No.

IN THE SUPREME COURT OF THE UNITED STATES

JUAN MARTIN FIGUEROA,

***Petitioner*,**

v.

W. L. MONTGOMERY, Warden,

***Respondent*.**

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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IN THE SUPREME COURT OF THE UNITED STATES

JUAN MARTIN FIGUEROA,

***Petitioner*,**

v.

W. L. MONTGOMERY, Warden,

***Respondent*.**

QUESTION PRESENTED

Whether the Prosecutor Deprived Figueroa of Due Process, Compulsory Process, and a Fair Trial by Intentionally Misleading Defense Counsel?

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No.

JUAN MARTIN FIGUEROA,
***Petitioner*,**

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W. L. MONTGOMERY, Warden,
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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, JUAN FIGUEROA, petitions for a writ of certiorari to review the United States Court of Appeals for the Ninth Circuit's denial of Figueroa's Request for a Certificate of Appealability. (Appendix A)

OPINION BELOW

On August 26, 2022, the Ninth Circuit Court of Appeals denied Figueroa's request for a certificate of appealability. (Appendix A)

JURISDICTION

The Court has jurisdiction. 28 U.S.C. § 1254(1)

CONSTITUTIONAL PROVISIONS AND REGULATIONS INVOLVED

U.S. Const. Amends. V, VI, XIV; 28 U.S.C.§ 2254.

STATEMENT OF THE CASE

A. State Court Trial Proceedings

The prosecution charged Figueroa with the murders of Art Gomez (Ct. 1) and Jesus Rendon (Ct. 2). The prosecution also alleged firearm and special circumstances enhancements. Cal. Penal Code §§ 187(a), 12022.53 (b)-(d), 190.2(a)(3).

Figueroa's first trial, Judge Lench presiding, resulted in a mistrial after the jury deadlocked one to eleven in favor of not guilty as to Gomez and ten to two in favor of not guilty as to Rendon. (CT 510) After his second trial, Judge Perry presiding, the jury found Figueroa guilty of Rendon's murder but not guilty of Gomez' murder. (CT 697-98)

Judge Perry sentenced Figueroa to a term of 50 years to life in prison, consisting of 25 years to life on count 2, plus 25 years to life for the firearm enhancement. Cal. Penal Code § 12022.53 (b)-(d).

B. Direct Appeal

Figueroa appealed to the California Court of Appeal (CCA), and on April 23, 2019 the CCA affirmed the judgment.

Figueroa then filed a Petition for Review. On July 24, 2019, the California Supreme Court (CSC) summarily denied his petition.

C. Federal Habeas Proceedings

On, April 29, 2020, Figueroa, in pro se, filed a petition for writ of habeas corpus in the district court. On April 2, 2021, the district court denied Figueroa's habeas petition.

On June 29, 2021, Figueroa, through counsel filed a Request for Certificate of Appealability to the Ninth Circuit. On August 26, 2022, the Ninth Circuit Court of Appeals denied Figueroa's request for a certificate of appealability. (Appendix A)

STATEMENT OF THE FACTS ELICITED FROM THE CALIFORNIA COURT OF APPEAL OPINION

Figueroa, Frank Martinez, Art Gomez, and Jesus Rendon were members of the State Street gang based in the Boyle Heights neighborhood of Los Angeles. During the evening of November 30, 2011, Figueroa, Martinez, and about three other men and two women were hanging out in the front yard of a house on City View Avenue in Boyle Heights.

Gomez, who was driving with several other people in his car, stopped in front of the house and said "what's up" to the group of people standing outside. Gomez then drove away and dropped off some of his passengers before returning to the house. Gomez walked up to the front yard and started throwing punches at some of the people standing in front of the house. The group did not immediately fight back. Gomez walked away from the group and made a phone call. Shortly after Gomez made the call, Rendon drove up and parked his car outside the house. Gomez and Rendon met up in the street. They then walked back toward the house, at which point Rendon threw up his hands and said "what's up" to the group standing outside.

As Gomez and Rendon walked toward the house, Figueroa and Martinez started shooting at them. Figueroa shot Rendon several times, killing him. Gomez was also shot several times and later died from his injuries.

REASON TO GRANT CERTIORARI

I. THE PROSECUTOR DEPRIVED FIGUEROA OF DUE PROCESS, COMPULSORY PROCESS, AND A FAIR TRIAL BY INTENTIONALLY MISLEADING DEFENSE COUNSEL

A. The Prosecutor Represented that the State Would Present Witness Ibarra

At the first trial, the prosecution presented Fernando Ibarra and Brittany Garcia as prosecution witnesses. (2CT 375-376, 379) Before the second trial, defense counsel moved dismiss the case in the interest of justice. Cal. Penal Code § 1385. (2RT B1l)

The prosecutor opposed the motion and represented, "*We spoke to them [the jurors] after the mistrial and were told that they could not reach a verdict because of discrepancies between the Fernando Ibarra and Brittany Garcia's testimony.* The prosecution argued, "I think those discrepancies that were highlighted are things that can be addressed by other evidence in the case more effectively the second time around. (2RT B4) (Italics added.)

When Figueroa's second trial started, during opening statements, the prosecutor told the jury it would hear testimony

from Ibarra. According to the prosecutor, Ibarra wouldn't be able to identify any of the shooters, but he would provide an account of the shooting that is "consistent with and corroborates" the testimony of two other witnesses.

But, despite the prosecutor's representations during opening statement, just before resting its case in chief, the prosecutor told Judge Perry and defense counsel that the prosecution had lost contact with Ibarra. Defense counsel asked the prosecution to tell Judge Perry the next day if it located Ibarra:

> THE COURT: Okay, we' re at sidebar.
>
> THE PROSECUTOR: Your honor, at this point there was one additional witness that the people intended to call. We have had some serious difficulties trying to reach out to this person. but at this point, the People are going to rest.
>
> THE COURT: Okay. That's it? We had to come to sidebar for that?
>
> THE PROSECUTOR: I wanted to let you know.
>
> MR. WILLOUGHBY: Yeah, this is rather abrupt. We had planned on three weeks, your honor, and I'm not ready to go forward today. I can be ready tomorrow. We're way ahead of schedule. We're not even two weeks.

THE COURT: Yeah, okay.

MR. WILLOUGHBY: *I really thought they were going to call Mr. Ibarra who was their star witness.*

THE COURT: In any event, you can be ready tomorrow?

MR. WILLOUGHBY: Yes, tomorrow morning.

THE COURT: [Comments about Scheduling]

MR. WILLOUGHBY: The only thing is that if they've located Mr. Ibarra, I want them to inform the court tomorrow morning before I start.

THE COURT: Oh, yeah, I'll let them put him on. They can also hold him for rebuttal, I suppose. Trials are fluid things. (7RT 1902-1903) (Italics added.)

The prosecution said nothing about Ibarra the next day and the defense presented, and rested, its case-in-chief.

The jury found Figueroa guilty of Rendon's murder, but not guilty of Gomez' murder. (CT 697-98)

B. Judge Perry Denied Figueroa's Motion for New Trial

Defense counsel moved for a motion for new trial because the prosecution "misled the Court and the defense" about Ibarra's availability. Defense counsel stated that the prosecutors promised

the defense that they would produce Ibarra for trial. When defense counsel learned that the prosecutors would not produce Ibarra, he immediately "sought to have an investigator locate Mr. Ibarra." (4CT 713) But the trial ended before the defense could serve Ibarra. (4CT 713)

After trial, the defense also "tried to contact Mr. Ibarra to verify the Prosecution's story that he had evaded them." (4CT 713) The defense saw Mr. Ibarra "at his very same address," but he "took very serious evasive actions to avoid contact . . . " (4CT 713) At some point, the defense served Mr. Ibarra with a subpoena to appear. (4CT 713)

On August 24, 2016, at defense counsel's request, a neighbor, Stephanie Estrada, went to Ibarra's house and found him in his backyard. (4CT 713) Ibarra told Estrada he had "never evaded the prosecution or attempted to hide from them." (4CT 713.) He told her "he was in contact with Mr. Alvaro [sic], the Prosecution's investigating officer . . . [who] had informed him when the case was over." (Ibid.)

After trial, the defense subpoenaed Ibarra for the motion for new trial. Judge Perry refused to hear testimony about

whether the prosecution promised to produce Ibarra and that it intentionally lied about, and suppressed, its ability to contact him.

C. Relevant Federal Law and Analysis

The Sixth Amendment provides in pertinent part that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor[.]" U.S. Const. amend. VI. The Compulsory Process Clause secures, at a minimum, a criminal defendant's "right to the government's assistance in compelling the attendance of favorable witnesses at trial and the right to put before a jury evidence that might influence the determination of guilt." *Pennsylvania v. Ritchie,* 480 U.S. 39, 56, 107 S. Ct. 989, 94 L. Ed. 2d 40 (1987).

The right of an accused to present witnesses, and to compel their attendance, to establish a defense is "a fundamental element of due process of law" *Washington v. Texas,* 388 U.S. 14, 19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967)), and "is an essential attribute of the adversary system itself." *Taylor v. Illinois,* 484 U.S. 400, 408, 108 S. Ct. 646, 98 L. Ed. 2d 798 (1988).

D. The Law Holds Prosecutor to High Ethical Standards

Courts have held prosecutors to high ethical standards. E.g., *Berger v. United States,* 295 U.S. 78, 88 (1935) The prosecutor represents "'a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.'" *Id.*

A prosecutor "may prosecute with earnestness and vigor . . . [b]ut while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." *Berger v. United States,* 295 U.S. at 88; see also *Donnelly v. DeChristoforo*, 416 U.S. 637, 648-49 (1974) (Douglas, J., dissenting) (The prosecutor's "function is to vindicate the right of people as expressed in the laws and give those accused of crime a fair trial.")

A prosecutor who uses deceptive or reprehensible methods to persuade the jury commits misconduct, and such actions require reversal under the federal Constitution when they infect

the trial with such "'unfairness as to make the resulting conviction a denial of due process.'" *Darden v. Wainwright*, 477 U.S. 168, 181 (1986).

In evaluating a claim that a prosecutor engaged in misconduct, a court must determine whether the prosecutor's statements or actions "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Darden v. Wainwright*, 477 U.S. at 181.

E. The CCA Unreasonably Overlooked That the Prosecutor's and Judge Perry's Omissions Deprived Figueroa of Due Process, a Fair Trial and the Court's Compulsory Process

Before the first trial and before the second trial, the prosecutors promised to produce Ibarra. But not until the prosecution rested did the prosecution notify the court, in trial counsel's presence, about problems finding Ibarra. During the motion for new trial, trial counsel told the court that he tried to serve Ibarra when he learned that the prosecutor failed to serve Ibarra. Trial counsel admitted he "could have said something, but [he] couldn't believe this person was evading process when this person was a witness that had assisted them in the preparation

for the first trial." (8RT 3001-3011)

The prosecution frustrated the defense need to secure Ibarra's testimony by failing to timely advise the court and counsel that Ibarra could not be found. The CCA unreasonably faulted defense counsel by failing to advise the court or the prosecution that he wanted to call Ibarra as a witness during the second trial. The CCA unreasonably overlooked that the prosecution promised to inform the court whether it found Ibarra before the defense case. The CCA also overlooked that defense counsel made efforts to find Ibarra. Defense counsel immediately sought to have an investigator find Ibarra, But Ibarra evaded the defense service.

Judge Perry should have held a hearing to determine if the prosecution committed misconduct by intentionally misleading the defense about Ibarra and depriving defense counsel of due process, a fair trial, and the compulsory process of the court.

At the motion for new trial, Judge Perry refused to hear Ibarra's testimony. (8RT 3010) Judge Perry should have held a hearing to determine if the prosecutors agreed to produce Ibarra before trial and whether Ibarra evaded process. See *Stanley v.*

Illinois, 405 U.S. 645, 658 (1972) (Due Process Clause requires a hearing to make an individualized determination) "Procedure by presumption is always cheaper and easier than individualized determination." *Id.,* at 656-657. “In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses. [Citations].” *Goldberg v. Kelly,* 397 U.S. 254, 269 (1970).

CONCLUSION

Mr. Figueroa respectfully requests that this Court grant Certiorari.

DATED: November 15, 2022

Respectfully submitted,
FAY ARFA, A LAW CORPORATION

/s Fay Arfa

_____

Fay Arfa, Attorney for Appellant

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

AUG 26 2022

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

JUAN MARTIN FIGUEROA, Petitioner-Appellant, v. W. L. MONTGOMERY, Acting Warden, Respondent-Appellee.	No. 21-55432 D.C. No. 2:20-cv-03911-FMO-PLA Central District of California, Los Angeles ORDER

Before: SILVERMAN and M. SMITH, Circuit Judges.

The request for a certificate of appealability (Docket Entry No. 6) 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.

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JS-6

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

JUAN MARTIN FIGUEROA, Petitioner, v. W. L. MONTGOMERY, Warden, Respondent.	No. CV 20-3911-FMO (PLA) **JUDGMENT**

Pursuant to the Order accepting the Magistrate Judge's Second Report and Recommendation,

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

DATED: April 2, 2021

/s/ - Fernando M. Olguin
HONORABLE FERNANDO M. OLGUIN
UNITED STATES DISTRICT JUDGE

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

JUAN MARTIN FIGUEROA,

Petitioner,

v.

W. L. MONTGOMERY, Warden,

Respondent.

No. CV 20-3911-FMO (PLA)

ORDER ACCEPTING MAGISTRATE JUDGE'S SECOND REPORT AND RECOMMENDATION

Pursuant to 28 U.S.C. § 636, the Court has reviewed the Petition, all the records and files herein, and the Magistrate Judge's Second Report and Recommendation. The Court accepts the recommendations of the Magistrate Judge.

ACCORDINGLY, IT IS ORDERED:

1. The Second Report and Recommendation is accepted.
2. Judgment shall be entered consistent with this Order.
3. The clerk shall serve this Order and the Judgment on all counsel or parties of record.

DATED: April 2, 2021

/s/ - Fernando M. Olguin

HONORABLE FERNANDO M. OLGUIN
UNITED STATES DISTRICT JUDGE

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

JUAN MARTIN FIGUEORA, Petitioner, v. W.L. MONTGOMERY, Warden, Respondent.	No. CV 20-3911-FMO (PLA) **SECOND REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE**

This Second Report and Recommendation[1] is submitted to the Honorable Fernando M. Olguin, United States District Judge, pursuant to 28 U.S.C. § 636 and General Order 05-07 of the United States District Court for the Central District of California. For the reasons discussed below, the Magistrate Judge recommends that the Petition for Writ of Habeas Corpus be dismissed.

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[1] The Court issued a Report and Recommendation on February 8, 2021, that was withdrawn. (ECF Nos. 31, 32).

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I

SUMMARY OF PROCEEDINGS

On June 20, 2016, a Los Angeles County Superior Court jury convicted petitioner of first degree murder (Cal. Penal Code § 187(a)), and found true the allegation that petitioner personally and intentionally discharged a firearm within the meaning of California Penal Code section 12022.53(b).[2] (Reporter's Transcript ("RT") 2701, 2703-05; Clerk's Transcript ("CT") 698, 703-04, 796-97). On September 27, 2016, the trial court denied petitioner's motion for a new trial, and sentenced petitioner to a term of fifty years to life in state prison. (RT 3001, 3013-14; CT 710-19, 793-94, 796-97).

Petitioner filed an appeal. (Lodgment No. 4). On April 23, 2019, the California Court of Appeal affirmed the judgment, but remanded the case for a new sentencing hearing to allow the trial court to exercise its newly granted discretion under California Penal Code section 12022.53(h) to strike or dismiss the firearm enhancement in the interest of justice. (Lodgment No. 8 at 10-12). On July 24, 2019, the California Supreme Court denied review. (Lodgment Nos. 9, 10).

On remand, the Los Angeles County Superior Court declined to strike the firearm enhancement, leaving in place petitioner's original sentence of fifty years to life. (Lodgment No. 11 (November 20, 2019, hearing on remittitur)). Petitioner indicates in the Petition he did not file any state habeas petitions challenging his conviction or sentence. (ECF No. 1 at 3).

On April 29, 2020, petitioner filed the instant Petition. (ECF No. 1). On September 11, 2020, respondent filed an Answer and Return. (ECF No. 16). On February 4, 2021, petitioner filed a "Response/Traverse." (ECF No. 29). On February 10, 2021, petitioner filed a second "Response/Traverse." (ECF No. 33).

This matter is deemed submitted and is ready for a decision.

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[2] Petitioner was charged with the murders of Art Gomez and Jesus Rendon, along with firearm and special circumstances allegations. (CT 300-02). His first trial resulted in a hung jury. (CT 510). On retrial, the jury found petitioner guilty of murder as to Mr. Rendon, and not guilty of murder as to Mr. Gomez. (CT 697-98).

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II

STATEMENT OF FACTS

The Court adopts the following factual summary set forth in the California Court of Appeal's Opinion affirming petitioner's conviction:[3]

> [Petitioner], Frank Martinez, Art Gomez, and Jesus Rendon were members of the State Street gang based in the Boyle Heights neighborhood of Los Angeles. During the evening of November 30, 2011, [petitioner], Martinez, and about three other men and two women were hanging out in the front yard of a house on City View Avenue in Boyle Heights.
>
> Gomez, who was driving with several other people in his car, stopped in front of the house and said "what's up" to the group of people standing outside. Gomez then drove away and dropped off some of his passengers before returning to the house. Gomez walked up to the front yard and started throwing punches at some of the people standing in front of the house. The group did not immediately fight back.
>
> Gomez walked away from the group and made a phone call. Shortly after Gomez made the call, Rendon drove up and parked his car outside the house. Gomez and Rendon met up in the street. They then walked back toward the house, at which point Rendon threw up his hands and said "what's up" to the group standing outside.
>
> As Gomez and Rendon walked toward the house, [petitioner] and Martinez started shooting at them. [Petitioner] shot Rendon several times, killing him. Gomez was also shot several times and later died from his injuries.

(Lodgment No. 8 at 2-3).

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[3] The Court "presume[s] that the state court's findings of fact are correct unless [p]etitioner rebuts that presumption with clear and convincing evidence." Tilcock v. Budge, 538 F.3d 1138, 1141 (9th Cir. 2008) (citations omitted); 28 U.S.C. § 2254(e)(1). Because petitioner has not rebutted the presumption with respect to the underlying events, the Court relies on the state court's recitation of the facts. Tilcock, 538 F.3d at 1141. This presumption applies even if the finding was made by a state court of appeals, rather than by a state trial court. Pollard v. Galaza, 290 F.3d 1030, 1035 (9th Cir. 2002). However, to the extent that an evaluation of petitioner's claim depends on an examination of the trial record, the Court herein has made an independent evaluation of the record specific to his claim.

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III

GROUND FOR RELIEF

Petitioner in his sole ground for habeas relief asserts that his constitutional right to "compulsory process [was] violated by the prosecution[']s use of a deliberate plan of deception to exclude a materially favorable witness." (ECF No. 1 at 5-7).

IV

STANDARD OF REVIEW

The Court applies the Antiterrorism and Effective Death Penalty Act of 1996 ("the AEDPA") in its review of this action. Pub. L. No. 104-132, 110 Stat. 1214 (1996); see Lindh v. Murphy, 521 U.S. 320, 336, 117 S. Ct. 2059, 138 L. Ed. 2d 481 (1997).

Under the AEDPA, a federal court may not grant a writ of habeas corpus on behalf of a person in state custody "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." 28 U.S.C. § 2254(d). As explained by the Supreme Court, section 2254(d)(1) "places a new constraint on the power of a federal habeas court to grant a state prisoner's application for a writ of habeas corpus with respect to claims adjudicated on the merits in state court." Williams v. Taylor, 529 U.S. 362, 412, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000). In Williams, the Court held that:

> Under the "contrary to" clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts. Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case.

Williams, 529 U.S. at 412-13; see Weighall v. Middle, 215 F.3d 1058, 1061-62 (9th Cir. 2000) (discussing Williams). A federal court making the "unreasonable application" inquiry asks "whether

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the state court's application of clearly established federal law was objectively unreasonable." Williams, 529 U.S. at 409; Weighall, 215 F.3d at 1062. The Williams Court explained that "a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." Williams, 529 U.S. at 411; accord Lockyer v. Andrade, 538 U.S. 63, 75-76, 123 S. Ct. 1166, 155 L. Ed. 2d 144 (2003). Section 2254(d)(1) imposes a "highly deferential standard for evaluating state-court rulings," Lindh, 521 U.S. at 333 n.7, that "demands that state court decisions be given the benefit of the doubt." Woodford v. Visciotti, 537 U.S. 19, 24, 123 S. Ct. 357, 154 L. Ed. 2d 279 (2002) (per curiam). A federal court may not "substitut[e] its own judgment for that of the state court, in contravention of 28 U.S.C. § 2254(d)." Id. at 25; Early v. Packer, 537 U.S. 3, 11, 123 S. Ct. 362, 154 L. Ed. 2d 263 (2002) (per curiam) (holding that habeas relief is not proper where state court decision was only "merely erroneous").

The only definitive source of clearly established federal law under the AEDPA is the holdings (as opposed to the dicta) of the Supreme Court as of the time of the state court decision. Williams, 529 U.S. at 412. While circuit law may be "persuasive authority" for purposes of determining whether a state court decision is an unreasonable application of Supreme Court law (Duhaime v. Ducharme, 200 F.3d 597, 600-01 (9th Cir. 1999)), only the Supreme Court's holdings are binding on the state courts and only those holdings need be reasonably applied. Williams, 529 U.S. at 412; Moses v. Payne, 555 F.3d 742, 759 (9th Cir. 2009). Furthermore, under 28 U.S.C. § 2254(e)(1), factual determinations by a state court "shall be presumed to be correct" unless the petitioner rebuts the presumption "by clear and convincing evidence."

A federal habeas court conducting an analysis under § 2254(d) "must determine what arguments or theories supported, or, [in the case of an unexplained denial on the merits], could have supported, the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of [the Supreme Court]." Harrington v. Richter, 562 U.S. 86, 102, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011) ("A state court's determination that a claim lacks merit precludes federal habeas relief so long

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as 'fairminded jurists could disagree' on the correctness of the state court's decision."). In other words, to obtain habeas relief from a federal court, "a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." Id. at 103.

The United States Supreme Court has held that "[w]here there has been one reasoned state judgment rejecting a federal claim, later unexplained orders upholding that judgment or rejecting the same claim rest upon the same ground." Ylst v. Nunnemaker, 501 U.S. 797, 803, 111 S. Ct. 2590, 115 L. Ed. 2d 706 (1991). In petitioner's direct appeal, he challenged the trial court's denial of his motion seeking a new trial. (See Lodgment No. 4). The California Court of Appeal rejected the claim on the merits in a reasoned decision. (See Lodgment No. 8 at 9). The California Supreme Court denied review without comment or citation. Accordingly, in this habeas review, the Court looks through the California Supreme Court's denial and reviews the California Court of Appeal's opinion under the AEDPA's deferential standard. See Nunnemaker, 501 U.S. at 803; Shackleford v. Hubbard, 234 F.3d 1072, 1079 n.2 (9th Cir. 2000) (district court "look[s] through" unexplained California Supreme Court decision to the last reasoned decision as the basis for the state court's judgment).

V

DISCUSSION

GROUND FOR RELIEF: VIOLATION OF THE RIGHT TO COMPULSORY PROCESS

Petitioner seeks habeas relief on the ground that his right to compulsory process was violated with respect to witness Fernando Ibarra. (ECF No. 1 at 5-7). As set forth in more detail below, Mr. Ibarra had testified for the prosecution in petitioner's first trial that ended in a hung jury, but was not called as a witness in petitioner's second trial because, the prosecution represented, Mr. Ibarra could not be located. In petitioner's motion for a new trial, he argued that the prosecution intentionally prevented Mr. Ibarra's attendance at trial in violation of petitioner's due

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process rights. Petitioner sought to have Mr. Ibarra testify at the hearing on the motion to show that the prosecutor had misrepresented Mr. Ibarra's availability. The trial court denied the motion for a new trial without allowing Mr. Ibarra to testify.

A. The California Court of Appeal's Opinion

On appeal, petitioner argued that the trial court's refusal to allow Mr. Ibarra to testify at the hearing on the new trial motion prevented petitioner from establishing that the prosecution had violated his right to compulsory process. (Lodgment No. 8 at 4). The California Court of Appeal summarized the facts pertinent to this claim as follows:

> [Fernando] Ibarra testified as a witness to the shooting during the People's case-in-chief at [petitioner's] first trial. At a hearing before [petitioner's] second trial, one of the prosecutors informed the court that she had spoken to the jurors who had served on the first trial. Several of the jurors believed discrepancies between Ibarra's testimony and the testimony of Brittany Garcia, another witness to the shooting, contributed to the jury deadlocking on counts 1 and 2. The prosecutor told the court she believed "those discrepancies that were highlighted are things that can be addressed by other evidence in the case more effectively the second time around."
>
> During opening statements in [petitioner's] second trial, the prosecutor told the jury it would hear testimony from Ibarra. According to the prosecutor, Ibarra wouldn't be able to identify any of the shooters, but he would provide an account of the shooting that is "consistent with and corroborates" the testimony of two other witnesses.
>
> Toward the end of the People's case-in-chief, the prosecutor informed the court that she was having "some serious difficulties trying to reach out to [Ibarra]." The prosecutor indicated the People would rest without calling Ibarra as a witness.
>
> Defense counsel stated he was surprised the People were prepared to rest because Ibarra was their "star witness." Defense counsel asked the court to continue the trial to the next day to allow him to finish preparing [petitioner's] defense. The court instructed the prosecutor to "rest in front of the jury" and stated it would allow the People to reopen their case the next day if they were able to contact Ibarra.
>
> The next day, [petitioner] presented his defense. [Petitioner] never told the court he wanted Ibarra to testify as a witness for his defense, nor did [petitioner] ask the court to make a finding that Ibarra was unavailable to appear as a witness.
>
> Before his sentencing hearing, [petitioner] filed a new trial motion, in which he argued, among other things, that the People violated his due process rights by concealing Ibarra's whereabouts and withholding Ibarra's testimony. [Petitioner] explained that, after trial, one of his investigators contacted Ibarra, who claimed he had always cooperated with the People and had been in contact with one of the their [sic] investigators through the end of the second trial. But for the People's assertion during trial that they could not contact Ibarra, [petitioner] insisted he would have called Ibarra to appear as a defense witness. According to [petitioner], Ibarra's testimony was material to his defense because Ibarra "was the only person with a clear view of

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> what transpired[, and,] [i]n his testimony from the first trial, he states that [ ] [petitioner] was not present and was not the person involved in the incident."
>
> In September 2016, the court heard [petitioner's] new trial motion. [Petitioner] acknowledged he never informed the court or the People during the second trial that he wanted Ibarra to appear as a witness for his defense. When the court questioned why [petitioner] never asked the court to make a finding that Ibarra was unavailable to appear at the second trial, defense counsel replied, "I could have said something, but I couldn't believe this person was evading process when this person was a witness that had assisted them in the preparation for the first trial."
>
> [Petitioner] requested that the court allow him to call Ibarra as a witness at the hearing on the new trial motion to testify "whether, in fact, he evaded process, as the prosecution has represented to this court; or whether, in fact, he was available." After denying [petitioner's] request, the court denied his motion for a new trial, explaining: "I am not persuaded. I just don't think that this is an issue that rises to a level for a motion for new trial, especially since the witness had previously testified and there was the obvious remedy of asking that the witness's testimony be read into the record if it was that important." [FN]
>
> [FN] It is also unclear whether Ibarra could have testified at the new trial hearing. For example, [petitioner's] counsel stated that he "could simply have Mr. Ibarra come before this court and articulate whether, in fact, he evaded process," and that Ibarra "is a person [who] is not unreachable[;] Mr. Alvaro has been in contact with [Ibarra]."

(Lodgment No. 8 at 6-9).

The California Court of Appeal determined that petitioner failed to show any violation of his right to compulsory process, or that the trial court erred in denying his request to have Mr. Ibarra appear as a witness at the hearing on the new trial motion, stating:

> The Sixth Amendment to the United States Constitution and Article I, section 15, of the California Constitution guarantee a criminal defendant the right to compel the attendance of witnesses on the defendant's behalf. (People v. Jacinto (2010) 49 Cal.4th 263, 268-269 (Jacinto).) "The right of an accused to compel witnesses to come into court and give evidence in the accused's defense is a fundamental one. As the high court has explained: 'The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. The right is a fundamental element of due process of law.' [Citation.]" (Ibid.)
>
> The prosecution can infringe a defendant's right to compel witnesses to testify in a number of ways, such as by threatening to prosecute a witness for any crimes he or she reveals or commits while testifying, or by arresting "'a defense witness before he or other defense witnesses have given their testimony.' [Citation.]" (Jacinto, supra, 49 Cal.4th at p. 269.) To establish a claim that the prosecution violated a defendant's right to compulsory process, the defendant must prove: (1) prosecutorial misconduct; (2) the prosecutor's misconduct was a substantial cause in preventing

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the defendant from calling the witness to testify; and (3) the testimony the defendant was unable to present was material to his defense. (Id. at pp. 269-270.)

Unlike most other Sixth Amendment rights, the protections afforded by the right to compulsory process do not arise automatically out of the initiation of the adversary process. (Jacinto, supra, 49 Cal.4th at p. 273.) "While those [other] rights shield the defendant from potential prosecutorial abuses, the right to compel the presence and present the testimony of witnesses provides the defendant with a sword that may be employed to rebut the prosecution's case. The decision whether to employ it in a particular case rests solely with the defendant. The very nature of the right requires that its *effective use be preceded by deliberate planning and affirmative conduct*." (Ibid., quoting Taylor v. Illinois (1988) 484 U.S. 400, 410.) Thus, to establish a claim for violation of one's right to compulsory process, the defendant must "take an active role in ensuring the presence of his witnesses." (Jacinto, supra, 49 Cal.4th at p. 273.)

A defendant may move for a new trial on the ground that the prosecutor committed prejudicial misconduct during trial. ([Cal. Penal Code] § 1181, subd. (5).) "'We review a trial court's ruling on a motion for a new trial under a deferential abuse-of-discretion standard.' [Citations.] '"A trial court's ruling on a motion for new trial is so completely within that court's discretion that a reviewing court will not disturb the ruling absent a manifest and unmistakable abuse of that discretion."' [Citations.]" (People v. Thompson (2010) 49 Cal.4th 79, 140.)

* * *

[Petitioner] has failed to show the court erred in denying his request to have Ibarra appear as a witness at the hearing on the new trial motion. Even if we were to assume that Ibarra's testimony would have shown some form of prosecutorial misconduct, [petitioner] cannot establish any violation of his right to compulsory process because he made no attempt during trial to secure Ibarra's testimony for his defense. As noted above, [petitioner] never informed the court or the People that he wanted to call Ibarra as a witness during the second trial. (See Jacinto, supra, 49 Cal.4th at p. 273 [the defendant must "take an active role in ensuring the presence of his witnesses"].)

To the extent [petitioner] claims he reasonably relied on any representations the People may have made about Ibarra's availability in deciding not to attempt to call Ibarra as a defense witness at the second trial, such reliance would not support a claim for violation of [petitioner's] right to compulsory process. As the court explained during the hearing on [petitioner's] new trial motion, other mechanisms were available to [petitioner] through which he could have attempted to secure Ibarra's testimony. For example, [petitioner] could have informed the court he intended to call Ibarra as a witness and requested a continuance to allow [petitioner] additional time to locate Ibarra and secure his presence at trial. Accordingly, even if the court erred by not allowing Ibarra to testify at the hearing on the new trial motion, the error was harmless under Chapman v. California (1967) 386 U.S. 18, 24.

Because [petitioner] failed to take any steps before or during trial to secure Ibarra's testimony for his defense, he cannot show his right to compulsory process was violated by any misrepresentations the People may have made about Ibarra's availability to testify at the second trial. (See Jacinto, supra, 49 Cal.4th at pp. 273-274.) We therefore conclude the court did not err when it denied [petitioner's] request to have Ibarra testify at the hearing on [petitioner's] new trial motion.

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(Lodgment No. 8 at 5-6, 9-10).

B. Relevant Federal Law and Analysis

The Sixth Amendment provides in pertinent part that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor[.]" U.S. Const. amend. VI. The Compulsory Process Clause secures, at a minimum, a criminal defendant's "right to the government's assistance in compelling the attendance of favorable witnesses at trial and the right to put before a jury evidence that might influence the determination of guilt." Pennsylvania v. Ritchie, 480 U.S. 39, 56, 107 S. Ct. 989, 94 L. Ed. 2d 40 (1987).

The right of an accused to present witnesses, and to compel their attendance, to establish a defense is "a fundamental element of due process of law" (Washington v. Texas, 388 U.S. 14, 19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967)), and "is an essential attribute of the adversary system itself." Taylor v. Illinois, 484 U.S. 400, 408, 108 S. Ct. 646, 98 L. Ed. 2d 798 (1988). The Supreme Court has noted, however, that

> [t]here is a significant difference between the Compulsory Process Clause weapon and other rights that are protected by the Sixth Amendment [e.g., the rights to counsel, to a speedy trial, and to an impartial jury] -- its availability is dependent entirely on the defendant's initiative. Most other Sixth Amendment rights arise automatically on the initiation of the adversary process and no action by the defendant is necessary to make them active in his or her case. While those rights shield the defendant from potential prosecutorial abuses, the right to compel the presence and present the testimony of witnesses provides the defendant with a sword that may be employed to rebut the prosecution's case. The decision whether to employ it in a particular case rests solely with the defendant. The very nature of the right requires that its effective use be preceded by deliberate planning and affirmative conduct.

Id. at 410 (footnote omitted).

Here, to the extent petitioner asserts that he is entitled to habeas relief because the trial court misapplied state law in denying his motion for a new trial, his claim is not cognizable on federal habeas review. It is well established that habeas relief is not available for state law errors that are not of a constitutional dimension. Estelle v. McGuire, 502 U.S. 62, 67-68, 70, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991).

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To the extent petitioner asserts that the trial court's denial of his motion for a new trial violated due process, his claim fails. The record shows that, although the prosecutor told the jury during opening statements that Mr. Ibarra would testify about the fight he observed before the shooting took place (see RT 461-62), later in the trial the prosecutor informed the trial court and defense counsel during a sidebar discussion that the prosecution would rest without calling Mr. Ibarra as a witness because of "serious difficulties trying to reach out to [him]." (RT 1902). Defense counsel responded that "this [was] rather abrupt" as counsel "really thought [the prosecution was] going to call Mr. Ibarra [as] their star witness," but that counsel would be ready to present petitioner's defense the following day. (Id.). When back on the record and outside the presence of the jury, the prosecutor asked if any defense witnesses would be called. Defense counsel responded that the following individuals could possibly testify: petitioner's aunt, a gang member named "Repo," and petitioner. (RT 1904-09). There was no mention that Mr. Ibarra's testimony was material to petitioner's defense; in fact, defense counsel had referred to Mr. Ibarra being the *prosecution's* star witness. Later, at the hearing on petitioner's motion for a new trial, the trial court rejected petitioner's argument that a new trial was warranted because the defense had relied on the prosecution's initial statement that Mr. Ibarra would be called to testify, and that the prosecution had intentionally concealed Mr. Ibarra's whereabouts and prevented Mr. Ibarra from testifying. The trial court expressed disbelief that Mr. Ibarra "would have been that important to [petitioner's] case" (RT 3008) given that defense counsel had voiced no complaint to the court about Mr. Ibarra's absence from the trial and did not request to have Mr. Ibarra's prior trial testimony admitted. (RT 3009-10). Petitioner requested to have Mr. Ibarra testify at the hearing as to "whether, in fact, he evaded process, as the prosecution . . . represented . . .; or whether, in fact, he was available." (RT 3010). The trial court denied the motion without allowing Mr. Ibarra to testify. (Id.).

When a defendant knows he or she may subpoena witnesses but elects not to, there is no violation of the defendant's right to compulsory process. See Selam v. Warm Springs Tribal Corr. Facility, 134 F.3d 948, 952 (9th Cir. 1998) (citing Osborne v. United States, 371 F.2d 913, 926-27 n.15 (9th Cir. 1967)). Here, as the court of appeal observed, there is no indication that petitioner

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made *any* attempt to notify the trial court that Mr. Ibarra's testimony was critical to his defense. Petitioner never requested a continuance to secure Mr. Ibarra's presence at trial or, in the alternative, requested that Mr. Ibarra be declared unavailable to allow the admission of his prior trial testimony. Although petitioner asserts the foregoing summary is factually inaccurate because, after the prosecutor announced Mr. Ibarra would not be called as a witness, defense counsel took steps to locate Mr. Ibarra to secure his appearance at trial (see ECF No. 33 at 7 (citing CT 712-13)), that is not enough to show a compulsory process violation. Even if petitioner could establish that his counsel promptly tried to locate Mr. Ibarra after finding out Mr. Ibarra would not appear as a prosecution witness, the record nevertheless reflects his counsel did not inform the trial court that Mr. Ibarra's testimony was crucial until *after* petitioner was convicted and the motion for a new trial was filed. Indeed, at the hearing on the motion, when the trial court asked, "Well, why didn't you raise the issue [concerning Mr. Ibarra's testimony] when you learned that [Mr. Ibarra] was not going to be called," petitioner's counsel conceded, "In hindsight, . . . I should have." (RT 3007). On this record, the Court finds that the court of appeal reasonably determined that petitioner was not prevented from presenting Mr. Ibarra's testimony at trial, and that petitioner's claim alleging a violation of his right to compulsory process lacked merit. See, e.g., Guidry v. Cate, 2014 WL 6609414, at *8 (C.D. Cal. Oct. 2, 2014) (no denial of right to compulsory process because the petitioner did not request a continuance to investigate or subpoena any witness), Report and Recommendation accepted, 2014 WL 6612009 (C.D. Cal. Nov. 18, 2014). Moreover, because petitioner's right to compulsory process was not infringed, he has failed to show that the trial court incorrectly decided his motion for a new trial, let alone that the trial court's ruling on the motion violated due process.

Additionally, to the extent petitioner asserts the trial court erred by precluding Mr. Ibarra's testimony at the hearing on the motion for a new trial, the court of appeal found the alleged error to be harmless. Under AEDPA, the state court's harmlessness determination may be overcome only if petitioner "experienced 'actual prejudice,' that is, [if the Court has] grave doubt about whether [an] error of federal law had [a] 'substantial and injurious effect or influence'" on the proceeding. Frost

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v. Gilbert, 835 F.3d 883, 886 (9th Cir. 2016) (citations omitted); Brecht v. Abrahamson, 507 U.S. 619, 623, 637,113 S. Ct. 1710, 123 L. Ed. 2d 353 (1993) (a constitutional trial error justifies habeas relief if the error had a substantial and injurious impact in determining the jury's verdict); see also Davis v. Ayala, 576 U.S. 257, 268, 135 S. Ct. 2187, 192 L. Ed. 2d 323 (2015) (explaining that the Brecht standard "subsumes" the requirements that 28 U.S.C. § 2254 imposes when a petitioner challenges a state court's harmless error determination).

Assuming *arguendo* the trial court's decision to preclude Mr. Ibarra's testimony at the hearing on the motion for a new trial amounted to constitutional error, the error did not result in actual prejudice. As discussed above, petitioner failed to take any initiative during the trial to inform the court that a continuance was needed to secure Mr. Ibarra's appearance, or request that Mr. Ibarra be declared unavailable. This inaction was fatal to his compulsory process claim, as he cannot show a compulsory process violation when he made no effort to compel Mr. Ibarra's attendance at trial to begin with, or to rely on Mr. Ibarra's testimony from the first trial. Under these circumstances, it is evident that Mr. Ibarra's proposed hearing testimony would not have had any bearing on the trial court's determination of the motion, as the motion lacked merit for an independent reason -- petitioner failed to demonstrate he was in any way prevented from exercising his constitutional right to present Mr. Ibarra as a trial witness. In other words, because petitioner's right to compulsory process was not infringed, there was no basis to grant a new trial, and even if Mr. Ibarra had been permitted to testify in support of the motion for a new trial, there is no reasonable likelihood that the trial court would have reached a different conclusion. Accordingly, any error in precluding Mr. Ibarra's testimony was harmless.

To the extent petitioner argues that the prosecution, in not calling Mr. Ibarra as a witness at trial, acted deceptively and suppressed evidence in violation of due process as set forth in Brady v. Maryland, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), his claim fails.[4] (See ECF No. 1 at 5; ECF No. 33 at 11). In Brady, the Supreme Court held that "the suppression by the

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[4] The Court notes that, in his direct appeal, petitioner argued that the prosecution's actions regarding Mr. Ibarra amounted to suppression of evidence in violation of Brady. (Lodgment No. 4 at 90).

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prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Brady, 373 U.S. at 87. There are three components to a Brady violation: "[t]he evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." Strickler v. Greene, 527 U.S. 263, 281-82, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999).

Here, there was no Brady violation. As set forth above, the defense was aware of Mr. Ibarra's previous testimony during the first trial, and had the opportunity to subpoena Mr. Ibarra to testify at the second trial, but did not request a continuance to do so. Accordingly, because petitioner was not prevented from calling him Mr. Ibarra as a trial witness, the prosecution's actions did not amount to suppression of Brady material.[5]

For the foregoing reasons, the state courts' rejection of petitioner's claim was not inconsistent with any Supreme Court precedent. Richter, 562 U.S. at 102. Habeas relief is not warranted.

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[5] It appears that petitioner in his "Response/Traverse" may be attempting to raise a new claim by asserting that he is not guilty of first degree murder based on evidence showing "provocation/heat of passion." (ECF No. 33 at 7-9). A response to an answer is not the proper pleading to raise new grounds for relief. Cacoperdo v. Demosthenes, 37 F.3d 504, 507 (9th Cir. 1994). A district court has discretion to, but is not required to, consider claims presented for the first time in a party's response. In deciding whether to consider a newly presented claim, the district court must actually exercise its discretion rather than summarily deny the claim. See Brown v. Roe, 279 F.3d 742, 745 (9th Cir. 2002) (citing United States v. Howell, 231 F.3d 615, 621-22 (9th Cir. 2000)). Here, the Court exercises its discretion to not consider the purported new ground for relief challenging the sufficiency of the evidence. There is no indication that petitioner has exhausted his available state remedies by presenting this claim in the California Supreme Court. See 28 U.S.C. § 2254(b)(1); O'Sullivan v. Boerckel, 526 U.S. 838, 845-47, 119 S. Ct. 1728, 144 L. Ed. 2d 1 (1999) (exhaustion requires that a petitioner's contentions be fairly presented to the state supreme court for consideration). Additionally, although the Court recognizes petitioner's pro se status, petitioner nevertheless had the opportunity to properly present this claim at an earlier time, such as in an amended pleading, but failed to do so. There is nothing novel about petitioner's argument that would have made it difficult for him to include the new claim in his Petition, and allowing him to challenge the sufficiency of the evidence at this late stage would be prejudicial to respondent. Accordingly, petitioner's belatedly-raised challenge to the sufficiency of the evidence is not properly before the Court and, as such, cannot warrant habeas relief.

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VI

RECOMMENDATION

It is recommended that the District Judge issue an Order: (1) accepting this Second Report and Recommendation; and (2) directing that judgment be entered denying the Petition and dismissing this action with prejudice.

DATED: February 17, 2021

Paul L. Abrams

PAUL L. ABRAMS
UNITED STATES MAGISTRATE JUDGE

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NOTICE

Reports and Recommendations are not appealable to the Court of Appeals, but are subject to the right of any party to file Objections as provided in the Local Rules Governing Duties of Magistrate Judges, and review by the District Judge whose initials appear in the docket number. No Notice of Appeal pursuant to the Federal Rules of Appellate Procedure should be filed until entry of the Judgment of the District Court.

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Appellate Courts Case Information

Supreme Court

Change court

Disposition

PEOPLE v. FIGUEROA
Division SF
Case Number S255928

Only the following dispositions are displayed below: Orders Denying Petitions, Orders Granting Rehearing and Opinions. Go to the Docket Entries screen for information regarding orders granting review.

Case Citation:
none

Date	Description
07/24/2019	Petition for review denied

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Filed 4/23/19 P. v. Figueroa CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. JUAN MARTIN FIGUEROA, Defendant and Appellant.	B279062 Los Angeles County Super. Ct. No. BA441336

APPEAL from a judgment of the Superior Court of Los Angeles County, Robert J. Perry, Judge. Affirmed and remanded with directions.

Dan Mrotek, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Yun K. Lee and Lindsay Boyd, Deputy Attorneys General, for Plaintiff and Respondent.

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INTRODUCTION

A jury convicted defendant and appellant Juan Martin Figueroa of one count of first degree murder with a true finding that he personally and intentionally discharged a firearm causing great bodily injury or death. The trial court sentenced Figueroa to a total term of 50 years to life in prison. On appeal, Figueroa contends the court prejudicially erred when it precluded a witness from testifying at the hearing on Figueroa's new trial motion. Figueroa argues the witness's testimony was critical to establishing a claim that the People violated his right to compulsory process under the state and federal Constitutions by misrepresenting that the witness was unavailable to testify at trial. Figueroa also argues we should remand this matter for resentencing to allow the trial court to exercise its discretion to impose or to strike his firearm enhancement under Penal Code[1] section 12022.53, subdivision (h), which was recently amended by Senate Bill No. 620 (S.B. 620). We remand the matter for resentencing in light of S.B. 620 but otherwise affirm the judgment.

FACTUAL BACKGROUND

Figueroa, Frank Martinez, Art Gomez, and Jesus Rendon were members of the State Street gang based in the Boyle Heights neighborhood of Los Angeles. During the evening of November 30, 2011, Figueroa, Martinez, and about three other men and two women were hanging out in the front yard of a house on City View Avenue in Boyle Heights.

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1 All undesignated statutory references are to the Penal Code.

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Gomez, who was driving with several other people in his car, stopped in front of the house and said "what's up" to the group of people standing outside. Gomez then drove away and dropped off some of his passengers before returning to the house. Gomez walked up to the front yard and started throwing punches at some of the people standing in front of the house. The group did not immediately fight back.

Gomez walked away from the group and made a phone call. Shortly after Gomez made the call, Rendon drove up and parked his car outside the house. Gomez and Rendon met up in the street. They then walked back toward the house, at which point Rendon threw up his hands and said "what's up" to the group standing outside.

As Gomez and Rendon walked toward the house, Figueroa and Martinez started shooting at them. Figueroa shot Rendon several times, killing him. Gomez was also shot several times and later died from his injuries.

PROCEDURAL BACKGROUND

In December 2015, the People charged Figueroa with two counts of murder (§ 187, subd. (a) [count 1 – Gomez; count 2 – Rendon]). As to both counts, the People alleged Figueroa personally and intentionally discharged a firearm causing death or great bodily injury (§ 12022.53, subds. (b)–(d)). The People also alleged that counts 1 and 2 together constituted a multiple-murder special circumstance (§ 190.2, subd. (a)(3)).

Figueroa's first trial began in February 2016. In March 2016, the court declared a mistrial after the jury deadlocked one to eleven in favor of not guilty on count 1, and two to ten in favor of not guilty on count 2.

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Figueroa's second trial began in June 2016. The jury found Figueroa guilty of first degree murder on count 2 and found true the firearm enhancement as to that count; the jury acquitted Figueroa of count 1.

In September 2016, the court denied Figueroa's motion for a new trial. The court sentenced Figueroa to a term of 50 years to life in prison, consisting of 25 years to life on count 2, plus 25 years to life for the firearm enhancement under section 12022.53, subdivision (d).

Figueroa filed a timely notice of appeal.

DISCUSSION

1. The trial court properly denied Figueroa's motion for a new trial.

In his new trial motion, Figueroa argued the People violated his right to compulsory process under the state and federal Constitutions when they claimed Fernando Ibarra, a witness who testified at Figueroa's first trial, had avoided appearing as a witness at the second trial. Figueroa sought to call Ibarra as a witness at the hearing on the new trial motion to testify about whether he had in fact avoided testifying at the second trial. The court denied Figueroa's request.

On appeal, Figueroa contends the court's refusal to allow Ibarra to testify at the new trial hearing precluded Figueroa from establishing whether the People violated his right to compulsory process. Figueroa asks us to conditionally reverse his judgment and remand the matter for a new hearing on his new trial motion. We reject Figueroa's claim because regardless of whether the People falsely represented that Ibarra was unavailable to appear as a witness during their case-in-chief at the second trial,

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Figueroa made no attempt to secure Ibarra's testimony for his own defense.

1.1. Applicable Law and Standard of Review

The Sixth Amendment to the United States Constitution and Article I, section 15, of the California Constitution guarantee a criminal defendant the right to compel the attendance of witnesses on the defendant's behalf. (*People v. Jacinto* (2010) 49 Cal.4th 263, 268–269 (*Jacinto*).) "The right of an accused to compel witnesses to come into court and give evidence in the accused's defense is a fundamental one. As the high court has explained: 'The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. The right is a fundamental element of due process of law.' [Citation.]" (*Ibid.*)

The prosecution can infringe a defendant's right to compel witnesses to testify in a number of ways, such as by threatening to prosecute a witness for any crimes he or she reveals or commits while testifying, or by arresting " 'a defense witness before he or other defense witnesses have given their testimony.' [Citation.]" (*Jacinto*, *supra*, 49 Cal.4th at p. 269.) To establish a claim that the prosecution violated a defendant's right to compulsory process, the defendant must prove: (1) prosecutorial misconduct; (2) the prosecutor's misconduct was a substantial cause in preventing the defendant from calling the witness to

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testify; and (3) the testimony the defendant was unable to present was material to his defense. (*Id*. at pp. 269–270.)

Unlike most other Sixth Amendment rights, the protections afforded by the right to compulsory process do not arise automatically out of the initiation of the adversary process. (*Jacinto*, *supra*, 49 Cal.4th at p. 273.) "While those [other] rights shield the defendant from potential prosecutorial abuses, the right to compel the presence and present the testimony of witnesses provides the defendant with a sword that may be employed to rebut the prosecution's case. The decision whether to employ it in a particular case rests solely with the defendant. The very nature of the right requires that *its effective use be preceded by deliberate planning and affirmative conduct*." (*Ibid*., quoting *Taylor v. Illinois* (1988) 484 U.S. 400, 410.) Thus, to establish a claim for violation of one's right to compulsory process, the defendant must "take an active role in ensuring the presence of his witnesses." (*Jacinto*, *supra*, 49 Cal.4th at p. 273.)

A defendant may move for a new trial on the ground that the prosecutor committed prejudicial misconduct during trial. (§ 1181, subd. (5).) " 'We review a trial court's ruling on a motion for a new trial under a deferential abuse-of-discretion standard.' [Citations.] ' "A trial court's ruling on a motion for new trial is so completely within that court's discretion that a reviewing court will not disturb the ruling absent a manifest and unmistakable abuse of that discretion." ' [Citations.]" (*People v. Thompson* (2010) 49 Cal.4th 79, 140.)

1.2. Relevant Proceedings

Ibarra testified as a witness to the shooting during the People's case-in-chief at Figueroa's first trial. At a hearing before Figueroa's second trial, one of the prosecutors informed the court

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that she had spoken to the jurors who had served on the first trial. Several of the jurors believed discrepancies between Ibarra's testimony and the testimony of Brittany Garcia, another witness to the shooting, contributed to the jury deadlocking on counts 1 and 2. The prosecutor told the court she believed "those discrepancies that were highlighted are things that can be addressed by other evidence in the case more effectively the second time around."

During opening statements in Figueroa's second trial, the prosecutor told the jury it would hear testimony from Ibarra. According to the prosecutor, Ibarra wouldn't be able to identify any of the shooters, but he would provide an account of the shooting that is "consistent with and corroborates" the testimony of two other witnesses.

Toward the end of the People's case-in-chief, the prosecutor informed the court that she was having "some serious difficulties trying to reach out to [Ibarra]." The prosecutor indicated the People would rest without calling Ibarra as a witness.

Defense counsel stated he was surprised the People were prepared to rest because Ibarra was their "star witness." Defense counsel asked the court to continue the trial to the next day to allow him to finish preparing Figueroa's defense. The court instructed the prosecutor to "rest in front of the jury" and stated it would allow the People to reopen their case the next day if they were able to contact Ibarra.

The next day, Figueroa presented his defense. Figueroa never told the court he wanted Ibarra to testify as a witness for his defense, nor did Figueroa ask the court to make a finding that Ibarra was unavailable to appear as a witness.

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Before his sentencing hearing, Figueroa filed a new trial motion, in which he argued, among other things, that the People violated his due process rights by concealing Ibarra's whereabouts and withholding Ibarra's testimony. Figueroa explained that, after trial, one of his investigators contacted Ibarra, who claimed he had always cooperated with the People and had been in contact with one of the their investigators through the end of the second trial. But for the People's assertion during trial that they could not contact Ibarra, Figueroa insisted he would have called Ibarra to appear as a defense witness. According to Figueroa, Ibarra's testimony was material to his defense because Ibarra "was the only person with a clear view of what transpired[, and,] [i]n his testimony from the first trial, he states that [] Figueroa was not present and was not the person involved in the incident."

In September 2016, the court heard Figueroa's new trial motion. Figueroa acknowledged he never informed the court or the People during the second trial that he wanted Ibarra to appear as a witness for his defense. When the court questioned why Figueroa never asked the court to make a finding that Ibarra was unavailable to appear at the second trial, defense counsel replied, "I could have said something, but I couldn't believe this person was evading process when this person was a witness that had assisted them in the preparation for the first trial."

Figueroa requested that the court allow him to call Ibarra as a witness at the hearing on the new trial motion to testify "whether, in fact, he evaded process, as the prosecution has represented to this court; or whether, in fact, he was available." After denying Figueroa's request, the court denied his motion for

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a new trial, explaining: "I am not persuaded. I just don't think that this is an issue that rises to a level for a motion for new trial, especially since the witness had previously testified and there was the obvious remedy of asking that the witness's testimony be read into the record if it was that important."[2]

1.3. Analysis

Figueroa has failed to show the court erred in denying his request to have Ibarra appear as a witness at the hearing on the new trial motion. Even if we were to assume that Ibarra's testimony would have shown some form of prosecutorial misconduct, Figueroa cannot establish any violation of his right to compulsory process because he made no attempt during trial to secure Ibarra's testimony for his defense. As noted above, Figueroa never informed the court or the People that he wanted to call Ibarra as a witness during the second trial. (See *Jacinto*, *supra*, 49 Cal.4th at p. 273 [the defendant must "take an active role in ensuring the presence of his witnesses"].)

To the extent Figueroa claims he reasonably relied on any representations the People may have made about Ibarra's availability in deciding not to attempt to call Ibarra as a defense witness at the second trial, such reliance would not support a claim for violation of Figueroa's right to compulsory process. As the court explained during the hearing on Figueroa's new trial motion, other mechanisms were available to Figueroa through

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[2] It is also unclear whether Ibarra could have testified at the new trial hearing. For example, Figueroa's counsel stated that he "could simply have Mr. Ibarra come before this court and articulate whether, in fact, he evaded process," and that Ibarra "is a person [who] is not unreachable[;] Mr. Alvaro has been in contact with [Ibarra]."

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which he could have attempted to secure Ibarra's testimony. For example, Figueroa could have informed the court he intended to call Ibarra as a witness and requested a continuance to allow Figueroa additional time to locate Ibarra and secure his presence at trial. Accordingly, even if the court erred by not allowing Ibarra to testify at the hearing on the new trial motion, the error was harmless under *Chapman v. California* (1967) 386 U.S. 18, 24.

Because Figueroa failed to take any steps before or during trial to secure Ibarra's testimony for his defense, he cannot show his right to compulsory process was violated by any misrepresentations the People may have made about Ibarra's availability to testify at the second trial. (See *Jacinto*, *supra*, 49 Cal.4th at pp. 273–274.) We therefore conclude the court did not err when it denied Figueroa's request to have Ibarra testify at the hearing on Figueroa's new trial motion.

2. Remand is necessary for resentencing in light of S.B. 620.

In his reply brief, Figueroa argues we should remand this case for a new sentencing hearing to allow the court to exercise its discretion to impose or to strike his firearm enhancement under recently amended section 12022.53. (Stats. 2017, ch. 682.) At the time it sentenced Figueroa, the court was required to impose any firearm enhancements found true under sections 12022.5 and 12022.53. (See former §§ 12022.5, subd. (c) ["Notwithstanding Section 1385 or any other provision of law, the court shall not strike an allegation under this section or a finding bringing a person within the provisions of this section."]; 12022.53, subd. (h) [same], amended by Stats. 2017, ch. 682, § 2.) After S.B. 620 went into effect on January 1, 2018, however,

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sentencing courts may exercise discretion under sections 12022.5, subdivision (c), and 12022.53, subdivision (h), to "strike or dismiss an enhancement otherwise required to be imposed by" those statutes if doing so would be "in the interest of justice pursuant to Section 1385." (§§ 12022.5, subd. (c); 12022.53, subd. (h).) Because S.B. 620 is "ameliorative legislation which vests trial courts with discretion, which they formerly did not have, to dismiss or strike a prior serious felony conviction for sentencing purposes[,]" it applies retroactively to all cases, such as this one, that were not final when it went into effect. (*People v. Garcia* (2018) 28 Cal.App.5th 961, 972–973.)

As the People acknowledge, the matter must be remanded for a new sentencing hearing to allow the court, in the first instance, to exercise its discretion to impose or to strike Figueroa's firearm enhancement under section 12022.53, subdivision (h). In remanding the matter for resentencing, we offer no opinion on how the court should exercise its discretion under that statute.

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DISPOSITION

The judgment of conviction is affirmed. Figueroa's sentence is vacated and the matter is remanded for the limited purpose of allowing the court to exercise its sentencing discretion under section 12022.53, subdivision (h), as amended by SB 620.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

LAVIN, J.

WE CONCUR:

EDMON, P. J.

EGERTON, J.

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