In re DEREK SMYER on petition for writ of certiorari

APPENDIX 'A'

APPENDIX 'A'

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

AUG 30 2023

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

DEREK PAUL SMYER, Petitioner-Appellant, v. STUART SHERMAN, Warden, Respondent-Appellee.	No. 22-55514 D.C. No. 2:20-cv-09659-JWH-PD Central District of California, Los Angeles ORDER

Before: SCHROEDER and SANCHEZ, Circuit Judges.

The request for a certificate of appealability (Docket Entry No. 13) is denied because appellant has not shown that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also* 28 U.S.C. § 2253(c)(2); *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012); *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Any pending motions are denied as moot.

DENIED.

In re DEREK SMYER on petition for writ of certiorari

APPENDIX 'B'

APPENDIX 'B'

Case: 2:20cv9659 Doc: 28

Derek Paul Smyer CDCBD5115
California Substance Abuse Treatment Facility
P.O. Box 5244
Corcoran, CA 93212

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

Notice of Electronic Filing
The following transaction was entered on 4/29/2022 at 9:47 AM PDT and filed on 4/29/2022

Case Name: Derek Paul Smyer v. Stuart Sherman

Case Number: 2:20-cv-09659-JWH-PD

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WARNING: CASE CLOSED on 04/29/2022

Document Number: 28

Docket Text:
JUDGMENT by Judge John W. Holcomb, it is hereby ORDERED, ADJUDGED, and DECREED that the Petition is DISMISSED with prejudice. Related to: R&R - Accepting Report and Recommendations, [27] (MD JS-6, Case Terminated).(es)

2:20-cv-09659-JWH-PD Notice has been electronically mailed to:
Nikhil D Cooper stephanie.brenan@doj.ca.gov, nikhil.cooper@doj.ca.gov, janice.garcia@doj.ca.gov, docketinglaawt@doj.ca.gov, ecfcoordinator@doj.ca.gov, aida.paraiso@doj.ca.gov, maria.salvador@doj.ca.gov, docketinglacls@doj.ca.gov
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JS-6

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

DEREK PAUL SMYER,

Petitioner,

v.

STUART SHERMAN, Warden,

Respondent.

Case No. 2:20-cv-09659-JWH (PD)

JUDGMENT

Pursuant to the Court's Order Accepting the Report and Recommendation of United States Magistrate Judge,

It is hereby **ORDERED**, **ADJUDGED**, and **DECREED** that the Petition is **DISMISSED with prejudice.**

IT IS SO ORDERED.

DATED: April 29, 2022

JOHN W. HOLCOMB
UNITED STATES DISTRICT JUDGE

In re DEREK SMYER on petition for writ of certiorari

APPENDIX 'C'

APPENDIX 'C'

Case: 2:20cv9659 Doc: 27

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California Substance Abuse Treatment Facility
P.O. Box 5244
Corcoran, CA 93212

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

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Case Name:	Derek Paul Smyer v. Stuart Sherman
Case Number:	2:20-cv-09659-JWH-PD
Filer:	
Document Number:	27

Docket Text:
ORDER ACCEPTING FINDINGS, CONCLUSIONS, AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE, AND DENYING APPLICATION FOR CERTIFICATE OF APPEALABILITY by Judge John W. Holcomb for Report and Recommendation (Issued). [19] See Order for details. (es)

2:20-cv-09659-JWH-PD Notice has been electronically mailed to:
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2:20-cv-09659-JWH-PD Notice has been delivered by First Class U. S. Mail or by other means BY THE FILER to :
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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

DEREK PAUL SMYER,

Petitioner,

v.

STUART SHERMAN, Warden,

Respondent.

Case No. 2:20-cv-09659-JWH (PD)

ORDER ACCEPTING FINDINGS, CONCLUSIONS, AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE, AND DENYING APPLICATION FOR CERTIFICATE OF APPEALABILITY

Pursuant to 28 U.S.C. § 636, the Court has reviewed the Petition, the records on file, the Report and Recommendation of United States Magistrate Judge ("Report"), Petitioner's Objections to the Report, and the Supplemental Statement of Decision issued by the Magistrate Judge. The Court has engaged in a de novo review of those portions of the Report to which Petitioner has objected. The Court accepts the Report and the Supplemental Statement of Decision and adopts them as its own findings and conclusions. Accordingly, the Petition is dismissed with prejudice.

The Court has also reviewed Petitioner's Application for Certificate of Appealability [Dkt. No. 25], which sets forth arguments previously advanced by Petitioner in the Petition and in his Objections to the Report. For the reasons stated in the Report and the Supplemental Statement of Decision, the Court finds that Petitioner has not made a substantial showing of the denial of a constitutional right and, therefore, a certificate of appealability is **DENIED**. *See* 28 U.S.C. § 2253(c)(2); Fed. R. App. P. 22(b); *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003).

IT IS SO ORDERED.

DATED: April 29, 2022

JOHN W. HOLCOMB
UNITED STATES DISTRICT JUDGE

In re DEREK SMYER on petition for writ of certiorari

APPENDIX 'D'

APPENDIX 'D'

Case: 2:20cv9659 Doc: 26

Derek Paul Smyer CDCBD5115
California Substance Abuse Treatment Facility
P.O. Box 5244
Corcoran, CA 93212

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

Notice of Electronic Filing
The following transaction was entered on 2/9/2022 at 11:38 AM PST and filed on 2/9/2022

Case Name:	Derek Paul Smyer v. Stuart Sherman
Case Number:	2:20-cv-09659-JWH-PD
Filer:	
Document Number:	26

Docket Text:
MINUTE ORDER (IN CHAMBERS) Supplemental Statement of Decision by Magistrate Judge Patricia Donahue: For the foregoing reasons, the Court declines to modify its Report and Recommendation. The original Report, Petitioner's Objections, and this Supplemental Statement of Decision will be forwarded to United States District Judge John W. Holcomb for consideration under 28 U.S.C. § 636. re: Report and Recommendation (Issued)[19], Objection to Report and Recommendations [24]. [See document for further details.] (es)

2:20-cv-09659-JWH-PD Notice has been electronically mailed to:
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P.O. Box 5244
Corcoran CA 93212

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. 2:20-cv-09659-JWH-PD Date: February 9, 2022

Title *Derek Paul Smyer v Stuart Sherman, Warden,*

Present: The Honorable: Patricia Donahue, United States Magistrate Judge

Isabel Martinez	N/A
Deputy Clerk	Court Reporter / Recorder
Attorneys Present for Petitioner:	Attorneys Present for Respondent:
N/A	N/A

Proceedings: Supplemental Statement of Decision

1. On October 20, 2020, Petitioner filed a Petition for Writ of Habeas Corpus by a Person in State Custody alleging seven grounds for relief. [Dkt. No. 1.] On March 11, 2021, Respondent filed an Answer, and on April 14, 2021, Petitioner filed a Reply. [Dkt. Nos. 14, 15, 17.] On October 29, 2021, the Court issued a Report and Recommendation ("Report") recommending that the Petition be dismissed with prejudice. [Dkt. No. 19.]

2. On January 18, 2022, Petitioner filed his Objections. [Dkt. No. 24.] The Report addressed most of his objections. Some, however, warrant further discussion because they allege inaccuracies in the Report. The Court therefore exercises its discretion to issue a supplemental statement of decision to address those objections but declines to change its recommendation that the Petition be denied and dismissed with prejudice.

3. In his Objections, Petitioner challenges the Report's reliance on several of the state court of appeal's findings of fact to conclude that the court of appeal's rejection of his sufficiency of the evidence claims was not an unreasonable application of clearly established federal law. Each of these challenges is meritless. For example, contrary to Petitioner's argument [*see,*

e.g., Dkt. No. 24 at 2, 6, 9],[1] the record shows that several witnesses either affirmatively identified Moore as the person loitering around the victim's home on the day before the shooting [*see* Dkt. Nos. 15-14 at 78, 15-19 at 106] or identified him as someone who resembled that person [Dkt. No. 15-14 at 125–132, 149]. And even if, as Petitioner contends, only one witness affirmatively identified Moore, that witness's testimony in and of itself was sufficient to establish Moore's identity.[2] *See Bruce v. Terhune*, 376 F.3d 950, 957-58 (9th Cir. 2004) (explaining that testimony of single witness is sufficient to uphold conviction).

4. Petitioner is likewise incorrect that no testimony supported the finding that Moore was identified as the person fleeing the crime scene. [*See* Dkt. No. 24 at 3.] On the contrary, he concedes that at least one person – William Ohaeri – identified Moore. [*See id.*] That Ohaeri (or any testifying witness) may have offered inconsistent testimony concerning whether he could identify Moore is of no consequence to whether sufficient evidence supported the jury's verdicts. As noted in the Report, determinations of credibility and believability lie in the exclusive province of the jury. [*See* Dkt. No. 19 at 10 (citing *United States v. Goode*, 814 F.2d 1353, 1355 (9th Cir. 1987)).] Put simply, the jury heard the witnesses' testimony and was free to credit it or discredit it. Although Petitioner would have the Court make its own credibility findings [*see, e.g., id.* at 3, 5], the Court is prohibited from doing so. In any event, a second witness identified Moore as the person fleeing the crime scene. [*See* Dkt. No. 15-16 at 129-133.]

5. The rest of Petitioner's objections to the Court's reliance on the court of appeal's findings of fact are equally without merit. Indeed, although he asserts no evidence showed that an investigating detective observed him and Moore speaking to each other after the shooting, the detective identified

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[1] The Court uses the page numbers inserted on the pleadings by the electronic docketing system.

[2] Of course, the prosecutor was not required to prove that Moore was loitering outside of the victim's home on the day or night before the shooting to prove any of the charged crimes. Thus, even if Petitioner could establish that the finding was erroneous, he still would not be entitled to habeas relief.

both men at trial. [*See* Dkt. Nos. 15-18 at 52-55, 67-68, 15-19 at 105.] Petitioner is also incorrect that no testimony showed either that Traci W. – his former girlfriend – saw him and her attacker together or that her attacker stomped on her stomach and face. [*See* Dkt. No. 24 at 2.] Indeed, a witness testified that Traci told her that she saw Petitioner and her attacker together at a barber shop after the attack and that her attacker stomped her face and stomach. [*See* Dkt. No. 15-15 at 43-45, 51-52.] Although Traci herself may have denied or did not remember these facts when she testified, her prior inconsistent statements constituted substantive evidence of Petitioner's guilt. *See* Cal. Evid. Code §§ 770, 1235; *see also California v. Green*, 399 U.S. 149, 153-64 (1970) (upholding validity of California Evidence Code section 1235 permitting prior inconsistent statement of witness to be used as substantive evidence if statement is otherwise admissible); *accord Ticey v. Peters*, 8 F.3d 498, 503-04 (7th Cir. 1993) (rape victim's recanted, uncorroborated out-of-court statement sufficient to support rape conviction). Petitioner is likewise incorrect that the Court "speculat[ed]" that "[he] repeatedly indicated he did not want to support [the victim's] child." [Dkt. No. 24 at 10.] Indeed, he attempted to enlist the victim's coworker to "convince [her] to get rid of the baby," was overheard on the phone arguing with the victim about her decision to have the baby, and looked at a chat room regarding pregnancy with the statement, 'I just got some slut pregnant. Now bitch wants my money. What should I do?"[3] [Dkt. No. 1 at 48, 49, 52.]

[3] Petitioner contends that the Court erroneously attributed this online statement to him and thus erred in resolving his instructional error claim. [*See* Dkt. No. 24 at 18.] Even if Petitioner did not make the statement that was found on his computer, his instructional-error claim still fails. Putting aside the online statement, his jury heard other statements from Petitioner – including his out-of-court statement to his ex-girlfriend and his trial testimony. By contrast, his jury heard no testimony from Moore and was unaware of his out-of-court confession. Thus, as stated in the Report, the in all likelihood reasonably interpreted the challenged instruction's use of the term "statements made by a defendant" to refer to Petitioner's statements and moreover had no reason to believe it referred to a confession by Moore – a confession that the jury had no idea he had made. [*See* Dkt. No. 19 at 33.]

Contrary to Petitioner's objection, this evidence amounts to more than mere speculation.

6. Petitioner's challenges to the Report's statements that a bullet found at Moore's home was similar to the one used to murder the victim (*see* Dkt. No. 24 at 3) and that the attacks on Petitioner's ex-girlfriend mirrored the attacks on the victim (*see id.*) are also without merit. The two bullets were both .38 caliber; thus, they were similar, though not an exact match. And although the attacks on Traci were not identical to the attack on the victim, they were strikingly similar in that both were attacks committed against women who were pregnant with Petitioner's baby, both were committed by people unknown to the victims, and none of attackers took anything of value from the victims. Equally meritless is his claim that the Court erred in "speculating" that Moore took nothing from the victim when he murdered her. [*See id.*] No evidence showed that Moore took anything from the victim, and in fact her purse and car keys were left at the scene of the murder. [*See* Dkt. Nos. 1 at 48-49, 15-18 at 45.] As such, Petitioner cannot show that the court of appeal erred in finding that Moore "took nothing from her" or that this Court erred in relying on that finding. [*Id.* at 33.] Finally, contrary to Petitioner's arguments [*see* Dkt. No. 24 at 19-20, 22], testimony was presented to his jury showing that Moore was a member of the 190 East Coast Crip gang [*see, e.g.*, Dkt. No. 15-19 at 103-106; *see also* Dkt. No. 1 at 52].

7. Petitioner correctly notes that the Report erroneously states that he did not assert ineffective-assistance-of-counsel claims on direct appeal that corresponded to his direct challenges to the prior-bad-acts evidence or the character evidence from Traci's family. [*See* Dkt. No. 24 at 19.] Although the court of appeal did not address those ineffective-assistance claims and instead addressed the corresponding direct challenges, the record shows that in fact Petitioner conditionally raised them on appeal.[4] [*See* Dkt. No. 15-50 at

[4] On appeal, Petitioner argued that if the appellate court found his corresponding direct claims forfeited, then he received ineffective assistance of

89-91.] But that error is inconsequential to the Court's resolution of his ineffective-assistance-of-counsel claims because the Report rejected them under *de novo* review and also rejected the corresponding direct challenges. [*See* Dkt. No. 19 at 38 n.14; *see also id.* at 19-22, 35 n.12.]

8. Finally, Petitioner objects to the Report's observation that he did not assert an ineffective-assistance-of-counsel claim corresponding to his direct claim that the prosecutor impermissibly vouched for a prosecution witness during closing arguments. [*See* Dkt. No. 24 at 24.] This observation was erroneous, according to Petitioner, because he argued in his Petition that he was prejudiced by counsel's failure to object during closing arguments. [*Id.* (citing Dkt. No. 1 at 37).] This argument is meritless because the portion of the Petition that he cites has nothing to do with counsel's failure to object to the prosecutor's alleged vouching; rather, it concerns only counsel's failure to object to the prosecutor's argument that Moore agreed to kill the victim in exchange for Petitioner joining his gang. [*See* Dkt. No. 1 at 35-37.]

9. Petitioner moreover cannot use his Objections to amend his existing ineffective-assistance-of-counsel claim on the fly, as he evidently has attempted to do. [*Compare* Dkt. No. 24 at 24) (quoting his Petition as stating, "Effective assistance under the Sixth Amendment required that counsel attempt to block the prosecutor's trial by character (*not excluding personal assurances*) at every point, which did not happen in Petitioner's trial.") (emphasis added), *with* Dkt. No. 1 at 35 ("Effective assistance under the Sixth Amendment required that counsel attempt to block the prosecutor's trial by character at every point, which did not happen in Petitioner's trial.").] Although the Court can consider new claims raised in objections, it declines to do so here. *See Delgadillo v. Woodford*, 527 F.3d 919, 930 n.4 (9th Cir. 2008) ("Arguments raised for the first time in [a habeas] petitioner's reply brief are deemed waived."); *United States v. Howell*, 231 F.3d 615, 621-22 (9th Cir. 2000) (district court may decline to consider new allegations presented for first time in objections). Regardless, as noted in the Report,

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counsel. [*See* Lodged Doc. 13 at 89-91.] The appellate court did not rule either claim forfeited. [*See* Dkt. No. 1 at 79-86.]

counsel could not have erred because the evidence at trial supported the challenged comments and therefore the prosecutor's argument was proper. [*See* Dkt. No. 19 at 45, 46.]

10. For the foregoing reasons, the Court declines to modify its Report and Recommendation. The original Report, Petitioner's Objections, and this Supplemental Statement of Decision will be forwarded to United States District Judge John W. Holcomb for consideration under 28 U.S.C. § 636.

IT IS SO ORDERED.

Initials of Preparer im

In re DEREK SMYER on petition for writ of certiorari

APPENDIX 'E'

APPENDIX 'E'

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

DEREK PAUL SMYER,

Petitioner,

v.

STUART SHERMAN,

Respondent.

Case No. 2:20-cv-09659-JWH-PD

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This Report and Recommendation is submitted to the Honorable John W. Holcomb, United States District Judge, pursuant to 28 U.S.C. § 636 and General Order 05-07 of the United States District Court for the Central District of California. For the reasons discussed below, it is recommended that the Petition for Writ of Habeas Corpus be dismissed with prejudice.

I. Procedural History and Petitioner's Contentions

A Los Angeles County Superior Court jury convicted Petitioner Derek Paul Smyer of two counts of murder, one count of conspiracy to commit murder, and two counts of solicitation of murder and found, among other things, that he solicited the murders for financial gain. He was sentenced to

life in prison without the possibility of parole, plus 15 years to life, two six-year terms, and an additional two years. [*See* Dkt. No. 1 at 65-66.][1]

Petitioner challenges his conviction on seven grounds:

(1) the evidence was insufficient to prove that he aided and abetted murder, conspired to commit murder, and solicited murder for financial gain;

(2) the trial court deprived him of his rights to due process and a fair trial by allowing the prosecutor to introduce his prior bad acts into evidence;

(3) the trial court violated his rights to due process and a fair trial by excluding third-party culpability evidence;

(4) the trial court violated his rights to confrontation and a fair trial by alerting the jury that his non-testifying co-defendant confessed to the charged murder;

(5) trial counsel was ineffective by failing to object to evidence concerning Petitioner's prior bad acts and character and for failing to object to the prosecutor's misleading closing arguments;

(6) the cumulative impact of the trial errors deprived Petitioner of his right to a fair trial; and

(7) the prosecutor violated Petitioner's right to due process by vouching for the credibility of the investigating detective who testified for the prosecution. [Dkt. No. 1 at 13-43.]

[1] **Error! Main Document Only.** For nonconsecutively paginated documents, the Court uses the pagination generated by its Case Management/Electronic Case Filing system.

II. Statement of Facts

The facts set forth in the California Court of Appeal's opinion, which is attached to the Petition as Exhibit A [*see* Dkt. No. 1 at 46-118], are reasonably supported by the record. The evidence adduced at trial showed that Petitioner arranged to have Skyler Moore kill Petitioner's girlfriend, Crystal, who was five months pregnant with Petitioner's unwanted child.[2]

A. Petitioner and Crystal's Relationship

In 2001, Petitioner met Crystal and shortly thereafter the two began a relationship. The two met in Anderson Park, a territory claimed by the 190 East Coast Crips gang that Petitioner was known to frequent. Petitioner was not a member of the gang. In June 2001, Crystal became pregnant with Petitioner's child. Her relationship with Petitioner ended less than a month later.

In July 2001, Crystal asked her co-worker, Jana P., to email Petitioner and inform him that Crystal was pregnant. Petitioner told Jana that he did not want Crystal to have the baby. He recounted how his last girlfriend had gotten pregnant and kept the child. He did not want that to happen again. He urged Jana P. to do whatever she could to convince Crystal to abort the baby. Crystal considered, then decided against, having an abortion.

In September 2001, Crystal told her sister that she was depressed because Petitioner wanted her to abort the baby. On September 11, 2001, Crystal and her sister drove to Texas to visit their mother. While Crystal was there, her aunt overheard a phone conversation between Crystal and someone

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[2] The Court "presume[s] that the state court's findings of fact are correct unless [p]etitioner rebuts that presumption with clear and convincing evidence." *Tilcock v. Budge*, 538 F.3d 1138, 1141 (9th Cir. 2008) (citations omitted); 28 U.S.C. § 2254(e)(1).] Because Petitioner has not rebutted the presumption, the Court relies on the state court's recitation of the facts. To the extent that an evaluation of Petitioner's individual claims depends on an examination of the trial record, the Court herein has independently evaluated the record specific to those claims.

named "D."[3] "D" was yelling at Crystal, and Crystal told the caller, "You can't threaten me" and "you're not going to make me get rid of my baby." Crystal's aunt overheard a second phone conversation between Crystal and "D," in which "D" stated, "No bitch tells me what to do." The next day, Crystal's aunt took Crystal's phone from her after overhearing a third conversation where "D" was yelling at Crystal.

Crystal planned to return to work in California on September 24, 2001. Petitioner learned of Crystal's plan from one of her co-workers. On her first day back at work, she received a call from Petitioner, which made her cry.

B. Crystal's Murder

On September 24, 2001, the day before Crystal was murdered, her sister Michelle, who lived in the same apartment building as Crystal, noticed a man wearing a hoodie and a black paisley bandana on his head when she left the building at around 6:30 a.m. Michelle briefly spoke with the man. She thought the man was suspicious and warned Crystal about him. She later identified Moore from a photographic line-up as the man whom she had seen.

Later, at 1:00 a.m., Kenneth M., who lived in the building next Crystal, observed a light-skinned African-American man in a black hoodie loitering on the corner across the street. Kenneth thought the man was suspicious but did not confront him. At trial, Kenneth testified that Moore was approximately the same height and had the same skin color as the man whom he had seen.

On September 25, 2001, at 7:34 a.m., Crystal was found in the lobby of her apartment building. She had been shot in the back of the head with a cooper-clad .38 bullet. Both she and her unborn fetus died. None of Crystal's possessions were taken.

Earlier that morning, C.H., an eleven-year-old girl, was walking to school near Crystal's apartment when she heard a man and woman arguing

[3] Petitioner's first name is Derek.

and then a single gunshot. She saw a man run out of Crystal's apartment building, jump a fence, get into the passenger seat of a black car, and drive away. Days after the murder, she was shown a sketch of Moore that police had made based on Michelle's description. C.H. indicated that the sketch resembled the man whom she had seen running from Crystal's apartment. C.H. later identified Moore from a photographic line-up.

Crystal's neighbor, Walter O., saw a man wearing a white hooded sweatshirt with a bandana around his forehead enter the alley adjacent to the apartment building. Ten minutes later, Walter heard what he thought was a firecracker and then saw the man run away from the apartment building. Walter later identified Moore from a photographic line-up as the man whom he had seen.

C. The Police Investigation

After identifying Crystal, Detective Robbie Williams and his partner drove to her workplace and spoke with her co-workers. They learned that she had been dating Petitioner. They later took several of the co-workers to Anderson Park to find Petitioner. One of the co-workers, Jana P., identified Petitioner and noticed that he was talking to someone with whom she had previously seen Petitioner. She identified Moore as the man to whom Petitioner was talking. Detective Williams also observed Petitioner talking to someone, whom he later identified as Moore. Moore was a member of the 190 East Coast Crips gang.

Police subsequently searched Petitioner's home computer, which showed that he had looked at a chat room regarding pregnancy with the statement, "I just got some slut pregnant. Now bitch wants my money. What should I do?" Police also discovered that on the night before the murder, at 11:32 p.m., Petitioner withdrew money from an ATM located eight blocks from Crystal's home. Petitioner lived approximately 16 miles from Crystal.

Police, however, ruled Petitioner out as the shooter because he was at work when the shooting occurred. They later received an anonymous tip that Crystal was killed by a 190 East Coast Crip gang member with the moniker of "Little C-Styles," which was Moore's gang moniker. Police interviewed Moore, who denied having anything to do with Crystal's murder. Police later searched his apartment, which was located near Crystal's apartment, and found a bandana that matched the witnesses' description, as well as an unfired lead-clad .38 bullet. Although he was charged with Crystal's murder, most of the witnesses were reluctant to testify against him, and only one witness – eleven-year-old C.H. – identified him at his preliminary hearing. Because the evidence against him was weak, the charges against him were dropped.

D. Moore's Confession and the Discovery of the Attacks on Petitioner's Ex-girlfriend

Shortly after Crystal's murder in September 2001, Moore was convicted of an unrelated murder and sentenced to a term of life without parole. In 2011, while he was serving that prison term, he was interviewed regarding Crystal's murder. He confessed to killing Crystal and told police that he did so at Petitioner's request. Although police urged him to testify against Petitioner, Moore ultimately refused to do so.

Meanwhile, Detective Smith reopened the investigation into Petitioner's role in Crystal's murder. While running a records search on Petitioner, Detective Smith found two police reports that implicated Petitioner in two attacks on his former girlfriend, Traci W.

At trial, Traci W. testified that she and Petitioner met in high school and began dating. When Traci W. became pregnant, Petitioner urged her to have an abortion because he believed that having a child would prevent him from reaching his goal of going to college. When Traci W. was seven months pregnant, Petitioner called her to arrange to take her to her doctor. He asked

her to meet him in the alley behind her apartment. Traci agreed. While waiting for Petitioner in the alley, she was approached by a stranger who asked her for the time. The man then placed a knife to Traci W.'s throat, which cut her. Traci W., however, "threw [her attacked] over and [] stomped him out." Her finger was cut in the incident and permanently damaged. The attack did not appear to be a robbery because the attacker never asked for her purse. The baby was unharmed, and Traci W. gave birth to a daughter shortly thereafter. Sometime later, Traci W. and Petitioner ended their relationship.

Traci W. later saw her attacker and Petitioner together in a barbershop. She reported what she had seen to her mother. She was interviewed by the police about the attack, but no charges were brought. Years later, she told Petitioner's sister that she believed Petitioner had arranged the attack.

After Crystal's murder, Petitioner and Traci W. rekindled their relationship. In 2002, she again became pregnant, and Petitioner again urged her to have an abortion. When Traci W. refused, Petitioner sat on her stomach "trying to make the baby go away." He also placed his hand over Traci W.'s mouth, so she was unable to breathe properly. Petitioner threatened to "just kill that baby right then and there."

During her second pregnancy, Traci W. lived with her grandmother. One day, Petitioner called Traci W. multiple times to ask where she was. TraciW. told him that she was at her aunt's house but intended to return to her grandmother's home. When she arrived at her grandmother's home, a man approached her and punched her in the face. He repeatedly stomped on her stomach and her face. He never asked for Traci W.'s purse. Traci W. was injured and went to the hospital. She later gave birth to a healthy baby girl. Traci W. confided to her aunt and Petitioner's sister that she believed Petitioner had orchestrated the attack and moreover that she believed her

assailant was a friend of Petitioner's.

E. The Trial

Petitioner and Moore were jointly tried before two different juries. The foregoing evidence was presented to both juries, other than Moore's confession, which was introduced only to his jury.

III. Standard of Review

The standard of review is set forth in 28 U.S.C. § 2254(d), as amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA). *See* 28 U.S.C. § 2254(d); *see also Lindh v. Murphy*, 521 U.S. 320, 336 (1997). Under AEDPA, a federal court may not grant habeas relief on a claim adjudicated on its merits in state court unless that adjudication "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 "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); *see Williams v. Taylor*, 529 U.S. 362, 402 (2000).

A state court decision is "contrary to" clearly established federal law if the decision applies a rule that contradicts the governing Supreme Court law or reaches a result that differs from a result the Supreme Court reached on "materially indistinguishable" facts. *Williams*, 529 U.S. at 405-06. A decision involves an "unreasonable application" of federal law if "the state court identifies the correct governing legal principle from [Supreme Court] decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 413.

Where, as here, more than one state court adjudicated the petitioner's claims, on habeas review the federal court analyzes the last reasoned decision. *Bailey v. Rae*, 339 F.3d 1107, 1112-13 (9th Cir. 2003). Thus, a federal habeas

court looks through ambiguous or unexplained state court decisions to the last reasoned decision to determine whether that decision was contrary to or an unreasonable application of clearly established federal law. *Id.* Here, Petitioner asserted all but three of his current claims for relief on appeal to the California Court of Appeal, which issued a reasoned opinion rejecting those claims. Thereafter, the California Supreme Court summarily denied them. [*See* Dkt. No. 1 at 46-118, 172.] Accordingly, this Court reviews the court of appeal's reasoned opinion rejecting those claims for relief under AEDPA's deferential standard.

The court of appeal never addressed Petitioner's sufficiency of the evidence challenge concerning the jury's finding that he solicited the charged murder for financial gain or his claims that counsel erred in failing to object to the evidence of Petitioner's prior bad acts and to certain testimony regarding his character. In addressing these claims, the Court applies the *de novo* standard of review. *See Pirtle v. Morgan*, 313 F.3d 1160, 1167 (9th Cir. 2002).

IV. Discussion

A. Petitioner Is Not Entitled to Relief on His Sufficiency of the Evidence Claims

Petitioner contends that insufficient evidence was introduced to prove that he aided and abetted murder, conspired to commit murder, solicited murder, and that he did so for financial gain. [Dkt. No. 1 at 13-17.] "A petitioner for a federal writ of habeas corpus faces a heavy burden when challenging the sufficiency of the evidence used to obtain a state conviction on federal due process grounds." *Juan H. v. Allen*, 408 F.3d 1262, 1274 (9th Cir. 2005). Habeas relief is unavailable on a sufficiency of the evidence challenge unless "no rational trier of fact could have agreed with the jury." *Cavazos v. Smith*, 565 U.S. 1, 2 (2011) (per curiam); *Jackson v. Virginia*, 443 U.S. 307,

319 (1979). All evidence must be considered in the light most favorable to the prosecution. *Jackson*, 443 U.S. at 319. Accordingly, if the facts support conflicting inferences, reviewing courts "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. Under AEDPA, federal courts must "apply the standards of *Jackson* with an additional layer of deference." *Juan H.*, 408 F.3d at 1274.

Further, circumstantial evidence and inferences drawn from it may be sufficient to sustain a conviction. *See Jones v. Wood*, 207 F.3d 557, 563 (9th Cir. 2000) (evidence supported murder conviction where "evidence was almost entirely circumstantial and relatively weak"). The reviewing court must respect the exclusive province of the factfinder to determine the credibility of witnesses, resolve evidentiary conflicts, and draw reasonable inferences from proven facts. *See United States v. Goode*, 814 F.2d 1353, 1355 (9th Cir. 1987).

Here, the court of appeal rejected Petitioner's challenges to the evidence supporting his convictions for aiding and abetting murder, conspiracy to commit murder, and soliciting murder. In rejecting these challenges, the court of appeal applied the proper federal standard governing sufficiency of the evidence claims. *See Juan H*, 408 F.3d at 1274 n.12 (California's substantial evidence test is not contrary to Supreme Court precedent governing sufficiency of evidence challenges). The appellate court's resolution of these those claims, therefore, was not contrary to the Supreme Court's clearly established precedents. Consequently, habeas relief on those claims is available only if Petitioner can show that the court of appeal's resolution of his claims constituted an "unreasonable application of" the Supreme Court's clearly established precedent – that is, he must show that the court of appeal unreasonably applied the governing legal standard to the facts of his case. *See Penry v. Johnson*, 532 U.S. 782, 792 (2001). As discussed herein, the court

of appeal's denial of Petitioner's first three sufficiency of the evidence challenges was not an unreasonable application of *Jackson*.

The court of appeal did not address Petitioner's sufficiency of the evidence challenge to the jury's finding that he solicited murder for financial gain. That claim, however, fails under the *de novo* standard of review. Each of Petitioner's challenge is addressed in turn below.

1. The Court of Appeal Reasonably Concluded that There Was Sufficient Evidence to Prove that Petitioner Aided and Abetted Murder

Under California law, "a person who aids and abets the commission of a crime is a 'principal' in the crime, and thus shares the guilt of the actual perpetrator." *People v. Prettyman*, 14 Cal. 4th 248, 259 (1996). To establish guilt under a theory of aiding and abetting, the prosecutor must prove that the defendant acted "'with knowledge of the criminal purpose of the perpetrator and with an intent or purpose either of committing, or of encouraging or facilitating commission of, the offense.'" *Id.*

To make this showing, "[t]he prosecution must establish intent with respect to the specific offense the defendant is alleged to have aided and abetted; intent may not be established based upon 'the . . . generalized belief that the defendant intended to assist and/or encourage unspecified nefarious conduct.'" *Juan A.*, 408 F.3d at 1276 (citation omitted). In determining whether the evidence was sufficient to show that the defendant acted with the requisite intent, courts consider whether the defendant was a companion of the person who actually committed the crime, whether the defendant was present at the crime scene, and whether the defendant's conduct before and after the offense suggests that he acted with knowledge of the perpetrator's purpose and intended to encourage or facilitate that purpose. *People v. Campbell*, 25 Cal. App. 4th 402, 409 (1994).

Here, the court of appeal reasonably concluded that there was sufficient evidence to prove that Petitioner aided and abetted Moore in murdering Crystal. As an initial matter, there was ample evidence to show that Moore murdered Crystal. Indeed, he was identified by several witnesses as the person lurking in front of Crystal's building on the night before – and on the morning of – the murder, and he was identified as the person fleeing the crime scene. Police recovered a piece of clothing from Moore's home matching the eyewitness descriptions of the murderer's clothing and an unfired bullet from his home that was similar to the bullet used in Crystal's murder.

Moreover, the jury reasonably could have inferred that Moore murdered Crystal at Petitioner's direction. Jana P. testified that she has seen Petitioner and Moore together before and after the murder.[4] Petitioner often hung out an Anderson Park, a territory claimed by the gang to which Moore belonged. More importantly, Petitioner was the only connection between Crystal and Moore. Moore did not take anything from Crystal when he murdered her, and he had no motive of his own to murder her. What is more, the facts of Crystal's murder mirrored those involving the attacks on Petitioner's pregnant ex-girlfriend Traci W. On both occasions on which Traci W. was attacked, the perpetrator physically assaulted her but took none of her belongings.

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[4] Although Jana P. testified at trial that she had not seen Petitioner and Moore together at the park before the murder [Dkt. No. 15-18 at 162], she later contradicted that testimony and acknowledged that she had previously testified that in fact she had seen them together [*see id.* at 162, 166, 169]. Her prior inconsistent statements constituted substantive evidence of Petitioner's guilt. *See People v. Johnson*, 3 Cal. 4th 1183, 1219 (1992) (statement by witness that is inconsistent with his or her trial testimony is admissible to establish truth of matter asserted in statement). Moreover, her direct testimony that she saw them together before the murder also constitutes evidence of Petitioner's guilt. That she provided seemingly inconsistent testimony on that point is of no consequence: the jury heard all of Jana P.'s testimony and was free to credit or discredit any part of that testimony. *See Goode*, 814 F.2d at 1355 (*supra*).

Furthermore, the prosecutor presented compelling evidence that Petitioner had motive to murder Crystal. Petitioner repeatedly indicated that he did not want to support Crystal's child. Indeed, he urged her to have an abortion, berated her over the phone for her decision to go through with the pregnancy, and urged her co-worker to convince Crystal to have an abortion. The prosecutor also presented evidence that Petitioner posted a statement on an Internet chat room that he had "just got [sic] some slut pregnant. Now bitch wants my money." *See Carasi*, 44 Cal. 4th at 1309 (evidence that defendant complained about victim's efforts to obtain financial support for their child supported jury's finding that defendant killed victim to avoid having to pay her monthly child support payments). Moreover, the prosecutor presented evidence that Petitioner had orchestrated multiple attacks on another woman who was pregnant with his child but refused to have an abortion, both before and after Crystal was murdered. And Petitioner complained to Cystal's co-worker about his former girlfriend's decision keep her baby and stated that he did not want that to happen again. From this evidence, the jury could reasonably infer that Petitioner arranged to have Crystal killed so that he would not have to support their unborn child.

Finally, the evidence supported a reasonable inference that Petitioner directly aided Moore in having Crystal killed. As discussed above, Petitioner met with Moore before and after the murder. And on the night before the murder, Petitioner, who lived 16 miles away from Crystal's home, withdrew money from an ATM at 11:30 p.m. just eight blocks from her home. Within approximately one hour afterward, Moore was seen lurking in front of Crystal's building. And just hours after that, Moore murdered Crystal in the lobby of her apartment building. Tellingly, Crystal was murdered on the morning after she was scheduled to return to work after a two-week trip to Texas. Petitioner knew the date on which she was scheduled to return and,

as discussed above, was within eight blocks of her home at 11:30 p.m. that night. From this evidence, the jury reasonably could infer that Petitioner met with Moore to arrange Cystal's murder, informed Moore of her travel plans, met with Moore just hours before the murder to finalize their plans, and met with Moore afterwards.

Accordingly, the court of appeal reasonably rejected this claim.

2. The Court of Appeal Reasonably Concluded that There Was Sufficient Evidence to Prove that Petitioner Conspired to Commit Murder

In California, conspiracy requires proof of the following: (1) an agreement between two or more people; (2) who have the specific intent to agree to conspire to commit an offense; (3) with specific intent to commit that offense; and (4) an overt act committed by one or more of the parties to the agreement for the purpose of carrying out the object of the conspiracy. *People v. Morante*, 20 Cal. 4th 403, 416 (1999).

The unlawful agreement at the core of the conspiracy charge need not be explicit or expressed in words but may consist of a tacit mutual understanding to commit a crime. *People v. Vu*, 143 Cal. App. 4th 1009, 1025 (2006). Thus, the existence of an unlawful agreement may be inferred from conduct, relationships, interests, and activities of the alleged coconspirators before and during the alleged conspiracy. *People v. Gonzalez*, 116 Cal. App. 4th 1405, 1417 (2004). The requisite overt act need not be a criminal offense, nor must it be committed by the defendant. *People v. Fenenbock*, 46 Cal. App. 4th 1688, 1708 (1996).

Persuasive evidence that a conspiracy exists when an alleged member of a conspiracy employs similar tactics to commit the target offense that he used to commit a prior crime. *People v. Mullins*, 19 Cal. App. 5th 594, 607 (2013) (upholding conviction for conspiracy to commit theft at mall ATM where defendant had engaged in scheme to rob people after they withdrew money

from ATMs on at least two prior occasions just weeks before charged crime). California courts likewise recognize that when the target offense of the alleged conspiracy is carried out, that fact constitutes highly persuasive circumstantial evidence of a conspiracy to commit the offense. *People v. Herrera,* 70 Cal. App. 4th 1456, 1464 (1999), *disapproved on another ground in People v. Mesa*, 54 Cal. 4th 191, 199 (2012) .

Here, the court of appeal reasonably concluded that the prosecutor presented sufficient evidence to prove that Petitioner conspired with Moore to kill Crystal. As discussed above, the jury reasonably could have inferred that Petitioner and Moore agreed to murder Crystal at Petitioner's direction. The two were seen together before and after the murder, and Petitioner was the only connection between Crystal and Moore. Moore had no independent motive to kill Crystal, and he took nothing from her after he killed her. The attack, furthermore, mirrored the attacks on Petitioner's pregnant ex-girlfriend Traci. And, as discussed above, both Moore and Petitioner were in the vicinity of Crystal's home late in the evening on the night before she was murdered. The murder, moreover, occurred shortly after Crystal had returned from a two-week trip, and Petitioner was aware of when she planned to return to work. Based on these facts, the court of appeal reasonably concluded that there was sufficient evidence to show that Petitioner and Moore agreed to murder Crystal.

Furthermore, there was ample evidence to show that both Petitioner and Moore committed overt acts in furtherance of that agreement. They met before the murder at Anderson Park, and Petitioner was in the vicinity of Crystal's apartment building on the night before the murder. Moore was seen lurking around the building on the night before and on the morning of the murder, and he was seen fleeing the murder scene. And more importantly, Crystral was murdered. From these facts, the court of appeal reasonably

concluded that there was sufficient evidence to show that Petitioner and Moore took overt actions in furtherance of the conspiracy.

Accordingly, Petitioner is not entitled to relief on this claim.[5]

3. The Court of Appeal Reasonably Concluded that There Was Sufficient Evidence to Prove that Petitioner Solicited Murder

"Solicitation is defined as an offer or invitation to another to commit a crime, with the intent that the crime be committed." *In re Ryan*, 92 Cal. App. 4th 1359, 1377 (2001). "The offense requires (1) a request to another person to commit a specified crime, which was (2) made with the intent the crime be committed, and (3) received by the person to whom it was made." *People v. Rowe*, 224 Cal. App. 4th 310, 319 (2014) (citations omitted). It "is complete once the verbal request is made with the requisite criminal intent; the harm is in asking, and it is punishable irrespective of the reaction of the person solicited." *Ryan*, 92 Cal. App. 4th at 1377.

Where solicitation of murder is charged as a crime, it must "be proven by the testimony of two witnesses, or of one witness and corroborating circumstances." Cal. Penal Code § 653f(f). This requirement "guard[s] against convictions for solicitation based on the testimony of one person who may have suspect motives." *People v. Phillips*, 41 Cal.3d 29, 76 (1985). The "[c]orroborative evidence need not be strong nor even sufficient in itself,

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[5] As discussed above, there was ample evidence to show that Petitioner specifically intended to have Crystal murdered because she would not abort his unborn child. *See People v. Maciel*, 57 Cal. 4th 482, 518 (2013) (observing that evidence of defendant's involvement in conspiracy to commit murder may also show defendant aided and abetted in commission of murder). The jury, moreover, reasonably could have inferred that Moore specifically intended to kill Crystal because evidence showed that he laid in wait for her and that he shot her in the back of her head. *See People v. Koontz*, 27 Cal. 4th 1041, 1082 (2002) (manner of killing supported deliberate intent to kill where defendant fired close range shot "at a vital area of the [victim's] body"); *see also Jackson*, 443 U.S. at 325 (evidence of shooting at close range indicates manner of attempted killing consistent with premeditation and deliberation).

without the aid of other evidence, to establish the fact." *People v. Baskins*, 72 Cal. App. 2d 728, 731 (1946); *People v. Burt*, 45 Cal. 2d 311, 316 (1955). It "may be slight and, when standing by itself, entitled to but little consideration." *People v. Negra*, 208 Cal. 64, 69 (1929). It is sufficient "if it tends to connect the defendant with the commission of the crime in such a way as may reasonably satisfy the trier of fact that the witness who must be corroborated is telling the truth." *People v. Rissman*, 154 Cal. App. 2d 265, 277 (1957).

Here, the court of appeal reasonably concluded that there was sufficient evidence to prove that Petitioner solicited murder. First, the prosecution presented testimony from a witness to prove the crime. Specifically, Jana P., Crystal's co-worker, testified that she saw Petitioner and Moore together at Anderson Park before the murder, and she identified them together at Anderson Park after the murder. Her testimony constituted compelling evidence of Petitioner's guilt because he denied that he knew Moore. And as the court of appeal noted, Jana P. had no reason to lie. [*See* Dkt. No. 1 at 77.] Based on its verdict, the jury necessarily credited Jana P.'s testimony and rejected that of Petitioner.

Second, the prosecutor presented ample evidence to corroborate Jana P.'s testimony. As discussed above, Petitioner had motive to kill Crystal and had arranged for similar attacks on his ex-girlfriend who, like Crystal, was pregnant both times she was physically attacked. Moreover, as discussed above, Moore was identified as the person lurking around Crystal's building on the night before and the morning of the murder. He was also seen running from the scene of the murder, and police recovered evidence from his home implicating him in the murder. Finally, he had no motive to kill Crystal, and like the person or persons who attacked Petitioner's pregnant ex-girlfriend, he took nothing from Crystal after he killed her. Given these facts, the jury

reasonably could infer that he killed Crystal because he was asked to do so by Petitioner.

Accordingly, Petitioner is not entitled to relief on this claim.

4. There Was Sufficient Evidence to Support the Jury's Verdict that Petitioner Solicited Murder for Financial Gain

Under California law, the prosecution must show two things to prove a special circumstance allegation of murder for financial gain: (1) the murder was intentional; and (2) it was carried out for financial gain. Cal. Penal Code § 190.2(a)(1). The defendant need not "experience any actual pecuniary benefit from the victim's death." *People v. Carasi*, 44 Cal. 4th 1263, 1309 (2008). Rather, "'the relevant inquiry is whether the defendant committed the murder in the expectation that he would thereby obtain the desired financial gain.'" *People v. Crew*, 31 Cal. 4th 822, 850-51 (2003) (quoting *People v. Howard*, 44 Cal. 3d 375, 409 (1988)).

The financial gain special circumstance "was intended to cover a broad range of situations" (*People v. Howard* 44 Cal. 3d 375, 410 (1988)), including murder committed to cancel a debt or avoid a loss *see Carasi*, 44 Cal. 4th at 1309 (citing *People v. Edelbacher*, 47 Cal. 3d 983, 1025 (1989)). Accordingly, courts in California have repeatedly found that the financial gain special circumstance is satisfied where the evidence shows that the defendant murdered the victim to avoid having to pay the victim child support for the defendant's child. *See id.* at 1309 (finding that jury could infer that defendant murdered his ex-girlfriend with whom he had child to avoid paying $375 per month in court-ordered child support payments); *Edelbacher*, 47 Cal. 3d at 1025 (financial gain finding was proper where defendant murdered former wife to avoid paying child support arrearages and money due on community property division); *People v. Hawk*, F059371, 2014 WL 42443705, at *44 (Cal. Ct. App. Aug. 27, 2014) (holding that evidence was sufficient to prove

defendant murdered mother of his child for financial gain, in part, because defendant was in debt and seeking reduction in child support payments to victim).

Here, there was ample evidence in the record to show that Petitioner solicited murder for financial gain.[6] As discussed above, Petitioner repeatedly indicated that he did not want to support Crystal's child, urged her to have an abortion, and had orchestrated attacks on another woman who, like Crystal, was pregnant with his child but refused to have an abortion. From this evidence, the jury could reasonably infer that he arranged to have Crystal killed so that he would not have to support their unborn child.

Accordingly, habeas relief is not warranted on this claim.

B. Petitioner's Challenges to the Evidence of His Uncharged Prior Bad Acts Are Not Cognizable and, Alternatively, Do Not Warrant Relief

Petitioner, next, contends that the trial court violated his rights to due process and a fair trial by allowing the introduction of evidence concerning his alleged role in several uncharged attacks on his then-pregnant girlfriend, Traci, and his participation in a 2004 bank fraud scheme for which he was convicted. [Dkt. No. 1 at 18-24.]

Neither evidentiary challenge warrants habeas relief for several reasons. First, both allege only violations of state evidentiary law and, as such, are not cognizable on federal habeas review. *See Estelle v. McGuire*, 502 U.S. 62, 68 (1991). Petitioner's references to his rights to due process and a fair trial are insufficient to transform these state-law claims into ones that are cognizable federally. *See, e.g., Cacoperdo v. Demosthenes*, 37 F.3d 504, 507 (9th Cir. 1994); *Miller v. Stagner*, 757 F.2d 988, 993-94 (9th Cir. 1985).

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[6] As discussed above, the evidence at trial was sufficient to prove that Petitioner intended to kill Crystal and that he solicited Moore to murder her. [*See supra.*]

Second, even if Petitioner had asserted cognizable challenges to the trial court's evidentiary decisions, those challenges would not entitle him to habeas relief. The Supreme Court has not made a clear ruling "that admission of irrelevant or overtly prejudicial evidence constitutes a due process violation sufficient to warrant issuance of the writ." *Holley v. Yarborough*, 568 F.3d 1091, 1101 (9th Cir. 2009); *see also Walden v. Shinn*, 990 F.3d 1183, 1204 (9th Cir. 2021) (noting that *Holley*'s observation concerning lack of controlling precedent pertaining to admission of irrelevant or overtly prejudicial evidence "remains true"). Thus, the court of appeal's rejection of Petitioner's evidentiary claims cannot be said to be contrary to, or an unreasonable application of, clearly established federal law as determined by the Supreme Court. *See Carey v. Musladin*, 549 U.S. 70, 77 (2006) (where Supreme Court precedent gives no clear answer to question presented, "it cannot be said that the state court 'unreasonab[ly] appli[ed] clearly established Federal law'").

Finally, even under *do novo* review, Petitioner's evidentiary challenges would fail. In the Ninth Circuit, the introduction of evidence violates a petitioner's due process rights only if there is no permissible inference the jury can draw from the challenged evidence and the evidence is "of such quality as necessarily prevents a fair trial." *Jammal v. Van de Kamp*, 926 F.2d 918, 920 (9th Cir. 1991); *accord Estelle*, 502 U.S. at 70 (testimony does not violate due process if it is relevant).

Here, the jury could have drawn permissible inferences from the challenged evidence. The evidence concerning Petitioner's involvement in the attacks on Traci W. was relevant to his intent and motive in regard to Crystal's murder. As the court of appeal noted, "the prosecution's theory of the case was that [Petitioner] did not want the burden of another child." [Dkt. No. 1 at 84.] Testimony that Petitioner had arranged for another pregnant girlfriend to be attacked – not once, but twice – supported that theory and the

reasonable inference that he arranged for Crystal to be murdered because she would not abort her child. It also explained why Petitioner's co-defendant, who did not know the victim, would kill her – namely, because Petitioner had asked him to do so, just as Petitioner had asked others to attack Traci on both occasions when she was pregnant with his children.[7]

The evidence about Petitioner's 2004 bank fraud conviction was, likewise, relevant. Petitioner testified that he had no role in Crystal's murder. Consequently, the fact that he had been convicted of a crime involving fraud supported the reasonable inference that his testimony was untrue. Notably, the prosecution did not introduce evidence that he was involved in the 2004 bank fraud until he admitted as much on direct examination. Although prior to that the prosecution elicited testimony that Petitioner had been advised of how the bank operated, no testimony regarding his involvement in the scheme or his resulting conviction was admitted before Petitioner admitted to those facts. In any event, as the court of appeal noted, because Petitioner elected to testify at trial, the prosecutor was free to elicit testimony regarding the prior fraud conviction, as it was a crime of moral turpitude. [*See* Dkt. No. 1 at 90.]

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[7] Petitioner also contends that the trial court erred in permitting the testimony about the prior attacks on Traci W. because the prosecution failed to provide a sufficient foundation that he was involved in the attacks. [*See* Dkt. No. 1 at 20-21.] This contention does not warrant habeas relief because the Ninth Circuit has made clear that state law issues of admissibility and foundation are not cognizable on federal habeas review. *See Johnson v. Sublett*, 63 F.3d 926, 931 (9th Cir. 1995) (denying habeas relief based on claim that admission of wooden clubs found at defendant's house was unconstitutional due to lack of evidence linking clubs to crimes because claim merely "present[ed] state-law foundation and admissibility"). Moreover, the court of appeal concluded that, under California law, the prosecutor made the requisite showing that Petitioner orchestrated the attacks on Traci. [*See* Dkt. No. 1 at 81-84.] This Court is bound by the court of appeal's application and interpretation of state law. *See Bradshaw v. Richey*, 546 U.S. 74, 76 (2005) (per curiam) (stating that "a state court's interpretation of state law, including one announced on direct appeal of the challenged conviction, binds a federal court sitting in habeas corpus").

Accordingly, Petitioner's evidentiary claims do not warrant habeas relief.

C. Petitioner Is Not Entitled to Relief on His Claim Concerning the Exclusion of Third-Party Culpability Evidence

Petitioner contends that the trial court violated his rights to due process and a fair trial by excluding evidence that Kenneth W., the father of Crystal's son, might have killed her. [*See* Dkt. No. 1 at 25-30.]

1. Pertinent Facts

Before trial, Petitioner sought to introduce evidence that Crystal was killed by Kenneth W. [*See* Dkt. No. 15-6 at 91.] According to Petitioner, Kenneth had motive to kill Crystal because he could not keep up on his child support payments, he had been denied visitation of his child, and he was only ten miles away from Crystal's home on the night before she was murdered. Moreover, Petitioner asserted that Kenneth was tied to the murder by a photograph of his son that police found near Crystal's dead body. Petitioner also argued that evidence found at the murder scene – including the placement of Crystal's purse and the fact that the door to the lobby was propped open – indicated that Crystal knew her attacker, thus making it plausible that she was killed by Kenneth. And according to Petitioner, Kenneth gave inconsistent statements about where he was the night before Crystal was killed, telling police 2001 and 2002 that he was at his girlfriend's house and later telling police in 2015 that he was at his grandmother's house. [Dkt. No. 1 at 94.]

The trial court conducted a pre-trial hearing regarding the proposed evidence. The court acknowledged that Petitioner had presented evidence that Kenneth had motive and opportunity to murder Crystal but concluded there was no direct or circumstantial evidence linking him to the murder. Accordingly, the court prohibited Petitioner from introducing the proposed

third-party culpability evidence. [Dkt. No. 15-25 at 44-47.]

At trial, Petitioner renewed his request, citing testimony from one of the witnesses, O'Shay Slaughter, that he saw a man near Crystal's apartment building on the morning of the murder whom he had seen there before. Slaughter – who was a young boy when the murder occurred but had been living as a transient for the last ten years – further stated that the man was with a young boy, whom Slaughter believed to be the man's son. The trial court denied the request, noting that the record was unclear as to Slaughter's testimony because, according to the court, Slaughter suffered from an "obvious mental defect" that made it doubtful that he was "even qualified to give testimony." According to the court, his testimony was "inherently unreliable," because "it was obvious that [Slaughter] would take anything that was questioned to him, he would acknowledge." The court therefore denied the request. [Dkt. No. 15-17 at 3-4.]

2. Federal Legal Standard and Analysis

To the extent that Petitioner contends that the trial court erred under state law in excluding the proposed third-party culpability evidence, his claim fails because it is not cognizable on federal habeas review. Errors in the application of state law are not cognizable on federal habeas review. *Swarthout v. Cooke*, 562 U.S. 216, 219 (2011); *Estelle*, 502 U.S. at 67-68.

Moreover, assuming this claim is cognizable, it does not warrant habeas relief. "Whether rooted directly in the Due Process Clause of the Fourteenth Amendment, or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (quoting *California v. Trombetta*, 467 U.S. 479, 485 (1984)) (citations omitted); *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973).

The right to present relevant evidence, however, is subject to reasonable restrictions, such as state evidentiary rules. *Moses v. Payne*, 555 F.3d 742, 757 (9th Cir. 2009); *see also LaJoie v. Thompson*, 217 F.3d 663, 668 (9th Cir. 2000) (observing that right to present evidence in criminal case "'may, in appropriate circumstances, bow to accommodate other legitimate interests in the criminal trial process'") (quoting *Michigan v. Lucas*, 500 U.S. 145, 149 (1991)). Indeed, "state and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials. Such rules do not abridge an accused's right to present a defense so long as they are not 'arbitrary' *or* 'disproportionate to the purposes they are designed to serve.'" *Green v. Lambert*, 288 F.3d 1081, 1090 (9th Cir. 2002) (quoting *United States v. Scheffer*, 523 U.S. 303, 308 (1998)) (emphasis in original). The Supreme Court, moreover, has "indicated its approval of 'well-established rules of evidence [that] permit trial judges to exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury.'" *Moses*, 555 F.3d at 757 (quoting *Holmes v. South Carolina*, 547 U.S. 319, 326 (2006)).

The Ninth Circuit has observed that "[t]he Supreme Court has found a violation of the right to present a complete defense [only] in cases where a state evidentiary rule, *on its face*, 'significantly undermined fundamental elements of the defendant's defense,' but did little or nothing to promote a legitimate state interest." *United States v. Pineda-Doval*, 614 F.3d 1019, 1033 n.7 (9th Cir. 2010) (emphasis added). Specifically, the Supreme Court has struck down rules that "preclude[] a defendant from testifying, exclude[] testimony from key percipient witnesses, or exclude[] the introduction of all evidence relating to a crucial defense." *Moses*, 555 F.3d at 758.

Here, the challenged evidence was not excluded under any rule that falls into the categories of evidentiary rules struck down by the Supreme

Court. Rather, the trial court considered the proffered the third-party culpability evidence and, only after doing so, excluded because it did not sufficiently connect Kenneth to the murder. The Supreme Court has indicated its approval of such evidence-based determinations. *See Holmes*, 547 U.S. at 328-29 (striking down rule prohibiting third-party guilt evidence having "great probative value" whenever prosecution presents strong forensic evidence of defendant's guilt but noting widespread acceptance of rules excluding third-party guilt evidence where it does not sufficiently connect third person to charged crime).

Petitioner's claim therefore amounts to nothing more than a challenge the trial court's exercise of its discretion in disallowing the third-party culpability evidence. Under AEDPA, his claim fails because the Supreme Court has not squarely addressed whether a trial court's exclusion of evidence under a rule requiring it to "balance factors and exercise its discretion" may violate due process, nor has it established a "controlling legal standard" for evaluating discretionary decisions excluding evidence under such a rule. *Moses*, 555 F.3d at 758-60; *see Brown v. Horell*, 644 F.3d 969, 983 (9th Cir. 2011) (noting that, since Ninth Circuit issued its opinion in *Moses*, "the Supreme Court has not decided any case either 'squarely address[ing]' the discretionary exclusion of evidence and the right to present a complete defense or 'establish[ing] a controlling legal standard for evaluating such exclusions."). In the absence of any such Supreme Court precedent, the court of appeal's decision, here, upholding the trial court's exercise of its discretion cannot be contrary to, or an unreasonable application of, clearly established federal law as determined by the Supreme Court. *See Moses*, 555 F.3d at 760; *see also Musladin*, 549 U.S. at 77 (where Supreme Court precedent gives no clear answer to question presented, "it cannot be said that the state court 'unreasonab[ly] appli[ed] clearly established Federal law'").

Regardless, even assuming error, Petitioner could not show that the purported error had a substantial and injurious impact on the jury's verdict. *See Calderon v. Coleman*, 525 U.S. 141, 147 (1998) (constitutional trial error does not warrant habeas relief unless "the error, in the whole context of the particular case, had a substantial and injurious effect or influence on the jury's verdict") (citing *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993)) . As the trial court observed, the proffered evidence did not sufficiently connect Kenneth to the murder. Although Kenneth may have had motive to murder Crystal, no witness identified him, and as the court of appeal noted, the proffered evidence of his guilt would have required the jury to make "many jumps and leaps" to connect him to the crime. [Dkt. No. 1 at 92.] By contrast, Moore was identified by multiple people as the person hanging around Crystal's home on the morning of the murder, and he was seen fleeing the crime scene. [*See id.* at 50-51.] Testimony at trial tied Moore to Petitioner. [*See, e.g.*, Dkt. No. 1 at 51-52]. Significantly, there was no evidence tying Moore to Kenneth. What is more, compelling evidence was offered to show that Petitioner had arranged two physical assaults on his ex-girlfriend who, like Crystal, was pregnant with his child during both attacks.

Although Petitioner suggests that O'Shay Slaughter identified Kenneth and his son outside of the apartment building on the morning of the murder (*see* Dkt. No. 17 at 17), Slaughter made no such identification. Instead, he testified that he saw a someone he had seen before with a young boy whom the witness believed to be the man's son.[8] That testimony was unlikely to persuade the jury that Kenneth was the murderer because, as the trial court noted, Slaughter was suffering from an "obvious" mental illness that rendered

[8] Crystal and Kennth's son was named Javonta. Slaughter testified that he did not know that name and further that he did not know the name of the boy he claimed to have seen on the morning of the shooting. [Dkt. No. 15-16 at 59-60.]

his testimony unreliable.[9] *See Carriger v. Stewart*, 132 F.3d 463, 473 (9th Cir. 1997) ("We must defer to the state court's credibility finding unless the finding is not fairly supported by the record considered as a whole."). Indeed, a review of his testimony shows that he was confused by the questions posed to him, that he provided several nonsensical answers to questions, and that he oftentimes changed his answers based on the way in which the attorneys posed the questions.[10] He was also unable to remember basic facts, including the fact that, when the murder occurred, he was friends with C.H. and others. [*Compare* Dkt. No. 15-16 at 49 (Slaughter testifying that he did remember C.H. or Hilliard Smith), *with id.* at 62 (C.H. testifying she and Slaughter were childhood friends who regularly walked to school together with Hilliard Smith).] Putting that aside, Moore lived nearby Crystal and had a younger brother whom he walked to school. Given these facts, coupled with the

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[9] Slaughter was 29 years old when the trial occurred. He testified that he had spent the last 10 years of his life living on the streets and that he had never received counseling. [Dkt. No. 15-16 at 48.] According to his testimony, his living was "pretty rough," and he was "going through a lot." [*Id.*]

[10] [*Compare*, Dkt. No. 15-16 at 40 ("Q: How much time had passed by the time you heard a gunshot? A: Maybe, I want to say, like a hard 20 minutes. . . ."); *id.* (stating in response to immediate follow up question that "no less than five minutes elapsed"), *with id.* at 50-51 (Q: Okay. And it appeared to be five minutes or less when you heard the gunshot? A: Yes."); *see, e.g., id* at 55 ("Q: And who was with you at the time you observed this person? A: This person, I didn't really have much knowledge about him. I just knew he was a father. But it was like, something weird about him, you know? And I knew he was like very, very extra aggressive with her."); *id.* at 56 (stating in response to question about whether he was alone when shooting occurred, "Like first time I seen him I was with my other friend and someone else. Like, they just came over to like, I don't know, like to, make me feel bad and then they just passed through."); *id.* at 57 ("Q: Okay. So in the last month or so have you spoken to any police officers about what you had seen or what you saw that day? A: I just – like the sun come up. I like – like the rays of the sun, 'cause it was always – I was ready for my day, either energized or tired and needed more rest. It was like barely like – like how I feel like, like murky, like kind of so-so. Like, you never really know until you got to moving with it. It was a pretty rough day. I just thought about what happened.") .]

multiple witness testimony implicating Moore in the murder, the jury in all likelihood would have concluded that the person Slaughter saw was Moore, to the extent that the jury credited any part of his testimony.

Moreover, the fact that the jury may have sought information regarding Kenneth during its deliberations does not show that the lack of the proposed third-party culpability evidence had a substantial and injurious impact on the jury's verdict. Had Petitioner presented evidence that Kenneth might have been the killer, the prosecutor would surely have exploited the lack of any evidence tying him to the crime or to Moore. More importantly, the evidence of Kenneth's guilt proffered by Petitioner was profoundly weak. No witness identified him, and nothing about the placement of Crystal's purse at the murder scene suggests that he was the murderer. The same is true regarding the fact that the door to Crystral's building was propped open. There is nothing in the record to suggest that Crystal propped the door open to allow Kenneth in the building, and as the court of appeal observed, it could have been propped open by "the [responding] paramedics or by other people who lived in the building." [Dkt. No. 1 at 96.] That police found a photograph of Crystal's child (who was also Kenneth's child) near her body is not particularly surprising and connecting it to Kenneth would have required conjecture upon conjecture on the jury's part, when far more reasonable explanations were that Crystal inadvertently dropped the photograph or that it fell out of purse.

Finally, the record shows that the jury was not inclined to believe that Kenneth killed Crystal. Petitioner's theory was that Crystal – who had been shot in the back of the head – had the wherewithal to reach into her purse, select of photograph of her son, and leave it near her body in an effort to identify Kenneth as the shooter. Putting aside the implausibility of that theory, no evidence in the record supports it, other than the fact that the

photograph was found near her body. In any event, despite the trial court's refusal to allow the majority of the proffered evidence purportedly showing that Kenneth murdered Crystal, trial counsel argued in his closing argument that police neglected to investigate Kenneth as the possible murderer and moreover suggested that evidence at the crime scene – including the photograph – implicated Kenneth in the murder. [*See* Dkt. No. 15-23 at 96, 102-03, 165-70, 174-84.] Counsel also argued that Kenneth had motive to murder Crystal. [*See id.*] The jury's verdict shows that it rejected that argument. There is, thus no reason to believe that the jury would have accepted that argument had the prosecutor presented additional evidence pertaining to Kenneth, as that evidence did not tie him to the murder.

For the foregoing reasons, Petitioner is not entitled to habeas relief with respect to this claim.

D. Petitioner Is Not Entitled to Habeas Relief on His Instructional Error Claim

Petitioner contends that the trial court violated his rights to confrontation and a fair trial by alerting the jury that Moore had confessed to Crystal's murder and that his confession incriminated Petitioner. [Dkt. No. 1 at 31-34.]

1. Pertinent Facts

Ten years after the murder, Moore confessed to police that he had killed Crystal and that he had done so at Petitioner's request. Petitioner and Moore were tried jointly for Crystal's murder but before two separate juries. Moore's confession was admitted only to his jury. Petitioner's jury was unaware that Moore had confessed.

Petitioner testified in his own defense. Additionally, the jury heard testimony concerning several of his pre-trial statements, such as his ex-girlfriend's testimony that he had asked her if she would kill for him and his online post stating that he had "just got some slut pregnant. Now bitch wants

my money." [Dkt. No. 1 at 52-55, 58, 60.]

Both juries were instructed with the same instructions. [*See* Dkt. No. 15-24 at 36-88.] Those instructions included CALJIC Nos. 2.60 and 2.61, which addressed a defendant's right not to testify and how the decision against testifying did not relieve the prosecution from proving each element of the charged crimes beyond a reasonable doubt, and CALJIC Nos. 3.11 and 3.18, which addressed how the jury should assess testimony from one defendant that incriminated another defendant. [*See* Dkt. No. 15-7 at 32-35.] The jury was also instructed with CALJIC No. 2.70, which provided:

> A confession is a statement made by a defendant in which he has acknowledged his guilt of the crime for which he is on trial. In order to constitute a confession, the statement must acknowledge participation in the crimes as well as the required criminal intent. [¶] An admission is a statement made by the defendant which does not by itself acknowledge his guilt of the crimes for which the defendant is on trial, but which statement tends to prove his guilt when considered with the rest of the evidence. [¶] You are the exclusive judges as to whether the defendant made a confession or an admission, and if so, whether that statement is true in whole or in part. [¶] Evidence of an oral confession or an oral admission of the defendant not contained in an audio or video recording and not made in court should be viewed with caution.

[*Id.* at 36.] Additionally, the jury was instructed with CALJIC No. 2.72, which provided:

> No person may be convicted of a criminal offense unless there is some proof of each element of the crime independent of any confession or admission made by him outside of this trial. [¶] The identity of the person who is alleged to have committed a crime is not an element of the crime nor is the degree of the crime. The identity or degree of the crime may be established by a confession or admission.

[*Id.* at 37.]

On direct appeal, Petitioner argued these instructions violated his rights to a fair trial and to confront the witnesses against him because his jury necessarily understood them to mean that Moore had confessed to Crystal's murder and that his confession implicated Petitioner. The jury interpreted the instructions in this way, according to Petitioner, because Petitioner never confessed to the murder; thus, the only logical conclusion that his jury could have reached was that Moore had confessed. [*See* Dkt. No. 1 at 105.]

The California Court of Appeal rejected this claim, finding that Petitioner had forfeited it by failing to object to the instructions at trial. Alternatively, the court of appeal held that claim failed on its merits because it was not reasonably likely that the jurors were misled by the instructions. [Dkt. No. 1 at 107-108.] As explained below, the court of appeal's holding that Petitioner forfeited his challenge to the jury instructions prohibits this Court from considering it. Moreover, even if the Court could consider it, the claim would not warrant habeas relief because the court of appeal's rejection of the claim on its merits was neither an unreasonable application of, nor contrary to, clearly established federal law as determined by the Supreme Court.

2. This Claim is Procedurally Barred

Petitioner's challenge to the jury instructions is procedurally barred because the court of appeal held that he forfeited his challenge by failing to raise it at trial. *Coleman v. Thompson*, 501 U.S. 722, 729 (1991) (state court's denial of claim based on a procedural rule bars federal review if state rule constitutes "adequate and independent state ground" for denying claim); *see also Paulino v. Castro*, 371 F.3d 1083, 1092-93 (9th Cir. 2004) (barring review of jury instruction error claim because state court found that petitioner had forfeited claim by failing to object to instruction at trial); *Bennett v. Mueller*, 322 F.3d 573, 583 (9th Cir. 2003) (California's contemporaneous objection rule

constitutes independent and adequate ground precluding federal habeas review). The court of appeal's alternative rejection of Petitioner's claim on its merits does not alter the procedural bar analysis. *See Harris v. Reed*, 489 U.S. 255, 264 n.10 (1989).

Moreover, Petitioner has not shown the requisite cause and prejudice to overcome the procedural bar. *See Bousley v. United States*, 523 U.S. 614, 622 (1998). Consequently, the claim is procedurally barred and therefore cannot be considered by the Court. Alternatively, as explained below, if the claim were not procedurally barred, it would nevertheless fail on its merits.

3. Merits

The court of appeal reasonably concluded that the jurors did not misapply the challenged instructions. Where a habeas claim rests on an alleged constitutional error arising from a jury instruction, the question is whether the alleged instructional error "by itself so infected the entire trial that the resulting conviction violates due process." *Estelle*, 502 U.S. at 70-71 (citing *Cupp v. Naughten*, 414 U.S. 141, 147 (1973)). The challenged instruction "may not be judged in artificial isolation but must be viewed in the context of the overall charge." *Cupp*, 414 U.S. at 146-147. "If the charge as a whole is ambiguous, the question is whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that violates the Constitution." *Middleton v. McNeil*, 541 U.S. 433, 437 (2004) (per curiam) (citations and internal quotation marks omitted). Where an instructional error rises to the level of a constitutional violation under this standard, federal habeas relief nevertheless is unavailable unless "the error, in the whole context of the particular case, had a substantial and injurious effect or influence on the jury's verdict." *Calderon v. Coleman*, 525 U.S. 141, 147 (1998) (citing *Brecht*, 507 U.S. at 637).

Here, there is no reason to believe that Petitioner's jury applied the challenged instructions in a way that violated his rights to a fair trial and confrontation. His jury never learned that Moore had confessed and thus had no reason to assume that the instructions referred to any statement that he made to police. By contrast, the jury heard Petitioner testify and other witness testimony relaying his incriminating out-of-court statements. Accordingly, the jury in all likelihood would have assumed that CALJIC Nos. 2.70 and 2.72's language concerning admissions made by a defendant referred to Petitioner's admissions.

Although those instructions also referenced confessions made by a defendant, Petitioner's jury in all likelihood disregarded that aspect of the instructions because the jury heard no confession and was instructed to base its verdict only on the evidence presented at trial. [*See* Dkt. No. 15-7 at 5 ("[Y]ou must determine the facts from the evidence received at trial and not from any other source.").] The jury moreover was instructed to disregard any instructions that were not applicable. [*See id.* at 79 ("Disregard any instruction which applies to facts determined by you not to exist. Do not conclude that because an instruction has been given I am expressing an opinion as to the facts.")]. The jury was also instructed to apply the law as set forth in the court's instructions. [*Id.* at 5 ("[Y]ou must accept and follow the law as I state it to you, regardless of whether you agree with it."); *id.* at 141 (same). Petitioner has presented no evidence to rebut the presumption that the jury followed those unambiguous instructions. *See Weeks v. Angelone*, 528 U.S. 225, 226 (2000). Thus, the court of appeal reasonably concluded that the jury did not apply the challenged instructions in the manner advanced by Petitioner.

Accordingly, Petitioner is not entitled to relief on this claim.

E. Petitioner is Not Entitled to Relief on His Ineffective Assistance of Trial Counsel Claims

Petitioner asserts two claims of ineffective assistance of trial counsel. First, he contends that counsel erred in failing to object to the testimony regarding his prior bad acts and his character as a bad parent. Second, he asserts that counsel performed deficiently in failing to object to the prosecutor's misleading arguments concerning Moore's agreement to kill Crystal in exchange for Petitioner's agreement to work for Moore's gang. [Dkt. No. 1 at 35-38.]

1. Pertinent Facts

a) Prior Bad Acts and Character Evidence

As discussed above, the prosecutor introduced evidence concerning Petitioner's role in several uncharged attacks on his then-pregnant girlfriend, Traci W., and his participation in a 2004 bank fraud scheme for which he was convicted. [*See supra.*]

In addition, the prosecution presented testimony from Traci W.'s family and another former girlfriend, R.V., depicting Petitioner as a selfish person who was unwilling to spend money on anyone but himself. Traci W.'s family members testified that Petitioner rarely visited his children and only sporadically contributed financial support for them. According to her family, Traci W.'s relationship with Petitioner left her a "shell" of her former self, and as a result, she was often homeless and forced to leave her children with her mother or her aunt. At one point, according to the testimony, the children were scheduled to stay with Petitioner for four months, but he often left them alone, and the stay was cut short when he was arrested. Petitioner and Traci W.'s 18-year-old daughter testified she did not have a good relationship with her father and that he was ill-tempered when he was with her and her sister. She further described him as having "kind of monstrous ways." [Dkt. No. 1 at 59.]

R.V., who was also convicted in connection with the 2004 bank fraud scheme, provided a similar description.[11] She testified that Petitioner only admitted to having one child, even though he had two, and that he was reluctant to pay for his children's food and supplies, instead using his money to finance his convertible Mustang. According to R.V., Petitioner once asked her if she would kill for him. [*See id.* at 58-59.]

According to Petitioner, counsel performed deficiently in failing to object to the foregoing evidence "on all possible grounds." Although he acknowledges that counsel sought to exclude the evidence, he faults counsel for neglecting to object to it as irrelevant, unduly prejudicial, and impermissible character and propensity evidence. Counsel's failure to do so, according to Petitioner, was prejudicial because the evidence allowed the prosecution to urge the jury to convict based on Petitioner's poor character, rather than on evidence implicating him in Crystal's murder. Petitioner further maintains that had the challenged evidence been excluded, it is reasonably probable that at least one juror would have voted against convicting him of the charged crimes.[12]

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[11] As discussed above, R.V. did not testify that Petitioner was convicted of bank fraud when she was called as a witness during the prosecutor's case in chief. She did, however, testify that she was convicted of bank fraud. Petitioner, himself, admitted that he was convicted of bank fraud when he testified in his own defense.

[12] On direct appeal, Petitioner asserted direct a challenge to the admission of his prior bad acts and the character evidence from Traci's family and R.V. The court of appeal rejected his evidentiary challenges to the prior bad acts evidence and to the character evidence from Traci's family on the merits. Petitioner did not assert corresponding ineffective assistance of counsel claims on direct appeal concerning the prior bad acts evidence or the character evidence from Traci's family. The court of appeal found that Petitioner had forfeited his direct challenge to the character evidence from R.V. because he did not object to her testimony at trial. Petitioner, however, asserted a corresponding ineffective assistance of counsel claim as to R.V.'s testimony, and the court of appeal addressed that claim. Petitioner does not assert a direct challenge to R.V.'s testimony in this action. Regardless, as explained above, any direct challenge to the admission of the character evidence from any testifying witness would fail because it would necessarily involve only state law and therefore would not be cognizable on federal habeas review. [*See supra.*]

[Dkt. No. 1 at 36-37.]

b) The Prosecutor's Closing Argument

At trial, the prosecution presented testimony that Moore was a member of the 190 East Coast Crips gang and that he associated with Petitioner. [*See* Dkt. No. 1 at 52, 74-75, 77; Dkt. No. 15-19 at 104-05; Dkt. No. 15-18 at 69-70.] As discussed above, the prosecution also presented evidence tying Moore to Crystal's murder. [*See supra.*]

During closing arguments, the prosecutor argued that she had proven the conspiracy charge against Petitioner and that the evidence showed that Moore agreed to kill Crystal at Petitioner's request so that he could recruit Petitioner into his gang. Specifically, she argued as follows: "Moore agreed with [Petitioner] to kill. Moore wanted loyalty. He is a 190 East Coast [Crip] . . . He needed recruits. He needed something new. He needed something. [Petitioner] needed something." [Dkt. No. 15-23 at 54.]

On rebuttal, the prosecutor returned to this argument, stating:

> And we talked about agreements. Gangs want loyalty, that's what they look for. They want to suck you in and keep you in, because that's how they become powerful. A gang of one does nothing. A gang of a hundred does a lot. Gangs are not into the legitimate business of working and bettering the community. What did Moore want and what did [Petitioner] want, and why did the two meet?

[Dkt. No. 15-24 at 16.]

According to Petitioner, these arguments were impermissible because there was no evidence presented at trial show that that Moore agreed to kill Crystal so that he could recruit Petitioner into his gang. As such, he argues that counsel's failure to object to these arguments was unreasonable and prejudicial because the jury relied on the prosecutor's arguments to find him

guilty of conspiracy to commit murder.[13] [*See* Dkt. No. 1 at 36-37.]

2. Applicable Law

To prevail on a Sixth Amendment claim alleging ineffective assistance of counsel, a defendant must show that his counsel's performance was deficient and that his counsel's deficient performance prejudiced him. *Strickland*, 466 U.S. at 688, 694. To establish deficiency, the defendant must show that "counsel's representation fell below an objective standard of reasonableness." *Id.* at 687-88. In reviewing trial counsel's performance, courts "strongly presume[] [that counsel] rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* at 690. Only if counsel's acts and omissions, examined within the context of all the surrounding circumstances, were outside the "wide range" of professionally competent assistance, will the defendant meet this initial burden. *Id.* at 689-90.

To establish prejudice, the defendant must show "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. The errors must not merely undermine confidence in the outcome of the trial but must result in a proceeding that was fundamentally unfair. *Williams v. Taylor*, 529 U.S. 362, 393 n.17 (2000); *Lockhart v. Fretwell*, 506 U.S. 364, 369 (1993). A court deciding an ineffective assistance of counsel claim need not address both components of the inquiry if the petitioner makes an insufficient showing on one. *Strickland*, 466 U.S. at 697.

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[13] On direct appeal, Petitioner asserted a direct challenge to the foregoing portion of the prosecutor's closing argument. The court of appeal found that he had forfeited the claim because he did not object at trial. The court of appeal, however, addressed Petitioner's corresponding ineffective assistance of counsel claim. Petitioner does not assert his direct challenge to the foregoing portion of the prosecutor's closing argument in this action. By contrast, he asserts a direct challenge to the portion of the prosecutor's closing argument in which she purportedly vouched for a prosecution witness. [*See infra.*]

AEDPA requires an additional level of deference to a state-court decision rejecting an ineffective assistance of counsel claim: "The standards created by *Strickland* and § 2254(d) are both 'highly deferential,' . . . and when the two apply in tandem, review is 'doubly' so." *Richter*, 562 U.S. at 105 (citations omitted). As the Supreme Court has explained, "[w]hen § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard." *Id.* at 105; *Cheney v. Washington*, 614 F.3d 987, 995 (9th Cir. 2010) ("Our examination of counsel's performance 'must be highly deferential,' and, when conducted through AEDPA's lens, our review is 'doubly deferential.'") (citations omitted).

3. Petitioner Has Not Shown that His Counsel Performed Deficiently or that He Suffered Prejudice from Counsel's Performance

a) Evidence of Petitioner's Prior Bad Acts and Testimony of Traci's Family

Counsel did not perform deficiently in failing to object to either the prior bad acts evidence or the character evidence from Traci's family.[14] The court of appeal explicitly found that this evidence was highly relevant and that its probative value outweighed it potential for prejudice. [Dkt. No. 1 at 84 ("The evidence of the attacks was substantially more probative than prejudicial."); *id.* at 85 ("[T]he testimony from Traci and her family was relevant to

[14] As stated above, on direct appeal Petitioner did not assert an ineffective assistance of counsel claim regarding his prior bad acts evidence or the character evidence from Traci's family, and he did not file any state court habeas petitions. Accordingly, those allegations of attorney error appear to be unexhausted, although Respondent makes no such argument. Regardless, the Court elects to address those claims because they clearly fail on their merits. *See Cassett v. Stewart*, 406 F.3d 614, 623-24 (9th Cir. 2005) (district court may dismiss unexhausted ground for relief where it is "perfectly clear" that petitioner has not raised colorable federal ground for relief); *see also see also Lambrix v. Singletary*, 520 U.S. 518, 524-25 (1997). As to those allegations of attorney error, the Court applies the *de novo* standard of review. *See Pirtle v. Morgan*, 313 F.3d 1160, 1167 (9th Cir. 2002) (federal habeas court reviews claims not addressed in state court *de novo*)

demonstrate intent, motive, and common plan or scheme . . . This was highly probative evidence; it connected [Petitioner] to the crime when there was no evidence he was there.").] Accordingly, counsel could not have performed deficiently in failing to object to this evidence, as any objection was doomed to failed. *See Kimmelman v. Morrison*, 477 U.S. 365, 375 (1986); *Boag v. Raines*, 769 F.2d 1341, 1344 (9th Cir. 1985) (counsel's failure to raise meritless argument does not constitute ineffective assistance).

b) The Prosecutor's Closing Argument

Counsel did not err in declining to object to the prosecutor's arguments regarding the agreement between Petitioner and Moore because the arguments were permissible in light of the evidence adduced at trial. A prosecutor does not commit misconduct by asking the jury in closing arguments to make reasonable inferences from the evidence at trial, even if the defendant disputes those inferences. *See United States v. Cabrera*, 201 F.3d 1243, 1250 (9th Cir. 2000); *United States v. Patel*, 762 F.2d 784, 795 (9th Cir. 1985) ("When a prosecutor's remarks . . . constitute reasonable inferences from the evidence, no prosecutorial misconduct can be demonstrated."). Indeed, "[c]ounsel are given latitude in the presentation of their closing arguments, and courts must allow the prosecution to strike hard blows based on the evidence presented and all reasonable inferences therefrom." *Ceja v. Stewart*, 97 F.3d 1246, 1253-54 (9th Cir. 1996). This latitude does not, however, extend to arguments calculated to arouse the passions or prejudices of the jury. *Viereck v. United States*, 318 U.S. 236, 247-48 (1943); *United States v. Leon-Reyes*, 177 F.3d 816, 822 (9th Cir. 1999).

Here, the prosecutor did not overstep the wide latitude afforded to her during closing arguments. As the court of appeal noted in rejecting this claim, there was circumstantial evidence in the record to support the prosecutor's argument. [*See* Case No. 20-2537-JWH-PD, Dkt. No. 16-58 at 66.] Testimony

established that Moore was a 190 East Coast Crips gang member and that he and Petitioner met before and after the murder. Additionally, substantial evidence was introduced to show that Moore murdered Crystal. [*See supra.*] Further, because Moore had no independent motive to kill Crystal, the prosecutor could fairly argue that Moore killed Crystal in exchange for something from Petitioner, who unlike Moore, had ample motive to want Crystal killed.

Moreover, as the court of appeal observed [*see* Dkt. No. 1 at 111], counsel may have strategically decided not to object to the prosecutor's argument *see Silva v. Woodford*, 279 F.3d 825, 844 (9th Cir. 2002) (noting that United States Supreme Court precedent dictates that counsel commits no error when making informed strategic decision) (citing *Burger v. Kemp*, 483 U.S. 776 (1987)). Counsel could have, as the court of appeal noted, believed that objecting to the argument would have served only to highlight it in the jurors' eyes and that a better course of action was to attack the argument in his own closing argument. And, indeed, one of the first arguments counsel made to the jury was that there was no direct evidence to show that Moore agreed to kill Crystal at Petitioner's request. [*See* Dkt. No. 1 at 111 ("[W]here is the evidence that [Moore] [murdered Cystal] on behalf of [Petitioner]?").] Counsel also emphasized the prosecutor's admission that there was no direct evidence showing such an agreement. [*See id.* at 111-12.] Accordingly, the court of appeal's finding that counsel did not perform deficiently in opting not to object to this line of argument was reasonable.

Regardless, even assuming counsel erred, there is no reason to believe that but for counsel's failure to object to the prosecutor's argument, there was a reasonable probability that the jury would have reached a verdict more favorable to Petitioner than the one it reached without an objection. Counsel's challenged arguments were not extensive, comprising only a few

lines in an argument that spanned 77 pages of the Reporter's Transcript. [*See* Dkt. No. 15-23 at 47-93; Dkt. No. 15-24 at 4-35.] More importantly, the trial court's instructions to the jury ensured that the jurors disregarded any portions of the prosecutor's arguments that were not supported by the evidence at trial. [*See* Dkt. No. 15-7 at 5 (instructing the jury to base its verdict only on "the facts and the law" and defining "fact" as "something proved by evidence or by stipulation"); *id.* at 6 (admonishing jury that "[s]tatements made by the attorneys during the trial are not evidence.").] Accordingly, Petitioner cannot show that counsel's decision not to object to the challenged argument was prejudicial.

c) R.V.'s Testimony

There is no reason to believe that the trial court would have excluded R.V.'s testimony if counsel had objected to it. As the court of appeal noted in rejecting Petitioner's challenge to the testimony of Traci W.'s family, "testimony that [Petitioner] was a poor father to his existing children was relevant to demonstrate his motive and intent to kill Crystal in order to avoid having another child." [*See* Dkt. No. 1 at 85.] Consequently, had counsel objected to R.V.'s testimony regarding Petitioner's approach to parenting, the trial court would have overruled it. As such, counsel did not perform deficiently in opting not to object to her testimony.

Moreover, as the court of appeal found, Petitioner suffered no cognizable prejudice from R.V.'s testimony regarding his character. [*See id.* at 91.] Indeed, even without R.V.'s testimony on this issue, the jury heard testimony portraying Petitioner as a bad father who cared more about himself than his children. For example, his daughter testified that he had "kind of monstrous ways," that his contact with her was intermittent, and that she did not have a good relationship with him. Traci W.'s family testified Petitioner rarely provided any financial support for his children and that he rarely visited

them. In short, R.V.'s testimony regarding Petitioner's character as a bad parent was cumulative of other evidence and, consequently, was unlikely to have affected the jury's verdict. *See Mejorado v. Hedgpeth*, 629 F. App'x 785, 787 (9th Cir. Oct. 29, 2015) ("Neither the exclusion nor the admission of cumulative evidence is likely to cause substantial prejudice.") (citing *Wong v. Belmontes*, 558 U.S. 15, 22-23 (2009)); *Jackson v. Brown*, 513 F.3d 1057, 1084-85 (9th Cir. 2008)). As such, the court of appeal reasonably concluded that "it is unlikely [Petitioner] would have received a different outcome even if his counsel had objected and R.V.'s testimony had been excluded." [Dkt. No. 1 at 92.]

For the foregoing reasons, Petitioner is not entitled to relief as to any of his allegations of attorney error.

F. Petitioner Is Not Entitled to Relief on His Cumulative Error Claim

Petitioner asserts that the cumulative impact of the alleged trial errors violated his constitutional rights. [Dkt. No. 1 at 39-40.] The Ninth Circuit has held that the Supreme Court has "clearly established" that the cumulative effect of multiple trial-type constitutional errors may render a defendant's trial constitutionally infirm even if the errors, considered individually, are not considered harmful. *Parle v. Runnels*, 505 F.3d 922, 927-28 (9th Cir. 2007) (citing *Chambers v. Mississippi*, 410 U.S. 284, 298 (1973)). To justify habeas relief, the cumulative impact of multiple errors -- judged "harmless" when viewed individually -- must "render[ ] the resulting criminal trial fundamentally unfair." *Id.* at 927; *see United States v. Toles*, 297 F.3d 959, 972 (10th Cir. 2002) ("A cumulative-error analysis aggregates all errors found to be harmless and analyzes whether their cumulative effect on the outcome of the trial is such that collectively they [are not] harmless.").

Here, none of Petitioner's trial error claims has merit. Thus, the collective impact of the purported errors underlying those claims could not

have rendered his trial fundamentally unfair. Although the Court, alternatively, has recommended rejection of some of Petitioner's claims for lack of prejudice, the collective prejudice from the purported errors underlying those claims could not have rendered Petitioner's trial fundamentally unfair. Consequently, the court of appeal's rejection of this claim was neither an unreasonable application of, nor contrary to, clearly established federal law as determined by the Supreme Court. Habeas relief therefore is unwarranted on this claim.

G. Petitioner Is Not Entitled to Relief on His Vouching Claim

In his final claim, Petitioner contends that the prosecutor violated his right to due process by vouching for the credibility of the investigating detective who testified for the prosecution. [Dkt. No. 1 at 41-43.]

1. Pertinent Facts

During closing arguments, Petitioner's counsel criticized the investigation into Crystal's murder. He began by noting that the investigation into Moore as a suspect ended in 2002, when Detective Smith drafted a report stating, "None of the physical evidence or blood evidence incriminated Mr. Moore." He then noted that in 2011 police reopened the investigation into Moore. According to counsel, the only thing that changed between 2002 and 2011 was the statements of the witnesses. Counsel then argued that no one had compared the witnesses' statements from 2001 to the statements they gave in 2011 for inconsistencies, which according to counsel was "investigation 101 for police."

He also faulted Detective Smith for failing to investigate whether Kenneth W., the father of Crystal's son, was the murderer, even though police had found a photograph of his son at the murder scene. According to counsel, Crystal was trying to identify her murderer by leaving the photograph next to her. But Detective Smith neglected to investigate Kenneth, according to

counsel, because she was fixated only on Petitioner. As a result, according to counsel, she did not investigate anyone else, even though Kenneth had motive to kill Crystal. [Dkt. No. 15-23 at 96-97, 102-03.]

On rebuttal, the prosecutor addressed counsel's attacks on Detective Smith's investigation as follows:

> What changed? What changed from 2001? [¶] First of all, Detective Smith is a 31-year veteran of the Sheriff's Department. Thirty-one years. To stand up and argue that she doesn't know how to investigate a cold case is all but offensive. Thirty-one years she spent in this town protecting the lives of the citizens of this county.
>
> . . .
>
> In 2002 – and this is in the testimony – there is evidence of why the case was dismissed. And thank God we have detectives like Elizabeth Smith – like Beth Smith. Thank God we have them, because she didn't want to rush to judgment. She knew something was missing in this case. Something was missing. She testified to that. And she made a request [,] "I don't want to go forward until I get that missing piece." [¶] You should appreciate that kind of testimony. You should appreciate that kind of law enforcement work. That's what we want our law enforcement personnel to do.

[Dkt. No. 15-24 at 9-11.]

The prosecutor concluded her rebuttal with the following:

> This case has been proven to you beyond a reasonable doubt, and each and every one of you said that, if proven beyond a reasonable doubt you could convict. This case is tragic. But this case represents the best in law enforcement. It represents the fact that this beautiful 27-year-old and her child were never forgotten. She cries for justice.

[*Id.* at 35.]

According to Petitioner, the prosecutor's rebuttal argument amounted to impermissible vouching. [Dkt. No. 1 at 42.]

2. Procedural Bar

This claim is procedurally barred because the court of appeal held that Petitioner forfeited his challenge by failing to raise it at trial.[15] *Coleman v. Thompson*, 501 U.S. at 729; *see also Bennett*, 322 F.3d at 583; *Vansickel*, 166 F.3d at 957-58. Petitioner moreover has not attempted to show the requisite cause and prejudice to overcome the procedural bar. *See Bousley*, 523 U.S. at 622. Although he argued on direct appeal that his failure to object at trial should be excused due to ineffective assistance of counsel, he does not make that argument here.[16]

Regardless, even if he had raised that argument, it would fail because the court of appeal found that the prosecutor's comments were not objectionable, and thus counsel did not perform unreasonably in failing to object to them. [*See* Dkt. No. 1 at 113-15.] As explained below, this Court concurs.

3. Merits

A prosecutor may not vouch for the credibility of a prosecution witness. *See, e.g., United States v. Young*, 470 U.S. 1, 18-19 (1985); *United States v. Jackson*, 84 F.3d 1154, 1158 (9th Cir. 1996). "Vouching may occur in two ways: the prosecution may place the prestige of the government behind the witness or may indicate that information not presented to the jury supports the witness's testimony." *United States v. Roberts*, 618 F.2d 530, 533 (9th Cir. 1980) (citing *Lawn v. United States*, 335 U.S. 339, 359-60 n.15 (1958); *United States v. Lamerson*, 457 F.2d 371 (5th Cir. 1972)); *United States v.*

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[15] [*See* Dkt. No. 1 at 109.]

[16] Notably, in his fifth ground for relief, Petitioner argues that counsel was ineffective for failing to object to the prosecutor's arguments regarding the agreement between Petitioner and Moore. [*See supra.*] But Petitioner makes no mention of counsel's performance as to the prosecutor's statements about Detective Smith.

Weatherspoon, 410 F.3d 1142, 1146 (9th Cir. 2005).

An example of the first of these two forms of impermissible vouching occurs when the prosecutor asserts that a prosecution witness is honest. *See Hein v. Sullivan*, 601 F.3d 897, 913 (9th Cir. 2010) (holding that prosecutor improperly vouched for witness's credibility where prosecutor argued, among other things, that witness "was painfully honest" and that witness's testimony incriminating petitioner was "honest" despite that witness revealed embarrassing things about himself); *Weatherspoon*, 410 F.3d at 1146 (prosecutor improperly vouched for testifying officers by arguing that they had no reason to lie and that, if they lied, they would risk being prosecuted for perjury).

Here, the prosecutor's challenged comments were proper. She did not refer to evidence that was not presented at trial. On the contrary, her arguments constituted a fair comment on the trial testimony, including the fact that Detective Smith was a veteran detective with decades of experience. Indeed, in defending Detective Smith's investigation, the prosecutor quoted Detective Smith's testimony. Although she argued that the jurors should appreciate Detective Smith's doggedness, the prosecutor never indicated that she personally believed Detective Smith to be truthful. Rather, she argued that Detective Smith's dutiful investigation represented the best of law enforcement and something that should be appreciated. Both of those arguments were fair in light of the testimony at trial and Petitioner's attempts to discredit Detective Smith's investigation. Accordingly, the prosecutor's comments were not objectionable, and as the court of appeal concluded, counsel did not err in failing to object to them.

For the foregoing reasons, Petitioner is not entitled to relief with respect to this claim.

V. Recommendation

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

DATED: October 29, 2021

Patricia Donahue

PATRICIA DONAHUE
UNITED STATES MAGISTRATE JUDGE

NOTICE

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

Additional material from this filing is available in the Clerk's Office.