Appendix

(6 pages)

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

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

FRANK NATHAN ESCALANTE, Petitioner-Appellant, v. JIM ROBERTSON, Warden, Pelican Bay State Prison, Respondent-Appellee.	No. 21-56342 D.C. No. 2:19-cv-05563-RSWL-JPR Central District of California, Los Angeles ORDER

Before: CANBY and SUNG, Circuit Judges.

The request for a certificate of appealability (Docket Entry No. 4) 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.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

FRANK NATHAN ESCALANTE, Petitioner, v. JIM ROBERTSON, Warden, Respondent.	Case No. CV 19-5563-RSWL (JPR) ORDER ACCEPTING FINDINGS AND RECOMMENDATIONS OF U.S. MAGISTRATE JUDGE

The Court has reviewed the Petition, records on file, and Report and Recommendation of U.S. Magistrate Judge. On October 15, 2021, Petitioner filed Objections to the R. & R.; Respondent didn't respond. Although the Objections are largely unintelligible, the Court attempts to address them nonetheless.

Petitioner continues to insist that the state court admitted codefendant Akuna's statements without deciding the "factual existence of a conspiracy to commit murder." (Objs. at 2; see id. at 4-5.) He is apparently arguing that it didn't properly admit them under the federal or state coconspirator exception to the hearsay rule. (See R. & R. at 27 & n.14; see also Objs. at 3-5 (citing state and federal evidence rules and Carbo v. United States, 314 F.2d 718, 735 n.21 (9th Cir. 1963) (discussing coconspirator exception), and United States v. Ellsworth, 481

F.2d 864, 871 (9th Cir. 1973) (same).) But as the Magistrate Judge correctly noted, claims that a state court violated federal or state evidence rules aren't cognizable on federal habeas review. (See R. & R. at 27; see also id. at 16-17.) In any event, as the Magistrate Judge also observed, the state court didn't admit the statements under the coconspirator exception. (See id. at 27 (citing 1 Rep.'s Tr. at 36-54).) For that reason and others, Dutton v. Evans, 400 U.S. 74, 88-89 (1970) (plurality opinion), on which Petitioner relies (see Objs. at 3-4), doesn't apply.

Further, the Supreme Court has since held that the constitutional right of confrontation extends only to testimonial statements. (See R. & R. at 29 (citing Crawford v. Washington, 541 U.S. 36, 68 (2004); Davis v. Washington, 547 U.S. 813, 821 (2006)).) As the Magistrate Judge correctly found, the court of appeal was not objectively unreasonable in concluding that Akuna's statements weren't testimonial and thus that their admission didn't violate the Confrontation Clause. (See id. at 37-38.)

Petitioner's next argument fares even worse: the Magistrate Judge should have reviewed grounds one through three under Federal Rule of Criminal Procedure 52(b)'s plain-error standard, not de novo. (See Objs. at 5-6, 11; R. & R. at 14-16.) But plain error applies only on direct appeal and is "out of place" on habeas review. United States v. Frady, 456 U.S. 152, 164 (1982). In any event, it's a more deferential standard than the de novo review the Magistrate Judge engaged in and Petitioner thus couldn't possibly have been prejudiced. See, e.g., United

States v. Lindsey, 680 F. App'x 563, 565-66 (9th Cir. 2017).

Petitioner states that the Magistrate Judge "ma[de] an astounding effort to not mention . . . [the] jury inquiry about whether finding him not guilty of murder." (Objs. at 7 (citing 2 Clerk's Tr. at 263-64); see also id. at 10.) During deliberations, the jury asked if "someone [can] be found not guilty of murder [and] gui[l]ty of conspiracy or does it have to be all or none." (2 Clerk's Tr. at 263.) The judge responded, "[A] defendant may be found not guilty of murder and guilty of conspiracy." (Id. at 264.) Petitioner does not explain how the jury's question or the judge's answer bears on any of his claims, however, and the Magistrate Judge therefore made no mistake in not discussing the issue.[1]

Finally, Petitioner maintains that he didn't "freely" waive his right to testify. (Objs. at 9.) That claim appears nowhere in the Petition. Even if the Court could consider habeas claims, as opposed to arguments, raised for the first time in objections to an R. & R., see Akhtar v. Mesa, 698 F.3d 1202, 1208 (9th Cir. 2012); but see Cacoperdo v. Demosthenes, 37 F.3d 504, 507 (9th Cir. 1994) (court need not consider habeas claims raised for first time in traverse), his new claim has not been exhausted in state court and is likely time barred and therefore not appropriate for review, see Marquez-Ortiz v. Sullivan, No. SACV 08-552 ABC (FFM), 2012 WL 294741, at *1 (C.D. Cal. Feb. 1, 2012)

[1] Petitioner asserts that the jury inquiry required the state court to give CALJIC 6.24 (see Objs. at 19), contrary to the Magistrate Judge's finding that the court had no reason to give it (see R. & R. at 23-28). But he doesn't explain why the jury question required the court to do so.

(declining to consider habeas petitioner's additional claims raised for first time in objections to report and recommendation in part because they were not exhausted in state court). The Court therefore declines to consider it.

Having reviewed de novo those portions of the R. & R. to which Petitioner objects, the Court agrees with and accepts the findings and recommendations of the Magistrate Judge. IT THEREFORE IS ORDERED that the Petition is denied and Judgment be entered dismissing this action.

DATED: November 5, 2021.

RONALD S.W. LEW
U.S. DISTRICT JUDGE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

FRANK NATHAN ESCALANTE, Petitioner, v. JIM ROBERTSON, Warden, Respondent.	Case No. CV 19-5563-RSWL (JPR) **REPORT AND RECOMMENDATION OF U.S. MAGISTRATE JUDGE**

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

PROCEEDINGS

On June 26, 2019, Petitioner filed pro se a Petition for Writ of Habeas Corpus by a Person in State Custody, challenging his 2015 convictions for first-degree murder, conspiracy to commit murder, and firearm possession as well as related enhancements. On January 9, 2020, Respondent answered. Petitioner filed a Traverse on May 1, 2020. For the reasons discussed below, the Court recommends that the Petition be denied

and this action be dismissed with prejudice.

PETITIONER'S CLAIMS

I. The trial court violated Bourjaily v. United States, 483 U.S. 171 (1987), by admitting codefendant Noah Akuna's recorded jailhouse conversation with confidential informants. (See Pet. at 9, 20-32 (throughout, the Court uses the pagination generated by its Case Management/Electronic Case Filing system).)

II. The trial court violated state law and Brady v. Maryland, 373 U.S. 83 (1963), by admitting a stipulation that Petitioner's girlfriend was found dead. (See id. at 9, 32-36.)

III. The trial court deprived Petitioner of due process by erroneously giving two jury instructions concerning conspiracy and omitting another. (See id. at 10, 36-38.)

IV. The admission of Akuna's statements violated Petitioner's rights to due process and a fair trial because they were coerced. (See id. at 10, 73-75.)

V. The trial court violated Petitioner's constitutional right to confrontation by admitting Akuna's statements implicating Petitioner in the murder. (See id. at 10, 76-92.)

BACKGROUND

In April 2015, a Los Angeles County Superior Court jury convicted Petitioner and codefendant Akuna[1] of first-degree murder, conspiracy to commit murder, and firearm possession by a

[1] Akuna has a habeas petition pending in this Court. See Akuna v. Pfeiffer, No. 2:19-cv-03611-RSWL (JPR) (C.D. Cal. filed April 30, 2019).

felon. (See 4 Rep.'s Tr. at 699-705.)[2] The jury found that the murder was committed by personal discharge of a firearm; a principal discharged a firearm, causing death; and the murder was intended to benefit a criminal street gang. (See id. at 703-05.) Petitioner was sentenced to an aggregate term of 80 years to life in state prison. (See Supp. Clerk's Tr. at 88, 94-96, July 31, 2015.)

Petitioner appealed (see id. at 107), raising grounds four and five of the Petition, among others (see Lodged Doc. 1 at 30-34, 36-56). On August 2, 2017, the court of appeal affirmed the judgment in a reasoned decision. (See Lodged Doc. 7.) He filed a petition for review in the state supreme court, which summarily denied it on November 15, 2017. (See Lodged Doc. 9.)

On March 9, 2018, the court of appeal supplemented its decision under Senate Bill 620[3] but didn't alter its factual or legal findings on Petitioner's claims. See People v. Akuna, No. B264806, 2018 WL 1223995 (Cal. Ct. App. Mar. 9, 2018).[4]

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[2] The clerk's and reporter's transcripts were submitted in Akuna's case as lodged documents one through four and lodged document five, respectively. See Akuna, No. 2:19-cv-03611-RSWL (JPR).

[3] Senate Bill 620 "amended [California Penal Code] section 12022.5, subdivision (c), and section 12022.53, subdivision (h), effective January 1, 2018, to give the trial court discretion to strike, in the interest of justice, a firearm enhancement imposed under those two statutes." People v. Billingsley, 22 Cal. App. 5th 1076, 1079-80 (2018) (as modified).

[4] The court of appeal remanded the case to the trial court to consider whether to strike Petitioner's firearm enhancement under Senate Bill 620. Akuna, 2018 WL 1223995, at *11-12. The record does not show what the trial court did on remand.

Petitioner again petitioned the state supreme court for review (see Lodged Doc. 8), and the court summarily denied the petition on June 13, 2018, see Cal. App. Cts. Case Info., http://appellatecases.courtinfo.ca.gov/ (search for "Frank" with "Escalante" in supreme court) (last visited Sept. 23, 2021).

On August 13, 2018, Petitioner filed a petition for writ of habeas corpus in Los Angeles County Superior Court, raising grounds one through three of the Petition. (See Lodged Doc. 10.) The court denied the petition a week later, reasoning that the claims were procedurally barred and meritless. (See Lodged Doc. 11 at 1.) He filed a habeas petition in the state court of appeal alleging the same claims. (See Lodged Doc. 12.) In January 2019, that court denied it on procedural grounds and on the merits. (See Lodged Doc. 13.) He then filed a habeas petition in the state supreme court, again raising the same claims. (See Lodged Doc. 14.) On June 12, 2019, that court denied the petition only on procedural grounds, ruling that some claims were impermissibly duplicative of those raised on direct appeal and the others should have been raised on appeal but weren't. (See Lodged Doc. 15 (citing In re Waltreus, 62 Cal. 2d 218, 225 (1965), & In re Dixon, 41 Cal. 2d 756, 759 (1953)).)

SUMMARY OF THE EVIDENCE

The factual summary in a state appellate-court opinion is entitled to a "presumption of correctness" under 28 U.S.C. § 2254(e)(1). See Crittenden v. Chappell, 804 F.3d 998, 1010 (9th Cir. 2015). Although Petitioner does not challenge the sufficiency of the evidence, the Court has nonetheless

independently reviewed the state-court record.[5] See Nasby v. McDaniel, 853 F.3d 1049, 1054-55 (9th Cir. 2017). Based on that review, the Court finds that the following statement of facts from the court-of-appeal decision fairly and accurately summarizes the relevant evidence.

> In 2008, Jack Hicks ("Sugar Bear"), a member of the El Monte Hays (EMH) gang, was murdered. Around the neighborhood, it was rumored that a fellow EMH gang member, German Palacios ("Triste"), killed Hicks. Approximately four years later, on June 14, 2012, around 9:30 p.m., Palacios was gunned down outside Daisy's Meat Market at 11532 Medina Court, the heart of EMS[6] territory. Defendants Akuna ("Shadow") and [Petitioner] ("Smokey"), both EMS members, were convicted of planning and committing the murder. They were assisted by Michael Dominguez ("Pitbull") and Richard Sanchez ("Shark"),[7] who were charged but accepted plea agreements. The key evidence in the case was Akuna's recorded confession to two paid informants while in custody on an unrelated case, which implicated himself and [Petitioner] (as well as Dominguez and Sanchez).

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[5] This includes listening to the recording of Akuna's jailhouse discussion with the two informants, which was lodged in Akuna, No. 2:19-cv-03611-RSWL (JPR).

[6] The court's references to "EMS" appear to be transcription errors; presumably the court of appeal meant to refer to EMH.

[7] As Petitioner notes (Traverse at 8-9), in fact, Dominguez apparently went by the moniker "Shark" (see 1 Clerk's Tr. at 39) and Sanchez by "Pitbull" (id. at 22).

On the night of the killing, Juan Ignacio Ruiz Sanchez, who was with some friends on the patio of a house on Medina Court, heard two or three people arguing in front of Daisy's Meat Market, followed by four or five gunshots. At trial, he testified that he saw one muzzle flash and heard gunfire from a single gun. He had earlier told a sheriff's detective that he saw two separate muzzle flashes and, based on the sound, thought there were two different guns. He saw two silhouettes run through a gate next door to the right of the market, but was unable to identify anyone.

At around 9:38 p.m., El Monte Police Sergeant Doug Knight responded to the scene, and found Palacios lying partly in the street outside the market. He had been shot multiple times and was unresponsive. He was transported to County USC Hospital, w[h]ere he died after surgery. An autopsy later confirmed that he had been shot 16 times, with fatal wounds to the neck, abdomen and other areas, piercing internal organs and causing massive bleeding. Approximately thirteen projectiles were recovered from his body during the autopsy.

Los Angeles County Sheriff's Detective Steven Blagg arrived at the scene at around 12:15 a.m. the next morning, and supervised the collection of twelve .40 caliber Smith and Wesson shell casings from the area where Palacios was found. He also went to County USC Hospital and received a projectile that had been removed from Palacios during surgery.

Sheriff's firearm examiner Marco Iezza examined the 12 casings recovered at the scene and determined that they were all fired from a single Glock firearm. He also examined the projectiles and fragments recovered from Palacios. All but one were consistent with being Winchester .40-caliber Smith and Wesson projectiles fired from a Glock firearm. A fully loaded .40-caliber Glock would have a total of 16 rounds – 15 in the clip and one in the chamber (although in California, the legal magazine limit is 10 or less). One projectile removed from Palacios['s] body was consistent with being fired from either a .38- or .357-caliber revolver.

On July 18, 2012, Sheriff's Deputies and El Monte Police Officers executed a search warrant at Akuna's residence on Currier Street in Pomona. They found a newspaper article identifying German Palacios as a suspect in the shooting death of Jack Hicks, and a printout from the Los Angeles Times Homicide Report website (a service that chronicles Los Angeles County murders) reporting the death of Jack Hicks. They also found items (including clothing and photographs) associated with the EMH gang. A search of [Petitioner's] residence turned up no evidence. On the date of the searches, A[k]una and [Petitioner] were arrested, but were later released pending further investigation.

On March 20, 2013, A[k]una was arrested on an unrelated burglary charge, and booked at the Norwalk Sheriff's Station. About a week before the arrest,

> Detective Blagg met with two informants (Hispanic gang members who had prior records and were paid $1,500 plus $50 for food for participating) and provided them with information relating to the Palacios' [sic] murder, including the gang monikers of suspects and the area where the shooting took place. After A[k]una's arrest on the unrelated burglary, Detective Blagg transported the informants to the Norwalk station, activated recording devices they were wearing, and had them brought into the booking area. While A[k]una was being booked and in the presence of the informants, Detective B[l]agg told him that the Palacios murder investigation was still ongoing and that his DNA was found on a shell casing. A[k]una was placed in a cell with the two informants, and their conversation was recorded. At trial, the recording was played for the jury and a transcript was provided.
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> The transcript of Akuna's conversation with the informants is approximately 73 pages long.[8] The conversation began with Akuna denying involvement in the murder of Palacios. He said that he wanted to "see what they're booking [him] on" because it had been a "DA reject" but now "they're gonna take it to the DA and the DA's probably going to file . . . . He said my DNA . . . came back on a casing, which is bullshit . . . .

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[8] The full transcript is some 140 pages long. (See Supp. Clerk's Tr. at 15-153, Nov. 20, 2015.) But the actual discussion in the cell between Akuna and the informants without others present takes up only 107 of those pages.

Impossible. I wasn't even there. It was one of my homeboys that got shot." Akuna told the informants that he was at a banquet and had witnesses.

The informants talked with Akuna as if they knew vague details of the murder — that a gang member (who at one point Akuna volunteered might have been Palacios) was collecting rent when he should not have, and there was "supposed to be a hit on [Akuna's] neighborhood." Akuna said that the last time he was arrested for the Palacios murder, the police said witnesses had identified him, Sanchez, and [Petitioner] as being involved, but later released them. The informants said that Sanchez was in county jail, and asked about [Petitioner]. Akuna said that [Petitioner] was currently out of custody. The informants then prodded Akuna, saying that the police must have something on him and Sanchez. They urged him to think about whether, if he was involved, the others might say something to the police. They asked if he had a phone when the crime occurred, because the police could track his whereabouts. They also urged him to come up with an explanation for his DNA being on a shell casing. The informants then talked about knowing some other details of the killing, and Akuna talked about his earlier arrest for the crime with Sanchez and [Petitioner]. The informants suggested that it was illegal to record them speaking in the cell.

At one point, Akuna was removed from the cell for eight minutes, then returned and said he had been told

they were adding a murder charge to his arrest. The informants returned to the subject of Akuna's phone and asked if he knew where it was. Akuna said that the police had it. The informants reiterated that a witness must have put Akuna at the scene and the police could use the phone to "seal the deal."[9]

At that point, Akuna asked them what they thought was the best thing to do. They said it depended on how his DNA got on a shell casing and urged him to be smart and come up with an explanation. After some additional conversation, Akuna asked, "What if I touched the bullets?" He suggested "I sold the gun or what you're saying like." The informants urged him to rehearse his story. They said that they were all "homies," that they wanted to help him, and that he should not be afraid to ask.

After additional conversation, the informants again asked about Akuna's phone. Akuna said that he had not received his phone back, and that "it'll probably show" that he was in the area of the killing. He said that a Glock and a revolver had been used in the murder. He said that he had loaded the revolver but had not loaded [the] Glock, and suggested that maybe his DNA got on the expended shell casings from perspiration through his

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[9] This exact quote does not appear in the transcript, but the informants conveyed similar messages throughout the conversation. (See, e.g., Supp. Clerk's Tr. at 106, Nov. 20, 2015 (stating that phone information will "put [Akuna] right there" at crime scene).)

shirt.

The informants pressed him to tell what happened, saying that otherwise they could not help him. Subsequently, over the next 19 pages of transcript, Akuna confessed to the murder and implicated [Petitioner], Dominguez, and Sanchez. According to Akuna, Dominguez set up Palacios to be at Daisy's Meat Market on the pretense of talking with him, apparently about gang business. Akuna was at a banquet and received a call from Dominguez that the "fool [Palacios] was there." Akuna said "they came and picked us [Akuna and Petitioner] up." Akuna had a revolver ("like a .38 or something"), which he gave to [Petitioner]. Dominguez had a "[G]lock 40" which he gave to Akuna. They intended to kill Palacios, because he had "smoked" Akuna's "homey" Jack Hicks over gang politics.

Akuna and [Petitioner] "rolled over there" to the market. Akuna explained: "[S]o like I . . . just walked up to him [Palacios] and [Petitioner] like came out from behind me and tried to like dump . . . . But the gun [the revolver] that fool had just went click. Like the hammer just dropped and that was it. Nothin' happened. So . . . that's when I just unloaded on the fool [Palacios]." Palacios fell, and Akuna approached him as he lay on the ground and "started pumpin' that shit . . . . All 16 shots" from the "[Glock] 40." [Petitioner] eventually was able to fire a couple of times at Palacios. After the shooting, Akuna returned

> the Glock to Dominguez.
>
> After the conversation, Detective Blagg obtained a search warrant for Akuna's cell phone data. The data showed that on June 14, 2012, from 8:53 p.m. to 9:46 p.m., several calls were made and received by that phone from cell towers in and around the area of the murder, including a call to [Petitioner's] phone.
>
> . . . Akuna, [Petitioner], Sanchez, and Dominguez were all EMH members.

Akuna, 2018 WL 1223995, at *1-4 (some alterations in original).

STANDARD OF REVIEW

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

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim – (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Under AEDPA, the "clearly established Federal law" that controls federal habeas review consists of holdings of Supreme Court cases "as of the time of the relevant state-court

decision." Williams v. Taylor, 529 U.S. 362, 412 (2000). As the Supreme Court has "repeatedly emphasized, . . . circuit precedent does not constitute 'clearly established Federal law, as determined by the Supreme Court.'" Glebe v. Frost, 574 U.S. 21, 24 (2014) (per curiam) (quoting § 2254(d)(1)). Further, circuit precedent "cannot 'refine or sharpen a general principle of Supreme Court jurisprudence into a specific legal rule that [the] Court has not announced.'" Lopez v. Smith, 574 U.S. 1, 7 (2014) (per curiam) (quoting Marshall v. Rodgers, 569 U.S. 58, 64 (2013) (per curiam)).

A state-court decision is "contrary to" clearly established federal law if it either applies a rule that contradicts governing Supreme Court law or reaches a result that differs from the result the Supreme Court reached on "materially indistinguishable" facts. Early v. Packer, 537 U.S. 3, 8 (2002) (per curiam) (citation omitted). A state court need not cite or even be aware of the controlling Supreme Court cases, "so long as neither the reasoning nor the result of the state-court decision contradicts them." Id.

State-court decisions that are not "contrary to" Supreme Court law may be set aside on federal habeas review only "if they are not merely erroneous, but 'an unreasonable application' of clearly established federal law, or based on 'an unreasonable determination of the facts' (emphasis added)." Id. at 11 (quoting § 2254(d)). To obtain federal habeas relief for such an "unreasonable application," however, a petitioner must show that the state court's application of Supreme Court law was "objectively unreasonable." Williams, 529 U.S. at 409. In other

words, habeas relief is warranted only if the state court's ruling was "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." Harrington v. Richter, 562 U.S. 86, 103 (2011). "[E]ven clear error will not suffice." Woods v. Donald, 575 U.S. 312, 316 (2015) (per curiam) (citation omitted).

Petitioner raised grounds four and five on direct appeal. (See Lodged Doc. 1 at 30-34, 36-56.) In a reasoned decision, the court of appeal rejected ground four as forfeited and on the merits and ground five on the merits. (See Lodged Doc. 7 at 9-22); Akuna, 2018 WL 1223995, at *4-8. The supreme court summarily denied his petition for review raising those claims. (See Lodged Docs. 8, 9); Cal. App. Cts. Case Info., http://appellatecases.courtinfo.ca.gov/ (search for "Frank" with "Escalante" in supreme court) (last visited Sept. 23, 2021). Under Wilson v. Sellers, 138 S. Ct. 1188, 1192 (2018), a rebuttable presumption exists that a higher state court's unexplained ruling "adopted the same reasoning" as the last reasoned state-court decision. Id. The parties have not tried to rebut that presumption here, and the Court therefore looks through the supreme court's silent denial to the court of appeal's decision as the basis for the state court's judgment on grounds four and five. See id. at 1196-97. Because these claims were adjudicated on the merits, AEDPA's deferential review applies. See Richter, 562 U.S. at 100.

Petitioner presented grounds one through three in habeas petitions to the superior court (see Lodged Doc. 10) and court of

appeal (see Lodged Doc. 12), and both courts denied them on the merits and on procedural grounds (see Lodged Docs. 11, 13). He then raised the claims in a habeas petition to the supreme court (see Lodged Doc. 14), which denied it only on procedural grounds (see Lodged Doc. 15).

Respondent contends that the Court should look through that procedural denial to the court of appeal's merits decision. (See Answer, Mem. P. & A. at 9-10; id. at 10 (citing Ramsey v. Yearwood, 231 F. App'x 623, 624-25 (9th Cir. 2007)).) In Ramsey, the Ninth Circuit gave AEDPA deference to a superior court's merits decision even though it was followed by a procedural denial by the court of appeal and a summary denial by the California Supreme Court. 231 F. App'x at 624-25. Ramsey, however, is unpublished, and its application of Ylst v. Nunnemaker, 501 U.S. 797 (1991), differs from published Ninth Circuit cases. See Mejia v. Foulk, No. CV 13-9465-AB (RNB)., 2015 WL 391688, at *8 (C.D. Cal. Jan. 28, 2015) (finding Ramsey unpersuasive and declining to look through higher court's procedural denial to lower court's merits denial); see also Seeboth v. Allenby, 789 F.3d 1099, 1103-04 (9th Cir. 2015) (construing California Supreme Court's decision to be on merits but noting in dictum that if decision had been procedural, Ninth Circuit would have reviewed claims de novo even though lower court issued reasoned merits decision).

The supreme court never reached the merits of grounds one through three but found them procedurally barred. (See Lodged Doc. 15.) When the last reasoned decision in a state habeas proceeding has denied a claim on procedural grounds, the claim

has not been "adjudicated on the merits in a State court proceeding" and AEDPA's deferential standard of review does not apply; rather, review is de novo. See Cone v. Bell, 556 U.S. 449, 472 (2009); Chaker v. Crogan, 428 F.3d 1215, 1221 (9th Cir. 2005). In any event, the Supreme Court has instructed federal habeas courts to engage in de novo review when the appropriate standard of review is uncertain but the lack of merit under de novo review is clear, as is the case here. See Berghuis v. Thompkins, 560 U.S. 370, 390 (2010) ("Courts can . . . deny writs of habeas corpus under § 2254 by engaging in de novo review when it is unclear whether AEDPA deference applies, because a habeas petitioner will not be entitled to a writ of habeas corpus if his or her claim is rejected on de novo review, see § 2254(a)." (emphasis in original)). Thus, the Court reviews grounds one through three de novo.

DISCUSSION[10]

I. Petitioner's Claim that the Trial Court Violated Bourjaily By Admitting Akuna's Statements Doesn't Warrant Habeas Relief

Petitioner claims the trial court violated Bourjaily but doesn't explain exactly how. (See Pet. at 20-32.) Bourjaily involved the admissibility of a coconspirator's statement under Federal Rule of Evidence 801(d)(2)(E). See 483 U.S. at 173, 175.

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[10] Respondent argues that grounds two through four are procedurally barred. (See Answer, Mem. P. & A. at 6-9; cf. Answer at 1 (stating that ground one is also procedurally barred).) Because it's easier to dispose of the claims on the merits, the Court resolves them solely on that basis. See Lambrix v. Singletary, 520 U.S. 518, 524-25 (1997); Franklin v. Johnson, 290 F.3d 1223, 1232 (9th Cir. 2002).

If he claims that the trial court violated the Federal Rules of Evidence, the claim fails because they "do not apply in a state criminal proceeding," Rios v. Domingo, No. EDCV 10-0731-PSG (RNB)., 2010 WL 5563884, at *6 (C.D. Cal. Dec. 9, 2010), accepted by 2011 WL 93035 (C.D. Cal. Jan. 11, 2011), and are not grounded in the Constitution and therefore habeas relief for claims resting on them is unavailable, see Varghese v. Uribe, 736 F.3d 817, 826 (9th Cir. 2013) (as amended) (noting that federal-rules violation "cannot support a state prisoner's habeas claim").

Petitioner also cites state rules of evidence, the California constitution, and his due process rights under the 14th Amendment. (See Pet. at 20.) Claims that a state court violated state law aren't cognizable on federal habeas review.[11] See 28 U.S.C. § 2254(a) (federal habeas writ may issue only when person "is in custody in violation of the Constitution or laws or treaties of the United States"); see also Estelle v. McGuire, 502 U.S. 62, 67-68 (1991); Park v. California, 202 F.3d 1146, 1154 (9th Cir. 2000) (finding that violation of state evidentiary law in admitting jailhouse recordings didn't state cognizable habeas claim); Hinman v. McCarthy, 676 F.2d 343, 349-50 (9th Cir. 1982)

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[11] For example, Petitioner argues that the trial court erred under People v. Greenberger, 58 Cal. App. 4th 298 (1997) (as modified). (See Pet. at 20, 24-25, 30; Traverse at 10.) There, the court of appeal discussed when statements fall within the declaration-against-interest exception to hearsay under California evidence rules. See Greenberger, 58 Cal. App. 4th at 334-36. But any such claim isn't cognizable here because it concerns only state law. See Estelle v. McGuire, 502 U.S. 62, 67-68 (1991). Greenberger also discussed the Sixth Amendment's right to confrontation, see 58 Cal. App. 4th at 331-34, but as discussed infra at pages 28-38, any Confrontation Clause claim fails.

(as amended on denial of reh'g en banc) (observing that federal habeas relief does not lie for alleged violation of state constitution).

And his general appeal to due process doesn't render his claim cognizable. See Gray v. Netherland, 518 U.S. 152, 163 (1996) (explaining that petitioner may not convert state-law claim into federal one by mentioning constitutional guarantee); see also Cacoperdo v. Demosthenes, 37 F.3d 504, 507 (9th Cir. 1994) (habeas petitioner's mere reference to Due Process Clause could not render his claims viable under 14th Amendment).

Putting that aside, the Supreme Court has never specifically addressed whether admission of irrelevant or prejudicial evidence can violate due process. See Holley v. Yarborough, 568 F.3d 1091, 1101 (9th Cir. 2009); Walden v. Shinn, 990 F.3d 1183, 1204 (9th Cir. 2021) (noting that Holley's observation about lack of controlling precedent on admission of irrelevant or overtly prejudicial evidence "remains true"). Because no clearly established Court precedent exists, AEDPA precludes relief. See Wright v. Van Patten, 552 U.S. 120, 126 (2008) (per curiam); Crater v. Galaza, 491 F.3d 1119, 1123 (9th Cir. 2007) (noting that Supreme Court has "explained that if habeas relief depends upon the resolution of 'an open question in [Supreme Court] jurisprudence, § 2254(d)(1) precludes relief'" (alteration in original) (quoting Carey v. Musladin, 549 U.S. 70, 76 (2006))).

For these reasons, habeas relief isn't warranted even under do novo review.

II. Petitioner's Claim that the Trial Court Violated His Constitutional Rights By Admitting a Stipulation Doesn't Warrant Habeas Relief

Petitioner claims the trial court violated Brady by admitting a stipulation that police found his girlfriend dead in a wash. (Pet. at 32.) Even under de novo review, this claim fails.

A. Background

In his recorded statements, Akuna never referred to Petitioner by name. He instead used his gang moniker, "Smokey." (See, e.g., Supp. Clerk's Tr. at 101-02, 118-19, 121-22, Nov. 20, 2015.) Akuna told the informants that Smokey had killed his girlfriend and that she had been found dead in a wash. (See 3 Rep.'s Tr. at 451-52, 465, 490; Supp. Clerk's Tr. at 130-32, 138, 144, Nov. 20, 2015 (unredacted transcript).) But that part of the audio recording was redacted and the jury never heard it. (See 3 Rep.'s Tr. at 451-52, 464-65, 490.) Petitioner instead stipulated that his "girlfriend was found dead in a wash by law enforcement officers in November 2011" and that "Akuna states [in the recording] that Smokey's girlfriend was found dead in a wash." (Id. at 465; see also id. at 451-52; 1 Clerk's Tr. at 163.) Using the stipulation, among other evidence, the prosecution tried to prove that the Smokey referred to by Akuna was Petitioner. (See 3 Rep.'s Tr. at 587-88.)

B. Analysis

Petitioner primarily claims violations of the California constitution and evidence rules. (See Pet. at 32.) Those claims aren't cognizable here. See § 2254(a); Park, 202 F.3d at 1154;

Hinman, 676 F.2d at 349-50. He also argues in passing that his trial counsel "wrongly" and "foolishly" "misled" him about the meaning of "stipulation." (Pet. 33.) But he doesn't explain how his counsel explained the term or led him astray. (See id.) Indeed, by stipulating, his counsel kept from the jury Akuna's damaging statements about Petitioner's possible involvement in another murder. (See 3 Rep.'s Tr. at 452 (trial court noting that counsel "fought very hard to keep" statements from jury).) This conclusory argument therefore wouldn't warrant habeas relief, see Greenway v. Schriro, 653 F.3d 790, 804 (9th Cir. 2011) (finding that petitioner's "cursory and vague [ineffective-assistance-of-counsel claim] cannot support habeas relief"), even were the claim exhausted, which it is not.

Without any real explanation, Petitioner cites Brady, 373 U.S. 83, to support his claim concerning the stipulation. (See Pet. at 33-35.) "There could be exculpatory evidence," he argues, "that could establish [his] innocence." (Id. at 33.) He appears to suggest that evidence might have been suppressed because a detective also put confidential informants in his cell sometime after Akuna's and yet allegedly didn't turn over any transcript of any conversation that followed. (See id.) Petitioner's counsel clearly knew of the incident because he asked Detective Blagg about it at trial. (See 3 Rep.'s Tr. at 511.) The prosecution had to disclose information to the defense only if it was favorable to Petitioner and material. See Runningeagle v. Ryan, 686 F.3d 758, 769 (9th Cir. 2012). Petitioner has not even tried to show either of those things, much less that his counsel never received the evidence;

speculation is not enough. See id. (holding that to state Brady claim, petitioner must do more than "merely speculate" about nature of undisclosed evidence (citing Wood v. Bartholomew, 516 U.S. 1, 6, 8 (1995) (per curiam))).

He also maintains that the trial court violated Chapman v. California, 386 U.S. 18, 24 (1967), but doesn't explain how. (See Pet. at 32-36; Traverse at 11, 17.) Indeed, in one of his descriptions of Chapman, he quotes the dissent. (See Pet. at 35-36 (quoting Chapman, 386 U.S. at 53 (Harlan, J., dissenting)).) This conclusory argument cannot support habeas relief. See Greenway, 653 F.3d at 804.

Finally, Petitioner claims that the stipulation's admission "was prejudicial" and led to an "unfair trial." (Pet. at 34.) Assuming he means to bring a due-process claim, it lacks merit. The stipulation didn't implicate him in the woman's death, which he seems to acknowledge.[12] (See id. at 33 (noting that it didn't alert jury "how she died").) But even if it did, the Supreme Court has not yet decided whether admission of propensity evidence violates due process. See McGuire, 502 U.S. at 75 n.5 (expressly reserving issue); see also Kipp v. Davis, 971 F.3d 939, 951 n.8 (9th Cir. 2020) ("No clearly established law . . . addresses whether the admission of a defendant's criminal history or prior bad acts would violate due process."). Because no clearly established Court precedent exists, AEDPA precludes

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[12] Petitioner claims his trial counsel stated "in the trial court" that he was "arrested for the murder" of the woman. (Pet. at 34.) Counsel did indeed reference his arrest but only outside the jury's presence. (See 3 Rep.'s Tr. at 485, 490.)

relief. See Van Patten, 552 U.S. at 126; Crater, 491 F.3d at 1123. Indeed, the Ninth Circuit has repeatedly found that a state court's rejection of a claim that admission of propensity evidence violated due process cannot be an unreasonable application of clearly established federal law. See, e.g., Garza v. Yates, 472 F. App'x 690, 691-92 (9th Cir. 2012); Larson v. Palmateer, 515 F.3d 1057, 1066 (9th Cir. 2008); Alberni v. McDaniel, 458 F.3d 860, 866 (9th Cir. 2006). Likewise, even if Petitioner could show that the stipulation unduly prejudiced him, his claim would fail because the Supreme Court has not ruled that admission of irrelevant or overtly prejudicial evidence can violate due process. See Holley, 568 F.3d at 1101; see also Walden, 990 F.3d at 1204.

What's more, the stipulation wasn't the only evidence linking Petitioner to "Smokey." As the prosecutor noted, a photograph taken from Akuna's residence depicts seven EMH members, including Petitioner, with the moniker "Smokey" (among others) written on the back. (See 2 Rep.'s Tr. at 285-90; 3 Rep.'s Tr. at 587-88.) And a detective testified that Petitioner had identified himself in 2012 as "Smokey." (2 Rep.'s Tr. at 287.) Because the jury could have drawn a permissible inference from the stipulation — that Petitioner was Smokey — and its admission didn't prevent him from receiving a fair trial, his due-process claim fails. See Jammal v. Van de Kamp, 926 F.2d 918, 920 (9th Cir. 1991).

Thus, even under de novo review, ground two doesn't warrant habeas relief.

III. Petitioner's Instructional-Error Claim Doesn't Warrant Habeas Relief

Petitioner claims the trial court violated his due-process rights by instructing the jury with CALJIC numbers 6.22 (explaining that jury must decide whether each defendant individually was member of charged conspiracy) and 6.23 (stating alleged overt acts to support conspiracy) but not 6.24 (explaining how to evaluate coconspirator hearsay statements). (See Pet. at 36.) Even under de novo review, this claim fails.

A. Applicable Law

Claims of error in state jury instructions are generally matters of state law only and thus not cognizable on federal habeas review. See Gilmore v. Taylor, 508 U.S. 333, 344 (1993). A claim of instructional error does not raise a cognizable federal claim unless the error "by itself so infected the entire trial that the resulting conviction violates due process." McGuire, 502 U.S. at 72 (citation omitted). "[N]ot every ambiguity, inconsistency, or deficiency in a jury instruction rises to the level of a due process violation," Middleton v. McNeil, 541 U.S. 433, 437 (2004), and a claimed instructional error "must be considered in the context of the instructions as a whole and the trial record," McGuire, 502 U.S. at 72 (citation omitted). When the alleged error involves the failure to give an instruction, the petitioner's burden is "especially heavy" because "[a]n omission, or an incomplete instruction, is less likely to be prejudicial than a misstatement of the law." Henderson v. Kibbe, 431 U.S. 145, 155 (1977).

Federal habeas relief is not warranted unless the

instructional error caused a "substantial and injurious effect or influence in determining the jury's verdict." Hedgpeth v. Pulido, 555 U.S. 57, 58 (2008) (per curiam) (citing Brecht v. Abrahamson, 507 U.S. 619 (1993)).

B. Background

The trial court conferred with all counsel about jury instructions. (See 3 Rep.'s Tr. at 485-94.) No one requested that the court give CALJIC 6.24. (See id.) Both defense counsel stipulated that the instructions were complete and that the court had not refused to give any instruction requested by the defense.[13] (See id. at 493-94.)

The jury received CALJIC 6.22:

> Each defendant in this case is individually entitled to and must receive your determination whether he is a member of the alleged conspiracy. As to each defendant, you must determine whether he was a conspirator by deciding whether he willfully, intentionally and knowingly joined with any others or other in the alleged conspiracy.
>
> Before you may return a guilty verdict as to any defendant of the crime of conspiracy, you must unanimously agree and find beyond a reasonable doubt that, one, there was a conspiracy to commit the crime of murder, and two, the defendant willfully, intentionally and knowingly joined with any other or others to commit

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[13] Counsel apparently didn't discuss CALJIC 6.23 (see 3 Rep.'s Tr. at 485-94), but the jury did receive the instruction (see id. at 559-60; 2 Clerk's Tr. at 234).

the alleged conspiracy.

You must also unanimously agree and find beyond a reasonable doubt that an overt act was committed by one or more of the conspirators. You are not required to unanimously agree as to who committed an overt act or which overt act was committed so long as each of you finds beyond a reasonable doubt that one of the conspirators committed one of the acts alleged in the information to be overt acts.

(3 Rep.'s Tr. at 558-59.)

And they received CALJIC 6.23:

In this case the defendants are charged with a conspiracy to commit the following public crimes: murder.

It is alleged that the following acts were committed in this state by one or more of the defendants and were overt acts committed for the purpose of furthering the objects of the conspiracy:

One, Richard Sanchez instructed Noah Akuna and [Petitioner] to take care of German Palacios; [two,] Michael Dominguez provided a loaded .40 caliber handgun to Noah Akuna; three, Noah Akuna provided a .38 caliber revolver to [Petitioner]; four, Richard Sanchez arranged for German Palacios to be on Medina Court in El Monte on the night of June 14th, 2012; five, Richard Sanchez informed Noah Akuna and [Petitioner] that German Palacios would be on Medina Court in El Monte on the night of June 14th, 2012; six, Noah Akuna and [Petitioner] went to Medina Court with loaded firearms to meet German Palacios

> for the purpose of murdering him; seven, Noah Akuna shot German Palacios with a .40 caliber firearm multiple times; eight, [Petitioner] shot German Palacios with a .38 caliber revolver at least one time.

(3 Rep.'s Tr. at 559-60.)

CALJIC 6.24, which the jury was not given, concerns when a statement introduced under the coconspirator hearsay exception can be considered against another alleged conspirator:

> Evidence of a statement made by one alleged conspirator other than at this trial shall not be considered by you as against another alleged conspirator unless you determine by a preponderance of the evidence:
>
> 1. That from other independent evidence that at the time the statement was made a conspiracy to commit a crime existed;
>
> 2. That the statement was made while the person making the statement was participating in the conspiracy;
>
> 3. That the statement was made in furtherance of the objective of the conspiracy, and was made before or during the time when the party against whom it was offered was participating in the conspiracy.
>
> The word "statement" as used in this instruction includes any oral or written verbal expression or the nonverbal conduct of a person intended by that person as a substitute for oral or written verbal expression.

C. Analysis

Petitioner argues that the trial court erred by giving CALJIC numbers 6.22 and 6.23 "without a determination of a

preliminary fact that a conspiracy was indeed in existence." (Pet. at 36; see also id. at 20.) He apparently alludes to the preliminary facts required before a court can admit statements under California Evidence Code § 1223, the coconspirator exception to the hearsay rule. (See Pet. at 20); People v. Herrera, 83 Cal. App. 4th 46, 61 (2000) (noting that under § 1223, "[t]he existence of a conspiracy at the time the statement is made is the preliminary fact to the admissibility of the coconspirator's statement"). But as noted above, the Court cannot "reexamine state-court determinations on state-law questions."[14] McGuire, 502 U.S. at 68. At any rate, the trial court didn't admit Akuna's statements under § 1223. It admitted them under the hearsay exception for statements against penal interest. (See 1 Rep.'s Tr. at 36-54); see also Akuna, 2018 WL 1223995, at *10. Moreover, it was for the jury to decide whether a conspiracy existed. See CALJIC 6.22; see also CALJIC 8.69 (elements of conspiracy to commit murder); (3 Rep.'s Tr. at 549-52). Thus, the court didn't err, much less cause "substantial and injurious effect or influence in determining the jury's verdict." Pulido, 555 U.S. at 58.

As to omitting CALJIC 6.24, because the court didn't admit Akuna's statements under § 1223, that instruction didn't apply and the court had no reason to give it. See Galache v. Kenan, No. SA CV 06-00755 SVW (RZ)., 2008 WL 3833411, at *5 (C.D. Cal.

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[14] If he is alluding to the similar requirement under Federal Rule of Evidence 801(d)(2)(E), see Bourjaily, 483 U.S. at 175-76, his claim also fails. See Rios, 2010 WL 5563884, at *6; Varghese, 736 F.3d at 826.

Aug. 14, 2008) (rejecting instructional-error claim based on failure to give CALJIC 6.24 because court didn't admit statements under coconspirator exception).

Even under de novo review, habeas relief isn't warranted on ground three.

IV. Petitioner's Involuntary-Confession Claim Doesn't Warrant Habeas Relief

Respondent maintains that Petitioner lacks standing to bring this claim. (See Answer, Mem. P. & A. at 6-7.) "In general, [a habeas petitioner] does not have standing to challenge a violation of [another's] rights; however, illegally obtained confessions may be less reliable than voluntary ones, and thus using a coerced confession at another's trial can violate due process." Douglas v. Woodford, 316 F.3d 1079, 1092 (9th Cir. 2003). Petitioner argues that Akuna's confession was involuntary because it was "obtained through coercion and deception" and its admission therefore violated Petitioner's due-process rights. (Pet. at 73.) He thus has standing. See Douglas, 316 F.3d at 1092. But his involuntary-confession claim fails on the merits, as fully addressed at pages 14 to 22 of the Report and Recommendation in Akuna, No. 2:19-cv-03611-RSWL (JPR); the Court does not repeat that analysis here.

V. Petitioner's Confrontation Clause Claim Doesn't Warrant Habeas Relief

Petitioner claims the trial court violated his Sixth Amendment right to confront witnesses by admitting Akuna's statements implicating him in the murder. (See Pet. at 10, 76-92.) For the reasons discussed below, the court of appeal's

rejection of the claim was not contrary to or an unreasonable application of clearly established federal law, nor was it based on an unreasonable determination of the facts.

A. Applicable Law

The Confrontation Clause of the Sixth Amendment affords a criminal defendant the right to cross-examine witnesses. Delaware v. Van Arsdall, 475 U.S. 673, 678 (1986). In Crawford v. Washington, 541 U.S. 36, 53-54 (2004), the Supreme Court held that the Confrontation Clause bars "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." Conversely, the Confrontation Clause does not bar nontestimonial statements. Id. at 68; see Davis v. Washington, 547 U.S. 813, 821 (2006) ("It is the testimonial character of the statement that separates it from other hearsay that, while subject to traditional limitations upon hearsay evidence, is not subject to the Confrontation Clause.").

Crawford did not spell out a comprehensive list of "testimonial" statements but noted that they include (1) "ex parte in-court testimony or its functional equivalent," such as affidavits, custodial examinations, prior testimony made without cross-examination, and "similar pretrial statements that declarants would reasonably expect to be used prosecutorially"; (2) extrajudicial statements in formalized testimonial materials; and (3) "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." 541 U.S. at 51-52 (citations omitted); see id. at 68.

B. Court-of-Appeal Decision

The court of appeal first noted that "[l]ower federal courts have consistently held that a defendant's statements made unwittingly to a government informant are not testimonial within the meaning" of Crawford. Akuna, 2018 WL 1223995, at *6 (citing cases). It also observed that in Davis the Court "cited with approval" Bourjaily, 483 U.S. at 181-84, "as an example of statements that 'were clearly nontestimonial,' and described Bourjaily as involving 'statements made unwittingly to a Government informant.'" Akuna, 2018 WL 1223995, at *6 n.3 (quoting Davis, 547 U.S. at 825).

The court discussed other relevant Supreme Court authority:

> [U]nder the primary purpose test of testimonial statements propounded in Davis, statements unwittingly made to an informant are not testimonial, because the defendant does not expect his statements to be used in court. [See also] Michigan v. Bryant (2011) 562 U.S. 344, 367, footnote 11, 131 S. Ct. 1143, 179 L. Ed. 2d 93 (Bryant): " ' "[I]t is in the final analysis the declarant's statements, not the interrogator's questions, that the Confrontation Clause requires us to evaluate." [Citation.] . . . An interrogator's questions, unlike a declarant's answers, do not assert the truth of any matter.' "
>
> [Petitioner] argues that the lower federal court authorities decided after Davis and pre-Bryant are no longer good authority . . . because Bryant clarified that the primary purpose test requires an analysis of the

motivations of both the defendant and the questioner. Thus, that a declarant does not intend statements unwittingly made to an informant to be used in court is not controlling. Rather, Bryant reasoned that under the primary purpose test, among the relevant factors to be objectively assessed to determine whether a statement is testimonial is a "combined inquiry that accounts for both the declarant and the interrogator." (Bryant, supra, 562 U.S. at p. 367, 131 S. Ct. 1143.)

We have found no decision, and [Petitioner] has cited us to none, in which a court has held that under the reasoning of Bryant, a declarant's statement made unwittingly to a police informant is testimonial. Further, while we agree that Bryant requires consideration of the nature of the questioning from the perspective of both the questioner and the declarant, we do not agree that Bryant, or the later decision in Ohio v. Clark (2015) 576 U.S. ----, 135 S. Ct. 2173, 2180, 192 L. Ed. 2d 306 (Clark), which also discussed the primary purpose test, suggests that use of a police informant, to whom the declarant unknowingly makes statements that will be used in court, transforms the declarant's statements into testimonial hearsay.

Building on Davis, Bryant held that the confrontation clause is not triggered when an interrogation's primary purpose is in response to an ongoing emergency. In that situation, the purpose is not to create a record for trial. (Bryant, supra, 562 U.S.

at p. 358, 131 S. Ct. 1143.) However, Bryant noted other circumstances could exist "when a statement is not procured with a primary purpose of creating an out-of-court substitute for trial testimony." (Ibid.) Whether an ongoing emergency exists is one factor. (Id. at p. 366, 131 S. Ct. 1143.) Another factor is "the informality of the situation and the interrogation." (Id. at p. 377, 131 S. Ct. 1143.) Also relevant are the standard rules of hearsay, which are designed to identify some statements as reliable. (Id. at pp. 358-359, 131 S. Ct. 1143.) Applying these principles, the Bryant court held "that the statements made by a dying victim about his assailant were not testimonial because the circumstances objectively indicated that the conversation was primarily aimed at quelling an ongoing emergency, not establishing evidence for the prosecution." (Clark, supra, 576 U.S. at p. ----, 135 S. Ct. at p. 2180.)

In Clark, the high court again refined the primary purpose test, finding that statements made by a three-year-old to teachers who suspected he had been abused were not testimonial. (Clark, supra, 576 U.S. at p. ----, 135 S. Ct. at p. 2181.) Clark held that the boy's statements "clearly were not made with the primary purpose of creating evidence" for the defendant's prosecution so "their introduction at trial did not violate the Confrontation Clause." (Ibid.) In doing so, the court noted that the boy's "statements occurred in the context of an ongoing emergency involving suspected

child abuse." (Clark, supra, 576 U.S. at p. ----, 135 S. Ct. at p. 2181.) The teachers' immediate concern was protecting a vulnerable child, and the teachers needed to know whether it was safe to release the boy to his guardian. Moreover, both the teachers' questions and the boy's answers "were primarily aimed at identifying and ending the threat." (Ibid.) The high court found "no indication that the primary purpose of the conversation was to gather evidence" for the defendant's prosecution. (Ibid.) The teachers never informed the boy "that his answers would be used to arrest or punish his abuser. [The boy] never hinted that he intended his statements to be used by the police or prosecutors." (Ibid.) The conversation "was informal and spontaneous" (ibid.), and a young child in these circumstances "would [not] intend his statements to be a substitute for trial testimony," but rather "would simply want the abuse to end, would want to protect other victims, or would have no discernible purpose at all." (Id. at p. 2182.)

Clark also noted it was "highly relevant" that the boy was speaking to his teachers. (Clark, supra, 576 U.S.----, 135 S. Ct. at p. 2182.) "Courts must evaluate challenged statements in context, and part of that context is the questioner's identity. [Citation.] Statements made to someone who is not principally charged with uncovering and prosecuting criminal behavior are significantly less likely to be testimonial than statements given to law enforcement officers.

> [Citation.] It is common sense that the relationship between a student and his teacher is very different from that between a citizen and the police." (Ibid.) Clark concluded that "[b]ecause neither the child nor his teachers had the primary purpose of assisting in [the defendant's] prosecution, the child's statements do not implicate the Confrontation Clause and therefore were admissible at trial." (Id. at p. ----, 135 S. Ct. at p. 2177.)

Akuna, 2018 WL 1223995, at *6-7 (some alterations in original) (footnote omitted) (some citations omitted).

Finally, the court rejected Petitioner's Confrontation Clause claim:

> Davis, Bryant and Clark all involve ongoing emergency situations, which are markedly different from the situation here, in which gang members acting as police informants secretly recorded their conversation with Akuna, a fellow gang member, while in a jail cell. It is not at all apparent that the primary purpose analysis of these opinions, made in the context of emergencies, suggests that the Supreme Court would find statements made unknowingly to a government informant under the circumstances here to be testimonial. And, as we have noted, no case has so held. That said, assuming the primary purpose test as developed in these decisions fully applies to the situation here, it does not require a focus solely on the questioner's motives, nor does it compel the conclusion that the questioner's motives take

precedence over the declarant's motives. Further, Davis, Bryant and Clark do not suggest that to make a declarant's statements nontestimonial, both the questioner and declarant must lack any purpose of preserving evidence for future prosecution. Thus, in the instant case, even though the informants recorded Akuna's statements for the primary purpose of creating evidence for a future prosecution, that is not determinative. Rather, the high court has made it clear we must objectively view the totality of the circumstances. (Bryant, supra, 562 U.S. at p. 359, 131 S. Ct. 1143.)

Here, it is true that informants did not record Akuna during an ongoing emergency. However, Bryant noted that other circumstances can produce nontestimonial statements. (Bryant, supra, 562 U.S. at p. 358, 131 S. Ct. 1143.) The rules of hearsay and the "informality" of the situation are factors to consider. (Id. at pp. 358-359, 366, 377, 131 S. Ct. 1143.) Clark noted the young boy in that case made his statements in a conversation that "was informal and spontaneous." (Clark, supra, 576 U.S. at p. ----, 135 S. Ct. at p. 2181.) As such, to the extent [Petitioner] suggests that because the informants acted for the police, it is irrelevant that the conversation lacked solemnity or formality, he is mistaken. Akuna spoke in a relaxed setting with fellow gang members, and his statements were not made under circumstances that imparted the formality and solemnity characteristic of testimony. The

circumstances also were conducive to the reliability of his statements. Indeed, although the informants were acting for the police, the conversation, viewed objectively, did not proceed in any manner as would a police interrogation.

Clark also noted the statements must be examined in context, a consideration that includes the interviewer's identity. Clark found it "highly relevant" that the boy spoke to his teachers. (Clark, supra, 576 U.S. at p. ----, 135 S. Ct. at p. 2182.) Here, it is highly relevant that the questioners were gang members, albeit (unknown to Akuna) they were paid informants. Certainly the dynamic between gang members is not at all analogous to the dynamic between a citizen and the police.

Finally, Clark emphasized that the boy's age fortified the conclusion the statements were not testimonial. (Clark, supra, 576 U.S. at p. ----, [135 S. Ct. at pp. 2181-2182].) Clark determined it was "extremely unlikely" a three-year-old child in this situation would intend his statements to be a substitute for trial testimony. (Id. at p. 2182.) Likewise, it is extremely unlikely that a gang member in Akuna's position would intend his statements to be a substitute for trial testimony.

Assuming the primary purpose test as currently articulated applies with full force to the present case, we conclude that the totality of the circumstances demonstrates Akuna's statements were not testimonial.

> Thus, admission of the statements into evidence did not violate [Petitioner's] Sixth Amendment right to confrontation.

Akuna, 2018 WL 1223995, at *8 (some alterations in original) (some citations omitted).

C. Analysis

The state court's rejection of Petitioner's claim was not contrary to clearly established federal law or objectively unreasonable. No Supreme Court precedent has held that voluntary statements made unknowingly to government informants are testimonial under the Confrontation Clause or even that the primary-purpose test applies in nonemergency situations. See Meraz v. Pfeiffer, No. CV 16-1955-JAK (KS), 2017 WL 7101154, at *19 (C.D. Cal. Dec. 12, 2017), accepted by 2018 WL 587846 (C.D. Cal. Jan. 29, 2018), appeal filed, No. 18-55862 (9th Cir. June 28, 2018); Parra-Interian v. Obenland, No. 3:17-CV-05481-RBL-DWC, 2019 WL 2026515, at *20 (W.D. Wash. Mar. 20, 2019) ("Petitioner has not shown, nor does the Court find, clearly established Supreme Court law holding a body wire recording of a conversation between a third-party and an informant is testimonial."), accepted by 2019 WL 2022694 (W.D. Wash. May 8, 2019).

Given the abundant federal authority cited by the court of appeal, it was not objectively unreasonable in concluding that Akuna's statements were not testimonial. See Akuna, 2018 WL 1223995, at *6 & n.3; see also Meraz, 2017 WL 7101154, at *17-19 (finding that state court reasonably rejected petitioner's claim that recorded jailhouse statements between third party and government informant were testimonial); Parra-Interian, 2019 WL

2026515, at *20-21 (state court reasonably concluded that conversation between third party and informant was not testimonial); King v. Sherman, No. LACV 15-9948-ODW (LAL), 2017 WL 5899324, at *9 (C.D. Cal. Sept. 26, 2017) (finding that "[b]ecause [codefendant] made his statements to a police informant, whose true status was unknown to [codefendant], his statements were not testimonial for purposes of the Confrontation Clause"), accepted by 2017 WL 5900659 (C.D. Cal. Nov. 27, 2017).

Because Akuna's statements were not testimonial, the rule of Bruton v. United States, 391 U.S. 123, 135-36 (1968) (holding that confrontation right is generally violated by admission of nontestifying codefendant's facially incriminating confession, even with limiting jury instruction), does not apply. See Lucero v. Holland, 902 F.3d 979, 988 (9th Cir. 2018) ("[O]nly testimonial codefendant statements are subject to the federal Confrontation Clause limits established in Bruton."). Thus, Petitioner is not entitled to habeas relief.

RECOMMENDATION

IT THEREFORE IS RECOMMENDED that the District Judge accept this Report and Recommendation and direct that Judgment be entered denying the Petition and dismissing this action with prejudice.

DATED: September 24, 2021

JEAN ROSENBLUTH
U.S. MAGISTRATE JUDGE

JS-6

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

FRANK NATHAN ESCALANTE, Petitioner, v. JIM ROBERTSON, Warden, Respondent.	) Case No. CV 19-5563-RSWL (JPR))) **J U D G M E N T**))))))

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

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

DATED: November 5, 2021

Ronald S.W. Lew

RONALD S.W. LEW
U.S. DISTRICT JUDGE

FILED

JUN 15 2023

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FRANK NATHAN ESCALANTE, Petitioner-Appellant, v. JIM ROBERTSON, Warden, Pelican Bay State Prison, Respondent-Appellee.	No. 21-56342 D.C. No. 2:19-cv-05563-RSWL-JPR Central District of California, Los Angeles ORDER

Before: O'SCANNLAIN and BENNETT, Circuit Judges.

Appellant's motion for reconsideration en banc (Docket Entry No. 6) is denied on behalf of the court. *See* 9th Cir. R. 27-10; 9th Cir. Gen. Ord. 6.11.

No further filings will be entertained in this closed case.