No. _____

IN THE SUPREME COURT OF THE UNITED STATES

_____

STEPHANIE N. TORRES, *Petitioner*

*v.*

MONA D. HOUSTON, *Respondent.*

---

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

---

KARYN H. BUCUR, ESQ.
24881 Alicia Parkway, E193
Laguna Hills, California 92653
(949) 472-1092
Attorney for Petitioner
STEPHANIE N. TORRES
Under Appointment by the Criminal Justice Act

## TABLE OF CONTENTS

**PAGE**

## TABLE OF AUTHORITIES

**CASES** **PAGE**



FEDERAL STATUTES

## QUESTION PRESENTED

In this case, petitioner was convicted in California of attempted murder of two deputies who were pursuing her car in their separate vehicles. To be guilty of attempted murder in California, the defendant must be aware of the presence of the victims. In this case, the state court record shows that petitioner had no idea that these two deputies were pursuing her car. The state court misapprehended the state court record and mistakenly found that petitioner was aware of these two deputies and affirmed her convictions for attempted murder. Petitioner filed a petition for writ of habeas corpus in federal court pursuant to 28 U.S.C. § 2254 challenging the sufficiency of the evidence for the attempted murder convictions.

The question presented is:

When the state court record rebuts the state court's factual findings with clear and convincing evidence pursuant to 28 U.S.C. § 2254(e)(1) may a federal court reviewing a habeas petition under the Antiterrorism and Effective Death Penalty Act of 1996 "AEDPA" pursuant to 28 U.S.C. § 2254 bypass the state court's finding and rely strictly on the state court

record to adjudicate petitioner's claims?

## OPINION BELOW

On August 18, 2023, the United States Court of Appeals for the Ninth Circuit affirmed the district court's denial of Ms. Torres' petition for a writ of habeas corpus brought under 28 U.S.C. § 2254 in Torres v. Houston, 22-16755. A copy of this decision is attached hereto as Appendix "A".

## JURISDICTION

On August 18, 2023, the United States Court of Appeals for the Ninth Circuit affirmed the decision of the district court. Jurisdiction is invoked under 28 U.S.C. § 1254(1).

## STATEMENT OF THE CASE

Stephanie N. Torres is a state prisoner. A jury convicted Ms. Torres on three counts of attempted murder for the pursuing police officers. (ER-42.)[1] Ms. Torres was also convicted of other offenses unrelated to this appeal. (ER-42.) The trial court sentenced Ms. Torres to an aggregate term of 77 years and 4 months in prison. (ER-42.)

[1] "ER" refers to the Excerpts of Record filed in the Ninth Circuit. "SER" refers to the Supplemental Excerpts of Record filed in the Ninth Circuit.

On January 17, 2020, the California Court of Appeal affirmed Ms. Torres' attempted murder convictions. (ER-50.) On February 21, 2020, Ms. Torres filed a petition for review in the California Supreme Court, which was denied on April 15, 2020. (ER-53-90, ER-52.)

After exhausting all of her claims in state court, Ms. Torres filed a pro se petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 on April 26, 2021 in the district court raising the following grounds for relief: 1) due process was denied because the convictions for attempted murder of the three pursuing officers were not supported by sufficient evidence; 2) Due process was denied due to insufficient evidence to support a jury instruction on kill zone theory. (ER-106, ER-109.)

On September 27, 2021, the magistrate judge recommended that the petition for writ of habeas corpus be denied. (ER-24, ER-38.) A copy of the Order and Findings and Recommendations is attached as Appendix "B". The district court appointed counsel for the limited purpose of filing objections to the September 27, 2021, Findings and Recommendations. (ER-4.) On November 24, 2021, appointed counsel filed the Objections to the Magistrate Judge's Findings and Recommendations filed on September 27, 2021. (ER-6.)

On October 31, 2022, the district court adopted in full the findings and recommendations filed on September 27, 2021. A copy of this Order is attached as Appendix "C". The habeas petition was denied. The district court issued a certificate of appealability as to the sufficiency of the evidence issue regarding the intent to kill deputies Valdes and Thompson (cars two and three). (ER-4-5.)

The judgment in this case was filed on October 31, 2022 and is attached as Appendix "D".

Ms. Torres filed her timely Notice of Appeal on November 8, 2023. (ER-176.) On August 18, 2023, the Ninth Circuit affirmed the decision of the district court. (Appendix "A".)

## STATEMENT OF FACTS

The following is the Statement of Facts as set forth in the State Court Opinion:

"The background is limited to the circumstances pertinent to the contentions on appeal. Defendant shot and injured a man who allegedly made unwanted advances toward her teenage sister. The next day, Deputy Jarrod Valdes attempted to stop a car described in a domestic disturbance

report. The car did not pull over in response to his patrol lights and siren but instead attempted to flee. The fleeing car was eventually pursued by Deputy Valdes, Deputy William Derbonne and Deputy Greg Thompson in separate vehicles. At one point, Deputy Valdes heard what he thought were gunshots, but he could not see where they were coming from because he was driving behind Deputy Derbonne at the time. The shots were fired during the initial part of the pursuit over the course of about a minute, coming in regular succession in one or two shot intervals. He said any one of the pursuing officers could have been hit by a bullet.

The pursuit ended when the fleeing car parked at an apartment complex. Defendant exited the car from the back seat. An inspection of the car revealed damage to a rear window consistent with shots being fired through it.

Deputy Derbonne testified that during the pursuit he could see a firearm and muzzle flashes of shots being fired. The shooter had tattoos consistent with defendant's. Deputy Derbonne ducked and swerved to get out of the line of fire. He then noticed he was being shot at from the other side of the fleeing car. He could see the firearm because he was about 20 feet from the fleeing car with all of his lights on, and he could tell the

handgun was pointed in his direction. He could tell the shots were not being fired into the air or toward the ground, he could see the shots were fired in his direction. Deputy Derbonne testified that when a handgun is aimed at you and when somebody is shooting at you, you can tell, because the flash is coming towards your direction. He said the muzzle flash was not going up in the air and the barrel of the gun was not pointed in the air. Deputy Derbonne believed there were at least six shots, possibly more. To his knowledge, no shots hit the patrol car or any of the surrounding parked cars or buildings. During the pursuit, Derbonne maintained his position directly behind the fleeing car.

Alfredo Galvan is defendant's cousin and testified that he drove the fleeing car. He was giving defendant and Marlen Fernandez a ride when the patrol car lights illuminated. When defendant told Galvan she would shoot the officers if Galvan stopped the car, Galvan was scared and continued to drive. He said shots originated from the right rear of the car and defendant was the only person in the backseat as shots continued. Eventually, defendant said she would surrender if Galvan drove to her mother's home, which he did. Galvan admitted on cross-examination that he had originally been charged with attempted murder, but the charges were dismissed after

he agreed to testify against defendant.

Officer Justin Jimenez testified that he recovered a loaded handgun in the pursuit area. Detective Eric Patterson interviewed defendant, who admitted throwing a gun from the fleeing car. Defendant said she was in the front seat with Fernandez and Galvan when the patrol lights were activated, but she crawled into the backseat. She denied firing at police.

Deputy Valdes testified that both defendant and Fernandez have tattoos on their hands, but defendant also has tattoos on her arms. Detective Patterson testified that they did not observe bullet holes in the pursuing cars or in any of the buildings or vehicles in the pursuit area. However, Patterson said that was not unusual under the circumstances; searching for holes was like "looking for a needle in a haystack." Authorities recovered several shell casings along the road". (ER-40-42.)

## REASONS FOR GRANTING THE WRIT

This federal habeas petition is governed by the Antiterrorism and Effective Death Penalty Act of 1996 (ADEPA). "Under the AEPDA, where a state court decides the merits of a petitioner's constitutional challenge, a federal court may grant habeas relief with respect to that claim if the state decision was contrary to, or involved an unreasonable application of, clearly

established federal law, as determined by the Supreme Court of the United States, 28 U.S.C. § 2254(d)(1) or 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)(2)." Chein v. Shumsky, 373 F. 3d 978, 983 (9th Cir. 2004).

Federal law provides that state courts act contrary to clearly established federal law it is applies a legal rule that contradicts prior United States Supreme Court holdings or if it identifies the correct legal principle but applies it in an unreasonable manner to the particular facts before it. Brown v. Payton, 544 U.S. 133, 141, 125 S. Ct. 1432, 161 L. Ed. 2d 334, (2005).

In this case, petitioner was a passenger in a car that was being pursued by Deputy Derbonne in his vehicle in an attempt to pull petitioner's car over. Deputy Derbonne testified during the pursuit he could see a firearm and muzzle flashes of shots being fired. Petitioner was found guilty of attempted murder of Deputy Derbonne. Deputy Valdes and Deputy Thompson were also pursuing the car in their separate vehicles (vehicles two and three) behind Deputy Derbonne. Petitioner was also found guilty of attempted murder of Deputy Valdes and Deputy Thompson. The state court record

showed that petitioner had no idea of the presence of Deputy Valdes and Deputy Thompson. (3-SER-489, 3-SER-494, ER-34.)

Petitioner argued that the facts in the state court record showed that petitioner could not be guilty of attempted murder under California law as to Deputy Valdes and Deputy Thompson because she was unaware of the presence of these two deputies. Under California law, attempted murder requires the specific intent to kill the victim and the defendant's mental state must be examined as to each victim. If the defendant is aware of a victim, then the defendant can be guilty of attempted murder. If, as in this case, the state court record shows that petitioner was completely unaware of the two other deputies following the first deputy, then she is not guilty of attempted murder as to deputies two and three in California as a matter of law. People v. Stone, 46 Cal. 4th 131, 136-137 (2009).

A federal habeas petitioner can challenge not only the state court's legal analysis but also the state court's factual findings made based upon the evidence before it. Wiggins v. Smith, 539 U.S. 510, 528, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003). The state court opinion in this case reveals that the state court misapprehended the state court record and misstated a material fact from the record. Id. (Appendix "B", p. 3.)

A state court unreasonably applies clearly established federal law if it identifies the correct legal principle but applies it in an unreasonable manner to the particular facts before it. Brown v. Payton, supra, 544 U.S. at 141.

The question in this case is can a federal court reviewing a AEDPA habeas claim ignore the factual findings of the state court, if the state court record rebuts the state court's factual findings with clear and convincing evidence pursuant to 28 U.S.C. § 2254(e)?

In other words, as in this case, if the state court record clearly indicates that petitioner was aware of only one deputy, and if the state court found she was aware of the existence of all three deputies, can a federal court grant relief strictly on the state court record that demonstrates with clear and convincing evidence petitioner was aware of only one deputy? This means that under California law, petitioner could be guilty of attempted murder only as to the one deputy directly behind her and not the two other deputies following in cars two and three respectively.

In this case, Ms. Torres argues that the state court's decision rejecting Ms. Torres' insufficiency of the evidence claims for the attempted murder of Deputy Valdes and Deputy Thompson (cars two and three) was an objectively unreasonable application of Jackson v. Virginia, 443 U.S. 307, 319, 61 L. Ed

2d 560, 99 S. Ct. 2781 (1979) and based on the state court's misapprehension of the record. Wiggins v. Smith, supra, 539 U.S. at 528.

"Under Jackson, on habeas, 'the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Chein v. Shumsky, supra, 373 F. 3d at 982, citing to Jackson v. Virginia, supra, 443 U.S. at 319. "Put another way, the dispositive question under Jackson is 'whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt." Chein v. Shumsky, supra, 373 F. 3d at 982-983, citing to Jackson v. Virginia, supra, 443 U.S. at 318. The district court issued a certificate of appealability as to the insufficiency of the evidence issue regarding the intent to kill deputies Valdes and Thompson (cars two and three), but not as to Deputy Derbonne. (ER-5.)

Ms. Torres' constitutional challenge relating to these insufficiency of evidence claims have been "squarely addressed" in Jackson v. Virginia, supra, 443 U.S. at 319. The law provides that the Jackson standard "must be applied with explicit reference to the substantive elements of the criminal offense as defined state law." Chein v. Shumsky, supra, 373 F. 3d at 983, citing to

Jackson v. Virginia, supra, 443 U.S. at 318-324, n. 18.

"Insufficient evidence claims are reviewed by looking at the elements of the offense under state law." Emery v. Clark, 643 F. 3d 1210, 1214 (9th Cir. 2011); see *also* Bradshaw v. Richey, 546 U.S. 74, 76, 126 S. Ct. 602, 163 L. Ed 2d 407 (2005).

California defines attempted murder as follows:

"Attempted murder requires the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing." People v. Stone, 46 Cal. 4th 131, 136 (2009), People v. Superior Court (Decker), 41 Cal. 4th 1, 7 (2007). Under California law, the defendant's mental state must be examined as to each alleged attempted victim. Someone who intends to kill only one person and attempts unsuccessfully to do so, is guilty of the attempted murder of the intended victim, but not of others. People v. Stone, supra, 46 Cal. 4th at 136-137.

Here, the record establishes that Ms. Torres did not have the specific intent for attempted murder of Deputy Valdes and Deputy Thompson because the record shows Ms. Torres was unaware of these two deputies (in cars two and three) pursuing her behind Deputy Derbonne (car one). Ms. Torres' cousin, the driver of the car, where Ms. Torres was a passenger, testified both

on direct and cross-examination that Ms. Torres stated if he stopped the car, she would shoot "him" or "the cop" (3-SER-489, 3-SER-494, ER-34.) This shows that Ms. Torres was only aware of the first vehicle pursuing the car and was unaware of the two pursuing vehicles driven by Deputy Valdes and Deputy Thompson. The Magistrate Judge agreed: "It could be argued that petitioner was aware of just one car chasing her by virtue of this testimony." (ER-34.)

If Ms. Torres had no idea that Deputy Valdes or Deputy Thompson were also pursing her car, then she could not harbor any intent to attempt to kill these two deputies because she did not know they existed. To be guilty of attempted murder in California, the defendant must intend to kill the alleged victim, not someone else. The defendant's mental state must be examined as to each alleged attempted murder victim. People v. Stone, supra, 46 Cal. 4th at 136-137.

The record establishes that Ms. Torres did not know these two deputies existed. (3-SER-489, 3-SER-494, ER-34.) "We hold in a challenge to a state criminal conviction brought under 28 U.S.C. § 2254 – if the settled procedural prerequisites for such a claim have otherwise been satisfied – the applicant is entitled to habeas corpus relief if it is found that upon the record evidence

adduced at trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt." Jackson v. Virginia, supra, 443 U.S. at 324. In this case, no rational trier of fact upon the record evidence, could find Ms. Torres intended to kill Deputy Valdes and Deputy Thompson because the record evidence establishes she did not know these two deputies existed. (3-SER-489, 3-SER-494, ER-34.)

As argued above, the state court opinion misapprehended and misstated the state court record relating to Ms. Torres not knowing about the presence of Deputy Valdes and Deputy Thompson in cars two and three behind Deputy Derbonne: "When defendant told Galvan she would shoot the *officers*, if Galvan stopped the car, Galvan was scared and continued to drive." (ER-94, Appendix "B", p. 3.) Here, the trial transcript is clear that Mr. Galvan testified on both direct examination and cross examination that Ms. Torres said she would shoot "him" or "the cop". (3-SER-489, 3-SER-494, ER-34.)

The statement shoot "him" or "the cop" is singular and the only conclusion that can be inferred from this testimony is that Ms. Torres only knew about "the cop" that was driving directly behind her car and did not know the existence of the other two deputies ( Deputies Valdes and Thompson) driving behind the first car (Deputy Derbonne). This

misapprehension of the record by the state court resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings. 28 U.S.C. § 2254 (d)(2). Chein v. Shumsky, supra, 373 F. 3d at 983.

The law provides that the Jackson v. Virginia standard "must be applied with explicit reference to the substantive elements of the criminal offense as defined state law." Chein v. Shumsky, supra, 373 F. 3d at 983, citing to Jackson v. Virginia, supra, 443 U.S. at 324, n. 16. The state court decision was an objectively unreasonable application of Jackson v. Virginia, supra, 443 U.S. at 319.

The state court's decision was also an unreasonable application of federal law because the state court decision was based on a misapprehension of the state court record. The state court record shows that petitioner was not aware of the other two deputies behind the deputy who was chasing her. (3-SER-489, 3-SER-494, ER-34.) If petitioner had no idea of the existence of the two other deputies, her shots at the first deputy cannot as a matter of California law be attempted murder of deputies two and three.

The district court denied habeas relief because it found that deputies two and three "could have been hit" when petitioner shot at the first deputy.. (ER

33-34.) Petitioner has shown that the state court record rebuts the state court finding that petitioner was aware of deputies two and three with clear and convincing evidence pursuant to 28 U.S.C. § 2254(e)(1) and therefore as a matter of law petitioner could not be guilty of attempted murder under California law.

Petitioner asks that this Court grant certiorari to examine the question of whether the reviewing federal court should have been able to examine the state court record, bypass or ignore the findings of the state court, and found that the state court record shows that petitioner was only aware of the first deputy and not deputies two and three. Then, after finding that the state court record rebuts the state court's factual findings with clear and convincing evidence pursuant to 28 U.S.C. § 2254(e), the district court may rely strictly on the state court record to adjudicate petitioner's claims.

This petition for writ of certiorari should be granted.

## CONCLUSION

For the foregoing reasons, Ms. Torres respectfully submits that the petition for writ of certiorari should be granted.

Dated: November 9, 2023

Respectfully Submitted,

__*s/Karyn H. Bucur*_____
Karyn H. Bucur
Attorney for Petitioner

**NOT FOR PUBLICATION**

FILED

AUG 18 2023

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

| | |
|---|---|
| STEPHANIE N. TORRES,<br><br>Petitioner-Appellant,<br><br>v.<br><br>MONA D. HOUSTON,<br><br>Respondent-Appellee. | No. 22-16755<br><br>D.C. No.<br>2:21-cv-00743-KJM-CKD<br><br>MEMORANDUM* |

Appeal from the United States District Court
for the Eastern District of California
Kimberly J. Mueller, Chief District Judge, Presiding

Submitted August 14, 2023**
San Francisco, California

Before: CALLAHAN and BADE, Circuit Judges, and ANTOON,*** District Judge.

Stephanie Torres appeals the district court's denial of her petition for a writ of habeas corpus brought under 28 U.S.C. § 2254. We have jurisdiction under 28

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

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

*** The Honorable John Antoon II, United States District Judge for the Middle District of Florida, sitting by designation.

U.S.C. §§ 1291 and 2253(a), and we affirm.

We review de novo a district court's denial of a petition for a writ of habeas corpus. *Kipp v. Davis*, 971 F.3d 939, 948 (9th Cir. 2020). Our review is governed by the deferential standards of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") on "any claim that was adjudicated on the merits in State court proceedings." 28 U.S.C. § 2254(d).

1. Under AEDPA, to grant relief in a § 2254 case challenging the sufficiency of the evidence, "we must conclude that the state court's determination that a rational jury could have found that there was sufficient evidence of guilt, i.e., that each required element was proven beyond a reasonable doubt, was objectively unreasonable." *Boyer v. Belleque*, 659 F.3d 957, 965 (9th Cir. 2011). We also "assess whether record evidence is so lacking that habeas relief is merited under *Jackson* [*v. Virginia*] 'with explicit reference to the substantive elements of the criminal offense as defined by state law.'" *Id.* (quoting *Jackson v. Virginia*, 443 U.S. 307, 324 n.16 (1979)).

California defines attempted murder as "the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing," considering the defendant's intent as to each alleged victim. *People v. Stone*, 205 P.3d 272, 275 (Cal. 2009) (quoting *People v. Superior Court*, 157 P.3d 1017, 1021 (Cal. 2007)). Torres argues that she did not have the specific intent to

kill Deputies Valdes and Thompson because their vehicles were behind Deputy Derbonne's, and she was unaware of them.

Assuming this argument was fairly presented in state court, Torres has consistently stated that she "was being pursued by three deputy vehicles," that she fired with the intention of discouraging "the deputies" from pursuing her, and that she shot "wildly" at the pursuing "police vehicles." Her repeated use of the plural and her admission that she was shooting in a "fast and changing" environment, when considered alongside the considerable deference we owe state court judgments under AEDPA, confirms the California Court of Appeal's and district court's conclusions that—regardless of Torres's poor aim and failure to actually hit the officers' vehicles—Torres knew about and intended to shoot at Deputies Valdes and Thompson. Moreover, as the district court emphasized, Torres presented no contravening evidence that she would have ceased firing during the pursuit had she hit Deputy Derbonne.

Torres also notes that her cousin, Alfredo Galvan, testified that Torres threatened to shoot "the cop" (singular) if Galvan stopped driving the vehicle in which they were fleeing, and she argues that "the only conclusion that can be inferred" from his testimony is that Torres "did not know [of] the existence of the other two deputies." However, the record indicates that the lead patrol car was swerving in and out and likely exposing the other deputies. Therefore, "viewing

the evidence in the light most favorable to the prosecution," *Jackson*, 443 U.S. at 319, it was not "objectively unreasonable" for the state court to "determin[e] that a rational jury could have found that" Torres's actions demonstrated beyond a reasonable doubt an intent to shoot each of the deputies, *Boyer*, 659 F.3d at 965. The evidence presented to the California Court of Appeal was therefore sufficient to support Torres's convictions for the attempted murders of Deputies Valdes and Thompson.

2. We decline to expand the certificate of appealability to include Torres's uncertified claims that her due process rights were violated on the basis of (1) insufficient evidence to support her conviction for the attempted murder of Deputy Derbonne, and (2) insufficient evidence to support a jury instruction on a kill-zone theory, because Torres has not made a "substantial showing of the denial of a constitutional right." *Dixon v. Ryan*, 932 F.3d 789, 808 (9th Cir. 2019) (quoting 28 U.S.C. § 2253(c)(2) and *Slack v. McDaniel*, 529 U.S. 473, 483 (2000)).

In the first uncertified claim, Torres argues that the evidence did not demonstrate her shots were "leveled" at Deputy Derbonne's car or his person; rather, she contends the evidence at most proves she had a conscious disregard for human life when she was firing "wildly" at the "pursuing, moving, and swerving police vehicles." The jury was presented with evidence that Deputy Derbonne was

closest to the fleeing vehicle when the shots were fired, he could see and hear the gunfire, and Torres ordered her cousin not to stop their vehicle or else she would kill "the cop." Torres's failure to hit Deputy Derbonne does not undermine the reasonable conclusion that she intended to kill him. *See Jackson*, 443 U.S. at 319.

In the second uncertified claim, the California Court of Appeal and district court properly concluded that the jury was not asked to determine the case on a kill-zone theory. And, even if it were, there was sufficient evidence for the jury to reasonably infer that Torres intended to create a kill zone around Deputy Derbonne given her indiscriminate shooting. *See People v. Canizales*, 442 P.3d 686, 694 (Cal. 2019). Finally, even assuming the kill-zone theory was presented to the jury *and* there was insufficient evidence to support it, "'jurors are well equipped to analyze the evidence,' [so] we can be confident that the jury chose to rest its verdict on the object that was supported by sufficient evidence, rather than the object that was not." *United States v. Gonzalez*, 906 F.3d 784, 791 (9th Cir. 2018) (emphasis omitted) (quoting *Griffin v. United States*, 502 U.S. 46, 59 (1991)).

**AFFIRMED.**

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

STEPHANIE N. TORRES,

Petitioner,

v.

MONA D. HOUSTON, Warden,

Respondent.

No. 2:21-cv-00743 KJM GGH P

ORDER AND FINDINGS AND RECOMMENDATIONS

*Introduction and Summary*

Petitioner, a state prisoner proceeding pro se, has filed a petition for writ of habeas corpus pursuant to 28 U.S.C. §2254. The matter was referred to the United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1) and Local Rule 302(c).

Poor aim or not, if one shoots a bullet at another person, such a shooting can be termed "attempted murder." It was in this case. Petitioner contends that the evidence was insufficient to show that she actually intended to kill anyone. However, petitioner's argument about insufficient evidence essentially constitutes the oft argued, fallacious assertion that if the evidence could be construed in petitioner's favor, the evidence for conviction is *ipso facto* insufficient. That argument fails here as well. Also, petitioner's argument about the erroneous "kill zone" theory will fail for the reason that, in actuality, no such theory was given to the jury for decision, and in

any event, no federal interest was implicated by the giving of the instruction here. After carefully reviewing the filings, and application of the applicable law, this court recommends petitioner's habeas petition be denied.

*Factual Background*

The court has conducted a thorough review of the record in this case, as well as the California Court of Appeal, Third Appellate District's (Court of Appeal) unpublished memorandum and opinion. The appellate court's summary of the facts is consistent with the court's own review of the record. Accordingly, it is provided below:

> The background is limited to the circumstances pertinent to the contentions on appeal. Defendant shot and injured a man who allegedly made unwanted advances toward her teenage sister. The next day, Deputy Jarrod Valdes attempted to stop a car described in a domestic disturbance report. The car did not pull over in response to his patrol lights and siren but instead attempted to flee. The fleeing car was eventually pursued by Deputy Valdes, Deputy William Derbonne and Deputy Greg Thompson in separate vehicles. At one point, Deputy Valdes heard what he thought were gunshots, but he could not see where they were coming from because he was driving behind Deputy Derbonne at the time. The shots were fired during the initial part of the pursuit over the course of about a minute, coming in regular succession in one or two shot intervals. He said any one of the pursuing officers could have been hit by a bullet.
>
> The pursuit ended when the fleeing car parked at an apartment complex. Defendant exited the car from the back seat. An inspection of the car revealed damage to a rear window consistent with a shot being fired through it.
>
> Deputy Derbonne testified that during the pursuit he could see a firearm and the muzzle flashes of shots being fired. The shooter had tattoos consistent with defendant's. Deputy Derbonne ducked and swerved to get out of the line of fire. He then noticed he was being shot at from the other side of the fleeing car. He could see the firearm because he was about 20 feet from the fleeing car with all of his lights on, and he could tell the handgun was pointed in his direction. He could tell the shots were not being fired into the air or toward the ground, he could see the shots were fired in his direction. Deputy Derbonne testified that when a handgun is aimed at you and when somebody is shooting at you, you can tell, because the flash is coming towards your direction. He said the muzzle flash was not going up in the air and the barrel of the gun was not pointed in the air. Deputy Derbonne believed there were at least six shots, possibly more. To his knowledge, no shots hit the patrol cars or any of the surrounding parked cars or buildings. During the pursuit, Derbonne maintained his position directly behind the fleeing car.

////

Alfredo Galvan is defendant's cousin and testified that he drove the fleeing car. He was giving defendant and Marlen Fernandez a ride when the patrol car lights illuminated. When defendant told Galvan she would shoot the officers if Galvan stopped the car, Galvan was scared and continued to drive. He said shots originated from the right rear of the car, and defendant was the only person in the backseat as the shots continued. Eventually, defendant said she would surrender if Galvan drove to her mother's home, which he did. Galvan admitted on cross-examination that he had originally been charged with attempted murder, but the charges were dismissed after he agreed to testify against defendant.

Officer Justin Jimenez testified that he recovered a loaded handgun in the pursuit area. Detective Eric Patterson interviewed defendant, who admitted throwing a gun from the fleeing car. Defendant said she was in the front seat with Fernandez and Galvan when the patrol lights were activated, but she crawled into the backseat. She denied firing at the police.

Deputy Valdes testified that both defendant and Fernandez have tattoos on their hands, but defendant also has tattoos on her arms. Detective Patterson testified that they did not observe bullet holes in the pursuing cars or in any of the buildings or vehicles in the pursuit area. However, Patterson said that was not unusual under the circumstances; searching for holes was like "looking for a needle in a haystack." Authorities recovered several shell casings along the road.

In connection with the shooting of the man who allegedly made unwanted advances toward defendant's teenage sister, the jury convicted defendant of assault with a semiautomatic firearm (Pen. Code, § 245, subd. (b) -- count II),[(Fn. 1 omitted)] possession of a firearm by a felon (§ 29800, subd. (a) -- count III), and possession of ammunition by a felon (§ 30305, subd. (a) -- count IV). The jury also found true allegations that defendant, in the commission of the count II assault, personally inflicted great bodily injury (§ 12022.7, subd. (a)) and personally used a firearm (§ 12022.5).

Moreover, in connection with the shots fired at the pursuing police officers the next day, the jury convicted defendant on three counts of first degree attempted murder (§§ 664/187, subd. (a) -- counts V-VII), possession of a firearm by a felon (§ 29800, subd. (a) -- count XI), and possession of ammunition by a felon (§ 30305, subd. (a) -- count XII). The jury also found true allegations that defendant, in the commission of counts V-VII, personally and intentionally discharged a firearm (§ 12022.53, subd. (c)).

Defendant admitted, as to all counts, that she had a prior serious felony conviction (§ 667, subd. (a)(1)), three prior prison terms (§ 667.5, subd. (b)), and a prior strike conviction (§ 1170.12, subds. (a)-(d)).

////

////

> The trial court sentenced defendant to an aggregate 77 years four months in prison.

People v. Torres, No. C087086, 2020 WL 255068, at *1-2 (Cal. Ct. App. Jan. 17, 2020).

The undersigned adds that petitioner did not testify. Nor did the defense offer any evidence as to petitioner's state of mind. Her stated protestation here *in this federal habeas proceeding* is that her firing wildly without intent to kill is not evidence.

*Procedural Background*

This habeas petition was filed on April 26, 2021. ECF No. 1. An answer was filed on July 7, 2012, and a traverse was filed on September 7, 2021. ECF Nos. 13, 17. The issues raised by the petition are referenced in this Findings and Recommendations' *Introduction and Summary*.

*Legal Standard of Review*

The statutory limitations of a federal courts' power to issue habeas corpus relief for persons in state custody is provided by 28 U.S.C. § 2254, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). The text of § 2254 provides:

> (d) 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 facts in light of the evidence presented in the State court proceeding.

As a preliminary matter, the Supreme Court has held and reconfirmed "that § 2254(d) does not requires a state court to give reasons before its decision can be deemed to have been 'adjudicated on the merits.'" Harrington v. Richter, 562 U.S. 86, 98 (2011). Rather, "when a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary." Id. at 99 (citing Harris v. Reed, 489 U.S. 255, 265 (1989) (presumption of a merits determination when it is unclear whether a decision

appearing to rest on federal grounds was decided on another basis)). "The presumption may be overcome when there is reason to think some other explanation for the state court's decision is more likely." Id.

The Supreme Court has set forth the operative standard for federal habeas review of state court decisions under AEDPA as follows: "For purposes of § 2254(d)(1), 'an unreasonable application of federal law is different from an incorrect application of federal law.'" Harrington, supra, at 101 (citing Williams v. Taylor, 529 U.S. 362, 410 (2000)). "A state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." Id. at 101 (citing Yarborough v. Alvarado, 541 U.S. 652, 664 (2004)).

Accordingly, "a habeas court must determine what arguments or theories supported or…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 this Court." Id. at 102. "Evaluating whether a rule application was unreasonable requires considering the rule's specificity. The more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations." Id. Emphasizing the stringency of this standard, which "stops short of imposing a complete bar of federal court relitigation of claims already rejected in state court proceedings[,]" the Supreme Court has cautioned that "even a strong case for relief does not mean the state court's contrary conclusion was unreasonable." Id. (citing Lockyer v. Andrade, 538 U.S. 63, 75 (2003).)

The undersigned also finds that the same deference is paid to the factual determinations of state courts. Under § 2254(d)(2), factual findings of the state courts are presumed to be correct subject only to a review of the record which demonstrates that the factual finding(s) "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." It makes no sense to interpret "unreasonable" in §2254(d)(2) in a manner different from that same word as it appears in § 2254(d)(1) – i.e., the factual error must be so apparent that "fairminded jurists" examining the same record could not

////

abide by the state court's factual determination. A petitioner must show clearly and convincingly that the factual determination is unreasonable. See Rice v. Collins, 546 U.S. 333, 338 (2006).

The habeas corpus petitioner bears the burden of demonstrating the objectively unreasonable nature of the state court decision in light of controlling Supreme Court authority. Woodford v. Viscotti, 537 U.S. 19 (2002). Specifically, the petitioner "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." Harrington, supra, at 102. "Clearly established" law is law that has been "squarely addressed" by the United States Supreme Court. Wright v. Van Patten, 552 U.S. 120, 125 (2008). Thus, extrapolations of settled law to unique situations will not qualify as clearly established. See, e.g., Carey v. Musladin, 549 U.S. 70, 76 (2006) (established law not permitting state sponsored practices to inject bias into a criminal proceeding by compelling a defendant to wear prison clothing or by unnecessary showing of uniformed guards does not qualify as clearly established law when spectators' conduct is the alleged cause of bias injection). The established Supreme Court authority reviewed must be a pronouncement on constitutional principles, or other controlling federal law, as opposed to a pronouncement of statutes or rules binding only on federal courts. Early v. Packer, 537 U.S. 3, 9 (2002).

The state courts need not have cited to federal authority, or even have indicated awareness of federal authority in arriving at their decision. Id. at 8. Where the state courts have not addressed the constitutional issue in dispute in any reasoned opinion, the federal court will independently review the record regarding that issue. Independent review of the record is not *de novo* review of the constitutional issue, but rather, the only method by which we can determine whether a silent state court decision is objectively unreasonable." Himes v. Thompson, 336 F.3d 848, 853 (9th Cir. 2003).

Finally, if the state courts have not adjudicated the merits of the federal issue, no AEDPA deference is given; instead the issue is reviewed *de novo* under general principles of federal law. Stanley v. Cullen, 633 F.3d 852, 860 (9th Cir. 2012). However, when a state court decision on a petitioner's claims rejects some claims but does not expressly address a federal claim, a federal

habeas court must presume, subject to rebuttal, that the federal claim was adjudicated on the merits. Johnson v. Williams, 568 U.S. 289, 293 (2013).

*Discussion*

When a challenge is brought alleging insufficient evidence, federal habeas corpus relief is available if it is found that upon the record evidence adduced at trial, viewed in the light most favorable to the prosecution, no rational trier of fact could have found "the essential elements of the crime" proven beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, (1979). Jackson established a two-step inquiry for considering a challenge to a conviction based on sufficiency of the evidence. United States v. Nevils, 598 F.3d 1158, 1164-65 (9th Cir. 2010) (en banc):

> First, a reviewing court must consider the evidence presented at trial in the light most favorable to the prosecution *Jackson,* 443 U.S. at 319, 99 S.Ct. 2781...[W]hen "faced with a record of historical facts that supports conflicting inferences" a reviewing court "must presume—even if it does not affirmatively appear in the record—that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution." *Id.* at 326, 99 S.Ct. 2781; *see also McDaniel,* 130 S.Ct. at 673–74.
>
> Second, after viewing the evidence in the light most favorable to the prosecution, the reviewing court must determine whether this evidence, so viewed, is adequate to allow "*any* rational trier of fact [to find] the essential elements of the crime beyond a reasonable doubt." *Jackson,* 443 U.S. at 319, 99 S.Ct. 2781.
>
> ***
>
> At this second step, we must reverse the verdict if the evidence of innocence, or lack of evidence of guilt, is such that all rational fact finders would have to conclude that the evidence of guilt fails to establish every element of the crime beyond a reasonable doubt. *See id*.

And, where the trier of fact could draw conflicting inferences from the facts presented, one favoring guilt and the other not, the reviewing court will assign the one which favors conviction. McMillan v. Gomez, 19 F.3d 465, 469 (9th Cir. 1994). However, the mere fact that an inference can be assigned in favor of the government's case does not mean that the evidence on a disputed crime element is sufficient—the inference, along with other evidence, must demonstrate that a reasonable jury could find the element beyond a reasonable doubt, i.e., "'[A] reasonable

inference is one that is supported by a chain of logic, rather than mere speculation dressed up in the guise of evidence.'" United States v. Katakis, 800 F.3d 1017, 1024 (9th Cir. 2015). Finally, the relevant inquiry is not whether the evidence excludes every hypothesis except guilt, but whether the factfinder could rationally arrive at its verdict. United States v. Fleishman, 684 F.2d 1329, 1340 (9th Cir. 1982).

Superimposed on these already stringent insufficiency standards is the AEDPA requirement that even if a federal court were to initially find on its own that no reasonable jury should have arrived at its conclusion, the federal court must actually determine that the state appellate court could not have affirmed the verdict under the Jackson standard in the absence of an unreasonable determination. Juan H. v. Allen, 408 F.3d 1262, 1274 (9th Cir. 2005), i.e., reasonable jurists, upon review, could not uphold the state courts' determination that the evidence was sufficient.

A federal habeas court determines sufficiency of the evidence in reference to the substantive elements of the criminal offense as defined by state law. See Jackson, 443 U.S. at 324 n. 16; Chein v. Shumsky, 373 F.3d 978, 983 (9th Cir. 2004) (en banc).

1. Insufficiency of the Evidence With Respect to Attempted Murder

In California, to prove the crime of attempted murder, the prosecution must establish "the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing." People v. Lee, 31 Cal.4th 613, 623 (2003). When a single act is charged as an attempt on the lives of two or more persons, the intent to kill element must be examined independently as to each alleged attempted murder victim; an intent to kill cannot be "transferred" from one attempted murder victim to another under the transferred intent doctrine. People v. Bland, 28 Cal.4th 313, 327–328 (2002).

> We also explained, however, that if a person targets one particular person, under some facts a jury could find the person *also*, concurrently, intended to kill—and thus was guilty of the attempted murder of—other, nontargeted, persons. Citing a Maryland case (*Ford v. State* (1993) 330 Md. 682, 625 A.2d 984), we explained that "the fact the person desires to kill a particular target does not preclude finding that the person also, concurrently, intended to kill others within what [the Ford court] termed the 'kill zone.' " (*Bland, supra*, 28 Cal.4th at p. 329, 121 Cal.Rptr.2d 546, 48 P.3d 1107.) For

> example, if a person placed a bomb on a commercial airplane intending to kill a primary target, but also ensuring the death of all the passengers, the person could be convicted of the attempted murder of all the passengers, and not only the primary target. (*Bland, supra*, at pp. 329–330, 121 Cal.Rptr.2d 546, 48 P.3d 1107.) Likewise, in *Bland,* "[e]ven if the jury found that defendant primarily wanted to kill [a driver] rather than [the] passengers, it could reasonably also have found a concurrent intent to kill those passengers when defendant and his cohort fired a flurry of bullets at the fleeing car and thereby created a kill zone. Such a finding fully supports attempted murder convictions as to the passengers." (*Id.* at pp. 330–331, 121 Cal.Rptr.2d 546, 48 P.3d 1107.)
>
> We also explained in *Bland* that this "concurrent intent" or "kill zone" theory "is not a legal doctrine requiring special jury instructions.... Rather, it is simply a reasonable inference the jury may draw in a given case: a primary intent to kill a specific target does not rule out a concurrent intent to kill others." (*Bland, supra,* 28 Cal.4th at p. 331, fn. 6, 121 Cal.Rptr.2d 546, 48 P.3d 1107.) Nevertheless, current pattern jury instructions discuss the kill zone theory. (CALJIC No. 8.66.1 (2004 rev.);1 CALCRIM No. 600 (2008).)2 [omitted] The Bench Notes to CALCRIM No. 600 explain that *Bland* stated that a special instruction on the point is not required, and that the kill zone "language is provided for the court to use at its discretion."

People v. Stone, 46 Cal. 4th 131, 137-138 (2009).

Because, as found by the Court of Appeal, the kill zone theory was not actually presented to the jury, see below, the undersigned reviews the issue here under the standard that attempted murder had to be shown with respect to all three deputies. First, the undersigned sets forth the reasoning of the Court of Appeal:

> Defendant expressed her intent to shoot the deputies if her cousin stopped the car. Her cousin kept driving out of fear, but the evidence shows defendant nevertheless opened fire in the direction of the pursuing deputies. Deputy Derbonne ducked and swerved to get out of the line of fire. He then noticed he was being shot at from the other side of the fleeing car. He could see the firearm because he was about 20 feet from the fleeing car with all of his lights on, and he could tell the handgun was pointed in his direction. He could tell the shots were not being fired into the air or toward the ground. Deputy Valdes was driving behind Deputy Derbonne and testified any one of the pursuing deputies could have been hit by a bullet.
>
> That the deputies were unable to find any bullet holes in their cars does not preclude a finding that defendant intended to kill the deputies. She could certainly argue that circumstance to the jury, but the testimony of the deputies was clear that defendant was shooting in their direction. On the facts of this case, the jury was free to find that defendant failed to hit the deputies' cars because of the movement of the car defendant was riding in, her poor aim, and the

> deputies' effort to avoid her aim. Thus, the jury was not required to find defendant did not intend to kill the deputies even if she failed to hit their cars.
>
> Likewise, the contingent nature of defendant's threat to Galvan that she would shoot a deputy if Galvan stopped the car was another circumstance defendant could argue to the jury, but it does not overcome the substantial nature of the evidence that she expressed a willingness to shoot a deputy and actually shot at the deputies as they were pursuing the car. A jury could reasonably infer the intent to kill from the evidence in this case.

People v. Torres, supra, 2020 WL 255068, at *3.

There is no doubt that the evidence was sufficient as to Deputy Derbonne, who as to all times at which the shots were fired, was in the lead car closest to petitioner's car. ECF No. 11-3 at 178-180. He testified as to the direction of fire, which was levelled, at the very least, at his car. Any jury (and reviewing court) could rationally come to the conclusion that Derbonne was an intended target. And, petitioner's driver had related petitioner's state of mind when ordered not to stop or she would kill the cop(s). We should not forget that petitioner shot her civilian target a day before the police chase. The jury would have understood that murder was not a foreign concept to petitioner. The weapon used by petitioner, a .22 caliber presumably semi-automatic, (ECF No. 11-3 at 217), was close to fully expended during the chase.[1] That petitioner could argue that the facts were consistent with merely attempting to dissuade the chase by "wildly" shooting in the general direction of the police car(s), and not premeditated attempted murder, does not mean that the finding of premeditated attempted murder was insufficient.

The above conclusion is less clear for Deputies Valdes and Thompson. These deputies were, respectively, in cars two and three behind Derbonne. After testifying that Derbonne was the person most in danger from being hit by gunfire, ECF No. 11-3 at 169, testimony which was inexplicably objected to by defense counsel, and then sustained by the judge, Valdes testified that all three deputies could "easily" have been hit by the gunfire. Id. at 170. The evidence does show

[1] The testimony referenced a "magazine," something that is connected to a semi-automatic firearm. ECF No 11-3 at 217. Moreover, the deputies testified to numerous shots being fired in fairly short order—too numerous for a revolver. Finally, unfired bullets were found in petitioner's pocket and car, and it was possible that the magazine had been reloaded during the chase. ECF No. 11-3 at 238.

that the lead patrol car was swerving in and out to avoid being hit, id. at 170; 179, thereby possibly exposing the other deputies. There is no evidence that petitioner would have "called it a day" simply because she had shot the lead deputy. Thus, the fact that all three deputies (incontrovertibly) could have been easily hit is the only evidence demonstrating petitioner's state of mind with respect to the second and third place deputies, as the defense presented no evidence otherwise. It is here that the jury could draw a logical inference that petitioner was shooting at all three deputies.[2] Nevertheless, the evidence is slim regarding deputies two and three.[3]

////

////

////

////

////

////

////

////

////

////

[2] Nevertheless, the testimony of the driver who recounted petitioner's statement was vague as to whether a single "cop" was the subject of petitioner's intent or whether cops (plural) was intended by petitioner's statement.

> Q. […] What, if anything, did your cousin, Stephanie Torres, say?
> A. That if I stopped the car, she'd shoot 'em.
> Q. By shoot them?
> A. The cop.

ECF No. 11-3 at 203.

> Q. And you claim that my client told you that if you stopped the car she would shoot the cops?
> A. Shoot him, yes.
> Q. Shoot him?
> A. The cop, yeah.

ECF No. 11-3 at 208.

It could be argued that petitioner was aware of just one car chasing her by virtue of this testimony.

[3] Deputy Thompson, for whatever reason, did not testify.

Given all the facts and circumstances recounted above, however, the undersigned cannot find the Court of Appeal's finding of intent sufficiency AEDPA unreasonable.[4] [5]

////

////

[4] Petitioner does not argue that the jury's finding of *premeditated* attempted murder was inaccurate as to the premeditation component necessary for an enhanced punishment; she argues only that specific intent to kill altogether was missing. California law on the "degrees" of attempted murder is complicated, and even the Court of Appeal in this case incorrectly found that the jury had convicted petitioner of first-degree attempted murder (emphasis added):

> Hart's analysis fails for two reasons. First, contrary to Hart's presupposition, attempted premeditated murder and attempted unpremeditated murder are not separate offenses. *Attempted murder is not divided into different degrees.* (*People v. Douglas* (1990) 220 Cal.App.3d 544, 549, 269 Cal.Rptr. 579 [rejecting claim that attempted second degree murder is lesser offense included within offense of attempted willful, deliberate, and premeditated murder], cited with approval in *People v. Bright* (1996) 12 Cal.4th 652, 665–667, 49 Cal.Rptr.2d 732, 909 P.2d 1354 (*Bright*), which we disapproved on another ground in *People v. Seel* (2004) 34 Cal.4th 535, 550, fn. 6, (21 Cal.Rptr.3d 179, 100 P.3d 870.2 ) "[T]he provision in section 664, subdivision (a), imposing a greater punishment for an attempt to commit a murder that is 'willful, deliberate, and premeditated' does not create a greater degree of attempted murder but, rather, constitutes a penalty provision that prescribes an increase in punishment (a greater base term) for the offense of attempted murder." (*Bright, supra,* 12 Cal.4th at pp. 656–657, 49 Cal.Rptr.2d 732, 909 P.2d 1354.) "[T]he statutory language employed in prescribing an additional penalty for attempted murder ... reflects a legislative intent to create a penalty provision specifying a greater term, rather than a substantive offense." (*Bright, supra,* 12 Cal.4th at p. 668, 49 Cal.Rptr.2d 732, 909 P.2d 1354; *see also id*. at p. 670, 49 Cal.Rptr.2d 732, 909 P.2d 1354 ["the division of a crime into degrees constitutes an exclusively legislative function"].) Thus, " premeditated attempted murder is not a separate offense from attempted murder." (*Anthony v. Superior Court* (2010) 188 Cal.App.4th 700, 706, 115 Cal.Rptr.3d 519.) Because [*People v.*] *Woods*[, (1992) 8 Cal.App.4th 1570] involved murder—not attempted murder—where there are different degrees of the offense, Hart 's reliance on *Woods*'s lesser included offense analysis is misplaced.

People v. Favor, 54 Cal. 4th 868, 876-877 (2012).

In this case, once the jury found a specific intent to kill, the fact that it was premeditated followed as night does day, i.e., she had communicated her intent to kill the deputy(s) to her driver which bespeaks premeditation, however short.

[5] It is somewhat ironic that the incident involving the person who petitioner actually did shoot the day before the missed shots were taken at the deputies, only warranted an assault with a deadly weapon conviction.

2. The Kill Zone Instruction for Attempted Murder

Petitioner does not contend that a kill zone instruction violates some aspect of due process *per se,* but does argue that the evidence was insufficient to support giving the instruction.

The law pertinent to the kill zone theory has been set forth above. The Court of Appeal's bottom line was that the jury, in actuality, was not asked to determine the case based on the kill zone theory.

> The trial court then instructed the jury with a bracketed portion of CALCRIM No. 600 designed to instruct on the kill zone theory. But the trial court filled in the blanks for that portion of the instruction in such a way that the jury was only allowed to convict defendant for attempted murder of each deputy if defendant intended to kill that deputy, without regard to whether defendant created a zone of fatal harm. Specifically, the relevant bracketed portion of CALCRIM No. 600 provides: "In order to convict the defendant of the attempted murder of [insert name of victim based on concurrent-intent theory], the People must prove that the defendant not only intended to kill [insert name of alleged primary target] but also either intended to kill [insert name of victim based on concurrent-intent theory], or intended to kill everyone within the kill zone." To instruct on attempted murder based on a kill zone theory as to alleged victim Deputy Derbonne, the trial court should have inserted Deputy Derbonne's name in the first and third blanks as the alleged concurrent-intent victim and inserted someone else's name in the second blank referring to the alleged primary target. But instead, the trial court inserted Deputy Derbonne's name into all three blanks, as follows: "In order to convict the defendant of the attempted murder of Deputy William Derbonne, the People must show that the defendant not only intended to kill Deputy William Derbonne but also intended to kill Deputy William Derbonne or intended to kill everyone within the kill zone." The trial court gave that same bracketed portion of the instruction in connection with the other two alleged deputy victims, inserting each deputy's name into all three blanks, just like the trial court had done with Deputy Derbonne's name.
>
> The purpose of CALCRIM No. 600 is to present to the jury two options for finding intent to kill: (1) under the general theory of attempted murder (if the jury finds the defendant intended to kill the named victim), or (2) under the kill zone theory (if the jury finds the defendant intended to kill the named victim because the defendant intended to kill the primary target other than the named victim, the defendant concurrently intended to kill everyone within the zone of fatal harm, and the named victim was within the zone of fatal harm). Based on the way the trial court gave the instructions in this case, however, the jury could only convict on each count of attempted murder if it found that the named victim was the primary target, which is essentially the general theory of attempted murder.

////

> Therefore, the instruction effectively precluded the jury from relying on the kill zone theory to convict defendant of attempted murder.

People v. Torres, 2020 WL 255068, at *4.

The undersigned cannot find this conclusion AEDPA unreasonable.

Respondent also correctly observes, citing Griffin v. United States, 502 U.S. 46, 59-60 (1991), and United States v. Gonzalez, 906 F.3d 784, 790-91 (9th Cir. 2018), that even if the kill zone theory was actually presented to the jury, and there was insufficient evidence to support it, the jury will be presumed to have chosen the theory for which sufficient evidence exists. Petitioner's second argument cannot withstand AEDPA scrutiny.

*Certificate of Appealability*

Pursuant to Rule 11 of the Federal Rules Governing Section 2254 Cases, this court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant. A certificate of appealability may issue only "if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The certificate of appealability must "indicate which specific issue or issues satisfy" the requirement. 28 U.S.C. § 2253(c)(3).

A certificate of appealability should be granted for any issue that petitioner can demonstrate is "'debatable among jurists of reason,'" could be resolved differently by a different court, or is "'adequate to deserve encouragement to proceed further.'" Jennings v. Woodford, 290 F.3d 1006, 1010 (9th Cir. 2002) (quoting Barefoot v. Estelle, 463 U.S. 880, 893 (1983)).

Petitioner has made a substantial showing of the denial of a constitutional right in the following issue presented in the instant petition: insufficiency of the evidence regarding the intent to kill deputies Valdes and Thompson (cars two and three).

*Conclusion*

IT IS HEREBY ORDERED that:

1. The Federal Defender is appointed for the limited purposes of arguing objections, if any, for petitioner[6]; and

[6] See 18 U.S.C. § 3006A(a)(2)(B); see also Weygandt v. Look, 718 F.2d 952, 954 (9th Cir. 1983). Of course, the Federal Defender may seek appointment for an attorney on the CJA

2. The Clerk of the Court is directed to serve a copy of this order and findings and recommendations on the Federal Defender, Attention: Habeas Appointment.

Further, IT IS HEREBY RECOMMENDED that:

1. The habeas petition be DENIED; and

2. A Certificate of Appealability should issue as to the insufficiency of the evidence issue regarding the intent to kill deputies Valdes and Thompson (cars two and three).

These Findings and Recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(l). Within twenty-one days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections shall be served and filed within fourteen days after service of the objections. The parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

Dated: September 27, 2021

/s/ Gregory G. Hollows
UNITED STATES MAGISTRATE JUDGE

panel in lieu of attorney representation from the Office of the Federal Defender.

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

| | |
|---|---|
| STEPHANIE N. TORRES,<br>Petitioner,<br>v.<br>MONA D. HOUSTON, Warden,<br>Respondent. | No. 2:21-cv-00743 KJM CKD P<br><br>ORDER |

Petitioner, a state prisoner proceeding with counsel[1], has filed this application for a writ of habeas corpus under 28 U.S.C. § 2254. The matter was referred to a United States Magistrate Judge as provided by 28 U.S.C. § 636(b)(1)(B) and Local Rule 302.

On September 27, 2021, the magistrate judge filed findings and recommendations, which were served on all parties and which contained notice to all parties that any objections to the findings and recommendations were to be filed within twenty-one days. ECF No. 18. Petitioner has filed objections to the findings and recommendations. ECF No. 26. Respondent has filed a reply to the objections. ECF No. 27.

/////

/////

[1] The undersigned appointed counsel for petitioner for the limited purpose of filing objections to the September 27, 2021 Findings and Recommendations. *See* ECF No. 18 at 14-15.

In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C) and Local Rule 304, this court has conducted a *de novo* review of this case. Having reviewed the file, the court finds the findings and recommendations to be supported by the record and by proper analysis.

Accordingly, IT IS HEREBY ORDERED that:

1. The findings and recommendations filed September 27, 2021, are adopted in full;

2. The habeas petition is denied; and

3. The court issues a certificate of appealability as to the insufficiency of the evidence issue regarding the intent to kill deputies Valdes and Thompson (cars two and three).

DATED: October 31, 2022.

CHIEF UNITED STATES DISTRICT JUDGE

**UNITED STATES DISTRICT COURT**

**EASTERN DISTRICT OF CALIFORNIA**

**JUDGMENT IN A CIVIL CASE**

**STEPHANIE N. TORRES,**

CASE NO: **2:21−CV−00743−KJM−CKD**

**V.**

**MONA D. HOUSTON,**

---

**Decision by the Court.** This action came before the Court. The issues have been tried, heard or decided by the judge as follows:

IT IS ORDERED AND ADJUDGED

**THAT JUDGMENT IS HEREBY ENTERED IN ACCORDANCE WITH THE COURT'S ORDER FILED ON 10/31/2022**

**Keith Holland**
Clerk of Court

ENTERED: **October 31, 2022**

by: /s/ A. Coll
Deputy Clerk