No. _____

IN THE

Supreme Court of the United States

JUAN VALENZUELA,

Petitioner,

v.

L. SMALL, WARDEN

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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NOT FOR PUBLICATION

FILED

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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JUAN VALENZUELA, Petitioner-Appellant, v. L. SMALL, Respondent-Appellee.	No. 19-55759 D.C. No. 2:10-cv-02428-DSF-DFM MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Dale S. Fischer, District Judge, Presiding

Argued and Submitted October 16, 2020
Pasadena, California

Before: MURGUIA and LEE, Circuit Judges, and KORMAN,** District Judge.

On August 1, 1995, Edward Wilkins died after he was shot several times while riding in a car. On August 23, Pops LeGrone was severely beaten in the parking lot of a liquor store in Long Beach, California. Soon after, Oscar Thomas was also assaulted near the same parking lot. Thomas survived, but LeGrone later died from

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable Edward R. Korman, United States District Judge for the Eastern District of New York, sitting by designation.

his injuries.

Petitioner Juan Valenzuela was ultimately charged with various offenses arising out of these crimes. At petitioner's trial, the district attorney called two eye-witnesses, one to each murder. Angela Liner testified that on August 1, 1995 she saw petitioner firing a gun at three African American men in a Cadillac. She had been drinking and had taken seizure medication that night. Liner did not come forward to authorities until her son was arrested in connection with the same crime. Liner testified that she remained at the scene while police were investigating the shooting, but she was not interviewed by officers and no other witnesses testified to her presence during that period. She testified that she had bought two beers, one at approximately 8 P.M. and one just before the liquor store closed, but a liquor store employee testified that Liner only purchased one beer at 8 P.M. and did not return.

Kevin Moran testified that on August 23, 1995 petitioner and a group of Hispanic men approached him and LeGrone and beat them both with fists and a baseball bat. Moran had a prior felony conviction and then-pending burglary charges for which he was offered a very favorable disposition. Nevertheless, Moran made prior consistent statements to officers at the scene shortly after the beating, undermining this potential ground for impeachment, and the prosecutor expressly relied on those statements in his summation.

Long Beach Police Department ("LBPD") Officer Julio Alcaraz was not an

eyewitness to either murder. Alcaraz testified that on August 1, he saw petitioner "hanging out" at a known gang spot near the liquor store approximately 35 minutes before Wilkins was killed. Alcaraz also testified that three weeks later, on August 23, approximately 30 minutes before LeGrone was assaulted, he saw petitioner walking in the direction of the scene of LeGrone's beating with Tapia, who was carrying a "wooden stick" of some kind. Shortly after Alcaraz saw petitioner, he responded to a call about Thomas being assaulted near the same place where LeGrone had been beaten. Paramedics had already removed LeGrone from the scene by the time Alcaraz arrived to find petitioner and Tapia fighting Thomas. Both were arrested there by Alcaraz and another officer.

Petitioner, who was convicted of the two murders and the assault, sought habeas relief in the California state courts, contending that the prosecution had improperly withheld information about Alcaraz's criminal conduct that could have been used to impeach Alcaraz at trial. Specifically, in 2000, some two and a half years after petitioner was convicted, petitioner learned that at the end of March 1997, a Deputy Chief of the LBPD contacted the FBI after receiving "credible evidence implicating [Officer Alcaraz]" in drug trafficking. Alcaraz was eventually indicted, but not until February 2000 for crimes committed between 1999 and 2000. And there was no evidence that he committed any offenses prior to 1998.

The California Court of Appeal held that petitioner failed to make the requisite

showing of prejudice under *Brady v. Maryland*, 373 U.S. 83 (1963) and denied the petition. Petitioner applied for relief pursuant to 28 U.S.C. § 2254. The district court held that it was not objectively unreasonable for the California Court of Appeal to find that petitioner was not prejudiced. On this appeal, petitioner concedes that we owe the California Court of Appeal's decision deference, *Amado v. Gonzalez*, 758 F.3d 1119, 1131 (9th Cir. 2014), unless he can show that it was "objectively unreasonable," *Wiggins v. Smith*, 539 U.S. 510, 521 (2003). We hold that it was not.

For prejudice to have ensued under *Brady*, the withheld evidence must be material to the defendant's guilt or punishment. *Wearry v. Cain*, 136 S. Ct. 1002, 1006 (2016); *Smith v. Cain*, 565 U.S. 73, 75 (2012). Evidence is material if there is a "reasonable probability" that the result of the proceeding would have been different had the evidence been disclosed. *Kyles v. Whitley*, 514 U.S. 419, 433 (1995) (quoting *United States v. Bagley*, 473 U.S. 667, 682 (1985)).

Alcaraz was not an eyewitness to either murder. With respect to Wilkins, the only support Alcaraz's testimony offered Liner's account was to place petitioner near the crime scene—at a place he was known to spend time—approximately 35 minutes before the shooting.[1] The same is true with respect to LaGrone. Moran provided the eyewitness account of LeGrone's murder. Alcaraz testified that on

[1] The prosecutor's closing argument never mentioned Alcaraz's testimony in connection with Wilkins's murder.

August 23 he saw petitioner and Tapia walking towards the liquor store about 30 minutes before LeGrone was beaten in the parking lot and that Tapia was carrying a stick of some kind. The same day, Alcaraz reported that account to LBPD Officer Chris Rose, and Rose's written report of the conversation, which he authenticated, was read into the record. Even setting aside that corroboration, we are not convinced that the prosecutor placed such emphasis on Alcaraz's testimony that the possibility of impeachment gave rise to prejudice. To the extent the prosecutor portrayed Alcaraz's testimony as "important," it is not clear that he was referring to the LeGrone murder as opposed, in some incoherent way, to the assault on Thomas.

Nevertheless, whatever words the prosecutor used, the issue turns on whether the alleged impeachment evidence was sufficient to create a reasonable probability of a different result. We hold that it was not, for two separate reasons. First, the fact that Alcaraz saw petitioner shortly before the assault on LeGrone (and his observation that Tapia was carrying some sort of stick) was corroborated by a recorded statement that Alcaraz made the same day, two and a half years before trial and the contemporaneous statements of Moran, enhances the credibility of Alcaraz's testimony. Second, and more significantly, the evidence that Alcaraz was involved in, though not yet convicted of, an unrelated offense was at best weakly probative of his credibility.

Indeed, the Federal Rules of Evidence would not permit such a use of such

uncharged conduct because it is not "probative of the character for truthfulness or untruthfulness of the witness." Fed. R. Evid. 608(b)(1); *United States v. Collins*, 90 F.3d 1420, 1429 (9th Cir. 1996); *cf. United States v. Gross*, 603 F.2d 757, 758 (9th Cir. 1979) ("[P]rior *convictions* for narcotics offenses are not technically within the concept of [c]rimen falsi, and . . . were inadmissible unless the Government bore its burden of proving that the probative value of the prior convictions for impeachment purposes exceeded the prejudicial effect of their admission.") (emphasis added). While California grants trial courts the discretion to allow the use of any uncharged conduct involving moral turpitude for impeachment, including drug trafficking, *People v. Harris*, 118 P.3d 545, 565 (Cal. 2005), the California Supreme Court has recognized that one of a number of considerations that a judge should take into account is that uncharged conduct is "generally [] less probative of immoral character or dishonesty" than a past conviction. *People v. Clark*, 261 P.3d 243, 307 (Cal. 2011). Moreover, "the latitude [the California Evidence Code] allows for exclusion of impeachment evidence . . . is broad" and "a reviewing court ordinarily will uphold the trial court's exercise of discretion." *Id.* Alcaraz's conduct was not only uncharged, it was also collateral. Thus, even if this information had been disclosed, it is at best uncertain that the trial judge would have allowed its use for impeachment. If it could not have been so used, it could not have affected the verdict. *See Kyles*, 514 U.S. at 435 (explaining that a *Brady* violation requires, a

"showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict").

In sum, it was objectively reasonable for the Court of Appeal to conclude that the availability of evidence to impeach Alcaraz would not have given rise to a reasonable probability of a different result.

AFFIRMED.

JS-6

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

JUAN VALENZUELA, Petitioner, v. L SMALL, Warden, Respondent.	No. CV 10-2428-DSF (DFM) JUDGMENT

Pursuant to the Court's Order Accepting the Final Report and Recommendation of United States Magistrate Judge,

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

DATED: June 14, 2019

Dale S. Fischer

Honorable Dale S. Fischer
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

JUAN VALENZUELA, Petitioner, v. L SMALL, Warden, Respondent.	No. CV 10-2428-DSF (DFM) Order Accepting Report and Recommendation of United States Magistrate Judge

Under 28 U.S.C. § 636, the Court has reviewed the Petition, the other records on file herein, and the Final Report and Recommendation of the United States Magistrate Judge. Further, the Court has engaged in a de novo review of those portions of the Final Report and Recommendation to which objections have been made. The Court accepts the report, findings, and recommendations of the Magistrate Judge.

IT IS THEREFORE ORDERED that Judgment be entered denying the Petition on the merits and dismissing this action with prejudice.

DATED: June 14, 2019

Dale S. Fischer
Honorable Dale S. Fischer
UNITED STATES DISTRICT JUDGE

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

JUAN VALENZUELA, Petitioner, v. L SMALL, Warden, Respondent.	No. CV 10-2428-DSF (DFM) Final Report and Recommendation of United States Magistrate Judge

This Final Report and Recommendation is submitted to the Honorable Dale S. Fischer, 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.[1]

[1] The Court issued its original Report and Recommendation on January 9, 2019. See Dkt. 103. Petitioner filed objections. See Dkt. 106. The Court now issues this Final Report and Recommendation to clarify some of the original report's conclusions. Because these changes do not affect the Court's substantive analysis, the parties have not been given an opportunity to file additional objections.

I. BACKGROUND

In 1997, after two mistrials, a jury found Petitioner Juan Valenzuela guilty of first-degree murder, second-degree murder, and assault with a deadly weapon or by means likely to cause great bodily injury. See Clerk's Transcript ("CT") 52, 73, 117-20.[2] The jury also found true a multiple-murder special circumstance, along with firearm and deadly weapon use enhancements. See CT 118-20. On October 15, 1997, the trial court sentenced Petitioner to state prison for a term of life without the possibility of parole, plus 17 years. See CT 126-30.

Petitioner appealed. See Lodged Document ("LD") 1. On December 23, 1998, the California Court of Appeal affirmed the judgment in a reasoned opinion. See LD 4 at 38-52. Petitioner did not file a petition for review in the California Supreme Court. See Dkt. 1 ("Petition") at 3. On November 27, 2007, Petitioner's retained counsel filed a habeas petition in the Los Angeles County Superior Court.[3] See LD 11. On December 3, 2007, while counsel's Superior Court petition was pending, Petitioner constructively filed a pro se habeas petition in that same court. See LD 13.

On January 14, 2008, the Superior Court denied the first petition because (1) it was vague and conclusory, citing People v. Karis, 46 Cal. 3d 612, 656 (1988) and People v. Duvall, 9 Cal. 4th 464, 474 (1995); (2) it failed to state a prima facie case for relief, citing In re Crow, 4 Cal. 3d 613, 624 (1971)

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[2] All citations to electronically-filed documents, except for the Clerk's and Reporter's Transcripts, are to the CM/ECF pagination.

[3] The Court applies the earlier constructive filing date warranted by the prison "mailbox rule" to pro se filings, but not to filings by counsel. See Houston v. Lack, 487 U.S. 266, 275-76 (1988).

and Duvall, 9 Cal. 4th at 474; and (3) the claimed error could have been, but was not raised on appeal, citing In re Dean, 12 Cal. App. 3d 264, 267 (1970). See LD 12. On July 30, 2008, the Superior Court denied the second petition because Petitioner failed to show a prima facie case for relief, citing In re Smith, 2 Cal. 3d 508, 510 (1970), Crow, 4 Cal. 3d at 624, and Duvall, 9 Cal. 4th at 474. See LD 14.

On November 6, 2008, Petitioner constructively filed a pro se habeas petition in the California Court of Appeal. See LD 8. On December 19, 2008, that court denied the petition because (1) it was "procedurally defaulted . . . due to [Petitioner's] inadequately explained delay in seeking relief," citing In re Clark, 5 Cal. 4th 750, 771, 775, 783 (1993) and McCleskey v. Zant, 499 U.S. 467, 498 (1991); (2) it lacked merit; and (3) Petitioner's confrontation rights claim "could have been, but was not, raised on appeal," citing In re Harris, 5 Cal. 4th 813, 826 (1993), Clark, 5 Cal. 4th at 765, and In re Waltreus, 62 Cal. 2d 218, 225 (1965). See LD 4 at 32-33.

On January 5, 2009, Petitioner constructively filed a pro se habeas petition in the California Supreme Court. See LD 9. On July 8, 2009, that court summarily denied the petition. See LD 4 at 31. On September 20, 2009, Petitioner constructively filed another pro se habeas petition in the California Supreme Court. See LD 10. On March 10, 2010, that court denied the petition, citing Clark, 5 Cal. 4th 750; In re Robbins, 18 Cal. 4th 770, 780 (1998); In re Miller, 17 Cal. 2d 734 (1941); and Waltreus, 62 Cal. 2d 218. See LD 4 at 30.

On March 28, 2010, Petitioner constructively filed in this Court a Petition for Writ of Habeas Corpus by a Person in State Custody ("Petition"). See Dkt. 1. On June 15, 2010, the Court dismissed the Petition as time-barred, rejecting Petitioner's argument that he was entitled to equitable tolling due to the abandonment of his case by his postconviction attorney. See Dkts. 15, 17.

On November 1, 2013, the Ninth Circuit vacated the dismissal of the Petition and remanded for an evidentiary hearing on the issue of equitable tolling. See Dkt. 31; Valenzuela v. McEwen, 544 F. App'x 701, 702 (9th Cir. 2013). On remand, and after further litigation concerning timeliness, this Court dismissed the Petition again as time-barred, finding that while Petitioner was entitled to an extended period of equitable tolling, the limitation period nonetheless expired in 2009 before the Petition was filed. See Dkts. 77-79.

On June 5, 2017, the Ninth Circuit issued a memorandum disposition disagreeing with this Court's analysis and finding that the Petition was timely based on equitable tolling. See Dkt. 87; Valenzuela v. Small, 692 F. App'x 409, 409-10 (9th Cir. 2017). The Ninth Circuit vacated the dismissal of the Petition and remanded the matter, which is now fully briefed. See Dkts. 94 (Answer), 99 (Reply).

II. STATEMENT OF FACTS

The underlying facts are taken from the California Court of Appeal's unpublished opinion on direct review.[4] Unless rebutted by clear and convincing evidence, these facts are presumed correct. See 28 U.S.C. § 2254(e)(1); Crittenden v. Chappell, 804 F.3d 998, 1011 (9th Cir. 2015). Because Petitioner has raised a claim of insufficient evidence, the Court has independently reviewed the record. See Jones v. Wood, 114 F.3d 1002, 1008 (9th Cir. 1997).

1. Murder of Edward Wilkins

> On August 1, 1995, at about midnight, Mister Thomas, Edward Wilkins, and Rodney Hayes were sitting in a Cadillac near Benny's Liquor at the intersection of Anaheim and Cherry

[4] In all quoted sections of the state court records, "Valenzuela" has been replaced with "Petitioner."

Streets in Long Beach. Someone fired a gun at the car, shattering the windows. A man approached the car from behind and fired about five shots into the car. Wilkins and Hayes were hit. Hayes managed to drive away. Wilkins died from his gunshot wound.

Angela Liner testified that she had been standing next to Benny's Liquor before the shooting, talking with friends. Petitioner, whom Liner knew, walked by. Liner heard arguing, then gunshots from the direction of Benny's Liquor. She turned and saw Petitioner firing a gun at three African-American men in a Cadillac. The Cadillac pulled away and Petitioner ran away.

2. Murder of Norman LaGrone

At about 1:30 a.m. on August 23, 1995, Kevin Moran and Norman LaGrone were talking outside a liquor store at the intersection of Anaheim and St. Louis Streets in Long Beach. Petitioner, Tapia and six to seven other Hispanic men approached Moran and LaGrone. Tapia was carrying a baseball bat. Petitioner said "I don't like you, motherfucker" to LaGrone. Petitioner slapped, then punched, LaGrone. Tapia hit Moran with the bat, knocking him to the ground. Petitioner took the bat from Tapia and hit LaGrone with it. LaGrone fell to the ground, and Petitioner continued to hit him with the bat, and kick him. Tapia kicked LaGrone in the face. Moran ran for help.

Long Beach Police Officers David Hendricks and Brian Bell arrived at the scene at about 1:45 a.m. LaGrone was lying unconscious on the ground. There was blood and vomit on his face. His head was swollen to the size of a basketball. LaGrone was taken to St. Mary's Hospital, where he died on September 25, 1995. Dr. Eugene Carpenter, a medical examiner for the coroner's

office, performed an autopsy and testified that blunt force trauma to the head, resulting in a brain fungus, was one of the causes of death.

3. Assault on Oscar Thomas

On August 23, at about 1:30 or 2 a.m., Oscar Thomas left Benny's Liquor. As he was walking down the street, Petitioner, Tapia and three other Hispanic men stepped in front of him. Petitioner asked Thomas: "Are you a gangbanger, nigger?" Thomas replied that he was not. Petitioner hit Thomas in the head twice with his fist. Thomas took out a pocket knife to defend himself. Tapia got a bicycle frame from around the corner and held it up in the air and moved it up and down over Thomas. At that point, a police car drove by. The police car stopped. Tapia dropped the bicycle and started running. Long Beach Police Officer Julio Alcaraz chased Tapia and caught him. Petitioner did not run.

4. Race war

Tapia and Petitioner were members of the Eastside Longos, an Hispanic gang. Long Beach Detective Abel Morales testified that the Eastside Longos were engaged in a race war, and attacked African-Americans found in Eastside Longos territory.

LD 4 at 40-41 (footnotes omitted).

III. PETITIONER'S CONTENTIONS

The Petition presents the following claims for relief (see Petition at 5-9):

1. Petitioner's rights were violated because the appellate record was inadequate ("Ground One").

2. Petitioner was denied his right to due process when he was excluded from an in camera hearing ("Ground Two").

3. Petitioner was denied his right to due process when the prosecutor suppressed material exculpatory evidence ("Ground Three").

4. Petitioner was denied his right to the effective assistance of trial counsel ("Ground Four").[5]

5. Petitioner was denied his right to confront a key prosecution witness because the State was not diligent in securing the witness's attendance at trial ("Ground Five").

6. There was insufficient evidence that Petitioner proximately caused Norman LaGrone's death ("Ground Six").

7. Petitioner was denied his right to due process based on the cumulative errors at his trial ("Ground Seven").

Petitioner has withdrawn Grounds One and Two as moot because they pertain to his second trial, which was declared a mistrial.[6] See Reply at 4-5.

IV. STANDARD OF REVIEW

Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), a petitioner may obtain relief on federal habeas claims that have been "adjudicated on the merits in state court proceedings" only if the state court's adjudication resulted in a decision: (1) "contrary to, or involve[ing] an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States;" or (2) "based on an unreasonable

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[5] The Court construes Ground Four to encompass Petitioner's claim that trial counsel was ineffective for failing to investigate Angela Liner's son. See MPA at 59-60.

[6] Petitioner's first trial was declared a mistrial during jury selection due to juror misconduct. See CT 52. The second trial also ended in mistrial after the prosecutor impermissibly commented on Petitioner's silence. See CT 73.

determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d).

Under the "contrary to" clause, a federal habeas court may grant the writ if the state court "arrives at a conclusion opposite to that reached by [the U.S. Supreme] Court on a question of law or if the state court decides a case differently than [the U.S. Supreme] Court has on a set of materially indistinguishable facts." Williams v. Taylor, 529 U.S. 362, 412-13 (2000). Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court "identifies the correct governing legal principle from [the U.S. Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." Id. at 413.

The U.S. Supreme Court has vigorously and repeatedly affirmed that under § 2254, there is a heightened level of deference a federal habeas court must give to state court decisions. See Dunn v. Madison, 138 S. Ct. 9, 12 (2017) (per curiam). In all, AEDPA"imposes a highly deferential standard for evaluating state-court rulings and demands that state-court decisions be given the benefit of the doubt." Hardy v. Cross, 565 U.S. 65, 66 (2011) (per curiam) (citation omitted). "If this standard is difficult to meet, that is because it was meant to be." Harrington v. Richter, 562 U.S. 86, 102 (2011).

V. PROCEDURAL DEFAULT

A federal habeas court will not review a claim on its merits if the decision of the state court rests on a state law ground that is "independent of the federal question and adequate to support the judgment." Walker v. Martin, 562 U.S. 307, 315 (2011) (citation omitted). The state-law ground may be either a substantive rule that resolves the case or a procedural barrier to adjudication of petitioner's claim on the merits. See id. For a claim to be procedurally defaulted, the opinion of the last state court rendering a judgment in the case must "clearly and expressly[] state[] that its judgment rests on a

state procedural bar." Harris v. Reed, 489 U.S. 255, 263 (1989) (citation omitted). A petitioner may overcome a procedural bar only by making a showing of both cause for the default and prejudice resulting from it, or a showing of a fundamental miscarriage of justice. See id. at 262.

Here, Respondent argues that Grounds One through Four and Ground Seven are procedurally barred.[7] See Answer at 6-9. The last reasoned decision on these claims—the California Court of Appeal's decision on collateral review—imposed a timeliness bar under California law: "Petitioner is procedurally defaulted from challenging the validity of his 1997 conviction due to his inadequately explained delay in seeking relief." LD 4 at 32 (citing Clark, 5 Cal. 4th at 771, 775, 783 and McCleskey, 499 U.S. at 498). California's timeliness bar is an adequate and independent procedural rule that bars federal habeas review. See Walker, 562 U.S. at 317-21.

Petitioner contends he has cause to overcome the state court's timeliness bar based on his postconviction counsel's abandonment. See Reply at 1-4. Cause exists where "something external to the petitioner, something that cannot fairly be attributed to him impeded his efforts to comply with the State's procedural rule." Maples v. Thomas, 565 U.S. 266, 280 (2012) (alterations and citation omitted).

The general rule of Coleman v. Thompson, 501 U.S. 722 (1991) is that "attorney error committed in the course of state postconviction proceedings—for which the Constitution does not guarantee the right to counsel—cannot supply cause to excuse a procedural default that occurs in those proceedings." Davila v. Davis, 137 S. Ct. 2058, 2065 (citing Coleman, 501 U.S. at 755)

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[7] The Court evaluates Respondent's argument that Ground Five is procedurally barred within the context of that claim.

(2017) (internal citations omitted).[8] The U.S. Supreme Court has recognized a narrow exception whereby cause can be shown when postconviction counsel was not merely negligent but "abandoned" the representation without notice to the petitioner, resulting in the loss of his state remedies. See Maples, 565 U.S. at 281-83. In that circumstance, the principal-agent relationship is severed and the attorney's conduct "'cannot fairly be attributed to [the client].'" Id. at 281 (quoting Coleman, 501 U.S. at 753).

Petitioner contends that he, like Maples, was abandoned by his postconviction counsel. See Reply at 3-4. The Court agrees. Counsel admits that he ignored Petitioner's calls and emails between 2001 and 2003, sent Petitioner a signed habeas petition with bogus proof of service leading Petitioner to believe a petition had been filed when it was not, then ignored Petitioner's efforts to learn the status of his case until 2007, when a state bar complaint was filed. See Dkt. 77 (Final Report & Recommendation) at 13-16. This abject failure to communicate and to preserve Petitioner's ability to appeal sufficiently constitutes abandonment. See Foley v. Biter, 793 F.3d 998, 1002-04 (9th Cir. 2015) (holding that counsel's failure to communicate, which included discarding petitioner's unanswered letters, severed the principal-client

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[8] Petitioner contends that Respondent misapplies Davila: "Davila merely declined to expand [the] equitable exception [that attorney negligence could excuse a defaulted ineffective-assistance-of-trial-counsel claim] to defaulted claims of ineffective assistance of appellate counsel." Reply at 2. That may be so, but Davila did not upset the rule of Coleman that errors committed by postconviction counsel cannot establish cause to excuse a procedural default. Instead, Davila acknowledged the continuing viability of Coleman several times. See Davila, 137 S. Ct. at 2062, 2065-66 ("Martinez did not purport to displace Coleman as the general rule governing procedural default.").

relationship and "clearly constituted abandonment"); Gibbs v. Legrand, 767 F.3d 879, 886-88 (9th Cir. 2014) (holding that counsel's failure to notify petitioner of state supreme court's denial of his claim for post-conviction relief "constituted abandonment"). Petitioner should not be forced to bear the cost of an attorney "who is not operating as his agent in any meaningful sense of that word." Holland v. Florida, 560 U.S. 631, 659 (2010) (Alito, J., concurring)).

Having shown "cause," Petitioner must show prejudice, i.e., "not merely that the errors at his trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with errors of constitutional dimensions." United States v. Frady, 456 U.S. 152, 170 (1982). Because Petitioner's showings of prejudice overlap with the merits of his constitutional claims, the Court resolves them simultaneously. See Strickler v. Greene, 527 U.S. 263, 282 (1999) ("In this case, cause and prejudice [for procedural default] parallel two of the three components of the alleged [trial error] itself.").

VI. DISCUSSION

A. Exculpatory Evidence (Ground Three)

In Ground Three, Petitioner alleges that he was denied his right to due process when the prosecutor failed to disclose in 1997 that testifying officer Julio Alcaraz was under investigation by the Long Beach Police Department and FBI for illegal drug trafficking.[9] See Petition at 7; MPA at 27-37. Alcaraz was eventually charged in a five-count indictment in February 2000. See Reply at 5-6, Ex. 2 (Indictment). He ultimately pleaded guilty to using or possessing a

[9] Petitioner withdraws his additional claim contending that the prosecution failed to disclose DNA testing of blood found on his shirt. See Reply at 5 n.5.

firearm in connection with a drug-trafficking crime and was sentenced to 135 months imprisonment. See id., Exs. 3 (Plea Agreement), 4 (Judgment).

1. Relevant Law

Under Brady v. Maryland, 373 U.S. 83 (1963), prosecutors are constitutionally obligated to disclose "evidence favorable to an accused . . . [that] is material either to guilt or to punishment." Id. at 87. This prosecutorial duty is grounded in the Fourteenth Amendment, see id. at 86, which instructs that states shall not "deprive any person of life, liberty, or property, without due process of law," U.S. CONST. amend. XIV § 1. The prosecution is trusted to turn over evidence to the defense because its interest "is not that it shall win a case, but that justice shall be done." Strickler, 527 U.S. at 281.

The prosecutor's duty to divulge relevant information is a "broad obligation." Id. The prosecutor, although "not required to deliver his entire file to defense counsel," is required to turn over evidence that is favorable to the defendant and material to the case. United States v. Bagley, 473 U.S. 667, 675 (1985). This duty exists regardless of whether the defense made any request of the prosecution. See id. at 680-82.

Favorable evidence is not limited to evidence that is exculpatory, i.e., evidence that tends to prove the innocence of the defendant. Rather, it includes that which impeaches a prosecution witness. See Giglio v. United States, 405 U.S. 150, 154 (1972); see also Bagley, 473 U.S. at 676 (holding that the prosecution must disclose all material impeachment evidence).

Evidence is material if "there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different." Cone v. Bell, 556 U.S. 449, 469-70 (2009). "A reasonable probability does not mean that the defendant 'would more likely than not have received a different verdict with the evidence,' only that the likelihood of a

different result is great enough to 'undermine[ ] confidence in the outcome of the trial.'" Smith v. Cain, 565 U.S. 73, 75-76 (2012) (quoting Kyles v. Whitley, 514 U.S. 419, 434 (1995)); see also Amado v. Gonzalez, 758 F.3d 1119, 1139 (9th Cir. 2014) ("Evidence can be sufficient to sustain a verdict, and still Brady can be violated."). "Impeachment evidence is especially likely to be material when it impugns the testimony of a witness who is critical to the prosecution's case." United States v. Price, 566 F.3d 900, 913-14 (9th Cir. 2009) (quoting Silva v. Brown, 416 F.3d 980, 987 (9th Cir. 2005)) (finding Brady violation for the prosecution's failure to disclose evidence of a key witness's criminal history of dishonest and fraudulent conduct).

To summarize, a Brady claim must satisfy three elements: "The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." Banks v. Dretke, 540 U.S. 668, 691 (2004) (quoting Strickler, 527 U.S. at 281-82).

2. Review of the Court of Appeal's Decision

The last reasoned decision on Petitioner's Brady claim was the California Court of Appeal's decision on collateral review. It rejected the claim on the merits for lack of prejudice: "Petitioner fails to show prejudice from . . . his claim[] relating to . . . prosecutorial misconduct." LD 4 at 32. As explained below, it was not objectively unreasonable for the state court to find a lack of prejudice to Petitioner because there was testimony, other than that of Alcaraz, to support each charge.

Count One involved the murder of Edward Wilkins outside of a liquor store in Long Beach on August 1, 1995. Alcaraz's testimony placed Petitioner near the scene of the Wilkins murder about 35 minutes before the shooting. See RT 114-15.

Angela Liner directly implicated Petitioner in the murder. Liner was standing near Benny's Liquor before the shooting, drinking a beer and talking with friends. See RT 335-36. Petitioner, whom Liner knew, walked by. See RT 336. Liner said "hi" to Petitioner but received no response. See RT 336-37. Liner heard arguing, then gunshots from the direction of Benny's Liquor, which was 15-20 feet away. See RT 337-39. She stepped out and saw Petitioner firing a "small handgun" at three African-American men in a Cadillac. See RT 339-42. The Cadillac pulled away and Petitioner left. See RT 342-43. Liner did not immediately inform the police because she knew Petitioner and thought he was a "good kid," and feared retaliation from the Eastside Longos. See RT 355-56.

On cross-examination, Liner admitted that she came forward only after her then-juvenile son, Michael Delgado, was arrested with Petitioner and Tapia for the LaGrone murder and Thomas assault. See RT 359-60. Liner also admitted that she had been drinking that night and had taken seizure medicine, although she denied that this affected her mental state. See RT 335, 389-90. Her testimony also had some small inconsistencies. Gregory Webb, an employee of Benny's Liquor, testified that Liner came into the store before the shooting, not after, as Liner had remembered. See RT 388 (Liner testifying that she went back into Benny's Liquor "at least once" after the shooting), 549 (Webb testifying that Liner did not come into the store after the shooting). Jurors also learned that Liner was convicted of misdemeanor grand theft in 1997. See RT 369.

Mister Thomas testified that he was sitting in a car with Wilkins and Rodney Hayes outside Benny's Liquor when gunshots were fired at them. See RT 187. A man ran up to the car with a gun wrapped in a rag and continued firing at them, hitting Wilkins and Hayes. See 187-90. Thomas, however, was unable to identify the shooter. See RT 188-89.

Count Two involved the murder of Norman LaGrone on August 23, 1995. Alcaraz testified that he saw a group of Eastside Longos, including Petitioner and Tapia, walking with a stick that was the size of a small baseball bat or table leg half an hour before he was called to return to the scene. See RT 117-20.

Kevin Moran directly implicated Petitioner in the murder. Moran testified that he and LaGrone were outside Benny's Liquor when they were approached by a group of Hispanic gang members including Petitioner and Tapia. See RT 451-52. Tapia was carrying a baseball bat. See RT 452. Petitioner said something like, "I don't like you, motherfucker" to LaGrone and slapped him. See RT 446, 452-53. Petitioner then hit LaGrone's face with his fist. See RT 442 Tapia hit Moran's face with the bat, knocking Moran to the ground. See RT 442, 447. Petitioner took the bat from Tapia and hit LaGrone with it. See RT 442, 447. While LaGrone was on the ground, Petitioner repeatedly kicked him and hit him with the bat, and Tapia kicked LaGrone in the face. See RT 443, 445-46, 448-49. Moran identified Petitioner and Tapia on the night of the crime in a field show up and later identified them in court. See RT 443, 454, 482-83.

Moran also had credibility problems. The jury learned that Moran had originally refused to testify, but changed his mind once offered a deal: his testimony in exchange for lesser charges in an unrelated incident. See RT 456-61. Moran admitted that he lied to police about his name when he was arrested and often lied when it would benefit him. See RT 472-73.

Count Three involved the assault of Oscar Thomas, also on August 23. Alcaraz testified that after he heard about LaGrone, he witnessed an African-American man fighting three Eastside Longo gang members, including Petitioner. See RT 120-123. Tapia had a bike frame held over his head. See RT 123. After Alcaraz approached the group, Tapia ran away and was later

apprehended by Alcaraz. See RT 124. Petitioner stayed on scene and was detained. See RT 125.

Oscar Thomas testified that after leaving Benny's Liquor, he was approached by Petitioner, Tapia, and other Hispanic males. See 147-48. Thomas recognized Petitioner because he saw him in the neighborhood "all the time." See RT 148. Petitioner asked Thomas if he was a "gangbanger," then hit him several times in the head with his fists. See RT 149-50. Thomas took out a pocketknife to protect himself. See RT 150-51. Tapia then got a bicycle frame from around the corner and held it over his head. See RT 151-53. Eventually, Thomas saw a police car and waved for help. See RT 154. Thomas identified Petitioner at trial and in a photographic lineup. See RT 156-58.

Altogether, the record shows that while Alcaraz's testimony was helpful, each count was supported by direct eyewitness testimony: Liner saw Petitioner shoot Wilkins, Moran saw Petitioner attack LaGrone, and Thomas experienced the assault. Both witnesses had credibility issues. Liner did not come forward with information about the Wilkins murder until after her son was arrested for the LaGrone and Thomas incidents, whereas Moran initially refused to testify and then changed his mind once he was arrested for an unrelated incident to get a better deal. These problems were put front and center for the jury by trial counsel, and Petitioner was convicted nonetheless.

Nor can it be assumed that the suppressed information would have made a big impact on the jury. Petitioner's trial took place in September 1997. At that time, the FBI had only recently opened an investigation into Alcaraz after receiving "credible information" from the LBPD about his possible involvement in drug trafficking at nightclubs in the Long Beach area. See Reply, Ex. 1 (Complaint) at 8. Alcaraz was eventually indicted, but not until February 2000 for crimes committed between 1999 and 2000, several years after Petitioner's trial had concluded. See Indictment at 2-3.

Given the scope of the possible impeaching evidence and the existence of eyewitness testimony to support Petitioner's conviction, it was not objectively unreasonable for the state court to find a lack of prejudice to Petitioner, i.e., that the undisclosed evidence would not have affected the jury's verdict. See Strickler, 527 U.S. at 293-94; see also Harrington, 562 U.S. at 101-02 ("[H]abeas corpus is a 'guard against extreme malfunctions in state criminal justice systems,' not a substitute for ordinary error correction through appeal.") (citation omitted). In view of the "deference and latitude" afforded to the state court's application of Brady, the Court is unable to say that the California Court of Appeal's decision "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." Harrington, 562 U.S. at 103.

B. Ineffective Assistance of Counsel (Ground Four)

In Ground Four, Petitioner contends that he was denied his right to effective assistance of trial counsel. See Petition at 7; MPA at 38-54, 59-60.

1. Relevant Law

The Supreme Court case establishing federal law for an ineffective assistance of counsel claim is Strickland v. Washington, 466 U.S. 668 (1984). To prevail under Strickland, Petitioner must show that his counsel's deficient performance prejudiced him. See id. at 687. To establish deficiency, Petitioner must show his "counsel's representation fell below an objective standard of reasonableness." Id. at 688. In evaluating deficiency, "counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. at 690. Prejudice occurs when there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. "A reasonable probability is a probability sufficient to undermine

confidence in the outcome." Id. "The likelihood of a different result must be substantial, not just conceivable." Harrington, 562 U.S. at 112.

2. Review of the Court of Appeal's Decision

The last reasoned decision on the majority of Petitioner's ineffective-assistance-of-trial-counsel claims was the California Court of Appeal's decision on collateral review. It concluded that Petitioner did not establish prejudice: "Petitioner fails to show prejudice from . . . his claim[] relating to . . . ineffective assistance of counsel." LD 4 at 32. Because the Court of Appeal did not reach the issue of deficiency, that element is reviewed de novo. In contrast, the Court gives AEDPA deference to that court's prejudice ruling. See Porter v. McCollum, 558 U.S. 30, 39-40 (2009) (examining deficient performance de novo where state court did not reach the issue and giving AEDPA deference to state court's prejudice ruling); Miles v. Ryan, 713 F.3d 477, 489-90 (9th Cir. 2013).

Petitioner's claim that trial counsel should have investigated Angela Liner's son was presented in his first habeas petition to the California Supreme Court, which was summarily denied. See LD 4 at 31. "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." Harrington, 562 U.S. at 98.

a. Gisele La Vigne

Petitioner contends that trial counsel was ineffective for not objecting to state criminalist Gisele La Vigne's testimony on the ground that she could not establish that the blood on Petitioner's shirt belonged to Norman LaGrone, the victim in Count Two. See MPA at 39-40. La Vigne determined that the human blood on Petitioner's shirt was too degraded to perform comparison testing to determine whether it came from a particular individual. See RT 255-57.

Petitioner offers no authority establishing that La Vigne's inability to perform a successful blood test categorically rendered her testimony inadmissible. "[T]rial counsel cannot have been ineffective for failing to raise a meritless objection." Juan H. v. Allen, 408 F.3d 1262, 1273 (9th Cir. 2005). And Petitioner's trial counsel delivered an aggressive cross-examination of La Vigne to show that her testimony was unhelpful. See RT 259 ("Basically, you cannot tell us why you're here today, can you?"). Petitioner has not shown that counsel's conduct fell below an objective standard of reasonableness or that he was prejudiced.

b. DNA expert

Petitioner contends trial counsel was ineffective for failing to request the appointment of a DNA expert to test the blood on his shirt to show it did not come from LaGrone. See MPA at 41. Petitioner has not demonstrated that a DNA expert was required to rebut the state criminalist's testimony that the blood on the shirt was too degraded to perform testing. In addition, the record indicates that trial counsel used the lack of DNA as part as a broader narrative about the general absence of evidence in the case. For instance, counsel argued in closing that "[t]he blood, whoever's blood it may be, was destroyed for purposes of identification while in the possession of the police department. It cannot be used to exonerate my client and it cannot be used to find him guilty, having committed a crime." RT 728.

Petitioner also has not shown that the state court's prejudice ruling was unreasonable. His statement that further testing would have "clearly shown that the blood did not come from victim LaGrone," MPA at 41, is pure speculation. And, as explained previously, Kevin Moran was present during the crime and identified Petitioner and Tapia as the individuals who beat LaGrone. See RT 442.

c. *Pitchess* motion

Petitioner contends that trial counsel was ineffective in failing to file a motion under Pitchess v. Superior Court, 11 Cal. 3d 531 (1974) to obtain evidence of Officer Alcaraz's misconduct for impeachment purposes. See MPA at 42-45. To prevail on this claim, Petitioner must demonstrate "a likelihood of prevailing on the motion" and "a reasonable probability that the granting of the motion would have resulted in a more favorable outcome." Leavitt v. Aravae, 646 F.3d 605, 613 (9th Cir. 2011) (citation omitted).

Petitioner cannot demonstrate a likelihood of success for the simple reason that the parties agree that the record contains no evidence suggesting trial counsel was aware of Alcaraz's misconduct. See Answer at 21; Reply at 16. In fact, trial counsel states as much in a declaration attached to Petitioner's Reply. See Reply, Ex. 9 ¶ 4 ("At the time of [Petitioner's] trial, I had no knowledge of any misconduct involving Officer Alcaraz.").

d. Lee brothers

Petitioner faults trial counsel for not investigating or subpoenaing the "Lee brothers," who supposedly identified a third person as the perpetrators of the Wilkins shooting. See MPA at 45-46. In support, Petitioner cites trial counsel's statement from his prior trial explaining why he did not call them as witnesses:

> [Petitioner's Counsel]: The second was a tactical [sic] relating to the Lee brothers, that relates to the August 2nd, 1995, shooting. There are two witnesses who miss ID'd and identified a third party, but upon being interviewed by my investigator, one of them identified my client. It was a tactical decision not to call either one.

MPA at 45 (citing Ex. L).

It is evident that trial counsel made a tactical decision not to call the Lee brothers after investigating the matter and determining that their testimony

might be detrimental to Petitioner's case. This is not the sort of performance that is considered deficient under Strickland. See Strickland, 466 U.S. at 690 (noting that "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable"). Additionally, Petitioner cannot show prejudice because he presents no declarations from the Lee brothers or any other evidence indicating they would have provided favorable defense testimony. See Dows v. Wood, 211 F.3d 480, 486 (9th Cir. 2000) (rejecting claim of ineffective assistance for failing to interview or call alleged alibi witness where petitioner presented no affidavit from witness or evidence that witness would have given helpful defense testimony).

e. Joinder

Petitioner contends trial counsel was deficient for failing to request a severance of the "relatively weak LaGrone case with the more compelling Wilkens charges." MPA at 46-48.

California law provides for the joinder of different offenses connected together in their commission or different offenses of the same class of crimes. See Cal. Penal Code § 954. Offenses are connected in their commission if there is a common element of substantial importance in their commission, including the intent or motivation with which different acts are committed. See Alcala v. Superior Court, 43 Cal. 4th 1205, 1219 (2008).

California has a "strong legislative policy in favor of joinder of charges unless there is prejudice[.]" People v. Gomez, 24 Cal. App. 4th 22, 28 (1994). The burden to show prejudice is on the party seeking severance. See People v. Soper, 45 Cal. 4th 759, 773 (2009). When confronted with motions to sever, the trial court should consider: (1) the cross-admissibility of the evidence in separate trials; (2) whether some of the charges are likely to unusually inflame the jury against the defendant; (3) whether a weak case has been joined with a

strong case or another weak case so the total evidence may alter the outcome of some or all of the charges; (4) and whether joinder of the charges converts the matter into a capital case. See id. at 775.

Here, counsel reasonably could have decided that a severance motion had little to no likelihood of success. The murder charges are the same class of crime. The Court does not agree with Petitioner that the LaGrone charge was weak compared to the Wilkins charge, as the evidence of Petitioner's involvement and culpability in each charge was similar. Both were proven by eyewitness testimony describing Petitioner's violent acts. It is thus highly unlikely that a motion for severance would have been granted. Counsel is not obligated to raise frivolous motions, and the failure to do so cannot constitute ineffective assistance of counsel. See Sanders v. Cullen, 873 F.3d 778, 815 (9th Cir. 2017). Just as important, Petitioner has not demonstrated prejudice from trial counsel's reasonable tactical decision. His statement that the jury would be unable to "compartmentalize the damaging information," MPA at 48, is conclusory.

f. Sylvia Cranston

Petitioner contends trial counsel was ineffective by not calling Sylvia Cranston, a law clerk at the District Attorney's office, as a defense witness. See MPA at 48-49. Petitioner suggests Cranston could shed light on whether LaGrone's mother went to the county jail to secure Moran's testimony. See id. at 49. However, Petitioner does not provide a declaration from Cranston or point to any other evidence indicating what her testimony would have been or explain how her testimony would have changed the verdict.

g. Mary Hall

Petitioner contends that trial counsel was ineffective by not calling Mary Hall as a witness. According to Petitioner, Mary Hall is the owner of a liquor store who placed Angela Liner's son at the scene of the Wilkins shooting right

before the crime occurred. See MPA at 49-50. Petitioner contends Hall's testimony would have "altered significantly the evidentiary position" of the case. Id. Once again, Petitioner's claim fails because he does not provide a declaration from Hall or any other evidence showing she was willing to testify and would have provided favorable defense testimony. See Dows, 211 F.3d at 486.

h. Angela Liner

Petitioner argues that trial counsel was ineffective by eliciting prejudicial testimony from Angela Liner. See MPA at 51-53. On direct examination, Liner testified that she delayed going to the police because she was afraid of retaliation from Petitioner's gang, the Eastside Longos. See RT 356-58. Liner eventually came forward with information about the Wilkins murder after her son was arrested alongside Petitioner and Tapia in connection with the LaGrone and Thomas incidents. See RT 360. On cross-examination, Petitioner's trial counsel and Liner had the following exchange:

> Q [Counsel] Now, between August the 1st, 1995 and today, no one's hurt your family, have they, with regards to this case?
>
> A [Liner] My family? No.
>
> Q And no one's hurt you?
>
> A Yes, they have.

RT 372. At sidebar, Petitioner's counsel said, "That was a stupid question on my part, but I would like to hear from the People. What's happened to your witness?" Id. The prosecutor explained that the Eastside Longos had repeatedly beaten Liner. See RT 372-73. Petitioner's counsel then moved for a mistrial, which the court denied. See RT 386. Before Liner resumed her

testimony, the trial court instructed the jury to disregard the question and answer related to Liner being harmed. See RT 387.

Even assuming counsel was deficient in asking Liner whether anyone had hurt her, Petitioner has not shown that the state court's prejudice determination "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." Harrington, 562 U.S. at 103. Significantly, the trial court instructed the jury to disregard the question and answer, and a jury "is presumed to follow its instructions." Weeks v. Angelone, 528 U.S. 225, 234 (2000). In addition, there was no pattern of continuing misconduct. The comments were an isolated instance that was immediately addressed by the trial court, and the comments were stricken. See Greer v. Miller, 483 U.S. 756, 766 (1987) ("The sequence of events in this case—a single question, an immediate objection, and two curative instructions—clearly indicates that the . . . improper question did not violate [petitioner's] due process rights."). Neither the prosecutor nor defense counsel ever again referred to Liner or her family being threatened by the Eastside Longos.

i. Angela Liner's son

Petitioner argues that trial counsel was ineffective for failing to investigate Angela Liner's son, Michael. See MPA at 59-60. Michael was arrested with Petitioner and Tapia for the attempted murder of LaGrone. See RT 345-46, 352-53, 358, 360. Michael was prosecuted for the crime but the juvenile court dismissed the charges against him. See RT 362, 365.

Petitioner has not shown that there was "no reasonable basis" for the California Supreme Court to deny this claim. He suggests without evidence that trial counsel "had no idea" the facts surrounding Michael's arrest and charges. And Petitioner does not explain what the investigation would have revealed or how it would have affected the verdict. Claims that trial counsel

should have done more, without more specificity, cannot support a Strickland claim. See Ceja v. Stewart, 97 F.3d 1246, 1255 (9th Cir. 1996) (rejecting Strickland claim where petitioner failed to explain what compelling evidence would have been uncovered had counsel interviewed more witnesses). To the extent Petitioner believes Michael's arrest for the LaGrone incident bears on the Wilkins murder, the jury heard Angela Liner's testimony that she came forward with information only after Michael was arrested, and was free to discredit her on that basis. See RT 360.

j. Cumulative error

Finally, Petition contends that he was prejudiced by the cumulative effect of trial counsel's alleged errors. See MPA at 54. The Ninth Circuit has "previously recognized that 'prejudice may result from the cumulative impact of multiple deficiencies.'" Harris v. Wood, 64 F.3d 1432, 1438 (9th Cir. 1995) (citation omitted). Here, Petitioner falls short of establishing the multiple deficiencies needed to show a cumulative impact.

C. Confrontation Clause (Ground Five)

In Ground Five, Petitioner contends he was denied his Sixth Amendment right of confrontation when the prosecution was unable to secure Kevin Moran's presence at trial. See Petition at 7; MPA at 54-58.

Moran—an eyewitness to the murder of LaGrone—testified at Petitioner's second trial, which ended in a mistrial. See CT 69, 73. At the third trial, the prosecution represented that Moran was unavailable and the trial court held a diligence hearing, at which Detective William Collette testified regarding attempts to locate Moran. See RT 31-45. The trial court ruled that the prosecution had made a diligent effort to locate Moran, that Moran was unavailable, and the prosecution could introduce his prior testimony. See RT 45.

1. Relevant Law

The Confrontation Clause provides that the accused has the right to "be confronted with the witnesses against him." U.S. CONST. amend. VI. In Crawford v. Washington, 541 U.S. 36 (2004), the Supreme Court held that the Confrontation Clause bars the "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." Id. at 53-54. A witness is "unavailable" if "the prosecutorial authorities have made a good faith effort to obtain his presence at trial" but were unsuccessful. Barber v. Page, 390 U.S. 719, 725 (1968). The length to which the prosecution must go to produce a witness is a question of reasonableness. See Hardy, 565 U.S. at 70.

2. Review of the Court of Appeal's Decision

The parties agree that the California Court of Appeal's decision on collateral review is the last reasoned decision on this claim. That court imposed a procedural bar: "The issue of violations of petitioner's confrontation rights could have been, but was not, raised on appeal." LD 4 at 32 (citing Harris, 5 Cal. 4th at 826, Clark, 5 Cal. 4th at 765, and Waltreus, 62 Cal. 2d at 225). California's rule that a defendant procedurally defaults a claim raised for the first time on habeas if the claim could have been raised on appeal is an adequate and independent procedural rule that bars federal habeas review. See Johnson v. Lee, 136 S. Ct. 1802, 1805-06 (2016).

Undeterred, Petitioner argues that the ineffectiveness of his appellate counsel demonstrates "cause" and "prejudice" to excuse his procedural default. See Reply at 18-20. The U.S. Supreme Court has made clear that attorney error can excuse a petitioner's procedural default, but only where

attorney error amounts to ineffective assistance of counsel.[10] See Coleman, 501 U.S. at 752. Whether the actions of Petitioner's appellate counsel can excuse his procedural default thus depends on whether counsel fell below Strickland's standard for constitutionally effective counsel, i.e., appellate counsel's advice fell below an objective standard of reasonableness and there is a reasonable probability that, but for counsel's unprofessional errors, Petitioner would have prevailed on appeal. See Strickland, 466 U.S. at 688; see also Miller v. Keeney, 882 F.2d 1429, 1433 (9th Cir. 1989) (applying Strickland to claim of ineffective assistance of appellate counsel).

Significantly, the California Court of Appeal alternatively construed Petitioner's habeas petition as raising such an ineffective assistance claim to excuse the default, which it denied: "To the extent the failure to raise [the confrontation] issue is attributable to appellate counsel, we hold that petitioner has no ground for a claim of ineffective assistance of appellate counsel." LD 4 at 32-33 (citing Jones v. Barnes, 463 U.S. 745, 750 (1983) and Miller, 882 F.2d at 1434 n.10).

The appellate court's rejection raises the difficulty setting. Under Strickland, "counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." 466 U.S. at 690. By itself, this is a deferential standard that is challenging for a petitioner to meet. When the claim is subject to AEPDA, that standard is raised even higher, as the petitioner must show that the state court's application of Strickland itself was unreasonable. This amounts to a "doubly deferential standard of review that gives both the state court and the defense

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[10] In contrast to collateral review, criminal defendants have a due process right to the effective assistance of counsel on their first appeal. See Evitts v. Lucey, 469 U.S. 387, 394-95 (1985).

attorney the benefit of the doubt." Burt v. Titlow, 571 U.S. 12, 15 (2013) (internal quotation omitted). Stated differently, AEPDA requires the Court to "take a highly deferential look at counsel's performance through the deferential lens of § 2254(d)." Cullen v. Pinholster, 563 U.S. 170, 190 (2011) (internal quotations omitted).

Petitioner contends appellate counsel was deficient for not raising the Confrontation Clause claim. See Reply at 19-20. Appellate counsel, however, has no constitutional obligation to raise every nonfrivolous issue requested by the defendant. See Jones v. Barnes, 463 U.S. 745, 751-54 (1983). "[I]ndeed, the weeding out of weaker issues is widely recognized as one of the hallmarks of effective appellate advocacy." Miller, 882 F.2d at 1434. "Appellate counsel will therefore frequently remain above an objective standard of competence (prong one) and have caused her client no prejudice (prong two) for the same reason—because she declined to raise a weak issue." Id. Such is the case here.

While raising the issue of Moran's absence on direct appeal would not have been frivolous, neither would it have led to a reasonable probability of reversal. The Ninth Circuit's decision in Jackson v. Brown, 513 F.3d 1057, 1083-84 (9th Cir. 2008) is instructive. In that case, the Ninth Circuit considered whether the prosecution made "a good-faith effort" to procure the appearance of two witnesses whose subpoenas were returned in the mail before trial. See id. at 1083. As to the first witness, the Ninth Circuit concluded the prosecution did enough where the investigator: visited the witness's apartment and discovered it was vacated; attempted to locate the witness through her husband, who told him that she was in custody; personally served the witness in custody, but trial was then continued; lost touch with the witness when she was released from custody on bail; checked to see if she had been arrested under any of her aliases; attempted to locate her through a friend; and repeatedly visited the street corner where she reportedly was working as a

prostitute. See id. at 1083-84. As for the second witness, the Ninth Circuit concluded the prosecution's efforts were insufficient where the investigator made several efforts to contact the witness but made no attempts between August 30 and December 21, a nearly four-month span. See id.

Here, Detective Collette testified that up until the second trial, Moran's permanent address was county jail. See RT 33. Collette started looking for Moran in March 1997. See id. At some point, Moran was released from jail, but the jail's computer records were never updated and showed that he was still in custody. See RT 33-34 ("Matter of fact, if I run him in the County computer today, it shows that he is in custody."). Collette learned in July 1997 that Moran was paroled. See RT 40. Collette then contacted Moran's parole agent and learned that he failed to show for his first appointment. See RT 33. Collette also contacted Moran's sister, whose address Moran had given to the parole department. See RT 35. She told Collette that she had not seen Moran since July, believed he was "on the streets," and would try to find him. See RT 35-37, 42. Collette left a subpoena with her. See RT 37. Collette checked whether Moran had utilities in his name, his driver's license activity, and if he had been arrested anywhere in the country. See RT 35. Collette personally looked for Moran on the streets near Anaheim and Cherry, where Moran often spent time, about six times over the last few months. See RT 43. Collette did not talk to any patrol officers who regularly patrolled that area. See RT 39. Collette generated a wanted poster of Moran in September 1997, which was distributed department-wide and included a photograph. See RT 33, 37.

Collette's efforts to locate Moran were more like the efforts to locate the first witness in Jackson. Due to a computer error, Collette believed that Moran was in custody. After finding out that was not the case, Collette contacted Moran's parole agent, repeatedly went to his listed address, talked to Moran's sister and left a subpoena with her, ran several searches, personally searched

for Moran on the streets, and generated a wanted poster, which was distributed department-wide. Under the circumstances, these were reasonable and good faith efforts to locate Moran to secure his presence at trial. See Jackson, 513 F.3d at 1083-84; see also Windham v. Merkle, 163 F.3d 1092, 1102-03 (9th Cir. 1998) (prosecution showed good faith effort to locate witness where the district attorney's office attempted to contact him by telephone, contacted his parole officer, obtained a bench warrant for his arrest, went to his home and other places, and checked to see if he was an accident casualty); Dres v. Campoy, 784 F.2d 996, 999-1001 & n.2 (9th Cir. 1986) (prosecution showed good faith effort to locate minor witness who ran away from home before trial where prosecutor called phone numbers, contacted police to verify that witness was living with mother and was not in custody, visited her previous apartment, and showed her picture at various locations she frequented). It is thus extremely doubtful that Petitioner would have prevailed on this claim on direct review.

Because Petitioner had only a remote chance of obtaining reversal based on the admission of Moran's testimony, he cannot demonstrate that the California Court of Appeal applied Strickland to the facts of his case in an objectively unreasonable manner. Petitioner has not shown cause and prejudice to excuse his default.

D. Insufficient Evidence (Ground Six)

In Ground Six, Petitioner contends that there was insufficient evidence he proximately caused LaGrone's death. See Petition at 9; MPA at 60-63. Specifically, Petitioner contends the prosecution failed to show beyond a reasonable doubt that LaGrone's death was caused by the beating rather than the result of a rare, pre-existing brain infection, as testified to by the county's chief medical examiner.

1. Relevant Law

The Due Process Clause of the Fourteenth Amendment protects a criminal defendant from conviction "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In re Winship, 397 U.S. 358, 364 (1970). Sufficient evidence exists to support a conviction if, "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 v. Virginia, 443 U.S. 307, 319 (1979). In applying the Jackson standard, the federal court must refer to the substantive elements of the criminal offense as defined by state law at the time that a petitioner committed the crime and was convicted. See id. at 324 n.16. The jury's credibility determinations are "entitled to near-total deference," Bruce v. Terhune, 376 F.3d 950, 957 (9th Cir. 2004), and when the factual record supports conflicting inferences, the federal court must presume that the trier of fact resolved any such conflicts in favor of the prosecution, and defer to that resolution, see Jackson, 442 U.S. at 326.

After AEDPA, federal courts must "apply the standards of Jackson with an additional layer of deference." Juan H., 408 F.3d at 1274; see also Boyer v. Belleque, 659 F.3d 957, 965 (9th Cir. 2011) (noting that when an insufficiency of the evidence claim is "subject to the strictures of AEDPA, there is a double dose of deference that can rarely be surmounted"). Even where a state court decision does not cite to or discuss the relevant Jackson standard, habeas relief is not warranted "'so long as neither the reasoning nor the result of the state-court decision contradicts' Supreme Court precedent." Juan H., 408 F.3d at 1274 n.12 (quoting Early v. Packer, 537 U.S. 3, 8 (2003) (per curiam)); see also Coleman v. Johnson, 566 U.S. 650, 651 (2012) (holding that a federal court may overturn a state court decision

rejecting a sufficiency of the evidence challenge only where the state court decision was "objectively unreasonable") (per curiam).

2. Review of the Court of Appeal's Decision

The last reasoned decision on Petitioner's insufficient evidence claim was the California Court of Appeal's decision on direct review. That court summarized and rejected the claim as follows:

> In reviewing the sufficiency of the evidence, "courts apply the substantial evidence test. Under this standard, the court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence - that is, evidence which is reasonable, credible, and of solid value - such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt."
>
> "Although we must ensure the evidence is reasonable, credible, and of solid value, nonetheless it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts on which that determination depends. Thus, if the verdict is supported by substantial evidence, we must accord due deference to the trier of fact and not substitute our evaluation of a witness's credibility for that of the fact finder."
>
> A defendant's act causes the victim's death when the act contributed to the death, even if it was not the sole or immediate cause; when the act contributed concurrently with another's act to the death, regardless of the extent of each person's contribution; and when an extraneous contributing cause of death is a foreseeable natural consequence of the defendant's act, regardless of whether the defendant's act was fatal.

Here, there was conflicting medical testimony concerning the cause of LaGrone's death. Dr. Carpenter, a prosecution witness, testified that there were three "mechanisms" by which LaGrone died: (1) the brain fungus; (2) pneumonia; and (3) heart failure. He opined that the fungus was introduced directly into the brain from the beating, that LaGrone acquired pneumonia by breathing in vomit after the beating and that the heart failure stemmed from a pre-existing condition.

Dr. Carpenter testified that the brain fungus was a type of fungus which lived in the soil, was introduced into LaGrone's brain through hairline cracks caused by the beating, and spread throughout his brain by means of the lymph system. Dr. Carpenter also testified that such cracks would not be visible on x-ray or during an autopsy if they occurred in frontal bones around the forehead. Dr. Carpenter also acknowledged that doctors disagree about whether the brain has a lymph system. We see no inconsistencies in his testimony.

Dr. Sheridan testified for the defense. His testimony contradicted Dr. Carpenter's testimony in several respects. Dr. Sheridan opined that the fungus originated in LaGrone's lung and spread through his blood to the brain. He also opined that the fungus could not have been introduced directly into the brain because there was no evidence of an injury through which the fungus could pass, and that the beating was therefore not a cause of LaGrone's death.

Dr. Carpenter's testimony, which obviously was believed by the jury, is sufficient evidence to establish that the cause of LaGrone's death was the savage beating administered by

Petitioner. "The testimony of a single witness is sufficient to uphold a judgment even if it is contradicted by other evidence, inconsistent or false as to other portions."

Petitioner also contends, in effect, that Dr. Carpenter's testimony about the source of the brain fungus which contributed to LaGrone's death was inconsistent and equivocal and therefore could not support the jury verdict.

We do not understand Dr. Carpenter's testimony on the source of the brain fungus to be equivocal. As Petitioner points out, Dr. Carpenter did testify that: "But I do not thoroughly -- nor do I believe anyone can understand the fine detail of how these abscesses occurred where they did, and exactly how the fungus got through to cause them." Dr. Carpenter explained that when there is a brain infection following head trauma, "doctors feel it's reasonable to conclude that there were fractures and the -- the infection spread from the skin to the brain through the fractured areas . . . ." The fact that Dr. Carpenter admitted that doctors do not know precisely where the fractures occur or how the fungus spreads once inside the brain does not mean that the doctors are wrong about how the fungus entered the brain in the first place or render his testimony equivocal.

Petitioner's argument that the jury could not believe Dr. Carpenter's testimony because it may have been contradicted by Dr. Sheridan's testimony is unmeritorious. "[I]t [is] for the jury to resolve the conflicts in the expert testimony, accepting such of it, or none of it, as [it sees] fit."

Further, even if we discounted Dr. Carpenter's testimony about the brain fungus entirely, we would not reverse the

> judgment. Dr. Carpenter also testified that pneumonia was a cause of death, and that the pneumonia resulted from an inhalation of vomit at the beating.

LD 4 at 41-44 (footnotes and citations omitted).

Based on an independent review of the record, the state court's denial of this claim was not unreasonable. Los Angeles County Medical Examiner Eugene Carpenter, a prosecution witness, testified that there were three "mechanisms" by which the blunt force trauma caused LaGrone's death: abscesses in the brain caused by a fungus, pneumonia, and pre-existing severe heart disease. See RT 262-63, 272. The brain fungus originated from the soil and was pushed into LaGrone's skin when he was beaten and spread into his brain through the lymphatic drainage channels. See RT 270-71. The pneumonia was caused by the inhalation of vomit. See RT 267. With respect to heart disease, LaGrone's injuries strained his heart causing it to go into failure. See RT 263. Dr. Carpenter also testified that a complication of Decadron, which LaGrone received to prevent his head from swelling further and causing death, is that it enables weak fungal infections to spread deeply into the tissues. See RT at 264-65, 270-71, 279-80. Viewing this evidence in the light most favorable to the prosecution, a rational trier of fact could conclude that Petitioner's beating of LaGrone caused his death.

Petitioner makes much of the fact that his witness, Dr. Sheridan, offered conflicting testimony suggesting the fungus originated in LaGrone's lung and spread through his blood to the brain. See RT 581-82, 584. All this demonstrates is that the jury was presented with competing views of how LaGrone died and sided with Dr. Carpenter. Petitioner effectively asks this Court to reexamine the evidence at trial and reassess the jury's credibility determinations, which it may not do. See Jackson, 443 U.S. at 326; see also Cavazos v. Smith, 565 U.S. 1, 7-8 (2011) (where medical experts presented

"competing views" as to cause of victim's death, California Court of Appeal did not unreasonably apply Jackson in deciding that evidence was sufficient). The same is true of Petitioner's claim that Dr. Carpenter's evidence rested on "unobservable evidence about which he had no expertise." Reply at 22. The jury heard testimony about Dr. Carpenter's qualifications and was free to disregard his conclusion regarding how LaGrone denied. The fact that the jury credited Dr. Carpenter's theory is not a reason to overturn Petitioner's conviction.

E. Cumulative Errors (Ground Seven)

In Ground Seven, Petitioner that his Fourteenth Amendment rights were violated based on the cumulative errors at his trial. See Petition at 9; MPA at 58-59. "[E]ven if no single error were prejudicial, where there are several substantial errors, their cumulative effect may nevertheless be so prejudicial as to require reversal." Killian v. Poole, 282 F.3d 1204, 1211 (9th Cir. 2002) (internal quotation marks and citation omitted).

On habeas review, the California Court of Appeal denied Petitioner's cumulative error claim on the merits: "Petitioner's assertion that cumulative errors violated his due process rights also fails." LD 4 at 33. Because the Court concludes that no error of constitutional magnitude occurred, the appellate court's determination was not unreasonable or contrary to clearly established federal law. See Rupe v. Wood, 93 F.3d 1434, 1445 (9th Cir. 1996) (rejecting cumulative error claim where court found no constitutional errors).

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VII. CONCLUSION

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

Date: March 8, 2019

DOUGLAS F. McCORMICK
United States Magistrate Judge

S176616

IN THE SUPREME COURT OF CALIFORNIA

En Banc

In re JUAN VALENZUELA on Habeas Corpus.

The petition for writ of habeas corpus is denied. (See *In re Clark* (1993) 5 Cal.4th 750; *In re Robbins* (1998) 18 Cal.4th 770, 780; *In re Miller* (1941) 17 Cal.2d 734; *In re Waltreus* (1965) 62 Cal.2d 218.)

GEORGE
Chief Justice

p466 22

S169648

IN THE SUPREME COURT OF CALIFORNIA

En Banc

In re JUAN VALENZUELA on Habeas Corpus.

The petition for writ of habeas corpus is denied.

GEORGE
Chief Justice

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

In re	B212038
JUAN VALENZUELA	(Super. Ct. No. NA025820)
on	(Mark C. Kim, Judge)
Habeas Corpus.	**ORDER**

THE COURT:

The court has read and considered the petition for writ of habeas corpus, filed November 13, 2008. The petition is denied. Petitioner is procedurally defaulted from challenging the validity of his 1997 conviction due to his inadequately explained delay in seeking relief. (See *In re Clark* (1993) 5 Cal.4th 750, 771, 775, 783; *McCleskey v. Zant* (1991) 499 U.S. 467, 498.) The petition is also denied on the merits. Petitioner fails to show prejudice from any of his claims relating to exclusion from an in camera hearing, prosecutorial misconduct or ineffective assistance of counsel. (*Strickland v. Washington* (1984) 466 U.S. 668, 693-694; *People v. Waidla* (2000) 22 Cal.4th 690, 742; *In re Sassounian* (1995) 9 Cal.4th 535, 546; *People v. Fosselman* (1983) 33 Cal.3d 572, 584.) The issue of violation of petitioner's confrontation rights could have been, but was not, raised on appeal. (*In re Harris* (1993) 5 Cal.4th 813, 826; *In re Clark* (1993) 5 Cal.4th 750, 765; *In re Waltreus* (1965) 62 Cal.2d 218, 225.) To the extent the failure to raise this issue is attributable to appellate counsel, we hold that petitioner has no ground for a claim of ineffective assistance of appellate counsel. (*Jones v. Barnes* (1983) 463 U.S. 745, 750; *Miller v. Keeney* (9th Cir. 1989) 882 F.2d 1428, 1434,

fn. 10.) Petitioner's assertion that cumulative errors violated his due process rights also fails.

ARMSTRONG, Acting P.J. MOSK, J. KRIEGLER, J.

Excerpt from Prosecutor's Opening Argument
Reporter's Transcript Volume 1, Pages 74-77

COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

THE PEOPLE OF THE STATE OF CALIFORNIA, PLAINTIFF-RESPONDENT VS. JUAN C. VALENZUELA; ELIAS J. TAPIA, DEFENDANT-APPELLANTS.	SUPERIOR COURT NO. NA025820

MAY 20; AUGUST 12; SEPTEMBER 3, 4, 5, 8, 1997

APPEAL FROM THE SUPERIOR COURT OF LOS ANGELES COUNTY

HONORABLE ROBERT L. LA FONT, JUDGE PRESIDING

REPORTERS' TRANSCRIPT ON APPEAL

APPEARANCES:

FOR PLAINTIFF-RESPONDENT: DANIEL E. LUNGREN
STATE ATTORNEY GENERAL
300 SPRING STREET
2ND FLOOR/NORTH TOWER
LOS ANGELES, CALIFORNIA 90013

FOR DEFENDANT-APPELLANTS: IN PROPRIA PERSONA

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CHRISTINA ARCHAMBEAU, CSR #3416
OFFICIAL REPORTER

STREET. AND THERE WAS ANOTHER SERIES OF INCIDENTS. AND THAT BRINGS US TO AUGUST 23, 1995.

ANGELA LINER, WHO ULTIMATELY DID COME FORWARD AND WAS ABLE TO TELL POLICE THAT SHE SAW WHO DID THAT SHOOTING, SHE SAW MR. VALENZUELA, WHO SHE KNOWS IS GRUMPY, WALK PAST HER ON THE STREET. SHE SAW HIM LATER WITH HIS GUN OUT ON THE STREET, FIRING THE BULLETS INTO THAT CAR. SHE KNOWS THE DEFENDANT. THE ONLY REASON SHE KNOWS HIM IS SHE'S GOT A SON, MICHAEL DELGADO, WHO HANGS WITH THOSE PEOPLE. THAT WAS HIS NEIGHBORHOOD AT THE TIME.

NOW, ON AUGUST 23 YOU ARE GOING TO LEARN ABOUT INCIDENTS THAT OCCURRED ON THAT DAY. BUT VERY IMPORTANTLY YOU'RE GOING TO LEARN OR YOU'RE GOING TO HEAR FROM AN OFFICER WHO PATROLLED THAT NEIGHBORHOOD. IN FACT, HE WAS OUT AT THE SCENES ON BOTH OF THOSE EVENINGS. IT'S AN OFFICER ALCARAZ OF THE LONG BEACH POLICE DEPARTMENT.

HE'S AN OFFICER TRAINED IN GANG INVESTIGATION AND, FOR A NUMBER OF YEARS, WAS WORKING A GANG INVESTIGATION DETAIL. IN FACT, HE WORKED IN ASSOCIATION WITH THE FBI. BUT JUST BEFORE THESE INCIDENTS, HE WENT BACK TO PATROL, AND HE WAS WORKING. BUT BECAUSE HE'S FAMILIAR WITH THE GANG MEMBERS -- ANY PATROL OFFICER IS NATURALLY GOING TO BE, BUT ADDITIONALLY HE CONCENTRATED AND SPECIALIZED IN THEM BECAUSE HE WAS A GANG INVESTIGATOR AND HE WAS A SPANISH-SPEAKING GANG INVESTIGATOR WHO COULD SPEAK TO ALL OF THESE GANG MEMBERS OF A LATINO GANG. HE WAS FAMILIAR WITH THESE GUYS.

HIS ACTIVITY ON AUGUST 23 IS VERY CRUCIAL. NOW, HE'LL TESTIFY TO YOU ABOUT THAT. AND HE'S ANOTHER

OFFICER WHO'S BEEN UP ALL LAST NIGHT AND WHO YOU WILL SEE HIM TODAY ALL BLEARY-EYED. HE'LL BE ABLE TO TELL YOU BECAUSE HE KNOWS BOTH OF THESE DEFENDANTS. HE KNOWS, IN FACT, THE EASTSIDE LONGOS, THEIR MAIN HANGOUT IN THIS NEIGHBORHOOD IS SOME APARTMENTS THAT APPEAR BEHIND A PLACE CALLED THE ZACATECAS BAR ON ANAHEIM STREET.

AND HE'D GO BACK THERE, AND HE'D CHECK ON THEM REGULARLY. WHEN HE WAS PATROLLING THIS NEIGHBORHOOD, HE WOULD SIMPLY MAKE IT A POINT TO CRUISE AROUND THE NEIGHBORHOOD. HE KNEW THE GANG MEMBERS. AND HE WOULD CHECK ON WHAT THEY WERE DOING.

HE SHOWED UP AT A VERY INTERESTING TIME ON AUGUST 23 BECAUSE ABOUT A HALF AN HOUR BEFORE, POPS WAS BEATEN TO DEATH. POPS WAS BEATEN TO DEATH IN THE VICINITY OF THE INTERSECTION OF ANAHEIM AND ST. LOUIS ON ONE OF THOSE STREET CORNERS. OFFICER ALCARAZ WAS PATROLLING THE NEIGHBORHOOD, AND HE SAW A GANG OF EASTSIDE LONGOS THAT HE RECOGNIZED. THEY WERE WALKING DOWN THE STREET, INCLUDING MR. VALENZUELA, INCLUDING MR. TAPIA.

IN FACT, ONE OF THEM WAS CARRYING WHAT LOOKED TO ALCARAZ LIKE A STICK. HE DOESN'T KNOW WHAT KIND OF STICK IT WAS. HE DIDN'T GO INSPECT IT PERSONALLY, BUT IT WAS ABOUT THE SIZE OF A BASEBALL BAT OR A TABLE LEG. HE THINKS IT COULD HAVE BEEN A TABLE LEG, BUT HE REALLY DOESN'T KNOW. HE DIDN'T INSPECT IT. IT LOOKED LIKE TO HIM LIKE IT HAD A LITTLE BIT OF METAL ON ONE END, BUT IT WAS LARGELY WOOD.

BUT HE SAW THESE EASTSIDE LONGOS WALKING IN A GANG DOWN THE SIDEWALK. IT'S NOT A CRIME TO WALK IN A GANG

DOWN THE SIDEWALK. IT'S NOT A CRIME TO CARRY A STICK IN YOUR HAND. SO ALL HE COULD DO IS PULL UP NEAR THEM, SHOUT TO THEM, MAKE CONTACT WITH THEM, TALK TO THEM A LITTLE BIT, AND THEN DRIVE ON. BUT HE HAD SEEN THEM. HE SAW BOTH THESE GUYS MOVING DOWN THE SIDEWALK WITH A STICK.

WHEN THE CALL CAME OUT THAT THERE HAD BEEN AN INCIDENT HERE, OFFICER ALCARAZ AND OTHER OFFICERS CAME TO THE SCENE ON AUGUST 23. THEY FOUND POPS BEATEN AT THE CORNER OF ST. LOUIS AND ANAHEIM. THERE WAS ALSO A WITNESS THERE NAMED KEVIN MORAN. YOU'LL HEAR MORE ABOUT KEVIN MORAN AT ANOTHER TIME. I'M NOT GOING TO ADDRESS HIM AND POPS' BEATING AT THIS TIME IN THIS OPENING STATEMENT.

BUT WHEN OFFICER ALCARAZ CAME BACK TO THE SCENE, HE CAME UP ANAHEIM STREET, AND HE SAW THE GANG MEMBERS AGAIN. THIS TIME, AS HE WAS RESPONDING TO THE SCENE OF POPS' BEATING, WHERE POPS WAS DOWN ON THE SIDEWALK WITH HIS HEAD SWELLING UP LIKE A BASKETBALL AND BLEEDING, THIS IS A MAN WHO WAS BEGINNING TO DECLINE TOWARDS DEATH. IT WASN'T THERE, BY THE TIME OFFICER ALCARAZ GOT TO THE SCENE, THAT HE SAW THESE GANG MEMBERS AGAIN. HE SAW THEM DOWN THE STREET A LITTLE BIT IN THE PARKING LOT NEAR ON'S MARKET WHERE, AS OFFICER ALCARAZ DROVE UP, HE SAW MR. VALENZUELA; HE SAW MR. TAPIA.

MR. TAPIA HAD A BICYCLE FRAME IN HIS HANDS. HE WAS HOLDING IT OVER ANOTHER GENTLEMAN. THIS GENTLEMAN WAS MR. OSCAR THOMAS. AND AS THE POLICE ROLLED UP, HE STARTED SIGNALING TO THEM FRANTICALLY. HE HAD A KNIFE IN HIS HAND. HE WAS TRYING TO FLAG DOWN THE POLICE, AND THE

POLICE CAME UP AND FOUND HIM. WHEN THEY CAME UP AND FOUND HIM, THE GANG MEMBERS FLED. AND OFFICER ALCARAZ AND FELLOW OFFICERS HAD TO CHASE AFTER THEM. MR. TAPIA DROPPED HIS BICYCLE, AND HE TRIED TO DISAPPEAR INTO THE NEIGHBORHOOD, BUT HE WAS CAUGHT THAT NIGHT.

BUT WHAT WE WILL LEARN, WE'LL LEARN FROM OSCAR THOMAS, WHO SHOULD TESTIFY TODAY. AND HE'LL TELL YOU WHAT HAPPENED OUT THERE THAT NIGHT JUST BEFORE HE WAS FORTUNATE ENOUGH THAT THE OFFICERS CAME ALONG AND SAVED HIM. BUT THEY DID NOT COME ALONG, OBVIOUSLY, IN TIME TO SAVE POPS.

OSCAR THOMAS WILL TELL YOU THIS: HE'S A FELLOW WHO CAME TO -- HE DID NOT GROW UP IN LONG BEACH. HE HASN'T LIVED IN LONG BEACH A LONG TIME. HE ARRIVED IN LONG BEACH IN NOVEMBER OF '94. HE'S A FELLOW WHO, IN HIS EARLY FORTIES, CAME FROM GEORGIA.

HE WAS WALKING DOWN THE STREET THAT NIGHT BECAUSE HE LIVED ON ANAHEIM AND HE WANTED TO GO OUT AND GET SOME CIGARETTES LATE THAT NIGHT. HE DID. HE GOT THE CIGARETTES. AND HE CAME WALKING BACK UP THE STREET, CROSSED CHERRY, PASSED WHAT YOU SEE IS ON'S MARKET. AND THERE IN THAT PARKING LOT HE WAS ENCOUNTERED BY THESE GANG MEMBERS.

MR. VALENZUELA, GRUMPY HERE, WENT UP TO HIM, SAID TO HIM -- LET ME SEE IF I CAN GIVE YOU THE WORDS -- "NIGGER, ARE YOU A BANGER?" THAT PHRASE MEANS, "DO YOU GANGBANG? ARE YOU A MEMBER OF GANGS?"

OSCAR THOMAS IS NOT. HE SAID, "NO, MAN. I'M 40 SOMETHING YEARS OLD. I'M FROM GEORGIA. I DON'T BANG."

IT MADE NO DIFFERENCE TO THE DEFENDANT. HE

Excerpt from Prosecutor's Closing Argument
Reporter's Transcript Volume 3, Pages 700-702

COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

THE PEOPLE OF THE STATE OF CALIFORNIA, PLAINTIFF-RESPONDENT VS. JUAN C. VALENZUELA; ELIAS J. TAPIA, DEFENDANT-APPELLANTS.	SUPERIOR COURT NO. NA025820

SEPTEMBER 11, 12, 15, 16, 17, 18, 19, 22; OCTOBER 15, 1997

APPEAL FROM THE SUPERIOR COURT OF LOS ANGELES COUNTY

HONORABLE ROBERT L. LA FONT, JUDGE PRESIDING

REPORTERS' TRANSCRIPT ON APPEAL

APPEARANCES:

FOR PLAINTIFF-RESPONDENT: DANIEL E. LUNGREN
STATE ATTORNEY GENERAL
300 SPRING STREET
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FOR DEFENDANT-APPELLANTS: IN PROPRIA PERSONA

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OFFICIAL REPORTER

AUGUST 23RD.

AND SHE CAME FORWARD BECAUSE OF HER CONCERN OVER THE SITUATION. BUT NOTICE WHAT SHE DID NOT DO. SHE DID NOT CLAIM TO HAVE ANY KNOWLEDGE OF AUGUST 23RD. SHE DID NOTHING TO GET HER SON OFF THE HOOK FOR AUGUST 23RD, AND SHE DIDN'T GET HER SON OFF THE HOOK FOR AUGUST 23RD. HE WAS PROSECUTED FOR AUGUST 23RD. SHE NEVER ASKED THE DETECTIVES, SHE NEVER ASKED THE DISTRICT ATTORNEY'S OFFICE, TO LIFT ONE FINGER TO HELP HER SON.

THE NIGHT OF THE CRIMES HE WAS CHARGED WITH, SHE HAD NO INFORMATION FOR. IT WAS FOR THE AUGUST 1ST CRIME, THE AUGUST 1ST CRIME THAT SHE STEPPED FORWARD.

NOW, WHAT WOULD BE YOUR MOTIVE FOR THAT? SHE SUBMITS HERSELF TO RISK BY DOING THAT AND HE BENEFITS. NONE THAT WE COULD SEE IN THE EVIDENCE.

ALL RIGHT. LET ME MOVE TO THE AUGUST 23RD, THE MOST -- ONE OF THE MOST IMPORTANT THINGS THAT I THINK WE NEED TO UNDERSTAND ABOUT THE AUGUST 23RD CRIMES IS HOW THE OBSERVATIONS OF KEVIN MORAN AND THE OBSERVATIONS OF OSCAR THOMAS ARE SANDWICHED VERY CLOSELY IN-BETWEEN OBSERVATIONS BY THE POLICE OFFICERS.

IT'S ONLY 15 TO 30 MINUTES BEFORE POPS LE GRONE WAS BEATEN TO DEATH THAT OFFICER ALCARAZ SAW THESE GUYS OUT ON THE STREET AND SAW THEM OUT ON THE STREET WITH A STICK OR A BAT, SOMETHING LIKE THAT, 15, 30 MINUTES BEFOREHAND.

AND THEN THEY CATCH HIM IN THE ACT. ALCARAZ CATCHES HIM IN THE ACT OF BEATING OSCAR THOMAS, OR ASSAULTING OSCAR THOMAS. WE'VE GOT THEM SANDWICHED. PUT

THE STICK IN THE HANDS OF TAPIA SHORTLY BEFORE THE BEATING OF NORMAN LE GRONE. IT'S VERY IMPORTANT.

BUT NOT MERELY DO WE PUT A STICK IN TAPIA'S HAND, WE ALSO PUT BLOOD ON MR. VALENZUELA'S SHIRT.

IT'S INTERESTING THAT AT THE TIME THEY ARE BEATING OSCAR THOMAS, THEY DON'T HAVE THE STICK ANYMORE. THEY'RE USING FISTS. THEY'RE USING A BICYCLE FRAME. THERE'S NO STICK.

WHERE DO YOU THINK THAT STICK WENT? WHY DO YOU THINK THEY DIDN'T HAVE THAT STICK?

I WOULD SUGGEST IT'S BECAUSE THAT STICK GOT COVERED WITH BLOOD WHILE THEY'RE BEATING MR. LE GRONE. THAT STICK WAS A BLOODY MESS THAT NO ONE WOULD WANT TO CARRY AROUND ANYMORE. IT WAS NOT A WEAPON YOU WANTED TO HAVE IN YOUR HANDS ANYMORE, BUT THE BLOOD WAS ON THE SHIRT OF --

MR. AYERS: OBJECTION; MISSTATES THE TESTIMONY.

THE COURT: LADIES AND GENTLEMEN OF THE JURY, YOU ARE THE EXCLUSIVE JUDGES OF THE EVIDENCE. IF YOU DON'T RECALL, YOU CAN REFER TO YOUR NOTES OR YOU CAN HAVE THE COURT REPORTER READ BACK.

STATEMENTS OF COUNSEL ARE NOT EVIDENCE. YOU ARE THE EXCLUSIVE JUDGES OF THE EVIDENCE.

YOU MAY CONTINUE, MR. NIELSEN.

MR. NIELSEN: ALL RIGHT. WHEN I SAY THERE'S BLOOD ON THE SHIRT OF VALENZUELA, NOT MERELY VALENZUELA ALONE, OSCAR THOMAS SAID A COUPLE OF GUYS IN THE BACKGROUND ALSO HAD BLOOD ON THEM. HE SAW THEM RUN AWAY, THE GUYS WHO HAD

BLOOD ON THEM. THAT BLOOD APPARENTLY SPREAD AROUND. IT WAS QUITE A BLOODY BEATING OF NORMAN LE GRONE.

KEVIN MORAN, KEVIN MORAN, WHEN HE TESTIFIED -- AND YOU HEARD HIS STATEMENT -- YOU KNOW THE DETAILS OF THAT WELL.

HE GAVE THAT STATEMENT ONLY AFTER WE GAVE HIM A DEAL ON HIS OWN CHARGES. DOES THAT MAKE IT NOT TRUSTWORTHY?

I DON'T THINK YOU SHOULD LOOK AT THE EVIDENCE THAT WAY, FOR A COUPLE OF REASONS: NUMBER ONE, LOOK AT THE COURSE OF EVENTS IN THE COURTHOUSE. KEVIN MORAN TOLD THE DETECTIVES HE WAS READY, WILLING AND ABLE TO TAKE THAT STAND.

WHAT CHANGED? WHAT CAUSED HIM NOT TO TAKE THE STAND WAS, HE TALKED TO AN ATTORNEY. AFTER HE TALKED TO HIS ATTORNEY, THE POSITION CHANGED, AND THAT ATTORNEY CAME TO THE DISTRICT ATTORNEY'S OFFICE AND SAID, "HE'S NOT TESTIFYING UNLESS HE GETS A DEAL."

MR. AYERS: OBJECTION; NO TESTIMONY --

MR. SLEVIN: JOIN.

THE COURT: ALL RIGHT. AGAIN, AS I UNDERSTAND, I THINK THAT INFERENCE CAN BE DRAWN FROM THE TESTIMONY, BUT WHAT I SAY IS NOT EVIDENCE. YOU ARE THE EXCLUSIVE JUDGES OF THE EVIDENCE.

MR. NIELSEN ...

MR. NIELSEN: BUT THERE'S AN EVEN BETTER REASON THAT WE DON'T HAVE TO WORRY ABOUT THE FACT THAT KEVIN MORAN GET'S A DEAL, AND THAT IS THAT HE TALKED TO THE

No. _____

IN THE

Supreme Court of the United States

JUAN VALENZUELA,
Petitioner,

v.

L. SMALL, WARDEN,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of February, 2021, I served a copy of **APPENDIX TO PETITION FOR WRIT OF CERTIORARI** by e-mail and by first-class mail to:

Herbert S. Tetef, Deputy Attorney General
Office of the Attorney General
300 South Spring Street, Suite 1702
Los Angeles, CA 90013
E-mail: herbert.tetef@doj.ca.gov

I was appointed to represent Petitioner under the Criminal Justice Act, 18 U.S.C. § 3006(A)(b).

MICHAEL PARENTE
Counsel of Record