No. _____

IN THE

Supreme Court of the United States

Deshon Aaron Atkins

Petitioner,

v.

DAVID HOLBROOK

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

Cuauhtemoc Ortega
Federal Public Defender
Laura Schaefer*
Deputy Federal Public Defender
321 East 2nd Street
Los Angeles, California 90012
Telephone: (213) 894-1730
Facsimile: (213) 894-0081
Laura_Schaefer@fd.org
Attorneys for Petitioner
Deshon Aaron Atkins
**Counsel of Record*

INDEX TO APPENDIX

1. Ninth Circuit Court of Appeals
Opinion, Case No. 20-56007, July 31, 2024..... Pet. App. 001

2. Ninth Circuit Court of Appeals
Order Discharging Order to Show Cause and Setting Briefing Schedule
Case No. 20-56007, April 28, 2022..... Pet. App. 007

3. Ninth Circuit Court of Appeals
Appellee's Response to Order to Show Cause, Case No. 20-56007,
March 22, 2022..... Pet. App. 010

4. Ninth Circuit Court of Appeals
Order Granting Certificate of Appealability and Order to Show Cause,
Case No. 20-56007, January 18, 2022 ..... Pet. App. 035

5. United States District Court
Notice of Appeal,
Case No. CV 18-06877-DOC-MAA, September 28, 2020..... Pet. App. 037

6. United States District Court
Judgment, Case No. CV 18-06877-DOC-MAA,
August 26, 2020 .....Pet. App. 039

7. United States District Court
Order Accepting the Findings and Recommendation of the Magistrate
Judge, Case No. CV 18-06877-DOC-MAA,
August 26, 2020 .....Pet. App. 040

8. United States District Court
Order Denying Certificate of Appealability,
Case No. CV 18-06877-DOC-MAA, August 26, 2020..... Pet. App. 043

9. United States District Court
Report and Recommendation of the Magistrate Judge,
Case No. CV 18-06877-DOC-MAA, May 21, 2020..... Pet. App. 045

10. United States District Court
Order Denying Motion to Dismiss and Requiring Briefing on the Merits, Case No. CV 18-06877-DOC-MAA, February 28, 2019 ..... Pet. App. 067

11. United States District Court
Respondent's Motion to Dismiss and Memorandum of Points and Authorities, Case No. CV 18-06877-DOC-MAA, October 31, 2018 ..... Pet. App. 069

12. United States District Court
Notice of Appearance for Counsel for Respondent Case No. CV 18-06877-DOC-MAA, October 11, 2018 ..... Pet. App. 077

13. United States District Court
Order Requiring Response to Petition, Case No. CV 18-06877-DOC-MAA, October 5, 2018 ..... Pet. App. 080

14. United States District Court
Petitioner's Notice of Withdrawal of Grounds 2 & 3, Case No. CV 18-06877-DOC-MAA, September 24, 2018 ..... Pet. App. 085

15. United States District Court
Minutes re: Petition for Writ of Habeas Corpus Case No. CV 18-06877-DOC-MAA, September 4, 2018 ..... Pet. App. 089

16. United States District Court
Petitioner's Petition for Writ of Habeas Corpus Case No. CV 18-06877 DOC-MAA, August 10, 2018 ..... Pet. App. 091

17. United States District Court
Petitioner's Election Regarding Consent to Proceed Before a United States Magistrate Judge Case No. CV 18-06877-DOC-MAA, August 10, 2018 ..... Pet. App. 104

18. United States District Court
Notice of Reference to Magistrate Judge Case No. CV 18-06877-DOC-MAA, August 10, 2018 ..... Pet. App. 105

19. Superior Court, County of Los Angeles
Minute Order
Case No. YA093316, April 30, 2018 ..... Pet. App. 106

NOT FOR PUBLICATION

FILED

JUL 31 2024

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DESHON AARON ATKINS, Petitioner-Appellant, v. W. L. MONTGOMERY, Acting Warden, Respondent-Appellee.	No. 20-56007 D.C. No. 2:18-cv-06877-DOC-MAA MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
David O. Carter, District Judge, Presiding

Submitted July 15, 2024**
Pasadena, California

Before: PAEZ and SANCHEZ, Circuit Judges, and LYNN,*** Senior District Judge.

Deshon Aaron Atkins appeals the district court's denial of his petition for a writ of habeas corpus under 28 U.S.C. § 2254. The certified issue on appeal is

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

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

*** The Honorable Barbara M. G. Lynn, Senior United States District Judge for the Northern District of Texas, sitting by designation.

whether the magistrate judge exceeded her authority in determining, without the consent of the parties, that Atkins's August 10, 2018, petition was a mixed petition, subject to dismissal under *Rose v. Lundy*, 455 U.S. 509 (1982), which resulted in the voluntary dismissal of his unexhausted claims. We have jurisdiction to review the appeal under 28 U.S.C. §§ 1291 and 2253. We affirm.

Atkins was convicted by a jury in California state court of two counts of attempted murder. After he appealed unsuccessfully to the California Court of Appeals, on March 28, 2018, the California Supreme Court denied Atkins's petition for review.

On August 10, 2018, acting *pro se*, Atkins filed the underlying Petition for Writ of Habeas Corpus under 28 U.S.C. § 2254 in the Central District of California, seeking relief on three grounds: (1) insufficient evidence to support the jury's attempted murder finding on Count 4, (2) ineffective assistance of counsel at trial, and (3) lack of proof for the jury's finding as to a certain gun enhancement on hearsay grounds. The Petition expressly noted that "Grounds #2 and #3 were not presented to the California Supreme Court."

The case was referred to a magistrate judge for pretrial matters. Before the government appeared, the magistrate judge issued a minute order stating that "it appears from the record now before the Court that the instant Petition is subject to dismissal as a mixed petition because Petitioner has not exhausted his state

remedies in regard to Grounds Two and Three." The minute order further stated that, before deciding the matter, the magistrate judge would give Atkins an opportunity to address the exhaustion issue by electing one of four options: (1) file a notice of withdrawal of his unexhausted claims in Grounds Two and Three, and proceed solely on his exhausted claim in Ground One; (2) demonstrate that Grounds Two and Three are, in fact, exhausted; (3) file a notice of voluntary dismissal of the Petition without prejudice, so as to exhaust all state remedies before refiling in federal court; and (4) file a motion to hold his current federal habeas petition in abeyance while he returns to state court to exhaust his state remedies with respect to his unexhausted claims in Grounds Two and Three. In response, Atkins withdrew his claims based on Grounds Two and Three. The magistrate judge subsequently entered a report, recommending that Atkins's Petition be denied, which the district court accepted.

A petition filed under § 2254 shall not be granted unless the petitioner has "exhausted the remedies available in the courts of the State," and "fairly present[ed]" the federal claims in state court. 28 U.S.C. § 2254(b)(1)(A); *Duncan v. Henry*, 513 U.S. 364, 365 (1995) (per curiam). In *Rose v. Lundy*, 455 U.S. at 510, 522, the Supreme Court imposed a "total exhaustion" requirement, such that district courts are required to dismiss without prejudice "mixed" petitions that contain both exhausted and unexhausted claims.

On appeal, Atkins argues that, in deciding the exhaustion issue and issuing the "option order" offering Atkins various choices as a result, the magistrate judge exceeded her authority. The authority of magistrate judges "is a question of law subject to *de novo* review." *Bastidas v. Chappell*, 791 F.3d 1155, 1159 (9th Cir. 2015) (quoting *United States v. Carr*, 18 F.3d 738, 740 (9th Cir. 1994)).

The power of federal magistrate judges is limited by 28 U.S.C. § 636. *See Mitchell v. Valenzuela*, 791 F.3d 1166, 1168 (9th Cir. 2015). Under § 636, a district judge "may designate a magistrate judge to hear and determine any pretrial matter pending before the court," except for certain motions enumerated under § 636(b)(1)(A) and other analogous dispositive judicial functions. 28 U.S.C. § 636(b)(1)(A); *Flam v. Flam*, 788 F.3d 1043, 1046 (9th Cir. 2015). To determine whether a motion is dispositive, we employ a "functional approach," which looks "to the effect of the motion, in order to determine whether it is properly characterized as 'dispositive or non-dispositive of a claim or defense of a party.'" *Flam*, 788 F.3d at 1046 (quoting *United States v. Rivera–Guerrero*, 377 F.3d 1064, 1068 (9th Cir. 2004)).

District courts are permitted to *sua sponte* consider threshold constraints on federal habeas petitioners, including claim exhaustion. *See Day v. McDonough*, 547 U.S. 198 (2006). Moreover, preliminarily identifying a claim as "unexhausted" is not a dispositive matter, particularly where Atkins stated in the

Petition that two of his claims were not raised below. Thus, because the magistrate judge gave Atkins fair notice and an opportunity to respond to her finding that the Petition was mixed, the magistrate judge did not exceed her authority by *sua sponte* evaluating the Petition and making a preliminary determination that Grounds Two and Three were unexhausted.

In addition, the magistrate judge's options order, which offered Atkins choices in response to her preliminary determination that the Petition was mixed, did not constitute a dispositive order under § 636(b)(1)(B) such that the magistrate judge was unauthorized to issue it. The options order did not dispose of a claim or defense of a party, or preclude the ultimate relief sought. *See Flam*, 788 F.3d at 1046. Instead, the order offered options that would have preserved the viability of Atkins's unexhausted claims, including inviting Atkins to demonstrate exhaustion or seek a stay to be able to return to state court and perfect exhaustion. The inclusion of these non-dispositive options distinguishes this case from this Circuit's precedent in *Hunt v. Pliler*, 384 F.3d 1118, 1124 (9th Cir. 2004), in which both options presented to the petition in that case required the dismissal of at least some claims.

Atkins further argues the magistrate judge failed to provide meaningful assistance in exhausting his claims and should have done more to take his *pro se* status into account. Under *Pliler v. Ford*, 542 U.S. 225, 231 (2004), "[d]istrict

judges have no obligation to act as counsel or paralegal to *pro se* litigants." As such, the magistrate judge was under no obligation to provide additional guidance or instruction to Atkins on account of his *pro se* status, and was not required to take into account the amount of time remaining on Atkins's one-year statute of limitations in requiring a response to her order.

AFFIRMED.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

APR 28 2022

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

DESHON AARON ATKINS, Petitioner-Appellant, v. W. L. MONTGOMERY, Acting Warden, Respondent-Appellee.	No. 20-56007 D.C. No. 2:18-cv-06877-DOC-MAA Central District of California, Los Angeles ORDER

Before: GRABER and TALLMAN, Circuit Judges.

On January 18, 2022, this court granted a certificate of appealability as to whether the magistrate judge exceeded her authority in determining, without the consent of the parties, that appellant's 18 U.S.C. § 2254 petition was a mixed petition, subject to dismissal under *Rose v. Lundy*, 455 U.S. 509, 522 (1982), which resulted in the voluntary dismissal of appellant's unexhausted claims.

This court also ordered appellees to show cause as to why the district court's judgment should not be vacated and this appeal summarily remanded to the district judge for consideration of whether appellant's petition includes unexhausted claims.

In light of appellee's response (Docket Entry No. 13), the order to show cause is discharged.

The district court granted appellant leave to proceed in forma pauperis and such permission has not been revoked. Accordingly, appellant's in forma pauperis status continues in this court. *See* Fed. R. App. P. 24(a)(3). The Clerk will update the docket.

Counsel is appointed sua sponte for purposes of this appeal. *See* 18 U.S.C. § 3006A(a)(2)(B); *Weygandt v. Look*, 718 F.2d 952, 954 (9th Cir. 1983). Counsel will be appointed by separate order.

If appellant does not wish to have appointed counsel, appellant must file a motion asking to proceed pro se within 14 days of the date of this order.

The Clerk will electronically serve this order on the appointing authority for the Central District of California, who will locate appointed counsel. The appointing authority must send notification of the name, address, and telephone number of appointed counsel to the Clerk of this court at counselappointments@ca9.uscourts.gov within 14 days of locating counsel.

The opening brief is due July 20, 2022; the answering brief is due August 19, 2022; and the optional reply brief is due within 21 days after service of the answering brief.

The Clerk will serve on appellant a copy of the "After Opening a Case – Counseled Cases" document.

Appellant's request for an injunction pending appeal (Docket Entry Nos. 11 & 12) is denied without prejudice to renewal by appointed counsel, should counsel determine such relief is appropriate and necessary.

20-56007

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DESHON ATKINS,

Petitioner-Appellant,

v.

W. MONTGOMERY,

Respondent-Appellee.

On Appeal from the United States District Court
for the District of California

No. CV-18-06877-DOC (AMA)
The Honorable David O. Carter, Judge

APPELLEE'S RESPONSE TO ORDER TO SHOW CAUSE

ROB BONTA
Attorney General of California
LANCE E. WINTERS
Chief Assistant Attorney General
SUSAN SULLIVAN PITHEY
Senior Assistant Attorney General
XIOMARA COSTELLO
Deputy Attorney General
JONATHAN M. KRAUSS
Deputy Attorney General
State Bar No. 279101
300 South Spring Street, Suite 1702
Los Angeles, CA 90013-1230
Telephone: (213) 269-6123
Facsimile: (916) 731-2122
Email: DocketingLAAWT@doj.ca.gov
Jonathan.Krauss@doj.ca.gov
Attorneys for Respondent-Appellee

TABLE OF CONTENTS

Page

Introduction 1
Procedural History 4
Argument 7
The Magistrate Judge Issued a Nondispositive Order 7
A. A Magistrate Judge Is Authorized to Issue a Nondipositive Order 7
B. The Magistrate Judge's Order Was Nondispositive Because It Did Not Make a Definitive Ruling on Exhaustion 8
C. The Magistrate Judge's Order Was Nondispositive Because It Did Not Require Any Claim Be Dismissed 10
D. The Magistrate Judge's Order Was Nondispositive Because It Did Not Prevent Petitioner From Timely Reasserting Any Claim In Federal Court 13
E. The Magistrate Judge's Order Was Nondispositive Because It Offered Nondispositive Options 16
Conclusion 18
Statement of Related Cases 19
Certificate of Compliance 20
Declaration of Service by U.S. Mail 21

TABLE OF AUTHORITIES

Page

CASES

Bastidas v. Chappell
791 F.3d 1155 (9th Cir. 2015) ..... *passim*

Caspari v. Bohlen
510 U.S. 383 (1994)..... 14

Flam v. Flam
788 F.3d 1043 (9th Cir. 2015) 7

Hunt v. Pliler
384 F.3d 1118 (2004) ..... *passim*

In re U.S. Dep't of Educ.
25 F.4th 692 (9th Cir. 2022) ..... *passim*

Mitchell v. Valenzuela
791 F.3d 1166 (9th Cir. 2015) ..... *passim*

Rhines v. Weber
544 U.S. 269 (2005)..... 5, 11

Robinson v. Lewis
9 Cal. 5th 883 (2020) 15

Rose v. Lundy
455 U.S. 509 (1982).....6

S.E.C. v. CMKM Diamonds, Inc.
729 F.3d 1248 (9th Cir. 2013) 12

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

28 U.S.C.
§ 636 7
§ 2244(d) 5, 17
§ 2254 ..... 4, 10

COURT RULES

Cal. R. Ct. 8.308(a) 14

Fed. R. Civ. P. 72 7

Fed. R. Civ. P. 72(b) 7

Rule 4 10

INTRODUCTION

The issue before the Court is a novel one: whether a preliminary order about potentially unexhausted claims that does not definitively rule on exhaustion, require the dismissal of any claim, or foreclose a federal habeas petitioner from timely reasserting a claim in federal court by denying a stay, and further, offers the petitioner nondispositive options, is nevertheless a dispositive one. If such an order is dispositive, the magistrate judge had no authority to issue it. If, on the other hand, it was not dispositive, she did. Because the order did not dispose or effectively dispose of any claim, it was nondispositive.

This type of options order is fundamentally different from the dispositive orders issued in *Hunt v. Pliler*, 384 F.3d 1118 (2004), *Mitchell v. Valenzuela*, 791 F.3d 1166, 1168 (9th Cir. 2015), and *Bastidas v. Chappell*, 791 F.3d 1155, 1157 (9th Cir. 2015). In each of those cases, the magistrate judge found certain claims unexhausted and, through various means, ultimately prevented the petitioners from asserting or reasserting their unexhausted claims before expiration of the federal deadline by requiring their dismissal without a stay.

Unlike those orders, the preliminary options order here was nondispositive for four reasons. First, the magistrate judge did not issue an

order definitively ruling on exhaustion. Instead, the order stated it "appear[ed]" two of Petitioner-Appellant Deshon Atkin's (Petitioner's) claims were unexhausted, but "*before* deciding this matter," Petitioner could elect one of four options: dismiss the unexhausted claims pending exhaustion and proceed on the exhausted claim; establish exhaustion; voluntarily dismiss the petition and refile after exhaustion; or, seek a stay. The tentative language of the order and the express invitation to Petitioner to establish exhaustion demonstrate that the magistrate judge did not make a definitive ruling that any claim was unexhausted. Second, the order did not require the dismissal of any claim. Instead, it gave Petitioner four options, which he could select in the alternative, and two of which did not involve any type of dismissal. Third, the order did not prevent Petitioner from reasserting his unexhausted claims by requiring the dismissal of a claim without a stay. Indeed, the order not only left the option of dismissal entirely up to Petitioner, but unlike the petitioners in *Hunt*, *Mitchell*, and *Bastidas*, Petitioner had nearly 300 of 365 days to timely reassert any unexhausted claims in federal court and the deadline would have been extended even further by statutory tolling. Fourth, the options of establishing exhaustion or seeking a stay were inherently nondispositive. By contrast, none of the orders in *Hunt*, *Mitchell*, and *Bastidas* offered the

petitioner a nondispositive option. Instead, in *Hunt* and *Mitchell*, each petitioner was required to dismiss the unexhausted claims without a stay or face dismissal of the entire petition and, because of the timing, the petitioners were prevented from timely asserting or reasserting their claims in federal court. And in *Bastidas,* the denial of a stay prevented the petition from ever asserting his unexhausted claim on time.

In *Hunt*, *Mitchell*, and *Bastidas*, the same confluence of factors existed—a stay denial, the dismissal or preclusion of claims, and the expiration of the federal deadline before they could be asserted or reasserted. Because those orders permanently precluded the unexhausted claims from federal review, they were tantamount to a denial with prejudice and thus dispositive. But none of those critical factors is present in magistrate judge's preliminary order here. Because the magistrate judge's order did not definitely rule on exhaustion, require the dismissal of any claim, or foreclose Petitioner from timely reasserting any unexhausted claim in federal court by denying a stay, and further, offered Petitioner nondispositive options, it did not effectively deny relief on any claim and was thus nondispositive.

PROCEDURAL HISTORY

Petitioner filed a habeas petition pursuant to 28 U.S.C. § 2254 raising three claims. (Dkt. No. 1.)[1] On the form petition, he indicated he had not presented two of the claims to the California Supreme Court in either a petition for review or a habeas petition. (*Id*. at 6.) The Petition was assigned to a United States District Court Judge, who referred the case to a magistrate judge "to consider preliminary matters and conduct all further hearings as may be appropriate or necessary[.]" (Dkt. No. 2.) The magistrate judge later ordered the State to respond to the Petition, but before doing so, issued a preliminary order about the two claims Petitioner indicated were unexhausted. The order stated that "it appears from the record now before the Court that the instant Petition is subject to dismissal as a mixed petition because Petitioner has not exhausted his state remedies in regard to Grounds Two and Three." (Dkt. No. 5 at 1 (citing *Rose v. Lundy*, 455 U.S. 509, 522 (1982)).) But, "before deciding this matter, the Court first will give Petitioner an opportunity to address the exhaustion issue by electing" one of four options within thirty days:

[1] The docket numbers in this procedural history refer to the district court proceedings in United States District Court case number CV 18-06877-DOC (MAA), as reflected on the ECF docket.

(1) file a notice of withdrawal of the two unexhausted claims and proceed solely on the exhausted claim in Ground One;

(2) if Petitioner contends Grounds Two and Three are exhausted, file a response showing those grounds are exhausted;

(3) file a notice of voluntary withdrawal without prejudice in order to exhaust Grounds Two and Three in state court, and then return to federal court before the statute of limitations in 28 U.S.C. § 2244(d) expires; or

(4) file a motion to hold the petition in abeyance while Petitioner returns to state court to exhaust his state remedies; if Petitioner selects option (4), he must demonstrate good cause for failing to previously exhaust the claims before filing the federal petition pursuant to *Rhines v. Weber*, 544 U.S. 269 (2005), demonstrate the claims are not plainly meritless, and demonstrate the absence of abusive litigation tactics or delay.

(Dkt. No. 5 at 1-2.) The order warned Petitioner that if he failed to make an election by the deadline, the magistrate judge would "recommend the dismissal without prejudice of this action for failure to prosecute and/or failure to exhaust state remedies." (*Id*. at 2.) Petitioner selected option (1) by filing a notice of withdrawal of Grounds Two and Three. (Dkt. No. 6.)

The magistrate judge construed the notice as an amendment to the petition and ordered the State to file an answer addressing Ground One. (Dkt. No. 12 at 1-2.) The magistrate judge subsequently issued a report to the district court judge recommending that Ground One be denied and the action be dismissed with prejudice. The district court judge adopted the report and entered judgment denying the petition with prejudice. (Dkt. Nos. 28-30.)

Petitioner timely appealed. This Court issued an order directing the State to address "whether the magistrate judge exceeded her authority in determining, without consent of the parties," that the petition was "mixed, subject to dismissal pursuant to *Rose v. Lundy*, 455 U.S. 509, 522 (1982), leading to [Petitioner's] voluntary dismissal of his unexhausted claims, *see Hunt v. Pliler*, 384 F.3d 1118 (9th Cir. 2004); *see also Mitchell v. Valenzuela*, 791 F.3d 1166 (9th Cir. 2015); *Bastidas v. Chappel[l]*, 791 F.3d 1155 (9th Cir. 2015)." (No. 20-56007, Dkt. No. 5 at 1.) The order also directs the State to show cause why the district court's judgment should not be vacated and this appeal summarily remanded to the district court for consideration whether the petition includes unexhausted claims. (*Id.* at 2.)

ARGUMENT

THE MAGISTRATE JUDGE ISSUED A NONDISPOSITIVE ORDER

A. A Magistrate Judge Is Authorized to Issue a Nondipositive Order

A magistrate judge's authority is governed by 28 U.S.C. § 636 and Federal Rule of Civil Procedure 72, which provide that a magistrate judge may "hear and determine" pretrial matters that are nondispositive. If a ruling is dispositive, a magistrate judge is not authorized to issue it; instead she must make a recommendation to the Article III district court judge, who makes the final ruling. Fed. R. Civ. P. 72(b). Section 636 enumerates eight types of dispositive orders, but the Supreme Court later held that the list was not exhaustive. *See Flam v. Flam*, 788 F.3d 1043, 1046 (9th Cir. 2015) (citing *Gomez v. United States*, 490 U.S. 858, 873-74 (1989)). To decide whether a matter is dispositive, this Court asks whether its effect "is to deny the ultimate relief sought or foreclose a defense of a party." *In re U.S. Dep't of Educ.*, 25 F.4th 692, 699 (9th Cir. 2022) (quoting *Flam v. Flam*, 788 F.3d at 1046) (quotation marks omitted)).

A stay denial is dispositive in certain circumstances. "[W]here the denial of a motion to stay is effectively a denial of the ultimate relief sought, such a motion is considered dispositive, and a magistrate judge lacks the

authority to 'determine' the matter." *Mitchell v. v. Valenzuela*, 791 F.3d at 1170 (quoting *S.E.C. v. CMKM Diamonds, Inc.*, 729 F.3d 1248, 1260 (9th Cir. 2013) (quotations omitted)). "By contrast, a motion to stay is nondispositive where it does not dispose of any claims or defenses and does not effectively . . . deny any ultimate relief sought." *Id*. (cleaned up).

This Court has not yet addressed whether a preliminary options order like the one issued by the magistrate judge here is dispositive. But because the four factors present here are the opposite of the factors the precipitated the decisions in *Hunt*, *Bastidas*, and *Mitchell*, the Court should hold that an order that does not definitively rule on exhaustion, require the dismissal of any claim, or foreclose Petitioner from timely reasserting a claim in federal court by denying a stay, and further, offers the petitioner nondispositive options, is nondispositive.

B. The Magistrate Judge's Order Was Nondispositive Because It Did Not Make a Definitive Ruling on Exhaustion

The order was nondispositive for four reasons, the first two of which will ordinarily co-exist. First, the magistrate judge's order was nondispositive because it did not definitively rule any claim was unexhausted. The text of the order is conclusive on this point. The order states that it "appears" two of the claims are unexhausted but "*before*

deciding this matter, the Court will give Petitioner an opportunity to address this matter" by selecting from the four options: (1) dismiss the unexhausted claims and proceed on the exhausted one; (2) establish exhaustion; (3) dismiss the petition and refile after exhaustion; or (4) seek a stay. Petitioner could also select options in the alternative. (Dkt. 5 at 1-2 (emphasis added).) By stating that it "appeared" two claims were unexhausted (presumably based on Petitioner's admission on the form Petition that he did not present either of those claims to the California Supreme Court), the order was tentative in nature and dispels any notion of a conclusive finding that any claim was unexhausted. That conclusion is reinforced by the option inviting Petitioner to establish exhaustion, the oppositive of a conclusive finding on exhaustion. Because the order used tentative language and expressly invited Petitioner to establish exhaustion, the magistrate judge did not find any claim unexhausted, let alone effectively "deny the ultimate relief sought[.]" *In re U.S. Dept. of Educ.*, 25 F.4th at 699 (quoting *Flam v. Flam*, 788 F.3d at 1046 (quotation marks omitted)).

C. The Magistrate Judge's Order Was Nondispositive Because It Did Not Require Any Claim Be Dismissed

Second, the order was nondispositive because it did not require the dismissal of any claim, a byproduct of the fact that the order did not find any claim unexhausted in the first place. Instead, in line with her authority under Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts, the magistrate judge conducted a pre-service examination of the Petition and issued a screening order that alerted Petitioner to a defect in his Petition, and gave him the opportunity to cure the defect within the statute of limitations for filing a timely federal petition. (Dkt. No. 5 at 1.)

Although two of the options allowed for dismissal of the claims or the petition, the choice to do so was left entirely up to Petitioner. And, critically, he was not placed in a position of dismissing claims or facing an adverse consequence. Instead, he could establish exhaustion or seek a stay or make alternative requests. These facts stand in stark contrast to *Hunt* and *Mitchell*, where the petitioners were required to dismiss their unexhausted claims, or else, face dismissal of the entire petition, and *Bastidas*, where the petitioner was prevented from ever asserting his unexhausted claim.

In *Hunt*, the magistrate judge determined the petition contained unexhausted claims, did not inform Hunt about the stay procedure, and

issued orders that "compelled Hunt to abandon claims he contended had been exhausted or face dismissal of the entire petition with prejudice." *Hunt v. Pliler*, 384 F.3d at 1124. These orders effectively disposed of the unexhausted claims "because any newly filed petition" would be barred by the federal deadline. *Id*.

Similarly, in *Mitchell*, the magistrate judge determined that the petition contained unexhausted claims, denied a *Rhines* stay, and ordered the petitioner to remove the unexhausted claims or face dismissal of the entire petition with prejudice. *Mitchell*, 791 F.3d at 1168. This order effectively disposed of the unexhausted claims because, as the State conceded, "there was 'no way' Mitchell would be able to return to federal court to assert those claims later." *Id*. at 1170.

Likewise, in *Bastidas*, a companion case to *Mitchell*, the petitioner moved for a stay so he could add an unexhausted claim pending in state court. The magistrate judge denied a stay. *Bastidas v. Valenzuela*, 791 F.3d at 1158. Once again, this denial disposed of the pending claim because, "[a]s the state recognized at oral argument, the stay denial meant that Bastidas would never be able to assert the new claim" in federal court. *Id*. at 1163.

In each case, this Court ruled that the dismissal or preclusion of unexhausted claims without a stay was tantamount to a dismissal of the unexhausted claims with prejudice because the federal deadline would expire before the petitioner could return to federal court. *Hunt*, 384 F.3d at 1124; *Mitchell*, 791 F.3d at 1172-73; *Bastidas*, 791 F.3d at 1163 (equating the preclusive effect of the stay denial with the dismissal in *Mitchell*). And, in each case, the lynchpin of the Court's ruling was the convergence of three factors: the dismissal or preclusion of claims without a stay and the expiration of the federal deadline. [2]

If the unexhausted claims had not been dismissed without a stay, or if the federal deadline did not prevent their timely assertion or reassertion, then that would have dramatically change the effect of the orders. And, here, all three factors are missing. As already established, the order did not require the dismissal of any claim without a stay; indeed, this order preceded any

[2] Both *Mitchell* and *Bastidas* recognized that a stay denial is not always dispositive, and *Mitchell* expressly left open the possibility for the State to establish that the denial of a stay motion "was not dispositive under the circumstances." *Mitchell v. Valenzuela*, 791 F.3d at 1172 n.5 (creating a rebuttable presumption for stay denial); *see S.E.C v. CMKM Diamonds, Inc.*, 729 F.3d at 1260 (a "motion to stay litigation that is not dispositive of either the case or any claim or defense in it may properly be determined by a magistrate judge") (quotations and citation omitted). But here, the magistrate judge did not deny a stay. Instead, she gave Petitioner the opportunity to ask for one.

conclusive determination on the question of either exhaustion or a stay. And, as discussed in the next section, the federal deadline was nowhere near expiring. Because the order did not require the dismissal of any claim without a stay, it did not "deny the ultimate relief sought" or effectively do so. *In re U.S. Dept. of Educ*., 25 F.4th at 699 (quoting *Flam v. Flam*, 788 F.3d at 1046 (quotation marks omitted)).

D. The Magistrate Judge's Order Was Nondispositive Because It Did Not Prevent Petitioner From Timely Reasserting Any Claim In Federal Court

Third, the magistrate judge's order was nondispositive because it did not prevent Petitioner from timely reasserting any unexhausted claim in federal court. This conclusion flows not only from the first two factors—the absence of a finding of non-exhaustion or dismissal of any claim—but also from the timing of the court's order in this case. Unlike the petitioners in *Hunt*, *Mitchell* and *Bastidas*, who were prevented from timely asserting or reasserting their claims before expiration of the federal deadline by the denial of a stay, the magistrate judge's order here did not require the dismissal of any claim without a stay and did not place any claim beyond the federal deadline.

Indeed, Petitioner had nearly 300 out of 365 days left on the federal clock, and that time frame would have been extended even further by

statutory tolling.[3] The fact Petitioner still had ten months to exhaust his claims and return to federal court sets this case far apart from *Hunt*, *Mitchell*, and *Bastidas*. As *Mitchell* explained, the magistrate judge's determination in *Hunt* that the petition contained unexhausted claims was "*pivotal*" and dispositive precisely "*because* any new filed petition would be barred by the statute of limitations." *Mitchell*, 791 F.3d at 1173 (quoting *Hunt*, 384 F.3d at 1124) (emphasis added). *Mitchell* and *Bastidas*, relying on the same consideration, reached the same conclusion. *See Mitchell v. Valenzuela*, 791 F.3d at 1173 (explaining that, in *Hunt*, the choices between dismissing the unexhausted claims or facing dismissal of the entire petition "was effectively with prejudice because any newly filed petition would be barred" by the federal deadline and the denial of Mitchell's stay motion was "dispositive for the same reason"); *Bastidas v. Chappell*, 791 F.3d at 1163 (explaining that "the stay denial meant that Bastidas would *never* be able to assert the

[3] Petitioner's conviction became final on June 29, 2018, sixty days after his sentence was amended on remand from the California Court of Appeal (CV 18-06877-DOC (MAA), Lodged Doc. 7 at 32). *See* Cal. R. Ct. 8.308(a); *Caspari v. Bohlen*, 510 U.S. 383, 390 (1994) ("A state conviction and sentence become final for purposes of retroactivity analysis when the availability of direct appeal to the state courts has been exhausted and the time for filing a petition for a writ of certiorari has elapsed or a timely filed petition has been finally denied."). Thus, when the magistrate judge issued her preliminary order on September 4, only sixty-seven days of the one-year statute of limitations had elapsed.

new claim in a federal habeas proceeding. The denial of Bastidas's stay request was, *thus*, as dispositive of his new claim as the denial of Mitchell's request was of his existing claims") (emphasis added). By contrast, when the magistrate judge issued the preliminary order here, the federal deadline was ten months away and the deadline would have been extended even further by statutory tolling.

Although *Mitchell* noted that statutory tolling was difficult to predict, and noted the "*ex ante* danger" that a petitioner would find out his claim was untimely after it was too late, *Mitchell v. Valenzuela*, 791 F.3d at 1172 n.5, that danger was subsequently removed by the California Supreme Court in *Robinson v. Lewis*, 9 Cal. 5th 883 (2020). *Robinson* created a four-month safe harbor between state habeas petitions so that "[a] new petition filed in a higher court within 120 days of the lower court's denial will *never* be considered untimely due to gap delay." *Id*. at 901 (emphasis added). This means that a petitioner will reliably receive statutory tolling for an entire round of state court habeas review, which will, in turn, extend the federal deadline.[4] Because Petitioner had ten months to return to federal court, and

[4] Although *Robinson* did not address the timeliness of the first state petition, Petitioner was nowhere near the federal deadline, meaning that his conviction had become final relatively recently. For that reason, it is highly unlikely that his first state petition would have been denied as untimely.

the deadline would have been extended even further by statutory tolling, the magistrate judge's order did not prevent Petitioner from timely reasserting any claim and thus did not "deny the ultimate relief sought" or effectively do so. *In re U.S. Dept. of Educ*., 25 F.4th at 699 (quoting *Flam v. Flam*, 788 F.3d at 1046 (quotation marks omitted).

E. The Magistrate Judge's Order Was Nondispositive Because It Offered Nondispositive Options

Fourth and finally, the magistrate judge's order was not dispositive because it offered two inherently nondispositive options: establish exhaustion or seek a stay. The order specified that Petitioner could establish exhaustion by filing a response addressing exhaustion and directing Petitioner to attach "copies of any documents establishing that Grounds Two and Three indeed are exhausted." (Dkt. 5 at 2.) This option invited Petitioner to establish the very thing conclusively ruled against the petitioners in *Hunt*, *Mitchell*, and *Bastidas*. Likewise, the option of seeking a stay gave Petitioner the opportunity to ask for the very thing denied to the petitioners in *Hunt*, *Mitchell*, and *Bastidas*. This factor, as with the prior three factors, placed Petitioner in a position directly opposed to the one faced by the petitioners in *Hunt*, *Mitchell,* and, *Bastidas*.

While it is true that Petitioner opted to dismiss the two grounds he indicated in the petition were unexhausted, he was not required to do so, and he faced no adverse consequence for deciding against dismissal.[5] This, once again, placed Petitioner at odds with the petitioners in *Hunt* and *Mitchell*, who had no nondispositive options, and instead, were constrained to dismiss unexhausted claims, or else, face dismissal of entire petition, and with the petitioner in *Bastidas*, who was prevented from ever asserting his unexhausted claim. Naturally, if Petitioner had opted to establish exhaustion or seek a stay, and if the magistrate judge then decided claims were unexhausted and a stay unavailable, then a report and recommendation would have been needed, but the case had not yet progressed to that point. At this stage, the order invited Petitioner to establish exhaustion or seek a stay, or do both in the alternative. Because these options were inherently

[5] If the federal action went to judgment before exhaustion was completed, then the unexhausted claims would likely be barred by the second or successive provision in 28 U.S.C. § 2244(d). But the future disposition of a potential later action does not transform the magistrate judge's order, which did not require the dismissal of any claim, into one that "den[ies] the ultimate relief sought" and whether that sequence of events would occur is speculative. *In re U.S. Dep't of Educ.*, 25 F.4th at 699 (quoting *Flam v. Flam*, 788 F.3d at 1046 (quotation marks omitted)). Further, a petitioner would not need to let the case get that far. If the magistrate judge were to issue a report and recommendation while the petitioner's unexhausted clams were pending in state court, he could object to the report on that basis and ask for a stay pending exhaustion.

nondispositive, and would have had no impact on the federal deadline, the order did not "deny the ultimate relief sought" or effectively do so. *In re U.S. Dept. of Educ*., 25 F.4th at 699 (quoting *Flam v. Flam*, 788 F.3d at 1046 (quotation marks omitted)).

CONCLUSION

For the foregoing reasons, the order to show cause should be discharged and this matter should not be summarily remanded to the district court for a determination on exhaustion.

Dated: March 22, 2022

Respectfully submitted,

ROB BONTA
Attorney General of California
LANCE E. WINTERS
Chief Assistant Attorney General
SUSAN SULLIVAN PITHEY
Senior Assistant Attorney General
XIOMARA COSTELLO
Deputy Attorney General

/s/
JONATHAN M. KRAUSS
Deputy Attorney General
Attorneys for Respondent-Appellee

LA2022600217
64983496.docx

20-56007

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DESHON ATKINS, Petitioner-Appellant, **v.** **W. MONTGOMERY,** Respondent-Appellee.

STATEMENT OF RELATED CASES

To the best of our knowledge, there are no related cases.

Dated: March 22, 2022

Respectfully submitted,

ROB BONTA
Attorney General of California
LANCE E. WINTERS
Chief Assistant Attorney General
SUSAN SULLIVAN PITHEY
Senior Assistant Attorney General
XIOMARA COSTELLO
Deputy Attorney General

/s/
JONATHAN M. KRAUSS
Deputy Attorney General
Attorneys for Respondent-Appellee

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 8. Certificate of Compliance for Briefs

Instructions for this form: http://www.ca9.uscourts.gov/forms/form08instructions.pdf

9th Cir. Case Number(s) 20-56007

I am the attorney or self-represented party.

This brief contains 3,473 **words**, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

I certify that this brief *(select only one)*:

- [x] complies with the word limit of Cir. R. 32-1.
- [ ] is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.
- [ ] is an **amicus** brief and complies with the word limit of Fed. R. App. P. 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).
- [ ] is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.
- [ ] complies with the longer length limit permitted by Cir. R. 32-2(b) because *(select only one)*:
  - [ ] it is a joint brief submitted by separately represented parties;
  - [ ] a party or parties are filing a single brief in response to multiple briefs; or
  - [ ] a party or parties are filing a single brief in response to a longer joint brief.
- [ ] complies with the length limit designated by court order dated _____.
- [ ] is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature /s/ Jonathan M. Krauss **Date** Mar 22, 2022

(use "s/[typed name]" to sign electronically-filed documents)

Feedback or questions about this form? Email us at forms@ca9.uscourts.gov

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: ***Deshon Atkins v. W. Montgomery***

No.: **20-56007**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter.

I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On March 22, 2022, I served the attached APPELLEE'S RESPONSE TO ORDER TO SHOW CAUSE by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013-1230, addressed as follows:

Deshon Aaron Atkins, # BB0955
CALSP - CALIPATRIA STATE PRISON
P.O. Box 5006
Calipatria, CA 92233

I declare under penalty of perjury under the laws of the United States of America the foregoing is true and correct and that this declaration was executed on March 22, 2022, at Los Angeles, California.

Virginia Gow	/s/ *Virginia Gow*
Declarant	Signature

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

JAN 18 2022

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

DESHON AARON ATKINS, Petitioner-Appellant, v. W. L. MONTGOMERY, Acting Warden, Respondent-Appellee.	No. 20-56007 D.C. No. 2:18-cv-06877-DOC-MAA Central District of California, Los Angeles ORDER

Before: PAEZ and HURWITZ, Circuit Judges.

The request for a certificate of appealability (Docket Entry Nos. 2 & 3) is granted with respect to the following issue: whether the magistrate judge exceeded her authority in determining, without the consent of the parties, that appellant's August 10, 2018 petition was a mixed petition, subject to dismissal under *Rose v. Lundy*, 455 U.S. 509, 522 (1982), which resulted in the voluntary dismissal of appellant's unexhausted claims, *see Hunt v. Pliler*, 384 F.3d 1118 (9th Cir. 2004); *see also Mitchell v. Valenzuela*, 791 F.3d 1166 (9th Cir. 2015); *Bastidas v. Chappel*, 791 F.3d 1155 (9th Cir. 2015). *See* 28 U.S.C. § 2253(c)(3); *Gonzalez v. Thaler*, 565 U.S. 134 (2012); *Slack v. McDaniel*, 529 U.S. 473, 483-85 (2000); *Lambright v. Stewart*, 220 F.3d 1022, 1026 (9th Cir. 2000); *see also* 9th Cir. R. 22-1(e).

Within 21 days of the filing date of this order, appellee is ordered to show cause as to why the district court's judgment should not be vacated and this appeal summarily remanded to the district judge for consideration of whether appellant's August 10, 2018 petition includes unexhausted claims. If appellee elects to show cause, appellant may file a response within 14 days after service of appellee's memorandum.

The Clerk will serve on appellant a copy of the "After Opening a Case – Pro Se Appellants" document.

If W.L. Montgomery is no longer the appropriate appellee in this case, counsel for appellee must notify this court by letter of the appropriate substitute party within 21 days of the filing date of this order. *See* Fed. R. App. P. 43(c).

All briefing is stayed pending resolution of this order to show cause.

DESHON AARON ATKINS #BB0955
CALIPATRIA STATE PRISON
FACILITY A3-124
P.O BOX 5004
CALIPATRIA, CA 92233

PETITIONER IN PRO PER

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

DESHON A. ATKINS
Petitioner,
V.
W.L. MONTGOMERY, WARDEN
Respondent.

Case No. 2:18-cv-06877-DOC-MAA

NOTICE OF APPEAL

Pursuant to Rule 4(a), Federal Rules of Appellate Procedure, Petitioner DESHON A. ATKINS, hereby appeals from the Judgment of the court denying the petition for writ of habeas corpus and dismissing the action with prejudice. Said Judgment was entered on August 26, 2020, by Hon. David O. Carter, U.S. District Judge.

Dated: September 18, 2020

Respectfully submitted,

DESHON A. ATKINS
Petitioner in Pro Per

VERIFICATION

(C.C.P.§ 446 & 2015.5 28 U.S.C. § 1746)

STATE OF CALIFORNIA
COUNTY OF IMPERIAL

I, Deshon Atkins Petitioner DECLARE UNDER PENALTY OF PERJURY THAT I AM THE IN THE ABOVE ENTITLED ACTION. I HAVE READ THE FOREGOING DOCUMENTS AND KNOW THE CONTENTS THEREOF AND THE SAME IS TRUE OF MY OWN KNOWLEDGE EXCEPT AS TO MATTERS STATED THEREIN UPON INFORMATION AND BELIEF, AND AS TO THOSE MATTERS, I BELIEVE THEM TO BE TRUE.

EXECUTED THIS 22 DAY OF September AT CALIPATRIA STATE PRISON, CALIPATRIA CALIFORNIA, 92233-5002

Deshon Atkins (DECLARANT/PRISONER)
SIGNATURE

PROOF OF SERVICE BY MAIL

(C.C.P.§ 1013(a) & 2015.5 U.S.C. § 1746)

I, Deshon Atkins AM A RESIDENT OF CALIPATRIA STATE PRISON, IN THE COUNTY OF IMPERIAL, STATE OF CALIFORNIA. I AM OVER EIGHTEEN (18) YEARS OF AGE, AND AM/AM NOT A PARTY OF THE ABOVE ENTITLED ACTION. MY STATE PRISON ADDRESS IS P.O. BOX 5002 CALIPATRIA STATE PRISON, CALIPATRIA, CALIFORNIA 92233-5002.

ON, September 22, 2020, I SERVED THE FOREGOING:

(SET FORTH EXACT TITLE OF DOCUMENT(S) SERVED)

ON THE PARTY(S) HEREIN BY PLACING A TRUE COPY THEREOF, ENCLOSED IN A SEALED ENVELOPE(S) WITH POSTAGE THEREON FULLY PAID, IN THE UNITED STATES MAIL, IN A DEPOSIT BOX SO PROVIDED AT CALIPATRIA STATE PRISON, CALIPATRIA CALIFORNIA 92233-5002:

United States District Court
Central District of California
Office of the clerk (Attn: Joe Reper)
255 East Temple Street, Room# 180
Los Angeles, CA 90012

Attorney General
Xavier Beccerra
300 South Spring Street
Los Angeles, CA 90013

THERE IS DELIVERY SERVICE BY UNITED STATES MAIL AT THE PLACE SO ADDRESSED AND THERE IS REGULAR COMMUNICATION BY MAIL BETWEEN THE PLACE OF MAILING AND THE SO ADDRESSED. I DECLARE UNDER PENALTY OF PERJURY THE FOREGOING IS TRUE AND CORRECT.

DATE September 22, 2020

Deshon Atkins
(DECLARANT/PRISONER)

JS-6

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

DESHON AARON ATKINS,

Petitioner,

v.

W.L. MONTGOMERY,

Respondent.

Case No. 2:18-cv-06877-DOC-MAA

JUDGMENT

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

IT IS ORDERED AND ADJUDGED that the Petition is denied and the action is dismissed with prejudice.

DATED: August 26, 2020

David O. Carter

DAVID O. CARTER
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

DESHON AARON ATKINS,

Petitioner,

v.

W.L. MONTGOMERY,

Respondent.

Case No. 2:18-cv-06877-DOC-MAA

ORDER ACCEPTING REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Pursuant to 28 U.S.C. § 636, the Court has reviewed the Petition, the other records on file herein, and the Report and Recommendation of the United States Magistrate Judge.

The Court also has reviewed Petitioner's objections to the Report and Recommendation, which the Court received and filed on June 29, 2020 ("Objections"). (Objs., ECF No. 26.) As required by Federal Rule of Civil Procedure 72(b)(3), the Court has engaged in de novo review of the portions of the Report and Recommendation to which Petitioner specifically has objected.

First, Petitioner argues that the Magistrate Judge overlooked his challenge to the state court's factual summary of the conviction. (Objs., at 2.) The Court of Appeal's factual summary, which was adopted by the Magistrate Judge,

summarized the evidence presented at trial. (*See* Report and Recommendation, ECF No. 25, at 4–5 (quoting Lodgment ("LD") 4, ECF No. 10-4, at 3–5).) Although Petitioner argues that Beasley was not present at the scene of the crime and that he presented this argument to the state courts, Petitioner has not challenged any specific portion of the Court of Appeal's factual summary. (*See* Objs., at 2; *see also* Petition, ECF No. 1.) Thus, he has not shown by clear and convincing evidence that any of the information contained in the Court of Appeal's factual summary is incorrect. *See* 28 U.S.C. § 2254(e)(1); *Hedlund v. Ryan*, 854 F.3d 557, 563 (9th Cir. 2017).

Second, Petitioner argues that his insufficient evidence claim has merit because attempted murder requires the specific intent to kill, "[i]t's impossible to have intentions to kill someone who is not present at the scene of the crime," and the evidence presented at trial did not prove that Beasley was present at the scene of the shooting. (Objs., at 3.) This argument lacks merit for the reasons stated in the Report and Recommendation. (Report and Recommendation, at 20–22.)

Third, Petitioner argues that the Court of Appeal and Magistrate Judge improperly assumed that any inconsistencies in the trial court's evidentiary rulings were harmless, and that an evidentiary hearing is warranted on this issue. (Objs., at 3–5.) This argument also fails for the reasons discussed in the Report and Recommendation. (Report and Recommendation, at 20–21.)

Fourth, Petitioner asserts that the prosecutor "presented unsubstantiated evidence of Beasley to the jury as facts, causing confusion and persuading the jury to a finding of guilt." (Objs., at 5.) Petitioner refers to the following statement: "I have an officer that will testify he went to the hospital, saw the injury to Mark Beasley on the same date and time." (*Id.* (quoting 6 RT 1825)). However, the prosecutor made this statement outside of the jury's presence, during a sidebar discussion between the trial court judge, the prosecutor, and defense counsel. (*See*

6 RT 1824 (noting that the proceedings occurred in the hallway outside the presence of the jury)). Thus, Petitioner's argument that this statement caused the jury confusion and led to the guilty verdict lacks merit.

In sum, the Court finds no defect of law, fact, or logic in the Report and Recommendation. The Court concurs with and accepts the findings, conclusions, and recommendations of the United States Magistrate Judge, and overrules the Objections.

IT THEREFORE IS ORDERED that (1) the Report and Recommendation of the Magistrate Judge is accepted; and (2) Judgment shall be entered denying the Petition and dismissing this action with prejudice.

DATED: August 26, 2020

David O. Carter

DAVID O. CARTER
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

DESHON AARON ATKINS,

Petitioner,

v.

W.L. MONTGOMERY,

Respondent.

Case No. 2:18-cv-06877-DOC-MAA

ORDER DENYING CERTIFICATE OF APPEALABILITY

Rule 11 of the Rules Governing Section 2254 Cases in the United States District Courts provides:

> (a) **Certificate of Appealability.** The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant. Before entering the final order, the court may direct the parties to submit arguments on whether a certificate should issue. If the court issues a certificate, the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. § 2253(c)(2). If the court denies a certificate, a party may not appeal the denial but may seek a certificate from the court of appeals under Federal Rule of Appellate Procedure 22. A motion to reconsider a denial does not extend the time to appeal.

(b) **Time to Appeal.** Federal Rule of Appellate Procedure 4(a) governs the time to appeal an order entered under these rules. A timely notice of appeal must be filed even if the district court issues a certificate of appealability. These rules do not extend the time to appeal the original judgment of conviction.

Pursuant to 28 U.S.C. § 2253(c)(2), a certificate of appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right."

The Supreme Court has held that this standard means a habeas petitioner must show that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (citation and quotation marks omitted).

After duly considering Petitioner's contentions in support of the claims alleged in the Petition, the Court finds that Petitioner has not satisfied the requirements for a certificate of appealability. Accordingly, a certificate of appealability is DENIED.

DATED: August 26, 2020

David O. Carter

DAVID O. CARTER
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

DESHON AARON ATKINS, Petitioner, v. W.L. MONTGOMERY, Respondent.	Case No. 2:18-cv-06877-DOC (MAA) **REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE**

This Report and Recommendation is submitted to the Honorable David O. Carter, 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.

I. INTRODUCTION

On August 10, 2018, Petitioner Deshon Aaron Atkins ("Petitioner") initiated this action by filing a Petition for Writ of Habeas Corpus by a Person in State Custody pursuant to 28 U.S.C. § 2254 ("Petition"). (Pet., ECF No. 1.) The Petition originally asserted Three Grounds challenging Petitioner's state-court criminal conviction (*id.*); however, Petitioner subsequently withdrew Grounds Two and

Three (ECF No. 6). The remaining Ground One challenges the sufficiency of the evidence supporting Petitioner's conviction for attempted murder of Mark Beasley (count 4). (Pet., at 5.) [1]

As discussed below, the Court recommends that the Petition be denied and that this action be dismissed with prejudice.

II. PROCEDURAL SUMMARY

In Los Angeles County Superior Court, a jury convicted Petitioner of two counts of willful, deliberate, and premeditated attempted murder (Cal. Penal Code §§ 664/187(a); counts 4 and 5) and found to be true gang (Cal. Penal Code § 186.22(b)(1)(C)) and gun enhancements (Cal. Penal Code § 12022.53(c), (d), & (e)(1)). (1 CT, ECF No. 15-1, at 207–12.) Petitioner was sentenced to life plus forty-five years in state prison. (*Id*., at 243–53.)

Petitioner appealed his judgment of conviction to the California Court of Appeal. (LD 12–14, ECF Nos. 15-10 to -12.) On August 21, 2017, the California Court of Appeal ordered Petitioner's abstract of judgment modified to reflect 235 days of presentence conduct credit, and otherwise affirmed the judgment. (LD 1, ECF No. 10-1, at 22.) Petitioner filed a petition for review to the California Supreme Court. (LD 2, ECF No. 10-2.) On November 15, 2017, the California Supreme Court granted the petition for review and remanded the case to the California Court of Appeal with directions to vacate its decision and reconsider the case in light of S.B. 620, chapter 682, amending California Penal Code section 12022.53. (LD 3, ECF No. 10-3.)

[1] Pinpoint citations of briefs and Lodged Documents ("LD") (LD, ECF Nos. 10-1 to -7 and 15-10 to -15) in this Report and Recommendation refer to the page numbers appearing in the ECF-generated headers. Pinpoint citations of the Clerk's Transcript ("CT," ECF No. 15-1, 15-8 to -9) and Reporter's Transcript ("RT," ECF Nos. 15-2 to -7) refer to the transcripts' own volume- and page-numbering schemes.

On January 23, 2018, the California Court of Appeal ordered the abstract of judgment modified to reflect a change in custody credits, remanded to the trial court to consider whether to strike the firearm enhancements, and otherwise affirmed the judgment. (LD 4, ECF No. 10-4, at 23.) Petitioner filed a petition for review to the California Supreme Court. (LD 5, ECF No. 10-5.) On March 28, 2018, the California Supreme Court denied Petitioner's petition for review. (LD 6, ECF No. 10-6.) On April 30, 2018, the trial court denied Petitioner's request to strike the firearm enhancement. (LD 7, ECF No. 10-7, at 32.)

Petitioner initiated this action by filing the Petition on August 10, 2018. (Pet.) On September 4, 2018, the Court issued an Order stating that Grounds Two and Three of the Petition did not appear to be exhausted and provided Petitioner options to address the exhaustion issue. (ECF No. 5.) On September 24, 2018, Petitioner withdrew Grounds Two and Three. (ECF No. 6.) On October 5, 2018, the Court ordered Respondent to file a response to the Petition. (ECF No. 7.) On October 31, 2018, Respondent—unaware that Petitioner already had withdrawn Grounds Two and Three—filed a Motion to Dismiss Grounds Two and Three of the Petition as unexhausted ("Motion"). (Mot., ECF No. 9.) On February 28, 2019, the Court denied the Motion as moot and ordered Respondent to file an Answer within forty-five days. (ECF No. 12.) On May 7, 2019, the Court ordered Respondent to show cause why he failed to file a timely Answer. (ECF No. 13.) On May 10, 2019, Respondent filed an Answer to the Petition. (Answer, ECF No. 14.) On May 13, 2019—presumably before receiving a copy of the Answer—Petitioner filed a Motion for Default/Summary Judgment (ECF No. 16), which the Court denied on June 24, 2019. (ECF No. 20.) Plaintiff filed a Reply on June 11, 2019 (ECF No. 18) and, with the Court's permission, an Amended Reply on July 24, 2019. (Am. Reply, ECF No. 21.) The case is now ready for decision.

///

///

III. FACTUAL SUMMARY

Pursuant to 28 U.S.C. § 2254(e)(1), a factual summary from a state appellate court's opinion is entitled to a presumption of correctness that may be rebutted only by clear and convincing evidence that the facts were otherwise. *See Hedlund v. Ryan*, 854 F.3d 557, 563 (9th Cir. 2017). Petitioner does not challenge the factual summary in the California Court of Appeal's decision on Petitioner's direct appeal:

> Other than one eyewitness who described the shootings, but could not describe the shooters, virtually all the trial evidence came from investigating officers and a gang expert. We recount their testimony concerning the charges involving Beasley and Wright.[3]
>
> The 107 Hoover Criminals and 10-Deuce Budlong Gangster Crips are rival gangs. A member of the 107 Hoover Criminals was murdered on April 2, 2012. Later that same evening, Beasley and Wright, members of 10-Deuce Budlong Gangster Crips, were standing on 102nd Street near Normandie when a gray or white Acura pulled up and blocked a driveway. An eyewitness stepping out of her car across the street heard someone in the car shout "Hoover." The eyewitness heard popping noises and ran for cover.
>
> Wright was shot in his left leg and ankle, right thigh, left wrist, and back. Beasley was shot in his right middle finger. Los Angeles County Sheriff's Department Detective Levi Belvillle responded to the scene of the shooting and was informed a silver sedan was involved. A few hours later, Detective Belville spotted a silver Acura

---

[3] As noted, defendant was acquitted of charges in the unrelated crimes, and we omit a recitation of the facts concerning those offenses.

We set forth only a summary of the offenses and the investigation here. Facts specific to the defendant's appellate issues will be detailed *post*.

traveling at a high rate of speed. He attempted to pull over the car, but it did not stop. During the pursuit, two firearms were thrown from the Acura. Eventually, the Acura crashed.

Defendant, a member of the 107 Hoover Criminals, and another gang member got out of the car and ran. A third firearm was tossed during the foot chase. Defendant was apprehended. His hands tested positive for gunshot residue.

Detective Belville retrieved the firearms thrown from the Acura. Nineteen cartridge cases and one expended bullet collected at the scene of the 102nd Street shooting were determined to have been fired from the recovered firearms. There were no fingerprints on the weapons. The third firearm was not found.

Los Angeles County Sheriff's Department Detective Derek White was assigned as the lead investigator for the Beasley/Wright shootings. Detective White met with Wright on three occasions after the shooting. The first time was the following day, while Wright was in the ICU. The second time was a month later as Wright was preparing for his fourth surgery. On that occasion, May, 9, 2012, he showed Wright a sixpack photographic lineup containing defendant's photograph. Wright did not identify defendant as one of the shooters. The third interview was the next year, in 2013. Portions of the interviews were recorded, and the recordings were played for the jury.

Wright told an investigating officer he believed the 107 Hoover Criminals suspected the 10-Deuce Budlong Gangster Crips were involved in the murder earlier in the day on April 2, 2012, 107 Hoover Criminals shot in retaliation. Wright said Beasley was his best friend and was with him during the attack.

(LD 4, at 3–5.)

IV. STANDARD OF REVIEW

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

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

Pursuant to AEDPA, the "clearly established Federal law" that controls federal habeas review of state-court decisions consists of the holdings, as opposed to the dicta, of Supreme Court decisions "as of the time of the relevant state-court decision." *Williams v. Taylor*, 529 U.S. 362, 412 (2000).

Although a state-court decision may be both "contrary to" and "an unreasonable application of" controlling Supreme Court law, the two phrases have distinct meanings. *See id.* at 391, 412–13. A state-court decision is "contrary to" clearly established federal law if the decision either applies a rule that contradicts binding governing Supreme Court law or reaches a result that differs from the result the Supreme Court reached on "materially indistinguishable" facts. *Early v. Packer*, 537 U.S. 3, 8 (2002) (per curiam); *see also Woods v. Donald*, 135 S. Ct. 1372, 1377 (2015) ("[I]f the circumstances of a case are only 'similar to' our precedents, then the state court's decision is not 'contrary to' the holdings in those cases."). When a state-court decision adjudicating a claim is contrary to controlling Supreme Court law, the reviewing federal habeas court is "unconstrained by § 2254(d)(1)." *See Williams*, 529 U.S. at 406.

State-court decisions that are not "contrary to" Supreme Court law may be set aside on federal habeas review "only if they are not merely erroneous, but 'an *unreasonable* application' of clearly established federal law, or based on 'an *unreasonable* determination of the facts.'" *Packer*, 537 U.S. at 11 (quoting Section 2254(d)). A state-court decision that correctly identifies the governing legal rule may be rejected if it unreasonably applies the rule to the facts of a particular case. *See Williams*, 529 U.S. at 406 (providing, as an example, that a decision may state the *Strickland* standard correctly but apply it unreasonably). However, to obtain federal habeas relief for such an "unreasonable application," a petitioner must show that the state court's application of Supreme Court law was "objectively unreasonable." *Woodford v. Viscotti*, 537 U.S. 19, 27 (2002) (per curiam). An objectively unreasonable application is "not merely wrong; even 'clear error' will not suffice." *White v. Woodall*, 572 U.S. 415, 419 (2014) (quoting *Lockyer v. Andrade*, 538 U.S. 63, 75-76 (2003)). Instead, "a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington v. Richter*, 562 U.S. 86, 103 (2011). The same standard of objective unreasonableness applies where the petitioner is challenging the state court's factual findings pursuant to Section 2254(d)(2). *See Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003) ("[A] decision adjudicated on the merits in a state court and based on a factual determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state-court proceeding . . . .").

The California Court of Appeal rejected Petitioner's claim on the merits in a reasoned decision. (LD 4.) The California Supreme Court summarily denied review. (LD 6.) For the purpose of AEDPA review, the California Court of Appeal's denial of is the relevant state-court adjudication on the merits. *See Wilson v. Sellers*, 138 S. Ct. 1188, 1192 (2018) (holding that where state supreme court

decision is unexplained, "the federal court should 'look through' the unexplained decision to the last related state-court decision that does provide a relevant rationale" and "presume that the unexplained decision adopted the same reasoning"); *see also Anderson v. Gipson*, 902 F.3d 1126, 1131 (9th Cir. 2018) (focusing on reasoning in California Court of Appeal decision where California Supreme Court denied petition for certiorari without comment).

V. DISCUSSION

In Ground One, Petitioner's sole surviving claim, Petitioner contends that there was insufficient evidence to prove all the elements of attempted murder of Mr. Beasley (count 4). (Pet., at 5.)

A. Background

The Court of Appeal rejected Petitioner's sufficiency of the evidence claim with respect to the attempted murder of Mr. Beasley as follows:

> **I. Sufficiency of the Evidence to Support Defendant's Conviction for Attempted Murder of Beasley**
>
> Defendant contends the only evidence of Beasley's presence at the scene of the shooting was hearsay testimony admitted not for its truth, but solely to impeach Wright. Alternatively, he argues evidence of Beasley's presence, if properly admitted, was unpersuasive. We disagree and find sufficient evidence supports the conviction. [4]

[4] Defendant also discusses at length the transferred intent and "kill zone" doctrines, but does not expressly tie them to an appellate issue. The argument appears to suggest that Wright, with multiple gunshot wounds, and not Beasley, struck only in his finger, was the intended target. No substantial evidence supports the application of either doctrine.

A. Standard of Review

In *People v. Edwards* (2013) 57 Cal. 4th 658, the Supreme Court set forth the standard of review when evaluating a challenge to the sufficiency of the evidence: "'[W]e review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.'" (*Id*. at p. 715.) In considering whether substantial evidence supports a conviction, "we do not reweigh the evidence, resolve conflicts in the evidence, draw inferences contrary to the verdict, or reevaluate the credibility of witnesses." (*People v. Little* (2004) 115 Cal. App. 4th 766, 771.)

B. Trial Evidence

Beasley was in state prison at the time of defendant's trial. No evidence was offered as to any out-of-court statements he might have made to law enforcement investigating the shootings.

Wright did appear at trial on July 25, 2016, under the compulsion of a subpoena. With a fair amount of prompting, he described his gunshot wounds and surgeries and the general layout of the neighborhood where the shooting occurred. He admitted he went to high school with Beasley. Otherwise he remembered very little, e.g., "I don't remember nothing," "I just woke up in the hospital," "I don't remember talking to any police." When asked a series of questions about whether he told investigating officers details of the shooting and the perpetrators, his invariable responses were "No, ma'am" or "No."

///

The prosecutor asked Wright, "Did you tell the detectives . . . that you were best friends with Mark Beasley who was the other victim of the shooting?" After he responded, "No, ma'am," defense counsel moved to strike that portion of the question asking whether Beasley "was the other victim of the shooting" on the basis it lacked foundation. The trial court overruled the objection. Counsel initially asked to approach for a sidebar, but the trial court provided the jurors with a routine admonition that advised in part, "an attorney may ask a question that assumes the existence of a fact. Unless the witness or other evidence in the case supports that, the attorney's question itself is not evidence. . . ." Defense counsel withdrew her request to approach and advised, "I will clarify on cross, your Honor." She did not return to the subject on cross-examination, however.

Wright was not the first or last witness whose memory failed. Several witnesses later, the trial court advised counsel outside the jury's presence: "[S]uffice it to say that with these witnesses, I allowed the prosecutor to impeach them with these prior consistent statements. If the record doesn't bear this out, I should indicate this court has found their answers were evasive and false, qualifying for examination under Evidence Code section 770."

Later that same day (July 25, 2016), Detective White took the stand and the following exchange occurred without objection:

"[Prosecutor]: Did Dashon [Wright] ever tell you about Mark Beasley being shot the same day he was at the same location?

"[Detective White]: In prior interviews we discussed that, yes.

"Q What did he tell you then?

///

///

"A That they were standing outside of 102nd, hanging out, and that's when the Acura drove up and Mark had been shot as well as him during that incident."

There was a break in the trial, and Detective Wright resumed his testimony on August 3, 2016. The detective had recorded portions of his interviews with Wright, and they were played for the jury. There was no mention of Beasley in the recorded interviews, and the prosecutor picked up that thread:

"[Prosecutor]: . . . [I]t's not on the recording. Did you ever ask [Wright] about who he was with or if he was with [Mr.] Beasley which has come up during this trial?

"[Detective White]: We had spoken about that, yes.

"Q What did he say about Mark Beasley?

"[Defense Counsel]: Objection. Hearsay."

With that objection, court and counsel adjourned to the hallway for an on-the-record sidebar:

"[Defense Counsel]: . . . I think at this point we're getting to where this officer is not only trying to impeach Mr. Wright who claimed at one point he was with Beasley and another point he said he didn't know Mr. Beasley—I think People are getting close to offering it for the truth of the matter that Mr. Beasley, in fact, was with Mr. Wright *and got injured*, and . . . that would be absolute hearsay, admitted for the truth of the matter—I would ask [the jury] be instructed that it should only be considered as to whether or not Mr. Wright told the truth about his relationship with Mr. Beasley." (Italics added.)

The trial judge asked whether the prosecutor was "trying to elicit from the detective statements made by Mr. Wright for

impeachment purposes." The prosecutor responded, "Not for the truth of the matter. *I have an officer that will testify he went to the hospital, saw the injury to Mark Beasley on the same date and time*." (Italics added.)

The trial judge asked defense counsel if she sought an instruction that the jurors "ought not to consider it for the truth of the matter asserted?" Defense counsel responded, "Only as it impeaches or substantiates." She added, "Just a cautionary instruction. It's been offered to impeach previous statements made by Mr. Wright."

Court and counsel wrapped up the discussion and when they returned to the courtroom, the trial judge told the jurors the prosecutor was about to ask a question "that sounds as if it may be interpreted as being offered for the truth of the matter asserted. That's why [defense counsel] objected." The court added, "these particular statements that were allegedly made by Mr. Wright to Detective White are not being offered for the truth of the matter asserted but being offered for the purpose of impeaching, impeaching or substantiating the testimony of Mr. Wright."

The following exchange then occurred:

"[Prosecutor]: . . . in regards to Mr. Dashon Wright in this interview, did he tell you anything about Mark Beasley, or if he was with Mark Beasley, anything of that nature?

"[Detective White]: He did say he was with Mark Beasley at the time of the shooting. Yes.

"Q Did he tell you if he witnessed Mark Beasley get any injuries?

"A He knew Mark had been shot too. Yes.

"[Defense Counsel]: Motion to strike. That answer is

nonresponsive. It required a yes or no. It went beyond the court's ruling.

"The Court: Overruled. [¶] Again, I think it makes a little bit more sense. *These last two answers by the detective again are not being offered for the truth of the matter asserted* but to impeach or substantiate statements previously made by Mr. Wright on this particular topic. [¶] You may proceed." (Italics added.)

The prosecutor did so, moving on to a different topic.

Later that day, rather than call a witness to testify Beasley had been shot in the finger, the parties stipulated to that fact.

At the close of the prosecution case, defendant moved for acquittal on the Beasley attempted murder count: "I think there is absolutely no evidence of an attempted murder of Mark Beasley, period." The prosecutor countered with, "It was the impeachment of Dashon Wright. . . . [Beasley] was with Dashon at the time at the scene . . . ." The trial judge asked whether that was "problematic . . . [b]ecause didn't we discuss the limited nature of that testimony, that it's not being offered for the truth of the matter asserted? The prosecutor essentially replied it was a question for the jury. There was no additional argument, and the trial court denied the motion.

C. Analysis

A statement "made other than by a witness while testifying at the hearing . . . that is offered to prove the truth of the matter stated" is hearsay. (Evid. Code, § 1200, subd. (a).) "Except as provided by law, hearsay evidence is inadmissible." (Evid. Code, § 1200, subd. (b).)

As defendant asserts, Detective White's testimony concerning Wright's statement placing Beasley at the scene of the shootings was

hearsay. That brief testimony was elicited twice: first on July 25, 2016, the same day Wright denied telling Detective White that Beasley was there, and a second time on August 3, 2016. On the first occasion, the testimony was received without a hearsay objection or a court admonition to the jury.[5] A hearsay claim as to the July 25, 2016 testimony now has been forfeited. (*People v. Wheeler* (1992) 4 Cal. 4th 284, 300.)

The failure to object does not alter our analysis, however. The trial court properly would have overruled a timely objection based on its finding that witnesses, including Wright, were intentionally evasive. Before Detective White offered this testimony, the trial court advised counsel the provisions of Evidence Code sections 770 and 1235 applied. Under oath, Wright denied ever talking to Detective White, much less telling him Beasley was present. The detective testified concerning Wright's inconsistent statements, and jurors were properly instructed they could consider that testimony for its truth. (See, e.g., *People v. Homick* (2012) 55 Cal. 4th 816, 859 (*Homick*); CALCRIM No. 318.[6])

---

[5] On July 25, 2016, defense counsel objected on the basis of lack of foundation, but that objection was overruled.

[6] The trial court instructed the jury with CALCRIM 318 as follows:

"You have heard evidence of statements that a witness made before the trial. If you decide that the witness made those statements, you may use those statements in two ways:

"1. To evaluate whether the witness's testimony in court is believable;

"AND

"2. As evidence that the information in those earlier statements is true."

On the second date, August 3, 2016, defense counsel did lodge a hearsay objection before Detective White could testify as to what Wright told him about Beasley. That led to the on-the-record discussion reproduced above and the trial court's admonition to the jury. Our review of the transcript persuades us the detective's testimony concerning whether Beasley was shot was not offered for the truth,[7] and the jury was properly so instructed.[8]

But the detective also reiterated his earlier testimony that Wright told him Beasley was at the scene of the shooting. While the sidebar focused on Beasley's injuries, the trial court's admonition was not so limited. The admonition can be fairly read as encompassing both aspects of Detective White's testimony. To the extent the trial court's admonition applied to evidence Beasley was standing with Wright when the shooting began, it was inconsistent with the court's earlier ruling under Evidence Code sections 770 and 1235.

The inconsistency only could have inured to defendant's benefit, however. The jury was properly instructed with CALCRIM Nos. 224 [if there are "two or more reasonable conclusions . . . and one points to innocence and another to guilt, you must accept the one that points to innocence"], 302 [how to evaluate conflicting evidence], 303, and 318.

---

[7] That fact was established later the same day by stipulation.

[8] CALCRIM No. 303 advised, "During the trial, certain evidence was admitted for a limited purpose. You may consider that evidence only for that purpose and for no other."

Despite Wright's recalcitrance, the record suggests he did not see Beasley shot and anything he said to Detective White would have been hearsay, making the detective's testimony double hearsay.

Moreover, the inconsistency did not appear to engender confusion during trial as to the admissibility of the evidence. The prosecutor referenced Beasley only briefly in her initial closing argument and not at all in her rebuttal.[9]

Defense counsel's closing argument stressed the paucity of the evidence placing *defendant* at the scene of the shooting: "There is very suspect testimony through tape recording that [defendant] was present at the time of the shooting of Dashon Wright that I would submit to you that that was based on police suggestion and inference as opposed to Dashon Wright's recollection." She had this to say about Beasley:

> As far as Mark Beasley goes, we don't know who he is, where he is—well, we know where he is now. But at the time of the offense, you know, Dashon Wright initially said he wasn't even there, and all of a sudden he is there. Nobody could identify him. I do think there is some kind of karma in the fact that [Deputy] Castaneda made such a big deal about the middle finger with the gang sign showing disrespect and supposedly the only injury Mr. Beasley received was a gunshot to his middle finger. But I don't know what he was doing with [his

[9] The prosecutor's only comments concerning Beasley were: "And Mark Beasley, you did not hear from Mark Beasley, yet a fifth gangster, and he is serving time in prison and could not join us, but what we know about Mark Beasley—and he is alleged as a victim nonetheless. You didn't get to hear from him. You didn't get to see him, but you heard evidence that he was standing on the street with Dashon Wright, and you heard evidence that he ended up in the hospital too with a gunshot wound to his finger."

> middle finger] before that, and we don't really have any evidence of it, just an officer said he saw an injury to his middle finger. But perhaps that is the only karma that resulted out of this case."

Defense counsel characterized the case against defendant as being based on "a lot of speculation, a lot of inconsistencies, a lot of lies because . . . all the witnesses lied or committed perjury . . . . We've got police work that was never really completed, never undertaken seriously." She added, "If evidence is susceptible to two interpretations and both of those interpretations are reasonable and one points to guilty and one points to not guilty, you must adopt the one that points to not guilty."

The requirements of Evidence Code sections 770 and 1235 were met. At trial, Wright persistently denied making any statements to Detective White, including those that were preserved on audio recordings played for the jury. While Wright's statement concerning Beasley's presence at the scene was not recorded, his denials at trial justified the trial court's decision to permit the detective to repeat the Beasley statement and the jury to consider it for the truth. (*Homick*, *supra*, 55 Cal.4th at p. 859 ["As long as there is a reasonable basis in the record for concluding that the witness's 'I don't remember' statements are evasive and untruthful, admission of his or her prior statements is proper"].) We recognize the jury was given an inconsistent admonition during the evidentiary portion of the trial. Any error on that score was harmless, however, in light of the jury instructions.[10]

---

[10] Defendant does not assert any instructional error.

> Alternatively, defendant contends the evidence of Beasley's presence was insufficient because it was not corroborated by any of the recorded Wright interviews. Corroboration was not necessary and, as the jury was instructed, the testimony of one witness was sufficient. (CALCRIM No. 301.)
>
> Based on our conclusion concerning the admissibility of the impeachment evidence for its truth, it is not necessary to separately address defendant's related claims of prosecutorial misconduct and ineffective assistance of trial counsel. The jury did hear "evidence that [Beasley] was standing on the street with Dashon Wright, and . . . he ended up in the hospital too with a gunshot wound to his finger." There was no misconduct in the prosecutor's so arguing. Without prosecutorial misconduct, defense counsel did not provide ineffective assistance by failing to object.

(LD 4, at 5–15.)

The California Supreme Court, presented with this claim in a petition for review, summarily denied discretionary review without comment or citation of authority. (LD 6.)

B. Legal Standard

"[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970). When a habeas petitioner challenges the sufficiency of the evidence supporting the jury's verdict, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). "[F]ederal courts must look to state law for 'the

substantive elements of the criminal offense,' but the minimum amount of evidence that the Due Process Clause requires to prove the offense is purely a matter of federal law." *Coleman v. Johnson*, 566 U.S. 650, 655 (2012) (per curiam) (citation omitted).

Jackson establishes a two-step inquiry for analyzing a challenge to a conviction based on sufficiency of the evidence. *United States v. Nevils*, 598 F.3d 1158, 1164 (9th Cir. 2010). First, a reviewing court must consider the evidence in the light most favorable to the prosecution. *Id*. At this step, a reviewing court "may not usurp the role of the trier of fact by considering how it would have resolved the conflicts, made the inferences, or considered the evidence at trial." *Id*. "Rather, when 'faced with a record of historical facts that supports conflicting inferences' a reviewing court 'must presume—even if it does not affirmatively appear in the record—that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution.'" *Id*. (quoting *Jackson*, 443 U.S. at 326).

At the second step, "the reviewing court must determine whether this evidence, so viewed, is adequate to allow '*any* rational trier of fact [to find] the essential elements of the crime beyond a reasonable doubt.'" *Nevils*, 598 F.3d at 1164 (alteration in original) (quoting *Jackson*, 443 U.S. at 326). A "reviewing court may not ask itself whether it believes that the evidence at the trial established guilt beyond a reasonable doubt, . . . only whether *any* rational trier of fact could have made that finding." *Nevils*, 598 F.3d at 1164 (citations and internal quotations omitted). A jury verdict must stand unless it "was so insupportable as to fall below the threshold of bare rationality." *Coleman*, 566 U.S. at 656.

Further, when, as here, both *Jackson* and AEDPA apply to the same claim, the claim is reviewed under a "twice-deferential standard." *Parker v. Matthews*, 567 U.S. 37, 43 (2012) (per curiam). Accordingly, the Court's inquiry is limited to whether the California Court of Appeal's rejection of Petitioner's insufficiency-of-the-evidence claim was an objectively unreasonable application of *Jackson*. *See*

Emery v. Clark, 643 F.3d 1210, 1213–14 (9th Cir. 2011); *Juan H. v. Allen*, 408 F.3d 1262, 1275 n.13 (9th Cir. 2005).

C. Discussion

Petitioner contends that there was insufficient evidence to support his conviction for attempted murder of Mr. Beasley (count 4) because the only evidence placing Mr. Beasley at the scene of the shooting came from Detective White's hearsay testimony, which was admitted solely to impeach Mr. Wright regarding his prior inconsistent statement and not for its truth. (Pet., at 5; Am. Reply, at 3.) Petitioner argues that Detective White said that Mr. Wright stated that Mr. Beasley was at the scene of the crime, but Detective White has no corroborating evidence as proof. (Pet., at 5.) Petitioner asserts that all parties involved agree that Mr. Beasley sustained a gunshot wound, but that there is no evidence that his gunshot wound was sustained in this incident. (Am. Reply, at 4.)

"Insufficient evidence claims are reviewed by looking at the elements of the offense under state law." *Macdonald v. Hedgpeth*, 907 F.3d 1212, 1218 (9th Cir. 2018) (quoting *Emery*, 643 F.3d at 1214). "Attempted murder requires the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing." *People v. Booker*, 51 Cal. 4th 141, 177–78 (2011).

The Court of Appeal did not unreasonably apply *Jackson* in rejecting Petitioner's insufficiency-of-the-evidence claim with respect to his conviction for attempted murder of Mr. Beasley. The Court of Appeal observed that Detective White's testimony concerning Mr. Wright's statement placing Mr. Beasley at the scene of the shootings—on July 25, 2016 and August 3, 2016—was hearsay. (LD 4, at 10.) The Court of Appeal noted that counsel failed to object on July 25, 2016, but that such failure did not alter the analysis, as the trial court would have overruled any hearsay objection because Mr. Wright had been "intentionally evasive." (*Id.*) Under California law, "[a] statement by a witness that is inconsistent with his or her

trial testimony is admissible to establish the truth of the matter asserted in the statement under the conditions set forth in Evidence Code sections 1235 and 770." *People v. Johnson*, 3 Cal. 4th 1183, 1219 (1992). The California Court of Appeal determined that under California Evidence Code sections 770 and 1235, the trial court properly instructed the jurors that they could consider for its truth Detective White's testimony regarding Wright's prior inconsistent statement placing Mr. Beasley at the scene of the shooting, given that there was a reasonable basis in the record for concluding that Wright's testimony was "intentionally evasive." (LD 4, at 10–14.) This Court is bound by the California Court of Appeal's interpretation of state law. *See Bradshaw v. Richey*, 546 U.S. 74, 76 (2005) ("We have repeatedly held 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.").

The Court of Appeal found that on the second date of Detective White's testimony, August 3, 2016, defense counsel did lodge a hearsay objection. (LD 4, at 11.) The Court of Appeal concluded that Detective White's testimony regarding Mr. Beasley was not offered for the truth, and the jury was properly instructed. (*Id.*) However, the Court of Appeal noted that Detective White reiterated his testimony that Mr. Wright told him that Mr. Beasley was present at the scene of the shooting, and the trial court's subsequent admonition arguably encompassed both aspects of Detective White's testimony. (*Id.*, at 12.) To the extent that the trial court's admonition applied to evidence that Mr. Beasley was present when the shooting began, the Court of Appeal recognized that this was inconsistent with the trial court's earlier ruling under Evidence Code sections 770 and 1235. (*Id.*) Nonetheless, the Court of Appeal concluded that any inconsistency inured to Petitioner's benefit, as the jury was instructed that if there were two or more reasonable conclusions, it must accept the one that points to innocence, not guilt, and as such, any error was harmless. (*Id.* at 12, 14.)

Thus, the jury was presented with evidence—which the Court of Appeal held was permissible to be considered for its truth—that Mr. Beasley was standing in the street with Mr. Wright, that they were shot, and that Mr. Beasley ended up in the hospital with a gunshot wound to his finger. A rational juror believing this evidence could have found Petitioner guilty of attempted murder of Mr. Beasley. A jury's credibility determinations are entitled to "near-total deference under *Jackson*." *Bruce v. Terhune*, 376 F.3d 950, 957 (9th Cir. 2004). In addition, this Court may not consider how it would have resolved any conflicts, made inferences, or considered the evidence at trial, but instead must presume that the jury resolved any alleged conflicts in favor of guilt. *See Nevils*, 598 F.3d at 1164. The only question under *Jackson* is whether the jury's finding of guilt "was so unsupportable as to fall below the threshold of bare rationality." *Coleman*, 566 U.S. at 656. The Court of Appeal did not think so, and "that determination in turn is entitled to considerable deference under AEDPA." *See id.* (citation omitted).

In sum, the California Court of Appeal's rejection of Petitioner's claim that the evidence was insufficient to support his conviction for attempted murder of Mr. Beasley did not involve an objectively unreasonable application of the *Jackson* standard. *See* 28 U.S.C. § 2254(d)(1); *Emery*, 643 F.3d at 1213–14.

VIII. RECOMMENDATION

IT THEREFORE IS RECOMMENDED that the District Court 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: 05/21/20

MARIA A. AUDERO
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

DESHON AARON ATKINS,

Petitioner,

v.

W.L. MONTGOMERY,

Respondent.

Case No. 2:18-cv-06877-DOC-MAA

ORDER DENYING MOTION TO DISMISS AND REQUIRING BRIEFING ON THE MERITS

On August 3, 2018, Petitioner Deshon Aaron Atkins constructively filed a petition for writ of habeas corpus. ("Petition," ECF No. 1.) On September 20, 2018, Petitioner constructively filed a document entitled "Notice of Withdrawal" in which he elected to withdraw Grounds Two and Three of the Petition because those grounds are unexhausted. (ECF No. 6.) Petitioner requested to proceed solely on Ground One. (*Id.*)

The Court construed Petitioner's Notice of Withdrawal to effect an amendment of his Petition pursuant to Federal Rule of Civil Procedure 15(a)(1). In the interest of judicial economy, the Court waived Local Rules 15-1 and 15-2 for the limited purpose of allowing Petitioner to proceed on Ground One by means of the Petition as originally filed, omitting references to Grounds Two and Three.

///

The Court ordered Respondent to file a response to the Petition. (ECF No. 7.) On October 31, 2018, Respondent filed a motion to dismiss the petition on the basis that Grounds Two and Three are unexhausted. ("Motion to Dismiss," ECF No. 9.) Petitioner opposed, noting that he already had withdrawn his unexhausted claims. (*See* ECF No. 11.)

Because Petitioner no longer asserts Grounds Two and Three in this action, the Court **DENIES** the Motion to Dismiss as moot.

Respondent shall file and serve an Answer to the Petition no later than forty-five (45) days after the date of this Order. At the time the Answer is filed, Respondent shall electronically lodge with the Court all records bearing on the merits of Petitioner's claims, including the briefs specified in Rule 5(d) of the § 2254 Rules. The Court may issue a subsequent order for the lodging of a paper copy of a lodgment if the lodgment is not usable in its electronic format. *See* C.D. Cal. L.R. 5-1. The Answer also specifically shall address the necessity for an evidentiary hearing to resolve any issue.

Petitioner may file a single, optional Reply responding to matters raised in the Answer no later than thirty (30) days after the date of service of the Answer. Any Reply filed by Petitioner shall (a) state whether Petitioner admits or denies each allegation of fact contained in the Answer, (b) be limited to facts or arguments responsive to matters raised in the Answer, and (c) not raise new grounds for relief that were not asserted in the Petition. Grounds for relief withheld until the Reply will not be considered. The Reply shall not exceed ten (10) pages in length absent advance leave of Court for good cause shown.

IT IS SO ORDERED.

DATED: February 28, 2019

UNITED STATES MAGISTRATE JUDGE
HON. MARIA A. AUDERO

XAVIER BECERRA
Attorney General of California
GERALD A. ENGLER
Chief Assistant Attorney General
LANCE E. WINTERS
Senior Assistant Attorney General
STEPHANIE C. BRENAN
Supervising Deputy Attorney General
JONATHAN M. KRAUSS
Deputy Attorney General
State Bar No. 279101
300 South Spring Street, Suite 1702
Los Angeles, CA 90013
Telephone: (213) 269-6123
Facsimile: (213) 897-6496
E-mail: DocketingLAAWT@doj.ca.gov
Jonathan.Krauss@doj.ca.gov
Attorneys for Respondent

IN THE UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

DESHON AARON ATKINS, Petitioner, **v.** **W. L. MONTGOMERY,** Respondent.	CV 18-06877-DOC-(MAA) **MOTION TO DISMISS PETITION FOR WRIT OF HABEAS CORPUS; MEMORANDUM OF POINTS AND AUTHORITIES** The Honorable Maria A. Audero United States Magistrate Judge

Respondent W.L. Montgomery, Warden of Calipatria State Prison in Calipatria, California, moves to dismiss the Petition for Writ of Habeas Corpus ("Petition" or "Pet.") on the basis that Grounds Two and Three are unexhausted because Petitioner never presented these claim to the California Supreme Court.

This Motion is based on this Court's file, the records and files in this case, and on such other matters as may properly be submitted to the Court. It is requested that this Motion be submitted on written briefs without a hearing pursuant to Local Rule 7-15 for the Central District of California.

WHEREFORE, Respondent respectfully requests that the Petition for Writ of Habeas Corpus be dismissed.

Dated: October 31, 2018

Respectfully submitted,

XAVIER BECERRA
Attorney General of California
GERALD A. ENGLER
Chief Assistant Attorney General
LANCE E. WINTERS
Senior Assistant Attorney General
STEPHANIE C. BRENAN
Supervising Deputy Attorney General

/s/ *Jonathan M. Krauss*
JONATHAN M. KRAUSS
Deputy Attorney General
Attorneys for Respondent

MEMORANDUM OF POINTS AND AUTHORITIES

PROCEDURAL HISTORY

Following a trial, a jury convicted Petitioner of two counts of willful, deliberate, and premeditated attempted murder (Cal. Penal Code §§ 664/187(a); counts 4 & 5)) and found gang (Cal. Penal Code § 186.22(b)(1)(C)) and gun enhancements (Cal. Penal Code § 12022.53(c), (d), & (e)(1)) to be true.[1] Petitioner was sentenced to life plus forty-five years in state prison. (Lodged Doc. 1 at 2.)[2]

Petitioner appealed his conviction in California Court of Appeal case number B278735. On July 27, 2017, the California Court of Appeal ordered the abstract of judgment modified to reflect a change in custody credits and otherwise affirmed the conviction. (Lodged Doc. 1.) Petitioner filed a petition for review in California Supreme Court case number S244320. (Lodged Doc. 2.) On November 15, 2017, the supreme court granted the petition for review and remanded the case back to the court of appeal with directions to vacate its decision and reconsider the cause in light of California Senate Bill 620, which amended California Penal Code section 12022.53(h). (Lodged Doc. 3.)

On January 23, 2018, after additional briefing by the parties, the California Court of Appeal, in case number B278735, ordered the abstract of judgment modified to reflect a change in custody credits, remanded to the trial court to consider whether to strike the firearm enhancements, and otherwise affirmed the judgment. (Lodged Doc. 4.) Petitioner filed a petition for review in California Supreme Court case number S246788. (Lodged Doc. 5.) On March 28, 2018, the supreme court denied discretionary review. (Lodged Doc. 6.) On April 10, 2018,

[1] Petitioner was acquitted of three other counts of attempted murder arising out of a separate incident. (Lodged Doc. 1 at 2 n.1.)

[2] Copies of various records pertaining to Petitioner's direct appeal and collateral filings are being lodged, as indexed in the Notice of Lodging, concurrently with this Motion.

the superior court denied Petitioner's request to strike the firearm enhancement. (Lodged Doc. 7 at 32.)

On August 10, 2018, Petitioner filed the instant Petition. (Dkt. No. 1.)

PETITIONER'S CONTENTIONS

1. Insufficient evidence was presented in support of Petitioner's count 4 attempted murder conviction. (Pet. at 5.)[3]

2. Petitioner's trial counsel was ineffective because she was biased against Petitioner, she told the jury there was "suspect testimony through tape recording" that Petitioner was present when Dashon Wright was shot, and she failed to object to the admission of improper evidence. (Pet. at 5-6.)

3. Insufficient evidence was presented in support of the California Penal Code section 12022.53(d) firearm enhancement. (Pet. at 6.)

ARGUMENT

GROUNDS TWO AND THREE ARE UNEXHAUSTED BECAUSE PETITIONER NEVER PRESENTED THOSE CLAIMS TO THE CALIFORNIA SUPREME COURT

In the instant Petition, Petitioner presents three claims to this Court. The first challenges the sufficiency of the evidence in support of his count 4 attempted murder conviction. (Pet. at 5.) That claim corresponds with the sole claim presented in Petitioner's two petitions for review on direct appeal. (Lodged Doc. 2 at 9-13; Lodged Doc. 5 at 10-14.) Petitioner's second claim alleges that he received ineffective assistance of trial counsel ("IAC") for various reasons. (Pet. at 5-6.) The third claim challenges the sufficiency of the evidence in support of one of the firearm enhancements. (Pet. at 6.) However, because Petitioner did not present his IAC claim or his enhancement sufficiency claim in either of his two petitions for review, those claims are unexhausted.

[3] For ease of reference, Respondent will cite to the Petition according to the consecutive page numbering provided by the Court's docketing system.

A. Applicable Law Governing Exhaustion

Exhaustion of state remedies is a prerequisite to a federal court's consideration of claims sought to be presented by a state prisoner in federal habeas corpus. 28 U.S.C. § 2254(b); *Picard v. Connor*, 404 U.S. 270, 275 (1971); *Wooten v. Kirkland*, 540 F.3d 1019, 1025 (9th Cir. 2008). To satisfy the state exhaustion requirement, the petitioner must fairly present his federal claims to the state's highest court. *Rose v. Lundy*, 455 U.S. 509, 515 (1982).

A claim has not been fairly presented unless the prisoner has described in the state court proceedings both the operative facts and the federal legal theory on which his contention is based. *See Gray v. Netherland*, 518 U.S. 152, 162-63 (1996); *Gatlin v. Madding*, 189 F.3d 882, 888 (9th Cir. 1999). Indeed, "fair presentation" requires that a petitioner expressly alert the state's highest court to the federal basis of his claim by "citing in conjunction with the claim the federal source of law on which he relies or a case deciding such a claim on federal grounds, or by simply labeling the claim 'federal.'" *Baldwin v. Reese*, 541 U.S. 27, 32 (2004) (finding that "ineffective assistance of appellate counsel" claim was not fairly presented to the state's highest court because the petitioner did not properly alert the court to the federal nature of the claim).

Moreover, "a state prisoner does not 'fairly present' a claim to a state court if that court must read beyond a petition or a brief (or a similar document) that does not alert it to the presence of a federal claim in order to find material, such as a lower court opinion in the case, that does so." *Baldwin v. Reese*, 541 U.S. at 32; *accord Castillo v. McFadden*, 399 F.3d 993, 999-1000 (9th Cir. 2005); *Casey v. Moore*, 386 F.3d 896, 911-15 (9th Cir. 2004). Furthermore, the citation of a relevant federal constitutional provision in relation to another claim does not satisfy the exhaustion requirement. *Baldwin v. Reese*, 541 U.S. at 33; *Castillo v. McFadden*, 399 F.3d at 1003 ("Exhaustion demands more than drive-by citation,

detached from any articulation of an underlying federal legal theory."). The petitioner has the burden of demonstrating he has exhausted available state remedies. *Williams v. Craven*, 460 F.2d 1253, 1254 (9th Cir. 1972); *see Werts v. Vaughn*, 228 F.3d 178, 192 (3d Cir. 2000).

If a petition includes both exhausted and unexhausted claims, it constitutes a "mixed petition," which must be dismissed unless the unexhausted claims are stricken. *Pliler v. Ford*, 542 U.S. 225, 230 (2004) (citing *Rose v. Lundy*, 455 U.S. at 522); *but see Rhines v. Weber*, 544 U.S. 269, 275-78 (2005).

B. Grounds Two and Three Were Never Presented to the California Supreme Court

Petitioner has made only two filings to the California Supreme Court: (1) his first petition for review on direct appeal (Lodged Doc. 2); and (2) his second petition for review, filed after the California Supreme Court remanded the case back to the California Court of Appeal (Lodged Doc. 5). In both petitions, Petitioner raised only one claim, challenging the sufficiency of the evidence presented in support of his count 4 attempted murder conviction (Lodged Doc. 2 at 9-13; Lodged Doc. 5 at 10-14), which corresponds with Ground One of the instant Petition. Accordingly, Ground One has been exhausted.

Grounds Two and Three, however, remain unexhausted. As Petitioner acknowledges (*see* Pet. at 7), he failed to present either claim in either of his two petitions for review on direct appeal, and he has not filed a state habeas corpus petition in the state's highest court. Because Petitioner did not "fairly present" these claims to the California Supreme Court, they remain unexhausted. *See Gray v. Netherland*, 518 U.S. at 162-63; *Gatlin v. Madding*, 189 F.3d at 888.

/ / /

/ / /

/ / /

/ / /

CONCLUSION

Because Grounds Two and Three are unexhausted, Respondent respectfully submits that the Petition should be dismissed or the unexhausted claims stricken.[4]

Dated: October 31, 2018

Respectfully submitted,

XAVIER BECERRA
Attorney General of California
GERALD A. ENGLER
Chief Assistant Attorney General
LANCE E. WINTERS
Senior Assistant Attorney General
STEPHANIE C. BRENAN
Supervising Deputy Attorney General

/s/ *Jonathan M. Krauss*
JONATHAN M. KRAUSS
Deputy Attorney General
Attorneys for Respondent

LA2018602381
53122938.docx

[4] Petitioner may seek redress on his unexhausted claims by filing a habeas corpus petition in the California Supreme Court. *See McQuown v. McCartney*, 795 F.2d 807, 810 (9th Cir. 1985); *In re Clark*, 5 Cal. 4th 750, 759, 763, 765, 767 (1993); Cal. Penal Code § 1473. The fact that a procedural bar "may" preclude the petitioner from returning to state court for a ruling on the merits of his unexhausted claims "in no way nullifies the fact that he had an adequate state remedy that has not been exhausted." *Tamalini v. Stewart*, 249 F.3d 895, 899 n.2 (9th Cir. 2001) (citing *Coleman v. Thompson*, 501 U.S. 722, 749-50 (1991)); *cf. Castille v. Peoples*, 489 U.S. 346, 351-52 (1989) (exhaustion may be found if it is "clear" that claim is "now procedurally barred" under state law); *see also Gray v. Netherland*, 518 U.S. at 161-62 (if it is clear that a claim would be procedurally barred, the exhaustion doctrine is satisfied but the claim is defaulted and may not be entertained absent cause and prejudice). However, in the event Petitioner seeks further relief from the California Supreme Court on his claims, he may be foreclosed from obtaining a ruling on the merits if, for example, he cannot explain and justify any delay in presenting his claims there. Depending upon the showing, Respondent might argue in the future that Petitioner's claims are defaulted. *See Russell v. Rolfs*, 893 F.2d 1033, 1037-39 (9th Cir. 1990); *see also Slack v. McDaniel*, 529 U.S. 473, 489 (2000) (noting that following the dismissal of a mixed petition, "the State remains free to impose proper procedural bars to restrict repeated returns to state court for postconviction proceedings").

CERTIFICATE OF SERVICE

Case Name: ***Deshon Aaron Atkins v. W. L. Montgomery***

No. **CV 18-06877-DOC-(MAA)**

I hereby certify that on October 31, 2018, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

MOTION TO DISMISS PETITION FOR WRIT OF HABEAS CORPUS; MEMORANDUM OF POINTS AND AUTHORITIES

Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

I further certify that some of the participants in the case are not registered CM/ECF users. On October 31, 2018, I have caused to be mailed in the Office of the Attorney General's internal mail system, the foregoing document(s) by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within three (3) calendar days to the following non-CM/ECF participant(s):

Deshon Aaron Atkins, BB0955
Calipatria State Prison
P.O. Box 5006
Calipatria, CA 92233-5006

I declare under penalty of perjury under the laws of the United States of America the foregoing is true and correct and that this declaration was executed on October 31, 2018, at Los Angeles, California.

Virginia Gow	/s/ *Virginia Gow*
Declarant	Signature

XAVIER BECERRA
Attorney General of California
GERALD A. ENGLER
Chief Assistant Attorney General
LANCE E. WINTERS
Senior Assistant Attorney General
STEPHANIE C. BRENAN
Supervising Deputy Attorney General
JONATHAN M. KRAUSS
Deputy Attorney General
State Bar No. 279101
300 South Spring Street, Suite 1702
Los Angeles, CA 90013
Telephone: (213) 269-6123
Facsimile: (213) 897-6496
E-mail: DocketingLAAWT@doj.ca.gov
Jonathan.Krauss@doj.ca.gov
Attorneys for Respondent

IN THE UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

DESHON AARON ATKINS, Petitioner, **v.** **W. L. MONTGOMERY,** Respondent.	Case No. CV 18-06877-DOC-(MAA) **NOTICE OF APPEARANCE** The Honorable Maria A. Audero United States Magistrate Judge

The California Attorney General, counsel for Respondent W. L. Montgomery, hereby files this Notice of Appearance to inform the Court of assigned counsel for Respondent in this proceeding.

///

///

///

///

Respondent hereby notifies the Court that the attorney with principal charge of the case is as follows:

Jonathan M. Krauss
Deputy Attorney General
State Bar No. 279101
300 South Spring Street, Suite 1702
Los Angeles, CA 90013
Telephone: (213) 269-6123
Facsimile: (213) 897-6496
E-mail: DocketingLAAWT@doj.ca.gov
Jonathan.Krauss@doj.ca.gov

Dated: October 11, 2018

Respectfully submitted,

XAVIER BECERRA
Attorney General of California
GERALD A. ENGLER
Chief Assistant Attorney General
LANCE E. WINTERS
Senior Assistant Attorney General
STEPHANIE C. BRENAN
Supervising Deputy Attorney General

/s/ *Jonathan M. Krauss*
JONATHAN M. KRAUSS
Deputy Attorney General
Attorneys for Respondent

LA2018602381
53102735.docx

CERTIFICATE OF SERVICE

Case Name: ***Deshon Aaron Atkins v. W. L. Montgomery***

No. **CV 18-06877-DOC-(MAA)**

I hereby certify that on October 11, 2018, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

NOTICE OF APPEARANCE

Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

I further certify that some of the participants in the case are not registered CM/ECF users. On October 11, 2018, I have caused to be mailed in the Office of the Attorney General's internal mail system, the foregoing document(s) by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within three (3) calendar days to the following non-CM/ECF participant(s):

Deshon Aaron Atkins, BB0955
Calipatria State Prison
P.O. Box 5006
Calipatria, CA 92233-5006

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on October 11, 2018, at Los Angeles, California.

Virginia Gow	/s/ *Virginia Gow*
Declarant	Signature

LA2018602381
53102735.docx

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

DESHON AARON ATKINS,

Petitioner,

v.

W.L. MONTGOMERY,

Respondent.

Case No. 2:18-CV-06877-doc-maa

ORDER REQUIRING RESPONSE TO PETITION (28 U.S.C. § 2254)

In order to facilitate the just, speedy, and inexpensive determination of this action, **IT IS ORDERED** that:

1. The Clerk of this Court promptly shall (a) serve electronic copies of the Petition and this Order on the California Attorney General's Office; and (b) serve a copy of this Order on Petitioner.

2. The Clerk also shall serve Petitioner with a blank copy of the Consent to Proceed Before a United States Magistrate Judge (Form CV-11B) along with this Order. If Petitioner wishes to exercise the consent option, he shall file a completed Form CV-11B with the Clerk and serve Respondent with same within twenty-eight (28) days after the date of this Order. Respondent shall have until the date of the filing of the Answer to the Petition or the filing of a Motion to Dismiss the Petition

in which to exercise the consent option by filing and serving a completed Form CV-11B. The Magistrate Judge shall not be informed of a party's consent decision unless all parties have consented to the referral. The parties are free to withhold consent without adverse substantive consequences. **Pursuant to Local Rule 5-4.2, litigants not represented by an attorney are exempt from the mandatory electronic filing requirement.**

3. Within fourteen (14) days after the date of this Order, Respondent shall file and serve a Notice of Appearance, notifying the Court of the name of the attorney who will have principal charge of the case, together with the address where the attorney may be served and the attorney's telephone and fax number. This information is important to assure accurate service of Court documents.

4. If Respondent contends that the Petition can be decided without the Court's reaching the merits of Petitioner's claims (*e.g.*, because Respondent contends that Petitioner has failed to exhaust any state remedies as to any ground for relief alleged in the Petition, or that the Petition is barred by the statute of limitations, or that a claim is procedurally defaulted, or that the Petition is subject to dismissal under Rule 9 of the Rules Governing Section 2254 Cases in the United States District Courts), Respondent shall file a Motion to Dismiss within thirty (30) days after the date of this Order. The Motion to Dismiss shall not address the merits of Petitioner's claims, but rather shall be confined to the basis for Respondent's contention that dismissal without reaching the merits of Petitioner's claims is warranted.[1] At the time the Motion to Dismiss is filed, Respondent shall electronically lodge with the Court all records bearing on Respondent's contention in this regard. *See* Local Rule 5-1. The Court may issue a subsequent order for the lodging of a paper copy of a lodgment if the lodgment is not usable in its electronic

[1] If Respondent contends that Petitioner has failed to exhaust any state remedies as to any ground for relief alleged in the Petition, the Motion to Dismiss also shall specify the state remedies still available to Petitioner.

format.

5. If Respondent files a Motion to Dismiss, Petitioner shall file his Opposition, if any, to the Motion to Dismiss within twenty (20) days after the date of service thereof.[2] At the time the Opposition is filed, Petitioner shall lodge with the Court any records not lodged by Respondent that Petitioner believes may be relevant to the Court's determination of the Motion.

6. Unless the Court orders otherwise, Respondent shall not file a Reply to Petitioner's Opposition to the Motion to Dismiss. If the Motion to Dismiss is denied, the Court will afford Respondent adequate time to respond to Petitioner's claims on the merits.

7. If Respondent does not contend that the Petition can be decided without the Court reaching the merits of Petitioner's claims, Respondent shall file and serve an Answer to the Petition within forty-five (45) days after the date of this Order. At the time the Answer is filed, Respondent shall electronically lodge with the Court all records bearing on the merits of Petitioner's claims, including the briefs specified in Rule 5(d) of the Rules Governing Section 2254 Cases in the United States District Courts. The Court may issue a subsequent order for the lodging of a paper copy of a lodgment if the lodgment is not usable in its electronic format. *See* Local Rule 5-1. The Answer also shall specifically address the necessity for an evidentiary hearing to resolve any issue.

8. Petitioner may file a single Reply responding to matters raised in the Answer within thirty (30) days after the date of service thereof. Any Reply filed by Petitioner shall (a) state whether Petitioner admits or denies each allegation of fact contained in the Answer, (b) be limited to facts or arguments responsive to matters raised in the Answer, and (c) not raise new grounds for relief that were not asserted in the Petition. Grounds for relief withheld until the Reply will not be considered.

---

[2] Note that additional time is added to any period during which a party must act if papers are served by means other than personal delivery. *See* Fed. R. Civ. P. 6(d).

No Reply shall exceed ten (10) pages in length absent advance leave of Court for good cause shown.

9. A request for an evidentiary hearing must be made no later than the date that Petitioner files his Reply to the Answer or, if discovery is requested, any request for an evidentiary hearing must be filed with the Court no later than thirty (30) days after Petitioner receives responses to discovery. Petitioner is responsible for notifying the Court of his request for an evidentiary hearing in writing and this request must be timely made or it will be denied.

10. A request by a party for an extension of time within which to file any required pleading will be granted only upon a showing of good cause and should be made in advance of the due date of the pleading. Any such request shall be accompanied by a declaration under penalty of perjury explaining why an extension of time is necessary and by a proposed form of order granting the requested extension.

11. Unless otherwise ordered by the Court, this case shall be deemed submitted on the day following the date Petitioner's Opposition to a Motion to Dismiss and/or Petitioner's Reply in Support of the Petition is due.

12. Every document filed in the Clerk's Office or delivered to the Court must include a certificate of service attesting that a copy of such document was served on opposing counsel (or on the opposing party, if such party is not represented by counsel). Any document without a certificate of service will be returned to the submitting party and will be disregarded by the Court.

///

///

///

///

///

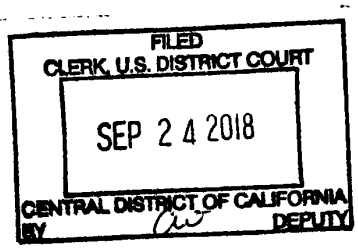
///

13. Petitioner shall notify the Court and counsel for respondent of any change of Petitioner's address immediately after such change. If Petitioner fails to keep the Court informed of where Petitioner may be contacted, this action will be subject to dismissal for failure to prosecute. *See also* Local Rule 41-6.

DATED: October 5, 2018

MARIA A. AUDERO
UNITED STATES MAGISTRATE JUDGE

DESHON AARON ATKINS (CDC#BB0955)
PETITIONER IN PRO PER



UNITED STATES DISTICT COURT

CENTRAL DISTRICT OF CALIFORNIA

DESHON AARON ATKINS
PETITIONER,
(CDC#BB0955)

V.

W.L.MONTGOMERY, WARDEN
RESPONDENT.

NO.2:18-cv-06877-DOC-MAA

NOTICE OF WITHDRAWAL

Petitioner , DESHON AARON ATKINS , hereby respectfully withdraw Grounds TWO and THREE, due to unexhaustion. Petitioner further request to proceed forward solely on the exhausted claim in Ground ONE.

DATED: September 20, 2018

Respectfully submitted,

DESHON A. ATKINS
Petitioner in Pro Per

VERIFICATION

(C.C.P.§ 446 & 2015.5 28 U.S.C. § 1746)

STATE OF CALIFORNIA
COUNTY OF IMPERIAL

I, Deshon Atkins DECLARE UNDER PENALTY OF PERJURY THAT I AM THE Petitioner IN THE ABOVE ENTITLED ACTION. I HAVE READ THE FOREGOING DOCUMENTS AND KNOW THE CONTENTS THEREOF AND THE SAME IS TRUE OF MY OWN KNOWLEDGE EXCEPT AS TO MATTERS STATED THEREIN UPON INFORMATION AND BELIEF, AND AS TO THOSE MATTERS, I BELIEVE THEM TO BE TRUE.

EXECUTED THIS 20th DAY OF September, 2018 AT CALIPATRIA STATE PRISON, CALIPATRIA CALIFORNIA, 92233-5002.

Deshon Atkins (DECLARANT/PRISONER)
SIGNATURE

PROOF OF SERVICE BY MAIL

(C.C.P.§ 1013(a) & 2015.5 U.S.C. § 1746)

I, Deshon Atkins AM A RESIDENT OF CALIPATRIA STATE PRISON, IN THE COUNTY OF IMPERIAL, STATE OF CALIFORNIA. I AM OVER EIGHTEEN (18) YEARS OF AGE, AND AM/AM NOT A PARTY OF THE ABOVE ENTITLED ACTION. MY STATE PRISON ADDRESS IS P.O. BOX 5002 CALIPATRIA STATE PRISON, CALIPATRIA, CALIFORNIA 92233-5002.

ON, September 20, 2018, I SERVED THE FOREGOING: Notice of Withdrawal

(SET FORTH EXACT TITLE OF DOCUMENT(S) SERVED)

ON THE PARTY(S) HEREIN BY PLACING A TRUE COPY THEREOF, ENCLOSED IN A SEALED ENVELOPE(S) WITH POSTAGE THEREON FULLY PAID, IN THE UNITED STATES MAIL, IN A DEPOSIT BOX SO PROVIDED AT CALIPATRIA STATE PRISON, CALIPATRIA CALIFORNIA 92233-5002:

United States District Court
Central District of California
Office of the clerk
ATTN: Deputy Clerk Joe Roper
255 East Temple Street, ROOM 180
Los Angeles, California 90012

Attorney General
Xavier Becerra
300 South Spring Street
Los Angeles, CA 90013

THERE IS DELIVERY SERVICE BY UNITED STATES MAIL AT THE PLACE SO ADDRESSED AND THERE IS REGULAR COMMUNICATION BY MAIL BETWEEN THE PLACE OF MAILING AND THE SO ADDRESSED. I DECLARE UNDER PENALTY OF PERJURY THE FOREGOING IS TRUE AND CORRECT.

DATE September 20, 2018

Deshon Atkins
(DECLARANT/PRISONER)

Deshon Atkins doc#BB0155
Calipatria State Prison - C3/105
P.O Box 5006
Calipatria, CA 92233

United States District Court
Central District of California
Office of the Clerk
ATTN: Deputy Clerk Joe Roper
255 East Temple Street, Room 180
Los Angeles, California 90012

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. **CV 18-06877-DOC (MAA)** Date: **September 4, 2018**

Title **Deshon Aaron Atkins v. W.L. Montgomery**

Present: The Honorable: MARIA A. AUDERO, U.S. Magistrate Judge

Joe Roper	N/A
Deputy Clerk	Court Reporter / Recorder

Attorneys Present for Petitioner:	Attorneys Present for Respondent:
N/A	N/A

Proceedings (In Chambers): Petition for Writ of Habeas Corpus (ECF No. 1)

A state prisoner must exhaust his state court remedies before a federal court may consider granting habeas corpus relief. *See* 28 U.S.C. § 2254(b)(1)(A); *O'Sullivan v. Boerckel*, 526 U.S. 838, 842 (1999). To satisfy the exhaustion requirement, a habeas petitioner must fairly present his federal claims in the state courts in order to give the State the opportunity to pass upon and correct alleged violations of the prisoner's federal rights. *See Duncan v. Henry*, 513 U.S. 364, 365 (1995) (*per curiam*).

For a petitioner in California state custody, this generally means the petitioner must have fairly presented his claims in a petition to the California Supreme Court. *See O'Sullivan*, 526 U.S. at 845 (interpreting 28 U.S.C. § 2254(c)); *Gatlin v. Madding*, 189 F.3d 882,888 (9th Cir. 1999) (applying *O'Sullivan* to California). A claim has been fairly presented if the petitioner has both "adequately described the factual basis for [the] claim" and "identified the federal legal basis for [the] claim." *Gatlin*, 189 F.3d at 888.

The inclusion of both exhausted and unexhausted claims in a federal habeas petition renders it mixed and subject to dismissal without prejudice. *See Rose v. Lundy*, 455 U.S. 509, 522 (1982).

Therefore, it appears from the record now before the Court that the instant Petition is subject to dismissal as a mixed petition because Petitioner has not exhausted his state remedies in regard to Grounds Two and Three. However, before deciding this matter, the Court first will give Petitioner an opportunity to address the exhaustion issue by electing any of the following four options:

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. **CV 18-06877-DOC (MAA)** Date: **September 4, 2018**

Title **Deshon Aaron Atkins v. W.L. Montgomery**

(1) File a notice of withdrawal of his unexhausted claims in Grounds Two and Three and go forward solely on his exhausted claim in Ground One;

(2) If Petitioner contends he has, in fact, exhausted his state court remedies on Grounds Two and Three, he should explain this clearly in a response to this Order. Petitioner should attach to his response copies of any documents establishing that Grounds Two and Three indeed are exhausted. (Petitioner also may file a response that, if the Court still finds the Petition to be mixed despite Petitioner's contention to the contrary, he alternatively selects one of the other options discussed below.);

(3) File a notice of voluntary dismissal without prejudice in order to return to state court to exhaust his state remedies with respect to his unexhausted claims in Grounds Two and Three, and then return to federal court prior to the lapse of the one-year limitations period of 28 U.S.C. § 2244(d); or

(4) File a motion to hold his current federal habeas petition in abeyance while he returns to state court to exhaust his state remedies with respect to his unexhausted claims in Grounds Two and Three. If Petitioner elects option (4), he will need to make the requisite showing of good cause for his failure to exhaust his unexhausted claims in state court prior to filing his original petition herein pursuant to *Rhines v. Weber*, 544 U.S. 269 (2005). He also will need to demonstrate to the Court's satisfaction that his unexhausted claims are not plainly meritless, by citing the Supreme Court authority upon which he is relying in support of each of those claims. Finally, he will need to demonstrate to the Court's satisfaction that he has not engaged in "abusive litigation tactics or intentional delay."

Out of consideration for Petitioner's *pro per* status, the Court will afford him thirty (30) days from the service date of this Minute Order to elect one of the foregoing three options. If Petitioner takes no further action, then the Court will be compelled to recommend the dismissal without prejudice of this action for failure to prosecute and/or failure to exhaust state remedies.

:
Initials of Preparer jr

Deshon A. Atkins
NAME
BB0955
PRISON IDENTIFICATION/BOOKING NO.
Calipatria State Prison
ADDRESS OR PLACE OF CONFINEMENT

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

fee Due

FILED
2018 AUG 10 PM 12:58
CLERK U.S. DISTRICT COURT
CENTRAL DIST. OF CALIF.
LOS ANGELES
BY:

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Deshon Aaron Atkins
FULL NAME (*Include name under which you were convicted*)
Petitioner,

v.

W.L. Montgomery
NAME OF WARDEN, SUPERINTENDENT, JAILOR OR AUTHORIZED PERSON HAVING CUSTODY OF PETITIONER
Respondent.

CASE NUMBER:
CV 18-6877-DOC (MAA)
To be supplied by the Clerk of the United States District Court

☐ _____ AMENDED

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

PLACE/COUNTY OF CONVICTION Los Angeles County
PREVIOUSLY FILED, RELATED CASES IN THIS DISTRICT COURT
(*List by case number*)
CV _____
CV _____

INSTRUCTIONS - PLEASE READ CAREFULLY

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

Clerk of the United States District Court for the Central District of California
United States Courthouse
ATTN: Intake/Docket Section
312 North Spring Street
Los Angeles, California 90012

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

This petition concerns:
1. ☒ a conviction and/or sentence.
2. ☐ prison discipline.
3. ☐ a parole problem.
4. ☐ other.

PETITION

1. Venue
   a. Place of detention Calipatria State Prison
   b. Place of conviction and sentence Los Angeles County South Bay Torrance Superior Court

2. Conviction on which the petition is based *(a separate petition must be filed for each conviction being attacked).*
   a. Nature of offenses involved *(include all counts)*: (2) counts of attempted murder, (2) gun enhancements, (2) gang enhancements
   b. Penal or other code section or sections: (2) 664-187(a), 12022.53(c), 12022.53(d), 186.22(b)(1)(C), 12022.53(e)(1)
   c. Case number: YA093316-01
   d. Date of conviction: 08-05-2016
   e. Date of sentence: 09-15-2016
   f. Length of sentence on each count: Life imprisonment plus 20 years consecutive in count 4, Life imprisonment plus 25 years to Life consecutive in count 5.
   g. Plea *(check one)*:
      ☒ Not guilty
      ☐ Guilty
      ☐ Nolo contendere
   h. Kind of trial *(check one)*:
      ☒ Jury
      ☐ Judge only

3. Did you appeal to the California Court of Appeal from the judgment of conviction? ☒ Yes ☐ No
   If so, give the following information for your appeal *(and attach a copy of the Court of Appeal decision if available)*:
   a. Case number: B278735
   b. Grounds raised *(list each)*:
      (1) Insufficient evidence to support the conviction in count 4.
      (2) The gang expert prejudicially relied on hearsay evidence in 12022.53(d) count 5.

(3) The court erred in failing to award any pre-sentence conduct credits.
(4) The discretion of the trial courts to strike the gun enhancements in light of sb 620
(5) _____
(6) _____

c. Date of decision: 08-21-2017 and 01-23-2018

d. Result Awarded pre-sentence conduct credits, and the other issues were affirmed, with the exception of senate bill 620 being remanded for re-sentencing.

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

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

a. Case number: S244320

b. Grounds raised *(list each)*:

(1) Insufficient evidence received by the jury to prove ALL elements of an attempted murder in count 4.
(2) The discretion of the trial courts to strike the gun enhancements in light of sb620.
(3) _____
(4) _____
(5) _____
(6) _____

c. Date of decision: 11-28-2017 and 03-28-2018

d. Result The case was sent back to the Courts of Appeal in consideration of senate bill 620, and the count 4 conviction was affirmed!

5. If you did not appeal:

a. State your reasons n/A

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

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

☐ Yes ☒ No

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

a. (1) Name of court: n/A
(2) Case number: n/A
(3) Date filed *(or if mailed, the date the petition was turned over to the prison authorities for mailing)*: n/A

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

(a) n/A

(b)

(c)

(d)

(e)

(f)

(5) Date of decision:

(6) Result

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

b. (1) Name of court: n/A

(2) Case number: n/A

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

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

(a)

(b)

(c)

(d)

(e)

(f)

(5) Date of decision:

(6) Result

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

c. (1) Name of court: n/A

(2) Case number: n/A

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

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

(a)

(b)

(c)

(d)

(e)

(f)

(5) Date of decision: _____

(6) Result _____

_____

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

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

If yes, answer the following:

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

(2) Result: _____

_____

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

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

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

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

a. Ground one: There was insufficient evidence to support the attempted murder in count 4 received by the jury to prove all the elements of an attempted murder.

(1) Supporting FACTS: There was no evidence received, that was offered for its truth, that connected the gun shot wound suffered by Beasley. The Detective stated Victim Wright told him Beasley was at the scene of the shooting, but has no evidence of saying so as proof. The court excluded this evidence for its truth, and later allowed this evidence for its truth, as impeachment.

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

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

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

b. Ground two: Ineffective assistance of counsel conducted by Nancy Sperber.

_____

(1) Supporting FACTS: Ms. Sperber was bias towards me because she felt I was guilty due to the evidence she received. She also stated to the jury "There is very

suspect testimony through tape recording that defendant was present at the time of the shooting of Dashon Wright." She also failed to object improper evidence argued to the jury by the prosecutor!

(2) Did you raise this claim on direct appeal to the California Court of Appeal? ☒ Yes ☐ No
(3) Did you raise this claim in a Petition for Review to the California Supreme Court? ☐ Yes ☒ No
(4) Did you raise this claim in a habeas petition to the California Supreme Court? ☐ Yes ☒ No

c. Ground three: The 12022.53(d) gun enhancement has no proof. It was supported by hearsay!

(1) Supporting FACTS: The true findings if the gang enhancement was relied on hearsay that supported this gun enhancement under section 12022.53 (e)(1). It was never said that I personally or intentionally discharged a firearm as the victim stated the one who stood over him was either asian or hispanic, but described me as dark skinned with tattoos in the face.

(2) Did you raise this claim on direct appeal to the California Court of Appeal? ☒ Yes ☐ No
(3) Did you raise this claim in a Petition for Review to the California Supreme Court? ☐ Yes ☒ No
(4) Did you raise this claim in a habeas petition to the California Supreme Court? ☐ Yes ☒ No

d. Ground four: n/A

(1) Supporting FACTS:

(2) Did you raise this claim on direct appeal to the California Court of Appeal? ☐ Yes ☐ No
(3) Did you raise this claim in a Petition for Review to the California Supreme Court? ☐ Yes ☐ No
(4) Did you raise this claim in a habeas petition to the California Supreme Court? ☐ Yes ☐ No

e. Ground five: n/A

(1) Supporting FACTS:

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

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

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

9. If any of the grounds listed in paragraph 7 were not previously presented to the California Supreme Court, state briefly which grounds were not presented, and give your reasons: Grounds #2 and #3 were not presented to the California Supreme Court, due to my appeal Attorney stating that they're issues that will be denied and it will also weaken my chances for an appeal.

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

☐ Yes ☒ No

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

a. (1) Name of court: n/A

(2) Case number: n/A

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

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

(a)

(b)

(c)

(d)

(e)

(f)

(5) Date of decision:

(6) Result

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

b. (1) Name of court: n/A

(2) Case number: n/A

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

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

(a)

(b)

(c)

(d)

(e)

(f)

(5) Date of decision:

(6) Result _____

_____

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

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

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

(1) Name of court: N/A

(2) Case number: N/A

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

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

(a) _____

(b) _____

(c) _____

(d) _____

(e) _____

(f) _____

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

If so, provide name, address and telephone number: _____

_____

_____

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

_____
Signature of Attorney (if any)

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

Executed on July 10, 2018 _____
Date *Signature of Petitioner*

Deshon Atkins
Petitioner

W.L. Montgomery
Respondent(s)

DECLARATION IN SUPPORT OF REQUEST TO PROCEED IN FORMA PAUPERIS

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

1. Are you presently employed? ☐ Yes ☒ No

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

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

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

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

   If the answer to any of the above is yes, describe each source of money and state the amount received from each during the past twelve months: A sum total of approximately $600.00 worth different j-pays

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

If the answer is yes, state the total value of the items owned: $54.00 on my books

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

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

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

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

Executed on JUN 10, 2018 (Date) Joshua Aftkin (Signature of Petitioner)

CERTIFICATE

I hereby certify that the Petitioner herein has the sum of $ 54.00 on account to his credit at the California State Prison institution where he is confined. I further certify that Petitioner likewise has the following securities to his credit according to the records of said institution: N/A

7-13-18 (Date) Accountant I SP (Authorized Officer of Institution/Title of Officer)

THE WITHIN INSTRUMENT IS A CORRECT COPY OF THE TRUST ACCOUNT MAINTAINED BY THIS OFFICE
ATTEST 7-13-18
CALIFORNIA DEPARTMENT OF CORRECTIONS
BY
TRUST OFFICE

Date\Time: 7/13/2018 1:28:27 PM CDCR Verified: _____

Institution: CAL

Inmate Statement Report

Start Date:	1/1/2018	**Revalidation Cycle:**	All
End Date:	6/1/2018	**Housing Unit:**	All
Inmate/Group#:	BB0955		

Date\Time: 7/13/2018 1:28:27 PM CDCR Verified: _____

Institution: CAL

Inmate Statement Report

CDCR#	Inmate/Group Name	Institution	Unit	Cell/Bed
BB0955	ATKINS, DESHON	CAL	C 003 1	105001

Current Available Balance: $54.00

Transaction List

Transaction Date	Institution	Transaction Type	Source Doc#	Receipt#/Check#	Amount	Account Balance
01/01/2018	CAL	BEGINNING BALANCE				$0.18
01/12/2018	CAL	JPAY	0000000080805671		$200.00	$200.18
01/12/2018	CAL	DIRECT ORDER PAYMENT			($100.00)	$100.18
01/12/2018	CAL	ADMINISTRATIVE FEE			($10.00)	$90.18
01/19/2018	CAL	SALES	36		($57.42)	$32.76
01/20/2018	CAL	JPAY	0000000081088512		$50.00	$82.76
01/20/2018	CAL	DIRECT ORDER PAYMENT			($25.00)	$57.76
01/20/2018	CAL	ADMINISTRATIVE FEE			($2.50)	$55.26
01/29/2018	CAL	REGULAR MAIL	EYEGLASSES		($1.63)	$53.63
02/02/2018	CAL	REGULAR MAIL	EYEGLASSES 2/2/18		($1.63)	$52.00
02/06/2018	CAL	REGULAR MAIL	EYEGLASSES		($1.63)	$50.37
02/07/2018	CAL	ARTIFICIAL APPLIANCE	EYEGLASSESCAL1/ 11/18		($32.75)	$17.62
02/11/2018	CAL	JPAY	0000000081949508		$40.00	$57.62
02/11/2018	CAL	DIRECT ORDER PAYMENT			($20.00)	$37.62
02/11/2018	CAL	ADMINISTRATIVE FEE			($2.00)	$35.62
02/14/2018	CAL	SALES	47		($34.95)	$0.67
03/06/2018	CAL	JPAY	0000000082955509		$100.00	$100.67
03/06/2018	CAL	DIRECT ORDER PAYMENT			($50.00)	$50.67
03/06/2018	CAL	ADMINISTRATIVE FEE			($5.00)	$45.67
04/01/2018	CAL	JPAY	0000000083991248		$100.00	$145.67
04/01/2018	CAL	DIRECT ORDER PAYMENT			($50.00)	$95.67
04/01/2018	CAL	ADMINISTRATIVE FEE			($5.00)	$90.67
04/11/2018	CAL	SALES	25		($90.45)	$0.22
04/24/2018	CAL	WUNK TRANSFER OUT			($0.22)	$0.00
04/25/2018	IHQ0	WUNK TRANSFER IN	WUNK		$0.22	$0.22
05/11/2018	CAL	TRACS TRANSFER IN	TX05112018		$0.22	$0.22
05/11/2018	IHQ0	TRACS TRANSFER OUT	TX05112018		($0.22)	$0.00
05/30/2018	CAL	MISC. INCOME (EXEMPT)	0026477285	13087	$1.24	$1.46

Encumbrance List

Encumbrance Type	Transaction Date	Amount

**No information was found for the given criteria.

THE WITHIN INSTRUMENT IS A CORRECT COPY OF THE TRUST ACCOUNT MAINTAINED BY THIS OFFICE
ATTEST 7-13-18
CALIFORNIA DEPARTMENT OF CORRECTIONS
BY _____
TRUST OFFICE

Date\Time: 7/13/2018 1:28:27 PM
Institution: CAL

CDCR

Verified: _____

Inmate Statement Report

Obligation List

Obligation Type	Court Case#	Original Owed Balance	Sum of Tx for Date Range for Oblg	Current Balance
No information was found for the given criteria.				

Restitution List

Restitution	Court Case#	Status	Original Owed Balance	Interest Accrued	Sum of Tx for Date Range for Oblg	Current Balance
RESTITUTION FINE	YA093316	Active	$300.00	$0.00	$0.00	$300.00
DIRECT ORDER	YA093316	Active	$5,000.00	$0.00	($245.00)	$4,405.00

THE WITHIN INSTRUMENT IS A CORRECT COPY OF THE TRUST ACCOUNT MAINTAINED BY THIS OFFICE
ATTEST 7-13-18
CALIFORNIA DEPARTMENT OF CORRECTIONS
BY _____
TRUST OFFICE

Deshon Atkins
Petitioner

W.L. Montgomery
Respondent(s)

ELECTION REGARDING CONSENT TO PROCEED BEFORE A UNITED STATES MAGISTRATE JUDGE

CV18-6877-DOC (MAA)

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

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

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

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

Executed on July 10, 2018
Date

Deshon Atkins
Signature of Petitioner/Counsel for Petitioner

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

DESHON AARON ATKINS

PETITIONER(S)

v.

W. L. MONTGOMERY

RESPONDENT(S).

CASE NUMBER:

2:18−cv−06877−DOC−MAA

NOTICE OF JUDGE ASSIGNMENT AND REFERENCE TO A UNITED STATES MAGISTRATE JUDGE

(Petition for Writ of Habeas Corpus / Motion for Extension of Time to File Habeas Corpus Petition)

This case has been assigned to the calendar of the Honorable Judge David O. Carter, U.S. District Judge, and referred to U. S. Magistrate Judge Maria A. Audero, who is authorized to consider preliminary matters and conduct all further hearings as may be appropriate or necessary. Thereafter, the Magistrate Judge shall prepare and file a report and recommendation regarding the disposition of this case, which may include proposed findings of fact, conclusions of law, and a proposed order or judgment, and which shall be served on all parties.

Pursuant to Local Rule 5-4.1, all subsequent documents in this case must be filed electronically, unless exempted by Local Rule 5-4.2. Documents exempt from electronic filing pursuant to Local Rule 5-4.2(b), or presented by filers exempt from electronic filing pursuant to Local Rule 5-4.2(a), must be filed with the Clerk in paper at the following location:

Western Division
255 East Temple Street, Suite TS-134
Los Angeles, CA 90012

Please note that, pursuant to Local Rule 83-2.5, all matters must be called to the judge's attention by appropriate application or motion filed in compliance with the Court's Local Rules. Parties are not permitted to write letters to the judge.

Local Rule 83-2.4 requires that the Court must be notified within five (5) days of any address change. If mail directed by the clerk to your address of record is returned undelivered by the Post Office, and if the Court and opposing counsel are not notified in writing within five (5) days thereafter of your current address, the Court may dismiss the petition, with or without prejudice, for want of prosecution.

Clerk, U.S. District Court

August 10, 2018
Date

By */s/ Estrella Tamayo*
Deputy Clerk

MINUTE ORDER
SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE PRINTED: 09/14/22

CASE NO. YA093316

THE PEOPLE OF THE STATE OF CALIFORNIA
VS.
DEFENDANT 01: DESHON ATKINS

INFORMATION FILED ON 12/17/15.

COUNT 01: 664-187(A) PC FEL
COUNT 02: 664-187(A) PC FEL
COUNT 03: 664-187(A) PC FEL
COUNT 04: 664-187(A) PC FEL
COUNT 05: 664-187(A) PC FEL

ON 04/30/18 AT 830 AM IN SOUTHWEST DISTRICT DEPT SWF

CASE CALLED FOR POSSIBLE MODIFI. OF SENTENCE

PARTIES: HECTOR M. GUZMAN (JUDGE) SILVIA ROSARIO (CLERK)
DAWSHA L. LAYLAND (REP) HEATHER J. STEGGELL (DA)

DEFENDANT IS PRESENT IN COURT, AND REPRESENTED BY NANCY B. SPERBER BAR PANEL ATTORNEY

DEFENDANT'S REQUEST TO STRIKE THE 1222.53 FIREARM ENHANCEMENT IS HEARD, ARGUED, AND DENIED.

.
COURT FURTHER STATES THE SENTENCE WAS NOT SET ASIDE AND THAT THE ORIGINAL SENTENCE IMPOSED REMAINS IN FULL FORCE AND EFFECT.
.
THE JUDGMENT HAVING BEEN AFFIRMED IN FULL, NO FURTHER ACTION IS TAKEN ON THE REMITTITUR.
.
REPORT OF ACTION TAKEN ON REMITTITUR IS SIGND, FILED, AND FORWARDED TO COURT MANAGER.

NEXT SCHEDULED EVENT:
PROCEEDINGS TERMINATED