take that vehicle on May 19, 2010—four months before the crime involving Bugarin and his truck.

[Petitioner] denied involvement in the carjacking involving Bugarin; he said he was at his sister's birthday party at the time. He said one of his friends brought the truck to him a few days later, saying someone had left the keys in it, and others had driven the truck too. [Petitioner] admitted he had taken pictures in the truck and knew it was stolen. He denied involvement in the attempted robbery of Hall as well as the carjacking and robbery of Murillo.

[Petitioner's] mother Erika Lopez also testified in his defense. She said [Petitioner] was at his sister's birthday party on September 18, 2010. (Cesar Bugarin's truck and property were taken at about 3:20 a.m. on September 19, 2010.) Lopez testified [Petitioner] spent the night in his room at her house that night and never left. Asked whether she would be aware if he left, she testified: "Of course. He's my son, I would have to be behind him. . . . It's a mother's nature to know when your son is not around you, you got to be looking for them." Although [Petitioner's] sister (and Lopez's daughter) turned

four on August 24, Lopez testified [Petitioner's] daughter was her first granddaughter, and [Petitioner] had asked Lopez to let her first granddaughter ([Petitioner's] daughter) have her party before Lopez's daughter's fourth birthday party. "[H]e's my son so I gave it to him." She showed the jury undated photos of [Petitioner] at a party.

[Petitioner's] mother confirmed "[Petitioner] is a gang member." (Lodg. No. 1 at 2-8.)

IV.

PETITIONER'S CLAIMS[1]

1. The evidence was insufficient to support Petitioner's convictions for carjacking and robbery of Michael Murillo ("Murillo"). (FAP at 5; FAP Attachment ["Att."] A, Ground One.)

2. Officer Juan Aguilar ("Aguilar") coerced Emilio Gomez's ("Gomez") initial pre-trial identification of Petitioner. (FAP at 5-6; Att. A, Ground Two.)

3. Petitioner's trial counsel rendered ineffective assistance. (FAP at 6; Att. A, Ground Three.)

4. The prosecutor committed misconduct by presenting false evidence and prosecuting Petitioner. (FAP at 6; Att. A, Ground Four.)

5. Gomez's and Murillo's eyewitness identifications were the result of Aguilar's unduly suggestive techniques. (FAP at 6; Att. A, Ground Five.)

6. Petitioner is actually innocent. (FAP at 5(a); Att. A, Ground Six.)

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[1] Respondent contends that Grounds Two through Six are procedurally barred because the state courts rejected these claims on procedural grounds. (Ans. Mem. at 16.) In the interest of judicial economy, the Court will address Petitioner's claims on the merits rather than consider the procedural default issue. Lambrix v. Singletary, 520 U.S. 518, 524-25 (1997); Franklin v. Johnson, 290 F.3d 1223, 1232 (9th Cir. 2002) ("Procedural bar issues are not infrequently more complex than the merits issues presented by the appeal, so it may well make sense in some instances to proceed to the merits if the result will be the same.").

7. Newly discovered evidence supports Petitioner's claim of innocence. (FAP at 5(a); Att. A, Ground Seven.)

V.

STANDARD OF REVIEW

The Petition is subject to the provisions of the Antiterrorism and Effective Death Penalty Act (the "AEDPA") under which federal courts may grant habeas relief to a state prisoner "with respect to any claim that was adjudicated on the merits in State court proceedings" only if that adjudication:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

Under the AEDPA, the "clearly established Federal law" that controls federal habeas review of state court decisions consists of holdings (as opposed to dicta) of Supreme Court decisions "as of the time of the relevant state-court decision." Williams v. Taylor, 529 U.S. 362, 412 (2000); see also Howes v. Fields, 565 U.S. 499, 505 (2012); Greene v. Fisher, 565 U.S. 34, 38 (2011).

Although a particular state court decision may be "contrary to" and "an unreasonable application of" controlling Supreme Court law, the two phrases have distinct meanings. Williams, 529 U.S. at 391, 413. A state court decision is "contrary to" clearly established federal law if the decision either applies a rule that contradicts the governing Supreme Court law, or reaches a result that differs from the result the Supreme Court reached on "materially indistinguishable" facts. Brown v. Payton, 544 U.S. 133, 141 (2005); Early v. Packer, 537 U.S. 3, 8 (2002) (per curiam). When a state court decision is

contrary to controlling Supreme Court law, the reviewing federal habeas court is "unconstrained by [Section] 2254(d)(1)." Williams, 529 U.S. at 406. However, the state court need not cite or even be aware of the controlling Supreme Court cases, "so long as neither the reasoning nor the result of the state-court decision contradicts them." Packer, 537 U.S. at 8.

State court decisions that are not "contrary to" Supreme Court law may only be set aside "if they are not merely erroneous, but 'an *unreasonable* application' of clearly established federal law, or based on 'an *unreasonable* determination of the facts.'" Packer, 537 U.S. at 11 (quoting 28 U.S.C. § 2254(d)). A decision correctly identifying the governing legal rule may be rejected if it unreasonably applied the rule to the facts. See Williams, 529 U.S. at 406-10, 413; Woodford v. Visciotti, 537 U.S. 19, 24-27 (2002) (per curiam). However, to obtain relief for such an "unreasonable application," a petitioner must show that the state court's application of Supreme Court law was "objectively unreasonable." Visciotti, 537 U.S. at 24-27. An "unreasonable application" is different from an erroneous or incorrect one. See Williams, 529 U.S. at 409-11. "To obtain habeas corpus relief from a federal court, a state prisoner must show that the challenged state-court ruling rested on 'an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.'" Metrish v. Lancaster, 569 U.S. 351, 358 (2013) (citation omitted)). Moreover, review of state court decisions under § 2254(d) is limited to the record that was before the state court that adjudicated the claim on the merits. Cullen v. Pinholster, 563 U.S. 170, 181, 185 n.7 (2011).

Here, Petitioner raised a claim corresponding to Ground One in the California Court of Appeal on direct appeal. The court of appeal rejected this claim in a reasoned decision. (Lodg. No. 1.) Thereafter, the California Supreme Court denied a Petition for Review without comment or citation to authority. (Lodg. No. 14.) In such circumstances, the Court will "look

through" the unexplained California Supreme Court decision to the last reasoned decision as the basis for the state court's judgment, here, the court of appeal's decision. See Ylst v. Nunnemaker, 501 U.S. 797, 803-04 (1991); see also Johnson v. Williams, 568 U.S. 289, 297 n.1 (2013) (noting that the Ninth Circuit, consistent with Ylst, "look[ed] through" a summary denial of a petition for review and examined the court of appeal's opinion).

Petitioner raised Ground Seven in a request for leave to amend in the California Court of Appeal. (Lodg. No. 4.) It is unclear whether this request was granted. Petitioner apparently initially attempted to raise this claim in the superior court, but his habeas petition was denied prior to his request to amend his petition in order to assert this additional claim. (See Trav. at 18, Exhibit ["Exh."] F.) In any event, both the California Court of Appeal and California Supreme Court summarily denied the petitions. (Lodg. Nos. 5, 7.) A summary denial is presumed to be a merits determination "in the absence of any indication or state-law procedural principles to the contrary" and the AEDPA standard of review will apply. Richter, 562 U.S. at 98-99. "Where a state court's decision is unaccompanied by an explanation, the habeas petitioner's burden still must be met by showing there was no reasonable basis for the state court to deny relief." Id. at 98; see also Pinholster, 563 U.S. at 187 ("Section 2254(d) applies even where there has been a summary denial."). "[A] habeas court must determine what arguments or theories . . . could have supporte[d] the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court." Id. at 188 (quoting Richter, 562 U.S. at 102). As such, with respect to Ground Seven, the Court must conduct an "independent review of the record and ascertain whether the state court's decision was objectively unreasonable." Walker v. Martel, 709 F.3d 925, 939 (9th Cir. 2013) (internal quotation marks and citation omitted).

With respect to the remaining claims (Grounds Two through Six), Petitioner raised a similar claim to Ground Two on direct appeal, but this claim was denied on procedural grounds. (Lodg. No. 1.) The California Supreme Court later denied the Petition for Review without comment or citation to authority. (Lodg. No. 14.) Petitioner raised claims generally corresponding with Grounds Three through Six in his habeas petition to the superior court (Lodg. No. 2) which denied the habeas petition, finding that Petitioner failed to justify the delay in seeking habeas relief, citing In re Clark, 5 Cal. 4th 750, 765 (1993) and In re Swain, 34 Cal. 2d 300, 302 (1949); that the petition "raises issues which were raised and rejected on appeal and petitioner has failed to allege facts establishing an exception to the rule barring habeas consideration of claims that were raised on appeal," citing In re Reno, 55 Cal. 4th 428, 478-79 (2012), In re Harris, 5 Cal. 4th 813, 825-26 (1993), and In re Waltreus, 62 Cal. 2d 218, 225 (1965); and that Petitioner failed to show that appellate counsel's exercise of judgment was deficient or that, but for counsel's errors, the outcome of the appeal would have been different. (Lodg. No. 3.) Thereafter, the California Court of Appeal and the California Supreme Court summarily denied Petitioner's petitions. (Lodg. Nos. 5, 7.) As the last reasoned state court decisions addressing these claims did not reach the merits of the claims, the Court will review the claims *de novo*. Pirtle v. Morgan, 313 F.3d 1160, 1167 (9th Cir. 2002); see also Berghuis v. Thompkins, 560 U.S. 370, 390 (2010) (where it is unclear whether AEDPA deference applies, courts may deny writs of habeas corpus under Section 2254 by engaging in *de novo* review).

VI.

DISCUSSION

A. Petitioner is not entitled to relief on his sufficiency of evidence claim.

In Ground One, Petitioner contends that his convictions for carjacking and robbery were based on less than proof beyond a reasonable doubt. (FAP at

5; Att. A, Ground One at 1.) Petitioner maintains that the evidence to support these convictions was insufficient because: (1) the three witnesses, Murillo, Gomez, and Juan Cazares ("Cazares"), never identified him as one of the perpetrators at trial and according to their testimony, never identified him out-of-court; (2) the prosecutor failed to produce any physical evidence; and (3) the victim's property was not found in Petitioner's possession. (Id. at 1-4.)

1. The California Court of Appeal decision

On direct appeal, the California Court of Appeal rejected Petitioner's insufficiency of the evidence claim as follows (Lodg. No. 1 at 9-13):

> According to [Petitioner], "No reasonable trier of fact could have found [him] guilty beyond a reasonable doubt for the crimes committed against Mr. Murillo." We disagree.
>
> First, as [Petitioner] acknowledges, in considering his challenge to the sufficiency of the evidence on appeal, "'we review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.'" (People v. Jones (2013) 57 Cal.4th 899, 960, quoting People v. Abilez (2007) 41 Cal.4th 472, 504, further citations omitted.)
>
> Further, "'[t]he standard of review is the same in cases in which the People rely mainly on circumstantial evidence. [Citation.] "Although it is the duty of the jury to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence [citations], it is the jury, not the appellate court which must be convinced of the defendant's guilt beyond a reasonable doubt. '"If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that

the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment."' [Citations.]" [Citation.] "'Circumstantial evidence may be sufficient to connect a defendant with the crime and to prove his guilt beyond a reasonable doubt.'"' [Citation.]" (People v. Jones, supra, 57 Cal.4th at pp. 960-961, quoting People v. Abilez, supra, 41 Cal.4th at p. 504.)

Reversal is not warranted "unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].'" (People v. Bolin (1998) 18 Cal.4th 297, 331.)

A carjacking conviction "requires proof that (1) the defendant took a vehicle that was not his or hers (2) from the immediate presence of a person who possessed the vehicle or was a passenger in the vehicle (3) against that person's will (4) by using force or fear and (5) with the intent of temporarily or permanently depriving the person of possession of the vehicle." (People v. Magallanes (2009) 173 Cal.App.4th 529, 534, citing § 215, subd. (a); People v. Hill (2000) 23 Cal.4th 853, 858-859.)

Citing People v. Coleman (2007) 146 Cal.App.4th 1363, 1365, but conceding that it is not on point (as he says the carjacking conviction was reversed in that case because "there was insufficient evidence to support actual or construction possession"), [Petitioner] contends "this Court should do the same because there was not a proper identification, or any other evidence to convict [him]." This is so, he says, because Murillo, Gomez and Cazares "all stated that it was not [[Petitioner]] who robbed and carjacked them."

The record defeats [Petitioner's] argument. Murillo identified [Petitioner] on the day of the crimes against him. Both Murillo and Gomez spoke on the calls to 9–1–1 on September 25, 2010. When Murillo spoke with Officer Rivas about 40 minutes after calling 9–1–1

to report what had occurred that day (September 25, 2010), he said he recognized one of the two Hispanic males with guns as "Buster from Avenues, Carlos's brother." Then, on October 4, 2010, Murillo pointed out [Petitioner's] photograph in a six-pack lineup, telling Officer Aguilar, "[T]hat's him, that's Buster." However, as the jury also heard, Murillo refused to fill out the form regarding his identification, expressing his fear that if he had to go to court, he might "see [[Petitioner's]] brother and that's not going to be good." Although he repeatedly stated he did not want to go to court, Murillo also unequivocally stated, "That's him [,]" referring to [Petitioner's] photograph. Officer Aguilar also testified that Murillo had told him that people had come to his house, and he (Murillo) was afraid they would be back to "get" him or his family.

When Gomez first viewed the six-pack lineup, he expressed his certainty that the other five men were *not* involved, then indicated the photograph of [Petitioner] "looks like him, but it's not him." In addition, Gomez had testified his brother was a Highland Park gang member—the Avenues gang's rival and had expressed his fear of testifying and being considered a "snitch" as "snitches . . . get green lighted"—"like they're going to come and kill you."

The jury also heard that although Murillo and Gomez had been subpoenaed to appear, they both failed to return for the afternoon session of [Petitioner's] preliminary hearing, telling Officer Aguilar they were "afraid," it was "not worth it," and they had already "d[one their] job" and were "done." Cazares provided the police with contact information he knew was no longer up to date and when he was located and called upon to testify, he volunteered that he did not remember anything before the prosecutor even asked her first question.

In People v. Cuevas (1995) 12 Cal.4th 252, our Supreme Court observed "many varied circumstances . . . may attend an out-of-court identification and affect its probative value. These circumstances include, for example: (1) the identifying witness's prior familiarity with the defendant; (2) the witness's opportunity to observe the perpetrator during the commission of the crime; (3) whether the witness has a motive to falsely implicate the defendant; and (4) the level of detail given by the witness in the out-of-court identification and any accompanying description of the crime." (Id. at p. 267, citation omitted.) The jury received CALCRIM No. 315 so they received express instructions regarding the factors to be considered in evaluating eyewitness testimony, including whether, for example, the eyewitness knew or had contact with the defendant before the crimes occurred. "Evidence of these circumstances can bolster the probative value of the out-of-court identification by corroborating both that the witness actually made the out-of-court identification (e.g., testimony by the police officer or other person to whom the statement was made) and that the identification was reliable (e.g., evidence that the witness was present at the scene of the crime and in a position to observe the perpetrator, evidence that the witness had a prior familiarity with the defendant, or evidence that the witness had no self-serving motive to implicate the defendant)." (People v. Cuevas, supra, 12 Cal.4th at p. 267.)

[Petitioner's] argument that Murillo's, Gomez's and Cazares's "clear non-identification" at trial compels reversal ignores our obligation to review the record as a whole. The jury heard testimony that [Petitioner] was not a stranger to Murillo at the time of the carjacking and robbery; Murillo already knew him as "Buster" and Carlos's brother and was certain of his identification at the time of the

crimes because he immediately recognized [Petitioner] based on this prior knowledge. Although Murillo attempted at trial to deny and distance himself from his prior identification(s) of [Petitioner] (People v. Jackson (2005) 129 Cal.App.4th 129, 167 ["[j]urors are the sole judges of a witness's credibility and they are rightfully suspicious of trial testimony that deviates 180 degrees from what the witness told the police . . . ."]), the jury heard testimony regarding the fear Murillo, Gomez and Cazares all exhibited in coming to court to testify against [Petitioner]. The carjacking and robbery took place in front of Murillo's home, one of the gunmen said he knew a Highland Park member lived there, Gomez's brother was a Highland Park member and all three victims knew [Petitioner's] gang (Avenues) as a Highland Park rival in the neighborhood. The jury had the opportunity to assess Murillo's as well as the other witnesses' demeanor. Although Murillo, Gomez and Cazares all tried to claim at trial they could not identify [Petitioner], the jury heard both police officers' testimony which gave context to this apparently contradictory testimony. Their efforts not to identify [Petitioner] when it came time to testify at trial cannot be viewed in isolation, and it was up to the jury to determine the truth notwithstanding the conflicts between the prior identifications and trial testimony. "It is the exclusive province of the trier of fact to determine credibility and the truth or falsity of the facts upon which credibility depends." (People v. Allen (1985) 165 Cal.App.3d 616, 623.)

On this record, the jury could reasonably conclude that Murillo knew [Petitioner] to be one of the gunmen involved in the carjacking and robbery—as evidenced by his unequivocal identifications initially provided to the police on more than one occasion—and Gomez did not hesitate to eliminate the five other photographs in the six-pack lineup

he was shown and acknowledged that one of the gunmen looked like the photograph of [Petitioner], but when it was time to testify against [Petitioner] at trial, Murillo (as well as his friends Gomez and Cazares) were too afraid to identify [Petitioner] in court.[FN7] "A reviewing court neither reweighs evidence nor reevaluates a witness's credibility." (People v. Lindbergh (2008) 45 Cal.4th 1, 27.) It follows that substantial evidence supports [Petitioner's] carjacking and robbery convictions relating to Murillo and his Honda Accord. (People v. Bolin, supra, 18 Cal.4th at p. 331 [reversal is unwarranted "unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction]'"]; People v. Allen, supra, 165 Cal.App.3d at p. 623 ["Weaknesses and inconsistencies in eyewitness testimony are matters solely for the jury to evaluate" and, as long as the identification is not "inherently improbable or factually impossible under the circumstances shown," the "testimony of a single eyewitness is sufficient to support a criminal conviction"].)

[FN7] According to the record, at least one of the witnesses was visibly "shaking" while testifying against [Petitioner] at trial.

2. Applicable legal authority and analysis

The California standard for determining the sufficiency of the evidence to support a conviction is identical to the federal standard enunciated in Jackson v. Virginia, 443 U.S. 307 (1979). See People v. Johnson, 26 Cal. 3d 557, 576 (1980). Under this standard, the question is "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson, 443 U.S. at 319. The reviewing court "must respect the province of the jury to determine the credibility of witnesses, resolve evidentiary conflicts, and draw reasonable inferences from proven facts by

assuming that the jury resolved all conflicts in a manner that supports the verdict." Walters v. Maass, 45 F.3d 1355, 1358 (9th Cir. 1995); see also Cavazos v. Smith, 565 U.S. 1, 7 (2011) (per curiam) (Jackson "instructs that a reviewing court 'faced with a record of historical facts that support conflicting inferences must presume—even if it does not affirmatively appear in the record—that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution.'" (quoting Jackson, 443 U.S. at 326)). Further, the AEDPA requires an additional degree of deference to a state court's resolution of an insufficiency of the evidence claim. See Coleman v. Johnson, 566 U.S. 650, 651 (2012) (per curiam) ("Jackson claims face a high bar in federal habeas proceedings because they are subject to two layers of judicial deference."). Consequently, habeas relief is not warranted unless "the state court decision was 'objectively unreasonable.'" Id. (quoting Smith). Finally, "the standard must be applied with explicit reference to the substantive elements of the criminal offense as defined by state law." Jackson at 324 n.16.

Here, Petitioner asks the Court to reweigh the evidence, reject the jury's credibility determinations, and draw different inferences than those drawn by the jury. However, on habeas review, the Court cannot reevaluate the evidence or draw new inferences. Walters, 45 F.3d at 1358; Bruce v. Terhune, 376 F.3d 950, 957-58 (9th Cir. 2004) (per curiam) ("A jury's credibility determinations are . . . entitled to near-total deference under Jackson."). Here, the California Court of Appeal reasonably concluded that substantial evidence supported Petitioner's robbery and carjacking convictions. Petitioner primarily contends that none of the witnesses identified him. However, Murillo identified him on the day of the incident in a 911 call, indicating he had seen the perpetrators before and referring to one of them as "Busti," and later told Officer Gabriel Rivas ("Rivas") that he knew suspect two. (2 CT 283; 4 RT 1253.) Murillo told Aguilar that he had seen suspect two before; knew his brother, Carlos, who

attended Franklin High School; and identified him as "Buster" from Avenues gang. (4 RT 1273; see also 3 RT 682.) When Aguilar showed Murillo a six pack photographic lineup, Murillo pointed to Petitioner's photograph, and stated, "That's him, that's Buster." (4 RT 1276-77.) As the jury heard, although Murillo identified Petitioner, he was unwilling to circle Petitioner's photograph because he feared that he would have to go to court. Murillo stated to Aguilar that if he had to go to court, he "might see [Petitioner's] brother and that's not going to be good." (4 RT 1277-78.) Aguilar testified that Murillo was concerned that the suspects had come to his house, knew where he lived, and knew what his car looked like. He feared that they were going to come back and get him or his family. (Id.) Aguilar explained that Petitioner's brother was an Avenues gang member and that Petitioner also was a member, with the monikers "Buster" and "Knuckles." (4 RT 1278, 1312, 1316.)

WAS AFRAID OF "BOOSTER"

In addition to the foregoing, other evidence also supported the verdicts. Aguilar also showed Gomez the six pack photographic lineup. After Gomez initially indicated that he knew it was not five of the men depicted in the photographs, he indicated that the photograph of Petitioner "looks like him, but it's not him." (4 RT 1281-82.) Further, Murillo's stolen vehicle was found near Petitioner's residence. (4 RT 1354.)

LIE BOLSTERED STATEMENT

Despite the evidence of the prior identifications, Petitioner argues that Murillo's and Gomez's testimony at trial is dispositive of the issue. Although Murillo and Gomez did not identify Petitioner at trial and testified that they did not previously identify Petitioner as one of the perpetrators or remember circling anyone in the photographic lineups (3 RT 678-79, 682-83, 725-28, 732, 736), evidence was presented from which the jury could have reasonably concluded that Murillo and Gomez did not identify Petitioner in court because they feared retaliation. As noted, a reviewing court "must respect the province of the jury to determine the credibility of witnesses, resolve evidentiary

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conflicts, and draw reasonable inferences from proven facts by assuming that the jury resolved all conflicts in a manner that supports the verdict." Walters, 45 F.3d at 1358; Bruce, 376 F.3d at 957-58 ("A jury's credibility determinations are . . . entitled to near-total deference under Jackson.").

Further, circumstantial evidence alone can be sufficient to support a finding of guilt (United States v. Cordova Barajas, 360 F.3d 1037, 1041 (9th Cir. 2004)) and jurors may draw an "inference upon an inference." United States v. Arteaga, 117 F.3d 388, 399 (9th Cir. 1997) (as amended) (citation omitted). Aguilar testified in his experience in gang crimes, witnesses are intimidated and fear something bad might happen to them if they go to court. (4 RT 1277-78.) The carjacking and robbery took place in front of Murillo's home, one of the gunmen said he knew a member of Highland Park, a rival gang, lived there, and Gomez's brother was a Highland Park member. (3 RT 655; 699, 713-14, 717; 4 RT 1263-64.) All of the victims were frightened when they spoke to Rivas after the incident. (4 RT 1251, 1255, 1262, 1264; see also 3 RT 701.) Aguilar also testified that Murillo refused to circle Petitioner's photograph because he did not want to testify because he feared for his safety and the safety of his family. (4 RT 1277-78; see also 3 RT 680-82, 689.) Murillo testified even if he had seen the perpetrator's picture, he was not going to testify against this person. (See 3 RT 684.) Further, although Murillo and Gomez appeared at the preliminary hearing, both failed to return, telling Aguilar that they were afraid and were not going to testify. (3 RT 685-86; 4 RT 1278-80.) Cazares provided the police with inaccurate contact information and when he testified at trial, intejected he did not recall the incident before the first substantive question had been asked. (3 RT 695; 4 RT 1271.) On this record, the jury could have reasonably concluded that Murillo's and Gomez's initial identifications were accurate. See Jackson, 443 U.S. at 326 (explaining that "a federal habeas corpus court faced with a record of historical facts that supports

conflicting inferences must presume—even if it does not affirmatively appear in the record—that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution").

Viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found beyond a reasonable doubt that that Petitioner committed the offenses. The state courts' rejection of this claim was neither contrary to, nor involved an unreasonable application of, the Jackson standard. Nor was it based on an unreasonable determination of the facts in light of the evidence. Petitioner is not entitled to habeas relief on this claim.

B. Petitioner is not entitled to habeas relief on Grounds Two and Five.

In Ground Two, Petitioner alleges that Aguilar coerced Gomez's pre-trial identification. (FAP at 5-6; Att. A, Ground Two at 1-6.) Relatedly, in Ground Five, Petitioner contends that Murillo's and Gomez's out-of-court identifications were the result of unduly suggestive techniques. (FAP at 6; Att. A, Ground Five at 1-8.) Petitioner alleges that Aguilar only showed the witnesses a single six pack photographic lineup, despite alleging that he showed three (the follow-up investigation report attached to the FAP reflects that the other photographic lineups contained other possible suspects and Murillo was unable to identify the suspects (FAP, Exh. C.)); Murillo initially identified the suspect as "Booster"; Murillo testified that he did not identify anyone during his interview with Aguilar; Gomez testified that he felt harassed and Aguilar was the one that pointed to Petitioner's photograph and circled it. (Att. A, Ground Five at 1-7.)

1. Relevant factual background

i. Gomez

Approximately two weeks after the carjacking and robbery, Aguilar went to Gomez's home and showed Gomez, in the presence of his mother, a six pack photographic lineup. (4 RT 1280-81.) Aguilar testified that Gomez agreed

to look at the photos and Aguilar asked him to let him know if he saw any of the suspects. Gomez stated, "I'll try, but I can't promise you." (4 RT 1281-82.) After reviewing the photographs, Gomez said that he knew it was "not five of those guys," but that "it looks like this guy, but," "oh but it's not him, it's not him." (4 RT 1282.) Aguilar asked Gomez, "Well it is him or not?" Gomez replied, "It looks like him, but I know it's not any of the other five guys." (4 RT 1282.) Aguilar instructed Gomez to write what he said down. Gomez then circled Petitioner's photograph and wrote, "Looks like him, but it's not him." (Id.) Aguilar testified that Gomez circled Petitioner's photograph voluntarily and that he never circles pictures on behalf of witnesses or victims. (Id.)

In contrast, although Gomez agreed that he was shown a six pack photographic lineup, he testified at trial that he did not recognize anyone or circle any photographs. (3 RT 724-26.) Gomez testified that Aguilar asked him about Petitioner's photograph and Gomez told him that it "looks like him, but it's not him." (3 RT 726.) Upon further questioning, Gomez indicated that he did not recall circling the photograph and that Aguilar was the one that circled the photograph and told him to write the statement at the bottom. (3 RT 726-27.) Gomez explained that he felt harassed because the police kept calling him and he did not want anything to do with it. (3 RT 728.)

ii. Murillo

Murillo called 911 after the carjacking and robbery. He told the 911 operator that he had seen the suspects before and appeared to identify one of the perpetrators as "Busti." (2 CT 283.) Rivas responded to the incident and spoke with Murillo, whom he described as frightened and anxious. (4 RT 1250-51.) Rivas testified that Petitioner told him that he knew suspect two as "Booster." (4 RT 1253.) Aguilar later followed up with Murillo to get additional information and verify who he knew as "Booster." (4 RT 1272-73.) Murillo stated that he had told Rivas "Buster," not "Booster," from Avenues

gang. He had seen "Buster" before and knew his brother Carlos, who attended Franklin High School. (4 RT 1273.) Aguilar then met with Murillo in person and showed him a six pack photographic lineup. (4 RT 1273-74.) Murillo agreed to look at the photographs. (4 RT 1274.) According to Aguilar, Murillo pointed at Petitioner's photograph and said, "That's him, that's Buster." (4 RT 1276-77.) As explained above, however, Murillo refused to circle Petitioner's photograph because he was afraid he would have to testify in court. (4 RT 1277.) Murillo told Agular that if he had to go to court, he might see Petitioner's brother and "that's not going to be good." (Id.) Murillo explained that they had gone to his house, knew where he lived, and knew what his car looked like. He feared that they were going to come back and get him or his family, and therefore, he did not want to go to court. (4 RT 1277-78.)

At trial, Murillo testified that although he did identify one of the perpetrators as "Buster" from Avenues, Carlos's brother, Petitioner was not the person he was referring to. (3 RT 678.) He recalled Aguilar showing him photographs after the incident and asking if he would have to come to court, but did not recall circling anyone or writing anything. (3 RT 680-82.) He also recalled stating that he would not go to court and that Carlos might remember him if he went to court. (3 RT 682.) He did not remember pointing to any of the photographs and stated that he did not recognize anyone or refuse to sign. (3 RT 682-83.) He thought Aguilar would show him additional photographs. (3 RT 683.) However, he indicated that even if he was shown the perpetrator's photograph, he was not going to court and testifying against that person. (3 RT 684.) He acknowledged telling Aguilar that he was afraid for his safety and the safety of his family. (3 RT 689.)

2. Coercive identification

As explained, Petitioner contends that Aguilar "coerced" Gomez's identification. "The Supreme Court has not decided whether the admission of

a coerced third-party statement is unconstitutional." Samuel v. Frank, 525 F.3d 566, 569 (7th Cir. 2008); Trammel v. Ducart, 2015 WL 4496338, at *10 (E.D. Cal. July 23, 2015) ("No Supreme Court case addresses the issue of whether coerced witness testimony can be used against a defendant at trial."). Although the Ninth Circuit has held that the admission of a witness's coerced testimony can violate due process, see Williams v. Woodford, 384 F.3d 567, 593 (9th Cir. 2004) (as amended), the circumstances in this case are distinguishable. In Williams, the third party witness stated in a sworn declaration that he agreed to testify against the petitioner because he feared being beaten by the police, being charged with murder, and receiving jail time on an unrelated charge. Id. at 593-94. The question was whether "the post-arrest coercion of a government witness so tainted that witness's trial testimony as to render the testimony's admission a violation of the defendant's right to due process." Id. at 594.

No such circumstances existed here. There is no evidence that the alleged coercion somehow tainted Gomez's testimony such that it violated Petitioner's due process rights. As Respondent notes, rather than providing testimony that bolstered his identification of Petitioner as one of the perpetrators, Gomez asserted multiple times that he could not remember the details of the incident because he "blacked out" (see, e.g., 3 RT 713, 715) and specifically testified that Petitioner was not one of the gunmen. (3 RT 736.)

Petitioner appears to contend that because Gomez testified that Aguilar was the one that circled Petitioner's photograph, Gomez's testimony is dispositive and must be accepted as true. However, as previously explained, substantial evidence was introduced that Gomez feared retaliation if he testified. Gomez's out-of-court identification and his testimony regarding what happened to snitches raised a reasonable inference that Gomez falsely testified at trial because he was afraid of gang retaliation. It was up to the jury to decide

whether to believe Aguilar's or Gomez's testimony. As there were permissible inferences the jury could draw from their testimony, the admission of this testimony did not violate Petitioner's due process rights. Jammal v. Van de Kamp, 926 F.2d 918, 920 (9th Cir. 1991) ("Only if there are *no* permissible inferences the jury may draw from the evidence can its admission violate due process."); see also Estelle v. McGuire, 502 U.S. 62, 70 (1991).

3. Unduly suggestive techniques

Petitioner also contends that both Murillo's and Gomez's out-of-court identifications were the result of Aguilar's unduly suggestive techniques.

A pretrial photographic identification procedure violates due process when it is "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." Simmons v. United States, 390 U.S. 377, 384 (1968). Evaluating a due process claim based on a pretrial photographic identification procedure requires a two-part analysis. United States v. Love, 746 F.2d 477, 478 (9th Cir. 1984) (per curiam). First, the court must determine whether the challenged procedure was impermissibly suggestive. Id. Second, if the process was suggestive, the court must examine the totality of the circumstances to determine whether the witness's identification was nonetheless reliable. Neil v. Biggers, 409 U.S. 188, 199 (1972). Factors to be considered in evaluating the reliability of an identification include "the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainly demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation." Id. at 199-200.

In this case, the evidence does not suggest that the identification procedure was unduly suggestive. Again, Petitioner's claim turns on Murillo's and Gomez's testimony that they did not make any out-of-court

identifications. However, testimony was presented from which the jury could reasonably infer that both Murillo and Gomez feared retaliation and therefore, recanted their previous identifications. Murillo's identification of Petitioner bore sufficient indicia of reliability. Murillo admitted that he knew one of the perpetrators and identified him as "Buster." (3 RT 678, 682.) Rivas, who was not involved in the photographic lineup also confirmed that Murillo indicated that he knew the assailant. (4 RT 1253.) Even though Murillo recanted his identification at trial, the record shows that he likely did so because he feared retaliation if he testified against Petitioner.[2]

With respect to Gomez, Aguilar showed Gomez the photographic lineup at his house, with his mother present. (4 RT 1280-81.) Aguilar testified that he gave the photographic lineup to Gomez, stating, "Here you go and just let me know if you see any of the suspects." Gomez said, "I'll try, but I can't promise you." (4 RT 1281.) After looking at the photographs, Gomez said, "Well I know it's not five of those guys," and Aguilar then asked him which one it was. Gomez responded, "Well it looks like this guy, but" "oh but it's not him, it's not him." Aguilar followed up saying, "Well it is him or not?" Gomez said, "It looks like him, but I know it's not any of the other five guys." (4 RT 1282.) Aguilar instructed him to write what he said down. Gomez circled Petitioner's photograph and wrote, "Looks like him, but it's not him." (Id.) Aguilar testified that he never circles pictures on behalf of witnesses and victims. (Id.)

There is nothing suggestive about this procedure. Petitioner maintains that the procedure was unduly suggestive because the witnesses were only shown a single photographic lineup. (Att. A, Ground Five at 5.) The mere fact

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[2] In his Traverse, Petitioner further speculates, without any evidentiary support, that the photographic lineup did not initially include his photograph, and Aguilar later replaced a photograph of another gang member with Petitioner's photograph. (Trav. at 52.) There is nothing to support this contention.

that the witnesses identified Petitioner after only being shown a single photographic lineup does not demonstrate that the photographic lineup in question, which also depicted five other individuals, was unduly suggestive.

Moreover, Petitioner's counsel had the opportunity to cross-examine Gomez and Aguilar regarding the identifications and highlighted the issue during closing arguments. Although Gomez testified that Aguilar circled Petitioner's photograph (3 RT 726), Aguilar testified that Gomez made the identification as he would never circle a suspect. The issue was fairly and appropriately presented to the jury to evaluate the credibility of these witnesses and the reliability of the identifications. In light of the evidence that Gomez feared retaliation, including Rivas's testimony that even after the incident, Gomez still feared the suspects would return (4 RT 1262), the jury could have reasonably found Gomez's testimony at trial regarding the identification procedure was not credible. See Ash v. Marshall, 2010 WL 1734918, at *9 (C.D. Cal. Mar. 26, 2010) ("The issue of whether witnesses lied or erred in their perceptions or recollections is properly left to the jury."), Report and Recommendation adopted by 2010 WL 1734917 (C.D. Cal. Apr. 27, 2010).

Petitioner is not entitled to habeas relief on these claims.

C. Petitioner is not entitled to relief for ineffective assistance of counsel.

In Ground Three, Petitioner contends trial counsel rendered ineffective assistance by: (1) failing to conduct a reasonable pre-trial investigation; (2) failing to file a motion pursuant Pitchess v. Superior Court, 11 Cal. 3d 531 (1974), superseded by statute as stated in City of San Jose v. Superior Court, 5 Cal. 4th 47 (1993) ("Pitchess motion"); (3) failing to object during critical stages of trial; and (4) failing to file a motion for acquittal on the carjacking and robbery counts. (FAP at 6; Att. A, Ground Three at 1-11.) Petitioner further alleges that counsel failed to build or execute a defense. (FAP at 6.) As Petitioner has not separately addressed this contention, it appears this claim is

incorporated within Petitioner's other claims of ineffective assistance.

A petitioner claiming ineffective assistance of counsel must show that counsel's performance was deficient and the deficiency prejudiced his defense. Strickland v. Washington, 466 U.S. 668, 687 (1984). "Deficient performance" means unreasonable representation falling below professional norms prevailing at the time of trial. Id. at 688-89. To show deficient performance, the petitioner must overcome a "strong presumption" that his lawyer "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. at 689-90. Further, the petitioner "must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." Id. at 690. The court must then "determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." Id.

To meet his burden of showing the distinctive kind of prejudice required by Strickland, the petitioner must "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694; see also Richter, 562 U.S. at 111 ("In assessing prejudice under Strickland, the question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently."). A court deciding an ineffective assistance of counsel claim need not address both components of the inquiry if the petitioner makes an insufficient showing on one. Strickland, 466 U.S. at 697.

1. Pre-trial investigation

Petitioner contends that trial counsel failed to conduct a reasonable pre-trial investigation. In particular, Petitioner alleges that he initially represented himself and developed a "blue print" of his defense, had a private investigator

appointed, and had a request for a fingerprint expert granted. (Att. A, Ground Three at 1.) After counsel was retained, Petitioner requested counsel to investigate "a number of prosecution[']s inconsistent facts and alleged finding[]s," including Aguilar's preliminary hearing testimony regarding Murillo's stolen vehicle and his identification of "Buster" and the recovery of the stolen vehicle. He also requested counsel to review all discovery and obtain any information regarding Murillo's change of suspect two's identity. (Id. at 1-2, 5.) Petitioner maintains that counsel failed to familiarize himself with the case and failed to use Petitioner's fingerprint expert. (Id. at 4-5.)

Trial counsel's failure to conduct a reasonable investigation may constitute ineffective assistance of counsel. See Wiggins v. Smith, 539 U.S. 510, 521-22 (2003). As the Supreme Court recognized in Strickland, trial counsel "has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." See Strickland, 466 U.S. at 691; see also Sanders v. Ratelle, 21 F.3d 1446, 1456 (9th Cir. 1994) ("[C]ounsel must, at a minimum, *conduct a reasonable investigation* enabling him to make informed decisions about how best to represent his client."). "[A] particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." Strickland, 466 U.S. at 691. "[A] lawyer who fails adequately to investigate and introduce . . . [evidence] that demonstrate[s] his client's factual innocence, or that raise[s] sufficient doubt as to that question to undermine confidence in the verdict, renders deficient performance." See Duncan v. Ornoski, 528 F.3d 1222, 1234 (9th Cir. 2008) (citation omitted) (alterations in original). However, the relevant inquiry is not what could have been pursued, but whether the choices made about what to pursue and what not to pursue were reasonable. Siripongs v. Calderon, 133 F.3d 732, 736 (9th Cir. 1998). The duty to investigate and prepare a defense does not require that

every conceivable witness be interviewed. See Hendricks v. Calderon, 70 F.3d 1032, 1040 (9th Cir. 1995) (as amended).

As to the stolen vehicle and Murillo's subsequent identification of suspect two as "Buster," Petitioner has not presented any evidence that counsel did not investigate these issues. As explained below, Petitioner maintains Aguilar falsely testified regarding Murillo identification of suspect two as "Buster" and the recovery of the stolen vehicle near Petitioner's residence, but he has not presented any evidence to support these allegations. Indeed, although Petitioner faults counsel for failing to obtain a "CHP 180 form or any official towing document" regarding the stolen vehicle, Petitioner has not shown that any such documentation exists. (See Dkt. 54, Order Denying Petitioner's Motion for Reconsideration.) Similarly, with respect to Aguilar's testimony that Murillo identified suspect two as "Buster," Petitioner contends that Aguilar's report did not support this information. (Att. A, Ground Three at 2.) Petitioner does not identify what additional information would have been discovered to support his claim that Aguilar fabricated this testimony.

Further, Petitioner has failed to show he was prejudiced by an alleged failure to investigate these issues. As previously explained, Murillo admitted that he knew one of the perpetrators and identified him as "Buster." Although Murillo did not identify Petitioner at trial, substantial evidence was introduced that he feared retaliation if he identified Petitioner as one of the perpetrators. Gomez's out-of-court identification also supported the guilty verdict.[3]

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[3] For the same reasons, to the extent Petitioner also challenges trial counsel's failure to further investigate Gomez's identification and the field identification cards identifying him as "Knuckles" (Trav. at 40), these claims fail. Indeed, as to the field identification cards, evidence was introduced that in 2010, Petitioner stated that his moniker was "Knuckles." (4 RT 1316.) To the extent Petitioner makes any other new claims in his Traverse, **Error! Main Document Only.**the Court exercises its discretion to decline to consider such claims. See Cacoperdo v. Demosthenes, 37

With respect to the fingerprint expert, Petitioner's trial counsel strategically decided not to use the fingerprint expert. As counsel explained during a People v Marsden, 2 Cal. 3d 118 (1970), hearing, the Los Angeles Police Department had already checked the handgun for DNA, and it came back negative. Petitioner's prints and DNA were not found on the handgun. As such, counsel did not believe it was necessary to have that test conducted a second time. (Reporter's Transcript of Marsden Proceedings ["Marsden RT"] 9.) Petitioner does not identify any other purpose for the fingerprint expert.

As such, Petitioner is not entitled to habeas relief on this claim.

2. *Pitchess* motion

Petitioner alleges that trial counsel should have filed a Pitchess motion following Aguilar's preliminary hearing testimony that Murillo changed his identification of suspect two from "Booster" to "Buster," alleging that he told counsel that Aguilar threatened him prior to being charged, trying to get him to give information on his prior gang affiliates and stating that there were plenty of cases he could put on Petitioner. He also told his counsel that Aguilar falsely claimed that Murillo's vehicle was found near Petitioner's home and that Murillo "sign[ed]" the photographic lineup admonition form. (Att. A, Ground Three at 2, 6.) Petitioner asserts that by failing to file the Pitchess motion, his counsel failed to impeach the prosecution's key witness. (Id. at 7.)

The purpose of a Pitchess motion is to allow a criminal defendant to discover relevant evidence in a law enforcement officer's personnel file. See Brown v. Valverde, 183 Cal. App. 4th 1531, 1538-41 (2010). Here, Petitioner

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F.3d 504, 507-08 (9th Cir. 1994) ("A Traverse is not the proper pleading to raise additional grounds for relief."); see also, e.g., Lopez v. Dexter, 375 F. App'x 724, 2010 WL 1452599, at *1 (9th Cir. 2010) (ruling that district court appropriately rejected petitioner's claim on the basis that it improperly surfaced for the first time in his traverse to the state's answer).

has not shown that a Pitchess motion as to Aguilar's personnel records, if granted, would have yielded favorable evidence. Beyond Petitioner's own conclusory and self-serving allegations regarding threats and false testimony, Petitioner has not shown that the discovery of Aguilar's personnel records would have revealed misconduct, or otherwise provided favorable evidence. Indeed, Petitioner's counsel explained at the Marsden hearing that he did not "see it as a viable motion." (Marsden RT 9.) Petitioner's allegations do not prove deficient performance or prejudice. 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."); Osumi v. Giurbino, 445 F. Supp. 2d 1152, 1163 (C.D. Cal. 2006) (petitioner's failure to identify evidence that trial counsel would have discovered by filing Pitchess motion and his mere speculation regarding evidence possibly in the personnel files was "manifestly insufficient to demonstrate a petitioner was in any manner prejudiced by trial counsel not filing a Pitchess motion").

3. Objections

Petitioner further alleges that trial counsel failed to object during critical stages of trial – when: (i) Aguilar testified that the alleged stolen vehicle was found by Petitioner's residence and that Murillo identified Petitioner out-of-court; (ii) when the prosecutor "badger[ed]" witnesses when they testified that they did not remember exactly what occurred or interacting with Aguilar; and (iii) the prosecutor's attempts to lead and confuse the witnesses, including allowing Gomez to testify to aspects of gangs and gang culture when he was not an expert. (Att. A, Ground Three at 3, 8.) At the same time, Petitioner alleges that counsel had a duty to point out witnesses' contradictory statements as to Aguilar's interview statements. (Id. at 8.)

Again, this ineffective assistance of counsel claim lacks merit. First, with respect to Aguilar's testimony regarding the stolen vehicle and Murillo's

identification, trial court could have reasonably concluded that any objection would be overruled. See Shah v. United States, 878 F.2d 1156, 1162 (9th Cir. 1989) ("The failure to raise a meritless legal argument does not constitute ineffective assistance of counsel." (citation omitted)). This evidence was relevant to identity. Petitioner provides no basis upon which an objection to this evidence would have been sustained. Rather than objecting on meritless grounds, Petitioner's counsel extensively argued in closing argument that the jury should consider the witnesses' testimony at trial, highlighted the inconsistencies between Aguilar's and the witnesses' testimony, and argued that the prosecution failed to produce any physical evidence. (5 RT 1864-68.) Defense counsel's failure to object was reasonable.

Second, with respect to Petitioner's claim that the prosecution badged witnesses and used leading or confusing questions, Petitioner does not refer the Court to any specific questions in the record. Vague and conclusory allegations are insufficient to warrant habeas relief. See Greenway v. Schriro, 653 F.3d 790, 804 (9th Cir. 2011) ("cursory and vague" claim was insufficient to warrant habeas relief); Jones v. Gomez, 66 F.3d 199, 204-05 (9th Cir. 1995) (conclusory allegations unsupported by specific facts do not warrant habeas relief); James, 24 F.3d at 26. Further, based on the Court's independent review of the record, trial counsel did object when it appeared the prosecutor was arguably "badgering" the witness. (See, e.g., 3 RT 684, 727, 729.)

Finally, with respect to Gomez's testimony regarding snitching, Cal. Evid. Code § 800 permits a witness to render a lay opinion that is "[r]ationally based on the perception of the witness" and "[h]elpful to a clear understanding of his testimony." Gomez was familiar with gang culture because his brother was a member of a gang, and thus, could properly opine on what it means to be a snitch and the consequences of being labeled a snitch. (See 3 RT 714.) Thus, any objection to this line of inquiry would have been overruled and trial

counsel could have strategically decided not to object in order to avoid further highlighting this testimony. See United States v. Patwardhan, 2013 WL 2428371, at *5 (C.D. Cal. June 3, 2013) (reasonable tactical decision not to object when "it could have highlighted the fact for the jury"); Barnes v. Gonzales, 2012 WL 3930351, at *13 (C.D. Cal. Sept. 10, 2012) (habeas relief not warranted where counsel could have intentionally chosen not to object to avoid highlighting an incriminating fact).

Petitioner is not entitled to relief on this ineffective assistance claim.

4. Motion for acquittal

Petitioner contends that trial counsel should have filed a motion for acquittal on the carjacking and robbery counts after Murillo and Gomez failed to identify Petitioner at trial, Cazares testified he did not know a "Buster" from Avenues gang, and Rivas testified that Murillo initially identified suspect two as "Booster." (Att. A Ground Three at 3-4, 9.) Petitioner argues that all three witnesses failed to identify him at trial and testified that they did not make an out-of-court identification of him. (Id. at 9.) He further argues that Aguilar improperly presumed that "Booster" was the same as "Buster." (Id. at 9-10.)

Petitioner's claims are belied by the record. His counsel did move under Cal. Penal Code § 1118.1 as to the counts involving Murillo. (5 RT 1523, 1527.) Cal. Penal Code § 1118.1 provides, in pertinent part, as follows:

> In a case tried before a jury, the court on motion of the defendant or on its own motion, at the close of the evidence on either side and before the case is submitted to the jury for decision, shall order the entry of a judgment of acquittal of one or more of the offenses charged in the accusatory pleading if the evidence then before the court is insufficient to sustain a conviction of such offense or offenses on appeal.

Following argument, the trial court denied the motion. (5 RT 1529.) Based on the substantial evidence of guilt, the Court concludes that further pursuing or

renewing this motion would have been futile, and Petitioner has failed to show otherwise. As such, Petitioner has failed to demonstrate that his counsel's performance was deficient or that he was prejudiced. See James, 24 F.3d at 27; Petitioner is not entitled to habeas relief on this claim.

D. Petitioner is not entitled to habeas relief on his prosecutorial misconduct claims.

In Ground Four, Petitioner alleges that Aguilar's testimony was false, the prosecutor improperly introduced the element of fear into the case, and he should not have been charged and prosecuted on the carjacking and robbery counts. (FAP at 6; Att. A, Ground Four at 1-8.) As explained below, there is no merit to these claims.

On habeas review, the relevant question is whether the alleged misconduct "so infected the trial with unfairness as to make the resulting conviction a denial of due process." Jones v. Ryan, 691 F.3d 1093, 1102 (9th Cir. 2012) (quoting Darden v. Wainwright, 477 U.S. 168, 181 (1986)). "To constitute a due process violation, the prosecutorial misconduct must be of sufficient significance to result in the denial of the defendant's right to a fair trial." Greer v. Miller, 483 U.S. 756, 765 (1987) (internal quotation marks and citation omitted). "[T]he touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor." Smith v. Phillips, 455 U.S. 209, 219 (1982). Further, habeas relief is not warranted unless the misconduct "had substantial and injurious effect or influence in determining the jury's verdict." Sechrest v. Ignacio, 549 F.3d 789, 808 (9th Cir. 2008) (quoting Brecht v. Abrahamson, 507 U.S. 619, 623 (1993)); see also Wood v. Ryan, 693 F.3d 1104, 1113 (9th Cir. 2012).

1. False testimony

Petitioner contends that Aguilar's testimony regarding the following was false: (1) Murillo's stolen vehicle was found near Petitioner's residence; (2) the

positive out-of-court identifications; (3) Murillo signed a photo admonition form prior to the out-of-court identification; (4) Murillo indicated that he identified the suspect as "Buster" not "Booster"; and (5) failing to acknowledge that there were two possible gang members named Booster and Buster. (FAP at 6; Att. A, Ground Four at 1.)

In order to prevail on a prosecutorial misconduct claim premised on the alleged presentation of false evidence, petitioner must establish that his conviction was obtained by the use of false evidence that the prosecutor knew at the time to be false or later discovered to be false and allowed to go uncorrected. See Napue v. Illinois, 360 U.S. 264, 269 (1959); see also Carothers v. Rhay, 594 F.2d 225, 229 (9th Cir. 1979); Pavao v. Cardwell, 583 F.2d 1075, 1077 (9th Cir. 1978) (per curiam) (explaining that the petitioner "was required to allege facts showing that there was a knowing use of the perjured testimony by the prosecution"). Due process protects against the admission of false evidence, "whether it be by document, testimony, or any other form of admissible evidence." Hayes v. Brown, 399 F.3d 972, 981 (9th Cir. 2005) (en banc). In order to state a claim under Napue, the petitioner must show: "(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) (citation omitted). Evidence is material if "there is a reasonable likelihood that the false evidence or testimony could have affected the judgment of the jury." Morris v. Ylst, 447 F.3d 735, 743 (9th Cir. 2006). "The fact that a witness may have made an earlier inconsistent statement, or that other witnesses have conflicting recollections of events, does not establish that the testimony offered at trial was false," United States v. Croft, 124 F.3d 1109, 1119 (9th Cir. 1997), or that the prosecutor knowingly used false testimony, see, e.g., United States v. Sherlock, 962 F.2d 1349, 1364 (9th Cir. 1992) (as

amended); United States v. Lochmondy, 890 F.2d 817, 822 (6th Cir. 1989).

Here, Petitioner has failed to establish that any perjured testimony was used to obtain his conviction. Petitioner merely challenges unfavorable testimony as false, without any evidentiary support. It appears Petitioner maintains that Aguilar's testimony regarding the stolen vehicle, the admonition form, and Murillo's identification of "Buster" not "Booster" as one of the perpetrators was false because he did not present any documentary proof. (See Att. A, Ground Four at 4-5.) Petitioner cites no authority suggesting that testimony must be supported by documentary proof in order to be admissible at trial and has presented no evidence that this testimony was false. Petitioner's conclusory allegations and speculation that if documentary evidence was produced it would support his contentions are insufficient to demonstrate the prosecutor presented false testimony.

Petitioner also alleges that Aguilar's testimony regarding Murillo's and Gomez's out-of-court identifications were false. Petitioner makes no effort to reconcile this contention with his other contentions that they made the identifications, but they were the result of coercion and unduly suggestive techniques. Like Petitioner's other claims regarding the identifications, Petitioner's allegations that the prosecutor presented false identification evidence is conclusory and legally flawed. Petitioner appears to be under the mistaken impression that when a victim recants his earlier statements to the police, the prosecutor is on notice that the victim's police statements are "false," and when the prosecutor nevertheless proffers such statements at trial, a Napue violation has occurred. As the Court has already explained, the questions of truth and the credibility of witnesses were matters properly presented to the jury. Defense counsel thoroughly cross-examined the witnesses at trial and argued his theory that Murillo's and Gomez's testimony at trial was more credible than Aguilar's during closing arguments. The

prosecutor's theory of the case rested on the belief that Murillo's and Gomez's earlier police identifications were accurate, despite their recantations at trial. The jury ultimately believed Aguilar's testimony over their testimony at trial. Petitioner's contentions that because Aguilar and the witnesses' testimony were different, Aguilar's testimony must therefore be false is unpersuasive. Petitioner has not demonstrated that the prosecutor presented perjured testimony which rendered the trial fundamentally unfair. See Lara v. Madden, 2017 WL 7938464, at *16 (C.D. Cal. Dec. 22, 2017) (petitioner failed to demonstrate a Napue violation where claim was based on the mistaken impression that when "the victims recanted their earlier statements to the police, the prosecutor was therefore on notice that the victims' police statements were 'false'"), Report and Recommendation accepted by 2018 WL 1135636 (C.D. Cal. Feb. 26, 2018); Navarro v. Sullivan, 2009 WL 6338632, at *7 (C.D. Cal. Dec. 10, 2009) (rejecting contention that earlier statements to the police were false, and concluding that the prosecutor was free to believe that the victim's initial statement to the police was truthful and that her later recantation was not), Report and Recommendation accepted by 2010 WL 1433855 (C.D. Cal. Apr. 7, 2010).

Petitioner's claim that Aguilar falsely testified that Murillo told him that he identified one of the suspects as "Buster" not "Booster" also lacks merit. Again, the Napue claims is conclusory, without any evidentiary support. See Jones, 66 F.3d at 204-05 (conclusory allegations do not warrant habeas relief). Indeed, Murillo testified -- consistent with Aguilar's testimony -- that he had identified one of the suspects as "Buster" from Avenues. (3 RT 678.) Petitioner failed to show that the prosecutor knowingly presented false testimony.

Finally, Aguilar testified that Petitioner was the only "Buster" he knew from Avenues gang. (4 RT 1317.) Petitioner contends that Aguilar must have been lying. (FAP at 6; Att. A, Ground Four at 1.) However, Aguilar merely

testified that Petitioner was the only "Buster" he knew, not that no other "Buster" existed. Petitioner has failed to show any false testimony, let alone that the prosecutor knew the evidence to be false and failed to correct it.

2. Prosecution for carjacking and robbery

Petitioner appears to further contend that the prosecutor should not have prosecuted him for carjacking and robbery in light of the witnesses' failure to identify him at trial and instead, improperly relied on a theory that the witnesses recanted based on fear of retaliation. (Att. A, Ground Four at 1-5.)

"[The] legal system has traditionally accorded wide discretion to criminal prosecutors in the enforcement process." Marshall v. Jerrico, Inc., 446 U.S. 238, 248 (1980). As the Supreme Court has explained:

> A prosecutor exercises considerable discretion in matters such as the determination of which persons should be targets of investigation, what methods of investigation should be used, what information will be sought as evidence, which persons should be charged with what offenses, which persons should be utilized as witnesses, whether to enter into plea bargains and the terms on which they will be established, and whether any individuals should be granted immunity.

Young v. U.S. ex rel. Vuitton et Fils S.A., 481 U.S. 787, 807 (1987); see also United States v. Banuelos-Rodriguez, 215 F.3d 969, 976 (9th Cir. 2000) (en banc) ("Courts generally have no place interfering with a prosecutor's discretion regarding whom to prosecute, what charges to file, and whether to engage in plea negotiations."). Generally, as long as "the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion." Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978). Further, "'the conscious exercise of some selectivity in enforcement is not in itself a federal

constitutional violation' so long as 'the selection was [not] deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification.'" Id. (citation omitted) (alternation in original).

A prosecutor has wide discretion in enforcing the law and may proceed zealously. See Young, 481 U.S. at 807; Marshall, 446 U.S. at 248. The evidence against Petitioner was substantial, including witness identifications, and the evidence supported a reasonable inference that Murillo and Gomez recanted earlier identifications because they feared retaliation if they testified against Petitioner. Evidence regarding the witnesses' fear and reluctance to testify were directly relevant to explaining the reasons why their testimony was not consistent with their earlier identifications. Petitioner's contention that the prosecutor's theory resulted in certain jurors feeling intimidated by comments they heard in the hallway of the courthouse is baseless. (Att. A, Ground Four at 7.)[4] The prosecutor was entitled to present relevant evidence supporting this theory and there is nothing to suggest that the individuals in the hallway had any relationship to the prosecutor. If anything, the record suggests that these individuals were connected to Petitioner. Petitioner has not otherwise presented any evidence that the prosecutor singled him out because of some discriminatory, vindictive, or improper motive.

Petitioner is not entitled to relief on his prosecutorial misconduct claims. To the extent Petitioner contends that the cumulative effect of the misconduct identified above requires reversal (Att. A, Ground Four at 8), the Court's rejection of each misconduct claims is dispositive of the cumulative error claim. See Hayes v. Ayers, 632 F.3d 500, 524 (9th Cir. 2011) (where "no error

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[4] During closing arguments, a bailiff notified the trial court that several jurors felt intimidated after hearing gentlemen in the hallway say "pay attention." (5 RT 1902-41.) After interviewing the jurors individually, the trial court decided not to remove any jurors and a deputy was assigned to the hallway. Id.

of constitutional magnitude occurred, no cumulative prejudice is possible").

E. Petitioner is not entitled to relief on his actual innocence claim.

In Ground Six, Petitioner alleges that he is actually innocent. (FAP at 5(a); Att. A, Ground Six.) To the extent Petitioner is asserting a freestanding actual innocence claim, such claim is meritless.

Respondent contends that Petitioner's claim is barred by Teague v. Lane, 489 U.S. 288 (1989) because granting relief would require that a new rule of constitutional law be announced—namely, that a prisoner may relitigate the factual basis of his conviction irrespective of any independent allegation of constitutional error. (Ans. Mem. at 37-38.) The Court must address Respondent's argument. See Horn v. Banks, 536 U.S. 266, 272 (2002) (per curiam) ("[A] federal court considering a habeas petition must conduct a threshold Teague analysis when the issue is properly raised by the state.").

In Teague, the Supreme Court held that a new constitutional rule of criminal procedure announced after a defendant's conviction became final cannot be applied retroactively on federal habeas review unless the new rule places "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe" or is a "watershed" rule of criminal procedure. 489 U.S. at 310-12 (citation omitted). The Court is not aware of any authority recognizing a freestanding actual innocence claim based on evidence already presented. In asserting actual innocence, Petitioner relies on his previous insufficiency of the evidence arguments. (Att. A, Ground Six at 1-5.) In the context of the actual innocence standard for overcoming a procedural default, "the gateway actual-innocence standard is 'by no means equivalent to the standard of Jackson v. Virginia . . .,' which governs claims of insufficient evidence." House v. Bell, 547 U.S. 518, 538 (2006) (citation omitted). Rather, an actual innocence claim involves evidence that the jury did not have before it. Id. Thus, an actual innocence claim is not the same as a

sufficiency of the evidence claim and cannot be addressed as such. The Supreme Court has not expressly held that prisoner may relitigate the factual basis of his conviction irrespective of any independent allegation of constitutional error in the trial that resulted in that conviction.

Nevertheless, Teague applies only to procedural rules; substantive rules are not subject to its retroactivity bar. Montgomery v. Louisiana, 577 U.S. –, 136 S. Ct. 718, 728 (2016) (as revised). Recently, other district courts in the Central District have indicated that a freestanding actual innocence claim is a substantive claim and thus, not barred by Teague. See Anderson v. Perez, 2016 WL 8078147, at *24 (C.D. Cal. Nov. 8, 2016), Report and Recommendation accepted by 2017 WL 379400 (C.D. Cal. Jan. 24, 2017); Golay v. Warden, 2016 WL 7046783, at *6 (C.D. Cal. Sept. 29, 2016), Report and Recommendation accepted by 2016 WL 7046583 (C.D. Cal. Dec. 2, 2016). Respondent has not addressed this issue or explained why the proposed new rule in this case would be procedural rather than substantive. As such, the Court finds Respondent's Teague argument unpersuasive.

In any event, under existing Supreme Court precedent, it is an open question whether a freestanding actual innocence claim is cognizable in a federal habeas action. See McQuiggin v. Perkins, 569 U.S. 383, 392 (2013) (stating "[w]e have not resolved whether a prisoner may be entitled to habeas relief based on a freestanding claim of actual innocence"); see also Herrera v. Collins, 506 U.S. 390, 400-17 (1993) (declining to decide whether a freestanding actual innocence claim warrants relief in a habeas case); House, 547 U.S. at 554-55 (same). In Herrera, the Supreme Court declared: "Claims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding." 506 U.S. at 400. The Supreme Court acknowledged the possibility that a freestanding

actual innocence claim might warrant federal habeas relief in a capital case, but stressed that it would be only upon an "extraordinarily high" and "truly persuasive" threshold showing. Id. at 417.

The Ninth Circuit also "ha[s] not resolved whether a freestanding actual innocence claim is cognizable in a federal habeas corpus proceeding in the non-capital context, although [it has] assumed that such a claim is viable." Jones v. Taylor, 763 F.3d 1242, 1246 (9th Cir. 2014). It also has held, however, that if a freestanding actual innocence claim is cognizable, the standard for establishing such a claim is "extraordinarily high" and the showing would have to be "truly persuasive." Id. (citation omitted). "[T]he petitioner must 'go beyond demonstrating doubt about his guilt, and must affirmatively prove that he is probably innocent.'" Id. (citation omitted).

Assuming that Petitioner has a cognizable claim, his showing falls far short of this demanding standard. Petitioner's claim is primarily based on the argument that insufficient evidence supported his convictions. A sufficiency of the evidence argument is not enough to make out a claim of actual innocence. See Bousley v. United States, 523 U.S. 614, 623 (1998) ("'[A]ctual innocence' means factual innocence, not mere legal insufficiency.").

Accordingly, Petitioner is not entitled to habeas relief on this claim.

F. Petitioner is not entitled to relief for "newly discovered evidence."

In Ground Seven, Petitioner alleges there is an Avenues gang member with the moniker "Booster." (Att. A, Ground Seven at 4.) Petitioner explains that while he was reviewing another inmate's opening brief in another case, he came across gang expert testimony that an Avenues gang member had the moniker "Booster" and was from a clique near where Murillo's vehicle was stolen. (Id. at 3-5.) Petitioner has attached a document entitled, "Appellant's Opening Brief," on behalf of Frank Servillo ("Servillo"). The "Statement of Facts" section purports to summarize the testimony Officer Oscar Castellanos,

who testified that in March 2012, he filled out a field identification card on Servillo's co-defendant, Jose Pereira ("Pereira"), at which time Pereira claimed he belonged to the Avenues gang and that his moniker was "Booster." (FAP, Exh. F at 22.) According to this summary of the facts, Officer Arshavir Shaldjian also indicated that Pereira's moniker was "Booster" and that he belonged to the Avenues 57 clique. (Id. at 24.) Petitioner contends that this evidence supports his claim of innocence, Murillo's testimony that he identified "Booster" as the perpetrator, impeaches Aguilar's testimony, and raises the possibility of another suspect. (Att. A, Ground Seven at 6-7.)

As explained, even assuming a freestanding actual innocence claim is cognizable, the standard for such a claim would be extraordinarily high, requiring Petitioner to affirmatively prove that he is probably innocent. Jones, 763 F.3d at 1246. Petitioner failed to satisfy this demanding standard. Even if there was an Avenues gang member with the moniker "Booster" two years after the carjacking and robbery, this does not establish Petitioner's innocence. As previously explained, Murillo testified that he identified one of the perpetrators as "Buster" from Avenues. (3 RT 678.) Although Rivas may have understood Murillo to say "Booster," both Murillo and Aguilar testified the suspect was "Buster." (3 RT 678; 4 RT 1273.) Further, as noted, Petitioner's conviction did not turn solely on whether the perpetrator was identified as "Booster" or "Buster." Aguilar testified that both Murillo and Gomez identified Petitioner as one of the perpetrators from a photographic lineup. Finally, Petitioner has presented no affirmative evidence to suggest that Pereira had any involvement in the crime. The evidence does not show Petitioner is probably innocent. The state court's rejection of this claim was not objectively unreasonable. Petitioner is not entitled to habeas relief on this claim.

G. Petitioner is not entitled to an evidentiary hearing.

Petitioner requests an evidentiary hearing. (Trav. at 2-3.) With respect to

claims adjudicated on the merits, the Supreme Court has held that the AEDPA requires federal courts to review state court decisions on the basis of the record before the state court. Pinholster, 563 U.S. at 181-85. The Supreme Court reasoned that the "backward-looking language" of Section 2254(d)(1) "requires an examination of the state-court decision at the time it was made," and thus, the record under review must be "limited to the record in existence at that same time *i.e.*, the record before the state court." Id. at 182. Accordingly, under Pinholster, Petitioner is not entitled to an evidentiary hearing.

Further, with respect to all of Petitioner's claims, an evidentiary hearing is not warranted where, as here, "the record refutes the applicant's factual allegations or otherwise precludes habeas relief." Schriro v. Landrigan, 550 U.S. 465, 474 (2007). "It is axiomatic that when issues can be resolved by reference to the state court record, an evidentiary hearing becomes nothing more than a futile exercise." Totten v. Merkle, 137 F.3d 1172, 1176 (9th Cir. 1998). Petitioner's request for an evidentiary hearing should be denied.

VII.

RECOMMENDATION

IT IS THEREFORE RECOMMENDED that the District Judge issue an Order: (1) approving and accepting this Report and Recommendation; (2) denying the request for an evidentiary hearing; and (3) directing that Judgment be entered denying the Petition and dismissing this action with prejudice.

Dated: April 18, 2018

JOHN D. EARLY
United States Magistrate Judge

APPENDIX

7

I HEREBY CERTIFY THAT THIS DOCUMENT WAS SERVED BY FIRST CLASS MAIL, POSTAGE PREPAID, TO (SEE BELOW) AT THEIR RESPECTIVE MOST RECENT ADDRESS OF RECORD IN THIS ACTION ON THIS DATE

TO: DATE: DEPUTY CLERK:

Petitioner 07/05/18 DV

JS-6

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

MICHAEL A. CERVANTES,
Petitioner,
v.
W. L. MONTGOMERY, Warden,
Respondent.

Case No. CV 15-08911-AG (JDE)

JUDGMENT

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

IT IS ADJUDGED that the petition is denied and this action is dismissed with prejudice.

Dated: June 29, 2018

ANDREW J. GUILFORD
United States District Judge

I HEREBY CERTIFY THAT THIS DOCUMENT WAS SERVED BY FIRST CLASS MAIL, POSTAGE PREPAID, TO (SEE BELOW) AT THEIR RESPECTIVE MOST RECENT ADDRESS OF RECORD IN THIS ACTION ON THIS DATE

TO: DATE: DEPUTY CLERK:
Petitioner 07/05/18 DV

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

MICHAEL A. CERVANTES,

Petitioner,

v.

W. L. MONTGOMERY, Warden,

Respondent.

Case No. CV 15-08911-AG (JDE)

ORDER ACCEPTING FINDINGS AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Pursuant to 28 U.S.C. § 636, the Court has reviewed the operative First Amended Petition ("Petition"), Respondent's Answer to the Petition, Petitioner's Traverse, the records on file, the Report and Recommendation of the United States Magistrate Judge and Objections thereto filed by Petitioner. Further, the Court has engaged in a de novo review of those portions of the Report and Recommendation to which objections have been made. The Court accepts the findings and recommendation of the Magistrate Judge.

IT IS THEREFORE ORDERED that:

(1) Petitioner's request for an evidentiary hearing is DENIED; and

(2) Judgment shall be entered denying the Petition and dismissing this action with prejudice.

Dated: June 29, 2018

ANDREW J. GUILFORD
United States District Judge

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