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NOT FOR PUBLICATION

FILED

NOV 23 2020

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROBERT IBARRA, Petitioner-Appellant, v. W.L. MONTGOMERY, Acting Warden, Respondent-Appellee.	No. 17-56623 D.C. No. 2:15-cv-08772-DMG-JPR MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Dolly M. Gee, District Judge, Presiding

Submitted April 15, 2020**
Pasadena, California

Before: COLLINS and LEE, Circuit Judges, and PRESNELL, *** District Judge.

Robert Ibarra appeals from the district court's denial of his petition for a writ of habeas corpus. We have jurisdiction under 28 U.S.C. § 2253(a), and we affirm.

1. Ibarra was tried and convicted in a California state court for the October 3, 2004 stabbing murder of Elias Silva at an apartment in Goleta, California. After

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

** The panel unanimously concludes that this case is suitable for decision without oral argument. *See* FED. R. APP. P. 34(a)(2)(C).

*** The Honorable Gregory A. Presnell, Senior United States District Court Judge for the Middle District of Florida, sitting by designation.

pleading guilty to a lesser charge and agreeing to cooperate with the State, Robert Galindo testified at Ibarra's trial that Joshua Miracle, Ibarra, and Galindo were together in the apartment when Silva arrived after Galindo lured him there under instructions from Miracle. Galindo also stated that, prior to Silva's arrival, Miracle and Ibarra had brought a duffle bag to the apartment and that Miracle armed himself with a butcher knife. The duffle bag was later found to contain, among other things, a tarp, a pair of gloves, and an October 2, 2004 receipt from Home Depot for these items, and a subsequent examination of surveillance video from the Home Deport showed that Ibarra had been the one to purchase them. Galindo testified that Miracle attacked Silva as soon as Silva arrived but that Galindo immediately fled the apartment and did not actually see Silva being stabbed. When police later found his body at the apartment, Silva had 48 stab wounds. Forensic evidence revealed a mixture of Silva's and Ibarra's blood on Silva's shoe. Ibarra and Miracle were arrested the next day driving Silva's car, and Ibarra had a stab wound on his leg. Silva's blood and Ibarra's blood were also found on Miracle's shoes as well as on a pair of gloves in the car's backseat.

Prior to Ibarra's trial, Miracle pleaded guilty to first degree murder with special circumstances, and at a pre-penalty-phase hearing, Miracle stated that he had pleaded guilty because "I'm guilty of the murder and Ibarra is not." Miracle explained that he had sought "to take responsibility in terms of Ibarra's case and

then make myself available to offer exonerating testimony on his behalf at his trial." Miracle was subsequently sentenced to death, and thereafter he made multiple additional statements attesting to Ibarra's innocence, both to Ibarra's investigator and, through Miracle's own investigator, to Ibarra's attorney. In these more detailed statements, Miracle stated, *inter alia*, that Ibarra had not participated in planning Silva's murder, and he claimed that Ibarra's stab wound resulted from the fact that Miracle had "stabbed Ibarra intentionally when [he] thought Ibarra was trying to interfere and help Silva."

When the time came, however, Miracle invoked his Fifth Amendment rights and declined to testify at Ibarra's trial.[1] Ibarra thereupon sought to introduce Miracle's prior statements exculpating Ibarra as statements against penal interest by an unavailable witness, *see* CAL. EVID. CODE § 1230, but the trial court excluded them as insufficiently trustworthy. The trial court subsequently reaffirmed that ruling, and Ibarra was convicted and sentence to life in prison. The California Court of Appeal affirmed, and the California Supreme Court denied review. *People v. Ibarra*, 2014 WL 934445 (Cal. Ct. App. 2014).

Ibarra filed a habeas petition alleging that the state courts' refusal to admit Miracle's statements exculpating Ibarra violated his federal constitutional right to

[1] Miracle's appeal before the California Supreme Court was pending at that time. His conviction was later affirmed. *See People v. Miracle*, 430 P.3d 847 (Cal. 2018).

present a complete defense under *Chambers v. Mississippi*, 410 U.S. 284 (1973), and its progeny. The district court accepted the magistrate judge's report recommending dismissal and denied a certificate of appealability. We subsequently issued a certificate of appealability limited to the question of "whether [Ibarra] was deprived of his right to present a complete defense when the trial court excluded statements by Joshua Miracle."

2. We reject Ibarra's contention that his federal complete-defense claim was not "adjudicated on the merits in State court proceedings," 28 U.S.C. § 2254(d), and that § 2254(d)'s deferential standards for reviewing such state-court merits decisions are therefore inapplicable.

The parties agree that the "last reasoned" relevant state court decision is the California Court of Appeal's decision affirming Ibarra's conviction. Although Ibarra's principal brief in that court squarely raised the federal complete-defense issue, it was not explicitly mentioned in the state court's decision. Nonetheless, there is a "strong but rebuttable presumption" that "the federal claim was adjudicated on the merits," *Johnson v. Williams*, 568 U.S. 289, 301 (2013), and that presumption is not rebutted here. The right to a complete defense under *Chambers* may require the admission of a hearsay statement that "bears *persuasive assurances of trustworthiness* and is critical to the defense," but it does not include the right to present *unreliable* hearsay statements. *Chia v. Cambra*, 360 F.3d 997,

1003 (9th Cir. 2004) (emphasis added); *see also Chambers*, 410 U.S. at 300 (noting that statements at issue there were made "under circumstances that provided considerable assurance of their reliability"); *Rhoades v. Henry*, 638 F.3d 1027, 1035–36 (9th Cir. 2011) (*Chambers* does not require admission of "unreliable" and "untrustworthy" confession). Here, in upholding the exclusion of Miracle's statements under California Evidence Code § 1230, the California Court of Appeal specifically held that those statements were "not reliable" and not "trustworthy." *Ibarra*, 2014 WL 934445, at *4. Because the court's analysis of that issue thus overlaps with, and is dispositive of, Ibarra's *Chambers* complete-defense issue, the *Johnson* presumption is plainly applicable here and has not been rebutted. The deferential standard of review under § 2254(d) therefore applies.

3. Under § 2254(d)'s deferential standard, we may overturn the California Court of Appeal's decision that Miracle's confession was untrustworthy "only if it is so erroneous that 'there is no possibility fairminded jurists could disagree that the state court's decision conflicts with [the Supreme] Court's precedents.'" *Nevada v. Jackson*, 569 U.S. 505, 508–09 (2013) (citation omitted). Because fairminded jurists could find the state court's decision to be consistent with *Chambers* and its Supreme Court progeny, the district court properly denied Ibarra's petition.

Fairminded jurists could conclude that, in contrast to *Chambers*, Miracle's statements were not "unquestionably against [his penal] interest" and that they were not made "under circumstances that provided considerable assurance of their reliability." 410 U.S. at 300–01. As the California Court of Appeal explained, Miracle's initial in-court statement was made *after* his conviction, but before his sentencing, and it presented "little risk to his own criminal liability." *Ibarra*, 2014 WL 934445, at *4; *cf. Lunbery v. Hornbeak*, 605 F.3d 754, 761 (9th Cir. 2010) (*Chambers* controlled where, *inter alia*, statement "was made shortly after the murder" and exposed speaker "to the risk of criminal prosecution"). Although Ibarra argues that Miracle's assertion that he was solely responsible could be viewed as an aggravating factor at his capital sentencing, the state courts permissibly and reasonably drew the opposite conclusion that, in this case, Miracle hoped that "his claim of sole responsibility could inspire leniency in the penalty phase of his own trial." *Ibarra*, 2014 WL 934445, at *4. The state court also reasonably concluded that the additional, more detailed statements made after Miracle had been sentenced to death were "even less trustworthy because of the time he had to reflect and construct them and because he had so little to lose after he was sentenced to death." *Id.* Finally, the state court reasonably considered, and rejected, Ibarra's contention that, because Miracle's detailed statements were consistent with the physical evidence, they should be deemed to be reliable. The

state court held that, because "Miracle had access to all of the physical evidence concerning Silva's murder" and had the "time and opportunity to create a coherent account" that would fit that evidence, this factor did not weigh in favor of finding his statements to be reliable. *Id*. Whether we would have drawn the same conclusion here is irrelevant. Because fairminded jurists could agree with the California court's conclusions, we cannot set it aside under § 2254(d).

AFFIRMED.[2]

[2] Respondent's unopposed motion for judicial notice of the corrected reporter's transcripts from the files of the state appellate court is **GRANTED**.

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

MAY 31 2018

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

ROBERT IBARRA, Petitioner-Appellant, v. W. L. MONTGOMERY, Acting Warden, Respondent-Appellee.	No. 17-56623 D.C. No. 2:15-cv-08772-DMG-JPR Central District of California, Los Angeles ORDER

Before: W. FLETCHER and WATFORD, Circuit Judges.

Appellant's fourth motion for an extension of time to file a request for a certificate of appealability (Docket Entry No. 8) is granted. The motion for a certificate of appealability (Docket Entry No. 9), received by this court on March 19, 2018, is deemed timely filed.

The request for a certificate of appealability is granted with respect to the following issue: whether appellant was deprived of his right to present a complete defense when the trial court excluded statements by Joshua Miracle. *See* 28 U.S.C. § 2253(c)(3); *see also* 9th Cir. R. 22-1(e).

Appellant is granted leave to proceed in forma pauperis based on the district court's order, entered on April 27, 2016. The Clerk shall change the docket to reflect appellant's in forma pauperis status.

Appellant's request for appointment of counsel (Docket Entry No. 9) is granted. *See* 18 U.S.C. § 3006A(a)(2)(B); *Weygandt v. Look*, 718 F.2d 952, 954 (9th Cir. 1983). Counsel will be appointed by separate order.

The Clerk shall electronically serve this order on the appointing authority for the Central District of California, who will locate appointed counsel. The appointing authority shall send notification of the name, address, and telephone number of appointed counsel to the Clerk of this court at counselappointments@ca9.uscourts.gov within 14 days of locating counsel.

The opening brief is due September 19, 2018; the answering brief is due October 19, 2018; the optional reply brief is due within 21 days after service of the answering brief.

The Clerk shall serve on appellant a copy of the "After Opening a Case - Counseled Cases" document.

If W.L. Montgomery is no longer the appropriate appellee in this case, counsel for appellee shall notify this court by letter of the appropriate substitute party within 21 days of the filing date of this order. *See* Fed. R. App. P. 43(c).

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ROBERT IBARRA, Petitioner, v. W.L. MONTGOMERY, Warden, Respondent.	Case No. CV 15-8772-DMG (JPR) **J U D G M E N T**

Pursuant to the Order Accepting Findings and Recommendations of U.S. Magistrate Judge,

IT IS HEREBY ADJUDGED that this action is dismissed with prejudice.

DATED: September 21, 2017

DOLLY M. GEE
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ROBERT IBARRA, Petitioner, v. W.L. MONTGOMERY, Warden, Respondent.	Case No. CV 15-8772-DMG (JPR) ORDER ACCEPTING FINDINGS AND RECOMMENDATIONS OF U.S. MAGISTRATE JUDGE

Pursuant to 28 U.S.C. § 636, the Court has reviewed *de novo* the Petition, records on file, and Report and Recommendation of U.S. Magistrate Judge. On April 27, 2017, Petitioner filed Objections to the R. & R. He raises two objections, both based on his argument that the Magistrate Judge erred in stating that (1) the trial court found Miracle's statements "untrustworthy" and not "significantly" against his penal interest and (2) the statements were made after Miracle was sentenced to death. (Objs. at 3.) Petitioner attached portions of the Reporter's Transcript to support his claims.

Contrary to Petitioner's assertion, the trial court clearly found that Miracle's statements – to the effect that he was the only person responsible for the murder and that Petitioner was innocent – were untrustworthy and not significantly against his

penal interest. (See, e.g., Lodged Doc. 2, 6 Rep.'s Tr. at 1609-10 ("It seems to me that they lack the required findings that has to be made by a court that they're trustworthy."), 1610-11 ("Mr. Miracle has a relationship with [Petitioner]," "none of the statements that the defense is seeking to introduce that are exculpatory of [Petitioner] are at the same time incriminating against Mr. Miracle," and "they're not significantly against his penal interest," which "goes to the question of whether they should be considered trustworthy"), 1612-13 ("So, it doesn't seem to me that the circumstances under which these statements are made indicate trustworthiness, to the contrary . . . the circumstances just don't seem to qualify as trustworthy declarations against penal interest."), 1613 ("it seems to me that they lack trustworthiness and I'm not going to admit them"), 1615 ("But the circumstances under which the hearsay version by Mr. Miracle are given clearly suggest to the Court that they're not trustworthy."), 1616 ("I don't consider them trustworthy."), 7 Rep.'s Tr. at 1748 ("It seems like the totality of the circumstances suggests that the statements are untrustworthy, and I'm going to exclude them.").)[1]

The portion of the transcript cited by Petitioner to support his claim that the trial court found certain of Miracle's statements trustworthy (see Objs. at 3-6) is in fact a discussion

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[1] Petitioner suggests that the trial court was referring to different statements, apparently made to "Miracle's stepmother." (See Objs. at 8.) But the portions of the trial transcript referred to at the cited pages of the R. & R. (see 6 Rep.'s Tr. at 1611, 1615) clearly refer to the statements made by Miracle to the court and in response to Petitioner's trial counsel's questions.

of whether to admit "the fact of [Miracle's] conviction" and his "admission of guilt." (See Lodged Doc. 2, 7 Rep.'s Tr. at 1749-53.) Indeed, the trial court begins that discussion by reiterating that the statements made by Miracle in an "attempt to exculpate" Petitioner "are untrustworthy" and would not be admitted. (Id. at 1748.) The discussion then continues in relation to the admissibility of the fact of Miracle's conviction. (Id. at 1749.) The trial court found that "trustworthiness is not an issue" as to Miracle's guilty plea, not his statements exculpating Petitioner. (Id. at 1750.) The trial court stressed that the issue under discussion in the pages cited by Petitioner was "a narrow one . . . the fact of the conviction, admission of guilt in the murder." (Id. at 1752.)

Petitioner also suggests that the Magistrate Judge found that "the statements were made after Miracle was sentenced to death," which was somehow in error. (Objs. at 3.) As the Magistrate Judge correctly noted, however, some of Miracle's statements were made before he was sentenced and some were made after. (See R. & R. at 27-28.) In both cases, the statements were untrustworthy. (Id.)

Petitioner asserts that the Magistrate Judge erred in relying "on the fact that Joshua Miracle was not facing criminal liability" when he made his pre-penalty-phase statements. (Objs. at 6.) Petitioner argues that a jury could consider "that the defendant acted alone" as a "circumstance of the crime to determin[e] the death penalty," citing California Penal Code section 190.3. (Id.) But it was not the trial court or the Magistrate Judge who suggested that Miracle's statements were

intended to "gain favor from the jury" in his sentencing; it was Miracle himself. (See Lodged Doc. 1, 4 Clerk's Tr. at 996-97 ("I'd like the Court [to] give thought to the possibility that the jury could very well decide not to impose the death sentence . . . in recognition of the fact that I chose not to make any excuses for my action and was willing to accept the consequences unconditionally.").) Indeed, one of the trial court's reasons for finding Miracle's pre-penalty-phase statements untrustworthy, which the Magistrate Judge found not objectively unreasonable, was that Miracle had the time and motivation to carefully prepare them and that they were intended, at least in part, to assist Petitioner, and possibly Miracle himself. (See R. & R. at 27-28.)

Having reviewed *de novo* those portions of the R&R to which objections were filed, the Court accepts the findings and recommendations of the Magistrate Judge. IT THEREFORE IS ORDERED that the Petition is denied, Petitioner's motion for a stay is denied, and Judgment be entered dismissing this action with prejudice.

DATED: September 21, 2017

DOLLY M. GEE
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ROBERT IBARRA, Petitioner, v. W.L. MONTGOMERY, Respondent.	Case No. CV 15-8772-DMG (JPR) REPORT AND RECOMMENDATION OF U.S. MAGISTRATE JUDGE

This Report and Recommendation is submitted to the Honorable Dolly M. Gee, U.S. District Judge, under 28 U.S.C. § 636 and General Order 05-07 of the U.S. District Court for the Central District of California.

PROCEEDINGS

On November 10, 2015, Petitioner filed a Petition for Writ of Habeas Corpus by a Person in State Custody, raising two claims. On March 22, 2016, Respondent filed an Answer, arguing that ground one should be denied on the merits and that ground two was moot. On April 21, 2016, Petitioner requested in forma pauperis status and more time to reply to the Answer, both of which the Court granted; on April 22 he filed a Traverse, addressing only ground one. On September 14, 2016, Petitioner filed another traverse, which he labeled his "Supplemental

Traverse," again addressing ground one only, and separately filed a request that the Court stay the proceedings while he returned to state court to exhaust two new claims.

On September 21, 2016, the Court ordered Respondent to file opposition, if any, to Petitioner's stay-and-abey motion. On October 18, 2016, Respondent filed opposition, arguing that Petitioner had failed to show "good cause" for a stay under Rhines v. Weber, 544 U.S. 269 (2005). (Opp'n at 4-5.) Petitioner did not file a reply.[1]

For the reasons discussed below, the Court recommends that Petitioner's motion for a stay be denied and judgment be entered denying the Petition and dismissing this action with prejudice.

PETITIONER'S CLAIMS

Petitioner raises two claims in the Petition:

I. The trial court erred in excluding from evidence statements made by codefendant Joshua Miracle, violating Petitioner's constitutional right to due process and a fair

[1] In its September 21, 2016 order setting a briefing schedule on Petitioner's stay motion, the Court reminded Petitioner that "[a]lthough Petitioner requires the Court's permission for a stay of these proceedings, nothing prevents him from immediately returning to state court to try to exhaust his new claims." The Court's review of the Santa Barbara Superior Court's website indicates that Petitioner filed a habeas petition in that court on November 14, 2016; the superior court apparently denied it on November 22. See Santa Barbara Super. Ct. Case Info., https://portal.sbcourts.org/CASBPORTAL/Home/WorkspaceMode?p=0 (search under Petitioner's first and last names) (last visited Mar. 8, 2017). The Court's review of the California Appellate Courts Case Information website indicates that Petitioner has not filed a recent habeas petition in the court of appeal or supreme court.

trial. (Pet. at 6-14.)[2]

II. Trial counsel was ineffective for failing to file a "Notice of Motion and Motion to Strike Death Penalty." (Id. at 15-29, 42.)

In his motion for a stay, Petitioner proposes two additional claims, presumably to be amended into the Petition after he exhausts them in state court:

III. The trial court erred in allowing Miracle to invoke his Fifth Amendment privilege against self-incrimination at Petitioner's trial, violating Petitioner's constitutional rights. (Mot. Stay at 1-2.)

IV. Miracle waived his Fifth Amendment privilege when he answered written questions about the crime.[3] (Id.)

BACKGROUND

Petitioner was convicted in 2011 by a Santa Barbara County Superior Court jury of first-degree murder with the special circumstance of lying in wait. (Lodged Doc. 1, 3 Clerk's Tr. at 822-23, 4 Clerk's Tr. at 1096-97.) The jury found true that he personally used a knife and committed the crime for the benefit of a street gang. (Lodged Doc. 1, 4 Clerk's Tr. at 1096-97.) He was sentenced in 2012 to life in prison without the possibility of parole. (Id.) His codefendants, Miracle and Robert Galindo, both pleaded guilty: Miracle, who represented himself with

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[2] For filings that are not consecutively numbered, the Court uses the pagination provided by its Case Management/Electronic Case Filing system.

[3] It is not clear whether Petitioner is alleging trial-counsel or -court error in proposed ground four.

advisory counsel (see id. at 982), pleaded guilty to first-degree murder and the special circumstance of lying in wait in July 2005 and was sentenced to death in January 2006 (see id. at 992-93; Lodged Doc. 2, 1 Rep.'s Tr. at 121; Lodged Doc. 6 at 2), and Galindo pleaded guilty to voluntary manslaughter in exchange for his testimony against Petitioner and Miracle (see Lodged Doc. 2, 2 Rep.'s Tr. at 371; Appellant's Br., People v. Miracle, No. S140894, 2014 WL 5085282, at *1-5 (Cal. Sept. 19, 2014)).

During a hearing following his guilty plea, Miracle stated that he was the only person responsible for the murder and that Petitioner was innocent. (Lodged Doc. 1, 4 Clerk's Tr. at 982, 994 (transcript of proceedings from Miracle's Oct. 25, 2005 hearing).) After he was sentenced to death, Miracle affirmed those claims in response to written questions from Petitioner's trial counsel. (Lodged Doc. 1, 3 Clerk's Tr. at 619-22 ("Questions for Miracle" and answers dated Jan. 24, 2006).) He repeated them during interviews with a private investigator hired by Petitioner's trial counsel. (Id. at 609-14 (private-investigator report from July 10, 2006 interview with Miracle), 616-17 (report from Mar. 5, 2007 interview).)

On August 3, 2006, Miracle appeared with advisory counsel at a pretrial evidentiary hearing in Petitioner's case pursuant to a prosecution subpoena, but he refused to "testify per his Fifth Amendment right." (Lodged Doc. 1, 1 Clerk's Tr. at 86; see also id. at 57-63, 79-83.) Miracle appeared at another pretrial hearing in May 2011, now represented by counsel. (Lodged Doc. 2, 1 Rep.'s Tr. at 162.) Despite having once indicated that he intended to testify (see Lodged Doc. 1, 4 Clerk's Tr. at 993),

Miracle invoked his privilege against self-incrimination and refused to answer questions related to the crime (Lodged Doc. 1, 3 Clerk's Tr. at 624; Lodged Doc. 2, 1 Rep.'s Tr. at 115, 160-66). The trial court administered the oath and defense counsel asked Miracle whether he knew Petitioner, if he recalled where he was on October 2, 2004, when he arrived in Santa Barbara in October 2004, and if it was his intent to refuse to answer all questions about that place and time. (Id. at 163-65.) Miracle refused to answer any questions except the last, to which he responded, "Yes." (Id.) The court found that if asked about the events surrounding the crimes, Miracle, whose appeal was still pending, see Cal. App. Cts. Case Info., http://appellatecases.courtinfo.ca.gov/search/case/dockets.cfm?dist=0&doc_id=1872572&doc_no=S140894 (last visited Mar. 20, 2017), could potentially incriminate himself (Lodged Doc. 2, 1 Rep.'s Tr. at 165). There was "no question" in the trial court's mind "that answering questions about the homicide . . . would be incriminating." (Id.) The court noted that it had handled Miracle's "trial," which gave it additional knowledge about the circumstances, and found that Miracle had the right to invoke the privilege for all questions about his, and Petitioner's, involvement in the crime. (Id.) The trial court asked Miracle three times whether he intended to invoke his Fifth Amendment privilege; Miracle confirmed each time that he did. (Id. at 166.)

Petitioner's trial counsel did not object (id. at 167), presumably in part because counsel intended to move to introduce Miracle's hearsay statements as a declaration against penal

interest by an unavailable witness (see Lodged Doc. 1, 3 Clerk's Tr. at 602-07; Lodged Doc. 2, 5 Rep.'s Tr. at 1364-65). The trial court excluded Miracle's hearsay statements, however, finding that they were not significantly against Miracle's penal interest and in any case were not trustworthy. (Lodged Doc. 2, 6 Rep.'s Tr. at 1609-18, 1625-26, 7 Rep.'s Tr. at 1747-49.)

SUMMARY OF THE EVIDENCE

The factual summary in a state appellate-court opinion is entitled to a presumption of correctness under 28 U.S.C. § 2254(e)(1). See Crittenden v. Chappell, 804 F.3d 998, 1010-11 (9th Cir. 2015). But see Murray v. Schriro, 745 F.3d 984, 1001 (9th Cir. 2014) (discussing "state of confusion" in circuit's law concerning interplay of § 2254(d)(2) and (e)(1)). Because Petitioner does not challenge the sufficiency of the evidence, the Court adopts the following statement of facts from the California Court of Appeal decision as a fair and accurate summary of the evidence presented at trial. The Court has nonetheless independently reviewed the state-court record.

> Elias Silva was stabbed to death in a Goleta apartment early in the morning on October 3, 2004. [Petitioner], Miracle, and Robert Galindo were the only people present when Silva was attacked.
>
> Police found Silva's body in the apartment. His body had 48 stab wounds. [Petitioner]'s fingerprints were on a knife on the floor of the apartment. [Petitioner]'s blood was on the outside of the front door. A mixture of [Petitioner]'s and Silva's blood was on Silva's shoe and on a T-shirt in the apartment.

Miracle's palm print was on the bathroom counter and on the inside of the front door next to [Petitioner]'s palm print. A large duffle bag with wheels was on the patio. A drop-cloth, a butane torch, a pick ax, and a receipt, among other items, were inside the bag. The receipt was for two drop-cloths and a pair of gloves that had been purchased the night of October 2, 2004, from Home Depot. A Home Depot videotape from that evening showed [Petitioner] buying gloves and a drop-cloth. Telephone records showed nine phone calls were made from [Petitioner]'s cell phone to Silva's cell phone in the hours before the murder.

[Petitioner] and Miracle were arrested a day after the murder, while driving Silva's car in San Diego. [Petitioner] was bleeding from a stab wound in his leg. Silva's blood and [Petitioner]'s blood were on Miracle's shoes and on a pair of gloves in the back seat.

In 2005, Miracle pled guilty to first degree murder and admitted to lying in wait, personally using a knife, and committing the crime for the benefit of a street gang. In 2006, a jury imposed the death penalty.

[Petitioner] was tried in 2011. Before [Petitioner]'s trial, Galindo pled guilty to voluntary manslaughter and agreed to testify against [Petitioner] in exchange for a maximum sentence of 11 years in state prison.

Miracle's Pre–Penalty Statement in Court

At his pre-penalty hearing, Miracle appeared in

court and said he had a "statement that [he] prepared." He said, "I'd like to go on record briefly about why I decided to plead guilty. . . . I'm guilty of the murder and [Petitioner] is not. . . . I'm the only person responsible for the murder of Eli Silva." He said the only reason he pled guilty was "because [he] felt the only honorable thing to do . . . was to take responsibility in terms of [Petitioner]'s case and then make [himself] available to offer exonerating testimony on [Petitioner]'s behalf at trial." Miracle said he intended to offer more detail at [Petitioner]'s trial and he did not intend to offer mitigating evidence at his own penalty phase trial.

Miracle's Statements to Defense Investigators

After Miracle was sentenced to death, he made several more statements claiming that he alone was guilty of Silva's murder and [Petitioner] was innocent. The first statement in January 2006 was in the form of written responses to 17[4] questions that were posed by [Petitioner]'s defense attorney, Robert Duvall [sic],[5] through Miracle's investigator. The resulting document, "Answers for Duval," gives a detailed account of the killing that, if believed, would exonerate [Petitioner]. According to Miracle, [Petitioner] was wholly innocent.

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[4] The questionnaire actually had 20 questions. (See Lodged Doc. 1, 3 Clerk's Tr. at 619-20.)

[5] The correct spelling of Petitioner's defense attorney's name is Duval. (See, e.g., Lodged Doc. 1, 3 Clerk's Tr. at 607.)

[Petitioner] did not help plan the murder and he did not pull Silva into the apartment. Miracle stabbed [Petitioner] in the leg when [Petitioner] tried to intervene, and Miracle forced [Petitioner] to drive away with him in Silva's car.

Miracle next made a statement in June 2006 to [Petitioner]'s investigator, Robert Strong, in an interview at San Quentin. Strong summarized the conversation in a report. Miracle refused to be interviewed by the prosecution. Upon request of the prosecution, the trial court ordered Miracle to appear for a hearing about his possible trial testimony pursuant to Evidence Code section 402. Miracle asserted his privilege against self-incrimination and refused to testify at [Petitioner]'s trial.

Miracle made another statement in March 2007 to [Petitioner]'s investigator, again claiming that [Petitioner] was innocent. Strong summarized it in a second report.

Defense Efforts to Admit Miracle's Statements

[Petitioner] sought to introduce Miracle's statements to investigators with an "Application to Present a Complete Defense," wherein he asserts they were admissible pursuant to Evidence Code section 1230 (hearsay statement admissible when unavailable witness made it against penal interest in circumstances indicating trustworthiness). The trial court deferred ruling. Toward the end of trial, [Petitioner] again

offered the statements with a "Motion to Admit Evidence as Declaration Against Interest." Both requests were limited to Miracle's statements to investigators. But at the hearing, counsel also offered Miracle's pre-penalty statement and the court included the pre-penalty statement in its ruling.

The trial court excluded Miracle's statements. The court found the statements were not "significantly" against Miracle's penal interest because they were made after he was convicted and were untrustworthy. With respect to Miracle's pre-penalty statement, the trial court found "part of [it] is a declaration against penal interest ['I'm guilty of the murder'], and part of it is collateral to the declaration against penal interest ['[Petitioner] is not']." With respect to the statements to investigators, the court found the circumstances "suggest that Mr. Miracle is reflective, he's thought about his statements, he's making them to a defense investigator, it seems to me that they lack trustworthiness. . . ."

The trial court said, "[T]hey're not the kind of incriminating statements that are made under circumstances that really expose him to criminal liability having been made two years later to an investigator for a co-participant or a co-defendant seems to suggest that his motivation may have been to protect the co-participants or the co-defendant as opposed to making the statements under circumstances where he was

truly exposing himself to criminal liability by making the statements. . . ." The court also excluded a recorded conversation between Miracle and his stepmother in which he said, "[I]f I am willing to kill, I should be willing to die," because it was not exculpatory of [Petitioner] and it would introduce the issue of penalty. At a subsequent hearing, the court further considered the statements and concluded, "[They were] made with an intent to enhance his reputation, avoid cooperation with law enforcement in any way, assist [Petitioner] with whom he had some sort of relationship. It would appear that he has the motivation to — which is obvious in reading his statement that he's going above and beyond any sort of objective recitation of the facts in order to attempt to exculpate [Petitioner]. It seems like the totality of circumstances suggests that the statements are untrustworthy, and I'm going to exclude them."

Galindo's Testimony

Galindo testified [that] for several days leading up to the night of October 2, 2004, he, Miracle, and [Petitioner] were gathered in his apartment. Silva was a methamphetamine dealer. Galindo testified that Miracle and [Petitioner] had a conversation about "cleaning up the rats in Santa Barbara." Miracle asked Galindo to call Silva and tell him to come to the apartment. When Galindo protested, Miracle held a knife to Galindo's throat. Galindo used [Petitioner]'s cell phone to call Silva many times before he persuaded Silva to come.

> Before Silva arrived, Miracle and [Petitioner] brought a duffel bag into the apartment and cleared the furniture from the entrance. Miracle armed himself with a butcher knife. When Silva opened the door, [Petitioner] pulled Silva into the apartment and Miracle attacked Silva. Galindo testified that he ran from the apartment and did not see Silva get stabbed.

(Lodged Doc. 6 at 2-5.)

DISCUSSION

I. Petitioner's Motion For a Stay Should Be Denied

A. Applicable Law

Under 28 U.S.C. § 2254(b), habeas relief may not be granted unless a petitioner has exhausted the remedies available in state court. Exhaustion requires that the petitioner's contentions were fairly presented to the state courts, Ybarra v. McDaniel, 656 F.3d 984, 991 (9th Cir. 2011), and disposed of on the merits by the highest court of the state, Greene v. Lambert, 288 F.3d 1081, 1086 (9th Cir. 2002). As a matter of comity, a federal court will not entertain a habeas petition unless the petitioner has exhausted the available state judicial remedies on every ground presented in it. See Rose v. Lundy, 455 U.S. 509, 518 (1982).

Two procedures are available to a habeas petitioner who wishes to stay a pending federal petition while exhausting additional claims in state court: the Rhines procedure and the procedure from Kelly v. Small, 315 F.3d 1063 (9th Cir. 2003), overruling on other grounds recognized by Robbins v. Carey, 481 F.3d 1143, 1149 (9th Cir. 2007). See King v. Ryan, 564 F.3d

1133, 1139-40 (9th Cir. 2003) (explaining differences between stays under Kelly and Rhines). Under the Rhines procedure, a petitioner may stay a "mixed" federal petition – one that includes both exhausted and unexhausted claims – and return to state court to exhaust his unexhausted claims; both his exhausted and unexhausted claims remain pending in federal court and are protected from any statute-of-limitations issues. Rhines, 544 U.S. at 277-78. Under the Kelly procedure, the petitioner voluntarily dismisses any unexhausted claims from the pending federal petition and only the exhausted claims are stayed; the petitioner may then seek to amend the dismissed claims into the petition after he has exhausted them in state court. King, 564 F.3d at 1135; see Jackson v. Roe, 425 F.3d 654, 661 (9th Cir. 2005) (noting that "Rhines applies to stays of mixed petitions" and Kelly to "stays of fully exhausted petitions" (emphasis omitted)). Under Kelly, the newly exhausted claims are not necessarily protected from any time bar. See King, 564 F.3d at 1140-41. "In this regard, the Kelly procedure . . . is a riskier one for a habeas petitioner because it does not protect a petitioner's unexhausted claims from expiring during a stay." Morris v. California, No. 2:11–cv–1051 MCE DAD P, 2012 WL 2358720, at *2 (E.D. Cal. June 20, 2012).

Rhines applies in "limited circumstances." See 544 U.S. at 277. For a Rhines stay, the petitioner must show (1) good cause for his failure to earlier exhaust the claims in state court, (2) that the unexhausted claims are not "plainly meritless," and (3) that he has not engaged in "abusive litigation tactics or intentional delay." Id. at 277-78.

The Supreme Court has not precisely defined what constitutes "good cause" for a Rhines stay. See Blake v. Baker, 745 F.3d 977, 980-81 (9th Cir. 2014). The Ninth Circuit has found that good cause does not require "extraordinary circumstances." Jackson, 425 F.3d at 661-62. Rather, "good cause turns on whether the petitioner can set forth a reasonable excuse, supported by sufficient evidence, to justify" the failure to exhaust. Blake, 745 F.3d at 982.

Under Kelly, the petitioner need not show good cause for a stay of totally exhausted claims. See King, 564 F.3d at 1135. But a stay under Kelly "will be denied when the court finds such a stay would be futile." Knowles v. Muniz, No. CV 15-2948-DSF (SP), 2017 WL 217645, at *__ (C.D. Cal. Jan. 17, 2017) (citation omitted), appeal docketed, No. 17-55419 (9th Cir. Mar. 28, 2017). "Futility would exist if the petitioner seeks a stay to exhaust a meritless claim." Id. Further, a petitioner may amend a newly exhausted claim into a pending federal habeas petition after the expiration of the limitation period only if it shares a "common core of operative facts" with one or more of the claims in the pending petition. Mayle v. Felix, 545 U.S. 644, 664 (2005). Thus, a new claim "does not relate back (and thereby escape AEDPA's one-year time limit) when it asserts a new ground for relief supported by facts that differ in both time and type from those the original pleading set forth." Id. at 650.

Petitioner does not specify in his motion which sort of stay he seeks. But in his Petition, he mentions both types. (See Pet. at 15.) Thus, the Court analyzes each; as explained below, Petitioner is entitled to neither type of stay.

B. Petitioner Has Failed to Show Good Cause for a *Rhines* Stay

As an initial matter, a stay under Rhines is appropriate only if the petition is "mixed," which means it includes both exhausted and unexhausted claims. Respondent concedes that ground one of the Petition has been exhausted. (See Answer at 1.) Ground two appears not to have been exhausted, however (see id.); indeed, Petitioner has not argued otherwise. Thus, the Petition is likely mixed.[6]

Petitioner contends that he is entitled to a stay because, "after extensive research," he "discovered" that his appellate counsel "overlooked" and "should have" raised two claims that were "readily apparent from the record." (Mot. Stay at 1-2.) He states that his appellate counsel "had no strategic reason for not including" those claims on appeal. But Petitioner has not explained why he could not have raised them himself during the limitation period.[7] (Id. at 2.) He does not offer any evidence

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[6] Because ground two is plainly meritless, as explained in Section I.C., its inclusion in the Petition might not render it "mixed" for exhaustion purposes. Cf. Urias v. Horel, No. CV 07-7155-JVS (RNB), 2008 WL 817082, at *2 & n.1 (C.D. Cal. Mar. 20, 2008) (inclusion of unexhausted but noncognizable claim in petition does not make it "mixed" for exhaustion purposes "because the exhaustion of state remedies requirement does not apply to noncognizable claims"). Because, as explained in Section I.C., Petitioner is not entitled to a Kelly stay either, the Court need not resolve the issue.

[7] Ineffective assistance of postconviction habeas counsel can constitute good cause for a Rhines stay, see Blake, 745 F.3d at 981 (finding that ineffective assistance of postconviction counsel for failure to investigate petitioner's history of mental illness showed good cause for Rhines stay because claim was sufficiently supported by medical reports, report of private investigator, and

supporting his claim that he only just discovered the claims: he does not say when he discovered them, how, or why he could not have learned of them earlier. Cf. Hasan v. Galaza, 254 F.3d 1150, 1154 n.3 (9th Cir. 2001) (holding that limitation period for filing habeas claim alleging ineffective assistance of counsel begins running when petitioner knows or through diligence could have discovered important facts, not when he understands their legal significance). Accordingly, Petitioner has not shown good cause for a Rhines stay. See Blake, 745 F.3d at 982 ("An assertion of good cause without evidentiary support will not typically amount to a reasonable excuse justifying a petitioner's

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declarations of family and friends), as can lack of counsel altogether during postconviction state habeas proceedings, see Dixon v. Baker, 847 F.3d 714, 721 (9th Cir. 2017). It is not clear, however, whether ineffective assistance of appellate counsel could also constitute the required good cause. While some courts have so held, see, e.g., Jauregui v. Jones, No. CV 16-1711 DSF (RAO), 2016 WL 4257147, at *2 (C.D. Cal. July 7, 2016), accepted by 2016 WL 4251572 (C.D. Cal. Aug. 8, 2016); Nogueda v. California, No. 2:14-cv-1045 GGH P, 2014 WL 5473548, at *2 & n.4 (E.D. Cal. Oct. 23, 2014) (no good cause shown because petitioner "failed to support" ineffective-assistance claim with "documentation – as opposed to oral assertions – showing he discussed these claims with trial and/or appellate counsel and was ignored," and noting that Blake was "instructive, but not controlling," on issue), that approach deemphasizes the reasoning of Blake to the effect that a petitioner who relies on incompetent habeas counsel would have no reason to separately raise claims himself during the limitation period. See 745 F.3d at 983-84. A petitioner does not rely on appellate counsel to raise claims for him during the limitation period, however. In any event, because Petitioner has not supported his stay request with any evidence, he has not shown good cause for a Rhines stay and the Court need not decide whether ineffective assistance of appellate counsel suffices under Rhines. Even if Petitioner could show good cause, as discussed in Section I.C., his proposed new claims are plainly meritless and thus no stay would be warranted.

failure to exhaust."). And although Respondent does not so argue, as discussed below, Petitioner's unexhausted claims are also "plainly meritless," further making a stay under Rhines inappropriate. Rhines, 544 U.S. at 277-78.

C. Any Stay Under *Kelly* Would Be Futile Because Petitioner's New Claims Lack Merit

In his proposed unexhausted claims, Petitioner argues that the trial court erred in allowing Miracle to invoke his Fifth Amendment privilege against self-incrimination and that Miracle waived the privilege by answering written questions about the crime. (Mot. Stay at 1-2.) As discussed below, Petitioner's claims fail even under de novo review, and any stay to allow Petitioner to exhaust them would be futile.[8]

As an initial matter, Petitioner's proposed new claims challenge a state-court evidentiary ruling. "Incorrect state court evidentiary rulings cannot serve as a basis for habeas relief unless federal constitutional rights are affected." Lincoln v. Sunn, 807 F.2d 805, 816 (9th Cir. 1987); see also 28 U.S.C. § 2254(a); Jammal v. Van de Kamp, 926 F.2d 918, 919 (9th Cir. 1991) (federal habeas courts "do not review questions of state evidence law"). A violation of the Due Process Clause occurs, however, if a state-court evidentiary ruling renders a trial arbitrary and fundamentally unfair. See Jammal, 926 F.2d at 919-20; Lopez v. Runnels, 495 F. App'x 855, 856 (9th Cir. 2012) ("We do not review questions of state evidence law, but

[8] If the Court granted a stay, its review of the claims in any amended, exhausted petition would likely be under AEDPA, making Petitioner's burden even higher.

consider 'whether the admission of the evidence so fatally infected the proceedings as to render them fundamentally unfair.'" (citing Jammal, 926 F.2d at 919)). To warrant relief, "[t]he state court's decision must be so prejudicial as to jeopardize the defendant's due process rights." Tinsley v. Borg, 895 F.2d 520, 530 (9th Cir. 1990).

A defendant generally has a constitutional right to meaningfully present a complete defense in his behalf. Chambers v. Mississippi, 410 U.S. 284, 294 (1973); see Moses v. Payne, 555 F.3d 742, 757 (9th Cir. 2009) (as amended) (defendant's right to present defense stems from both 14th Amendment right to due process and Sixth Amendment right to compel witnesses). A defendant does not have license to present any evidence he pleases, however; for instance, due process is not violated by the exclusion of evidence that is only marginally relevant, repetitive, privileged, or more prejudicial than probative. Crane v. Kentucky, 476 U.S. 683, 689-90 (1986); see Taylor v. Illinois, 484 U.S. 400, 410 (1988) ("The accused does not have an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence."). A defendant's right to present a complete defense "does not override a defense witness's valid assertion of Fifth Amendment privilege." Perez v. Cate, No. CV 11–10585 RGK (SS), 2012 WL 3962757, at *5 (C.D. Cal. Aug. 20, 2012), accepted by 2012 WL 3962751 (C.D. Cal. Sept. 10, 2012); see Arredondo v. Ortiz, 365 F.3d 778, 783 (9th Cir. 2004) ("[T]he Supreme Court has . . . never indicated that a trial court has no discretion in determining whether the areas on which a defense witness has

properly invoked the Fifth Amendment will so affect the probative value or prejudicial impact of his testimony as a whole that he should not be allowed to take the stand at all.")

"It is settled that a waiver of the Fifth Amendment privilege is limited to the particular proceeding in which the waiver occurs." United States v. Licavoli, 604 F.2d 613, 623 (9th Cir. 1979) (citations omitted) (holding that voluntary testimony before grand jury does not waive privilege against self-incrimination at trial); see also Mitchell v. United States, 526 U.S. 314, 325 (1999) (holding that guilty plea and statements made at plea colloquy do not function as waiver of Fifth Amendment right at sentencing); United States v. Trejo-Zambrano, 582 F.2d 460, 464 (9th Cir. 1978) ("A waiver of the Fifth Amendment privilege at one stage of a proceeding is not a waiver of that right for other stages." (citation omitted)).

Miracle made his voluntary statements to the court during the pre-penalty-phase portion of his own criminal proceedings and to Petitioner's trial counsel after he was sentenced, on each occasion proclaiming his guilt and Petitioner's innocence. Later, at Petitioner's trial, Miracle invoked his privilege against self-incrimination. Miracle's statements before his conviction became final – including at his pre-penalty-phase hearing – did not act as a waiver of his right to assert his privilege against self-incrimination later, at Petitioner's trial, because the proceedings were different. See Licavoli, 604 F.2d at 623. Thus, there was no error by Petitioner's trial counsel in failing to argue, or the trial court in failing to hold, that Miracle had waived his Fifth Amendment privilege.

Because there was no error, Petitioner's trial was not arbitrary or fundamentally unfair. See Jammal, 926 F.2d at 919-20. Accordingly, there is no merit to Petitioner's proposed due process claim based on Miracle's purported waiver.

Petitioner's related claim that the trial court erred in allowing Miracle to invoke his Fifth Amendment right against self-incrimination also lacks merit. "[A]s a general rule, . . . where there can be no further incrimination, there is no basis" to assert the Fifth Amendment privilege against self-incrimination. Mitchell, 526 U.S. at 326. But it is still available when incrimination is possible for a different crime. See United States v. Moore, 682 F.2d 853, 856 (9th Cir. 1982) ("A voluntary guilty plea . . . is a waiver of the fifth amendment privilege only in regard to the crime that is admitted; the defendant retains the right against self-incrimination as to any crimes for which he may still be prosecuted[.]"); United States v. Smith, 245 F.3d 538, 542-43 (6th Cir. 2001) (codefendant who had already been sentenced "rightfully" invoked Fifth Amendment privilege against self-incrimination at defendant's trial because he could have opened himself up to additional charges of "perjury, obstruction of justice, and possibly false statements to the police"). By testifying at Petitioner's trial, Miracle might have subjected himself to an obstruction-of-justice prosecution, among other charges.

Further, the privilege remains in effect when a defendant's direct appeal is pending. See Taylor v. Best, 746 F.2d 220, 222 (4th Cir. 1984) ("We will not undercut [witness's] right to appeal . . . by prematurely assessing the merits of his appeal in

a collateral proceeding. If [witness's] conviction were overturned on appeal, post-conviction evidence . . . might be used against him."); Holsen v. United States, 392 F.2d 292, 293 (5th Cir. 1968) (per curiam) (holding that because witness "was a codefendant who was then in the process of appealing his conviction," he was entitled to invoke Fifth Amendment privilege). Miracle's appeal was pending both times he was called to testify in Petitioner's case, and counsel was in the process of filing his opening brief in the state supreme court the second time, in May 2011. See Cal. App. Cts. Case Info., http://appellatecases.courtinfo.ca.gov/search/case/dockets.cfm?dist=0&doc_id=1872572&doc_no=S140894 (last visited Mar. 20, 2017). Miracle thus retained his Fifth Amendment privilege, and the trial court did not violate Petitioner's due process rights in so finding.

Accordingly, Petitioner's proposed grounds three and four are meritless, and his motion for a stay should be denied because a stay would be futile.

II. Grounds One and Two of the Petition Do Not Merit Habeas Relief

Petitioner argues that the trial court erred in excluding from evidence Miracle's statements, violating his constitutional right to due process and a fair trial (Pet. at 6-14), and that his trial counsel was ineffective for failing to file a "Notice of Motion and Motion to Strike Death Penalty" (id. at 15-29, 42). For the reasons discussed below, habeas relief is not warranted.

A. Standard of Review

Under 28 U.S.C. § 2254(d), as amended by the Antiterrorism and Effective Death Penalty Act of 1996:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim – (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.

Under AEDPA, the "clearly established Federal law" that controls federal habeas review consists of holdings of Supreme Court cases "as of the time of the relevant state-court decision." Williams v. Taylor, 529 U.S. 362, 412 (2000). As the Supreme Court has "repeatedly emphasized, . . . circuit precedent does not constitute 'clearly established Federal law, as determined by the Supreme Court.'" Glebe v. Frost, 135 S. Ct. 429, 431 (2014) (per curiam) (quoting § 2254(d)(1)).

Although a particular state-court decision may be both "contrary to" and "an unreasonable application of" controlling Supreme Court law, the two phrases have distinct meanings. Williams, 529 U.S. at 391, 412-13. A state-court decision is "contrary to" clearly established federal law if it either applies a rule that contradicts governing Supreme Court law or

reaches a result that differs from the result the Supreme Court reached on "materially indistinguishable" facts. Early v. Packer, 537 U.S. 3, 8 (2002) (per curiam) (citation omitted). A 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." Id.

State-court decisions that are not "contrary to" Supreme Court law may be set aside on federal habeas review only "if they are not merely erroneous, but 'an unreasonable application' of clearly established federal law, or based on 'an unreasonable determination of the facts' (emphasis added)." Id. at 11 (quoting § 2254(d)). A state-court decision that correctly identifies the governing legal rule may be rejected if it unreasonably applies the rule to the facts of a particular case. Williams, 529 U.S. at 407-08. To obtain federal habeas relief for such an "unreasonable application," however, a petitioner must show that the state court's application of Supreme Court law was "objectively unreasonable." Id. at 409-10. In other words, habeas relief is warranted only if the state court's ruling was "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." Harrington v. Richter, 562 U.S. 86, 103 (2011).

Petitioner raised ground one on direct appeal (Lodged Doc. 3), and the court of appeal adjudicated it on the merits in a reasoned decision (Lodged Doc. 6). The court did not specifically address the federal constitutional portion of the claim but did reject the related state claim on the merits. (Id.

at 6-7.) The Court assumes the federal claim was also rejected on the merits, see Johnson v. Williams, 133 S. Ct. 1088, 1091-92 (2013), particularly given that Petitioner has not argued otherwise. Petitioner raised ground one in a petition for review in the state supreme court (Lodged Doc. 7), which summarily denied it (Lodged Doc. 8). He raised it in a Petition for a Writ of Certiorari in the Supreme Court (Lodged Doc. 9), which denied certiorari (Lodged Doc. 10). Because the state court did not expressly address the federal aspect of the claim, the Court conducts an independent review of the record to determine whether the state court was objectively unreasonable in applying controlling federal law. See Haney v. Adams, 641 F.3d 1168, 1171 (9th Cir. 2011) (independent review "is not de novo review of the constitutional issue, but only a means to determine whether the 'state court decision is objectively unreasonable'" (citation omitted)); see also Richter, 562 U.S. at 98, 102 (holding that petitioner still has burden of "showing there was no reasonable basis for the state court to deny relief," and reviewing court "must determine what arguments or theories supported or . . . could have supported[] the state court's decision" and "whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with" Supreme Court precedent).

Petitioner did not raise ground two on direct appeal or in his petition for review in the state supreme court. But because "it is perfectly clear" that ground two does not raise a colorable federal claim, the Court can address it on the merits regardless of whether it is exhausted. See Cassett v. Stewart,

406 F.3d 614, 623-24 (9th Cir. 2005). The Court therefore reviews ground two de novo. See Bybee v. Lewis, No. EDCV 11-1299-PSG (PLA), 2012 WL 1325623, at *5 (C.D. Cal. Mar. 19, 2012) (reviewing unexhausted habeas claim de novo "to ensure that no colorable federal claim has been raised"), accepted by 2012 WL 1325547 (C.D. Cal. Apr. 16, 2012).

B. Ground One Does Not Warrant Habeas Relief

In holding that the trial court did not abuse its discretion in excluding Miracle's statements, the court of appeal found that

> Miracle became unavailable when he invoked the Fifth Amendment. (People v. Leach (1975) 15 Cal.3d 419, 438). He made the pre-penalty statement and the statements to investigators after he was convicted. Although the statements could be used against him if his conviction were reversed, the remoteness of this possibility, joined with other circumstances, supports the trial court's determination that Miracle's statements are not sufficiently reliable to warrant admission despite their hearsay character.
>
> To determine whether a statement against penal interest is sufficiently trustworthy to warrant admission, the trial court must consider the totality of the circumstances and may consider (1) not just the words but the circumstances under which they were uttered, (2) the possible motivation of the declarant, and (3) the declarant's relationship to the defendant. (People v. Duarte, supra, 24 Cal.4th 603, 614.)
>
> The trial court carefully considered all these

> factors and reasonably concluded the statements were not reliable. Miracle's pre-penalty statement was a contrived effort to exonerate [Petitioner] at little risk to his own criminal liability. Miracle described it as a "prepared" statement and asked the court for an opportunity to put it "on the record." He acknowledged that he was motivated to exonerate [Petitioner] and that his claim of sole responsibility could inspire leniency in the penalty phase of his own trial.
>
> Miracle's statements to defense investigators are even less trustworthy because of the time he had to reflect and construct them and because he had so little to lose after he was sentenced to death. He spent hours preparing the detailed written account "for Duvall [sic]." That Miracle's written answers to Duvall's [sic] questions were corroborated by physical evidence does not render them trustworthy. As a self-represented litigant, Miracle had access to all of the physical evidence concerning Silva's murder, and he had the time and opportunity to create a coherent account in response to the written questions.

(Lodged Doc. 6 at 6-7.)

As an initial matter, to the extent Petitioner challenges the state court's decision to exclude Miracle's statements under state law, his claim does not warrant habeas relief. See Estelle v. McGuire, 502 U.S. 62, 67–68 (1991). Further, the Court is bound by the state's interpretation of its own law. See Bradshaw v. Richey, 546 U.S. 74, 76 (2005) (per curiam) (holding that

state court's interpretation of state law, including that announced on direct appeal of challenged conviction, binds federal habeas court).

Petitioner's federal-law claim in ground one fails under AEDPA review. Due process is implicated only when state-court exclusionary rules infringe upon a "weighty interest of the accused" and are "'arbitrary' or 'disproportionate to the purposes they are designed to serve.'" Holmes v. South Carolina, 547 U.S. 319, 324-25 (2006) (quoting United States v. Scheffer, 523 U.S. 303, 308 (1998)); see also Nevada v. Jackson, 133 S. Ct. 1990, 1992-93 (2013) (per curiam) (finding that challenged evidentiary rule was supported by "good reasons" and therefore that its constitutional propriety "cannot be seriously disputed" (citation and alteration omitted)). Accordingly, the Court has "[o]nly rarely" found a violation of the right to present a defense from a trial court's exclusion of defense evidence under state evidentiary rules. Jackson, 133 S. Ct. at 1992.

The court of appeal was not objectively unreasonable in rejecting Petitioner's claim. The trial court found Miracle's statements untrustworthy (see Lodged Doc. 2, 6 Rep.'s Tr. at 1616), and the court of appeal agreed (see Lodged Doc. 6 at 7). As the court of appeal noted, Miracle had the motivation and opportunity to carefully craft his prepared statements. (Lodged Doc. 6 at 7.) His first statement was made before his sentencing, using prepared notes, and was intended, at least in part, to assist Petitioner in his case. (See Lodged Doc. 1, 4 Clerk's Tr. at 989-97.) He noted that he didn't want to "jeopardiz[e] [Petitioner]'s chances of acquittal" and that he

thought his decision to take full responsibility for the crime might assist in his own case by persuading the jury not to sentence him to death. (Id. at 995-97.) His later statements were also provided under circumstances that allowed him time to construct his answers carefully. The answers he provided to Petitioner's trial counsel were responses to written questions (Lodged Doc. 1, 3 Clerk's Tr. at 619-22), and his interviews with a private investigator hired by Petitioner's trial counsel allowed for similar time to carefully craft his answers (id. at 609-14, 616-17). Moreover, Miracle declined during his pre-penalty-phase statement to provide any detail to support his claim that Petitioner was innocent (see Lodged Doc. 1, 4 Clerk's Tr. at 994), further demonstrating that he wanted time to construct a scenario exonerating Petitioner.

Miracle's statements made after he was sentenced to death lack trustworthiness because, as the court of appeal noted, he "had nothing to lose" (Lodged Doc. 6 at 7) and they were made to individuals associated with Petitioner, with whom he had a relationship (see Lodged Doc. 2, 6 Rep.'s Tr. at 1615). Further, as the trial court noted, although "the statements made by Mr. Miracle are incriminating against his penal interest, they're not significantly against his penal interest." (Id. at 1611.) He was not "truly exposing himself to criminal liability" but more likely attempting to protect his codefendant. (Id.) Thus, the court of appeal was not objectively unreasonable in finding that the trial court did not err in excluding Miracle's untrustworthy statements. See Christian v. Frank, 595 F.3d 1076, 1085-86 (9th Cir. 2010) (finding no unreasonable application of Chambers in

state court's decision to exclude "less reliable evidence"); see also Taylor, 484 U.S. at 410 (Sixth Amendment does not give defendant "unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence").

Petitioner cites Chia v. Cambra, 360 F.3d 997 (9th Cir. 2004), to support his claim. (See Suppl. Traverse at 5.) In Chia, the Ninth Circuit held that "[i]t is clearly established federal law, as determined by the Supreme Court, that when a hearsay statement bears persuasive assurances of trustworthiness and is critical to the defense, the exclusion of that statement may rise to the level of a due process violation." Id. at 1003 (citing Chambers, 410 U.S. at 302). Similarly, in Cudjo v. Ayers, 698 F.3d 752, 767-68 (9th Cir. 2012), the Ninth Circuit held that a trial court's exclusion of witness testimony that the defendant's brother confessed to the crime was contrary to the federal law "clearly established" by Chambers. In Cudjo and Chambers, however, the excluded testimony was trustworthy. See Chambers, 410 U.S. at 300-01; Cudjo, 698 F.3d at 766. Here, as noted, the state courts expressly found that Miracle's statements were not trustworthy, and they were not objectively unreasonable in doing so. See, e.g., Williams v. Soto, No. 15-cv-04783-YGR, 2016 WL 6304454, at *6-7 (N.D. Cal. Oct. 26, 2016) (distinguishing Cudjo and Chambers to find no violation of clearly established federal law because trial court excluded hearsay testimony it found untrustworthy); see also Clark v. Arizona, 548 U.S. 735, 789 (2006) ("States have substantial latitude under the Constitution to define rules for the exclusion

of evidence and to apply those rules to criminal defendants.") Accordingly, the trial court's exclusion of Miracle's statements as unreliable hearsay did not violate clearly established federal law. See Williams, 529 U.S. at 412.

In any event, any error in excluding Miracle's statements was harmless. Under federal habeas review, a constitutional error does not warrant habeas relief unless it had a "substantial and injurious effect or influence in determining the jury's verdict." Brecht v. Abrahamson, 507 U.S. 619, 637-38 (1993) (citation omitted). Thus, "relief is proper only if the federal court has 'grave doubt about whether a trial error of federal law'" was prejudicial under Brecht. Davis v. Ayala, 135 S. Ct. 2187, 2197-98 (2015) (citation omitted).

Overwhelming evidence established that Petitioner helped plan and execute the crime. Galindo testified that Petitioner planned and facilitated the murder. (See Lodged Doc. 2, 2 Rep.'s Tr. at 366-473.) Petitioner and Miracle spent the days before the murder using drugs together. (Id. at 424-25.) Petitioner went to Home Depot a few hours before the murder to buy gloves and plastic sheeting. (Lodged Doc. 2, 3 Rep.'s Tr. at 837-38, 5 Rep.'s Tr. at 1401.) He told a neighbor to leave the area because something bad was about to happen. (Lodged Doc. 2, 5 Rep.'s Tr. at 1271-72.) He told Galindo to call Silva numerous times before the murder to ask him to come to the apartment. (Lodged Doc. 2, 2 Rep's Tr. at 454-58, 462-63.) When Silva arrived, Petitioner pulled him into the apartment. (Id. at 471.) Petitioner was arrested with Miracle shortly after the crime, apparently having driven together to San Diego. (See Lodged Doc.

2, 3 Rep.'s Tr. at 811.)

The physical evidence also linked Petitioner to the crime: his fingerprints were found on a blood-soaked knife next to Silva's body, his blood was found on Silva's shoe, and his DNA was found in a glove in Silva's car. (Lodged Doc. 2, 3 Rep.'s Tr. at 827-29, 4 Rep.'s Tr. at 927, 939, 1057, 8 Rep.'s Tr. at 2058.) Given the unreliable nature of Miracle's statements and the overwhelming evidence against Petitioner, there was no possibility that any error in not admitting those statements had a substantial and injurious effect on the jury's verdict. Brecht, 507 U.S. at 637-38.

Petitioner is not entitled to habeas relief on this claim.

C. Ground Two Is Moot

A habeas claim is moot if the court cannot redress the alleged wrong. See North Carolina v. Rice, 404 U.S. 244, 246-48 (1971); Aaron v. Pepperas, 790 F.2d 1360, 1362 (9th Cir. 1986). Because the prosecution did not seek the death penalty in Petitioner's case (see Lodged Doc. 1, 2 Clerk's Tr. at 513), there was no reason for Petitioner's trial counsel to file a motion to strike the death penalty. Ground two does not raise a colorable federal habeas claim, which Petitioner apparently now recognizes because he did not respond to Respondent's mootness argument in either of his traverses. Thus, the Court should deny the claim regardless of whether it is exhausted. See Cassett, 406 F.3d at 623-24.

RECOMMENDATION

IT ACCORDINGLY IS RECOMMENDED that the District Judge accept this Report and Recommendation, deny Petitioner's motion to stay, and direct that Judgment be entered denying the Petition and dismissing this action with prejudice.

DATED: April 6, 2017

JEAN ROSENBLUTH
U.S. MAGISTRATE JUDGE

Court of Appeal, Second Appellate District, Division Six - No. B243065

S217984

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

ROBERT QUINONEZ IBARRA, Defendant and Appellant.

The petition for review is denied.

CANTIL-SAKAUYE

Chief Justice

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

ROBERT QUINONEZ IBARRA,

Defendant and Appellant.

2d Crim. No. B243065
(Super. Ct. No. 1200303)
(Santa Barbara County)

Robert Quinonez Ibarra appeals a judgment after conviction by jury of first degree murder with the special circumstance of lying in wait. (Pen. Code, § 190.2, subd. (a)(15).) The jury found true allegations that Ibarra personally used a knife and committed the crime for the benefit of a street gang. (*Id.*, §§ 12022, subd. (b)(1), 186.22, subd. (b)(1).) The prosecutor did not seek the death penalty. The trial court sentenced Ibarra to life in prison without the possibility of parole.

In an earlier proceeding, Joshua Miracle was convicted of the same crime and sentenced to death. After Miracle's conviction, he said that he alone was responsible for the murder and that Ibarra was innocent. He refused to testify in Ibarra's trial and the trial court excluded his out-of-court statements.

Ibarra contends that the trial court should have admitted Miracle's statements because they were against his penal interest. (Evid. Code, § 1230.) Ibarra also contends a detective unfairly buttressed the testimony of an adverse witness when he

said the witness had offered to take a lie detector test. He contends the cumulative effect of these errors denied him a fair trial. We modify the judgment to include a mandatory $40 court security assessment (Pen. Code, § 1465.8, subd. (a)(1)) and a mandatory $30 criminal conviction assessment (Gov. Code, § 70373, subd. (a)(1)). We otherwise affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Elias Silva was stabbed to death in a Goleta apartment early in the morning on October 3, 2004. Ibarra, Miracle, and Robert Galindo were the only people present when Silva was attacked.

Police found Silva's body in the apartment. His body had 48 stab wounds. Ibarra's fingerprints were on a knife on the floor of the apartment. Ibarra's blood was on the outside of the front door. A mixture of Ibarra's and Silva's blood was on Silva's shoe and on a T-shirt in the apartment. Miracle's palm print was on the bathroom counter and on the inside of the front door next to Ibarra's palm print. A large duffle bag with wheels was on the patio. A drop-cloth, a butane torch, a pick ax, and a receipt, among other items, were inside the bag. The receipt was for two drop-cloths and a pair of gloves that had been purchased the night of October 2, 2004, from Home Depot. A Home Depot videotape from that evening showed Ibarra buying gloves and a drop-cloth. Telephone records showed nine phone calls were made from Ibarra's cell phone to Silva's cell phone in the hours before the murder.

Ibarra and Miracle were arrested a day after the murder, while driving Silva's car in San Diego. Ibarra was bleeding from a stab wound in his leg. Silva's blood and Ibarra's blood were on Miracle's shoes and on a pair of gloves in the back seat.

In 2005, Miracle pled guilty to first degree murder and admitted to lying in wait, personally using a knife, and committing the crime for the benefit of a street gang. In 2006, a jury imposed the death penalty.

Ibarra was tried in 2011. Before Ibarra's trial, Galindo pled guilty to voluntary manslaughter and agreed to testify against Ibarra in exchange for a maximum sentence of 11 years in state prison.

Miracle's Pre-Penalty Statement in Court

At his pre-penalty hearing, Miracle appeared in court and said he had a "statement that [he] prepared." He said, "I'd like to go on record briefly about why I decided to plead guilty . . . . I'm guilty of the murder and Ibarra is not. . . . I'm the only person responsible for the murder of Eli Silva." He said the only reason he pled guilty was "because [he] felt the only honorable thing to do . . . was to take responsibility in terms of Ibarra's case and then make [himself] available to offer exonerating testimony on [Ibarra's] behalf at trial." Miracle said he intended to offer more detail at Ibarra's trial and he did not intend to offer mitigating evidence at his own penalty phase trial.

Miracle's Statements to Defense Investigators

After Miracle was sentenced to death, he made several more statements claiming that he alone was guilty of Silva's murder and Ibarra was innocent. The first statement in January 2006 was in the form of written responses to 17 questions that were posed by Ibarra's defense attorney, Robert Duvall, through Miracle's investigator. The resulting document, "Answers for Duval," gives a detailed account of the killing that, if believed, would exonerate Ibarra. According to Miracle, Ibarra was wholly innocent. Ibarra did not help plan the murder and he did not pull Silva into the apartment. Miracle stabbed Ibarra in the leg when Ibarra tried to intervene, and Miracle forced Ibarra to drive away with him in Silva's car.

Miracle next made a statement in June 2006 to Ibarra's investigator, Robert Strong, in an interview at San Quentin. Strong summarized the conversation in a report.

Miracle refused to be interviewed by the prosecution. Upon request of the prosecution, the trial court ordered Miracle to appear for a hearing about his possible trial testimony pursuant to Evidence Code section 402. Miracle asserted his privilege against self-incrimination and refused to testify at Ibarra's trial.

Miracle made another statement in March 2007 to Ibarra's investigator, again claiming that Ibarra was innocent. Strong summarized it in a second report.

Defense Efforts to Admit Miracle's Statements

Ibarra sought to introduce Miracle's statements to investigators with an "Application to Present a Complete Defense," wherein he asserts they were admissible pursuant to Evidence Code section 1230 (hearsay statement admissible when unavailable witness made it against penal interest in circumstances indicating trustworthiness). The trial court deferred ruling. Toward the end of trial, Ibarra again offered the statements with a "Motion to Admit Evidence as Declaration Against Interest." Both requests were limited to Miracle's statements to investigators. But at the hearing, counsel also offered Miracle's pre-penalty statement and the court included the pre-penalty statement in its ruling.

The trial court excluded Miracle's statements. The court found the statements were not "significantly" against Miracle's penal interest because they were made after he was convicted and were untrustworthy. With respect to Miracle's pre-penalty statement, the trial court found "part of [it] is a declaration against penal interest ['I'm guilty of the murder'], and part of it is collateral to the declaration against penal interest ['Ibarra is not']." With respect to the statements to investigators, the court found the circumstances "suggest that Mr. Miracle is reflective, he's thought about his statements, he's making them to a defense investigator, it seems to me that they lack trustworthiness . . . ."

The trial court said, "[T]hey're not the kind of incriminating statements that are made under circumstances that really expose him to criminal liability having been made two years later to an investigator for a co-participant or a co-defendant seems to suggest that his motivation may have been to protect the co-participants or the co-defendant as opposed to making the statements under circumstances where he was truly exposing himself to criminal liability by making the statements . . . ." The court also excluded a recorded conversation between Miracle and his stepmother in which he said, "[I]f I am willing to kill, I should be willing to die," because it was not exculpatory of Ibarra and it would introduce the issue of penalty. At a subsequent hearing, the court further considered the statements and concluded, "[They were] made with an intent to

enhance his reputation, avoid cooperation with law enforcement in any way, assist Mr. Ibarra with whom he had some sort of relationship. It would appear that he has the motivation to--which is obvious in reading his statement that he's going above and beyond any sort of objective recitation of the facts in order to attempt to exculpate Mr. Ibarra. It seems like the totality of circumstances suggests that the statements are untrustworthy, and I'm going to exclude them."

Galindo's Testimony

Galindo testified for several days leading up to the night of October 2, 2004, he, Miracle, and Ibarra were gathered in his apartment. Silva was a methamphetamine dealer. Galindo testified that Miracle and Ibarra had a conversation about "cleaning up the rats in Santa Barbara." Miracle asked Galindo to call Silva and tell him to come to the apartment. When Galindo protested, Miracle held a knife to Galindo's throat. Galindo used Ibarra's cell phone to call Silva many times before he persuaded Silva to come. Before Silva arrived, Miracle and Ibarra brought a duffel bag into the apartment and cleared the furniture from the entrance. Miracle armed himself with a butcher knife. When Silva opened the door, Ibarra pulled Silva into the apartment and Miracle attacked Silva. Galindo testified that he ran from the apartment and did not see Silva get stabbed.

Galindo had Ibarra's cell phone, but he did not call 911. He went to an acquaintance's house where, she testified, he and others coordinated their stories before contacting police. Galindo testified in exchange for leniency. His testimony was inconsistent with his initial statements to police. In a note, a juror asked, "What do/can we do when there are inconsistencies in testimony that the attorneys don't address?" The juror pointed out that phone records contradicted Galindo's testimony. Another juror asked if Galindo had been gainfully employed, pointed out conflicts in his testimony, and wrote, "R.G. has stated this both ways. Which was it?"

Reference to Polygraph At Trial

Sheriff's Detective Christopher Dallenbach described Galindo's October 3 interview. The prosecutor asked Dallenbach whether Galindo offered to be tested for

narcotics? Dallenbach said, "I remember that. I also remember him offering to take a polygraph exam." The trial court sustained defense counsel's objection, struck the testimony, and instructed the jury to disregard the answer. Counsel did not request further admonition. The court denied Ibarra's request for a mistrial.

DISCUSSION

Statements Against Penal Interest

The hearsay statement of an unavailable witness may be admitted if, when made, it "subjected him to the risk of . . . criminal liability" such "that a reasonable man in his position would not have made the statement unless he believed it to be true." (Evid. Code, § 1230.) The proponent of a statement against penal interest must show that (1) the declarant is unavailable, (2) the declaration was against the declarant's penal interest, and (3) the declaration was sufficiently reliable to warrant admission despite its hearsay character. (*People v. Duarte* (2000) 24 Cal.4th 603, 610-611.) The exception does not apply to collateral assertions within declarations against penal interest. (*People v. Leach, supra,* 15 Cal.3d 419, 441.) Declarations against penal interest may contain self-serving and unreliable information. (*Duarte,* at p. 611.) Only those portions of a statement that are "specifically disserving" to the speaker's penal interest are admissible under Evidence Code section 1230. (*Duarte,* at p. 612.) We review for abuse of discretion a trial court's decision to admit or exclude a statement against penal interest. (*People v. Cudjo* (1993) 6 Cal.4th 585, 607.)

Miracle became unavailable when he invoked the Fifth Amendment. (*People v. Leach* (1975) 15 Cal.3d 419, 438). He made the pre-penalty statement and the statements to investigators after he was convicted. Although the statements could be used against him if his conviction were reversed, the remoteness of this possibility, joined with other circumstances, supports the trial court's determination that Miracle's statements are not sufficiently reliable to warrant admission despite their hearsay character.

To determine whether a statement against penal interest is sufficiently trustworthy to warrant admission, the trial court must consider the totality of the

circumstances and may consider (1) not just the words but the circumstances under which they were uttered, (2) the possible motivation of the declarant, and (3) the declarant's relationship to the defendant. (*People v. Duarte, supra,* 24 Cal.4th 603, 614.)

The trial court carefully considered all these factors and reasonably concluded the statements were not reliable. Miracle's pre-penalty statement was a contrived effort to exonerate Ibarra at little risk to his own criminal liability. Miracle described it as a "prepared" statement and asked the court for an opportunity to put it "on the record." He acknowledged that he was motivated to exonerate Ibarra and that his claim of sole responsibility could inspire leniency in the penalty phase of his own trial.

Miracle's statements to defense investigators are even less trustworthy because of the time he had to reflect and construct them and because he had so little to lose after he was sentenced to death. He spent hours preparing the detailed written account "for Duvall." That Miracle's written answers to Duvall's questions were corroborated by physical evidence does not render them trustworthy. As a self-represented litigant, Miracle had access to all of the physical evidence concerning Silva's murder, and he had the time and opportunity to create a coherent account in response to the written questions. The trial court did not abuse its discretion when it excluded Miracle's statements.

Reference to Polygraph Examination

Ibarra contends that Dallenbach leant Galindo's testimony a prejudicially false aura of credibility that could not be cured by admonition when Dallenbach said Galindo offered to take a polygraph examination. We disagree.

Evidence of an offer to take a polygraph is inadmissible, absent stipulation. (Evid. Code, § 351.1, subd. (a).) A mistrial should be granted if the court is apprised of prejudice that it judges incurable by admonition or instruction. (*People v. Dement* (2011) 53 Cal.4th 1, 40.) A witness's volunteered statement may provide the basis for a finding of incurable prejudice. (*Ibid.*) We review the denial of a motion for mistrial under the deferential abuse of discretion standard. (*People v. Cox* (2003) 30 Cal.4th 916, 953 [no incurable prejudice where prosecutor's isolated question about polygraph was stricken

before witness could respond], overruled on another ground in *People v Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) The trial court is vested with "considerable discretion" in determining a mistrial motion (*Dement*, at p. 40), because whether a particular incident is incurably prejudicial is "a speculative matter" (*id.* at p. 39).

Dallenbach's reference to a polygraph test was brief. The trial court immediately struck it and admonished the jury: "The last answer that this witness gave is stricken. You're not to consider it at any time either now or during the course of this trial or during deliberations." The trial court acted within its discretion when it concluded the reference was not prejudicial. "[A] trial court's timely admonition, which the jury is presumed to have followed, cures prejudice resulting from the admission of such evidence." (*People v. Cox, supra,* 30 Cal.4th 916, 953, see also *People v. Price* (1991) 1 Cal.4th 324, 428 [witness's brief, nonresponsive claim that he had taken polygraph tests did not lend prejudicially false aura of credibility because it was cured by forceful admonition].) It is true that in *Price* the court specifically admonished the jury that polygraph test results are unreliable and inadmissible, but counsel did not request that specific admonition here. Moreover, the admonition given was sufficient. And counsel engaged in reasonable trial tactics by accepting the trial court's swift admonition and moving on, rather than underscoring the testimony with further comment. This case is unlike *People v. Navarrete* (2010) 181 Cal.App.4th 828, 831-832, in which a mistrial was required after a detective deliberately suggested to the jury that the defendant confessed and the court ruled that "defendant's statement is inadmissible." (*Id.* at p. 831.)

Cumulative Error

We reject Ibarra's claim of cumulative error. The trial court afforded Ibarra a fair trial. Its approach to the entire proceedings was exemplary.

Court Security Fee and Criminal Conviction Assessment

The trial court did not impose a $40 court security assessment (Pen. Code, § 1465.8, subd. (a)(1)) or a $30 criminal conviction assessment (Gov. Code, § 70373, subd. (a)(1)). The fees are mandatory. (*People v. Rodriguez* (2012) 207 Cal.App.4th 1540, 1543, fn. 2; *People v. Woods* (2010) 191 Cal.App.4th 269, 272.)

DISPOSITION

We modify the judgment to include a $40 court security assessment (Pen. Code, § 1465.8, subd. (a)(1)) and a $30 criminal conviction assessment (Gov. Code, § 70373, subd. (a)(1)), but otherwise affirm. The trial court shall amend the abstract of judgment accordingly and forward it to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED.

GILBERT, P. J.

We concur:

YEGAN, J.

PERREN, J.

Brian Hill, Judge

Superior Court County of Santa Barbara

Sanger, Swysen & Dunkle, Robert M. Sanger, Stephen K. Dunkle for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Mark A. Kohm, Peggy Z. Huang, Deputy Attorneys General, for Plaintiff and Respondent.

8

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

-vs-

ROBERT QUINONEZ IBARRA,

Defendant and Appellant.

SUPERIOR COURT
No. 1200303

APPEAL FROM THE SUPERIOR COURT OF SANTA BARBARA COUNTY

HONORABLE BRIAN E. HILL, JUDGE

REPORTER'S TRANSCRIPT ON APPEAL

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VOLUME VIII (of VIII Volumes)
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SANTA BARBARA, CALIFORNIA, MONDAY, JULY 23, 2012

DEPARTMENT NO. 2 HON. BRIAN E. HILL, JUDGE

AM SESSION

APPEARANCES:

The Defendant represented by ROBERT SANGER, Attorney at Law; Deputy District Attorney KIMBERLY SMITH, representing the People of the State of California; SHARON REINHOLD, Certified Court Reporter.

PRONOUNCEMENT OF JUDGEMENT

SENTENCING

THE COURT: Let's go on the record in the case of People versus Robert Quinones Ibarra.

Mr. Ibarra is present with his attorney Mr. Sanger; Miss Smith for the People. This is Case 1200303.

And there are several issues before the Court. The first is a motion for a new trial filed by Mr. Sanger, and I have that in front of me, file stamped June 20th, 2012. I have a response -- June 29, 2012 -- I have a response filed by the People file stamped July 18th, 2012, and then a reply to the Points and Authorities in opposition filed by the People, a reply filed by Mr. Sanger file stamped July 20th, 2012.

I have read all of these documents and have an

understanding of the issues that are before the Court. And most of the issues, most if not all of the issues are issues that I think both sides understand that have been previously addressed and considered by the Court, but I don't think it's inappropriate they be addressed again in a case of this magnitude.

And so I'm prepared to hear argument and we'll begin with you, Mr. Sanger. Because I'm familiar with the issues, they've been raised I think not only by you, but by trial counsel, because I'm familiar with the issues I may interrupt you from time to time with questions.

But let's address the first issue raised in your Motion For New Trial which is that statements made beginning about one year after the date of the offense, statements made by co-defendant Joshua Miracle, which would be considered hearsay, should have been admitted by the Court under the Declaration Against Penal Interest exception to the hearsay rule. And I think the primary focus of the Court and the subject of discussion of the Appellate Court decisions on the question of the admissibility of a Declaration Against Penal Interest by a co-defendant focus on the trustworthiness of the statement, and it's just hard for me to conceive of the Court, any Court, including this Court concluding that these statements were made by Mr. Miracle in a circumstance which would permit me to conclude that they were trustworthy.

I mean, the one, kind of -- one salient fact that can't be missed is that Mr. Miracle is or was, certainly was, very much a part of the gang culture and very aware of the significance of him cooperating with law enforcement or with the system in any way. In fact, I think the evidence at trial suggested that the crime was committed because of a concern that the decedent was somehow a rat. And so when Mr. Miracle makes these statements exonerating, attempting to exonerate Mr. Ibarra it's in the context of someone who is hypersensitive to the possibility that a charge could be leveled at him that he is somehow cooperating with law enforcement or being a rat.

And this is someone who pled guilty to the charge of first degree murder, admitted the special circumstance and received the death penalty. Even before he received the death penalty he knew that he was going to be spending the rest his life, in all likelihood, in prison. So it would be extremely dangerous for him under those circumstances to come forward and cooperate in any way with law enforcement or to testify against someone else who appeared to be involved in this crime.

So, why don't you address that issue.

MR. SANGER: All right. I will.

And we're not going to lose that train of thought, but, your Honor, we did request an evidentiary hearing on the other matters and we do have witnesses here to testify about the other issues. But I'll start

by addressing this.

THE COURT: All right.

MR. SANGER: All right. The simple answer to the Court's question is it goes to weight, not admissibility.

We hear that all the time. The evidence comes in that is prejudicial to a defendant, in some incremental fashion helps the prosecution, and the answer is, well, the jury can figure that out, the jury can determine what weight to give a particular statement or a particular piece of evidence.

In this case, the most crucial piece of evidence in Mr. Ibarra's situation is that Mr. Miracle stated that he committed the crime entirely on his own. That testimony -- or those statements which were made not only by way of statements to investigator Bob Strong, but also made by way of statements in open court in his own case on the record, those statements are clearly against penal interest.

I understand the Court can find an argument as to why they may not be given the full credit on the face of them, but that's true of anybody's statements. It comes up all the time.

THE COURT: But isn't it true that these statements were made a full year after the date of the offense? And isn't it true that these statements were made after Mr. Miracle had already pled guilty?

MR. SANGER: They were made after he pled

guilty, but not before his penalty phase was concluded. My recollection.

THE COURT: But Mr. Miracle's attitude toward the death penalty was it doesn't matter to me whether the jury imposes death or not, that I killed, I mean, his words were something to the effect, I'm paraphrasing, I killed without mercy and if I get killed without mercy I'm not going to complain about it.

MR. SANGER: Right.

THE COURT: So, I mean --

MR. SANGER: That's all fine, your Honor, but that goes to the weight. That's something that the jury should have heard.

Let's stop for a second. I have a feeling I'm not going to be able to convince your Honor of this, but I'm going to try.

And the answer to --

THE COURT: But before we get to the question of weight there's a threshold element that has to be satisfied, which is whether it was made under circumstances that suggest trustworthiness. And I mean that's a very, very, very tall order I think in this particular case.

MR. SANGER: Well, I understand your Honor's saying that, I'd like to address that if I could.

I mean, obviously, the Court has to make the foundational finding and that happens all the time. You let in statements of a decedent, you let in statements of

a defendant, there are a lot of circumstances in which statements come in that are adverse to the defendant. And repeatedly we hear, well, maybe it's not perfect, or there could have been other motivations, there could have been all sorts of things that happen, but that's up to the jury to decide what weight they should give it.

Now, what we have here is a remarkable situation. You've got a situation where Mr. Ibarra is stabbed in the leg himself and that, among other things, gives some weight to the credibility of somebody who says that they were doing the stabbing and that they committed the murder, or he committed the murder in this case, and that was Mr. Miracle.

Now, we have a credible situation really. If we take a step back for just a moment and look at the big picture, you have a jury who hears the case, they don't hear from the co-defendant, which could happen in a given case, but they also don't hear that he has on multiple occasions admitted to being the only person who did this murder and who has said unequivocally that Mr. Ibarra did not do it. If we step back for a second and look at it from just not a technical standpoint for just a moment, that's pretty powerful and that's something that the jury would want to know. They would have the opportunity to weigh the evidence, they'd have the opportunity to reject the evidence if they wanted to, but they should have known it.

And I think that it gives bias -- forgive me for

interrupting, but I wanted to answer the Court's last question which was trustworthiness, the fundamental showing of trustworthiness is a concept that the Court doesn't, in other words, make a finding that somebody is absolutely trustworthy, the Court makes a finding that the circumstances under which a statement is made has some indices of trustworthiness. That's the basis of the California Evidence Code, it's based on common law evidence, back in 1968 when it was passed it simply codified the common law, that is, the Court in making the threshold determination doesn't decide that the jury will find it trustworthy, the Court just finds that the circumstances are such that the statement was made in a context that's somewhat trustworthy, it could be trustworthy. That's up to the jury to decide. Trustworthiness, for instance, a Declaration Against Penal Interest is an indication of trustworthiness.

Now, as the Court says, or the implication of what the Court says is it came into evidence the prosecutor could have gotten up and argued to the jury, well, even though a Declaration Against Penal Interest is a recognized exception as something that can come before you that doesn't mean that that decides the issue, that's just the threshold, you, the jury, have to decide whether or not it is a statement that you're going to give any weight to, is it trustworthy enough to have some weight. The fact that somebody admits to a murder and they admit to being the sole person involved is a Declaration

Against Penal Interest and, therefore, meets the trustworthiness criteria.

The fact that the prosecutor can argue that the weight of that evidence is somewhat less due to his motivation not to -- as the Court indicated, they could have argued he has a motivation not to be a snitch, he has a motivation to take credit for this for some reason, they could argue that. But the jury should have heard it. Okay.

And in the big picture of things, you know, jurors are sometimes deprived of the opportunity to hear certain evidence that's not admissible for one reason or another. But this is a big piece of evidence. This is a giant piece of evidence. It's something that they should have heard and should have had an opportunity to evaluate it and it would have been up to them to accept it or reject it.

While they're deciding whether or not to accept it or reject they have to look at the statements and see if it matches with other evidence that is present in the case. And the statement does, it does explain, it is corroborated by other evidence in this case that unfolded during the trial.

THE COURT: Well, very little other evidence. The only other evidence that would be consistent, and I'm not even sure it's consistent, but not inconsistent would be that Mr. Ibarra was apparently stabbed. But, I mean, all the other evidence would suggest that Mr. Ibarra and

Mr. Miracle were both extremely involved in the preparation for this offense and the offense itself. I mean, virtually everything. They were together for three or four days, they were using drugs together, Mr. Ibarra is on a videotape at Home Depot collecting items that were used in the commission of the murder. I mean that was some time before the actual homicide. So everything else would seem to point to Mr. Ibarra and Mr. Miracle acting in concert in the commission of this offense, not that Mr. Miracle was in some way orchestrating this by himself.

MR. SANGER: Well, that's a lot of evidence that suggests that he was orchestrating this by himself. He was -- he was in prison, he was part of a prison gang as far as everybody can tell. Mr. Ibarra has never been to prison.

The people that were there at the house, at least a couple of people had been to prison. There's a whole culture of prison gang life that Mr. Ibarra was not a part of.

The items at Home Depot were not, I wouldn't say they were used, they weren't necessarily used, some there's certainly an innocent explanation for what those -- the purchase of those items. But that's just circumstantial evidence on the other side. That's why Mr. Ibarra is sitting here because that circumstantial evidence was used to convict him, meanwhile, the jury never heard that Mr. Miracle admitted to the entire thing

and said that Mr. Ibarra didn't do it.

And so I think that in fairness to the jury, I mean we entrust jurors to have all sorts of information and all sorts of statements that are admitted, quite often to the disadvantage of the defendant, to say that maybe they would have been confused or couldn't work this out I don't think that's fair, in fairness the jury should have heard the evidence and been allowed to determine whether or not it was trustworthy themselves, it meets the fundamental declaration against penal interest trustworthiness standard, they should have been allowed to evaluate those statements in the context of the circumstantial evidence.

THE COURT: Okay. Well, I understand the argument. I've heard it before. I don't think it's a real close call in terms of whether or not the statements made by Mr. Miracle were done so in a context that suggests trustworthiness. I think the opposite.

I think the Court has a gatekeeper obligation. It's clear to me that these statements were not made in a context or in circumstances that suggested that they were trustworthy. And the motion for new trial on that ground is denied.

Let's move to the second issue raised in your motion.

MR. SANGER: Your Honor, we would like to first of all exclude witnesses who are going to testify. And we'd like to call Sergeant Fuller.

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

-vs-

ROBERT QUINONEZ IBARRA,

Defendant and Appellant.

SUPERIOR COURT
No. 1200303

APPEAL FROM THE SUPERIOR COURT OF SANTA BARBARA COUNTY

HONORABLE BRIAN E. HILL, JUDGE

REPORTER'S TRANSCRIPT ON APPEAL

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SANTA BARBARA, CALIFORNIA; MONDAY, JUNE 27, 2011

9:25 A.M.

DEPARTMENT NUMBER 2 HON. BRIAN E. HILL, JUDGE

APPEARANCES:

The Defendant with his Counsel, STEVE BALASH, Attorney at Law, and WILLIAM DUVAL, Attorney at law; representing the People of the State of California, KIMBERLY SMITH, Deputy District Attorney for the County of Santa Barbara; JANA B. COOKSEY, Official Court Reporter.

(The following proceedings were held in open court, outside the presence of the jury:)

THE COURT: All right.

Let's go on the record. People versus Ibarra. All parties are present. We're outside the presence of the jury, and we have Miss McLaren here, so let's address this issue first.

We have Exhibit 162 consisting of one, two, three, four, five pages, which is -- Page 1 is a letter to Mr. Duval from Miss McLaren dated January 24th, 2006, and then attached to this are the questions that were submitted to Miss McLaren by Mr. Duval on behalf of Mr. Ibarra, and then the answers that were provided to Mr. Duval from Mr. Miracle, and I believe we took -- we took testimony from Miss McLaren, I believe the other day, so we need to continue that, but I think at least as

FURTHER RECROSS EXAMINATION

BY MS. SMITH:

Q In the questions that were provided for Mr. Miracle from Mr. Duval, did you allow him to -- did he look at each individual question and read it for himself?

A I don't recall.

Q But you said that you reviewed or used these questions as a foundation or basis for which he provided -- he answered questions and then provided a full statement; is that right?

A What I recall is that we worked on both of those things at the same time. We -- that was -- that was the document that we used.

MS. SMITH: Okay.

THE COURT: All right.

Anything else from either side?

MR. DUVAL: No.

THE COURT: All right. Thank you. Thanks for coming in. Appreciate it. You're free to go.

THE WITNESS: Thanks.

THE COURT: All right.

On this particular issue, it's been discussed at some length. Mr. Duval, anything that you want to add?

MR. DUVAL: No. I think it's -- I agree we've discussed it at some length.

THE COURT: Okay.

I've just reviewed a number of cases. I don't think I've put them all on the record. It's probably not necessary to, but just -- I did review People versus Greenberger, a 1997 case, 58 Cal. App. 4th 298.

People versus Frierson, 1991 case, 53 Cal. 3d 730.

Chia, C-h-i-a, versus the Attorney General. It's a Ninth Circuit case, 360 Fed 3rd 997.

People versus Chapman, 50 Cal. App. 3d 872.

And in reviewing all of these cases, it seems to me in the context of the facts of this case, it seems to me that the statements made by Mr. Miracle a year or sometimes even two years after the event in question were made with an intent to enhance his reputation, avoid cooperation with law enforcement in any way, assist Mr. Ibarra with whom he had some sort of relationship.

It would appear that he has the motivation to -- which is obvious in reading his statement that he's going above and beyond any sort of objective recitation of the facts in order to attempt to exculpate Mr. Ibarra. It seems like the totality of circumstances suggests that the statements are untrustworthy, and I'm going to exclude them.

Okay. In terms of -- in terms of today's schedule, I mean, we have a little bit more flexibility in terms of time now that Mr. Balash has canceled his trip.

MR. DUVAL: Judge, may I ask -- sorry to interrupt.

instructions.

THE COURT: But I think the jury instruction was written to protect the Defendant against any possibility that they're going to attach liability, because the co-defendant's culpability is clear, and then that would be my guess, but this circumstance is a little bit different because you have two people who were together at the time, and what the Defendant is arguing is that it was the other person, not me, who committed the crime.

So -- and certainly that's a declaration against penal interest that I would deem trustworthy, because it is -- some of the cases talk about, you know, statements that are both incriminating to the declarant, and exculpatory to a co-defendant, and they say divide them up, separate them, so that those that are collateral to the declaration against penal interest are excluded, but those that are not collateral are theoretically admissible, certainly against the declarant if he's in trial, but -- so I mean, trustworthiness is not an issue in that regard.

We have Miracle who's not available, where statements that he makes that are incriminating to himself are trustworthy under the circumstances where they're made. He's got -- where the facts would suggest he's culpable without any question. His culpability is not an issue, he pled no contest, he had advisory Counsel, he did it repeatedly -- he made those statements repeatedly. So I'm not concerned about the

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

-vs-

ROBERT QUINONEZ IBARRA,

Defendant and Appellant.

SUPERIOR COURT
No. 1200303

APPEAL FROM THE SUPERIOR COURT OF SANTA BARBARA COUNTY

HONORABLE BRIAN E. HILL, JUDGE

REPORTER'S TRANSCRIPT ON APPEAL

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VOLUME VI (of VIII Volumes)
Pages 1423 through 1736, inclusive

SANTA BARBARA, CALIFORNIA, THURSDAY, JUNE 23, 2011

DEPARTMENT NO. 2 HON. BRIAN E. HILL, JUDGE

AM SESSION

APPEARANCES:

The Defendant represented by WILLIAM DUVAL, STEVE BALASH, Attorneys at Law; Deputy District Attorney KIMBERLY SMITH, representing the People of the State of California; SHARON REINHOLD, Certified Court Reporter.

CRIMINAL TRIAL PROCEEDINGS

(Whereupon, the following proceedings were held out of the presence of the jury:)

THE COURT: All right. Let's go on the record in People versus Ibarra. Who is present with his attorneys, Mr. Duval, Mr. Balash; Miss Smith for the People.

And in terms of today's schedule, we finished with Detective Dallenbach so are you going to put on Detective Kushner?

MS. SMITH: Yes.

THE COURT: This morning at ten.

MS. SMITH: Yes. But the Court had asked me to play the video, the Home Depot video.

THE COURT: No, I wasn't anticipating that we would argue. Even if we went -- okay.

So, we can informally, if we end early tomorrow we can informally go through jury instructions and then do jury instructions on Monday with argument on Monday.

MS. SMITH: That sounds good.

THE COURT: So the other issue we need to take up, or one of the other issues is the question of the admissibility of Mr. Miracle's statements.

And I have in front of me, and we'll make it part of the record, I have an investigation report that looks like it was turned over by the District Attorney's office to the defense. It's dated 10/14/2005 from Jim Nalls criminal investigator. This will be part of the Court's record. Court file.

And then I have also attached to the defense motion to admit certain statements I think three different exhibits.

So, I've reviewed the Points and Authorities, I've reviewed the exhibits. I haven't heard from the prosecution, but I have, in terms of formal response to the motion made by the defense, which is entitled Motion to Admit Evidence As Declarations Against Interest, file stamped June 20th, 2011. But I have looked at a number of cases, I think I looked at at least five including those cited by the defense, and I'm not inclined to admit any of the statements made by Mr. Miracle as declarations against penal interest. It seems to me that they lack

the required findings that has to be made by a court that they're trustworthy.

There are a couple of opinions that are virtually on point with the circumstances here. The first case is People versus Chapman, 15 Cal.App.3d at 872. This is a case where a co-defendant makes a statement exculpating the defendant and one of the cases involves a statement by a co-defendant made 14 years afterwards. I'm not sure that's the Chapman case, that's another case. But in Chapman these hearsay declarations were offered by the defense, they were both incriminating as to the declarant, as to statements made by Mr. Miracle, and exculpatory as to the defendant, and that's true with Mr. Miracle's statements as well.

But looking at the facts of this case, obviously Mr. Miracle has a relationship with Mr. Ibarra based on the testimony that I've heard, that's a relationship that although there may be some dispute about exactly what it is certainly the evidence would show that they were together for several days.

Further, none of the statements that the defense is seeking to introduce that are exculpatory of Mr. Ibarra are at the same time incriminating against Mr. Miracle. So while Miracle in certain statements indicates that he did the stabbings, he then goes on and offers separate statements as to Mr. Ibarra's involvement in the case and so the two are not necessarily connected.

Generally speaking, as I read the cases, when

declarations against penal interest are admitted because they're deemed to be trustworthy, the statements are commingled in terms of they're being perhaps somewhat incriminating as to the declarant, but also exculpatory as to th other. And that's not necessarily the case to the statements that I read that the defense is offering.

Further, it seems like the evidence in this case would suggest that -- well, the evidence in the case does indicate that though the statements made by Mr. Miracle are incriminating against his penal interest, they're not significantly against his penal interest, which goes to the question of whether they should be considered trustworthy because they're made several years after he entered a plea of guilty or no contest to the crime of murder in the first degree and admitted the special circumstance. They're incriminating in the sense that they could be used in the future if for some reason Mr. Miracle's conviction is reversed, which is always a possibility. I think he had the right to take the Fifth. But they're not the kind of incriminating statements that are made under circumstances that really expose him to criminal liability having been made two years later to an investigator for a co-participant or a co-defendant seems to suggest that his motivation may have been to protect the co-participants or the co-defendant as opposed to making the statements under circumstances where he was truly exposing himself to criminal liability by making the statements, which is the whole idea of the theory

behind declarations against penal interest. So, they're made at a time when he's already been convicted.

There's really no compelling reason why a Court would attach a degree of credibility to the statements at the time he makes them. If he had made the -- the one statement that appears to be made under circumstances which would suggest that they're trustworthy is the statement that is made by Miracle to his stepmother, which is, the way I see it if I'm willing to kill, I should be willing to die too, so that's made under circumstances that I would think that that statement is trustworthy. It's made to his stepmother, it's not made with anticipation it's going to be used by anybody. It's -- he may not even have known that the statement was being recorded so that's likely to be deemed a trustworthy statement. But it's hard to know how that assists Mr. Ibarra.

Moreover, there's prejudicial aspects of that statement that would indicate to me that probably under 352 the statement ought to be excluded because there's reference to actually be willing to die too. So it's only going to cause the jury to speculate what's the meaning of I should be willing to die too, did he receive the death penalty, what is he talking about.

So, it doesn't seem to me that the circumstances under which these statements are made indicate trustworthiness, to the contrary, and I know I'm repeating myself, but these are all statements made to a

defense investigator for Mr. Ibarra and they're made two years later. So, the circumstances just don't seem to qualify as trustworthy declarations against penal interest.

So, my reading of the cases, I've read four or five, and they all seem pretty much on point in terms of this particular set of circumstances, co-defendant making a statement after the co-defendant has already been convicted and made under circumstances where it's not spontaneous, it's not to -- it's not to a family member, it's not under circumstances where the person hasn't had a chance to reflect. These circumstances here are made under -- suggest that Mr. Miracle is reflective, he's thought about his statements, he's making them to a defense investigator, it seems to me that they lack trustworthiness and I'm not going to admit them.

MR. DUVAL: Well, I want to say a couple of things.

THE COURT: Go ahead.

MR. DUVAL: From the Court's comments it seems to me the Court is getting confused with spontaneous declarations when we're talking about declarations against interest, number one.

Number two, there's nothing to say that a declaration of interest made two years later doesn't make it a declaration against interest. As the Court is well aware when they -- in the '60s when the Evidence Code was put together one of the things that the authors of the

California Evidence Code attempted to do was to look at the kinds of statements that would be almost automatically trustworthy and created what are known as exceptions to the hearsay rule. One of the exceptions is a declaration against interest.

A person that is sitting on death row in San Quentin who has an automatic appeal, is aware that he has an automatic appeal is certainly in these circumstances making declarations against interest.

Now, because they are a declaration -- because they are -- they constitute declarations of interest they are cloaked with the presumption that they are trustworthy. And the question is, and if you go further on the test of trustworthiness, the question the Court ought to be looking at is are the statements that we are attempting to introduce as evidence do they fit, amongst other things, the facts of the case as you heard them. And under that test, or under that, you know, that approach to applying the test of trustworthiness they certainly do.

The statements are replete with the kind of planning that Miracle was doing, with the stabbing that he did, with the taking Mr. Silva to the ground, they're all trustworthy.

THE COURT: Well, you know, that's for the -- we have the Galindo version of what happened, that's, essentially, all we have at this point. So, we have a hearsay statement or statements made by Mr. Miracle which

is a second version. Now, which version is true I don't know. But the circumstances under which the hearsay version by Mr. Miracle are given clearly suggest to the Court that they're not trustworthy. That's sort of a gatekeeper determination that the Court has to make.

When you make the argument that these are against penal interest, they're against penal interest because he's admitting liability in the murder. But he's already admitted liability in the murder. He wanted to -- he confessed to the murder and he pled no contest, or, guilty to the murder. In fact, he was asking the Court to sentence him to death without a jury trial. But the law requires there to be a jury trial.

So, you know, it's ostensibly against his penal interest, but the reality is this is somebody who has already plead guilty. But beyond that, that's not the only determination that has to be made by the Court, the Courts are required to look at all of the facts and circumstances surrounding the declaration that is being offered by the defense and the declaration here was made under circumstances that would not suggest that they were trustworthy. These were not declarations that were made to somebody who didn't have partisan interest in the case, these were made to the investigator for a co-defendant with whom Mr. Miracle has a relationship, or at least had a relationship. I don't know what that relationship is now, but clearly at one time they were together and they were apparently friends and spent

several days together.

So, I understand the argument. I'm going to exclude the statements being offered by of the defense.

MR. DUVAL: Okay. Well, if we can find statements that were made before he was convicted, we're going to bring those statements to the Court and under the same circumstances ask that you --

THE COURT: It's a completely different circumstance if these statements are made to someone other than a defense investigator for Mr. Ibarra.

I mean the idea that spontaneous statements as declarations against penal interest are admitted or theoretically admissible because there's some indication that they ought to be considered reliable, and spontaneous declarations are considered reliable because they're made spontaneously, they're not made in response to an inquiry by some other person and after the declarant has had an opportunity to reflect. The circumstance here is he's not only had an opportunity to reflect, it's been two years since his own conviction, or a year a half or so, but a significant period of time.

So, if you can find other statements, and I think I previously invited both sides to present those to the Court, I'll take a look at them. Those would be different. But the ones that are being proffered here are not going to be admitted. I don't consider them trustworthy.

The case law I think is pretty clear in terms of

the Court having responsibility to examine the circumstances surrounding the statements being made by the declarant.

MR. DUVAL: I want the record to be clear about one other thing.

THE COURT: Sure. Go ahead.

MR. DUVAL: Exhibit A does not contain a statement made to defense counsel for Mr. Ibarra or a statement made to a representative of Mr. Ibarra, those statements were made to an investigator representing Mr. Miracle and to Mr. Miracle's then advisory counsel Joseph Allen.

THE COURT: Well, it's hard to tell. It says "Answers for Duval." So, I don't know who these statements were made to, because it's only answers, at least the first three pages of Exhibit A are only answers, not questions. And at the top of the first page it says "Answers for Duval." It would appear to me that the questions were posed to Mr. Duval. I don't know who the questions were posed to.

But again, so if you want to provide more information that you think would be relevant to the determination of whether they were made under circumstances that would suggest they're trustworthy I'll be willing to listen to you. And, furthermore, if you want to put on testimony, live testimony you can do that, too, in terms of how this particular document was created and how these answers were provided.

I assume because your name was at the top that this had some reference to what Mr. Strong was doing. But you're saying that these answers were made in 2006 at a time when -- well, you want to explain when those answers were provided?

MR. DUVAL: Yeah. Those questions were asked, the answers were provided through Lynn McLaren, who was investigator working for Mr. Allen. The pages beyond that were provided directly to Mr. Allen who was the attorney at that time.

THE COURT: So, if you want Miss McLaren to provide an additional report regarding how these answers were provided, the circumstances and all of that, that's fine, I'll take a look at that. I only can review what I have in front of me and that's what I have in front of me.

So, at this point based on what I have in front of me the motion to introduce these statements is denied, but without prejudice and we can revisit it if you would like.

MR. DUVAL: Okay. Thank you.

THE COURT: Okay. Anything else today?

MS. SMITH: No.

THE COURT: 9:30 tomorrow.

MR. DUVAL: Yes.

THE COURT: Thank you.

(RECESS)