UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOSEPH ANDREW PHIPPS, Petitioner-Appellant, v. NEIL MCDOWELL, Warden, Respondent-Appellee.	No. 19-56210 D.C. No. 5:18-cv-01302-PA-JEM Central District of California, Riverside ORDER

Before: THOMAS, Chief Judge, and BRESS, Circuit Judge.

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

Any pending motions are denied as moot.

DENIED.

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JOSEPH ANDREW PHIPPS,

Petitioner,

v.

NEIL McDOWELL, Warden,

Respondent.

Case No. EDCV 18-1302-PA (JEM)

ORDER ACCEPTING FINDINGS AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE

Pursuant to 28 U.S.C. Section 636, the Court has reviewed the pleadings, the records on file, and the Report and Recommendation of the United States Magistrate Judge. Petitioner has filed Objections, and the Court has engaged in a de novo review of those portions of the Report and Recommendation to which Petitioner has objected. The Court accepts the findings and recommendations of the Magistrate Judge.

IT IS ORDERED that: (1) the Petition for Writ of Habeas Corpus is denied; and (2) Judgment shall be entered dismissing the action with prejudice.

DATED: September 26, 2019

PERCY ANDERSON
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JOSEPH ANDREW PHIPPS,

Petitioner,

v.

NEIL McDOWELL,

Respondent.

Case No. EDCV 18-1302-PA (JEM)

JUDGMENT

In accordance with the Order Accepting Findings and Recommendations of United States Magistrate Judge filed concurrently herewith,

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

DATED: September 26, 2019

PERCY ANDERSON
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JOSEPH ANDREW PHIPPS,

Petitioner,

v.

NEIL McDOWELL, Warden,

Respondent.

Case No. EDCV 18-1302-PA (JEM)

ORDER DENYING CERTIFICATE OF APPEALABILITY

The Court has accepted the findings and recommendations of the Magistrate Judge, as set forth in the Report and Recommendation filed August 16, 2019, and has ordered the entry of Judgment dismissing this action with prejudice. Pursuant to Rule 11 of the Rules Governing Section 2254 cases, the Court "must issue or deny a certificate of appealability when it enters a final order adverse to the applicant."

The Court has reviewed Petitioner's contentions and is fully apprised of the relevant facts and law. For the reasons stated in the Magistrate's Report and Recommendation accepted by the Court, the Court concludes that Petitioner has not made a substantial

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showing of the denial of a constitutional right, as is required to support the issuance of a certificate of appealability. See 28 U.S.C. § 2253(c)(2).

Accordingly, the certificate of appealability is DENIED.

Dated: September 26, 2019

PERCY ANDERSON
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JOSEPH ANDREW PHIPPS,

Petitioner,

v.

NEIL McDOWELL, Warden,

Respondent.

Case No. EDCV 18-1302-PA (JEM)

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

The Court submits this Report and Recommendation to the Honorable Percy Anderson, United States District Judge, pursuant to 28 U.S.C. Section 636 and General Order 05-07 of the United States District Court for the Central District of California.

PROCEEDINGS

On June 16, 2018, Joseph Andrew Phipps ("Petitioner"), a prisoner in state custody, filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. Section 2254 ("Petition"). On October 11, 2018, Warden McDowell ("Respondent") filed an Answer. On October 29, 2018, Petitioner filed a Reply. The matter is ready for decision.

PRIOR PROCEEDINGS

On July 17, 2015, a San Bernardino County Superior Court jury found Petitioner guilty of second degree murder (Cal. Penal Code § 187(a)), a lesser included offense of first degree murder. (Lodged Document ("LD") 10, 3 Clerk's Transcript ("CT") 652, 659.) The jury found true allegations that Petitioner personally used a firearm (Cal. Penal Code § 12022.53(b)) and personally and intentionally discharged a firearm causing death (Cal. Penal Code § 12022.53(d)). (3 CT 653-54, 661.) On September 25, 2015, the trial court sentenced Petitioner to state prison for a term of 40 years to life. (3 CT 780, 786.)

Petitioner filed an appeal in the California Court of Appeal. (LD 2.) On March 27, 2017, the Court of Appeal affirmed the judgment in an unpublished opinion. (LD 1.) The Court of Appeal denied Petitioner's petition for rehearing. (LD 3, 4.) Petitioner filed a petition for review in the California Supreme Court, which summarily denied review on June 28, 2017. (LD 5, 6.)

On July 3, 2017, Petitioner filed a petition for a writ of habeas corpus in the California Supreme Court. (LD 7.) On September 27, 2017, the California Supreme Court summarily denied the petition. (LD 8.)

SUMMARY OF EVIDENCE AT TRIAL

Based on its independent review of the record, the Court adopts the following factual summary from the California Court of Appeal's unpublished opinion as a fair and accurate summary of the evidence presented at trial:

> For many months prior to Christy [Phipps]'s[1] death, she and [Petitioner] were having marital problems, and they frequently argued. She had filed for divorce, was engaging in a secret sexual relationship with another man, and planned to move out of the family home. [Petitioner] opposed the divorce. On

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[1] Because the victim, [Petitioner], and many of the witnesses were family members with the same last name, we refer to them by first name for clarity. No disrespect is intended.

various occasions, Christy told her boyfriend, sister, and close friend, that she was scared of [Petitioner] and that he had threatened her. Christy said that [Petitioner] threatened to kill her before he would allow her to divorce him, and told her that if he ever found out she was having an affair, he would do something that would land him in jail.

[Petitioner] ultimately found out that Christy was having an affair and that she was determined to leave him. On the night of January 29, 2013, Christy refused to accept some gifts that [Petitioner] tried to give her. They argued loudly. Their four children (the children) were in the home at the time. At around 11:19 p.m., [Petitioner] called his sister, Laura, who decided that she would go to the home and try to calm Christy down. Over the phone, Laura could hear Christy calling [Petitioner] "a piece of shit" and telling him "that he was no good." It would be another 20 or 25 minutes before Laura arrived.

The couple's 12-year-old daughter, Haley, heard [Petitioner] yelling that Christy had "changed" and heard Christy saying, "Stop, Joseph." As she walked into the master bedroom to say goodnight, Haley could see her mother sitting on her parents' bed and her father standing on the left side of the bed, grabbing Christy's arm and pointing a gun at Christy's head. [Petitioner] "kicked [Haley] out" of the room and told her to go back to bed. [Petitioner] then closed the bedroom door. After the door was closed, Haley heard a gunshot and heard her mother fall to the ground. By looking under the door of her parents' bedroom, Haley could see her mother's foot on the ground. [Petitioner] came out from the bedroom and told Haley to go back to bed, which she did.[2]

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[2] Haley disclosed these events to a police officer in May 2013. At trial in 2015, Haley recanted and testified that she had lied to the officer. The audio recording of Haley's May 2013 interview was played for the jury.

Laura arrived at the home with her teenage son Brandon at some point after the shooting. [Petitioner]'s and Laura's other brother, Troy, arrived at around the same time. Troy entered the home, discovered Christy's dead body, and instructed Brandon to wake up his cousins and get them out of the house. The children, who were not permitted to enter their parents' closed bedroom, were transported away by a relative. Troy called another brother, James, to come over and keep an eye on [Petitioner] while Troy called 911. Officers arrived on the scene after midnight in response to the 911 call.

Based on the crime scene and physical evidence, investigators determined that Christy was likely shot while she was sitting on the bed, and then rolled off the bed onto the floor, where officers found her body. A single bullet traveled in and out of Christy's head from left to right and pierced through bed sheets. The bullet was located in the bed with some of Christy's hair around it. The gun used to kill Christy, which belonged to [Petitioner], was found on the bottom left corner of the bed, covered by a blanket. Christy's hair, tissue, and blood were visible on the end of the gun's barrel. Officers observed apparent blood stains in various locations: on the bed, striated down the side of the bed, on the floor by Christy's head, and on a t-shirt found behind the door. Christy's bare feet were on the ground by the door.

A forensic pathologist testified that Christy died from a gunshot wound to her head and that her death was a homicide. The bullet entered Christy's left scalp and exited her right scalp with no movement front to back or back to front and a very slight upward trajectory.[3] The pathologist opined that at the time the gun was fired, it was in "hard contact" with the left side of Christy's head; based

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[3] The pathologist testified that the directional descriptions he used (e.g., left, right, front, back) were with reference to the standard anatomic position – a human body standing up, feet flat, facing forward, and palms forward.

on various indicators, no gases escaped from between the barrel of the gun and Christy's skin. She would have died immediately from the gunshot. Christy was right-handed. The forensic pathologist described the unlikelihood that a right-handed person could have self-inflicted the particular gunshot wound, based on human anatomy (i.e., length of arms and wrist flexibility) and the bullet's trajectory.

A firearms expert conducted a physical demonstration for the jury using a plastic replica gun. He attempted to use his right hand to hold the gun perpendicular to the left side of his head so that if he discharged the gun, the bullet would travel from left to right with no movement from front to back or back to front. The expert was able to discharge the gun only by changing his grip on the gun and using his thumb to pull the trigger rather than his forefinger.

The morning after Christy died, officers interviewed [Petitioner] at the police station. Although he coherently provided his background information, [Petitioner] would not provide an explanation of how his wife had been killed. During the course of the interview, he made certain incriminating statements, including, "It should have been me," "It was supposed to be me," "I'm a piece of shit," "They were leaving," "I didn't want to hurt her," and "I had the gun to my head."

Both Christy's and [Petitioner]'s DNA were found on the gun—Christy as a possible major contributor and [Petitioner] as a possible minor contributor. The DNA expert testified that these findings could be consistent with [Petitioner] holding the gun for a short period of time, pointing it at Christy's head, and shooting her. The expert could not draw any definitive conclusions regarding the shooter's identity due to many unknown variables, including the manner in which the DNA was transferred (e.g., perspiration, skin, etc.), the rate and quantity at

which the individuals normally shed DNA, and how long the DNA had been on the gun.

Similarly, a criminalist who analyzed gunshot residue (GSR) testified that he could not reach any conclusions regarding whether [Petitioner] had fired the gun. Although no GSR was detected on [Petitioner]'s hands, he could have washed off the particles. The GSR found on Christy's hands could have been from her being in close proximity to the discharged gun or having contact with a surface that had GSR on it. The criminalist testified that it was not surprising to find GSR on someone who was in the same room in which a gun has been fired.

At trial, [Petitioner] testified that Christy pointed the gun at his head and that he "grabbed her forearms," out of fear of being shot and to get the gun pointed away from him. Christy jerked her arms back, the two of them fell back onto the bed, [Petitioner] fell to one side, and "the gun went off." [Petitioner] could not explain how Christy was shot in the manner that she was, but he maintained that he heard the gun go off and saw Christy fall off of the bed. [Petitioner] testified that he never touched the gun on the night of the shooting. After seeing Christy's body fall to the ground, he "blacked out" and could not remember anything else, including his interview at the police station.[4]

(LD 1 at 2-6.)

PETITIONER'S CONTENTIONS

1. The evidence was constitutionally insufficient to support Petitioner's conviction and the jury's true findings on the firearm allegations.

2. The trial court's failure to instruct the jury regarding imperfect self-defense violated Petitioner's constitutional rights.

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[4] Despite purportedly having no memory of talking to his siblings, children, or any police officers after the shooting occurred, [Petitioner] testified that he did not wash his hands after the shooting.

3. Petitioner's constitutional rights were violated when the trial court permitted a gun demonstration.

4. Petitioner's constitutional rights were violated when his daughter's statements to the police were admitted as prior inconsistent statements and the prosecutor used them to "badger" her on the stand.

5. Petitioner's constitutional rights were violated by the prosecutor's misconduct.

6. Petitioner's constitutional rights were violated by the failure to preserve evidence.

7. Petitioner's constitutional rights were violated by the trial court's denial of his motion for change of venue.

8. Petitioner was deprived of a fair trial by jury misconduct.

9. Trial counsel was ineffective for failing to object to all instances of prosecutorial misconduct.

10. Petitioner's constitutional rights were violated when the trial court admitted evidence regarding the victim's state of mind.

11. Petitioner's constitutional rights were violated by cumulative error.

STANDARD OF REVIEW

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") governs the Court's consideration of Petitioner's cognizable federal claims. 28 U.S.C. § 2254(d), as amended by AEDPA, states:

> 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 of state court decisions consists of holdings (as opposed to dicta) of Supreme Court decisions "as of the time of the relevant state-court decision." Williams v. Taylor, 529 U.S. 362, 412 (2000); see also Lockyer v. Andrade, 538 U.S. 63, 71-72 (2003) (clearly established federal law is "the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision"). "[I]f a habeas court must extend a rationale before it can apply to the facts at hand, then by definition the rationale was not clearly established at the time of the state-court decision." White v. Woodall, 572 U.S. 415, 426 (2014) (internal quotation marks and citation omitted). If there is no Supreme Court precedent that controls a legal issue raised by a habeas petitioner in state court, the state court's decision cannot be contrary to, or an unreasonable application of, clearly established federal law. Wright v. Van Patten, 552 U.S. 120, 125-26 (2008) (per curiam); see also Carey v. Musladin, 549 U.S. 70, 76-77 (2006).

A federal habeas court may grant relief under the "contrary to" clause if the state court "applies a rule that contradicts the governing law set forth in [Supreme Court] cases," or if it decides a case differently than the Supreme Court has done on a set of materially indistinguishable facts. Williams, 529 U.S. at 405-406. "The court may grant relief under the 'unreasonable application' clause if the state court correctly identifies the governing legal principle . . . but unreasonably applies it to the facts of a particular case." Bell v. Cone, 535 U.S. 685, 694 (2002). An unreasonable application of Supreme Court holdings "must be objectively unreasonable, not merely wrong." White, 572 U.S. at 419 (citing Andrade, 538 U.S. at 75-76; internal quotation marks omitted). "A state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." Harrington v. Richter, 562 U.S.

86, 101 (2011) (citation omitted). The state court's decision must be "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." Id. at 102. "If this standard is difficult to meet, that is because it was meant to be." Id.

A state court need not cite Supreme Court precedent when resolving a habeas corpus claim. See Early v. Packer, 537 U.S. 3, 8 (2002). "[S]o long as neither the reasoning nor the result of the state-court decision contradicts [Supreme Court precedent,]" the state court decision will not be "contrary to" clearly established federal law. Id.

A state court's silent denial of federal claims constitutes a denial "on the merits" for purposes of federal habeas review, and the AEDPA deferential standard of review applies. Richter, 562 U.S. at 98-99. When no reasoned decision is available, the habeas petitioner has the burden of "showing there was no reasonable basis for the state court to deny relief." Id. at 98.

The federal habeas court "looks through" a state court's unexplained decision to the last reasoned decision of a lower state court, and applies the AEDPA standard to that decision. See Wilson v. Sellers, 138 S. Ct. 1188, 1192 (2018) (federal habeas court should "look through" unexplained state court decision to last state court decision "that does provide a relevant rationale" and "should then presume that the unexplained decision adopted the same reasoning," although presumption may be rebutted); Ylst v. Nunnemaker, 501 U.S. 797, 803 (1991) ("Where there has been one reasoned state judgment rejecting a federal claim, later unexplained orders upholding the judgment or rejecting the same claim rest upon the same ground.").

Petitioner presented Grounds One through Six and Ten to the state courts on direct appeal. (LD 2, 5.) The California Court of Appeal rejected the claims in a reasoned decision and the California Supreme Court summarily denied review. (LD 1, 6.) The Court looks through the California Supreme Court's silent denial to the Court of Appeal's reasoned

decision and applies the AEDPA standard to that decision.[5] See Wilson, 138 S. Ct. at 1192; Ylst, 501 U.S. at 803.

Petitioner raised Grounds Seven through Nine solely in his habeas petition, which was silently denied by the California Supreme Court. (LD 7.) In the absence of a reasoned decision regarding these claims, the Court will independently review the record to determine whether the state court's decision was an objectively unreasonable application of clearly established federal law . Himes v. Thompson, 336 F.3d 848, 853 (9th Cir. 2003).

As discussed below, Ground Eleven is unexhausted.

DISCUSSION

I. Ground One Does Not Warrant Federal Habeas Relief

Petitioner contends that the evidence at trial was constitutionally insufficient to support his conviction for second degree murder and the jury's true findings on the firearm enhancement allegations. (Pet. at 5, 13-32; Memorandum of Points and Authorities in Support of Petition ("Pet. Mem.") at 3-8.)

A. Applicable Federal Law

The Due Process Clause of the Fourteenth Amendment guarantees that a criminal defendant may be convicted only "upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In re Winship, 397 U.S. 358, 364 (1970). The federal standard for assessing the constitutional sufficiency of the evidence in support of a criminal conviction is set forth in Jackson v. Virginia, 443 U.S. 307 (1979). Under Jackson, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson, 443 U.S. at 319 (emphasis in original); see also Wright v. West, 505 U.S. 277, 296-97 (1992) (plurality

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[5] Petitioner also raised Grounds Three and Five in his state habeas petition, which was silently denied by the California Supreme Court. (LD 7, 8.) The pertinent reasoned decision remains the Court of Appeal's decision on direct appeal, but the Court will further discuss the standard of review in conjunction with its discussion of the merits.

opinion). Put another way, the Jackson standard "looks to whether there is sufficient evidence which, if credited, could support the conviction." Schlup v. Delo, 513 U.S. 298, 330 (1995).

The Jackson standard preserves the jury's responsibility to resolve conflicts in the testimony, weigh the evidence, and draw inferences from basic facts. Jackson, 443 U.S. at 319; see also Walters v. Maass, 45 F.3d 1355, 1358 (9th Cir. 1995) (reviewing court must respect the exclusive province of the trier of fact to determine the credibility of witnesses, resolve evidentiary conflicts, and draw reasonable inferences from proven facts). "[U]nder Jackson, the assessment of the credibility of witnesses is generally beyond the scope of review." Schlup, 513 U.S. at 330. A federal habeas court faced with a record supporting conflicting inferences "must presume – even if it does not affirmatively appear in the record – that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution." Jackson, 443 U.S. at 326; see also Wright, 505 U.S. at 296-97. Circumstantial evidence and reasonable inferences drawn from it may be sufficient to sustain a conviction. United States v. Jackson, 72 F.3d 1370, 1381 (9th Cir. 1995); Walters, 45 F.3d at 1358. Ultimately, "it is the responsibility of the jury – not the court – to decide what conclusions should be drawn from evidence admitted at trial." Cavazos v. Smith, 565 U.S. 1, 2 (2011) (per curiam).

Although sufficiency of the evidence review is grounded in the Fourteenth Amendment, the federal court must refer to the substantive elements of the criminal offense as defined by state law and must look to state law to determine what evidence is necessary to convict on the crime charged. See Jackson, 443 U.S. at 324 n.16; Juan H. v. Allen, 408 F.3d 1262, 1275 (9th Cir. 2005). However, "the minimum amount of evidence that the Due Process Clause requires to prove the offense is purely a matter of federal law." Coleman v. Johnson, 566 U.S. 650, 655 (2012).

Under AEDPA, the federal habeas court's inquiry is "even more limited"; the court "ask[s] only whether the state court's decision was contrary to or reflected an unreasonable

application of Jackson to the facts of a particular case." Emery v. Clark, 643 F.3d 1210, 1213-14 (9th Cir. 2011); see also Boyer v. Belleque, 659 F.3d 957, 964 (9th Cir. 2011) (where Jackson claim is "subject to the strictures of AEDPA, there is a double dose of deference that can rarely be surmounted"); Juan H., 408 F.3d at 1274 (under AEDPA federal courts must "apply the standards of Jackson with an additional layer of deference).

B. California Court of Appeal's Decision

The Court of Appeal found the evidence sufficient to support Petitioner's conviction and enhanced sentence. It stated:

> To support a finding of murder, the People were required to prove that [Petitioner] caused Christy's death, with malice aforethought, and without lawful excuse or justification. In addition, the People sought to prove that [Petitioner] caused Christy's death by personally discharging a firearm.
>
> Rejecting [Petitioner]'s explanation of events, as the jury was entitled to do, the evidence amply supports a finding that [Petitioner] murdered Christy by shooting her with his gun. There is substantial evidence that Christy's fatal gunshot wound was not self-inflicted, that [Petitioner] had a motive to kill her, and that he shot her without any excuse or justification. The forensic pathologist determined that Christy's death was a homicide based on a detailed examination of her body as well as reports of the crime scene, and determined that it was extremely unlikely that Christy could have inflicted the fatal wound herself. Various witnesses testified to a possible motive for [Petitioner] to kill Christy—he did not want her to divorce him, he had previously threatened her, and he was upset about her having an affair. In contrast, there was no substantial evidence that Christy would want to provoke or try to kill [Petitioner]. In addition, immediately before the shooting, [Petitioner] and Christy's daughter Haley witnessed [Petitioner] pointing the gun at the left side of Christy's head in a threatening manner and not in any apparent fear for his life. Haley's account matched the forensic and physical evidence, and it was unlikely that she could

> have described the events as she did unless she had actually witnessed them. Further, [Petitioner]'s conduct and statements at the police station suggested his guilt and that he had not acted in self-defense.
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> On appeal, [Petitioner] reargues the significance of certain facts and draws inferences from those facts to support a theory that Christy shot herself. In so doing, [Petitioner] essentially asks this court to reweigh the evidence and to draw inferences from the evidence in his favor. For example, he points to the fact that Christy's DNA was found on the gun and that there was GSR on her hands. However, those facts are not inconsistent with [Petitioner]'s having shot her. It is not this court's function to reweigh the evidence, but rather, to determine whether there is substantial evidence in the record to support the judgment. Further, on review, we draw all inferences in support of the judgment. The jury rejected [Petitioner]'s theories, and there is substantial evidence to support its findings.

(LD 1 at 8-9.)

C. Analysis

Viewed in the light most favorable to the prosecution, see Jackson, 443 U.S. at 319, the evidence was sufficient to support the jury's verdict of second degree murder and its findings that Petitioner personally and intentionally discharged the firearm that killed Christy. Petitioner and Christy were the only persons present when she was shot. (LD 12, 4 Reporter's Transcript ("RT") 949-50.) The forensic pathologist who performed an autopsy on Christy testified that she was shot in the left temple, with the bullet going through her skull and exiting on the right side a centimeter higher than the entrance wound. (2 RT 480, 482--97, 514.) Based on the absence of soot and stippling on Christy's skin, he opined that the gun was in "hard contact" with her left temple when it discharged. (2 RT 491-92.) Christy was right-handed. (2 RT 320; 4 RT 1029.) The pathologist opined that if Christy held the gun in her right hand, it would have been extremely difficult for her to shoot herself in her left temple so as to have the bullet come out of her right temple with an upward

orientation. (2 RT 499-502, 614). Petitioner argues that the gun demonstration illustrating this point was improperly admitted (Pet. at 30-32), but a court reviewing the sufficiency of the evidence "must consider all of the evidence admitted by the trial court, regardless of whether that evidence was admitted erroneously."[6] McDaniel v. Brown, 558 U.S. 120, 131 (2010) (internal quotation marks and citation omitted).

In addition, Petitioner's and Christy's daughter Haley told the police that immediately before the shooting, she saw Petitioner pointing a gun at Christy. Petitioner was standing to the left of Christy, who was sitting on the bed. (3 CT 804-06.) Although Haley recanted these statements at trial (1 RT 182-89) and testified that she was asleep and did not see anything (1 RT 191, 218), the jury was entitled to believe her earlier statements, which matched the forensic evidence, rather than her trial testimony.[7] See Walters, 45 F.3d at 1358. There was evidence that Petitioner was upset about Christy's affair and her plans to divorce him, and had verbally threatened her. (2 RT 305, 323-25, 333, 340-41, 419.) Petitioner's statements at the police station also suggested guilt. Petitioner said several times that "it should have been me," called himself a "piece of shit," and said that "they were leaving" and that he would shoot himself. (2 RT 423-26.)

Petitioner points to evidence supporting his version of the events. He stresses that Christy's DNA was on the gun and she had gunshot residue on her hands, whereas he was only a minor contributor to the DNA on the gun and had no gunshot residue on his hands. (Pet. at 27-28; Pet. Mem. at 11-12; see 4 RT 856-59, 883-84.) The DNA expert testified that the DNA evidence was consistent both with Christy being the only person to handle the gun the night of her death (and Petitioner's DNA being due to handling it in the past), and

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[6] The gun demonstration is the subject of Ground Three.

[7] Petitioner argues that his nephew's testimony that all the sisters, including Haley, were fast asleep when he woke them up after Petitioner's brother discovered Christy's dead body (1 RT 148-49) shows that Haley's statements to the police were false, because it is implausible that Haley saw her father pointing a gun at her mother, heard a shot and a thud, and then went to bed and fell asleep. (Pet. at 20; Reply at 3.) That was for the jury to consider in assessing the credibility of Haley's statements. "A jury's credibility determinations are . . . entitled to near-total deference under Jackson." Bruce v. Terhune, 376 F.3d 950, 957 (9th Cir. 2004); see also Schlup, 513 U.S. at 330.

with Petitioner holding the gun long enough to shoot Christy. (4 RT 862-63, 870-72.) The gunshot residue expert testified that a non-shooter within ten feet of a gun fired in a confined room may have gunshot residue on the hands. The shooter will definitely have gunshot residue on the hand immediately after firing, but if sampling is not immediate, gunshot residue might not be found because the shooter can rub it off or wash it off. (4 RT 890-91.) On sufficiency of the evidence review, the Court must assume that the jury resolved all conflicts and drew all reasonable inferences in favor of the verdict. Jackson, 443 U.S. at 326; see McDaniel, 558 U.S. at 133 (evidence that defendant washed his clothes immediately upon returning home supported inference that he did so to remove bloodstains; even though defendant provided alternative reason for washing clothes, reviewing court was obliged to draw inference supporting verdict).

Petitioner complains that the Court of Appeal did not discuss the forensic pathologist's testimony that other forces, i.e., forces other than the momentum of the bullet, would have to be involved for Christy's body to end up on the floor. (Pet. at 30; Pet. Mem. at 4-5; see 2 RT 502-03.) The pathologist testified that he could not say what other forces might have caused Christy's body to end up on the floor. (2 RT 502-03.) On direct appeal, Petitioner argued that his testimony described the "other forces": he pushed Christy's arms away as she pointed the gun at him, she yanked away, and the gun went off as she fell on the bed and rolled off. (LD 2 at 40-41; LD 5 at 5; see 4 RT 950.) But Petitioner's counsel made this argument in his closing statement (5 RT 1192, 1202), and the jury presumably rejected it. Jackson does not permit "fine-grained factual parsing" by the reviewing court, Coleman, 566 U.S. at 655, and the evidence need not "rule out every hypothesis except that of guilt beyond a reasonable doubt." Jackson, 443 U.S. at 326; see also United States v. Mares, 940 F.2d 455, 458 (9th Cir.1991) ("The relevant inquiry is not whether the evidence excludes every hypothesis except guilt, but whether the jury could reasonably arrive at its verdict.").

Petitioner wants the Court to reweigh the evidence and draw inferences different from the jury. That is impermissible. See Coleman, 566 U.S. at 655 ("Jackson leaves juries

broad discretion in deciding what inferences to draw from the evidence presented at trial, requiring only that jurors 'draw reasonable inferences from basic facts to ultimate facts'" (citation omitted)); Cavazos, 565 U.S. at 8 n.* ("reweighing of facts . . . is precluded by Jackson"). "A reviewing court may set aside the jury's verdict on the ground of insufficient evidence only if no rational trier of fact could have agreed with the jury." Cavazos, 565 U.S. at 4; see also Coleman, 566 U.S. at 656 ("The jury in this case was convinced, and the only question under Jackson is whether that finding was so insupportable as to fall below the threshold of bare rationality.") Petitioner's jury rejected his version of the shooting, and the Court of Appeal's determination that the jury's verdict passed muster under the deferential standard of Jackson was not objectively unreasonable.

Accordingly, the Court of Appeal's rejection of this claim was not contrary to, or an unreasonable application of, clearly established federal law as set forth by the United States Supreme Court. Ground One does not warrant federal habeas relief.

II. Ground Two Does Not Warrant Federal Habeas Relief

Petitioner contends that the trial court violated his constitutional rights by failing to instruct the jury regarding the lesser included offense of voluntary manslaughter based on imperfect self-defense. (Pet. at 5, 32; Pet. Mem. at 8-16.) Respondent argues that the claim is barred by the anti-retroactivity doctrine of Teague v. Lane, 489 U.S. 288 (1989), fails to present a federal question, and was reasonably rejected by the California Court of Appeal. He further argues that if there was federal error, it was harmless. (Answer at 11-14.)

A. Background

During the jury instructions conference, the trial court ruled that it would instruct the jury with CALCRIM No. 505 regarding justifiable homicide based on perfect self-defense, CALCRIM No. 510 regarding excusable homicide based on accident, CALCRIM No. 511 regarding excusable homicide based on accident in the heat of passion, CALCRIM No. 570 regarding voluntary manslaughter based on heat of passion, and CALCRIM No. 3403 regarding necessity. (4 RT 1066-66, 1069-73.) When the trial court inquired about

CALCRIM No. 571 regarding voluntary manslaughter based on imperfect self-defense, the prosecutor argued that the instruction did not apply, and trial counsel did not present a counter-argument. (4 RT 1066.) The trial court ruled that it would not give the instruction because the evidence did not support it. (4 RT 1067.)

B. California Court of Appeal's Decision

The Court of Appeal first set forth the applicable California law:

> When a defendant is charged with murder, the trial court has a sua sponte duty to instruct on imperfect self-defense if the evidence is such that a jury could reasonably conclude that the defendant killed the victim in the unreasonable but good faith belief in having to act in self-defense. (People v. Breverman (1998) 19 Cal.4th 142, 159.) The need to instruct "arises only when there is substantial evidence that the defendant killed in unreasonable self-defense, not when the evidence is 'minimal and insubstantial.'" (People v. Barton (1995) 12 Cal.4th 186, 201.) . . .
>
> Self-defense requires an actual and reasonable belief in the need to defend against an imminent danger of death or great bodily injury. [Citation.] If, however, the killer actually, but unreasonably, believed in the need to defend himself or herself from imminent death or great bodily injury, the theory of 'imperfect self defense' applies to negate malice." (People v. Viramontes (2001) 93 Cal. App. 4th 1256, 1261). Under both theories of perfect and imperfect self-defense, the defendant must have believed that the immediate use of deadly force was necessary to prevent imminent danger to himself. (People v. Por Ye Her (2009) 181 Cal. App. 4th 349, 353.)
>
> The Judicial Council's jury instruction on voluntary manslaughter based on imperfect self-defense provides in pertinent part: "The defendant acted in [imperfect self-defense] if: [¶] 1. The defendant actually believed that [he] was in imminent danger of being killed or suffering great bodily injury; [¶] AND [¶] 2. The defendant actually believed that the immediate use of deadly force was

> necessary to defend against the danger; [¶] BUT [¶] 3. At least one of those beliefs was unreasonable." (CALCRIM No. 571.)

(LD 1 at 10-11.)

Applying these principles, the Court of Appeal found that "the trial court correctly declined to instruct on imperfect self-defense." (Id. at 11.) It explained:

> [Petitioner]'s defense was that Christy accidentally shot herself, and was based on his testimony concerning the relevant events, as described above. [Petitioner]'s testimony does not support that he shot Christy because he believed the "immediate use of deadly force was necessary" to avoid imminent danger. (CALCRIM No. 571.) On the contrary, [Petitioner] denied that he shot Christy. He testified that he never touched the gun and that he merely grabbed Christy's forearms during their altercation. [Petitioner] claimed that he did not know how the gun "went off," but implied that Christy shot herself as she jerked her arms back or as she fell back onto the bed. According to [Petitioner], he was not at any time trying to fire the gun at Christy, and he employed only nonlethal force to attempt to get the gun pointed away from him. Thus, there was no substantial evidence that [Petitioner] shot Christy based on his belief that he had to kill or gravely injure Christy in order to save himself. "Under this victim-inflicted-[her]-own-injuries theory, [Petitioner] arguably was not entitled even to the actual self-defense instruction that the court gave." (People v. Szadziewicz (2008) 161 Cal. App. 4th 823, 834.) [Petitioner] clearly was not entitled to an imperfect self-defense instruction.

(Id. at 11-12.)

C. Applicable Federal Law

In Beck v. Alabama, 447 U.S. 625, 638 (1980), the United States Supreme Court held that a defendant in a capital case has a constitutional right to a jury instruction regarding a lesser included offense supported by the evidence. The Supreme Court, however, has not decided whether due process requires lesser included offense instructions

to be given in noncapital cases. Id. at 638 n.14; see Bortis v. Swarthout, 672 Fed. Appx. 754, 754 (9th Cir.) ("There is no Supreme Court precedent establishing that a state trial court is required to instruct on lesser included offenses in noncapital cases."), cert. denied, 137 S. Ct. 1605 (2017). The Ninth Circuit has declined to extend Beck to non-capital cases and has held that a state court's failure to instruct on a lesser included offense in a noncapital case does not present a federal constitutional question cognizable in a federal habeas proceeding. Solis v. Garcia, 219 F.3d 922, 929 (9th Cir. 2000); Windham v. Merkle, 163 F.3d 1092, 1106 (9th Cir. 1998); Turner v. Marshall, 63 F.3d 807, 819 (9th Cir. 1995), overruled on other grounds by Tolbert v. Page, 182 F.3d 677 (9th Cir. 1999); Bashor v. Risley, 730 F.2d 1228, 1240 (9th Cir. 1984).

Notwithstanding this general rule, a trial court's refusal to instruct the jury regarding a lesser included offense consistent with the defense theory of the case may implicate the defendant's constitutional right to present a defense and be a basis for a cognizable federal claim.[8] Solis, 219 F.3d at 929; Bashor, 730 F.2d at 1240; see also Bradley v. Duncan, 315 F.3d 1091, 1099 (9th Cir. 2002) ("[T]he right to present a defense would be empty if it did not entail the further right to an instruction that allowed the jury to consider the defense.") (internal quotation marks and citation omitted); Conde v. Henry, 198 F.3d 734, 739 (9th Cir. 2000) (as amended) ("It is well established that a criminal defendant is entitled to adequate instructions on the defense theory of the case.").

Even then, constitutional error warrants federal habeas relief only if it had a substantial and injurious effect or influence in determining the jury's verdict. See Brecht v. Abrahamson, 507 U.S. 619, 637 (1993). If a state court has found that a constitutional error

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[8] Whether this principle represents clearly established federal law for purposes of AEDPA is open to doubt. The Supreme Court has held that "[a]s a general proposition a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor," Mathews v. United States, 485 U.S. 58, 63 (1988), but Mathews was not decided on constitutional grounds. See Larsen v. Paramo, 700 Fed. Appx. 594, 596 (9th Cir.) (Mathews "stated a 'general proposition' of federal criminal procedure; it did not recognize a constitutional right to a jury instruction"), cert. denied, 138 S. Ct. 483 (2017). And in Gilmore v. Taylor, 508 U.S. 333, 343 (1993), the Supreme Court noted that its cases regarding the right to present a defense have dealt with the exclusion of evidence or testimony of defense witnesses, not with jury instructions.

was harmless, the federal habeas court must determine whether that finding was objectively unreasonable. Davis v. Ayala, 135 S. Ct. 2187, 2198 (2015). In such instances, "the Brecht test subsumes the limitations imposed by AEDPA." Id. at 2199. A federal habeas court applies the Brecht standard regardless of the harmlessness standard applied by the state court. Fry v. Pliler, 551 U.S. 112, 121-22 (2007).

D. Analysis

1. *Teague*

In Teague, the Supreme Court held that a new rule of constitutional law cannot be applied retroactively on federal collateral review to upset a state conviction or sentence, unless the new rule forbids criminal punishment of primary, private individual conduct or is a "watershed" rule of criminal procedure. 489 U.S. at 310-12; see Caspari v. Bohlen, 510 U.S. 383, 396 (1994). Federal habeas courts must decide at the outset whether Teague is implicated if the state argues that the petitioner seeks the benefit of a new rule. Caspari, 510 U.S. at 389. A rule may be "new" either because the decision relied upon by the habeas petitioner itself announced a new rule after his conviction became final, or because the habeas petitioner seeks to apply a prior decision's "old rule" to a novel setting, such that relief would create a new rule by extension of the precedent. See Stringer v. Black, 503 U.S. 222, 228 (1992). A Teague analysis looks to both Supreme Court and circuit case law in determining whether the rule advocated by the petitioner is "new." Butler v. Curry, 528 F.3d 624, 635 n.10 (9th Cir. 2008); Leavitt v. Arave, 383 F.3d 809, 819 (9th Cir. 2004) (per curiam) (as amended).

As discussed above, the Supreme Court has not addressed whether a criminal defendant has a due process right to a lesser included offense instruction in a noncapital case, and the Ninth Circuit has held that no such right exists. Solis, 219 F.3d at 929; Windham, 163 F.3d at 1106; Turner, 63 F.3d at 819; Bashor, 730 F.2d at 1240. The Ninth Circuit has also held that Teague bars the granting of federal habeas relief based on a failure to give a lesser included offense instruction in a noncapital case, because a finding

of constitutional error in such a case would create a new rule. Solis, 219 F.3d at 929; Turner, 63 F.3d at 819.

The Ninth Circuit views a claim challenging a trial court's refusal to instruct on the defendant's theory of the case as distinct from a claim challenging a failure to instruct on lesser included offenses, and such a claim is not barred by Teague. See, e.g., Solis, 219 F.3d at 929; Bashor, 730 F.2d at 1240. This exception does not apply here because, as discussed below, imperfect self-defense was not Petitioner's theory of defense. Accordingly, Petitioner's claim falls squarely under the general rule that Teague bars claims challenging a trial court's failure to give a lesser included offense instruction in a noncapital case.

2. Merits

Even if Petitioner's claim were not barred by Teague, it fails on the merits. The Ninth Circuit has held that a trial court's failure to instruct the jury regarding lesser included offenses in a noncapital case does not present a cognizable federal constitutional claim. See, e.g., Windham, 163 F.3d at 1106; Turner, 63 F.3d at 819; Bashor, 730 F.2d at 1240. Thus, Ground Two does not assert a constitutional error upon which habeas relief can be granted. In addition, AEDPA forecloses relief. Because no Supreme Court authority holds that a defendant has a constitutional right to a jury instruction on a lesser included offense in a noncapital case, the Court of Appeal could not have unreasonably applied clearly established federal law when it rejected Petitioner's claim. See Van Patten, 552 U.S. at 125-26; Musladin, 549 U.S. at 76-77.

Significantly, Petitioner's counsel did not argue for an instruction regarding imperfect self-defense at the jury instruction conference. In fact, he acquiesced in the trial court's decision to instruct the jury regarding voluntary manslaughter based solely on a heat of passion theory. (4 RT 1066.) Petitioner's theory of defense was that Christy accidentally shot herself after he grabbed her arms and she yanked away and fell on the bed. (4 RT 1192, 1207-08.) Counsel argued that Petitioner was afraid for his life because Christy was pointing a loaded gun at him, but he was arguing perfect self-defense. Under Petitioner's

version of the events, his fear for his life and his actions in grabbing Christy's arms would be reasonable. (5 RT 1207.) Because Petitioner did not pursue an imperfect self-defense theory, the trial court's refusal to give an imperfect self-defense instruction did not implicate his constitutional right to present a defense. See Bashor, 730 F.2d at 1240 (court's failure to instruct on lesser offenses did not violate petitioner's right to present a defense when petitioner's counsel did not request such instructions but chose "to base the defense on the theory that Bashor was either guilty or not guilty of deliberate homicide").

Furthermore, even in capital cases, or in noncapital cases implicating a defendant's theory of defense, a defendant has no due process right to a lesser included offense instruction that is not supported by the evidence. See Hopper v. Evans, 456 U.S. 605, 611-12 (1982) (capital case); Solis, 219 F.3d at 929 (non-capital case). A state court's finding that the evidence does not support an instruction under state law is entitled to a presumption of correctness on federal habeas review. Menendez v. Terhune, 422 F.3d 1012, 1029 (9th Cir. 2005). The Court of Appeal reasonably found that an imperfect self-defense instruction lacked evidentiary support. Petitioner testified that he did not fire the gun that killed Christy. (4 RT 953-54.) Christy pointed a loaded gun at him; he thought she would shoot him; he grabbed her arms to deflect the gun; she "violently jerked back" and fell backwards; and during the fall the gun went off. (4 RT 949-53.) Although Petitioner testified that he feared for his life (4 RT 950), he did not admit to shooting Christy but only to grabbing her arms.[9] Moreover, under those circumstances, he reasonably believed that his life was in imminent danger and reasonably responded by grabbing Christy's arms so that the gun would not point at him. Thus, Petitioner's testimony did not support a defense of imperfect self-defense.

Accordingly, for all these reasons, Petitioner is not entitled to federal habeas relief on Ground Two. His claim is barred by Teague, or alternatively, its denial by the Court of

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[9] For this reason, the Court of Appeal found that arguably the evidence did not warrant even a perfect self-defense instruction. (LD 1 at 11-12.)

Appeal was not contrary to, or an unreasonable application of, clearly established federal law as set forth by the United States Supreme Court.

III. Ground Three Does Not Warrant Federal Habeas Relief

In Ground Three, Petitioner contends that his constitutional rights were violated when the trial court permitted a prosecution witness to use a replica gun to demonstrate that it would have been difficult for Christy to shoot herself in a manner consistent with the physical evidence. He contends that the replica gun was so dissimilar to the actual gun that the demonstration had minimal probative value and greatly prejudiced him. (Pet. at 6, 33-34; Pet. Mem. at 16-19.)

A. Standard of Review

Petitioner presented this claim to the state courts on direct appeal. (LD 2, 5.) The California Court of Appeal denied it in a reasoned decision and the California Supreme Court summarily denied review. (LD 1, 6.) Petitioner re-raised this claim in his habeas petition in the California Supreme Court, this time accompanied by an unsigned declaration of juror William Rhodes and a signed declaration of a private investigator regarding her conversations with Rhodes. (LD 7.) The California Supreme Court summarily denied the habeas petition. (LD 8.) The Court reviews "the reasonableness of the California Supreme Court's decision by the evidence that was before it," including the newly added evidence, but uses the Court of Appeal's reasoning in accordance with the usual practice of "looking through" summary denials to the last reasoned decision. Reis-Campos v. Biter, 832 F.3d 968, 974 (9th Cir. 2016), cert. denied, 137 S. Ct. 1447 (2017) (citing Cannedy v. Adams, 706 F.3d 1148, 1159 n.5 (9th Cir. 2013)).

B. Background

Over trial counsel's objection, the trial court allowed criminalist Peter Vincie to perform a demonstration with a replica gun. Vincie attempted to use his right hand to place the replica gun perpendicular to the left side of his head. Vincie could not do so without his finger coming off the trigger. (3 RT 520, 537-38.) The trial court later refused to admit the

replica gun into evidence, stating that as compared to the actual gun, the replica gun had a longer barrel, it was plastic rather than metal, and the weight was different. (5 RT 1252.)

C. California Court of Appeal's Decision

The Court of Appeal found that the trial court's admission of the gun demonstration did not constitute an abuse of discretion under Cal. Evid. Code § 352.[10] (LD 1 at 14.) It stated:

> The People sought to demonstrate for the jury the unlikelihood that Christy, who was right-handed, could have inflicted the gunshot wound—a contact shot that entered the left side of her head and had no front to back or back to front movement—herself. The forensic pathologist had already testified to the unlikelihood of this scenario based on typical limitations of human anatomy. Although the firearms expert did not use the actual weapon during his demonstration, the differences between the gun used to kill Christy and the plastic replica were explained to the jury. The jurors were permitted to handle the actual gun, feel its weight, and observe the length of its barrel. Thus, "any potentially prejudicial effects of the inaccuracies [in the demonstration] were minimized, if not virtually eliminated." [citation omitted] Given the purpose of the demonstration, we conclude that the expert's demonstration was reasonable.
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> Further, the demonstration assisted the jurors in understanding what would be physically required for a right-handed person to shoot the gun in a manner consistent with the forensic evidence. We are not persuaded that the

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

Although the Court of Appeal addressed only the state law aspect of this claim, Petitioner has not rebutted the presumption that the Court of Appeal rejected the parallel federal claim on the merits. See Johnson v. Williams, 568 U.S. 289, 306 (2013) (when state and federal claims were very similar and petitioner herself treated them as interchangeable, unlikely that state court decided state law claim while overlooking federal claim).

> gun demonstration was prejudicial within the meaning of Evidence Code section 352. The expert was not purporting to reenact the crime, and the vast majority of his testimony involved explaining the mechanical operations of the actual gun used in the shooting. If the demonstration was damaging to [Petitioner], it was due to its high probative value and not to any emotional bias that it would provoke against him. . . .

(Id. at 13-14.)

D. New Evidence in State Habeas Petition

When Petitioner reasserted this claim in his state habeas petition, he attached an unsigned declaration of juror Rhodes. According to that declaration, the jury discussed the gun demonstration during deliberations. Rhodes felt that the demonstration was one-sided and unrealistic, and argued that the gun could have gone off during the struggle as Petitioner testified. Rhodes believes that the demonstration misled other jurors into believing that Petitioner's explanation was not plausible. (LD 7 at 45, ¶¶ 3-4.) He and "one or two other jurors" argued that the shooting was "not homicide." (Id. ¶ 5.) Rhodes is hard of hearing and throughout the trial he found it difficult to hear defense counsel. (Id., ¶ 6.) As a result, he lost confidence in what he "thought he heard," and eventually gave way to pressure by other jurors to change his vote. (LD 7 at 46, ¶¶ 7-8.)

Petitioner also attached to his state habeas petition a declaration executed on June 29, 2017 by private investigator Kristen Knowles. (LD 7 at 42 ¶ 1, 44.) She declares that: on March 9, 2017, she met with Rhodes; she drafted a declaration based on what he told her; she gave the declaration to Rhodes to review; during subsequent telephone conversations, Rhodes acknowledged that the declaration accurately set forth what he told her, but expressed concerns about signing the declaration because "it's a small town" and the district attorney would know about it; and on June 28, 2017, Rhodes told her that he would not sign the declaration.. (LD 7 at 42-43, ¶¶ 2-8.)

E. Applicable Federal Law

"The admission of evidence does not provide a basis for habeas relief unless it rendered the trial fundamentally unfair in violation of due process." Holley v. Yarborough, 568 F.3d 1091, 1101 (9th Cir. 2009) (citation omitted). The Supreme Court has defined the category of infractions that violate "fundamental fairness" very narrowly. Estelle v. McGuire, 502 U.S. 62, 72-73 (1991) (citing Dowling v. United States, 493 U.S. 342, 352 (1990)). "A habeas petitioner bears a heavy burden in showing a due process violation based on an evidentiary decision." Boyde v. Brown, 404 F.3d 1159, 1172 (9th Cir. 2005). Evidence introduced by the prosecution will often raise more than one inference, some permissible and some not, and it is up to the jury to sort them out in light of the trial court's instructions. Id.; Jammal v. Van de Kamp, 926 F.2d 918, 920 (9th Cir. 1991). "Only if there are no permissible inferences the jury may draw from the evidence can its admission violate due process. Even then, the evidence must be of such quality as necessarily prevents a fair trial." Jammal, 926 F.2d at 920 (internal quotation marks, emphasis, and citation omitted).

When an evidentiary error claim is governed by the Section 2254(d)(1) standard of review, federal habeas review is even more restricted. The Ninth Circuit has explained that "[u]nder AEDPA, even clearly erroneous admissions of evidence that render a trial fundamentally unfair may not permit the grant of federal habeas corpus relief if not forbidden by 'clearly established Federal law,' as laid out by the Supreme Court." Holley, 568 F.3d at 1101. "The Supreme Court has made very few rulings regarding the admission of evidence as a violation of due process," and "has not yet made a clear ruling that admission of irrelevant or overtly prejudicial evidence constitutes a due process violation sufficient to warrant issuance of the writ." Id.

F. Analysis

To obtain federal habeas relief, Petitioner must show that the Court of Appeal unreasonably applied clearly established federal law as set forth by the United States Supreme Court when it concluded that the replica gun demonstration did not violate due process. 28 U.S.C. § 2254(d)(1). Because the Supreme Court has never clearly held that

admission of irrelevant or overtly prejudicial evidence may violate due process so as to warrant federal habeas relief, Holley, 568 F.3d at 1101, "there was no clearly established federal law for the state court's determination to contravene." Pena v. Tilton, 578 Fed. Appx. 695, 695 (9th Cir. 2014). "When there is no clearly established federal law on an issue, a state court cannot be said to have unreasonably applied the law as to that issue." Holley, 568 F.3d at 1098 (citing Musladin, 549 U.S. at 77). Thus, Petitioner's claim fails under AEDPA.

Even if Petitioner's claim were not foreclosed by AEDPA, he has not shown a due process violation. The prosecution had the burden of proving that Christy did not accidentally shoot herself, as Petitioner testified. The prosecution firearm expert used a replica handgun to demonstrate to the jury that it would have been very difficult for Christy to hold the gun in her right hand and position it against her left temple in such a manner that the bullet would follow the trajectory described by the forensic pathologist. (3 RT 537-39.) Although the replica gun was not a replica of the actual gun, the differences between them were explained to the jury. The jury heard that the replica gun did not have a trigger safety catch like the actual gun and its barrel was one and a quarter inch to two inches longer. (3 RT 527, 537, 543-44, 728; 4 RT 813-15.) The bailiff showed the jurors the actual gun, and any jurors who wished to do so were permitted to feel its weight. (4 RT 814-16.) Because of the differences between the replica gun and the actual gun, the trial court did not permit the jurors to handle the replica gun and it was not admitted into evidence. (3 RT 540-41; 5 RT 1252.) Thus, there were permissible inferences the jury could draw from the demonstration, which was not unduly prejudicial. See Jammal, 926 F.2d at 920.

The additional evidence submitted during Petitioner's post-conviction proceedings does not change this analysis. Even if Rhodes had signed his declaration, Petitioner cannot demonstrate prejudice through juror testimony about the subjective effect of evidence on particular jurors. See Rushen v. Spain, 464 U.S. 114, 121 n.5 (9th Cir. 1983) ("a juror generally cannot testify about the mental process by which the verdict was arrived); Estrada v. Scribner, 512 F.3d 1227, 1237 (9th Cir. 2008) ("juror testimony about the subjective effect

of evidence on any of the particular jurors" may not be considered; applying Fed. R. Evid. 606(b) in case governed by AEDPA); Fed. R. Evid. 606(b).[11] The California Supreme Court similarly would not have considered Rhodes's statements because California also bars evidence of a juror's mental processes to attack a verdict. See Cal. Evid. Code § 1150(a); Estrada, 512 F.3d at 1237 n.10 (describing Cal. Evid. Code § 1150(a) as "substantively similar" to Fed. R. Evid. 606(b)).

Accordingly, the state courts' rejection of this claim was not contrary to, or an unreasonable application of, clearly established federal law as set forth by the United States Supreme Court. Ground Three does not warrant federal habeas relief.

IV. Ground Four Does Not Warrant Federal Habeas Relief

In Ground Four, Petitioner contends that his constitutional rights were violated when the trial court admitted Haley's recorded police interview and the prosecutor used it to "badger" Haley on the stand. (Pet. 6, 34-40; Pet. Mem. at 19-26.)

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[11] Fed. R. Evid. 606(b) provides:

> (1) **Prohibited Testimony or Other Evidence**. During an inquiry into the validity of a verdict or indictment, a juror may not testify about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment. The court may not receive a juror's affidavit or evidence of a juror's statement on these matters.
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> (2) **Exceptions**. A juror may testify about whether:
> (A) extraneous prejudicial information was improperly brought to the jury's attention;
> (B) an outside influence was improperly brought to bear on any juror; or
> (C) a mistake was made in entering the verdict on the verdict form.

In his Reply, Petitioner argues that the Court should consider Rhodes's unsigned declaration because Rule 606(b) does not preclude consideration of juror testimony regarding outside influences. (Reply at 7-8.) Petitioner has not identified any outside influences. The replica gun demonstration constituted evidence at trial. Petitioner attempts to analogize Rhodes's fear of the deputy district attorney to the situation in Tarango v. McDaniel, 837 F.3d 936, 942-43 (9th Cir. 2016), cert. denied, 137 S. Ct. 1816 (2017), where a juror known to be the holdout juror in a high-profile case involving the shooting of a police officer changed his vote to guilty after a police car tailed him during his drive to the courthouse. But Rhodes does not contend that the deputy district attorney did anything to intimidate him during the trial (or afterwards), and does not contend that his purported fear of her affected his vote.

A. Background

At the time of the shooting Haley was 12 years old. (1 RT 222.) The day after the shooting, Haley told a deputy sheriff that she was asleep at the time and did not see or hear anything. (1 RT 221-22.) Haley's friend Cheyanne testified at trial that Haley told her that she heard Christy say "No, Joe. No, Joe. Don't, no," and then heard a gunshot and a thud. Haley looked under the door and saw Christy's foot on the ground. (2 RT 295.) Haley told Cheyanne that she wanted to tell the police but her aunt (one of Petitioner's sisters) would not let her. (2 RT 295-96.) Cheyanne told her mother about Haley's statements and her mother told one of Christy's sisters, who told the police. (3 RT 578.)

On May 2, 2019, Detective Pennington spoke to Haley at Cheyanne's house. (1 RT 223-24; 3 RT 578-79.) Cheyanne and her parents were also present. (1 RT 223-24.) Haley did not know the interview was going to take place. (1 RT 224.) Pennington interviewed Haley at Cheyanne's house because he believed that Petitioner's family was trying to keep Haley from talking to the police. (3 RT 586-87.) At first Haley told Pennington that she was asleep at the time of the shooting and did not know what happened. (3 CT 800.) She then said that she heard Christy say, "Stop, Joseph." (3 CT 801.) She walked into her parents' bedroom and saw Petitioner pointing a gun at Christy's head. (3 Ct 804-05.) Christy was sitting on the bed with Petitioner standing on her ieft. (3 CT 805.) Haley also said that Petitioner grabbed Christy by the arm and pulled her. (3 CT 807.) Petitioner then "kicked [Haley] out of his room." (3 CT 805.) She heard a gunshot, and Petitioner came out of the room and told her to go to bed. (3 CT 806.) She saw Petitioner calling someone and pacing back and forth in the hallway. (3 CT 802.)

At trial, Haley testified that she lied to Detective Pennington. In fact, she was asleep during the shooting and did not see anything. (1 RT 182.) She lied because her maternal grandmother and aunts "promised [her] things" and told her what to say. (1 RT 182.) Cheyanne's mother promised to give her a butterfly necklace if she lied. (1 RT 183-84, 228-30.) After the interview Cheyanne's mother gave her a necklace with a dragonfly. (1 RT 226, 228.) During the interview Cheyanne texted her a script of what to say. (1 RT 185,

228.) The script was on Cheyanne's phone. Haley first said that she had Cheyanne's phone on her lap, but later said that Cheyanne held the phone right next to her so that she could see it. (1 RT185, 228-29.)

The trial court denied Petitioner's motion to exclude the recording of Halley's interview with Detective Pennington, and the recording was played at trial. (2 RT 350-57; 3 RT 580.) Detective Pennington testified that Cheyanne did not give Haley a cell phone during the interview. (3 RT 582.) Cheyanne testified that she did not tell Haley what to say and denied giving Haley a cell phone during an interview. (2 RT 297.) She testified that she did not have a cellphone at that time (2 RT 297), but the transcript shows her saying, "Mom can I see my phone real quick?" (3 CT 803.) Cheyanne's mother testified that she never told Haley to lie. (2 RT 307.) She gave Haley a dragonfly necklace because Christy loved dragonflies. (2 RT 306.) She bought it soon after Christy's death but gave it to her after the interview. (2 RT 30y, 313.)

B. California Court of Appeal's Decision

On appeal, Petitioner argued that Haley's statements to the police were inherently unreliable and untrustworthy, and their admission into evidence violated his constitutional rights of confrontation and due process. (LD 1 at 14.) The Court of Appeal found that the recorded interview was properly admitted as a prior inconsistent statement under Cal. Evid. Code § 1235. Petitioner's confrontation rights were not infringed because Haley testified at trial and was subject to cross-examination. (Id. at 14-15.) "[T]here was no requirement that Haley's prior statement show indicia of inherent reliability or trustworthiness." (Id. at 15.) Through "adversarial testing," the jurors could properly consider the reliability of Haley's statements, and it was the jury's role to decide which of her statements to believe, if any. (Id.) "There was no violation of [Petitioner]'s constitutional rights." (Id.)

C. Applicable Law and Analysis

The Confrontation Clause of the Sixth Amendment provides that the accused has the right to "be confronted with witnesses against him." U.S. Const. Amend. VI. The Supreme Court has held that the Confrontation Clause bars the introduction of testimonial

out-of-court statements by witnesses not appearing at trial unless the witnesses are unavailable and the defendant had a prior opportunity to cross-examine them. Crawford v. Washington, 541 U.S. 36, 53-54, 59 (2004). "[W]hen the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of [her] prior testimonial statements." Id. at 59 n.9. "The Clause does not bar admission of a statement so long as the declarant is present at trial to defend or explain it." Id.; see also California v. Green, 399 U.S. 149 (1970) ("the Confrontation Clause is not violated by admitting a declarant's out-of-court statements, as long as the declarant is testifying as a witness and subject to full and effective cross-examination").

Haley testified at trial and was subject to cross-examination. Accordingly, the introduction of her prior statements to the police did not implicate the Confrontation Clause. Petitioner vigorously argues that Haley's prior statements were unreliable, but reliability is not part of the post-Crawford confrontation analysis. See Crawford, 541 U.S. at 68-69 (overruling trustworthiness standard of Ohio v. Roberts, 448 U.S. 56 (1980)).

The Supreme Court has suggested that in some circumstances the Due Process Clause may bar the introduction of unreliable hearsay, Michigan v. Bryant, 562 U.S. 344, 370 n.13 (2011), and may bar admission of a prior inconsistent statement "where a reliable evidentiary basis is totally lacking," Green, 399 U.S. at 163 n. 15. These statements in cases addressing Confrontation Clause claims are dicta and do not represent clearly established federal law for purposes of AEDPA. See Williams, 529 U.S. at 412 (only Supreme Court's holdings constitute clearly established federal law). Nor is this a case where "a reliable evidentiary basis" for Haley's police statements was "totally lacking." Green, 399 U.S. at 163 n. 15. On the contrary, Haley's statement that Petitioner stood to the left of Christy as he pointed a gun at her head was consistent with forensic evidence that the bullet penetrated Christy's left temple.

Moreover, "[t]he admission of evidence does not provide a basis for habeas relief unless it rendered the trial fundamentally unfair in violation of due process." Holley, 568 F.3d at 1101; Johnson v. Sublett, 63 F.3d 926, 930 (9th Cir.1995). Haley's police

statements were properly admitted as prior inconsistent statements, and Petitioner had an adequate opportunity to examine Haley, Detective Pennington, Cheyanne, and Cheyanne's mother regarding the circumstances under which Haley made her statements. Petitioner contends that various factors rendered Haley particularly susceptible to police manipulation: she was only 12 years old, in a special program at school, mourning her mother's death, and not expecting the police interview. But the jury was aware of those circumstances, and was instructed regarding the factors relevant to evaluating a witness's credibility. (3 CT 615.) There was no fundamental unfairness in allowing the jury to decide whether to believe Haley's prior statements or her trial testimony.[12]

Accordingly, the Court of Appeal's rejection of this claim was not contrary to, or an unreasonable application of, clearly established federal law as set forth by the United States Supreme Court. Ground Four does not warrant federal habeas relief.

V. Ground Five Does Not Warrant Federal Habeas Review

Petitioner contends that the prosecutor committed misconduct and violated his due process rights during her direct examination of Haley, her cross-examination of Petitioner, her opening statement, and her closing statement. (Pet. at 6, 40-45; Pet. Mem. at 26-43.) Petitioner raised this claim on direct appeal, and re-raised it in his state habeas petition with the additional argument that the prosecutor's conduct at trial so affected juror Rhodes that he was afraid to sign his declaration. (LD 2, 5, 7.)

A. Applicable Federal Law

"[T]he touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor." Smith v. Phillips, 455 U.S. 209, 219 (1982). Thus, a habeas petition will be granted for prosecutorial misconduct only when the misconduct "so infected the trial with unfairness as to make the resulting conviction a denial of due process." Darden v. Wainwright, 477 U.S. 168, 181 (1986) (quoting Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974)); see also Parker v.

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[12] Petitioner's argument that the prosecutor used Haley's prior statements at her police interview to "badger" her at trial is discussed in connection with Ground Five.

Matthews, 567 U.S. 37, 45 (2012) (Darden standard constitutes relevant "clearly established federal law" for AEDPA review of prosecutorial misconduct claims). "Th[is] standard allows a federal court to grant relief when the state-court trial was fundamentally unfair but avoids interfering in state-court proceedings when errors fall short of constitutional magnitude." Drayden v. White, 232 F.3d 704, 713 (9th Cir. 2000).

B. Examination of Haley

Petitioner contends that the prosecutor committed misconduct when she "badgered" Haley on the stand, using Haley's "contaminated and coercive" interview with Detective Pennington. (Pet. at 39-40; Pet. Mem. at 27-29.) He points out that Haley was in a special program in school (1 RT 222), and that unlike Cheyanne (2 RT 290-91), she did not have a child advocate present when she testified (1 RT 173-74).

1. Questions at Issue

Petitioner specifically refers to the following questions:

"Why would you let your friend force you to tell lies that could hurt your dad?" Counsel objected "asked and answered," but the trial court overruled his objection. (1 RT 192.) Haley responded, "I don't know," and the prosecutor asked, "Because what you told Detective Pennington was the truth, wasn't it?" Counsel did not object and Haley responded, "No." (1 RT 192.)

"You have a pretty creative imagination to come up with all of that." Counsel objected "argumentative," and the trial court sustained his objection. (1 RT 193.)

"And you could have told him [Detective Pennington], 'I'm crying because I'm making all this up' couldn't you?" Counsel objected "calls for speculation," but the trial court overruled the objection. (1 RT 194.)

"And the reason you didn't is because you were telling him the truth –" Counsel's objection of "argumentative" was overruled. (1 RT 194.)

"[S]o it was worth to you getting a present that your dad would go to prison?" (1 RT 198.) Counsel objected that the question lacked foundation and called for a conclusion, but his objections were overruled. (1 RT 198-99.)

"So what's hard to understand is why you would let somebody influence you that way." Trial counsel said "Objection" and the prosecutor immediately asked another question without waiting for a ruling. (1 RT 200.)

"Is your love then for your dad, is what is making you testify that you told lies to Sergeant Pennington about what you saw that night?" Counsel objected "argumentative," but the trial court overruled the objection. (1 RT 217.)

"And, you know, sitting there today, that if you did see all of that, that you wouldn't be with your dad in the future, would you?" (1 RT 219.) Counsel objected "argumentative," but the trial court overruled the objection. (1 RT 220.)

2. California Court of Appeal's Decision

The Court of Appeal described Haley's direct examination as follows:

> Haley was called as the People's witness to describe what she saw and heard on the night of Christy's death. However, for the most part, Haley denied having seen or heard anything and testified that she had previously lied to a police officer in order to obtain a necklace. The prosecutor was entitled to probe into Haley's reasons for purportedly lying to the police officer in May 2013. The forensic and physical evidence validated Haley's earlier account, suggesting that she had been telling the truth during her police interview (and actually witnessed the events) but had decided more recently to protect her father. Defense counsel objected to certain questions, mostly as argumentative and/or lacking in foundation, and the court sustained some of the objections.

(LD 1 at 20.)

The Court of Appeal found that Petitioner had forfeited his prosecutorial misconduct claim to the extent his counsel did not specifically object to certain questions.[13] (Id. at 21.)

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[13] Respondent argues that Petitioner's prosecutorial misconduct claims based on these questions are barred by the doctrine of procedural default. Federal courts may address allegedly defaulted habeas claims on the merits if the lack of merit is clear but the procedural default issues are not. Lambrix v. Singletary, 520 U.S. 518, 523-25 (1997); Franklin v. Johnson, 290 F.3d 1223, 1232 (9th Cir. (continued...)

"Further, the prosecutor asked appropriate, challenging questions in order to pin down Haley's account of events." (Id.) "For example, the jury learned of a possible motive for Haley to be lying at trial – her desire to live with her father." (Id.) It concluded:

> [Petitioner] has not shown that the prosecutor's questioning of Haley was deceptive or reprehensible. Instead, the prosecutor's questions were fair in light of Haley's vacillating and strained testimony. There was no misconduct.

(Id. at 22.)

3. Analysis

The state court reasonably rejected Petitioner's due process claim. Haley was 15 at the time of the trial. (1 RT 173.) She recanted her prior statements to Detective Pennington that she saw Petitioner pointing a gun at Christy, and testified that she did not see or hear anything because she was in her room asleep. She testified that she lied to Detective Pennington because her maternal relatives "promised [her] things" and Cheyanne's mother promised her a necklace if she lied. (1 RT 182-2-1.) The prosecutor questioned her intensively, trying to establish that Haley was testifying falsely because she loved her father and wanted to live with him. (1 RT 182-203, 215-20.) There was no impropriety in questioning Haley about her prior inconsistent statements to Detective Pennington. See Cal. Evid. Code § 1235. Although the prosecutor's questioning of Haley was aggressive and at times unnecessarily sarcastic, her questions were based on the evidence and did not rise to the level of misconduct, much less a due process violation. See Darden, 477 U.S. at 181; see also Smith v. Campbell, No. C-06-2972-EMC, 2012 WL 1657169, at *23 (N.D. Cal. May 10, 2012) (noting that the prosecutor "may have been capable of more politely phrasing her questions," but her conduct did not reach "the level of misbehavior and badgering" that would constitute misconduct such as to deprive defendant of a fair trial).

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[13](...continued)
2002). In the interests of judicial economy, the Court will proceed to the merits of the claims without addressing the procedural default issue.

C. Cross-Examination of Petitioner

Petitioner contends that the prosecutor committed misconduct while cross-examining him. (Pet. at 40-42; Pet. Mem. at 29-34.)

1. Questions at Issue

Petitioner contends that the following questions constituted disguised argument:

"Isn't it, in fact, true you don't want to remember what happened?" Counsel objected "argumentative," but the trial court overruled the objection. (4 RT 956.)

"Right? So she wasn't pointing the gun at you, right?" The trial court overruled counsel's "argumentative" objection, but sustained an objection that the prosecutor was not giving Petitioner time to answer. (4 RT 960.)

"So you are not fearing for your life anymore. Correct?" Counsel's objection that the question misstated the evidence was overruled. (4 RT 961)

"And did you – you were going to try anything that night to get her to stay with you?" Counsel's objection to "anything" was overruled. (4 RT 971.)

"Is that what Haley saw, you grabbing Christy's arm when Christy aimed the gun at you?" Counsel's objection that the question called for speculation was overruled. (4 RT 980.)

"And your daughter said that, in fact, you were standing to – well, she was asked, Well, where was he standing? Well, he was standing next to . . . . my mom, who is sitting on the bed. And then the detective specifically asked her, Which side was she standing – was he standing on? And your daughter said the left side." (4 RT 984.) Counsel objected "Is that a question?" but the trial court allowed the prosecutor to proceed. She continued, "So your daughter saw you holding your wife on the end of the bed, right near the door. And you were standing on her left side." Counsel objected "calls for speculation," but the trial court allowed the prosecutor to continue. (4 RT 984.) "And you heard the medical examiner testify that the round went from the left side of her head to the right side, exactly where you were sitting, exactly where you're aiming the gun at her head, exactly where your daughter saw where you were standing. And that you were aiming the gun at your wife's

head." (4 RT 984-85.) Counsel objected that the question was compound, complex, and the prosecutor was testifying rather than asking. The trial court ruled that the question was compound and the prosecutor should start again. (4 RT 985.)

Petitioner argues that the following questions constituted disguised argument and improperly asked him to opine about Haley's veracity:

"How would Haley have known how exactly your wife was situated, what you were doing, and that the round went from the left to the right side of her head unless she actually saw it?" Counsel objected "argumentative," but the trial court overruled the objection. (4 RT 986.)

"Well, what I'm asking you though was not how everything happened so quickly. I'm asking you, how would Haley have known that unless she was there?" (4 RT 986-87.) Counsel's objection that the question called for speculation and was argumentative was overruled. (4 RT 987.)

"Do you know that Haley told her friend Cheyanne that she actually looked under the door and saw her mom's feet . . . in the room?" Counsel's objection that the question assumed a fact not in evidence was overruled. (4 RT 987.)

"How would Haley have known that her mom's feet were at the end of the bed unless she actually looked under the bed and saw them? How would she have been able to guess that?" (4 RT 987-88.) Counsel objected that the question was compound, argumentative and called for speculation. The trial court sustained the objection as to "calls for speculation." (4 RT 988.)

"And isn't it true that once you shot your wife, you came out of the bedroom and told Haley to go to bed, didn't you?" (4 RT 988.) There was no objection.

"But you heard the testimony from Sergeant Pennington that Haley told him that she didn't see her mom shot, but she heard the gunshot because she was outside of the room, and you came out and told her to go to bed?" Counsel's objection "as to what story at what time" was overruled. (4 RT 988.)

"You may not have told her that, but why would she have told the sergeant that if, in fact, she didn't see it and you didn't say that?" Counsel's objection that the question was argumentative and called for speculation was overruled. (4 RT 988.)

Petitioner contends that the following questions constituted improper argument:

"Was it -- when you came out of the room, after you shot your wife, was it hard to see your daughter, having to face her, after you just executed her mother?" Counsel objected to the word "executed" and the trial court directed the prosecutor to rephrase the question. (4 RT 989.) The prosecutor then asked, "Was it hard for you to face your 12-year-old daughter Haley once you shot her mom in the head?" Counsel's objection that the question misstated the evidence was overruled. (4 RT 989.)

Petitioner contends that the following line of questioning crossed the line from cross-examination to badgering:

"You blacked out when the detectives were interviewing you?" Counsel's objection that the question misstated the evidence was overruled. (4 RT 993-94.)

"Well, you testified previously that you did not black out when she aimed the gun at you. You did not black out when you grabbed her arms. You did not black out . . . when she was falling backwards." Counsel's objections that the question was argumentative, compound, and misstated the evidence were overruled. (4 RT 1004.)

"And you did not black out when you partially fell on her. And you didn't black out when she was laying on her side. And you did not black out when she falls to the ground. You blacked out afterwards?" (4 RT 1004.) There was no objection.

"Okay. So explain to me how if she has the gun aimed at you, you grab her forearms, you don't let go, but she falls backwards and you fall sort of on her, the gun just sort of goes off, how does she get the gun all the way on the other side of her head, up against her head, so that there's no gap, so that the gun is slightly angle[d] but hard pressed against her head? How does that happen?" The trial court overruled counsel's objections that the question had been asked and answered and that the prosecutor was badgering the witness. (4 RT 1010.)

"Is it your testimony when you fell on her, her arms had to have been pressed up against the side of her head when she pulled the trigger?" The trial court overruled counsel's objections that the question called for speculation and had already been answered. (4 RT 1011.)

"Cause we don't need to know how. The medical examiner told us." (4 RT 1011.) Counsel objected that the question was argumentative and the prosecutor was testifying. The trial court directed the prosecutor to rephrase the question. (4 RT 1011.)

"You know, when she fell off the bed, right when she's hit the ground, there would have been blood instantaneously. Because she had already been bleeding when she got shot, and was on the bed and then fell off it. So it is your testimony that when you blacked out, was it actually when she fell on the ground and then you blacked out or you looked at her on the ground and you blacked out?" The trial court sustained counsel's objection that the prosecutor was testifying and directed her to rephrase the question. (4 RT 1022.)

"So you testified that when your wife fell on the ground, you blacked out?" Counsel objected that the prosecutor was "rehashing over and over" and badgering the witness. The prosecutor said, "There is no objection for badgering." The trial court directed the prosecutor to move to another area. (4 RT 1022-23.)

2. California Court of Appeal's Decision

The Court of Appeal found no misconduct. It stated:

> Critical parts of [Petitioner]'s testimony contradicted the physical and forensic evidence, and he had no explanation for certain events when he should have had one. For instance, [Petitioner] could not explain how Christy was shot from left to right despite her being right-handed if he did not touch the gun and was holding her forearms. In addition, [Petitioner]'s testimony that he "blacked out" after the shooting was not credible, given that he was not drinking alcohol that night and his family members and police officers described him being sentient and lucid, albeit distraught. [Petitioner]'s claim that he never handled the gun that night was arguably contrived. Even though he claimed that he could not

> remember anything after Christy fell to the ground, he somehow knew that he had not washed his hands after the shooting, presumably because if he had, he would have washed off any GSR. These and other discrepancies abounded throughout his testimony.
>
> As with Haley, the prosecutor's zealous questioning was necessary to test [Petitioner]'s account of events, which was implausible and internally inconsistent. The prosecutor's questioning did not amount to misconduct.

(LD 1 at 22-23.)

3. Analysis

Petitioner has not shown that the state court's rejection of this prosecutorial misconduct claim was objectively unreasonable. The prosecutor was entitled to explore inconsistencies in Petitioner's testimony and to attempt to show that his version of the events was implausible. See Doyle v. Ohio, 426 U.S. 610, 617 n.7 (1976) (noting that prosecutors must be "allowed wide leeway in the scope of impeachment cross-examination"); People v. Chatman, 38 Cal.4th 344, 382 (2006) ("The permissible scope of cross-examination of a defendant is generally broad."). The prosecutor's questions were based on the testimony of prior witnesses and did not refer to matters not in the record. With a couple of possible exceptions, her questions did not constitute "a speech to the jury masquerading as a question" and "not seeking to elicit relevant testimony." Chatman, 38 Cal.4th at 384 (defining "argumentative question"). As for the questions that were argumentative, the trial court directed the prosecutor to rephrase them. (4 RT 989, 1011, 1022.) The jury was instructed to ignore questions as to which the trial court sustained an objection. (1 RT 103-04; 5 RT 1082.) The jury is presumed to follow its instructions. See Weeks v. Angelone, 528 U.S. 225, 234 (2000); Richardson v. Marsh, 481 U.S. 200, 211 (1987).

Petitioner argues that some of the prosecutor's questions sought to have him opine on Haley's veracity, but the prosecutor did not ask Petitioner whether Haley had lied. Rather, she challenged Petitioner's description of the events by asking him about Haley's

observations, which were consistent with the forensic evidence but conflicted with his account. The questions were proper under California law and did not constitute misconduct. See Chatman, 38 Cal.4th at 381–83 (defendant who is a percipient witness may be cross-examined regarding knowledge of facts showing that conflicting account by another witness is inaccurate, mistaken, or deliberately false).

Petitioner's remaining contentions regarding his cross-examination are without merit. The state court reasonably rejected this claim.

D. Prosecutor's Opening Statement

Petitioner contends that the prosecutor committed misconduct by intentionally misstating the evidence during her opening statement. (Pet. at 45; Pet. Mem. at 34-35.) Specifically, the prosecutor told the jury that when Petitioner called his sister, she could hear in the background Christy yelling abuse at him and saying, "I don't love you. I have a new boyfriend. He's better than you." (Augmented Reporter's Transcript ("ART") 3.) Petitioner's sister did not testify that she heard Christy telling Petitioner that she had a new boyfriend. (1 RT 118-31.) The prosecutor also said during her opening statement that Petitioner told Christy "If you ever leave me for another man, you won't like what you get," and "If I ever found out you cheated on me, what I'd do will end me up in jail." (ART 2-3.) Petitioner argues that Christy's boyfriend thought that these threats were directed at him, not Christy. (Pet. at 45; Pet. Mem. at 35-36.)

The California Court of Appeal rejected this claim, stating:

> We conclude that there is no reasonable likelihood that the jury was misled by any of the prosecutor's remarks. The jury was aware that no witnesses had yet testified and that the prosecutor was predicting and summarizing forthcoming evidence. The record supports that Christy did argue with [Petitioner] on the night she died, that she was having an affair, and that [Petitioner] had recently learned of the affair. In addition, various witnesses testified regarding [Petitioner]'s reported threats against Christy to the effect that he would harm her in some way if she were to leave or divorce him. There is no indication in the

> record that the prosecutor intentionally misstated evidence. [Petitioner] has not established misconduct.

(LD 1 at 23-24.)

The state court reasonably found no constitutional error. Although Petitioner's sister did not testify that she heard Christy yelling that she had a new boyfriend, she testified that she heard Christy yelling abuse at Petitioner. (1 RT 119-20.) And the jury heard evidence that Petitioner knew of Christy's affair. A police officer testified that Petitioner's brother mentioned that Petitioner had told him, the day before the shooting, that Christy was having an affair. (2 RT 419). Christy's boyfriend testified that Christy had told him that Petitioner "had threatened her and said if he found that she was . . . seeing someone else that she wouldn't like what he was going to do," and that "it would end him up in jail." (2 RT 333.) There was also other evidence that Petitioner had threatened Christy. Christy's sister testified that Christy told her that Petitioner said that if he ever found out she was unfaithful, both she and the person she cheated with would be sorry (2 RT 324), and Cheyanne's mother testified that Christy told her that Petitioner said that he would kill her before allowing her to divorce him (2 RT 305).

Accordingly, the discrepancies between the prosecutor's representations in her opening statement and the testimony presented at trial were minor and not prejudicial. If there was any prejudice, it was dispelled by the trial court's instructions that counsel's opening statements are not evidence. (1 RT 103; 5 RT 1081.) The jury is presumed to follow its instructions. Weeks, 528 U.S. at 226; Richardson, 481 U.S. at 211; see also Frazier v. Cupp, 394 U.S. 731, 735–36 (1969) (finding no prosecutorial misconduct when prosecutor summarized witness's expected testimony in opening statement but witness asserted privilege against self-incrimination at trial; stating that "not every variance between the advance description and the actual presentation constitutes reversible error, when a proper limiting instruction has been given"). The state court reasonably denied Petitioner's claim.

E. Prosecutor's Closing Statement

Petitioner contends that the prosecutor committed misconduct during her closing argument by characterizing him as a liar, misstating the prosecution's burden of proof, and vouching for prosecution witnesses. (Pet. at 44-45; Pet. Mem. at 35-41.)

A prosecutor may "strike hard blows" in closing argument, but "is not at liberty to strike foul ones." Berger v. United States, 295 U.S. 78, 88 (1935). In determining whether a prosecutor's comments rendered a trial fundamentally unfair, the statements must be analyzed in context. Boyde v. California, 494 U.S. 370, 385 (1990); Darden, 477 U.S. at 179; see also Hein v. Sullivan, 601 F.3d 897, 912–913 (9th Cir. 2010) (factors relevant to determining fundamental unfairness are "whether the comment misstated the evidence, whether the judge admonished the jury to disregard the comment, whether the comment was invited by defense counsel in its summation, whether defense counsel had an adequate opportunity to rebut the comment, the prominence of the comment in the context of the entire trial and the weight of the evidence"). "[A] court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations." Donnelly, 416 U.S. at 647.

1. Calling Petitioner a Liar

The prosecutor showed the jury a Power Point slide entitled "Defendant's Lies." Trial counsel's objection to the title was overruled. (5 RT 1123, 1127-28.) The prosecutor repeatedly said that Petitioner lied and called his testimony "a flat out lie," a "total fabrication," and "an absolute lie." (See, e.g., 5 RT 1126-27, 1163.) The trial court overruled trial counsel's objections. (5 RT 1127-28, 1163-64.)

On appeal, the Court of Appeal found no misconduct, stating:

> We have examined the record and conclude that the prosecutor's references to [Petitioner] as a liar and his "lies" were fair comments based on the evidence. [Petitioner] did not initially claim that Christy aimed the gun at him when he was interviewed by police, but he did at trial. Even then, he altered the details as he

> was testifying. His story contradicted the forensic evidence, and he did not coherently explain why Christy would have retrieved the gun, much less attempted to kill him. [Petitioner]'s account also did not comport with what Haley witnessed immediately before hearing the gun go off. The prosecutor could fairly argue that [Petitioner] was lying.

(LD 1 at 24-25.)

The state court's rejection of Petitioner's claim was reasonable. In order to meet her burden of proof, the prosecutor had to convince the jury that Petitioner did not act in self-defense and that his testimony regarding the shooting was false. The prosecutor discussed Petitioner's testimony in detail and argued that his version of the events should not be believed because it was implausible and contradicted the forensic evidence and Haley's statements to the police. A prosecutor is entitled to argue reasonable inferences from the evidence, including the inference that one of the two sides is lying. United States v. Molina, 934 F.2d 1440, 1445 (9th Cir. 1991). "[A] prosecutor is free to voice doubt about the veracity of a defendant's story." Dubria v. Smith, 224 F.3d 995, 1004 (9th Cir. 2000); see United States v. Laurins, 857 F.2d 529, 539 (9th Cir. 1988) (prosecutor's comment that defendant was a liar could be construed as comment on the evidence rather than statement of personal belief).

2. Burden of Proof

Petitioner contends that the prosecutor misstated the law and lowered her burden of proof when she told the jury:

> If you accept the truth – the story of the defendant as the absolute truth, he is saying that the victim, Christy Phipps, legally deserved to be shot point-blank in the head. You have to accept that if you believe in self-defense. It legally deserved – she legally deserved to be shot point-blank in the head.

(5 RT 1162-63; see Pet. Mem. at 36-39.)

Shortly afterwards, the prosecutor said: "Defendant's story is an absolute lie and this is why. So we will go through it step by step." (5 RT 1163.)

On appeal, the Court of Appeal found that "[t]he prosecutor's argument was not improper." (LD 1 at 25.) It stated:

> Just before the challenged comments, the prosecutor unequivocally stated, "People have to prove that the defendant did not act in self-defense" and reviewed the components of self-defense. Read in context, the prosecutor's "[i]f you accept the truth" comments did not misstate the law, which she had correctly recited only moments before. The prosecutor was merely urging the jurors to reject [Petitioner]'s story of "self-defense."

(LD 1 at 25.)

The state court's rejection of Petitioner's claim was reasonable. Petitioner argues that by equating a finding of self-defense with a finding that Christy deserved to be shot, the prosecutor was shifting the burden of proof to him. (Pet. Mem. at 37-38.) This is a strained reading of the prosecutor's argument. The prosecutor expressly acknowledged that she had the burden of proving that Petitioner did not act in self-defense. (5 RT 1162.) She reviewed the elements of self-defense and correctly stated that in order to act in self-defense, Petitioner had to use no more force than was reasonably necessary to defend against the danger. (5 RT 1162.) She then argued that to make this finding, the jury would have to find that Christy "legally deserved" to be shot in the head, i.e., that shooting Christy in the head was no more force than necessary for Petitioner to defend himself. Arguably, the prosecutor's "if you accept the truth" argument did not address Petitioner's actual theory of self-defense, which was that he grabbed Christy's arms in self-defense and the gun went off accidentally. But the argument did not shift the burden of proof and was not improper. Moreover, the jury was instructed on self-defense, reasonable doubt, and the prosecution's burden of proof, and was instructed to follow the instructions rather than any conflicting comments made by counsel. (5 RT 1079, 1081, 1091-92.) "[A]rguments of counsel generally carry less weight with a jury than do instructions from the court." Boyde, 494 U.S. at 384.

Petitioner additionally argues that the prosecutor's statement about Christy deserving to be shot was unduly inflammatory. (Pet. at 38-39.) The jury acquitted Petitioner of first degree murder and found him guilty of second degree murder. (3 CT 652.) The second degree murder verdict indicates that the jury was not inflamed. See United States v. De Cruz, 82 F.3d 856, 861 (9th Cir. 1996) (acquittal on one charge indicated that jury was not prejudiced against defendant).

3. Vouching

"Vouching consists of placing the prestige of the government behind a witness through personal assurances of the witness's veracity, or suggesting that information not presented to the jury supports the witness's testimony." United States v. Necoechea, 986 F.2d 1273, 1276 (9th Cir. 1993) (citation omitted). "As a general rule, a prosecutor may not express his opinion of the defendant's guilt or his belief in the credibility of government witnesses." Id. (citation omitted). On the other hand, prosecutors must have reasonable latitude to fashion closing arguments and can argue reasonable inferences based on the evidence. Id.

Petitioner contends that the prosecutor improperly vouched for Cheyanne's credibility when she said that Cheyanne "is a straightforward little kid . . . a very straightforward, honest kid." (Pet. Mem. at 39; see 5 RT 1110.) He further contends that the prosecutor vouched for the credibility of Cheyanne and Detective Pennington when she said that (1) Haley's testimony about getting phone messages from Cheyanne was not true because "Detective Pennington said she did not have a phone in her hands," and (2) Cheyanne's request to her mother for her phone in the middle of the interview "means nothing." (Pet. Mem. at 39; see 5 RT 1218.) Finally, he contends that the prosecutor expressed a personal opinion about his guilt when she said that it was understandable why Haley, faced with losing her remaining parent, would testify as she did, "[b]ut we know what happened." (Pet. Mem. at 40; see 5 RT 1156.)

The Court of Appeal found that "the prosecutor did not imply that she had personal knowledge of Cheyanne or Haley but instead, drew reasonable inferences based on their testimony." (LD 1 at 26) (citation and parenthetical omitted). The Court concurs. The prosecutor's characterization of Cheyanne as straightforward and honest was part of her argument that the jury should reject Haley's testimony that Cheyanne texted her a script, and should believe Cheyanne's testimony that she did not influence Haley's statements to Detective Pennington. Immediately after her "straightforward and honest" comment, the prosecutor summarized Cheyanne's testimony as "I was concerned about my friend. My friend Haley had told me what she had seen and I thought it was important that she tell the police." (5 RT 1110.) The prosecutor was not suggesting that she had personal knowledge of Cheyanne's credibility. Compare Hein, 601 F.3d at 913 (prosecutor vouched for witness's credibility when he described the witness as a "very powerful and credible witness," who was "painfully honest," was "the model of a perfect witness," was "so honest about it," and possessed "the kind of integrity that our system would like to see").

The prosecutor's statements that the jury should believe Detective Pennington's testimony that Haley did not have a cellphone during the interview, and that Cheyanne's mid-interview reference to a cellphone had no significance, were merely comments on the evidence. Similarly, the prosecutor's statement "we know what happened," when viewed in context, refers to her prior argument setting forth why the jury should disbelieve Haley's story that Cheyanne coached her on what to say. The prosecutor was not claiming that she had personal knowledge about which witness was telling the truth. See Duckett v. Godinez, 67 F.3d 734, 742 (9th Cir. 1995) (prosecutor's assertions regarding relative believability of witnesses were not representations of personal opinion but inferences from evidence); see generally United States v. Young, 470 U.S. 1, 11 (1985) (prosecutor's "statements or conduct must be viewed in context; only by so doing can it be determined whether the prosecutor's conduct affected the fairness of the trial").

Moreover, the jurors were instructed that the attorneys' remarks during closing argument were not evidence (1 RT 103; 5 RT 1081), and that the jurors alone should "judge the credibility or believability of the witnesses" (5 RT 1085). The jury is presumed to have followed these instructions, which helped mitigate any possible effects of the prosecutor's isolated comments. Weeks, 528 U.S. at 234; Richardson, 481 U.S. at 211.

Accordingly, the state court reasonably rejected this claim.

F. Cumulative Misconduct

Petitioner argues that the cumulative effect of the prosecutor's misconduct rendered his trial fundamentally unfair. (Pet. Mem. at 41-43.) The Court of Appeal did not expressly address this claim, presumably because it found that the prosecutor had not committed misconduct.

Under the cumulative error doctrine, the combined effect of multiple trial errors may give rise to a due process violation if it renders a trial fundamentally unfair, even if each error considered individually would not warrant relief. See Parle v. Runnels, 505 F.3d 922, 928 (9th Cir. 2007); Alcala v. Woodford, 334 F.3d 862, 883 (9th Cir. 2003). As discussed above, the state court reasonably concluded that there was no prosecutorial misconduct. Juror Rhodes's purported fear of the prosecutor adds nothing to this analysis, and he never says that his nervousness had anything to do with how she comported herself at trial. Thus, there is nothing to cumulate and no basis for habeas relief based on cumulative error. See Hayes v. Ayers, 632 F.3d 500, 524 (9th Cir. 2011) ("Because we conclude that no error of constitutional magnitude occurred, no cumulative prejudice is possible.").

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Accordingly, the state courts' rejection of Petitioner's prosecutorial misconduct claims was not contrary to, or an unreasonable application of, clearly established federal law as set forth by the United States Supreme Court. Ground Five does not warrant federal habeas relief.

VI. Ground Six Does Not Warrant Federal Habeas Relief

Petitioner contends that the police violated his constitutional rights under California v. Trombetta, 467 U.S. 479 (1984) by failing to preserve a key found on the bedroom floor after the shooting. (Pet. at 46; Pet. Mem. at 43-45.)

A. Background

Detective Pennington testified that while examining the crime scene, he noticed a key on the bedroom floor that looked like it might fit a locked safe in the closet. (2 RT 573.) Pennington used the key to unlock the safe, which contained a hookah. (2 RT 574.) It did not contain anything related to firearms. (2 CT 574-75.) He closed the safe and locked it. (3 RT 575.) He believes that he gave the key to one of the crime scene specialist ("CSS") personnel. (3 RT 575, 610.) However, apparently the key was not collected with the other evidence, because two weeks later Petitioner's brother found it in the bedroom while he was cleaning up. (4 RT 907-09.) Petitioner had a second key to the safe on his key ring. (4 RT 905.) Petitioner testified that the gun was kept in the safe. (4 RT 953.)

When asked whether the key was important evidence, Pennington said "no," and explained that even if Christy's DNA was found on the key, there was no way to prove that she used it to open the safe the night of the shooting, and the same was true for Petitioner. (3 RT 610.) The DNA expert testified that "there's no time stamp on DNA" and it cannot be determined when DNA was deposited. (4 RT 868.)

Trial counsel requested the trial court to give the following instruction:

> If the jury finds there was an improper destruction of evidence. The improper destruction of evidence could support an inference adverse to the prosecution which may be sufficient to raise a reasonable doubt with respect to the charges against the defendant.

(3 CT 650.)

The trial court told counsel that it would give the instruction, but only if it included additional language clarifying that failure to look for evidence does not constitute suppression

of evidence. (4 RT 1051-52.) Trial counsel initially opted for the pinpoint instruction with the additional language (4 RT 1052), but later withdrew the request for the special instruction (5 RT 1077).

B. Applicable Federal Law

The government's failure to preserve potentially exculpatory evidence may violate due process. Trombetta, 467 U.S. at 488–89. The duty to preserve evidence, however, is "limited to evidence that might be expected to play a significant role in the suspect's defense." Id. at 488. The evidence "must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." Id. at 489. When "no more can be said than that [the evidence] could have been subjected to tests, the results of which might have exonerated the defendant," the defendant must demonstrate the government's bad faith in failing to preserve the evidence. Arizona v. Youngblood, 488 U.S. 51, 57–58 (1988).

C. California Court of Appeal's Decision

The Court of Appeal rejected Petitioner's Trombetta claim. Referring to the key found on the bedroom floor as "key 2" and the key on Petitioner's key chain as "key 1," the Court of Appeal stated:

> The trial court's finding that key 2 possessed no apparent exculpatory value is supported by substantial evidence. At the time Officer Pennington found the key, there was nothing to indicate that the gun had been stored in the safe. He found nothing related to the crime or the gun in the safe. Even if the safe key had been found not to have [Petitioner]'s DNA on it, he would not have been eliminated as a suspect. Assuming that the gun had been retrieved from the safe on the night of the shooting, regardless of who retrieved the gun, [Petitioner] could still have used it to kill Christy. Further, there could be a number of

> reasons why his DNA might not be on key 2, or [Petitioner] could have used key 1 to open the safe. In short, key 2 had no apparent exculpatory value.
>
> [Petitioner] also failed to establish that the police acted in bad faith. Although Pennington considered the key to be irrelevant from an evidentiary standpoint, he believed that he had handed it off to CSS personnel for collection. It is possible that one of them may have left it at the scene. Under the circumstances, the failure of the police to collect the key from the crime scene "can at worst be described as negligent." Pennington explained why he would not have had the key tested for DNA. There was no denial of due process, and [Petitioner] was not entitled to a special evidentiary instruction.

(LD 1 at 18-19) (citations and parenthetical omitted).

D. Analysis

Petitioner argues that the failure to preserve the key resulted in the loss of exculpatory evidence because he could have been "eliminated as a suspect" if Christy's DNA and fingerprints were on the key and his were not. (Pet. Mem. at 43-44.) Petitioner is speculating as to what DNA and fingerprint tests on the key would have shown. See Youngblood, 488 U.S. at 57–58; see also Cunningham v. City of Wenatchee, 345 F.3d 802, 812 (9th Cir. 2003) (failure to gather physical evidence did not show bad faith because "the value of the untested evidence [was] speculative" and could have either exonerated or inculpated defendant). Moreover, the absence of Petitioner's DNA or fingerprints on the key would not have exonerated him because Petitioner could have used his other key to open the safe. (4 RT 905-06.) The key, therefore, had little exculpatory value. It certainly had none that was apparent to Detective Pennington, who did not know that (as Petitioner testified) the gun was kept in the safe. When Detective Pennington used the key to open the safe, the safe contained nothing related to firearms (2 RT 574), and its contents did not indicate that the gun came from the safe. The Court of Appeal reasonably found that the key had no exculpatory value apparent at the time it was left at the crime scene.

The Court of Appeal also reasonably found that Petitioner had not established bad faith. Pennington testified that despite his view that the key was unimportant, he handed it to CSS personnel for collection. (3 RT 610.) Although CSS personnel apparently left the key on the scene, that does not suggest more than negligence. See Youngblood, 488 U.S. at 58; see also Villafuerte v. Stewart, 111 F.3d 616, 625 (9th Cir. 1997) ("Even assuming that the officers were negligent, a negligent investigation does not violate [a defendant's] due process rights.") Petitioner points out that bad faith exists when "the police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant," id., and makes a strained argument that Pennington's act of checking to see whether the key fit the safe brings this case into this category. (Pet. Mem. at 44.) As discussed above, Pennington did not discard the key but gave it to persons responsible for collecting evidence. This is not a case where the police deliberately failed to collect potentially exculpatory evidence so as not to hamper a prosecution. Compare Miller v. Vasquez, 868 F.2d 1116, 1121 (9th Cir. 1989) (finding colorable claim of bad faith when investigating officer failed to collect victim's jacket after she told him it had the perpetrator's blood, lied about his knowledge of jacket, and tried to dissuade witnesses from testifying in defendant's favor).

Accordingly, the California Supreme Court's rejection of this claim was not contrary to, or an unreasonable application of, clearly established federal law as set forth by the United States Supreme Court. Ground Six does not warrant federal habeas relief.

VII. Ground Seven Does Not Warrant Federal Habeas Relief

In Ground Seven, Petitioner contends that the trial court's denial of his motion for change of venue violated his rights to an impartial jury and a fair trial. (Pet. at 47; Pet. Mem. at 45-47.)

A. Analysis

Petitioner moved for change of venue, arguing that widespread and negative media reports surrounding the case made it impossible to seat a fair and unbiased jury in the

Joshua Tree District. (1 CT 200-52.) He attached articles from a local newspaper (Hi-Desert Star) with a circulation of 7,800, internet articles, and a sample social medial post. (1 CT 216-31, 244, 251-52.) He also attached population data for Joshua Tree (2010 population 7,414), Yucca Valley (2010 population 20,700), Pioneertown (2006 population 350), Landers (2000 population 2,600), and Morongo Valley (2010 population 3,552). (1 CT 232-43.) The motion stated that both Petitioner and Christy were born and raised in the Joshua Tree District and had family and friends there. (1 CT 207.)

The prosecutor opposed the motion, arguing that the media coverage had been minimal; the potential jury pool included places other than those listed in the motion; and neither Petitioner nor Christy were prominent members of the community. (1 CT 255-65.)

At the hearing, the trial court stated that apart from the motion papers, it had reviewed population data for the local jury pool on the United States census website. The 2010 population of San Bernardino County was 2,035, 210. The 2010 population of Twentynine Palms was 25,048, of Yucca Valley was 20,700, of Joshua Tree was 7, 414, of the marine base was 3,846, of Morongo Valley was 3,552, and of Johnson Valley and Landers was 2,632. (1 RT 10.) The population was sufficiently large "to be able to choose from our jury pool." (1 RT 12.) The trial court described the coverage of the case in the newspapers as "relatively unspectacular" and noted the absence of any indications of coverage in the television news. (1 RT 11.) Petitioner did not have "any spectacular status" in the community. The trial judge had been a prosecutor in the community since the late nineties and a judge since 2006, and he had never heard of Petitioner, nor had he read or heard about him in the news. (1 RT 12-13.) The victim was also not prominent in the community and was not well known. (1 RT 13.) The trial court denied the motion, but stated that trial counsel could revisit the issue after voir dire was completed and before a jury was sworn. (1 RT 13.)

Before voir dire commenced, the trial court stated that it would ask the prospective jurors "whether anyone's familiar with the case given the number of stories that have been

written about or been on the radio." (1 RT 85-86.) The trial court said that it would "do a thorough inquiry," but that counsel were welcome to do further follow-up. (1 RT 86.)

The voir was not transcribed for appeal. (1 RT 92-95.) Trial counsel did not revisit the issue. (3 CT 568-69.)

B. Applicable Federal Law

The Sixth and Fourteenth Amendments guarantee a criminal defendant the right to be tried before a fair and impartial jury. Irvin v. Dowd, 366 U.S. 717, 722 (1961). When a trial court is unable to seat an impartial jury because of prejudicial pretrial publicity or an inflamed community atmosphere, due process requires that the trial court grant the defendant's motion for change of venue. Hayes, 632 F.3d at 507-08; see Rideau v. Louisiana, 373 U.S. 723, 726 (1963).

In order to show a constitutional violation from denial of a motion for change of venue, the defendant must show either presumed or actual prejudice. Skilling v. United States, 561 U.S. 358, 377-86 (2010); Estes v. Texas, 381 U.S. 532, 542-43 (1965). A presumption of prejudice "attends only the extreme case." Skilling, 561 U.S. at 381. Juror exposure to news accounts of the crime does not alone give rise to a presumption of prejudice. Murphy v. Florida, 421 U.S. 794, 798-99 (1975). Impartiality does not require that jurors be completely unaware of the facts and issues involved in a case. Id. at 800; Irvin, 366 U.S. at 722 (jurors are not required to be "totally ignorant of the facts and issues involved"). Rather, the question is whether the jurors have "fixed opinions" preventing them from judging the case impartially. Patton v. Yount, 467 U.S. 1025, 1035 (1984).

An examination of actual prejudice "focuses on the nature and extent of the voir dire examination and prospective jurors' responses to it." Hayes, 632 F.3d at 510; see Skilling, 561 U.S. at 385-86. The Supreme Court has "refused to equate juror impartiality with a lack of any preconceptions about the defendant or the case." Ybarra v. McDaniel, 656 F.3d 984, 992 (9th Cir. 2011) (citing Murphy, 421 U.S. at 799-800). Instead, the Supreme Court has "held that a rebuttable presumption of impartiality normally attached if the juror could

provide assurances that he or she could 'lay aside his impression or opinion and render a verdict based on the evidence presented in court.'" Id. (quoting Murphy, 421 U.S. at 800). The defendant can rebut this presumption by showing that the juror actually held a biased opinion. Id.

C. Analysis

The Supreme Court has declared that "[w]hen pretrial publicity is at issue, 'primary reliance on the judgment of the trial court makes [especially] good sense' because the judge 'sits in the locale where the publicity is said to have had its effect' and may base her evaluation on her "own perception of the depth and extent of news stories that might influence a juror.'" Skilling, 561 U.S. at 388 (citation omitted). A trial judge has "on-the-spot comprehension of the situation" that reviewing courts lack. Id. Here, the trial court was a longtime member of the community, first as a prosecutor and then as a trial judge. (1 RT 12.) It acknowledged that the jury pool was relatively small, but viewed it as large enough to select an impartial jury. (1 RT 12.) It found that neither Petitioner nor Christy were prominent members of the community, and considered the pretrial publicity in this case to be limited and not in any way remarkable. (1 RT 12-13.) In the absence of clear and convincing evidence to the contrary, the trial court's factual findings are presumed to be correct. Ybarra, 656 F.3d at 992; 28 U.S.C. § 2254(e)(1).

Petitioner has not shown that the publicity in his case was such as to utterly corrupt his trial and give rise to presumptive prejudice. Skilling, 561 U.S. at 388; Murphy, 421 U.S. at 798. Indeed, the articles attached to Petitioner's motion for change of venue are relatively neutral in tone and do not focus on inadmissible evidence. (See 1 CT 216-31.) Nor has Petitioner shown actual prejudice. Although the voir dire was not transcribed, the trial court indicated that it would question the jurors about their exposure to news coverage and presumably did so. (1 RT 85-86.) Trial counsel's failure to renew the motion for change of venue after jury selection was completed suggests that the jurors' responses did not raise additional concerns about their impartiality.

Petitioner points to the unsigned declaration of juror Rhodes, who stated that he knew about the homicide before he was called for jury duty. (Pet. at 56, ¶ 2.) Rhodes stated: "It is a small town and everyone knew about the homicide and where [sic] in my opinion, prejudiced by the adverse publicity in this case." (Id.) Assuming the Court can consider Rhodes's unsigned declaration, it does not rebut the presumption of impartiality. Jurors need not be totally ignorant of the facts and issues of a case to be impartial. Murphy, 421 U.S. at 800; Irvin, 366 U.S. at 722. And the fact that, according to Rhodes, he and "one or two" other jurors initially argued for accepting Petitioner's version of the shooting suggests that exposure to pretrial publicity about the case did not necessarily prejudice jurors against Petitioner. (See Pet. at 56, ¶ 5.)

In sum, the California Supreme Court reasonably found that the trial court's denial of Petitioner's change of venue motion did not violate his constitutional rights. See Ybarra, 656 F.3d at 992 (although petitioner's capital murder case was tried in a county of less than 8,000 people, all prospective jurors were exposed to media coverage, and at least nine seated jurors knew victim or her family, denial of change of venue motion did not warrant habeas relief because media coverage was not excessively biased or inflammatory and there was no evidence of actual bias based on news coverage); Casey v. Moore, 386 F.3d 896, 908-09 (9th Cir. 2004) (denial of motion for change of venue from small community where victim was well known did not support federal habeas relief when news coverage was largely factual and not inflammatory and there was no evidence of actual bias)

Accordingly, the California Supreme Court's rejection of this claim was not contrary to, or an unreasonable application of, clearly established federal law as set forth by the United States Supreme Court. Ground Seven does not warrant federal habeas relief.

VIII. Ground Eight Does Not Warrant Federal Habeas Relief

In Ground Eight, Petitioner contends that his constitutional rights were violated by juror misconduct. Specifically, he contends that: (1) juror Rhodes did not tell the trial court that he had trouble hearing trial counsel; (2) other jurors refused to listen to the views

expressed by juror Rhodes and "one or two" other jurors because they wanted to be done with the trial; (3) some jurors pressured juror Rhodes to change his vote; and (4) one juror was so carried away by her emotions that she wished to see Petitioner executed. (Pet. at 47-48; Pet. Mem. at 47-51; see also Pet. at 56-57, ¶¶ 5-8.)

Petitioner's claim of juror misconduct is based entirely on the unsigned declaration of juror Rhodes. Even if Rhodes had signed the declaration, statements by jurors may not be used to impeach a verdict unless the misconduct concerns extraneous influences on the jury. Tanner v. United States, 483 U.S. 107, 118 (1987). Juror testimony about internal matters – the mental processes of the jurors in reaching a verdict – may not be considered. See Rushen, 464 U.S. at 121 n.5; Estrada, 512 F.3d at 1237. The alleged misconduct by Rhodes and other jurors concerns purely internal matters. See Tanner, 483 U.S. at 118 ("Courts wisely have treated allegations of a juror's inability to hear or comprehend at trial as an internal matter."); Pannella v. Marshall, 434 Fed. Appx. 603, 605 (9th Cir. 2011) (rejecting claim that juror misconduct—foreperson's non-physical coercion of another juror to change her vote—warranted habeas relief where record supported state court's finding that allegations described no more than permissible "heated discussions that naturally occur at times during jury deliberations"); Estrada, 512 F.3d at 1237 (evidence that jurors were treated disrespectfully by other jurors and felt pressured to vote for second degree murder was inadmissible evidence of subjective mental processes); United States v. Decoud, 456 F.3d 996, 1019 n.11 (9th Cir. 2006) (Rule 606(b) barred "consideration of the declaration's allegation that the juror said that she was subjected to pressure by other jurors for being a 'holdout for acquittal'"). Rhodes's assertions that other jurors pushed him to change his vote, and that because of his hearing difficulties he lost confidence in "what [he] thought [he] heard" when arguing with other jurors (Pet. at 56-57, ¶¶ 7-8), clearly pertain to his mental processes in reaching a verdict.

Petitioner also argues that Rhodes's assertion that the other jurors wanted to be done with the trial before the weekend shows that the jurors refused to deliberate. The

jurors deliberated for approximately five and a half hours and reached a verdict at 3:19 p.m. (3 CT 594, 660.) No juror complained to the trial court that any other juror was refusing to deliberate. Each juror affirmed the verdict when polled. (5 RT 1265-66.) Moreover, Rhodes does not describe conduct by any juror in refusing to deliberate, but only his own general impression.

Petitioner argues that the alleged statement by one juror that Petitioner deserved to be executed shows that she was improperly "carried away by her emotions." (Pet. Mem. at 50.) But that juror, like the other jurors, voted to acquit Petitioner of first degree murder. (5 RT 1265-66.) The state court could reasonably view the statement as merely an over-emphatic expression of the juror's view that Petitioner had murdered Christy.

Accordingly, the California Supreme Court's rejection of this claim was not contrary to, or an unreasonable application of, clearly established federal law as set forth by the United States Supreme Court. Ground Eight does not warrant federal habeas relief.

IX. Ground Nine Does Not Warrant Federal Habeas Relief

In Ground Nine, Petitioner contends that trial counsel was ineffective for failing to object to prosecutorial misconduct and preserve the issue for appeal. (Pet. at 48-49; Pet. Mem. at 51-52.)

A. Applicable Federal Law

Review of an ineffective assistance of counsel claim involves a two-step analysis. See Strickland v. Washington, 466 U.S. 668, 687 (1984). First, Petitioner must prove that his attorney's representation fell below an objective standard of reasonableness. Id. at 687-88. Second, Petitioner must show that he was prejudiced by counsel's deficient performance. Id. at 687. Petitioner must prove both elements. Id. The Court may reject the petitioner's claims upon finding either that counsel's performance was reasonable or that the claimed error was not prejudicial. Id. at 697; see Rios v. Rocha, 299 F.3d 796, 805 (9th Cir. 2002) ("[f]ailure to satisfy either prong of the Strickland test obviates the need to consider the other").

Moreover, courts generally maintain a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Strickland, 466 U.S. at 689. Indeed, the Supreme Court dictates that "[j]udicial scrutiny of counsel's performance must be highly deferential." Id. In order to show that his counsel's performance was objectively unreasonable, Petitioner must overcome the strong presumption that the challenged action might be considered sound trial strategy under the circumstances. Id. A reasonable tactical decision by counsel with which Petitioner disagrees cannot form a basis for an ineffective assistance of counsel claim. See id. at 690. The Court does not consider whether another lawyer with the benefit of hindsight would have acted differently than Petitioner's trial counsel. Id. at 689. Instead, the Court looks only to whether Petitioner's trial counsel made errors so serious that counsel failed to function as guaranteed by the Sixth Amendment. Id. at 687. In conducting this analysis, the Court must make "every effort . . . to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Id. at 689.

Assuming that Petitioner can show that his counsel's performance was unreasonable, the Court still must determine whether counsel's performance prejudiced Petitioner. See Strickland, 466 U.S. at 694. Petitioner can prove prejudice by demonstrating "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. A "reasonable probability" is "a probability sufficient to undermine confidence in the outcome." Id.

"The standards created by Strickland and § 2254(d) are both 'highly deferential,' and when the two apply in tandem, review is 'doubly' so." Richter, 562 U.S. at 105 (internal citations omitted); see also Cullen v. Pinholster, 563 U.S. 170, 190 (2011) (review of state court's adjudication of Strickland claim is "doubly deferential" (citation omitted)). To succeed on an ineffective assistance of counsel claim governed by Section 2254(d), "it is not enough" to persuade a federal court that the Strickland test would be satisfied if a claim

"were being analyzed in the first instance." Bell v. Cone, 535 U.S. 685, 698-99 (2002). It also "is not enough to convince a federal habeas court that, in its independent judgment, the state-court decision applied Strickland incorrectly." Id. at 699. Rather, Petitioner must show that the state courts "applied Strickland to the facts of his case in an objectively unreasonable manner." Id.

B. Analysis

As discussed in connection with Ground Five, trial counsel failed to object to certain questions and statements by the prosecutor that Petitioner now contends constituted prosecutorial misconduct. However, although the California Court of Appeal found that Petitioner had forfeited some of his prosecutorial misconduct claims through counsel's failure to object, the Court of Appeal also found no misconduct. (LD 1 at 19, 21-22, 26.) Counsel's objections would have been meritless and futile, and counsel was not ineffective for failing to make them. See Juan H., 408 F.3d at 1273 ("trial counsel cannot have been ineffective for failing to raise a meritless objection"); James v. Borg, 24 F.3d 20, 27 (9th Cir. 1994) ("failure to make a futile motion does not constitute ineffective assistance"). For the same reason, Petitioner was not prejudiced by counsel's failure to preserve the issue for appeal. He has not shown a reasonable likelihood of a different result if counsel had objected. See Strickland, 466 U.S. at 694.

The California Supreme Court reasonably applied Strickland when it rejected this ineffective assistance claim. Ground Nine does not warrant federal habeas relief.

X. Ground Ten Does Not Warrant Federal Habeas Relief

In Ground Ten, Petitioner contends that his due process rights were violated when the trial court admitted testimony that Christy was afraid of him and that he had threatened her. He argues that Christy's hearsay statements were untrustworthy, prejudicial, and improperly offered to establish his intent. (Pet. at 49-51; Pet. Mem. at 53-55.)

A. Background

Petitioner moved to exclude evidence of certain statements made by Christy to other persons. (2 CT 434-38.) The trial court denied the motion. It found that Petitioner was placing Christy's state of mind at issue because he was claiming self-defense, and Christy's statements that Petitioner had threatened her were admissible under the state-of-mind exception to the hearsay rule. (1 RT 43-48.)

In her opening statement, the prosecutor told the jury that Petitioner had previously threatened Christy, telling her "If I can't have you, no one else will"; "if you ever leave me for another man, you won't like what you get"; and "If I ever found you cheated on me, what I'd do will end me up in jail." (ART 2-3.) Christy's boyfriend Sean Turner testified that Christy "was really worried and saying that [Petitioner] had threatened her and said if he found that she was . . . seeing somebody else that she wouldn't like what he was going to do." (2 RT 333.) The prosecutor asked whether Christy also said that Petitioner had said that it would end him up in jail, and Turner responded, "I believe so." (2 RT 333.) Christy was worried about Petitioner coming after Turner, but Turner told her that he was not worried. (2 RT 338-39.)

Christy's sister testified that Christy had told her that she was afraid of what Petitioner would do if she divorced him. (2 RT 319, 323-24.) Christy said that Petitioner would "go crazy"; she "didn't know what he was capable of doing towards her"; and Petitioner had told her that if he ever discovered that she was unfaithful, she and "the person that she was with" would be sorry. (2 RT 323-24.) Christy's friend Sarah Vaughan, the mother of Cheyanne, testified that Christy discussed her relationship with Petitioner with her and told her several times that she was afraid of Petitioner. Christy said that she would never be able to divorce him because Petitioner had told her that "he would kill her before he divorced her or allowed her to divorce him." (2 RT 303-06.)

B. Court of Appeal's Decision

The Court of Appeal rejected Petitioner's argument that the hearsay statements were improperly admitted.[14] (LD 1 at 16.) It explained:

> The statements were admissible as evidence of Christy's state of mind, an exception to the rule against hearsay. (Evid. Code, § 1250, subd. (a).) Evidence of a victim's fearful state of mind is admissible when relevant to an element of an offense or to rebut a claim that the victim's death was accidental or provoked. [Citation omitted]
>
> In his testimony, [Petitioner] portrayed Christy as the aggressor, claiming that she had retrieved the gun and pointed it at him. He implied that her aggressive conduct resulted in her accidentally shooting herself. Christy's fear of him was thus relevant to show that she was not the aggressor, did not provoke him, and did not kill herself. Moreover, Christy made the same type of statements to her boyfriend, sister, and close friend—people she normally and naturally spoke with about her relationship issues. The trial court could have reasonably concluded that Christy's statements were trustworthy, as well as more probative than prejudicial under Evidence Code section 352.

(Id.)

C. Analysis

The Court of Appeal found that testimony about Christy's statements regarding Petitioner's threats fell under the state of mind exception to the hearsay rule. The Court defers to the state court's interpretation of California evidence law. See Bradshaw v. Richey, 546 U.S. 74, 76 (2005) (per curiam) ("a state court's interpretation of state law, including one announced on direct appeal of the challenged conviction, binds a federal

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[14] Although the Court of Appeal addressed only the state law aspect of this claim, Petitioner has not rebutted the presumption that the Court of Appeal rejected the accompanying federal claim on the merits. See Johnson, 568 U.S. at 306.

court sitting in habeas corpus"); Estelle, 502 U.S. at 67-68 ("not the province of a federal habeas court to reexamine state-court determinations on state-law questions").

Petitioner argues that the evidence was unreliable because Christy made "self-serving, guilt relieving" statements to justify cheating on him. (Pet. Mem. at 53.) The Supreme Court has explained that the Constitution "protects a defendant against a conviction based on evidence of questionable reliability, not by prohibiting introduction of the evidence, but by affording the defendant means to persuade the jury that the evidence should be discounted as unworthy of credit." Perry v. New Hampshire, 565 U.S. 228, 237 (2012). Petitioner further argues that the evidence did not meet the reliability standard required by the Confrontation Clause of the Sixth Amendment, as set forth in Ohio v. Roberts, 448 U.S. 56 (1980). (Pet. Mem. at 53.) The Supreme Court has eliminated the reliability requirement of Roberts. Crawford, 541 U.S. at 68-69; see also Whorton v. Bockting, 549 U.S. 406, 420 (2007) (if hearsay statements are nontestimonial, "the Confrontation Clause has no application to such statements and therefore permits their admission even if they lack indicia of reliability"). Moreover, the Court does not construe Ground Ten to include an unexhausted confrontation claim, and even if Petitioner is asserting such a claim, it would fail on de novo review because statements made to friends and family members are nontestimonial and do not implicate the Confrontation Clause. See Giles v. California, 554 U.S. 353, 376 (2008) (noting that statements to friends and neighbors are nontestimonial); Garnett v. Morgan, 330 Fed. Appx. 671, 672-73 (9th Cir. 2009) (state court reasonably concluded that petitioner's wife's statements to friend were nontestimonial).

Petitioner argues that the evidence was so inflammatory and prejudicial as to violate due process. As discussed in connection with Ground Three, the United States Supreme Court has never clearly held that the admission of overtly prejudicial evidence violates due process so as to warrant federal habeas relief. Holley, 568 F.3d at 1101. "When there is no clearly established federal law on an issue, a state court cannot be said to have

unreasonably applied the law as to that issue." Id. at 1098 (citing Musladin, 549 U.S. at 77); see also Pena, 578 Fed. Appx. at 695. And even apart from AEDPA, Petitioner has not shown a due process violation. There were permissible inferences the jury could draw from evidence that Christy told her friends and relatives that Petitioner had threatened her and that she was afraid of him. The jury could infer that Petitioner rather than Christy was the aggressor. See Jammal, 926 F.2d at 920. Moreover, Petitioner's threats to Christy, as described by her, were not particularly inflammatory. See Ortiz-Sandoval v. Gomez, 81 F.3d 891, 898 (1996) (noting that threat made by defendant "was not particularly inflammatory or macabre"). The evidence was not of such quality as would render Petitioner's trial fundamentally unfair. See Jammal, 926 F.2d at 920.

Accordingly, the Court of Appeal's rejection of this claim was not contrary to, or an unreasonable application of, clearly established federal law as set forth by the United States Supreme Court. Ground Ten does not warrant federal habeas relief.

XI. Ground Eleven Does Not Warrant Federal Habeas Relief

In Ground Eleven, Petitioner contends that the cumulative effect of the errors alleged in this Petition rendered his trial fundamentally unfair. (Pet. Mem. at 55.) Respondent argues that this claim is unexhausted. Although Petitioner raised a cumulative error claim in his petition for review (see LD 5 at 20), it was not the same claim because his federal Petition includes claims not raised on direct appeal.

The Court may deny an unexhausted claim on the merits "when it is perfectly clear that the applicant does not raise even a colorable federal claim." Cassett v. Stewart, 406 F.3d 614, 623–24 (9th Cir. 2005); see also 28 U.S.C. § 2254(b)(2) ("[a]n application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies in the courts of the State").

As previously explained, the combined effect of multiple trial errors may give rise to a due process violation if it renders a trial fundamentally unfair, even if each error considered individually would not warrant relief. See Parle, 505 F.3d at 928; Alcala, 334 F.3d at 893.

"[T]he fundamental question in determining whether the combined effect of trial errors violated a defendant's due process rights is whether the errors rendered the criminal defense 'far less persuasive,' and thereby had a 'substantial and injurious effect or influence' on the jury's verdict." Parle, 505 F.3d at 928 (citations omitted). Usually, relief is warranted only when there is a "unique symmetry" of otherwise harmless errors, so that they amplify each other in relation to a key contested issue in the case and have a synergistic effect. Ybarra v. McDaniel, 656 F.3d 984, 1000-01 (9th Cir. 2011),

The Court has addressed each of the errors that Petitioner contends gave rise to cumulative error and has found that no error has occurred. Thus, there is nothing to cumulate and no basis for habeas relief. See Hayes, 632 F.3d at 524; Mancuso v. Olivarez, 292 F.3d 939, 957 (9th Cir. 2002) ("Because there is no single constitutional error in this case, there is nothing to accumulate to a level of a constitutional violation."), overruled on other grounds by Slack v. McDaniel, 529 U.S. 473 (2000).

Accordingly, Petitioner is not entitled to relief on his cumulative error claim.

RECOMMENDATION

THE COURT, THEREFORE, RECOMMENDS that the District Court issue an Order: (1) accepting this Report and Recommendation; (2) denying the Petition; and (3) directing that Judgment be entered dismissing this action with prejudice.

DATED: August 16, 2019

/s/ John E. McDermott
JOHN E. MCDERMOTT
UNITED STATES MAGISTRATE JUDGE

APPENDIX C

JOSEPH ANDREW PHIPPS
NAME

AY-1198
PRISON IDENTIFICATION/BOOKING NO.

Ironwood State Prison
ADDRESS OR PLACE OF CONFINEMENT

19005Wiley"s Wall Road, Blythe CA 92225

Note: It is your responsibility to notify the Clerk of Court in writing of any change of address. If represented by an attorney, provide his or her name, address, telephone and facsimile numbers, and e-mail address.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JOSEPH ANDREW PHIPPS

FULL NAME (*Include name under which you were convicted*)

Petitioner,

v.

NEIL MCDOWELL

NAME OF WARDEN, SUPERINTENDENT, JAILOR, OR AUTHORIZED PERSON HAVING CUSTODY OF PETITIONER

Respondent.

CASE NUMBER:

CV 5:18-1302

To be supplied by the Clerk of the United States District Court

☐ _____ AMENDED

PETITION FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY 28 U.S.C. § 2254

PLACE/COUNTY OF CONVICTION San Bernardino

PREVIOUSLY FILED, RELATED CASES IN THIS DISTRICT COURT (*List by case number*)

CV

CV

INSTRUCTIONS - PLEASE READ CAREFULLY

1. To use this form, you must be a person who either is currently serving a sentence under a judgment against you in a California state court, or will be serving a sentence in the future under a judgment against you in a California state court. You are asking for relief from the conviction and/or the sentence. This form is your petition for relief.
2. In this petition, you may challenge the judgment entered by only one California state court. If you want to challenge judgments entered by more than one California state court, you must file a separate petition for each court.
3. Make sure the form is typed or neatly handwritten. You must tell the truth and sign the form. If you make a false statement of a material fact, you may be prosecuted for perjury.
4. Answer all the questions. You do not need to cite case law, but you do need to state the federal legal theory and operative facts in support of each ground. You may submit additional pages if necessary. If you do not fill out the form properly, you will be asked to submit additional or correct information. If you want to submit a legal brief or arguments, you may attach a separate memorandum.
5. You must include in this petition all the grounds for relief from the conviction and/or sentence that you challenge. You must also state the facts that support each ground. If you fail to set forth all the grounds in this petition, you may be barred from presenting additional grounds at a later date.
6. You must pay a fee of $5.00. If the fee is paid, your petition will be filed. If you cannot afford the fee, you may ask to proceed *in forma pauperis* (as a poor person). To do that, you must fill out and sign the declaration of the last two pages of the form. Also, you must have an authorized officer at the penal institution complete the certificate as to the amount of money and securities on deposit to your credit in any account at the institution. If your prison account exceeds $25.00, you must pay the filing fee.
7. When you have completed the form, send the original and two copies to the following address:

Clerk of the United States District Court for the Central District of California
United States Courthouse
ATTN: Intake/Docket Section
255 East Temple Street, Suite TS-134
Los Angeles, California 90012

PLEASE COMPLETE THE FOLLOWING (*check appropriate number*):

This petition concerns:

1. ☑ a conviction and/or sentence.
2. ☐ prison discipline.
3. ☐ a parole problem.
4. ☐ other.

PETITION

1. Venue
   a. Place of detention Ironwood State Prison, 19005 Willey's Wall Road, Blythe CA 92225
   b. Place of conviction and sentence San Bernardino Superior Court

2. Conviction on which the petition is based *(a separate petition must be filed for each conviction being attacked).*
   a. Nature of offenses involved *(include all counts)*: second degree murder Penal Code § 187 (Count 1) allegations: Penal Code § 12022.53(b) personally and intentionally discharge a firearm and Penal Code § 12022.53(d) personally used a firearm
   b. Penal or other code section or sections: Penal Code § 187; Penal Code § 12022.53(b); Penal Code § 12022.53(d)
   c. Case number: FMB1300048
   d. Date of conviction: July 17, 2015
   e. Date of sentence: September 25, 2015
   f. Length of sentence on each count: 15 yrs to life count 1(PC § 187); 10 yrs stayed on use of firearm (PC § 12022.53 (b)); consecutive 25 yrs (PC § 12022.53 (d)) discharge firearm and GBI
   g. Plea *(check one)*:
      ☑ Not guilty
      ☐ Guilty
      ☐ Nolo contendere
   h. Kind of trial *(check one)*:
      ☑ Jury
      ☐ Judge only

3. Did you appeal to the California Court of Appeal from the judgment of conviction? ☑ Yes ☐ No
   If so, give the following information for your appeal *(and attach a copy of the Court of Appeal decision if available)*:
   a. Case number: D071096 formerly E064550
   b. Grounds raised *(list each)*:
      (1) There Was Insufficient Evidence for Second degree murder (additional grounds attached)
      (2) Failure to Give the Imperfect Self Defense Instruction was Error

(3) There Was Insufficient to enhance the sentence for personal use of firearm

(4) Improper Demonstration Gun conducted with a longer toy gun was prejudicial

(5) Improper admission of minor's prior statement in which she was vulnerably manipulated

(6) Improper admission of victim's hearsay statements regarding alleged threats of violence

c. Date of decision: 03/27/2017

d. Result Judgement Affirmed

4. If you did appeal, did you also file a Petition for Review with the California Supreme Court of the Court of Appeal decision? ☑ Yes ☐ No

If so, give the following information *(and attach copies of the Petition for Review and the Supreme Court ruling if available)*:

a. Case number: S241735 (additional Grounds Attached)

b. Grounds raised *(list each)*:

(1) Insufficiency of Evidence in Support of Conviction and Enhanced Sentence

(2) Ruling Regarding Imperfect Self Defense Was in Error

(3) The Denial of the Evidence Code § 352 Objection in Regard to the Toy Gun Demonstration

(4) Minor's Vulnerability and Manipulation Rendered Inconsistent Statement Inadmissable

(5) Prosecutorial Errors and Their Cumulative Effect Violated 5th ,6th and 14th Amend Rights.

(6) The Court of Appeal's Ruling Upholding Admitting State of Mind Evidence.

c. Date of decision: 06/28/2017

d. Result denied

5. If you did not appeal:

a. State your reasons

b. Did you seek permission to file a late appeal? ☐ Yes ☑ No

6. Have you previously filed any habeas petitions in any state court with respect to this judgment of conviction?

☑ Yes ☐ No

If so, give the following information for each such petition *(use additional pages, if necessary, and attach copies of the petitions and the rulings on the petitions if available)*:

a. (1) Name of court: SUPREME COURT OF THE STATE OF CALIFORNIA

(2) Case number: S242898

(3) Date filed *(or if mailed, the date the petition was turned over to the prison authorities for mailing)*: 07/03/2017

(4) Grounds raised *(list each)*:

(a) Denial of Denial of Motion for Change of Venue violated 5th,6th and 14th Amend.

(b) Petitioner Did Not Receive a Fair Trial Due to Jury Misconduct

(c) Improper Gun Demonstration with Toy Gun violated 5th,6th and 14th Amend.

(d) Ineffective Assistance re: Failure to Preserve Prosecutor's Misconduct Issue.

(e) Prosecutor Committed Misconduct

(f) Cumulative Misconduct

(5) Date of decision: 09/27/2017

(6) Result Denied

(7) Was an evidentiary hearing held? ☐ Yes ☑ No

b. (1) Name of court:

(2) Case number:

(3) Date filed *(or if mailed, the date the petition was turned over to the prison authorities for mailing)*:

(4) Grounds raised *(list each)*:

(a)

(b)

(c)

(d)

(e)

(f)

(5) Date of decision:

(6) Result

(7) Was an evidentiary hearing held? ☐ Yes ☐ No

c. (1) Name of court:

(2) Case number:

(3) Date filed *(or if mailed, the date the petition was turned over to the prison authorities for mailing)*:

(4) Grounds raised *(list each)*:

(a)

(b)

(c)

(d)

(e)

(f)

(5) Date of decision: _____

(6) Result _____

_____

(7) Was an evidentiary hearing held? ☐ Yes ☐ No

7. Did you file a petition for certiorari in the United States Supreme Court? ☐ Yes ☑ No

If yes, answer the following:

(1) Docket or case number (if you know): _____

(2) Result: _____

_____

(3) Date of result (if you know): _____

(4) Citation to the case (if you know): _____

8. For this petition, state every ground on which you claim that you are being held in violation of the Constitution, laws, or treaties of the United States. Attach additional pages if you have more than five grounds. Summarize briefly the facts supporting each ground. For example, if you are claiming ineffective assistance of counsel, you must state facts specifically setting forth what your attorney did or failed to do.

CAUTION: *Exhaustion Requirement*: In order to proceed in federal court, you must ordinarily first exhaust your state court remedies with respect to each ground on which you are requesting relief from the federal court. This means that, prior to seeking relief from the federal court, you first must present all of your grounds to the California Supreme Court.

a. Ground one: Insufficiency of Evidence in Support of Conviction and Enhanced Sentence violated Petitioner's 5th,6th and 14th Amendment Right

(1) Supporting FACTS: See Attached

(2) Did you raise this claim on direct appeal to the California Court of Appeal? ☑ Yes ☐ No

(3) Did you raise this claim in a Petition for Review to the California Supreme Court? ☑ Yes ☐ No

(4) Did you raise this claim in a habeas petition to the California Supreme Court? ☐ Yes ☒ No

b. Ground two: Ruling Regarding Imperfect Self Defense Was in Error and violated Petitioner's 5th,6th and 14th Amendment Rights

(1) Supporting FACTS: See Attached.

(2) Did you raise this claim on direct appeal to the California Court of Appeal? ☑ Yes ☐ No

(3) Did you raise this claim in a Petition for Review to the California Supreme Court? ☑ Yes ☐ No

(4) Did you raise this claim in a habeas petition to the California Supreme Court? ☐ Yes ☑ No

c. Ground three: Petitioner's was Deprived of 5th,6th and 14th Amendment Rights When Judge Permitted a Gun Demonstration with a Dissimilar Toy Gun.

(1) Supporting FACTS: See attached Fact

(2) Did you raise this claim on direct appeal to the California Court of Appeal? ☑ Yes ☐ No

(3) Did you raise this claim in a Petition for Review to the California Supreme Court? ☑ Yes ☐ No

(4) Did you raise this claim in a habeas petition to the California Supreme Court? ☑ Yes ☐ No

d. Ground four: Minor's Vulnerability and Manipulation During a Prior Inconsistent Statement was Used to Badger Witness Violating Petitioner's 5th,6th and 14th Amendment Rights.

(1) Supporting FACTS: see attached

(2) Did you raise this claim on direct appeal to the California Court of Appeal? ☑ Yes ☐ No

(3) Did you raise this claim in a Petition for Review to the California Supreme Court? ☑ Yes ☐ No

(4) Did you raise this claim in a habeas petition to the California Supreme Court? ☐ Yes ☑ No

e. Ground five: Prosecutorial Errors and Their Cumulative Effect Violated Petitioner's 5th ,6th and 14th Amendment Rights.

(1) Supporting FACTS: See facts

(2) Did you raise this claim on direct appeal to the California Court of Appeal? ☑ Yes ☐ No

(3) Did you raise this claim in a Petition for Review to the California Supreme Court? ☑ Yes ☐ No

(4) Did you raise this claim in a habeas petition to the California Supreme Court? ☑ Yes ☐ No

9. If any of the grounds listed in paragraph 8 were not previously presented to the California Supreme Court, state briefly which grounds were not presented, and give your reasons: _____

_____

_____

10. Have you previously filed any habeas petitions in any federal court with respect to this judgment of conviction?

☐ Yes ☑ No

If so, give the following information for each such petition *(use additional pages, if necessary, and attach copies of the petitions and the rulings on the petitions if available)*:

a. (1) Name of court: _____

(2) Case number: _____

(3) Date filed *(or if mailed, the date the petition was turned over to the prison authorities for mailing)*: _____

(4) Grounds raised *(list each)*:

(a) _____

(b) _____

(c) _____

(d) _____

(e) _____

(f) _____

(5) Date of decision: _____

(6) Result _____

_____

(7) Was an evidentiary hearing held? ☐ Yes ☐ No

b. (1) Name of court: _____

(2) Case number: _____

(3) Date filed *(or if mailed, the date the petition was turned over to the prison authorities for mailing)*: _____

(4) Grounds raised *(list each)*:

(a) _____

(b) _____

(c) _____

(d) _____

(e) _____

(f) _____

(5) Date of decision: _____

(6) Result _____

_____

(7) Was an evidentiary hearing held? ☐ Yes ☐ No

11. Do you have any petitions now pending (i.e., filed but not yet decided) in any state or federal court with respect to this judgment of conviction? ☐ Yes ☑ No

If so, give the following information *(and attach a copy of the petition if available)*:

(1) Name of court: _____

(2) Case number: _____

(3) Date filed *(or if mailed, the date the petition was turned over to the prison authorities for mailing)*: _____

(4) Grounds raised *(list each)*:

(a) _____

(b) _____

(c) _____

(d) _____

(e) _____

(f) _____

12. Are you presently represented by counsel? ☑ Yes ☐ No

If so, provide name, address and telephone number: Lynne Patterson 14121 Beach Boulevard Westminster CA 92

_____

_____

WHEREFORE, petitioner prays that the Court grant petitioner all relief to which he may be entitled in this proceeding.

Lynne Patterson
Signature of Attorney (if any)

I declare (or certify, verify, or state) under penalty of perjury that the foregoing and Attachment hereto are ~~is~~ true and correct.

Executed on 6-8-2018
Date

X Joseph Thuppa
Signature of Petitioner

JOSEPH ANDREW PHIPPS

Petitioner

NEIL MCDOWE LL

Respondent(s)

ELECTION REGARDING CONSENT TO PROCEED BEFORE A UNITED STATES MAGISTRATE JUDGE

- A magistrate judge is available under 28 U.S.C. § 636(c) to conduct all proceedings in this case, including dispositive matters and entry of final judgment. However, a magistrate judge may be assigned to rule on dispositive matters only if all parties voluntarily consent.
- Parties are free to withhold consent to magistrate judge jurisdiction without adverse substantive consequences.
- If both parties consent to have a magistrate judge decide the case, any appeal would be made directly to the Ninth Circuit Court of Appeals, as if a district judge had decided the matter.
- Unless both parties consent to have a magistrate judge decide the case, the assigned magistrate judge will continue to decide only non-dispositive matters, and will issue a Report and Recommendation to the district judge as to all dispositive matters.

Please check the "yes" or "no" box regarding your decision to consent to a United States Magistrate Judge and sign below.

☑ Yes, I voluntarily consent to have a United States Magistrate Judge conduct all further proceedings in this case, decide all dispositive and non-dispositive matters, and order the entry of final judgment.

☐ No, I do not consent to have a United States Magistrate Judge conduct all further proceedings in this case.

Executed on 05/30/18
Date


Signature of Petitioner/Counsel for Petitioner

_____
Petitioner

_____
Respondent(s)

DECLARATION IN SUPPORT OF REQUEST TO PROCEED *IN FORMA PAUPERIS*

I, _____, declare that I am the petitioner in the above entitled case; that in support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to relief.

1. Are you presently employed? ☐ Yes ☐ No

   a. If the answer is yes, state the amount of your salary or wages per month, and give the name and address of your employer. _____

   b. If the answer is no, state the date of last employment and the amount of the salary and wages per month which you received. _____

2. Have you received, within the past twelve months, any money from any of the following sources?

   a. Business, profession or form of self-employment? ☐ Yes ☐ No
   b. Rent payments, interest or dividends? ☐ Yes ☐ No
   c. Pensions, annuities or life insurance payments? ☐ Yes ☐ No
   d. Gifts or inheritances? ☐ Yes ☐ No
   e. Any other sources? ☐ Yes ☐ No

   If the answer to any of the above is yes, describe each source of money and state the amount received from each during the past twelve months: _____

3. Do you own any cash, or do you have money in a checking or savings account? *(Include any funds in prison accounts)*
   ☐ Yes ☐ No

If the answer is yes, state the total value of the items owned: _____

_____

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property? *(Excluding ordinary household furnishings and clothing)* ☐Yes ☐No

   If the answer is yes, describe the property and state its approximate value: _____

   _____

5. List the persons who are dependent upon you for support, state your relationship to those persons, and indicate how much you contribute toward their support: _____

   _____

   _____

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct.

Executed on _____ _____

Date *Signature of Petitioner*

CERTIFICATE

I hereby certify that the Petitioner herein has the sum of $_____ on account to his credit at the _____ institution where he is confined. I further certify that Petitioner likewise has the following securities to his credit according to the records of said institution: _____

_____

_____

_____ _____

Date *Authorized Officer of Institution/Title of Officer*

JOSEPH ANDREW PHIPPS Petitioner vs NEIL MCDOWE, Warden Respondent	ATTACHMENT TO PETITION FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY (28 U.S.C. § 2254)

3.b Grounds Raised in California Court of appeal continued

(7) Failure to Preserve Evidence.

(8) Prosecutorial Misconduct and Their Cumulative Effect.

(9) Cumulative Error

4.b Grounds for Petition for Review in California Supreme Court.

(7) Failure to Preserve Evidence.

(8). Cumulative Error Doctrine Requires Reversal

8. Additional Grounds for this Petition:

f. Ground 6: Failure to Preserve Evidence violated 5th,6th and 14th Amend.

(1) Supporting Facts: See below in FACTUAL ALLEGATIONS section.

(2) Was Claim raised in Direct Appeal ? Yes

(3) Was Claim raised in Petition for Review in California Supreme Court? Yes

(4) Was Claim raised in Habeas Petition in California Supreme Court? Yes

g. Ground 7: Denial of Motion for Change of Venue violated 5th,6th and 14th Amend.

(1) Supporting Facts: See below in FACTUAL ALLEGATIONS section.

(2) Was Claim raised in Direct Appeal ? No

(3) Was Claim raised in Petition for Review in California Supreme Court? No

(4) Was Claim raised in Habeas Petition in California Supreme Court? Yes

h. Ground 8: Petitioner Did Not Receive a Fair Trial Due to Jury Misconduct in violation of 5th,6th and 14th Amend.

(1) Supporting Facts: See below in FACTUAL ALLEGATIONS section.

(2) Was Claim raised in Direct Appeal ? No

(3) Was Claim raised in Petition for Review in California Supreme Court? No

(4) Was Claim raised in Habeas Petition in California Supreme Court? Yes

i. Ground 9: Ineffective Assistance re: Failure to Preserve Prosecutor's Misconduct Issue in violation of 5th,6th and 14th Amend.

(1) Supporting Facts: See below in FACTUAL ALLEGATIONS section.

(2) Was Claim raised in Direct Appeal ? No

(3) Was Claim raised in Petition for Review in California Supreme Court? No

(4) Was Claim raised in Habeas Petition in California Supreme Court? Yes

j. Ground 10: Admission of State of Mind Evidence in violation of 5th,6th and 14th Amend.

(1) Supporting Facts: See below in FACTUAL ALLEGATIONS section.

(2) Was Claim raised in Direct Appeal ? No

(3) Was Claim raised in Petition for Review in California Supreme Court? Yes

(4) Was Claim raised in Habeas Petition in California Supreme Court? NO

k. Ground 11: Cumulative Error Doctrine in violation of 5th,6th and 14th Amendment.

(1) Supporting Facts: See below in FACTUAL ALLEGATIONS section.

(2) Was Claim raised in Direct Appeal ? Yes

(3) Was Claim raised in Petition for Review in California Supreme Court? Yes

(4) Was Claim raised in Habeas Petition in California Supreme Court? No

FACTUAL ALLEGATIONS

8a. (1) Petitioner Alleges the Following Supporting Facts for the First Ground for Relief:

A. The Scene.

1. On January 30, 2013, 911 calls were made, one from the defendant's

brother that came in at approximately 2 minutes after midnight and one from the victim's mother at nine the next morning [4RT 809 – 811].

2. Detective Jeffrey Diekhoff was dispatched to AltaVista in Joshua Tree he arrived right around midnight. Diekhoff met Sergeant Hutchins at the scene. They were the first to arrive at the scene. Diekhoff noticed a group of people and cars congregating outside the location. He spoke to one of the male family members and found out there had been four children present [2RT 366-367, 409].

3. Entering the house Diekhoff and Sergeant Thomas Hutchins made contact with Joseph Phipps and his brother James. They were sitting in the living room side by side [2RT 368]. Joseph Phipps was rocking and in a distraught condition. Diekhoff checked that they were unarmed then proceeded into the bed room with Sergeant Hutchins.

4. Sergeant Thomas Hutchins was the watch commandeer at the scene. Upon entering the room it was apparent that a female was lying on the floor to the left of the bed. There was blood pooling around her head on the carpet. There was a plastic gun case on the baby crib but no weapon was visible. A shell casing was located on the right side of the bed. Diekhoff and Hutchins then returned to the living room [2RT 369-370, 397-401, 406-408].

5. Joseph Phipps informed the detective that there was a gun in the bed room but he was unsure of it location. Joseph Phipps was distraught and made no attempt to escape. Mr. Phipps collapsed into tears and squatted on the ground during his questioning outside the house. Diekhoff brought Joseph Phipps uncuffed to the station to conduct a test for gunshot residue (GSR) on his hands. The GSR test was conducted upon arrival at the station. Mr. Phipps was asked the last time he bathed or washed his hands since that could rinse away the residue. However, in Joseph Phipps distraught state he was unable to answer. [2RT 371-374, 379-380]. At trial Joe was able to remember between January 29, 2013 and January 30, 2013 after Christy was dead that he did not

wash his hands. [4RT 1016, 1019,1020].

6. Hutchins escorted medical into the bedroom. The two paramedics brought in an EKG. The box was set on the bottom left corner of the bed as you are facing the bed. The medic felt something underneath him as he set the box down. The blanket moved and a firearm was setting there. Blood and hair were inside the barrel of the gun. The gun was a semiautomatic a .45. The EKG found no heart beat or pulse [2RT 401-404].

7. Hutchins spoke to James before escorting Joseph Phipps to the patrol car [2RT 405]. Hutchins did not see Joseph Phipps use the rest room or wipe his hands before he was removed from the scene [2RT 408].

B. Earlier That Day.

1. Joseph Phipps went to work on January 29, 2013 at Hill's towing [4RT 936]. He returned to the house and took Haley, who stayed home from school due to illness to work with him. Sometime that morning Joe went to a pawn shop with Christy, who had pawned her ring, in order to recover the ring.[4RT 937]. Mr. Phipps' brother Mr. Reynolds loaned him the money to recover the ring [1RT 145]. Joe Phipps kept the ring because Christy was worried she would lose it at work. [4RT 938, 997-999].

2. Mr. Phipps went home after work on January 29, 2013 [4RT 939]. Christy asked him to return to the shop to retrieve a copy of Rebecca's birth certificate and while he was out Christy text him requesting he pickup some things at the store. [4RT 940].

3. On January 29, 2013, Joe Phipps did not know Christy was having an affair with Sean Turner. However, his brother Troy Reynolds knew. Mr. Phipps did know that Christy wanted to move out of the house. She had mentioned it multiple times that she wanted her own place. That evening Joe Phipps also went to Vons to purchase flowers. His nephew and his nephew's fiancé , Alison, helped him pick out the card [4RT 941 – 942, 969-972].

C. The Events Leading Up To The Incident.

1. Joseph arrived home and prepared corn dogs for everyone because his daughter and wife were arguing over who would make dinner [4RT 943-944, 972]. Rebecca had been texting her mother and did not want to talk to her anymore so she left her cell phone in the living room. [1RT 162].

2. Joseph gave Christy the card before bringing corn dogs to her in the bedroom. Christy was on the phone and watching TV. Haley came in to say good night while Joe was sitting on his side of the bed. After serving the corn dogs, Joe was in the living room with his son. All three girls retired to one bedroom having a little "sister time" watching TV and eating corn dogs. Their door was closed [4RT 944-945, 974-975].

3. On January 29, 2013, Rebecca and her sisters went to bed around 9:00 or 10:00 p.m., the sisters were staying in Rebecca's room [1RT 163, 2RT 387].

4. At some point during the evening Christy came out of the bedroom and returned the card and flowers to Joe. Christy had been brooding because Joe had stepped in when Becky was supposed to make dinner. They argued about past stuff, for example Christy withdrawing $500.00 from the account all the time. Christy then went outside to smoke, returned and continued arguing with Joseph calling him a worthless piece of shit. Christy was still screaming in the background, when Joe called his sister Laura Fisher and asked that she come over and calm Christy down. There was no physical confrontation [4RT 946-947, 973-974, 977-978].

5. After the argument Christy returned to the bedroom and closed the door. Joe opened the bedroom door intending to cross the bedroom to use his bathroom. Joe saw Christy standing by the bed holding the gun with both hands. The gun was pointed at his head. Christy was turning from facing the crib as Joe walked in. Joe asked her to give him the gun. Christy responded: "I cannot take this shit no more". Joe grabbed Christy's forearms [4RT 948-949, 957, 1034-1038].

6. Christy violently jerked back, so the gun was no longer pointing at Joe. The

struggle took place in the foot or two of floor space between the bed and the door. They both fell toward the bed. The gun went off. As Joseph falling he landed partially on Christy, hitting the bed, then falling off and ended up on the floor. Christy fell on the bed, then rolled off and lay on the floor. Joe was on the floor and standing up when he saw Christy roll off the bed and Joe exclaimed "oh shit are you okay". After that Joseph blacked out. Joseph feared for his life when he grabbed for the gun Christy was pointing at him. [4RT 950, 955, 958, 960-963].

7. Joseph remembers nothing from that point on through the next morning [4RT 951, 956]. Joseph does not remember anything until he woke up in a cell with five other guys. Joe has no recollection of an interview with Detectives Flores and Rodriguez [4RT 990-995].

8. Joseph does not know how the gun went off. Prior to that night, the gun had been in the safe for over a year. Joseph never shot it. The gun was loaded [4RT 952]. The gun was stored loaded in the gun case inside a gun safe. Christy knew the location of the gun and the second safe key. None of the children were in the room when the gun went off. Joseph did not murder Christy. Joseph did not discharge a gun on the evening of January 29, 2013 [4RT 953-954, 966-967].

9. Laura Fisher is Joseph Phipps' sister [1RT 118]. Ms. Fisher confirmed receiving a phone call from her brother Joseph at 11:19 p.m., on January 29, 2013, He was calling because of his wife. Christy was in the background screaming and yelling his name. Laura usually went over to calm Christy down. *Ms. Fisher heard Christy P. calling Mr. Phipps a piece of shit* and offered to come over.. Laura brought her son Brandon Fisher who was 17 years old at the time with her [1RT 119- 120, 147].

10. The prosecutor misstated this evidence during her opening statement: Claiming that the defendant found out Christie was cheating on him based on Christy's statement within Laura's hearing "you're useless. You're a piece - -, *I don't love you. I have a new boyfriend. He's better than you*". [1ART 3]

11, Laura Fisher planned to go over and have a couple of cigarettes with Christy and calm her down. Laura talked to her brother maybe 15 minutes on the phone. Ms. Fisher stated they were having marital problems. Laura also contacted her brother Troy Reynolds to go over with her. Mr. Reynolds received the phone call after 11:00 p.m. Laura Fisher requested Troy's presence because it was late at night. Laura Fisher acknowledged that her brother Joe is a big guy but stated he is harmless and she has never really seen him get angry. Joseph is quiet [1RT 121, 133-134].

12. It took Ms. Fisher about 15 minutes to get over to the Phipps' residence although she may have estimated 20 to 25 minutes two years ago when she spoke to the deputy. Ms. Fisher saw her brother at work earlier, Mr. Phipps was wearing a Hill shirt at work with orange stripes going down the sleeves and Hills towing on the front as well as his name. When Ms. Fisher got to the house she was smoking a cigarette. The Phipps did not allow cigarettes in the house so she opened the door but did not enter. [1RT 122-123]

13. Ms. Fisher walked up to the house, opened both the screen door and inside door without knocking [1RT 124]. Ms. Fisher looked in and saw the defendant between the bathroom and the kitchen where the wall is visible by the kitchen entrance leaning up against the wall. Mr. Phipps was sitting down shaking and crying [1RT 125-126]. Laura Fisher states he didn't respond to her he was shaking with his hands on his head [1RT 123].

14. Laura had never seen her brother like that. As she stood in the door her brother Troy Reynolds came up behind her. Ms. Fisher stayed by the door as Troy entered asking what happened. Mr. Reynolds then directed his question to Joseph Phipps and inquired what was going on with Christy. Joseph pointed down the hall [1RT 127-128, 135].

15. When Troy Reynolds arrived his sister Laura Fisher was standing outside with a cigarette. Brandon was in the driveway. It was about 20 min. until Troy Reynolds

got to the home. Mr. Reynolds then walked to the door as Laura looked into the house, his brother Joseph Phipps was in the fetal position crying and shaking. [1RT 135, 148].

16. Mr. Reynolds went to the bedroom, opened the door and saw Christy. In order to get to the master bedroom he had to pass the girl's bedroom door which was closed. [1RT 136-137].

17. Entering the bedroom Troy Reynolds asked Christy if she was okay, she did not respond. Troy walked over to the bed, lifted her right wrist and tried to take a pulse. He knelt on the left corner of bed in order to pick up the arm laying there, Christy's body was also on the left side of the bed [1RT 137]. When Mr. Reynolds knelt down, he felt something hard, looking down he discovered the back of a gun sticking out from the covers, partially covered by the bedding.[1RT 138].

18. The bedroom was pretty cluttered. Troy did not see any blood on Christy's head, her hair was covering her face. After checking Christy's pulse, Troy went back towards the living room [1RT 139].

19. Ms. Fisher stayed at the door asking her son Brandon to collect the girls. Brandon went down the hallway to the first door on the left. He walked in, told them to get up. The girls were all asleep, the TV was on and it was hard to wake them. Brandon shook each one awake. The girls asked what was going on and he informed them he had no idea. [1RT 128-130, 148].

a. The un-rebutted fact that Haley was in bed asleep when her Aunt Laura and cousin Brandon arrived at the house (Opin., p. 3) was ignored.

The Opinion states that: "The couple's 12-year-old daughter, Haley, heard Joseph yelling that Christy had "changed" and heard Christy saying, "Stop, Joseph." As she walked into the master bedroom to say goodnight, Haley could see her mother sitting on her parents' bed and her father standing on the left side of the bed, grabbing Christy's arm and pointing a gun at Christy's head. Joseph "kicked [Haley] out" of the room and told her to go back to bed. Joseph then closed the bedroom door. After the door was closed,

Haley heard a gunshot and heard her mother fall to the ground. By looking under the door of her parents' bedroom, Haley could see her mother's foot on the ground. Joseph came out from the bedroom and told Haley to go back to bed, which she did. In footnote 3, Haley disclosed these events to a police officer in May 2013. At trial in 2015, Haley recanted and testified that she had lied to the officer. The audio recording of Haley's May 2013 interview was played for the jury. (Opin., p. 3).

b. The un-rebutted fact that Brandon woke up the children.

Undisputed in the Statement of Facts section of the Opinion it is noted that Laura "instructed Brandon to wake up his cousins and get them out of the house. The children, who were not permitted to enter their parents' closed bedroom", were transported away by a relative (Opin., p. 3). Given this fact it is not credible to believe that Haley's May 2013 statement to the police was true - what child would return to bed and go to sleep after seeing a gun pressed to her mother's head, and hearing a gun shot and the sound of a body falling.

20. The girls passed their dad on the way out. He was sitting between the living room and the kitchen wall. The girls may have asked about their mother when they saw their father crying [1RT 149-150]. Once the girls were outside, Brandon stood by his uncle's truck [1RT 151].

21. Rebecca did not hear her parents fighting that night while she was in her room with her two sisters. [1RT 162]. Rebecca remembers her cousin Brandon awakening her in the middle of the night. Her sisters were also awakened. The lights were off until Brandon turned them on and woke her sisters by shaking them. Her sisters were on the floor and Rebecca was sleeping on the bed. Brandon walked them outside to her aunt's car. Brandon told them they had to wait for Tanya to come pick them up. [1RT 164].

22. As Rebecca walked out of the house, she saw her dad in the fetal position vigorously shaking, she didn't know what was happening. Rebecca did not talk to him

[1RT 165]

23. Laura's sister-in-law, Tanya, showed up a few minutes after in her car. The kids left Laura's car and entered Tanya's car. Ms. Fisher retrieved Joseph Phipps' son who was sleeping on the couch in the living room brought him to the car and Tanya drove all the kids away [1RT 128-130. 151].

24. Troy Reynolds did not talk to the girls when they were removed from the house. The girls were still dressed in their pajamas when they left. Joseph never moved from the fetal position he had been in [1RT 140].

25. Laura Fisher was present when Troy Reynolds called 911 and the police arrived [1RT 130]. Ms. Fisher's brother James arrived at some point, Troy had called him and asked James to watch over Joseph while Troy called 911. Troy was concerned for Joseph because of his state of mind, [1RT 131,141].

26. James Phipps went to his brother Joseph's house because his older brother called him to come over and keep an eye on him. When James arrived there were people outside. He walked in the house found his brother in a fetal position. His sister was outside, as he walked in. Everyone was in a panic. Laura was crying. Joseph did not respond to James questions. James stayed with Joseph until the deputies came. James was there when the children left the house but he didn't speak to his nieces as he walked by [1RT 154 – 155]. According to James, Joseph and Christy loved each other but they had their ups and downs. He believed the marriage would work out [1RT 156].

D. The Investigation.

1. Detective Flores interviewed the appellant. Mr. Phipps was distraught throughout the interview he cried, sniffled, looked down, did not maintain eye contact, indicated he was dizzy, on several occasions he indicated he thought he was a piece of shit because someone told him and on several occasions Joseph Phipps said it should have been me, never explaining what he meant. [2RT 421,423 – 425,432, 435-436, 442].

2. At one point during the interview Joseph muttered that he was going to

shoot himself . When asked why there was no reply. However, when prompted by the question because you what? Joe replied they were leaving. During the interview Joseph Phipps stated he wanted to die, he was in so much pain that he did not want the pain and it was supposed to be me, I had a gun to my head, I wish it were me. There was never a clear explanation regarding the incident [2RT 426 – 427, 451-452].

2. Toward the end of the interview the appellant got frustrated and started banging his head on the table and injured his head [2RT 428 -429]. Mr. Phipps was interviewed at 8:30 a.m. in the morning he did not sleep before the interview [2RT 431]. Mr. Phipps cannot read or write [2RT 434]. He asked who had the kids [2RT 435].

3. According to Troy, Christy was sharp sometimes with Joe, if she did not like something she would make it known very verbally [1RT 144] and Joseph Phipps has a normal temper, he tried to walk away from conflict [1RT 145].

4. Detective Flores claims Troy Reynolds informed him that Joseph Phipps wanted to harm himself when he informed Troy that his wife Christy was having sexual relations with another man but later told Troy he was trying to work things out with his wife, but Troy does not remember making this statement [2RT 417 – 419, 1RT 143].

5. Rebecca talked to detective Rodriguez on January 30, 2013, at a station in Morongo. Rebecca does not remember informing Rodriguez: Her dad was acting strange, pacing the hall and prevented her from going into her parent's bedroom. Rebecca did not hear any loud noises that night nor did she smell any gunpowder in the house [1RT 165-167, 2RT 385 - 387].

6. Rebecca does remember her dad showed the gun to her, as well as, her mom and sisters. [1RT 168].

E. Crime Scene Evidence and Autopsy

1. Michelle Alcantara was employed at the San Bernardino County Sheriff's Department in the crime scene unit in January of 2013 [3RT 661] and was called to a crime scene in Joshua tree on January 30, 2013, for the decedent Christy Phipps. [3RT

665- 666].

2. Alcantara documented how the body was lying. Blood was coming down the side of the bed and there was more blood above where the head of the body was located. [3RT 673-674].

3. There was a *large blood stain on the left side of the bed*, the south side that appeared to be blood. To the *right of the blankets on top of the bed was a hair*. The hair led to the discovery of the first outer bullet hole on the blanket. There were large blood stains on the left side or South side of the bed and bloodstains on the side of the bed. The large pool of blood on top suggests either the blood source was against the bed at that time or there was a large deposit very close that was made near that area. The blood that is down the side of the bed is more gravity from *the blood falling downward but it is very thick so it indicates more likely a large deposit close to the bed.* [1RT 247 – 251, Exhibits 271, 272].

4. Alcantara indicates that there is what appears to be blood contact or swipe *consistent with the blood on bed and a body falls on the bed and it tracks the hands through part of the blood* [3RT 693, Exhibit 219]. Alcantara describes the blood pattern going down the side of the bed as gravity trails. The fabric or sheet on the bed had gotten wrinkled as if something went through the blood on the way down. *On the folds of the bedding the blood is striated but there is something that looks like the blood has been touched on the way down. This would be consistent with the head hitting that area.* The large volume bloodstain at the top of the bed by the edge, that travels down the side of the bed, indicates this is most likely the location, that the head hit. [3RT 675-677] and is consistent with the head being there at the time the bullet impacted it since the head was the source of blood [3RT 739-740, Exhibit 73]. *The head hitting the floor could have caused blood splatters.* [3RT 745].

5. The hair seen on the blanket was tracked through the holes to where the expended bullet was found. The hair was still connected to the fired bullet that was in

the pink blanket beneath the comforter and there was a hole in the brown sheet. Underneath the brown sheet was a blue sheet that did not have a hole in it but there was an impression and that is where an expended bullet was found. [3RT 679, 710 -711].

6. In her opening statement the prosecutor misstates this evidence acknowledging that the round got caught in a set of blankets but then exaggerates claiming "that the round went through her head and into the bed" [1ART 7:3 – 8].

7. Criminalist Sherri Hill opined that the two holes on the brown sheet seemed odd in that one was on the side of the bed. So as part of the normal investigation as they pulled back the blankets and sheets. *Under the sheet were other sheets and a mattress and there was no bullet hole* from the side of the bed to the top of the bed. It was possible that if the sheets were bunched up the bullet could have gone through two sets of sheets. This is consistent with the bloodstains. [1RT 252].

8. The blankets were bunched up on top of the bed. There were two holes in the sheets of the bed as well. The investigators did not put the sheets together but the holes appeared to lined up and there was a large amount of blood on the sheet between the holes [1RT 246 – 247].

9. *The bullet believed to have traveled through Christy head was found embedded in the sheets. There was hair around the bullet.* On the opposite side of the bed a fired cartridge case (FCC) was found on the floor to the right of the foot of the bed [3RT 569, 681].

10. There was *not anything to show trajectory* of the round found in the bed because *all the sheets and blankets were movable however it did all line* up from evidence from the south side to the north side or bottom of the bed *from left to right* [1RT 247 – 251]

11. There was a purse below the arm of the body with the hand on the purse. An EKG pad was on her wrist [3RT 673-674].

12. The left hand of the decedent was sort of curled around the body and over

the purse but the hand is exposed. The right-hand is curled under the shoulder that is exposed. The little dots on the hand look like blood [3RT 694 – 695].

13. The small spot on the left hand indicates it was close to the source of impact [3RT 724]. Little blood spattered both hands could be from being close to impact [3RT 738-739]. Little blood spots could be seen on both Christy's hands, however, CSI did not do presumptive blood tests on the spots [3RT 624 – 625, 633].

14. The right-hand shows contact from touching something that has blood on it. On the right-hand there appears to be a small injury, the dots on the fingers seem to be blood but it cannot be said whether it is just on the surface or injury [3RT 696 – 697].

15. The decedent is also lying on something that was a hamper of sorts, some clothes and a backpack. The body's feet were beyond the base of the bed next to the door. The key that is seen in the bedroom was not given to Alcantara to collect. [3RT 678, 690, 725, Exhibit 75, 76].

16. *Christy's feet where right next to the bedroom door. On the left side of the bed (facing toward the door from inside the bedroom) there was a crib where the gun case and extra magazine were found.* [3RT 571-572] The unfired cartage was found under the foot of the bed [3RT 685 – 686]. Foam packing was found next to the crib close to the bedroom entrance, it was from a gun case. Paperwork containing the serial number for the gun was found on the ground at the base of the crib [3RT 682- 684, Exhibit 77]. The gun case was collected but no fingerprints or DNA were checked [3RT 623].

17. Alcantara found clothing behind the bedroom door and described it as a gray work shirt and had orange stripes on it, there were a pair of blue jeans and a white undershirt. The jeans and the undershirt were taken into evidence. The work shirt was not taken as it did not appear to have any blood on it. Another work shirt was on the floor inside out by the body when it was rolled, on the floor when the body was rolled and blood now on backpack could be the result. Both the backpack and work shirt had

been moved [3RT 691 – 692, 734,771-772, 776].

18. The body was next to the backpack which was next to the work shirt [3RT 769]. The work shirt on the floor was inside out so splatter could have gotten on the shirt [3RT 735, 745]. There was no notation of blood splatter on the backpack and the work shirt made at the time of the incident [3RT 760-761]. The jeans were not reported to have blood on them [3RT 728]. A picture of the decent also shows a backpack and the work shirt with a large patch of blood to the right [3RT 732, Exhibit 287].

19. Sherri Hill, a crime scene technician, testified that the master bedroom was crowded. Only two people could work in the bedroom at the same time. [1RT 245].

20. The gun was visible on the bed after the covers were removed. At this point the body was below the bed. The gun was loaded with a magazine and a cartridge was inserted in the chamber. [3RT 563 – 566]. An additional magazine was found in the case with nine rounds of the same Blazer .45 ammunition [3RT 567 – 568].

21. The gun found at the scene was registered to Joseph Phipps and was purchased July 25, 2011 [3RT 611-612]. There appeared to be tissue, blood and hair stuck to the end of the muzzle.[3RT 562, 687].

22. Alcantara collected hair from the gun barrel and then did a super glue fuming in order to check for fingerprints. A visual inspection was conducted and in this case no fingerprints were seen. Then the weapon was dusted with powder still no finger prints. After that the blood on the gun was swabbed from the muzzle and then the grip, trigger and slide. The grip, trigger and slide of a gun are swabbed together in ordered to concentrate as much of the DNA on a swab as possible. Alcantara checked the ammunition, magazines, the cartridges and the fired cartridge case. She was able to lift a latent print from the magazine that had been inserted into the gun [3RT 714 – 717].

23. The picture of the kitchen showed flowers on the table and corn dogs [3RT 722-723].

24. The photographs of Phipps' palms showed no blood on his palms or the

back of his hands [1RT 153]. There was no injury to Mr. Phipps' fingernails. The injury to the forehead was taken the second time Ms. Hill went to the station and could have occurred when Mr. Phipps was banging his head while he is being interviewed. The injury just below the right ear that appears to be scabbing over [1RT 255-256, Exhibit 29].

25. Amanda Haleman, employed by the Orange County Sheriff's Department as a fingerprint examiner, examined a fingerprint card but it was not detailed enough to make a comparison. The smudged fingerprint was taken off the magazine of the gun clip. This smudging could be from a lot of handling by different fingers. [2RT 86 – 287]. There were no fingerprints examined from the gun itself [2RT 289].

26. Mehul Anjaria, a DNA expert for the defense, sent the swabs from the gun grip, trigger and slide for DNA testing as well as DNA samples from Christy Phipps and Joseph Phipps for comparison. The swabs from the gun were checked and there was no blood on the swabs so any DNA on the swabs were not from Christy bleeding on the gun [4RT 848-851]. The following conclusions were drawn after review of the DNA data. The possibility that Christy Phipps was a major contributor to the DNA on the gun is 1 in 80 quintillion. (The world's population is 1 in 7.4 billion so strong evidence.) [4RT 856]. There are two possible minor contributors Joe Phipps and an unknown individual. [4RT 857]. In some of the areas tested Joe and Christy's DNA type overlap [4RT 859].

27. It is fair to say that Christy Phipps DNA was found on the gun swab and that only 1/6th of the DNA found was male thus the male is a minor contributor. The longer an object is handled the more DNA will be left behind [4RT 860-861]. If someone is sweaty and nervous more DNA would be left behind. If Joseph Phipps last handled the gun one and ½ years ago his DNA would still be on the gun. Joe Phipps handling the gun some time in the past can explain him being a minor contributor on the gun. Christy Phipps being the only individual to handle the gun on the night of her death would explain her being a major contributor. Specifically holding the gun tightly would cause

more contact and more opportunity to leave DNA behind and nervous perspiration [4RT 862-863, 872].

28. The State Court Opinion the reasonable doubt raised by this testimony:

> Both Christy's and Joseph's DNA were found on the gun—Christy as a possible major contributor and Joseph as a possible minor contributor. The DNA expert testified that these findings could be consistent with Joseph holding the gun for a short period of time, pointing it at Christy's head, and shooting her. The expert could not draw any definitive conclusions regarding the shooter's identity due to many unknown variables, including the manner in which the DNA was transferred (e.g., perspiration, skin, etc.), the rate and quantity at which the individuals normally shed DNA, and how long the DNA had been on the gun. (Opin., p. 5-6)

29. There is no way of telling in this case when either of the individuals DNA was put on the weapon [4RT 868]. Contact with a single hair on the gun is highly unlikely to leave behind a transfer of DNA [4RT 869].

30. DNA can be transferred to a key, hard plastic, or even foam packing [4RT 850].

31. A Gunshot residue (GSR) kit was run on the inside of the pointer finger or web of hand between pointer finger and thumb of Christy's hands and fingernail swabs from both the left and right hand were taken [3RT 613, 759, 719-720].

32. Jason McCauley preformed a gunshot residue analysis on the kit for Joe Phipps and there were not any gunshot residue particles identified on either the left or right hands. Therefore, it cannot be determined whether or not Joe handled a weapon or was in close proximity to a weapon [4RT 883].

33. The results of the gunshot residue analysis for Christy Phipps were that 5 particles were found on *the right hand and 8 particles were found on the left hand for a total of 13 combined.* The present of gunshot residue particle does indicate that the individual fired a firearm, handled a firearm or was in close proximity to a discharging firearm but not which one of these situations occurred [4RT 884].

34. According to Mr. McCauley the person firing the firearm always tests positive immediately after firing. When the gun fires, the gas expands in the direction

the barrel was pointing since that is the direction of the bullet. If a semiautomatic firearm is used to eject the cartridge out of the firearm that is another hole from which the gas can escape [4RT 886]. If the gun is fired in someone's hands are near the ejection port of the gun there is a potential for a gun residue on the hands. If two people were within 10 feet of the gun it would be surprising if they both did not have gun shot residue on their hands[4RT 890].

35. A living individual who is capable of moving their hands can have gun residue present up to six hours after firing a handgun. Any manipulation of hands can cause particles to fall off, certainly washing hands would remove most of the particles. The particles can remain on the hands for days provided the hands are left undisturbed [4RT 887 – 888]. Gunshot residue may occur if particles are transferred person to person, or by coming into contact with a weapon after it was fired. There is no difference in the particles whether someone was near a gun or fired a gun or contacted a gun. [4RT 888 – 889].

36. Forensic pathologist Dr. Glenn Holt performed Christy Phipps' autopsy on February 5, 2013. Law enforcement informed the doctor of the location where the death occurred, of the case history, and statements from family members. There were two parallel investigations going on. [2RT 480 – 481, 505 – 506].

37. There was a head injury, Christy's hair was shaved around the wound. There were a number of tears in the scalp that radiated from the bullet entrance wound. Indicating that the gun was in close contact with the skin. Gases and the bullet are propelled from the gun barrel into the wound. The gasses blow out causing the tears for the entrance wound.[2RT 482- 484].

38. The bullet creates a larger hole on the exiting surface than it does on the entrancing surface. Thus, it was determined the bullet went in on the left side of the head and was traveling left to right through the bone on the other side of the skull where the exit wound was found. In this particular case almost all of the *components of the bullet*

were left to right. There was a bit of an upward component and really no significant front to back or back to front component so the line between the entrance and exit movement was side to side and a little bit upwards. The exit wound was a little higher than the entrance.[2RT 489 – 491]. The wound on the left was 7 cm below the top of the head and the right was 6 cm below [2RT 514].

39. **a) In the Statement of Facts section, the Opinion states:**

> The pathologist opined that at the time the gun was fired, it was in "hard contact" with the left side of Christy's head; based on various indicators, no gases escaped from between the barrel of the gun and Christy's skin. She would have died immediately from the gunshot. Christy was right-handed. The forensic pathologist described the unlikelihood that a right-handed person could have self-inflicted the particular gunshot wound, based on human anatomy (i.e., length of arms and wrist flexibility) and the bullet's trajectory. (Opin., p. *4-5*.)

b) However, the Opinion omits pathologist testimony as follows: Given the hypothetical facts supposed, i.e., about the position on the bed assuming that the head is sideways so that the right side is down and the left side is up than the force would be downward and in the doctor's opinion *other forces would have to been involved* as well to have the body wind up on the floor [2RT 502]. Further, the doctor indicated that the very complex mechanical question one of which he wasn't at the scene for *so in terms of what forces might have caused the body to be on the floor after everything was all said and done he was not really in a position having examined the body to say very much* [2RT 503].

40. The opinions given in response to the prosecutor's hypothetical questions were relying on not just the autopsy findings but the combination of the full law enforcement reports and the selected pictures from the scene [2RT 512].

41. Peter Vince, San Bernardino Sheriff's Department firearm expert, tested a semiautomatic Springfield XD.45, the firearm used in this case [3RT 522 – 523]. In order to fire the Smithfield XT unit your hand needs to be on the grip. The trigger has

a safety, you have to exert pressure to defeat the safety in order to fire. Almost like there's two triggers. When you put your finger on the inside trigger guard, the first thing you depress is the trigger safety which allows you to pull back on the trigger. If the safety is not depressed the trigger is prevented from going back and the gun cannot be fired [3RT 526 – 528]. Mr. Vince opines it can be considered a double action [3RT 530, 547].

42. Mr. Vince admits however, that the trigger pull on the Springfield XD was an average 7 pounds and that the manufacturer claims it is single action only since pulling the trigger defeats the safety and releases the striker, so the striker is fully cocked. [3RT 530, 537, 547] There is an opening to the top middle of the gun, an ejection port. The FCC comes out of there. [3RT 532]. If someone pulled back the slide far enough when the magazine was loaded into this gun and there was one cartridge in the chamber, the cartridge would be ejected and the next round would enter into the chamber from the magazine [3RT 547-548].

43. Mr. Vince testified using a replica weapon a 1911 which had a different grip, different safety and the shape of the trigger is different but they're designed to do the same thing. The prosecution then asks Mr. Vince to pick up his replica gun with both hands so he can shoot from the left above his ear about 45 cm. and hold it slightly upward so that the round would come out of the right side of his head slightly above the ear. It was requested he do that with the muzzle perpendicular to his head [3RT 537, 549]

44. Defense objected as lack of proper foundation: There is no evidence whatsoever at this point as to what transpired or how it transpired. This is incomplete hypothetical. Not only that he is using a six-inch weapon in his hand. The gun used in this case has a 4 inch barrel. So it an improper demonstration in misleading. The objection was overruled [3RT 538]

45. The same objection was repeated four more times as the witness performed

various contortions with the replica gun [Exhibit 298]. Each resulting in following commentary: That it is difficult, not without the finger coming off the trigger, the use of his left arm to maneuver his right arm and the comment that he could not depress the trigger in that position without changing his grip. Until the court finally denied the prosecutor request that the jury be allowed the gun to experiment for themselves [3RT 538-541].

46. Later in the trial, the court itself stated that he saw both guns. The gun and the replica are different sizes. The replica has a longer barrel. The prosecutor asked for the gun back and the court states "you're going to get the gun back trust me you are getting it back, the weight is different, it's plastic versus the gun. There a too many variables that show it should not be submitted to the jury if it was an actual replica of the handgun I'd be inclined but Exhibit 298 will not be admitted into evidence" [5RT 1252].

47. Mr. Vince also works in collection of DNA. If he was asked to collect DNA to determine who possibly fire the weapon, collecting DNA around trigger and trigger guard would be a good place and way to determine the shooter. DNA was collected in this case but he is unaware of the results [3RT 545 – 547].

8b.(1). Petitioner Alleges the Following Supporting Facts for the Second Ground for Relief:

A On July 15, 2015, court and counsel reviewed jury instructions to be read CALCRIM Jury instruction 505 and 571 were discussed. CALCRIM Instruction 505: self-defense was given and 571 imperfect self-defense was denied [4RT 1062, 1066-1067].

B. The Petitioner re-alleges the facts set forth in 8a.(1) paragraphs A1- A7, B 1-B3, C1-C26, D1-6, E1-E47 above and 8c.(1) A, B1-B3 below as if fully set forth herein and incorporated herein.

8c.(1). Petitioner Alleges the Following Supporting Facts for the Third Ground for Relief:

The Petitioner re-alleges the facts set forth in 8a.(1) paragraphs A1- A7, B 1-B3, C1-C26, D1-6, E1-E47 as if fully set forth herein and incorporated herein. The facts of particular note to this third ground as well as the additional facts below:

A. The California Opinion fails to consider the following facts:

The physical re-enactment by Mr. Vince with his longer replica gun where he utilized both hands and raised it with the muzzle perpendicular to his head so it would shoot from the left just above his ear at a slightly upward so that the round would come out of the right side of his head slightly above the ear. [3RT537]. This did not contribute any insight into the credibility of the defendant's testimony in which he stated that his grabbing Christy's arms, holding her arms despite her jerking upwards lead to the fall which resulted in the gun pressing against Christy's head and going off. [4RT961-962]

B. Further, the Opinion fails to acknowledge:

1. The trial judge's comments that the replica gun was not substantially similar to the gun and the jury might confuse the issues, or be misled. The judge noted the gun and the replica are different sizes. The replica has a longer barrel, and the weight is different, it's plastic versus a gun. There are too many variables for the replica to be submitted to the jury. [5RT1252]. Thus, after viewing the trial in its entirety the trial court ruled the replica as not substantially similar to the gun. Unfortunately, this revelation came too late and the evils of this demonstration with the longer replica gun had already infected the jury, substantially outweighing the probative value of the demonstration.

2. The minimal probative value of the evidence was diminished further by the absence of similarity of both the setting and circumstances of the demonstration. A courtroom is hardly the appropriate venue to attempt to recreate and prove the manner of commission of a homicide that occurred in entirely dissimilar setting, lacking in the dimensions, configuration and the furniture that was present in the defendant's bedroom. Further, the use of a plastic replica gun that bore little physical likeness to the smaller

heavier gun which had a different grip, different safety and the shape of the trigger is different [3RT530, 537, 547, 5RT1252]. The re-creation that was orchestrated by the prosecutor with the following commentary and contortions: That it is difficult, the finger would come off the trigger, using his left arm to maneuver his right arm and the trigger could not be depressed without changing his grip.[3RT538-541].

3. Mr. Rhodes' declaration illustrates the irrelevance and the prejudicial nature of the demonstration, which was brought to the California Supreme Court's Attention via Habeas. During jury deliberations, the jurors discussed the demonstrations by the Prosecution witnesses. Mr. Rhodes felt then, and Mr. Rhodes still feels, that the demonstrations were very unrealistic and one sided. Mr. Rhodes argued that it was entirely possible that the gun went off during the Phipps' fighting over Christy Phipps having the gun but Mr. Rhodes believes that the demonstration mislead the other jurors into believing Mr. Phipps was not plausible. [Exhibit 1A , ¶ 14]

8d.(1) Petitioner Alleges the Following Facts in Support of the Fourth Ground for Relief:

On June 29, 2015, trial commenced and 14 defense motions in limine pursuant to Evidence Code § 402 where heard. The most notable for purposes of appeal:1) to exclude the entire continuous interview of Haley P. conducted on May 2, 2013, by detective Stephen Pennington. The Court denied a hearing and reserved ruling until after Haley testified. This objection was renewed on July 8, 2015, the grounds were multiple hearsay under Evidence Code §§§ 351, 352, 1200.2, a violation of the 5th, 6th and 14th amendments of the United States Constitution, and California article 1 section 15. The objections were noted and overruled [2CT 278-406, 2RT 350 -357].

The Petitioner re-alleges the facts set forth in 8a.(1) paragraphs A1- A7, B 1-B3, C1-C26, D1-6, E1-E47 and 8c.(1) A, B1-B3 as if fully set forth herein and incorporated herein, as well as, alleges the additional facts as follows:

A. The efforts made by law enforcement and Prosecution First render minor

vulnerable and manipulate her.

1. Haley was 12 years old at the time of the incident and enrolled in a special program at school and still is at Yucca Valley High School. On May 2, 2013, Haley was at the park with Amy, Celeste, her gramma Sue, April and her daughter all of whom are her mother's family. Haley's sister Tina was also present. Haley was picked up by her friend Cheyenne's dad from the park and brought to their house. Unbeknownst to Haley a detective was awaiting her arrival, recorder at the ready, along with Cheyenne, and her mother Sarah. They all sat down with Haley to talk to her [1RT222- 224].

2. Cheyenne Fritz a 15-year-old witness testified with witness advocate Iris Robinson from the District Attorney's Office Cheyenne was a friend of Haley [1RT 291]. Cheyenne Fritz was called as a prosecutorial witness to deny that she told Haley to lie. Cheyenne denied that she gave her cell phone with text message containing those lies. Even though Cheyenne can be heard clearly asking her mom for her phone as she sat beside Haley during her May 2, 2013 interview. She even denies having a cell phone at the time [1RT 291, 2CT 397].(Her mother Sarah believes she recalls she did have a cell phone. [2RT 312 – 316]. Cheyenne remembers her mother giving Haley a dragonfly necklace on May 2, 2013, the day Detective Pennington came to the house to interview her [1RT 301].

3. On April 29, 2013, Detective Pennington received a call from Amy Utley, sister of Christy Phipps and Aunt to Haley. Amy Utley called to inform him that Haley told a friend, named Cheyenne, she saw her dad shoot her mom. Pennington drove out and interviewed Cheyenne and Sarah Vaughan, Cheyenne's mother (who had provided the information to Amy Utley). Upon inquiring if there was anyway to get Haley to the house, Cheyenne's father offered to collect Haley from her aunt's house. Pennington believed that the father's side of the family would prevent him from interviewing Haley. Between January 30, 2013 and May 2, 2013, Pennington never requested anyone from

the father's side to bring Haley in for an interview. Pennington did not review with the child whether she understood the difference between right and wrong before beginning the interview. The interview was recorded and played for the jury and transcripts were passed out over the objection of defense [3RT 578-580, 585-588, 604].

4. The first thing out of Haley's mouth was "I really do not know what happened because I was sleeping." (Haley made a similar statement on January 30, 2013, wherein she stated that she was asleep and did not hear anything.) Pennington unsatisfied with that answer continued to question a child who had been brought to him for questioning without her prior knowledge [1RT 222, 3RT 589].

5. After Pennington first received an answer that Haley did not hear an argument he continued "working on Haley" to get out of her the statement's Cheyenne claimed she made and coxing Haley to do the right thing for her mom who cannot speak for herself. Pennington admits pressuring Haley to say something different, she really did not know what had happened. Pennington did not look into Haley Phipps background prior to this ambush and did not know she was a special education student who had difficulty comprehending reading and writing. [3RT 590- 591, 593, 599-600].

6. Haley remembers telling the detective back in May of 2013 that she heard her parents arguing that evening because her mom had the music up to loud and her dad was trying to sleep. When her parents argued back in January 2013, they usually argued in the kitchen or the bedroom. Haley does not remember what time her mother got home on January 29, 2013 [1RT 178 – 179].

7. Haley went to her mother's room on January 29, 2013, to say good night but her mother was on the phone. Haley said goodnight and gave her mother a hug. Her dad gave her a hug and told her goodnight. She did not hear her mother yell anything at her dad that evening. She does not recall saying to Detective Pennington that she heard her mother say no Joe - - stop Joseph. Joseph confirmed that his daughter came in to the bedroom to say goodnight that they were not arguing at the time and Haley did not hear

Christy say no Joe. Further, it is Pennington that states her parent's were arguing and asks what happened after the argument [1RT 180 – 181, 3RT 592, 596-597, 976-977].

8. At one point during the interview Haley states she did not go into her parent's room and the door was closed at another point she said she smelt gunpowder in response to questioning regarding hearing a gun shot [3RT 584-585].

9. When Haley spoke to Pennington back in May of 2013 she told him about things she had seen that night but she just made them up because her grandma Sue, Celeste, Amy and Patricia promised things and that is why she decided to tell the detective things she made up. They told her to tell the detective that her dad hit her mom but it wasn't true. They also told her to tell the detective to say that she saw her mothers feet but Haley did not. They told her to tell detective she heard the gunshot but she did not. She talked to Pennington because Cheyenne and Sarah promised to give her a butterfly necklace [1RT 182 – 183]. During the time of the interview Susan Utley, Christy's mother was petitioning for guardianship [3RT 584-585].

10. Haley said she was lying when she claimed to see her father with a handgun, that her father grabbed her mother and that her dad was yelling at her mom. [1RT 184]. Joseph did not have the gun in his hand [4RT 983]. She said those things because her friend Cheyenne wrote it on her phone saying that it's okay to say and she helped by writing a script for Haley. During her interview with Detective Pennington, Haley kept looking down at the phone Cheyenne had in her lap. [1RT 184 – 185].

11. Detective Pennington confirmed that Cheyenne sat beside Haley during her interview and at on point Cheyenne told her it was going to be all right when Haley was crying, however, he denied Cheyenne gave Haley a cell phone and that Haley had anything in her hands [3RT 581-582, 597].

12. Pennington also confirmed that after the interview Sarah told Haley she did great, offered to take her to the park or for ice cream and asked if she had her necklace

[3RT 605].

13. During the interview Haley used her hands to demonstrate her dad pointing a gun and her dad grabbing her mother [3RT 582]. However, Pennington did not note these gestures in his report [3RT 596].

14. Verbally during the interview Haley only said she did not believe her mom shot her self, she made a hum noise in response to the question of whether her father shot her mother and the following question why she thought he shot her because he loved her. It is the detective who first mentioned her dad shooting her mom. Haley never stated her father shot her mother it was just Pennington's impression that she believed that. Haley denies that her father ever threatened her mother [3RT 598-599]. Haley mostly looked away during the interview. She would answer questions either nodding or shaking her head [3RT 583].

15. Haley reiterates that she did not see any thing and she did not hear anything on January 29, 2013. She admits that she lied to detective Pennington during their interview. Haley did not see her dad point the gun at her mother, she did not see her dad stand on the left side of her mother, she did not see her father grab her mother, she did not see her dad shake her mom, her dad did not yell at her mom, her dad didn't kick her out of their bedroom, and she did not hear the gun go off when she was outside her father's bedroom door. None of that was true [1RT 188 – 189].

16. Joseph confirmed that Haley was lying when she said that Joseph shot Christy and then told Haley to go to her room [4RT 989]. Haley was in her room watching TV. The TV was loud her door was open. She did hear arguing but she fell asleep watching TV. The argument she heard occurred before she went in to say good night to her parents. Haley went to the room and they stopped arguing [1RT 190 – 191].

17. When Haley was talking to Pennington she was 12 years old, she felt like she had to tell him those things. She was crying at the time and her friend was forcing her to say those things. She is no longer friends with Cheyenne [1RT 192]. Haley went

over to her friends house to hang out. Haley entered the house and was ushered into the kitchen where Pennington was waiting. [1RT 193 – 194].

18. On January 29 2013, Haley saw her parents texting each other when she was trying to say goodnight [1RT 203]. The last time Haley saw her mother was when she said good night. Haley denied looking under the door after the gun went off to see her mother's feet [1RT 197].

B . The Prosecutor Uses Haley Statement to Badger Her in Front of the Jury.

1. The Court ruled the statement was admissible as prior inconsistent statement. Haley Phipps a 15 year old was called as a prosecutorial witness without the aid of witness advocate Iris Robinson from the District Attorney's Office [1RT 173] with the express purpose of establishing grounds to admit the objected to May 2, 2013 statement, which the court denied a 402 hearing to resolve.

2. The prosecutor then badgers this girl on several occasions asking why her friend would force her to lie about stuff that could hurt her dad which was objected to as asked and answered. Immediately followed by a question: Because you told Detective Pennington the truth? Which was objected to as argumentative. Followed a question: You have to be pretty creative imaginative to come up with all that? Which was objected to as argumentative. And that was finally sustained.[1RT 192-193]. Again the prosecutor asks an objectionable question "you could have told him I am crying because I am making this all up. Which was objected to as speculative. And the reason you did not was because you told Detective Pennington the truth? Which was objected to as argumentative. [1RT 194]. So it was worth getting a present that your dad would go to prison? Which was objected to as lacking foundation. .[1RT 198-199]. So what's hard to understand is why you would let somebody influence you that way. Which was objected to as asked and answered many times [1RT 200]. Is your love for your dad is what making you testify that you told lies to Sergeant Pennington which was objected as argumentative. [1RT 217]. You know if you did see all that you would not be with

your dad in the future, would you? Which was objected as argumentative. [1RT 219].

8e.(1) Petitioner Alleges the Following Facts in Support of the Fifth Ground for Relief:

The Petitioner re-alleges the facts set forth in 8a.(1) paragraphs A1- A7, B 1-B3, C1-C26, D1-6, E1-E47, 8c.(1) A, B1-B3 and 8d.(1) A1-A18, B1-B2 as if fully set forth herein and incorporated herein, as well as, alleges the additional facts as follows:

A. The Prosecutor Used Argument or Cross-examination as a Basis to Testify Before the Jury During the Cross-examination of the Defendant.

Isn't it true you don't want to remember what happened? The objection argumentative was overruled [4RT 956]; Court instructs the prosecutor to give him time to answer. [4RT957]; "Right? So she wasn't pointing the gun at you, right?" An objection: she is not giving him time to answer, the Court instructed the prosecutor to give him time to answer. [4RT 960]; "So you are not fearing for your life any more?" An objection: misstates the evidence is overruled [4RT 961]; An objection: that he did not finish the answer is sustained [4RT 967]: "You were going to try anything that night to get her to stay with you?" The objection to "anything" was overruled [4RT 971]; "Is that what Haley saw, you grabbing Christy's arm when Christy aimed the gun at you?" The objection speculation was overruled [4RT 980]; "You did not go over in your head today what you wanted to say?" The objection argumentative was overruled [4RT 983].

> Q. And your daughter said that in fact you were standing . . well where was he standing? Well he was standing next to my wife or my daughter or excuse me my mom who is sitting on the bed. And then the detective specifically asked her which side was she standing was she standing on? And she daughter said left side. [This is objected to, the prosecutor indicates she has finished, the court allowed her to continue] So your daughter saw you holding your wife on the end of the bed right near the door and you were standing on her left side. [This is objected to as calls for

speculation, the prosecutor indicates she still has not finished] And you heard the medical examiner testify that the rounds went from left-side of her head to the right-side of her head, exactly where you were sitting, exactly where you're aiming the gun at her head, exactly where your daughter saw you standing. And that you were aiming the gun at your wife's head.[Another objection, the prosecutor indicates she still has not finished, the objection continues it is compound, complex, she is testifying not asking a question. The court finally rules it is compound and lets the prosecutor start again]. [4RT 984 – 985]

B. The prosecution then covers the same topic inquiring if she is correct after each line. [4RT 985-986].

The particularly objectionable questions follow. "How would Haley have known how exactly your wife was situated what you were doing and that the round went from the left to the right side of the head unless she actually saw it?" The objection argumentative was overruled. [4RT 986]."I am asking you how would Haley have known that unless she was there?" The objection calls for speculation and argumentative was overruled. Did you know that Haley told her friend Cheyenne that she actually looked under the door and saw her mom's feet? [The objection it's not even in evidence is overruled] [4RT 987]. How would Haley have known that her mom's feet were at the end of the bed unless she actually looked under there and saw them? How would she have been able to guess that? The objection compound, argumentative and calls for speculation was sustained, as to calls for speculation] [4RT 987-988].

And isn't it true that once you shot your wife you came out of the bedroom and told Haley to go to bed didn't you? I didn't shoot my wife and no I didn't tell Haley to go to bed. But you heard the testimony from Sgt. Pennington that Haley told him that she didn't see her mom shoot but she heard the gunshot because she was outside the room and you came out in told her to go to bed? [The objection, what story at what time, is

overruled] Why would she say that? I didn't tell her that. You may not have told her that but why would she have told the sergeant that if in fact she didn't see it and you didn't say that? [The objection calls for speculation and argumentative is overruled] [4RT 988]. Was it – when you came out of the room, after you shot your wife was it hard to see your daughter after you executed her mother?" the objection to the word execution as improper caused the court to direct the prosecutor to rephrase . "Was it hard for you to face your 12 year old daughter Haley once you shot her mom in the head?" The objection, misstates the evidence is overruled.[4RT 989].

"You blacked out when the detectives were interviewing you?" The objection, misstates the evidence is overruled. [4RT 993-994].

Well you testified previously that you did not blackout when she aimed the gun at you. You did not black out when you grabbed her arms. You did not blacked out when she was falling backwards.[The objection that the question was argumentative, compound, and misstates the evidence was overruled] And you did not black out when you fell on the bed. And you did not black out when you partially fell on her. And you did not black out when she was laying on her side. And you did not black out when she falls to the ground. And blacked out afterwards? [4RT 1004]. Okay so explain to me how or if she has the gun aimed at you, you grab her forearms, you don't let go, but she falls backwards and you fall sort of on her, the gun just sort of goes off, how does she get the gun all the way to the other side of her head, up against her head, so that there is no gap, so that the gun is slightly angled but hard pressed against her head? How does that happen? [The objection asked and answered he's answered that before she's now badgering the witness he's explained it he's demonstrated it this is this has been asked and answered over and over again. This objection was overruled] [4RT 1010] "Is it your testimony when you fell on her, her arms had been pressed up against the side of her head when she pulled the trigger?" The objection he has answered that question that speculation is overruled [4RT 1011]. "Cause we don't need to know how the medical

examiner told us." The objection it's argumentative and she's testifying caused the court to direct the prosecutor to rephrase the question [4RT 1011]. The court finally does sustain objections to question as compound, complex and calls for speculation when the prosecutor attempt is to testify via question near the end of her cross [4RT 1022-1023, 1028].

C. The Prosecutor also vouched for her witnesses:

1. Cheyanne testified she is a straight forward little kid . . . very straight forward honest kid [5RT 1110].

2. In regard to Cheyanne having a cell phone the prosecutor vouches for her witnesses by claiming that the testimony regarding Cheyanne having a cell phone is not true because Detective Pennington says she did not and claiming the reference on the tape about getting her phone from her mom in the middle of the tape means nothing [3RT 581-582, 5RT 1218].

3. The prosecutor expressed her personal opinion in reference to Haley, indicating it is understandable that she, the daughter of the defendant, who also lost her mother would deny everything. But we know what happened [5RT 1156].

D. During the prosecution's cross examination/testimony the prosecutor also referred to defense counsel's opening statement falsely claiming:

Counsel only described Phipps as grabbing Christy's left forearm but now he is testifying as grabbing both [4RT 956]. However, this is untrue the defense counsel's opening statement describes the defendant's action as such:

> "as soon as he walks in, Cristy Phipps has the gun out, she sees him in, she's got the gun close, she turns, and points the gun directly at him.. . . His immediate reaction - -which is consistent with the forensics - - is he immediately *grabbed her arms here* - - that's why there's no gun residue - - *grabs her arms* and tries to grab and - - as she pulls back . . . She's so furious that she pulls back . . . falls to the bed and the gun goes off . He doesn't know how it happened. He blacked out . He is in total shock. All he knows is he *grabbed her arms, her forearms* that's all he knows. They both fall, and the gun goes off that's directly - - she pulled so hard that the

gun goes like this, I guess because nobody knows what really happened. Nobody knows exactly what happened after they fell on the bed or towards the bed. Gun goes off the first thing he says is "Are you all right?" and she rolls off the bed because she's at the edge of the bed - - rolls off to the floor. It's a tragedy, it's not a crime. I'm going to ask you find the defendant not guilty by self-defense" [1ART 24 – 25].

E. The Prosecutor's Misconduct During Closing Statement.

1. In particular argument that defendant washed his hands, inferring the defendant induced his daughter Haley to lie assumed facts not in evidence, calling the defendant a liar throughout her closing along with a power point that is entitled defendant's lies, calling the fifteen year old she badgered on the stand a liar when she recanted her May 2, statement to police, and calling Rebecca a liar because her testimony differed from that of her's to the detective [3CT 19-25 , 5RT 1117, 1119, 1123, 1124 -1128, 1163-1165, 1168, 1173, 1174].

2. The prosecution's closing statement refers the jury back to defense opening statement on several occasions: Let's look back at what the defense's claims.

a) "In the defenses of the statement he wants you to believe that the whole thing was a bad mom lost her temper because her daughter didn't do the corn dogs and the defendant did and also that they had an argument. That Christy got the key from the safe and aimed the gun at him. That's ridiculous. There is no basis for this whatsoever. It is unreasonable discard this" [5RT 1104: 20 – 26].

3. 'In the opening, when defense was describing what the defendant did, he never said anything about any sort of talking that went on when he was assaulted by his wife and had to protect himself and grab the forearms and fall down. Now on the stand he said Christy yelled "I can't take this." I'm not sure why. I guess his memory now is coming back a little bit and he also testified that she said, "I can't take this shit anymore." none of this was brought out during opening. He also said another thing on the stand. This wasn't in their opening about what the defendant did. Now there's another story'. She says both these things after he walks in and while she points a gun

at him and he asks her to give him the gun [5RT 1116: 6 – 1117:15]. In another version she faced the crib and then aimed the gun at him [5RT 1166].

4. The prosecutor shows the jury Power Point slides entitled "Defendant's Lies over the objection of the defense and continually refers to the defendant as lying and requests a mistrial if she continues. The objections are overruled [5RT 1123,1127-1128].

5. The Prosecutor, while acknowledging her burden of proof, argues to the jury that "If you accept the truth - - the story of the defendant as the absolute truth he is saying that the victim Christy Phipps legally deserved to be shot point blank in the head. You have to accept that if you believe in self defense. It is legally deserved – she legally deserved to be shot point blank in the head.... Defendant's story is an absolute lie. At this point the defense objects again regarding claiming defendant is lying as prosecutorial misconduct and is overruled yet again [5RT 1162-1163]

F, The prosecutor misstated evidence during her opening statement.

Claiming that the defendant found out Christie was cheating on him based on Christy's statement within Laura's hearing "you're useless. You're a piece of - - *I don't love you. I have a new boyfriend. He's better than you*". [1ART 3] There was no evidence that Laura heard Christy state that she had a new boyfriend when she heard Christy screaming in the background during her phone call with the appellant the night of the incident. Also during her opening statement allegedly the defendant told Christie "if I can't have you, no one else can will."; "If you ever leave me for another man, you won't like what you get."; "If I ever found out you cheated on me, what I do will end me up in jail". [1ART 2 – 3]. However, this misstates the actual testimony. In which Sean Turner considered these alleged threat to be directed toward him not toward Christy [3RT 333, 336, 5RT 1157:13-16].

8f.(1): Petitioner Alleges the Following Supporting Facts for the Sixth Ground for Relief:

The Petitioner re-alleges the facts set forth in 8a.(1) paragraphs A1- A7, B 1-B3, C1-C26, D1-6, E1-E47, 8c.(1) A, B1-B3 and 8d.(1) A1-A18, B1-B2, 8e.(1) A, B, C1-C3, D, and E1-E5, F as if fully set forth herein and incorporated herein, as well as, alleges the additional facts as follows:

A. Behind Christy's body is a night stand. Behind the night stand is a closet. An object, a key as it turns out, near an orange cord was seen on the floor. There was a locked gun safe in the closet of the bedroom. Pennington picked up the key, with gloves on, and fit the key into the lock on the safe. Sgt. Pennington succeeded in opening the safe. Pennington believed he handed the key to CSS personnel, however it was left at the scene [3RT 573 – 575, 608-611 Exhibit 76, Exhibit 87, Exhibit 88].

B. The house was sealed for two weeks until Detective Pennington allowed the family access to the house. James Phipps went in to clean up the house. As they were packing a key ring was found in the living room and photographed (Exhibit 143), Joe's shop keys, and one of the keys was a safe key with the number one on it.(Exhibit 143-A) [4RT 902 – 906].

C. The key ring is shown to Pennington and he identified the key on the ring as being similar to the key for the safe that was found at the scene [3RT 628 -629, Exhibit 144].

D. James Phipps also found a key in the bedroom when he was cleaning which he photographed (Exhibit 144). This key had a number two on it. The ring of keys was taken to the shop but the number two key was brought to the storage locker, as well as, the safe from his brother's house [4RT 907 –.909].

8g.(1): Petitioner Alleges the Following Supporting Facts for the Seventh Ground for Relief:

The Petitioner re-alleges the facts set forth in 8a.(1) paragraphs A1- A7, B 1-B3, C1-C26, D1-6, E1-E47,8b.(1) A, 8c.(1) A, B1-B3, 8d.(1) A1-A18, B1-B2,.8e.(1) A, B, C1-C3 ,D, E1-E5, F and 8f.(1) A-D, above and 8h.(1) A-D, 8i.(1) A-B , and 8j.(1) A1-

A6, B1-B3, below as if fully set forth herein and incorporated herein, as well as, alleges the additional facts as follows:

A. After trial juror WILLIAM A. RHODES, on the case of ***People of the State of California v. Joseph Andrew Phipps*** (Case Number FMB1300048) tried in San Bernardino County Superior Court came forwarded and spoke to defense investigater stating he and the other jurors knew of the homicide of Christy Phipps prior to being called for Jury duty. It is a small town and everyone knew about the homicide and where in Mr. Rhodes opinion prejudiced by the adverse publicity in this case.[Exhibit 1A , ¶¶ 1&2].

B. Known news articles about the Petitioner by the Hi Desert Star and others sources (See, 1 CT 216-231).

C. As of 2010, the total population of Joshua Tree was 7,414 [1 CT 232-235]. As of 2010, the total population of Yucca Valley was 20,700 [1 CT 236-237]. As of 2006, the total population of Pioneertown was 350 [1 CT 238]. As of 2000, the total population of Landers was 2,600 [1 CT 239]. As of 2010, the total population of Morongo Valley was 3,552 [1 CT 240-243].

D. Hi Desert Star has a newspaper circulation of 7,800 copied. The post of said articles provides unlimited access on the internet to this small jury pool. The total population of San Bernardino is 2,084,507 as of July 1, 4014, therefore the county seat would provide a much larger jury pool [1 CT 244-250].

E. Kristen Knowles, the private investigator who took Mr. Rhode's statement, stated after confirming that the declaration [Exhibit 1A] was exactly what he said and was thinking Mr. Rhode's declined to sign the statement because he was concerned that it was a small town and the DA will find out. [Exhibit 1]

8h.(1): Petitioner Alleges the Following Supporting Facts for the Eighth Ground for Relief:

The Petitioner re-alleges the facts set forth in 8a.(1) paragraphs A1- A7, B

1-B3, C1-C26, D1-6, E1-E47,8b.(1) A, 8c.(1) A, B1-B3, 8d.(1) A1-A18, B1-B2, 8e.(1) A, B, C1-C3 ,D, E1-E5, F, 8f.(1) A-D and 8g(1) A - E as if fully set forth herein and incorporated herein, as well as, alleges the additional facts as follows:

A. Mr. Rhodes was a hold out, along with one or two other jurors, and argued that the shooting of Christy Phipps was not homicide, but no one else in the jury wanted to listen. It was a Friday, and at the time, the rest of the jury just wanted to get out and be done with the trial [Exhibit 1A , ¶ 5], basically refusing to deliberate.

B. Mr. Rhodes is hard of hearing. Throughout the trial, Mr. Rhodes had issues with hearing the defense attorney. It was difficult to hear the defense attorney. Mr. Rhodes did not notify the court or the court staff because Mr. Rhodes was once on a different jury and when Mr. Rhodes notified the court in that trial, Mr. Rhodes was given headphones which crackled and made things worse, so Mr. Rhodes did not say anything. There were times he did not hear what the defense attorney was saying because he was speaking in low tones. [Exhibit 1A , ¶ 6]

C. Because of Mr. Rhodes' inability to hear everything, when Mr. Rhodes was arguing with the other jurors during deliberations, Mr. Rhodes began to lose confidence in what he thought he heard. Mr. Rhodes thought maybe the other jurors heard something Mr. Rhodes didn't. [Exhibit 1A , ¶ 7]

D. A couple of the other jurors were pushing Mr. Rhodes to change his verdict. Mr. Rhodes is not sure what made him go along with the other jurors, but Mr. Rhodes has regretted it since that day. There was one juror who was so against Joseph Phipps, she wanted him executed. [Exhibit 1A , ¶ 8] Thus, expressed a disregard of the law.

8i.(1): Petitioner Alleges the Following Supporting Facts for the Ninth Ground for Relief:

The Petitioner re-alleges the facts set forth in 8a.(1) paragraphs A1- A7, B 1-B3, C1-C26, D1-6, E1-E47,8b.(1) A, 8c.(1) A, B1-B3, 8d.(1) A1-A18, B1-B2, 8e.(1) A, B, C1-C3 ,D, E1-E5, F and 8f.(1) A-D as if fully set forth herein and incorporated herein,

as well as, alleges the additional facts as follows:

A. Petitioner challenges a number of the prosecutor's questions, comments, and arguments before the jury as "misconduct", contending they rendered his trial fundamentally unfair. Since According to The Appellate Opinion petitioner failed to preserve his right to challenge much of the alleged misconduct and in any event, his claims are meritless [Opin. P. 19].

B. Appellant counsel believes these instances of misconduct (which are enumerated the Fifth ground for relief below in Paragraph A through I and incorporated herein as if fully set forth herein) were preserved by the objections referred to in the briefing but to the extent this court might finds a waiver it is requested that consider the issue in the context of incompetence of counsel.

8j.(1): Petitioner Alleges the Following Supporting Facts for the Tenth Ground for Relief:

The Petitioner re-alleges the facts set forth in 8a.(1) paragraphs A1- A7, B 1-B3, C1-C26, D1-6, E1-E47,8b.(1) A, 8c.(1) A, B1-B3, 8d.(1) A1-A18, B1-B2, 8e.(1) A, B, C1-C3 ,D, E1-E5, F and 8f.(1) A-D, 8g.(1) A-E, 8h.(1) A-D, and 8i.(1) A-B, as if fully set forth herein and incorporated herein, as well as, alleges the additional facts as follows:

A. Double Hearsay Statements of Decedent Allowed.

1. Over objection in motion in limine 8 [3CT 434-453, 1RT 43-48] the prosecutor referred to threats made by the defendant in her opening statement allegedly the defendant told Christy "if I can't have you no one else can will."; "If you ever leave me for another man, you won't like what you get."; "If I ever found out you cheated on me, what I do will end me up in jail". [1ART 2:27 – 3:4]. However, these misstate the actual testimony.

2. Sean Turner testified that he understood Christy's hearsay statements: if he found out she was seeing someone she would not like what he was going to do, to apply

to him. Christy also stated the defendant mentioned he would end up in jail. Mr. Turner states Joseph Phipps did not ever threaten him, not personally, and he did not know if Christy's claim was true .[3RT 333, 336]. Obviously, he believed the threat, if it was made at all, was directed toward the someone she was seeing. What is even worse is that the prosecutor misquoted witness Sean Turner in closing as to the alleged threats made being directed at Christy.[5RT 1157:13-16]

3. Sarah Vaughan, mother of Cheyenne, knew Christy Philpp and Joseph Phipps. She was Christy's friend for about two years. Over a hearsay objection, Sarah testified that Christy stated on several occasions she was afraid of her husband and did not think she would ever be able to divorce her husband because he threatened to kill her before allowing a divorce. Christy made these claims to Sarah over the course of a year and a half. However, Sarah admitted she had positive interactions with the defendant [2RT 303-306].

4. Linda Sewell Otto, Christy's sister, claims that Christy said on more than one occasion that she was afraid of Joe's reaction to the pending divorce. The first time Christy mentioned she was afraid was a few years before this incident. Christy allegedly said things like he would not let her go without a fight. Christy felt Joseph would go crazy if he found out she was cheating on him [2RT 322 – 324]. Linda based her opinion on Christy's relationship with Joseph on what Christy told her [2RT 324 – 327].

6. Susan Utley mother of Christy Phipps states on at least four occasions she gave her a daughter a ride because according to Christy her husband would not give her the keys to the car [4RT 828 – 830, 832].

B. Testimony Refuting Double Hearsay Statements.

1. Virginia House (Fisher), Laurie Fisher's sister-in-law, babysat for the Phipps family from November 2012 to January 2013. Generally, Joe took their little boy to Virginia's place and either Joe or Christy would pick him up. At no time from November through January did Christy Phipps have any problems dropping Jaden off or

picking him up in the evening. Christy would pick him up really late. At no time did Christy say she was being abused in anyway such as having her phone taken away from her so she could not contact her. Christy always carried her cell phone and never complained she lacked a phone. Christy never indicated that she was deprived of a car. Virginia had Christy's telephone number and Christy had Virginia's cell phone number. January 28, 2013, was the last day Christy picked up Jaden. [4RT 918 – 922].

2. Ed Montgomery, a paralegal, paid to prepared a response to divorce petition filed by Christy Phipps for Mr. Phipps indicated there were no allegations of spousal abuse in the petition. [4RT 896 – 900]

3. Pennington viewed divorce papers found in a packet from Sean Turner, Christy had filed for divorce there is no allegation of abuse in the divorce papers [3RT 627-628].

8k.(1): Petitioner Alleges the Following Supporting Facts for the Eleventh Ground for Relief:

The Petitioner re-alleges the facts set forth in 8a.(1) paragraphs A1- A7, B 1-B3, C1-C26, D1-6, E1-E47,8b.(1) A, 8c.(1) A, B1-B3, 8d.(1) A1-A18, B1-B2, 8e.(1) A, B, C1-C3 ,D, E1-E5, F and 8f.(1) A-D, 8g.(1) A-E, 8h.(1) A-D, 8i.(1) A-B , and 8j.(1) A1-A6, B1-B3, as if fully set forth herein and incorporated herein, as well as, alleges the additional facts as follows:

VERIFICATION

I am an attorney admitted to practice law in the State of California and the United States of America. I have been retained by the Petitioner to represent him on direct appeal and I have been authorized by the petitioner to prepare and file the accompanying Petition for a Writ of Habeas Corpus and the accompanying Memorandum of Points and Authorities. Petitioner has also verified this Petition by affixing his signature on form petition for habeas corpus. All of the facts alleged in the above document, not otherwise supported by citations to the record, or other documents, are true based on information

and belief.

I declare, under the penalty of perjury, that the foregoing is true and correct, and that this verification was executed on May 30, 2018, at Westminster, California.

Lynne Patterson,
Attorney for Petitioner
JOSEPH ANDREW PHIPPS

DECLARATION OF KRISTEN L. KNOWLES

I, KRISTEN L. KNOWLES, declare:

1. I am a private investigator licensed by the State of California and, owner of, and employed by the firm of Knowles & Vacca, Inc. (Personal PI License # PI15139 and Corporate PI License # PI19011). I have been a licensed private investigator since 1991. I have personal first-hand knowledge of the facts set forth herein, and if called upon, I could and would testify competently thereto.

2. On 02/09/2017, I was retained by attorney Lynne Patterson to assist her with contacting a WILLIAM RHODES, who was a juror in the case of ***People of the State of California v. Joseph Phipps.*** MR. RHODES had made contact with a mutual friend of the PHIPPS family and stated he was willing to speak to an investigator about the case and the deliberations [please see attached **Exhibit A**].

3. On 03/09/2017 at approximately 2:50 PM, I met with WILLIAM RHODES at his residence in Yucca Valley, California. After we met, I put what MR. RHODES told me in a declaration.

4. On 05/26/2017 at approximately 12:06 PM, I spoke with WILLIAM RHODES again via telephone. MR. RHODES stated he had been dealing with his father in law being in hospice. I explained to him that I put a declaration together about what he told me and I wanted him to look it over. I asked MR. RHODES that if the declaration met to his satisfaction, could he sign it and return it to me. MR. RHODES stated he wanted to know if the Motion for New Trial came back to the original trial court and if the District Attorney would see it. I told him the Motion was in a different court, but the District Attorney who handled the case would see it because they have to respond. MR. RHODES gave me his email address to send the declaration and stated he would get back to me.

5. On 06/06/2017 at 1:28 PM, I contacted WILLIAM RHODES via telephone. MR. RHODES stated his father-in-law had passed away on 06/02/2017. He stated he was dealing with everything that dealt with his father-in-law's death. Regarding the

declaration, MR. RHODES stated that I "got it right" and wrote "exactly what he said and was thinking". MR. RHODES stated he did not think I took enough notes to get it all down". MR. RHODES stated he was "concerned" about signing the declaration "because it is a small town". MR. RHODES stated "it worries" him because "the DA will find out". MR. RHODES stated that "keeps going through his head". MR. RHODES stated to me that he "doesn't know what to do" and that he was "still thinking on it (signing the declaration)". MR. RHODES stated he "is thinking not to sign it" and is "leaning in that direction". MR. RHODES stated he wanted a couple more weeks to think about it. MR. RHODES stated "if the motion has already been denied, what is the chance it will be denied again?" MR. RHODES stated he was dealing with his father-in-law's passing on 06/02/2017 and after that he could figure out what he wanted to do with the declaration. I told him I would follow-up with him in the upcoming week or so.

6. On 06/26/2017 at approximately 11:34 AM, I attempted to contact WILLIAM RHODES via his cell phone. It went directly to voicemail and I left a message asking MR. RHODES to contact me. I did not receive a return phone call from him.

7. On 06/27/2017 at approximately 1:18 PM, I attempted to contact WILLIAM RHODES via his cell phone – although it went directly to voice mail. I left another voice mail for MR. RHODES to contact me. I did not hear back from MR. RHODES for the rest of the day.

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8. On 06/28/2017 at approximately 8:34 AM, I received a call from WILLIAM RHODES' cell phone to my cell phone. MR. RHODES apologized to me for not calling me back sooner. MR. RHODES stated that he had a lot to deal with regarding the death of his father-in-law so he and his wife just packed up and went to the river where they are now. MR. RHODES stated he thought about it some more and "after all his thinking, [he] just can't sign" the declaration. MR. RHODES wanted to know if the attorney was still going to file an appeal/brief and I assured him there would be an appeal. He stated that was "good", but he "just could not bring [himself] to do it". I thanked MR. RHODES for contacting me to let me know his position.

I declare under the penalty of perjury under the laws of the State of California that the foregoing is true and correct to the best of my knowledge. Signed in the City of Santa Ana, California.

Date: 06/28/2017

Kristen L. Knowles
Knowles & Vacca, Inc.

Exhibit 1 55

DECLARATION OF WILLIAM A. RHODES

I, WILLIAM A. RHODES, have personal first-hand knowledge of the facts set forth herein, and if called upon, I could and would testify competently thereto. I declare:

1. I was a juror on the case of ***People of the State of California v. Joseph Andrew Phipps*** (Case Number FMB1300048) tried in San Bernardino County Superior Court.

2. I knew of the homicide of Christy Phipps prior to being called for Jury duty. It is a small town and everyone knew about the homicide and where in my opinion, prejudiced by the adverse publicity in this case.

3. During the trial, the Assistant District Attorney had demonstrations regarding how Christy Phipps and Joseph Phipps were fighting over the gun.

4. During jury deliberations, the jurors discussed the demonstrations by the Prosecution witnesses. I felt then, and I still feel, that the demonstrations were very unrealistic and one sided. I argued that it was entirely possible that the gun went off during the Phipps' fighting over Christy Phipps having the gun, but I believe that the demonstrations mislead the other jurors into believing Mr. Phipps' explanation was not plausible.

5. I was a hold out, along with one or two other jurors, and argued that the shooting of Christy Phipps was not homicide, but no one else in the jury wanted to listen. It was a Friday, and at the time, the rest of the jury just wanted to get out and be done with the trial.

6. I am hard of hearing. Throughout the trial, I had issues with hearing the defense attorney. It was difficult to hear the defense attorney. I did not notify the court or the court staff because I was once on a different jury and when I notified the court in that trial, I was given headphones which crackled and made things worse, so I did not say anything. There were times I did not hear what the defense attorney was saying because he was speaking in low tones.

7. Because of my inability to hear everything, when I was arguing with the other jurors during deliberations, I began to lose confidence in what I thought I heard. I thought maybe the other jurors heard something I didn't.

8. A couple of the other jurors were pushing me to change my verdict. I am not sure what made me go along with the other jurors, but I have regretted it since that day. There was one juror who was so against Joseph Phipps, she wanted him executed.

I declare under the penalty of perjury under the laws of the State of California that the foregoing is true and correct to the best of my knowledge. This declaration is being executed in Yucca Valley, California.

Date:

WILLIAM A. RHODES

PROOF OF SERVICE

I am a citizen of the United States, over the age of 18 years, employed in the County of Orange, and not a party to the within action. My business address is 14121 Beach Boulevard Westminster, CA 82683, I am a member of the bar of this court. June 16, 2018, I served the within PETITION FOR Habeas Corpus and Memorandum of Points in Support thereof, in said action, by placing a true copy thereof enclosed in a sealed envelope addressed as follows, and deposited the same in the United States mail at Westminster, CA.

JOSEPH ANDREW PHIPPS Served 5/31/18
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Blythe CA 92226

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Office of District Attorney
6527 White Feather Road
Joshua Tree, CA 92252

Hon. Rondey A. Cotez
c/o Clerk of Superior Court
6527 White Feather Road
Joshua Tree, CA 92252

I declare under the penalty of perjury of the laws of the United States that the foregoing is true and correct. Executed this 16th day of June, 2018, at Westminster, CA.