EXHIBIT "A"

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

MAR 24 2020

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

SMITH ELLISON, Jr., Petitioner-Appellant, v. ROBERT NEUSCHMID, Warden, Respondent-Appellee.	No. 20-55141 D.C. No. 5:19-cv-00634-SVW-JDE Central District of California, Riverside ORDER

Before: CLIFTON and NGUYEN, Circuit Judges.

We have received and reviewed appellant's response to this court's February 11, 2020, order to show cause.

The request for a certificate of appealability is denied because the notice of appeal was not filed within 30 days after entry of the district court's judgment. *See* 28 U.S.C. §§ 2107, 2253(c)(2). Appellant is not entitled to the benefit of the prison mailbox rule because his notice of appeal was mailed to the district court by a third party who is not incarcerated. *Cf.* Fed. R. App. P. 4(c).

Any pending motions are denied as moot.

DENIED.

UNITED STATES COURT OF APPEALS

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SMITH ELLISON, Jr., Petitioner-Appellant, v. ROBERT NEUSCHMID, Warden, Respondent-Appellee.	No. 20-55141 D.C. No. 5:19-cv-00634-SVW-JDE Central District of California, Riverside ORDER

Before: TROTT and N.R. SMITH, Circuit Judges.

Appellant's request for a certificate of appealability (Docket Entry No. 5) is construed as a motion for reconsideration. So construed, the motion for reconsideration is denied. *See* 9th Cir. R. 27-10.

No further filings will be entertained in this closed case.

EXHIBIT "B"

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

EASTERN DIVISION

SMITH ELLISON, JR., Petitioner, v. ROBERT NEUSCHMID, Respondent.	No. 5:19-cv-0634-SVW (JDE) ORDER DENYING MOTION FOR RECONSIDERATION

I.

INTRODUCTION

On April 9, 2019, Smith Ellison, Jr. ("Petitioner") filed a Petition for Writ of Habeas Corpus by a Person in State Custody under 28 U.S.C. § 2254, challenging a conviction suffered in the Riverside County Superior Court. Dkt. 1. On April 24, 2019, Petitioner filed a First Amended Petition. Dkt. 4 ("Petition" or "Pet."). On July 8, 2019, Respondent filed an Answer to the Petition. Dkt. 12. Petitioner did not file a Reply to the Answer within the time allotted under the Court's Scheduling Order (Dkt. 7). On October 22, 2019, the assigned magistrate judge issued a Report and Recommendation recommending the Petition be

denied and the action dismissed. Dkt. 14. Petitioner did not file a timely objection to the report. On December 18, 2019, the Court issued: (1) an Order accepting the report, denying the Petition, and dismissing the action with prejudice ("Dismissal Order"); (2) a Judgment of Dismissal; and (3) an Order denying the issuance of a certificate of appealability. See Dkt. 15, 16, 17. The docket reflects that a request by Petitioner to the United States Court of Appeals for the Ninth Circuit for a certificate of appealability was denied as untimely on March 24, 2020. Dkt. 20.

On April 20, 2020, the Court received from Petitioner a "Motion for Reconsideration Pursuant to Federal Rules of Civil Procedure Rule 60(b)(3)" that asserts that the Dismissal Order constituted "fraud" and "a conspiracy with the state courts" to deny Petitioner relief, asks this Court to reconsider the Dismissal Order, and thereafter largely reargues the grounds rejected in the Dismissal Order. Dkt. 21 ("Motion for Reconsideration").

For the reasons set forth herein, Petitioner's Motion for Reconsideration of the Dismissal Order is DENIED.

II.

LEGAL STANDARD

Motions to reconsider may be brought under Rule 59(e) or Rule 60(b) of the Federal Rules of Civil Procedure. Fuller v. M.G. Jewelry, 950 F.2d 1437, 1422 (9th Cir. 1991). Under Rule 59(e), reconsideration may be appropriate where the movant demonstrates that there is (1) an intervening change in the controlling law, (2) new evidence not previously available, or (3) a need to correct a clear error of law or to prevent manifest injustice. School Dist. No. 1J, Multnomah County, Oregon v. ACandS, Inc., 5 F.3d 1255, 1263 (9th Cir. 1993). Rule 60(b) provides for reconsideration only upon a showing of: (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered before the court's decision; (3) fraud by the adverse party; (4) a

void judgment; (5) satisfaction of judgment; or (6) any other reason justifying relief. See Fed. R. Civ. P. 60(b); School Dist. No. 1J, 5 F.3d at 1263. Rule 60(b)(6) requires a showing that the grounds justifying relief are extraordinary; mere dissatisfaction with the court's order or belief that the court is wrong in its decision are not adequate grounds for relief. See Twentieth Century—Fox Film Corp. v. Dunnahoo, 637 F.2d 1338, 1341 (9th Cir. 1981).

In addition, Local Civil Rule 7-18 of this Court provides, in part:

> A motion for reconsideration of the decision on any motion may be made only on the grounds of (a) a material difference in fact or law from that presented to the Court before such decision that in the exercise of reasonable diligence could not have been known to the party moving for reconsideration at the time of such decision, or (b) the emergence of new material facts or a change of law occurring after the time of such decision, or (c) a manifest showing of a failure to consider material facts presented to the Court before such decision.

III.

DISCUSSION

As an initial matter, Petitioner has not shown any basis for reconsideration of the Dismissal Order under Rules 59(e) or 60(b) or Local Rule 7-18, such as an intervening change in the controlling law, newly discovered evidence, etc. Petitioner's baseless assertion of "fraud," apparently directed at this Court, is unsupported by any evidentiary showing. As noted, dissatisfaction with a judgment is not a proper basis upon which a reconsideration motion may be brought. As Petitioner has not shown an appropriate legal basis for reconsideration of the Dismissal Order, the Motion for Reconsideration is denied.

/ / /

IV.

CONCLUSION

For the foregoing reasons, Petitioner's Motion for Reconsideration (Dkt. 21) is DENIED.

DATED: April 27, 2020

STEPHEN V. WILSON
United States District Judge

Presented by:

John D. Early
United States Magistrate Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
EASTERN DIVISION

SMITH ELLISON, JR.,

Petitioner,

v.

ROBERT NEUSCHMID, Warden,

Respondent.

Case No. 5:19-cv-00634-SVW (JDE)

ORDER DENYING ISSUANCE OF CERTIFICATE OF APPEALABILITY

Rule 11 of the Rules Governing Section 2254 Cases in the United States District Courts provides as follows:

(a) Certificate of Appealability. The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant. Before entering the final order, the court may direct the parties to submit arguments on whether a certificate should issue. If the court issues a certificate, the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. § 2253(c)(2). If the court denies a certificate,

the parties may not appeal the denial but may seek a certificate from the court of appeals under Federal Rule of Appellate Procedure 22. A motion to reconsider a denial does not extend the time to appeal.

(b) Time to Appeal. Federal Rule of Appellate Procedure 4(a) governs the time to appeal an order entered under these rules. A timely notice of appeal must be filed even if the district court issues a certificate of appealability.

Under 28 U.S.C. § 2253(c)(2), a Certificate of Appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." The Supreme Court has held that this standard means a showing that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were '"adequate to deserve encouragement to proceed further."'" Slack v. McDaniel, 529 U.S. 473, 483-84 (2000) (citations omitted).

Here, the Court, having considered the record in this action, finds and concludes that Petitioner has not made the requisite showing with respect to the claims alleged in the operative petition.

Accordingly, a Certificate of Appealability is denied.

Dated: December 18, 2019

STEPHEN V. WILSON
United States District Judge

JS-6

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
EASTERN DIVISION

SMITH ELLISON, JR., Petitioner, v. ROBERT NEUSCHMID, Warden, Respondent.	Case No. 5:19-cv-00634-SVW (JDE) JUDGMENT

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

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

Dated: December 18, 2019

STEPHEN V. WILSON
United States District Judge

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

EASTERN DIVISION

SMITH ELLISON, JR., Petitioner, v. ROBERT NEUSCHMID, Warden, Respondent.	No. 5:19-cv-00634-SVW-JDE REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This Report and Recommendation is submitted to the Honorable Stephen V. Wilson, 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 April 9, 2019, Petitioner Smith Ellison, Jr. ("Petitioner") filed a pro se Petition for Writ of Habeas Corpus by a Person in State Custody. Dkt. 1 ("Petition"). On April 12, 2019, the Court advised Petitioner of several pleading deficiencies, and dismissed the Petition with leave to amend. Dkt. 3.

Petitioner filed the operative First Amended Petition ("FAP") on April 25, 2019. Dkt. 4. On July 8, 2019, Respondent filed an Answer and supporting Memorandum ("Ans. Mem."). Dkt. 11. Despite an opportunity to do so, Petitioner did not file a Reply within the allotted time and has not requested an extension of time within which to do so.

For the reasons discussed hereafter, the Court recommends that the FAP be denied and the action be dismissed with prejudice.

II.

PROCEDURAL HISTORY

On September 28, 2016, a Riverside County Superior Court jury found Petitioner guilty of second degree murder. The jury also found true the allegations that Petitioner personally and intentionally discharged a firearm and proximately caused great bodily injury or death to another person. 2 Clerk's Transcript on Appeal ("CT") 353-54. On November 4, 2016, the trial court sentenced Petitioner to forty years to life in state prison. 2 CT 390-91.

Petitioner appealed his conviction and sentence to the California Court of Appeal. Respondent's Notice of Lodgment ("Lodgment") 3. On October 12, 2018, the California Court of Appeal remanded the matter for resentencing to allow the trial court to decide whether to exercise its discretion to strike the firearm use enhancement and affirmed the judgment in all other respects. Lodgment 1, Appendix A. A Petition for Review was denied on January 16, 2019. Lodgments 1-2. On March 22, 2019, the trial court declined to strike the firearm use enhancement. Lodgment 7.

Petitioner also sought to collaterally attack his conviction by filing a habeas petition in the Riverside County Superior Court. Lodgment 8. That petition was denied on June 13, 2017. Lodgment 9. Petitioner then filed a habeas petition in the California Court of Appeal, which was denied on November 9, 2017 for want of a record. Lodgments 10-11.

III.

SUMMARY OF THE EVIDENCE PRESENTED AT TRIAL

The underlying facts are taken from the California Court of Appeal's opinion. Petitioner does not contest the California Court of Appeal's summary of the facts and has not 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 petitioner "rebuts that presumption with clear and convincing evidence").

> On the afternoon of April 17, 2015, [Petitioner] fatally shot his 28-year-old son Jason in the chest with a 9 mm handgun. The shooting took place at [Petitioner's] rural home in Mead Valley, near a shed used to store all-terrain vehicles (ATVs).
>
> At the time of the shooting, Jason and [Petitioner] were arguing about an ATV that was on [Petitioner's] property and that Jason often rode. [Petitioner] and Jason were in the process of completing paperwork for [Petitioner] to transfer ownership of the ATV to Jason. [Petitioner] had a confrontational in-person interaction with Jason earlier in the day and knew that Jason would be coming to his property to get the ATV to go riding with friends. Before Jason arrived at the property to get the ATV, [Petitioner] took the key out of the ATV, so Jason could not take it, and he armed himself with a handgun. [Petitioner] claimed at trial that he armed himself because he was planning to feed his animals and wanted to protect himself from snakes, coyotes and wild dogs, not because he was expecting a confrontation with Jason.
>
> When Jason arrived with his friends at [Petitioner's] property, he called [Petitioner] to say he was there to get the ATV, but [Petitioner] did not open the driveway gate for him. Jason

jumped the fence and walked to the ATV shed while his friends waited outside the driveway gate. [Petitioner] and Jason met near the ATV shed, out of view of Jason's friends.

One of Jason's friends testified that he heard Jason repeatedly stating to [Petitioner], "Take it, take it," presumably referring to paperwork to transfer ownership of the ATV, and repeatedly calling [Petitioner] a "son of a bitch." Jason's friends then heard a single gunshot and shortly thereafter saw Jason walking part of the way down the driveway toward them before collapsing. According to one friend, Jason said, "The son of a bitch finally shot me." [Petitioner] appeared from behind the shed and then walked into the house, where he called 911 and reported that he shot his son. [Petitioner] did not open the driveway gate for Jason's friends, who drove away to a place with better cellphone reception and called 911.

When law enforcement officers arrived several minutes later, [Petitioner] was kneeling in the driveway with his arms wrapped around Jason. [Petitioner] appeared to be emotionally distraught and was crying. Jason died shortly thereafter as a result of a gunshot wound to the left side of his chest, which went through his lung and perforated his pulmonary artery, causing significant internal bleeding. Jason was not armed during the confrontation with [Petitioner].

An information charged [Petitioner] with second degree murder (Pen. Code, § 187, subd. (a)), and alleged that [Petitioner] personally and intentionally discharged a firearm in committing the murder (id., §§ 12022.53, subd. (d), 1192.7, subd. (c)(8).)

During trial, [Petitioner] testified on his own behalf, claiming that he shot Jason in self-defense. According to

> [Petitioner], during the confrontation near the ATV shed, Jason was "raving" and cussing and told [Petitioner] "I'm gonna kick your ass." [Petitioner] testified that he was scared of Jason, and although he repeatedly told Jason that he was armed, Jason kept coming toward him and was "totally out of control." According to [Petitioner], when Jason raised a fist to hit him, [Petitioner] fired his gun because he was in fear for his life.
>
> At trial, as a result of a series of evidentiary rulings by the trial court, the jury heard evidence presented by the People of numerous acts of violence that [Petitioner] perpetrated against Jason, as well as against other family members, including [Petitioner's] other children, his stepchildren and his wife. The incidents spanned a long period of time and included firing a gun or threatening to fire a gun at other family members during confrontations.

Lodgment 1, Appendix A at 2-5.

IV.

PETITIONER'S CLAIMS

1. The trial court committed prejudicial error when it allowed the prosecution to introduce "almost unlimited evidence of prior conduct as propensity evidence" under Cal. Evid. Code § 1109.[1] FAP at 5.

2. The trial court abused its discretion by admitting evidence relating to Petitioner's "parenting style and [discipline] of his children" because such evidence was time-barred under Section 1109. FAP at 5.

3. The conduct involving Petitioner's minor children lacked probative value. FAP at 6.

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[1] Unless otherwise indicated, all further statutory references are to the California Evidence Code.

4. The trial court violated Petitioner's right to fully present a defense when it precluded him from introducing evidence of his remorse, "which spoke to both [his] mental state (i.e., lack of malice) and which supported [his] defense that Jason [Ellison ("Jason")] was the aggressor and [Petitioner] acted in self-defense." FAP at 6.

5. The trial court wrongfully precluded Petitioner from presenting evidence of Jason's prior act of vandalism, which showed Jason's propensity for violence and relevant to Petitioner's claim of self-defense. FAP at 6.

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).

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 it 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); Williams, 529 U.S. at 405-06. When a state court decision adjudicating a claim 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." Early v. Packer, 537 U.S. 3, 8 (2002) (per curiam).

State court decisions that are not "contrary to" Supreme Court law may only be set aside on federal habeas review "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 state court decision that correctly identified the governing legal rule may be rejected if it unreasonably applied the rule to the facts of a particular case. See Williams, 529 U.S. at 406-10, 413; Woodford v. Visciotti, 537 U.S. 19, 24-27 (2002) (per curiam). However, to obtain federal habeas 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; see also Visciotti, 537 U.S. at 25; Bell v. Cone, 535 U.S. 685, 694 (2002). "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) (quoting Harrington v. Richter, 562 U.S. 86, 103 (2011)). Moreover, as the Supreme Court held in Cullen v. Pinholster, 563 U.S. 170, 181, 185 n.7 (2011), 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.

Here, Petitioner raised his claims in the California Court of Appeal on direct appeal. The court of appeal rejected his claims in a reasoned decision on October 12, 2018. Lodgment 1, Appendix A. Thereafter, the California Supreme Court denied Petitioner's Petition for Review without comment or citation to authority. Lodgment 2. 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, in this case, the court of appeal's decision. See Wilson v. Sellers, 584 U.S. –, 138 S. Ct. 1188, 1192 (2018) ("[T]he federal court should 'look through' the unexplained decision to the last related state-court decision that does provide a relevant rationale. It should then presume that the unexplained decision adopted the same reasoning."); Ylst v. Nunnemaker, 501 U.S. 797, 803-04 (1991). In reviewing the state court decision, the Court has independently reviewed the relevant portions of the record. Nasby v. McDaniel, 853 F.3d 1049, 1052-53 (9th Cir. 2017).

VI.

DISCUSSION

A. Petitioner's State Law Claims are Not Cognizable on Federal Habeas Review

As an initial matter, to the extent Petitioner's claims are based on a violation of state law, such claims are not cognizable on federal habeas review. Federal habeas relief is not available for errors of state law. See 28 U.S.C. § 2254(a); Estelle v. McGuire, 502 U.S. 62, 67-68 (1991). "In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States." McGuire, 502 U.S. at 68; Smith v. Phillips, 455 U.S. 209, 221 (1982) ("A federally issued writ of habeas corpus, of course, reaches only convictions obtained in violation of

some provision of the United States Constitution."). "[A] state court's interpretation of state law, including one announced on direct appeal of the challenged conviction, binds a federal court sitting in habeas corpus." Bradshaw v. Richey, 546 U.S. 74, 76 (2005) (per curiam). A federal habeas court is not to "second-guess" a state court's "construction of its own state law unless 'it appears that its interpretation is an obvious subterfuge to evade consideration of a federal issue.'" Hubbart v. Knapp, 379 F.3d 773, 780 (9th Cir. 2004) (quoting Peltier v. Wright, 15 F.3d 860, 862 (9th Cir. 1994)); see also Mullaney v. Wilbur, 421 U.S. 684, 691 & n.11 (1975). No such deception exists here, and Petitioner has not presented any evidence demonstrating otherwise. Accordingly, Petitioner's claims alleging evidentiary error based on state law do not present federal questions and as such, Petitioner is not entitled to habeas relief on these claims. See McGuire, 502 U.S. at 71-72 ("the fact that the instruction was allegedly incorrect under state law is not a basis for habeas relief"); Jammal v. Van de Kamp, 926 F.2d 918, 919 (9th Cir. 1991) (federal habeas courts "do not review questions of state evidence law").

B. Petitioner is Not Entitled to Habeas Relief on his Claims Challenging the Admission of Prior Acts Evidence

In Grounds One through Three, Petitioner challenges the trial court's admission of prior conduct involving his "minor children," arguing that: (1) the trial court erred in allowing the prosecution to introduce "almost unlimited evidence of prior conduct as propensity evidence" under Section 1109 (Ground One); (2) such prior conduct evidence was time-barred under Section 1109 (Ground Two); and (3) the evidence lacked probative value (Ground Three). FAP at 5-6. Liberally construing Petitioner's allegations, the Court presumes that Petitioner is challenging the same thirteen instances of prior acts involving his children and stepchildren as he did on direct review, claiming that such evidence was inadmissible, in whole or in part, under Sections 1101, 1103, and

1109 and violated his right to a fundamentally fair trial.[2] Lodgment 1 at 19-23, 25-26. Petitioner challenged the following evidence:[3]

- Incidents Admitted Under Section 1101(b):
  1. Petitioner hitting his step-daughter, Crystal, who was born in 1972, with a quirt when she was a minor for stealing (2 Reporter's Transcript on Appeal ["RT"] 255-56);
  2. Petitioner physically "beating" his son, DeQuen, who was born in 1971, during his childhood (4 RT 554-57);
  3. Petitioner disciplining DeQuen with an extension cord, leaving a five-inch long scar (4 RT 554-56);
  4. Petitioner disciplining his son, Smith Ellison, III (or, "Little Smitty"), with an extension cord when he was a child (2 RT 260-61);
  5. Petitioner firing a shotgun as DeQuen when he was seventeen years old, during a confrontation with Petitioner as DeQuen was running away (4 RT 562-71);
  6. Petitioner slapping his daughter, Cicely (or, "Jennifer"), when she was sixteen after she got into a physical fight with her brother Jason (3 RT 464-65);
  7. Petitioner slapping Jason off a horse when he was seventeen (4 RT 577-78, 684);

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[2] Petitioner has not challenged the admission of two additional incidents involving his wife, and as such, the Court does not address the admission of this evidence. On direct appeal, the appellate court concluded Petitioner forfeited his challenge to the admission of this evidence by failing to object. Lodgment 1, Appendix A at 18-20.

[3] The trial court issued preliminary rulings on which provisions of the California Evidence Code provided the basis for admitting some of the evidence, and later finalized the rulings when discussing the jury instructions, which, in some instances, were different from the preliminary rulings. See 1 RT 16-50, 94-138; 9 RT 1680-86; 12 RT 2237-43; 2 CT 268, 278-81.

- Incidents Admitted under Section 1101 and 1109:

8. Petitioner firing a shotgun as DeQuen ran away after an argument in 2014 (4 RT 600-07);
9. Petitioner and Jennifer having an argument and Petitioner making threats against his children in 2014 (3 RT 489-91);
10. Petitioner loading a gun in front of Jennifer in 2015, and then threatening to kill DeQuen if he did not leave Petitioner's property (3 RT 489-99, 510);

- Incidents Admitted Under Section 1103(b):

11. Petitioner punching Little Smitty in the face at the dinner table, causing him to fall out of his chair (12 RT 2133-35);
12. Petitioner's physical altercation with his step-son, Maurice, when he was seventeen years old, scratching the inside of Maurice's mouth (12 RT 2119-22); and
13. Petitioner pointing a shotgun at Crystal and hitting her with it after her son started pulling himself up on the television, when she was twenty years old (12 RT 2135-41).

See Lodgment 1 at 19-23. In his Petition for Review, Petitioner argued that the prior conduct evidence involving his children was inadmissible as propensity evidence because it had a disciplinary animus and thus, did not amount to domestic violence, and evidence regarding conduct that occurred when the children were growing up was time-barred under Section 1109(d). Lodgment 1 at 23-24. Petitioner further claimed that the prior acts evidence was, in whole or in part, too remote and/or too dissimilar to the charged offense to support the inference for which it was proffered; and the evidence was cumulative and resulted in an undue consumption of time. Id. at 24.

The three California Evidence Code sections at issue provide for the admission of evidence regarding a defendant's prior conduct and/or character for violence. Section 1101(b) provides for the admission of evidence "that a person committed a crime, civil wrong, or other act when relevant to prove some fact . . . . such as motive, opportunity, intent, preparation, plan, knowledge, identity, [or] absence of mistake or accident . . . other than his or her disposition to commit such an act." Section 1109 provides for the admission of evidence of a defendant's other acts of domestic violence. Section 1103(b) provides for the admission of evidence of a defendant's character for violence or trait of character for violence "if the evidence is offered by the prosecution to prove conduct of the defendant in conformity with the character or trait of character and is offered after evidence that the victim had a character for violence or a trait of character tending to show violence has been adduced by the defendant . . . ."

1. The California Court of Appeal Decision

The California Court of Appeal rejected each of Petitioner's evidentiary error claims on state law grounds, and did not specifically address the federal nature of these claims. Lodgment 1, Appendix A. "When a state court rejects a federal claim without expressly addressing that claim, a federal habeas court must presume that the federal claim was adjudicated on the merits." Johnson v. Williams, 568 U.S. 289, 301 (2013). Here, in the absence of contrary evidence, the Court presumes that the court of appeal adjudicated the federal nature of Petitioner's claims on the merits.

As to the admission of prior conduct evidence, the California Court of Appeal concluded that the trial court did not abuse its discretion in admitting this evidence. First, the appellate court concluded that because Petitioner was charged with "an offense involving domestic violence" within the meaning of Section 1109, other instances of domestic violence perpetrated by Petitioner

were admissible to show his propensity to commit domestic violence. Lodgment 1, Appendix A at 13-14. The appellate court rejected Petitioner's contention that some of the prior acts admitted as evidence under Section 1109 should have been excluded because they were not incidents of domestic violence, but rather, permissible instances of parental discipline, because none of the instances that Petitioner identified as permissible parental discipline were admitted under Section 1109. Instead, they were admitted under Section 1101(b) as evidence of Petitioner's intent, motive, or common plan in shooting Jason. Id. at 15. The appellate court further concluded that all of the incidents involving Petitioner's children and stepchildren admitted under Section 1109 occurred in 2014 or 2015, and therefore, were within the statutory time limit; and the trial court did not abuse its discretion in declining to exclude the evidence pursuant to Section 352[4] as "too dissimilar." Id. at 17-18, 21-22.

The court of appeal also found that the trial court did not abuse its discretion in admitting evidence of the prior acts pursuant to Section 1101(b) to show intent, motive, or common plan. Lodgment 1, Appendix A at 26. The appellate court reasoned that the prior incidents all involved instances in which Petitioner was the aggressor in using violence or threatening to use violence against his children or stepchildren when he got into an angry confrontation with them; therefore, the incidents were all sufficiently similar to Petitioner's shooting of Jason to constitute probative evidence on the issue of whether Petitioner acted aggressively and violently toward Jason during the confrontation with the intent to inflict injury on him, or whether, as Petitioner claimed, he was acting in self-defense. Id. at 24-25. For the same reason, the

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[4] Section 352 provides: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

appellate court concluded that the evidence was relevant to show Petitioner's motive, explaining:

> evidence that he committed numerous violent acts or threatened to do so when involved in angry confrontations with his children and stepchildren tended to show that [Petitioner] had a motive other than self-defense to shoot Jason during the confrontation. Specifically, the incidents admitted into evidence tended to show that when [Petitioner] did not approve of his children's and stepchildren's actions or words, his way of reacting was to become the aggressor in using violence against them or threatening to do so. The jury could conclude that [Petitioner] acted pursuant to the same motive in this case.

Id. at 25. Likewise, the court of appeal found "at least some of the prior violent acts were properly admissible to show that [Petitioner] had a common plan in committing those acts and in shooting Jason" (id. at 25-26 (footnote omitted):

> In this case, [Petitioner] contended that he armed himself with a handgun before Jason arrived at the property to shoot snakes or other creatures while feeding his animals, not for use in shooting at Jason during a possible confrontation. However, several of the prior incidents admitted into evidence . . . showed that on prior occasions when in confrontations with his children, [Petitioner] chose to arm himself with a gun and either fire or threaten to fire the gun at them. As the trial court reasonably observed, these incidents are relevant to show a common plan because they tend to prove that "when he gets angry, he gets a gun and he fires it."

The California Court of Appeal also rejected Petitioner's contention that the prior acts admitted pursuant to Section 1101(b) should have been excluded under Section 352. The court reasoned:

> the evidence of [Petitioner's] prior violent acts toward his children had significant probative value to the central disputed issue in this case, namely whether [Petitioner] acted in reasonable and justifiable self-defense in shooting Jason or whether he maliciously shot Jason in the midst of an angry confrontation. All of the evidence admitted pursuant to section 1101, subdivision (b) assisted the jury to understand the nature of the relationship that [Petitioner] had with his children through their lives, and more specifically to understand [Petitioner's] consistent willingness to use violence toward his children and stepchildren in confrontations with them. Even though some of the violent incidents admitted into evidence were temporally remote, they still had significant probative value to demonstrate the history and development of [Petitioner's] relationship with his children.

Lodgment 1, Appendix A at 27-28. The appellate court further concluded that "the trial court acted within its discretion in determining that the prior violent acts would not unduly inflame the emotions of the jury." Id. at 28.

Finally, the California Court of Appeal rejected Petitioner's challenge to the admission of rebuttal evidence pursuant to Section 1103, explaining:

> [T]he trial court did not abuse its discretion in determining that the three instances admitted into evidence under section 1103 were probative of [Petitioner's] violent character and should not be excluded under section 352. In the first instance, [Petitioner] punched one of his sons in the face while the son was sitting at a table, knocking him to the ground. In the second instance, [Petitioner] jumped another son from behind and then wrestled with him, using his fingernails to scratch the inside of the son's mouth. In the third instance, [Petitioner] struck his stepdaughter

> with the stock of a shotgun. The trial court could reasonably conclude that the incidents had probative value and should not be excluded pursuant to section 352 because they tended to show [Petitioner's] character for violence and, as specifically relevant here, to show his propensity to use violence against his children and stepchildren.

Lodgment 1, Appendix A at 30-31 (footnote omitted).

2. Applicable Legal Authority and Analysis

"Habeas relief is available for wrongly admitted evidence only when the questioned evidence renders the trial so fundamentally unfair as to violate federal due process." Jeffries v. Blodgett, 5 F.3d 1180, 1192 (9th Cir. 1993) (as amended); see also McGuire, 502 U.S. at 67-70; Walters v. Maass, 45 F.3d 1355, 1357 (9th Cir. 1995). However, "[t]he Supreme Court has made very few rulings regarding the admission of evidence as a violation of due process." Holley v. Yarborough, 568 F.3d 1091, 1101 (9th Cir. 2009). "Although the Court has been clear that a writ should be issued when constitutional errors have rendered the trial fundamentally unfair, it has not yet made a clear ruling that admission of irrelevant or overly prejudicial evidence constitutes a due process violation sufficient to warrant issuance of the writ." Id. (internal citation omitted). Indeed, the Supreme Court has left open whether a state law would violate the Due Process Clause if it permitted the use of prior crimes evidence to show propensity to commit a charged crime. McGuire, 502 U.S. at 75 n.5. Absent clearly established federal law, this Court cannot find the state court's ruling was an unreasonable application of clearly established Supreme Court law. Holley, 568 F.3d at 1101; see also Knowles v. Mirzayance, 556 U.S. 111, 122 (2009) (holding "it is not 'an unreasonable application of' 'clearly established Federal law' for a state court to decline to apply a specific legal rule that has not been squarely established by this Court"); see also Mejia

v. Garcia, 534 F.3d 1036, 1046-47 (9th Cir. 2008) (admission of propensity evidence did not violate clearly established law); Alberni v. McDaniel, 458 F.3d 860, 866 (9th Cir. 2006) (prior violent acts); Garibay v. Lewis, 323 F. App'x 568, 569 (9th Cir. 2009) (prior acts of domestic violence).

Even assuming Petitioner has raised a cognizable due process claim, habeas relief still would not be warranted as the admission of this evidence did not render his trial fundamentally unfair. "Only if there are no permissible inferences the jury may draw from the evidence can its admission violate due process." Jammal, 926 F.2d at 920; see also McGuire, 502 U.S. at 70; Noel v. Lewis, 605 F. App'x 606, 608 (9th Cir. 2015). Here, evidence of Petitioner's prior violent conduct toward his children and stepchildren was probative of Petitioner's violence character, the nature of his relationship with his children and willingness to use violence toward them, and refuted his claim that he was acting in self-defense. As the appellate court concluded, the ten incidents admitted under Section 1101(b) were probative as to whether Petitioner acted aggressively and violently toward Jason during the confrontation with the intent to inflict injury on him, or whether, as Petitioner claimed, he acted in self-defense. Such evidence also was relevant to motive as such evidence "tended to show that when [Petitioner] did not approve of his children's and stepchildren's actions or words, his way of reacting was to become the aggressor in using violence against them or threatening to do so." See Lodgment 1, Appendix A at 25. Several of these incidents also were relevant to showing Petitioner had a common plan in committing those acts and in shooting Jason. Although Petitioner claimed that he armed himself with a handgun to shoot snakes or other creatures while feeding the animals (see 10 RT 1850), several of the prior acts involved incidents in which Petitioner would arm himself with a gun or fire or threaten to fire a gun when he became angry. Similarly, the rebuttal evidence was probative of Petitioner's violent

character and willingness to use violence against his children and stepchildren. From this evidence, the jury could reasonably infer that Petitioner intentionally shot his son with malice aforethought and was not acting in self-defense.

The state court's findings were neither contrary to, nor involved an unreasonable application of, clearly established federal law, as determined by the United States Supreme Court. Nor was it based on an unreasonable determination of the facts. Petitioner is not entitled to habeas relief.

C. Petitioner is Not Entitled to Habeas Relief on His Claims Regarding the Exclusion of Evidence Supporting His Defense

In Grounds Four and Five of the Petition, Petitioner argues that the trial court erred in excluding relevant evidence that supported his defense, resulting in the denial of his constitutional right to present a complete defense. FAP at 6.

1. Applicable Legal Authority

"Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" Holmes v. South Carolina, 547 U.S. 319, 324 (2006) (citation omitted)). Nevertheless, "'[a] defendant's right to present relevant evidence is not unlimited, but rather is subject to reasonable restrictions,' such as evidentiary and procedural rules." Moses v. Payne, 555 F.3d 742, 757 (9th Cir. 2009) (as amended) (citation omitted). "[W]ell-established rules of evidence permit trial judges to exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury." Holmes, 547 U.S. at 326. The defendant "must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence." Chambers v. Mississippi, 410 U.S. 284, 302 (1973); see also Montana v. Egelhoff, 518 U.S. 37, 42 (1996) ("The

accused does not have an unfettered right to offer [evidence] that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence." (citation omitted) (alteration in original)); Crane v. Kentucky, 476 U.S. 683, 689-90 (1986) ("the Constitution leaves to the judges . . . 'wide latitude' to exclude evidence that is 'repetitive . . ., only marginally relevant' or poses an undue risk of 'harassment, prejudice, [or] confusion of the issues.'" (citation omitted)).

Finally, if a state trial court is found to have committed a constitutional error in excluding evidence, that error must still be analyzed for harmlessness according to the standard set forth in Brecht v. Abrahamson, 507 U.S. 619, 637 (1993). Under Brecht, habeas petitioners are entitled to relief if "the error 'had substantial and injurious effect or influence in determining the jury's verdict.'" Brecht, 507 U.S. at 637 (citation omitted); see also Moses, 555 F.3d at 760.

2. Evidence of Petitioner's Expressions of Remorse

In Ground Four, Petitioner asserts the trial court improperly precluded him from introducing "various pieces of evidence" of his remorse, "which spoke to both [his] mental state (i.e., lack of malice) and which supported [his] defense that Jason was the aggressor and [Petitioner] acted in self-defense." FAP at 6. Petitioner does not identify the specific evidence excluded; liberally construing the allegations, the Court presumes Petitioner is referring to the same evidence raised on direct appeal, statements he made at the scene shortly after the shooting: "I'm sorry," "Come on, Jason," "Stay with me," and "Hang in there." Lodgment 1 at 32-33. The trial court excluded the evidence on the grounds that the evidence was irrelevant and constituted inadmissible hearsay. 7 RT 1321-27; 9 RT 1536-37; 10 RT 1758-1762. Petitioner also sought to admit evidence regarding how he felt upon learning that Jason died from his injuries. Lodgment 1 at 32. The trial court excluded this evidence on relevance grounds. 11 RT 1896-97.

i. The California Court of Appeal Decision

On direct appeal, the California Court of Appeal affirmed the trial court's exclusion of evidence regarding Petitioner's expressions of remorse as follows (Lodgment 1, Appendix A at 42-45 (footnote omitted)):

> Although it is a close question, we conclude that given the extremely deferential standard of review applicable to the trial court's relevancy rulings, the trial court did not abuse its discretion in excluding evidence of [Petitioner's] expressions of remorse after the shooting. Our Supreme Court has explained that "[a]bsence of remorse . . . may be relevant, because it sheds light on the defendant's mental state, in determining the degree of the homicide." (People v. Michaels (2002) 28 Cal.4th 486, 528, [emphasis] added.) Further, other case law establishes that "[a] defendant's lack of concern as to whether the victim lived or died, expressed or implied, has been found to be substantial evidence of an 'abandoned and malignant heart' by the appellate courts of this state," for the purpose of showing implied malice in a murder prosecution. (People v. Burden (1977) 72 Cal.App.3d 603, 620 [citing cases].) In contrast, addressing a defendant's positive expressions of remorse after a killing, our Supreme Court concluded in People v. Pearson (2013) 56 Cal.4th 393, that the rule of completeness (§ 356) did not require that the jury hear certain additional excerpts from the defendant's confession shortly after the killings (id. at p. 458), in which he expressed remorse for killing the victims because "defendant fail[ed] to demonstrate that . . . [his] expressions of remorse during the police interview were relevant to his state of mind at the time of the murders." (Id. at pp. 460-461, [emphasis] added.) This contrasting case law suggests

that although expressions of lack of remorse are relevant to show implied malice, a defendant's positive expressions of remorse after committing a murder may not be relevant to that issue.

Here, the trial court provided a thorough explanation for its conclusion that [Petitioner's] expressions of remorse were not relevant. Specifically, as the trial court explained, the fact that [Petitioner] was upset after the shooting when he saw that he had fatally injured Jason does not tend to prove [Petitioner's] state of mind during the shooting, especially because "one would expect that when a father is seeing his son dying in front of him, he would be upset" after the fact. We accordingly conclude that the trial court was within its discretion to exclude evidence that [Petitioner] was remorseful after the shooting because it was not relevant evidence of [Petitioner's] state of mind during the shooting. The same analysis applies to the trial court's ruling sustaining the objection to the question about how [Petitioner] felt after learning his son had died, as the question would have elicited testimony about [Petitioner's] state of mind after the fact, but not during the shooting.

Further, even if we were to conclude that the trial court abused its discretion in excluding evidence of [Petitioner's] remorse, the exclusion of the evidence was not prejudicial in that there is no reasonable probability of a more favorable outcome for [Petitioner] had the evidence been admitted. (See People v. DeHoyos (2013) 57 Cal.4th 79, 131 [applying "reasonable probability" standard in reviewing prejudice attributable to the erroneous exclusion of evidence].) Although the jury did not hear evidence of what [Petitioner] stated to Jason while holding him as

> he died, and [Petitioner] was not permitted to testify about how he felt when he learned Jason had died, the jurors did hear testimony about [Petitioner's] demeanor after the shooting, which could lead them to conclude that [Petitioner] was upset and remorseful. Specifically, the law enforcement officer who responded to the scene testified that he saw [Petitioner] holding Jason on the ground, and [Petitioner] appeared to be emotionally distraught and was crying. Based on this evidence, there is no reasonable probability that the jury would have had a different view of [Petitioner's] emotional reaction to the shooting had the jury heard [Petitioner's] statement "'I'm sorry. Come on, Jason. Stay with me. Hang in there,'" or testimony from [Petitioner] explaining that after learning Jason died he was "distraught and repentant" about having killed Jason.

ii. Analysis

The Supreme Court has not yet "squarely address[ed]" the state court's discretionary exclusion of evidence and the right to present a complete defense or established a controlling legal standard for evaluating such exclusions. See Brown v. Horell, 644 F.3d 969, 983 (9th Cir. 2011) (citing Moses, 555 F.3d at 758); Chandler v. Sherman, 2015 WL 3492323, at *6-7 (S.D. Cal. June 3, 2015) (denying habeas relief for state court's exclusion of evidence of a witness's employment termination in the absence of Supreme Court precedent); Ortega v. Ducart, 2015 WL 5013699, at *4-6 (C.D. Cal. Mar. 2, 2015) (concluding that court of appeal was not objectively unreasonable in rejecting the petitioner's claim regarding the exclusion of third-party culpability evidence because the Supreme Court had not squarely addressed whether state court's discretionary exclusion of exculpatory evidence can ever violate a defendant's right to present a defense), report and recommendation accepted

by, 2015 WL 5020668 (C.D. Cal. Aug. 24, 2015). Nevertheless, as noted, the Supreme Court has held that the Constitution affords judges making decisions regarding the admissibility of evidence "'wide latitude' to exclude evidence" that is "only marginally relevant." Crane, 476 U.S. at 689 (citation omitted); see also United States v. Alvarez, 358 F.3d 1194, 1205 (9th Cir. 2004) ("Trial judges have 'wide discretion' in determining whether evidence is relevant." (quoting United States v. Long, 706 F.2d 1044, 1054 (9th Cir.1983))).

Here, the state court reasonably concluded that Petitioner's expressions of remorse were not relevant. To determine whether Petitioner committed second-degree murder and to assess his self-defense claim, the relevant inquiry was his state of mind when he shot Jason—that is, whether he acted with malice aforethought and whether he believed he needed to defend himself. See People v. Nieto Benitez, 4 Cal. 4th 91, 102 (1992) ("Second degree murder is defined as the unlawful killing of a human being with malice aforethought, but without the additional elements—i.e., willfulness, premeditation, and deliberation—that would support a conviction of first degree murder."); accord People v. Sotelo-Urena, 4 Cal. App. 5th 732, 744 (2016) ("A homicide is considered justified as self-defense where the defendant actually and reasonably believed the use of deadly force was necessary to defend himself from imminent threat of death or great bodily injury.").

The state court reasonably concluded Petitioner's expressions of remorse after the shooting were not relevant in determining his mental state at the time he shot Jason. Cf. United States v. LeVeque, 283 F.3d 1098, 1106 (9th Cir. 2002) (statements from a voicemail that the defendant "left long after" the violating conduct occurred was not probative of the defendant's state of mind at the time of the violation); Diego v. Hill, 2013 WL 6536493, at *7-8 (C.D. Cal. Dec. 13, 2013) (petitioner's knowledge of his wife's sexual relations with another man from evidence found after the murder was irrelevant in

establishing the petitioner's state of mind at the time he killed his wife); Yau v. Small, 2010 WL 883855, at *7-9 (C.D. Cal. Mar. 10, 2010) (evidence that the petitioner spoke to others about the shootings after it happened was not probative in establishing the petitioner's state of mind at the time of the shootings). As the trial court noted, it is not unusual for a father to be upset while seeing his son dying in front of him. Lodgment 1, Appendix A at 43; 9 RT 1537. That a person may be emotionally distraught and remorseful after killing another does not mean the person lacked a requisite culpable mental state. Petitioner's statement and testimony related to his remorse are the kind of "marginally relevant" evidence for which the Constitution grants "wide latitude" to trial judges to exclude. Crane 476 U.S. at 689-90. The exclusion of this evidence, did not violate Petitioner's right to present a complete defense. See Miller v. Stagner, 757 F.2d 988, 994-95 (9th Cir.) (courts "must give due weight to the substantial state interest in preserving orderly trials, in judicial efficiency, and in excluding unreliable or prejudicial evidence"), amended by 768 F.2d 1090 (9th Cir. 1985); see also Galvan v. Yates, 587 F. App'x 361, 362 (9th Cir. 2014) (concluding that state court's decision was neither contrary to, nor involved an unreasonable application of, clearly established federal law because the evidence proffered was only marginally relevant and its exclusion was not disproportionate to the legitimate purposes it served); Daniels v. Henry, 281 F. App'x 663, 663-664 (9th Cir. 2008) (finding the state court's decision to exclude irrelevant evidence was not contrary to, nor involved an unreasonable application of, clearly established federal law); Drew v. Scribner, 252 F. App'x 815, 818-19 (9th Cir. 2007) (concluding that the petitioner was not entitled to habeas relief on claim that the trial court erred in excluding evidence regarding mental capacity where evidence was not relevant).

Further, even if the trial court erred in excluding this evidence, the error did not have "substantial and injurious effect or influence in determining the

jury's verdict" in light of other evidence. See Brecht, 507 U.S. at 637. Notably, the responding law enforcement officer testified Petitioner as to Petitioner's demeanor after the shooting, describing him as holding Jason, emotionally distraught, and crying. 10 RT 1739. As the court of appeal noted, the jurors could have reasonably concluded from this evidence that Petitioner was upset and remorseful. See Lodgment 1, Appendix A at 44.[5]

The state court's rejection of this claim was neither contrary to, nor involved an unreasonable application of, clearly established federal law, as determined by the United States Supreme Court. Nor was it based on an unreasonable determination of the facts. Petitioner is not entitled to habeas relief on this claim.

3. Evidence of Jason's Vandalism

In Ground Five, Petitioner argues the trial court violated his right to present a complete defense by excluding evidence that Jason vandalized his former girlfriend's car several hours after he physically assaulted her. FAP at 6; Lodgment 1 at 35-36. Petitioner contends that such evidence showed Jason's propensity for violence and was relevant to his claim of self-defense. FAP at 6.

At trial, Petitioner was permitted to introduce evidence of Jason's violent character pursuant to Section 1103. Jason's former girlfriend, Tashianna Lewis ("Lewis"), testified that Jason punched her when she was seventeen years old and gave her a black eye. 8 RT 1439-40. Lewis also testified that during an argument in November 2014, Jason was angry and cursing, and he punched

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[5] In concluding that any error in excluding the evidence was not prejudicial, the California Court of Appeal applied the "reasonable probability" standard articulated in People v. Watson, 46 Cal. 2d 818, 836 (1956), which asks whether "it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." See Lodgment 1, Appendix A at 44. The Ninth Circuit has determined that the Watson standard is equivalent to the federal Brecht standard. Bains v. Cambra, 204 F.3d 964, 971 n.2 (9th Cir. 2000).

her with a closed fist, which left Lewis with a black eye and caused her to fall and lose consciousness. 8 RT 1421-25, 1430. When Lewis regained consciousness about one minute later, she saw Jason retrieve a metal baseball bat from his car trunk. 8 RT 1425. Jason then raised the bat over Lewis, who was still on the ground, and said, "I'll knock your ass out." 8 RT 1425-26. Finally, Lewis testified that a week after the November 2014 argument, Jason was angry and cursing at her when she was at Petitioner's ranch to pick up her daughter, of whom Jason is the father. 8 RT 1429, 1431, 1434. Petitioner was calm. 8 RT 1435. After Petitioner told Lewis that she could take her daughter, Jason approached Petitioner in an aggressive manner, cursing at Petitioner because Jason did not want Lewis to take their daughter. 8 RT 1435-37. Jason then pushed Petitioner and wrestled with him on the ground. 8 RT 1437-38. Petitioner appeared to have been injured during this confrontation. 8 RT 1438.

Petitioner also attempted to introduce evidence that after the 2014 incident involving Lewis, Jason returned to the neighborhood and used a baseball bat to knock out the windows of Lewis's car. 8 RT 1400. Interpreting Section 1103 to concern only instances of violence against a person, not property, the trial court concluded that evidence of Jason's vandalism was inadmissible. 8 RT 1402-03, 1449. The trial court further concluded that even if Section 1103(a) included instances of violence against property, this evidence would be inadmissible under Section 352 because Lewis's testimony that Jason assaulted her on two separate occasions and was the aggressor in a physical confrontation involving Petitioner made this evidence cumulative and more prejudicial than probative. 8 RT 1449-50.

i. The California Court of Appeal Decision

The California Court of Appeal rejected Petitioner's claim regarding the exclusion of evidence concerning Jason's vandalism as follows (Lodgment 1, Appendix A at 47-48 (footnote omitted)):

We need not, and do not, decide whether the trial court properly ruled that evidence of a victim's violence toward an object, rather than a person, is inadmissible under section 1103, subdivision (a), as the second ground relied upon by the trial court to exclude that evidence supports its ruling. Specifically, the trial court excluded the evidence of the car vandalism pursuant to section 352, explaining that it had already allowed testimony about three violent acts by Jason, and a fourth incident would be unnecessarily cumulative. Further, as the trial court stated, the other three violent acts by Jason were more probative of whether he may have violently attacked [Petitioner] in this case because those three incidents concerned violence against people, whereas the vandalism of the car concerned only violence against an object. The trial court was within its discretion to conduct a weighing analysis under section 352 to conclude that the evidence about the vandalism of the car was cumulative of the other evidence (People v. Brown (2003) 31 Cal.4th 518, 576 [§ 352 "permits the exclusion of evidence on the ground that it is cumulative"]), and to exclude it on the basis that it had far less probative value with respect to [Petitioner's] self-defense claim than the other three violent incidents because it did not involve violence directed at a person.

Further, any error in excluding the girlfriend's testimony that Jason vandalized her car was not prejudicial because the jury learned of the incident through [Petitioner's] testimony in any event. During [Petitioner's] testimony, he was asked by defense counsel what details Jason's girlfriend had given him about being assaulted by Jason. [Petitioner] testified as follows:

"A. She told me that Jason had got a baseball bat at her

and, uh, he broke out windows, and she—she was—

"Q. Did she mention him punching her in the face?

"A. Yeah, she did say that. She said she got punched in the face the first time, then the baseball bat thing."

Based on this testimony, the jury was made aware that Jason was also involved in a violent incident during which he broke his girlfriend's windows. As the jury was already aware that Jason committed vandalism against his girlfriend's property, it is not reasonably probable [Petitioner] would have obtained a more favorable result at trial had the jury heard additional testimony from the girlfriend about that incident.

The California Court of Appeal also rejected Petitioner's contention that this evidence should have been admitted because it demonstrated Jason's character trait for remaining angry for a sustained period of time. The court of appeal explained (Lodgment 1, Appendix A at 48 n.29):

According to [Petitioner], Jason's character trait for sustained anger is relevant in this case because Jason had an angry argument with [Petitioner] earlier in the day of the shooting. Although we understand the argument, we conclude that it is not reasonably probable that [Petitioner] would have obtained a more favorable result at trial had the jury heard evidence suggesting Jason's capacity for sustained anger. The jury was already aware that there was some sort of angry confrontation between [Petitioner] and Jason near the ATV shed immediately before the shooting, during which, even according to Jason's friend, Jason repeatedly called [Petitioner] a "son of a bitch." The main disputed issue was whether [Petitioner] was legally justified in shooting Jason as a result of that angry confrontation.

ii. Analysis

The trial court excluded the evidence under Section 352, concluding that it was cumulative and more prejudicial than probative. Section 352 affords the trial court discretion to "exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

The Supreme Court has not decided whether an evidentiary rule that requires a trial court to "balance factors and exercise its discretion" might violate a defendant's right to a present a defense. See Moses, 555 F.3d at 758. The Ninth Circuit recently reiterated the lack of clearly established Supreme Court precedent on this issue:

> We have previously held that a trial court's exercise of discretion to exclude evidence under a rule of evidence that requires balancing probative value against prejudice could not be an unreasonable application of clearly established Supreme Court precedent, because the Court has never addressed the question whether such a rule could violate a defendant's constitutional rights. See Moses, 555 F.3d at 758-59. No Supreme Court decision has established such a rule since we reached this conclusion in Moses. Therefore, no reasonable jurist could disagree with the district court's conclusion that the state court's rejection of [petitioner's] Crane claim was not contrary to, or an unreasonable application of, clearly established federal law.

Robertson v. Pichon, 849 F.3d 1173, 1189 (9th Cir. 2017). In the absence of clearly established federal law, the Court cannot conclude that the state court's rejection of Petitioner's claim was either contrary to, or involved an unreasonable application of, clearly established federal law, as determined by

the United States Supreme Court. See Knowles, 556 U.S. at 122; Brewer v. Hall, 378 F.3d 952, 955 (9th Cir. 2004) ("If no Supreme Court precedent creates clearly established federal law relating to the legal issue the habeas petitioner raised in state court, the state court's decision cannot be contrary to or an unreasonable application of clearly established federal law."); Berry v. Davey, 2017 WL 7310097, at *6-7 (C.D. Cal. Oct. 25, 2017) (denying habeas relief for state court's exclusion of impeachment evidence in the absence of Supreme Court precedent), report and recommendation accepted by, 2018 WL 671153 (C.D. Cal. Jan. 31, 2018), appeal dismissed, 2018 WL 3344913 (9th Cir. May 25, 2018); cf. Borges v. Gipson, 2013 WL 6240423, at *15-17 (C.D. Cal. Dec. 2, 2013) (finding that trial court's exclusion of proposed cross-examination pursuant to Section 352 did not warrant habeas relief).

In addition, the affirmance of the exclusion of evidence of Jason's vandalism was objectively reasonable. Under Section 1103(a), Petitioner was permitted to introduce evidence of Jason's violent character to support his self-defense claim. The trial court allowed Lewis to testify regarding two instances of Jason's physical assault against her and an incident where Jason approached Petitioner in an aggressive manner and then pushed him and wrestled with him on the ground. As Petitioner introduced evidence of three separate events to establish Jason's character for violence, the California Court of Appeal reasonably determined that evidence of Jason's vandalism, which was offered to support the same point, would be cumulative. In addition, the three instances of Jason's violent character had greater probative value to Petitioner's defense because, unlike the excluded testimony, which related to Jason's violence against property, the admitted evidence involved Jason's violence towards other individuals. Considering the comparatively lower probative value of the excluded evidence, the state courts reasonably concluded that the evidence would be more prejudicial than probative.

Further, any error in the exclusion of this evidence did not have "substantial and injurious effect or influence in determining the jury's verdict." See Brecht, 507 U.S. at 637. As the California Court of Appeal noted, the jury heard testimony from Petitioner that Jason was involved in a violent incident during which he broke Lewis's windows, and the jury was presented with evidence that there was an angry confrontation between Petitioner and Jason immediately before the shooting. 5 RT 806-807; 10 RT 1743, 1859, 1868, 1870-71; 11 RT 2008; 13 RT 2283. In light of the other evidence presented, Petitioner has failed to demonstrate that any error in the exclusion of this evidence resulted in "actual prejudice." See Brecht, 507 U.S. at 637.

The state court's rejection of this claim was neither contrary to, nor involved an unreasonable application of, clearly established federal law, as determined by the United States Supreme Court. Nor was it based on an unreasonable determination of the facts. Petitioner is not entitled to habeas relief on this claim.

VII.

RECOMMENDATION

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

Dated: October 22, 2019

JOHN D. EARLY
United States Magistrate Judge