APPENDIGES

A - Ninth Circuit Order Denying Appealability

B - District Court Order Denying Relief/Magistrate's Report

C - State Court Opinion Affirming Judgment On Appeal

D - Petitioner's Opening Brief Filed On Appeal

E - Cell Tower Map Utilized At Trial

F - Diagram Of Cisco's Mexican Restaurant

G -Objections To The Magistrate's Report

H - Petition For Appealability In The Ninth Circuit

I - Relevant Trial Transcripts

APPENDIX A - Ninth Circuit Order Denying Appealability

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ANDRE TERIAL LOVE,

Petitioner-Appellant,

v.

J. M. ROBERTSON,

Respondent-Appellee.

No. 23-55660

D.C. No. 2:22-cv-00977-MWF-KK
Central District of California,
Los Angeles

ORDER

Before: SCHROEDER and NGUYEN, Circuit Judges.

The request for a certificate of appealability (Docket Entry No. 4) is denied because appellant has not made a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see also Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Any pending motions are denied as moot.

DENIED.

B - District Court Order Denying Relief/Magistrate's Report

JS-6

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ANDRE TERIAL LOVE, Petitioner, v. J. M. ROBERTSON, Warden, Respondent.	Case No. CV 22-977-MWF (KK) JUDGMENT

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

IT IS HEREBY ADJUDGED that the Petition is DENIED and this action is DISMISSED with prejudice.

Dated: June 29, 2023

MICHAEL W. FITZGERALD
United States District Judge

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ANDRE TERIAL LOVE, Petitioner, v. J. M. ROBERTSON, Warden, Respondent.	Case No. CV 22-977-MWF (KK) ORDER ACCEPTING FINDINGS AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Pursuant to 28 U.S.C. § 636, the Court has reviewed the Petition for a Writ of Habeas Corpus, the records on file, and the Report and Recommendation of the United States Magistrate Judge. The Court has also reviewed the objections filed by Petitioner on May 30, 2023. (Docket No. 44) The Court then engaged in de novo review of those portions of the Report to which Petitioner has objected.

The Court accepts the findings and recommendation of the Magistrate Judge, which carefully analyzed each of Petitioner's claims and rejected them. (Report & Recommendation at 11-23). The Magistrate Judge correctly concluded that the alleged errors were not cognizable on federal habeas corpus or had been decided by the California Court of Appeal under the AEDPA deferential standard or resulted in no prejudice to Petitioner or simply were not errors.

IT IS THEREFORE ORDERED that Judgment be entered (1) denying the Petition for a Writ of Habeas Corpus; and (2) dismissing this action with prejudice.

Dated: June 29, 2023

MICHAEL W. FITZGERALD
United States District Judge

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ANDRE TERIAL LOVE, Petitioner, v. J.M. ROBERTSON, WARDEN, Respondent.	Case No. CV 22-977-MWF (KK) REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This Report and Recommendation is submitted to the Honorable Michael W. Fitzgerald, 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.

SUMMARY OF RECOMMENDATION

Petitioner Andre Terial Love ("Petitioner") has filed a Petition for Writ of Habeas Corpus ("Petition") pursuant to 28 U.S.C. § 2254, challenging his 2017 state conviction for five counts of second degree robbery. ECF Docket No. ("Dkt.") 1, Petition ("Pet."). Petitioner asserts claims of evidentiary error, instructional error, and cumulative error. Because Petitioner's claims fail on their merits, the Court recommends denying the Petition.

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II.

PROCEDURAL HISTORY

A. STATE COURT PROCEEDINGS

On September 29, 2017, following a jury trial in Ventura County Superior Court, a jury convicted Petitioner of five counts of second degree robbery in violation of sections 211 and 212.5(c) of the California Penal Code. 2 CT 407-11, 448.[1] However, the jury found the allegations that Petitioner personally used a firearm during the commission of each robbery "not true." Id. Petitioner then admitted allegations he (a) had three prior strike convictions within the meaning of California's Three Strikes Law, Cal. Penal Code §§ 667(b)-(i), 1170.12(a)-(d), and one prior serious felony conviction, id. § 667(a); and (b) had previously served three prior prison terms, id. § 667.5(b). Lodg. 1 at 1; Pet. at 2. On November 27, 2017, the trial court sentenced Petitioner to state prison for a term of seventy-five years to life plus fifteen years. Lodg. 1 at 1-2; Pet. at 2; 2 CT 444-49. In imposing this sentence, the trial court

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[1] The Court's citations to Lodged Documents refer to documents lodged in support of Respondent's March 10, 2022 Motion to Dismiss, see dkt. 7, and December 6, 2022 Answer, see dkt. 32.

1. California Court of Appeal opinion on direct appeal ("Lodg. 1")
2. Petition for Review in California Supreme Court ("Lodg. 2")
3. California Supreme Court order denying review ("Lodg. 3")
4. Ventura County Superior Court docket ("Lodg. 4")
5. Volumes 1-2 Clerk's Transcript in Ventura County Superior Court case number 2016022147 ("CT")
6. Volumes 1-3 Reporter's Transcript in Ventura County Superior Court case number 2016022147 ("RT")
7. Appellant's Opening Brief in California Court of Appeal ("Lodg. 7")
8. Respondent's Brief in California Court of Appeal ("Lodg. 8")
9. Appellant's Reply Brief in California Court of Appeal ("Lodg. 9")
10. Petition for Rehearing in California Court of Appeal ("Lodg. 10")
11. California Court of Appeal order denying rehearing ("Lodg. 11")

imposed a five-year sentence enhancement on each of Petitioner's convictions pursuant to section 667(a) of the California Penal Code because of Petitioner's prior serious felony conviction. Lodg. 1 at 19; 2 CT 444-49.

Petitioner appealed his conviction to the California Court of Appeal. Lodgs. 7-9. On February 5, 2019, the California Court of Appeal issued a reasoned decision affirming Petitioner's convictions but remanding the case for the superior court to exercise its discretion to impose or strike two of the prior prison term enhancements and to impose or strike the prior serious felony enhancements. Lodg. 1.

Petitioner then filed a petition for rehearing in the California Court of Appeal. Lodg. 10. On February 19, 2019, the California Court of Appeal denied the petition. Lodg. 11.

Petitioner next filed a petition for review in the California Supreme Court. Lodg. 2. On April 17, 2019, the California Supreme Court denied the petition for review. Lodg. 3.

On May 14, 2019, the trial court on remand declined to strike any enhancements. Lodg. 4 at 61.

B. FEDERAL HABEAS PETITION

On February 3, 2022, Petitioner constructively filed[2] the instant Petition challenging his 2017 convictions. Dkt. 1.

On December 6, 2022, Respondent filed an Answer addressing the four remaining claims[3] in the Petition. Dkt. 31.

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[2] Under the "mailbox rule," when a pro se prisoner gives prison authorities a pleading to mail to court, the Court deems the pleading constructively filed on the date it is signed. Roberts v. Marshall, 627 F.3d 768, 770 n.1 (9th Cir. 2010) (citation omitted).

[3] On July 26, 2022, the Court issued an Order denying Petitioner's request for a stay pursuant to Rhines v. Weber, 544 U.S. 269 (2005) ("Rhines stay") and granting a stay pursuant to Kelly v. Small, 315 F.3d 1063 (9th Cir. 2003) ("Kelly stay") while Petitioner exhausted nine additional claims alleging ineffective assistance of counsel in state court. Dkt. 23. However, on August 24, 2022, the Court issued an Order

On February 8, 2023, Petitioner constructively filed a Reply in support of his Petition. Dkt. 38.

The matter thus stands submitted.

III.

SUMMARY OF FACTS

For a summary of the facts, this Court relies on the California Court of Appeal's February 5, 2019 opinion on direct appeal, as those facts pertain to Petitioner's convictions:[4]

> Bandits Grill & Bar is a restaurant located near U.S. Highway 101 (US-101) in Thousand Oaks. Around 11:30 p.m. on a Sunday in July 2015, Bandits's general manager, R.E., walked outside to lock the doors. A man—later described as a 6'2"-tall [FN: R.E. originally told police the man was 5'10" tall.] African-American wearing a hoodie and bandana—jumped from behind the trash enclosure and put a gun to R.E.'s head. He told R.E. to unlock the restaurant door and give him the money inside. He instructed R.E. not to look at him.
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> Once inside, R.E. told the robber the restaurant did not have a safe. The robber replied, "What do you mean you don't have a safe? . . . Don't mess with me. This isn't my first rodeo." R.E. gave the robber cash from the restaurant and employee paychecks. The robber then ziptied R.E.'s hands together, forced him into an office, told him not to move, and left. Police later tested DNA found on the zipties, and

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granting Petitioner's request to lift the Kelly stay and proceed on only the four exhausted grounds set forth in the Petition. Dkt. 25.

[4] Because this factual summary is drawn from the California Court of Appeal's opinion, "it is afforded a presumption of correctness that may be rebutted only by clear and convincing evidence." Moses v. Payne, 555 F.3d 742, 746 n.1 (9th Cir. 2008) (citations omitted). To the extent Petitioner alleges the summary is inaccurate, the Court has independently reviewed the trial record and finds the summary accurate.

determined that it was 246 times more likely to have come from Love[5] than from another person.

Al Mulino Italian Restaurant & Bar is located near US-101 in Thousand Oaks. Just before 11:00 p.m. on a Sunday in May 2016, L.O., a custodian at the restaurant, was finishing his cleaning shift. A man walked in the back door and demanded to see the owner. He was holding a gun. L.O. told the man that he was the only person at the restaurant.

The robber pointed his gun at L.O. and demanded his wallet. He also took L.O.'s cell phone. He then forced L.O. into the bathroom, locked the door, and told him he would shoot him if he did not remain there for 30 minutes.

L.O. described the robber as an African-American or Hispanic man standing about 5'8" tall. His face and head were covered and he was wearing gloves.

Cisco's Mexican Restaurant is located near US-101 in Thousand Oaks. Around 10:40 p.m. on the Sunday following the Al Mulino robbery, C.B. and A.S. were counting money in the Cisco's office when a man with a gun entered. He announced that he was robbing the restaurant, and instructed C.B. and A.S. not to look at his face.

The robber told C.B. and A.S. to put money in one of the office trashcans. He also demanded money from their wallets. When J.N. entered the office, the robber pointed the gun at him and demanded money from his wallet, too.

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5 The California Court of Appeal referred to Petitioner as "Love."

The robber took C.B.'s and A.S.'s cell phones and hid them outside the office. He said he would shoot the workers if they opened the office door or called police.

Another Cisco's employee, C.S., was at the dumpster outside while the robber was in the office. He noticed a white car in the parking lot. Someone was in the driver's seat, and the motor was running. As C.S. walked back toward the restaurant, a man armed with a gun ran out the back door. He told C.S. to go inside, but C.S. ran across the street instead. The robber signaled to the driver of the white car and fled on foot.

The robber wore a hoodie, a bandana over his face, and ski gloves. C.B. and J.N. thought he was African American; A.S. described him as Hispanic with dark skin. All three said he was between 5'10" and 6'0" tall.

Sheriff's deputies found a "burner" cell phone outside the back door of Cisco's. It was purchased four days before the robbery, from a store one block from Love's apartment in Sylmar. Love's DNA was on the [burner] phone. So were his fingerprints. It was registered in his name. Cisco's employees said the [burner] phone was not at the restaurant prior to the robbery.

The burner phone was used near Love's apartment in the days leading up to the Cisco's robbery. The last activity occurred around 10:00 p.m. on the night of the robbery. The only contact stored in the [burner] phone matched one in Love's personal cell phone.

Data from Love's personal cell phone show that it was used in Thousand Oaks, near US-101, at 9:39 p.m. on the night of the Bandits robbery. The [personal cell] phone was used along US-101 between San Fernando and Thousand Oaks around 9:00 p.m. the night of the robbery

at Al Mulino. It was used several times near Cisco's starting at 11:09 p.m. the night of the robbery there, but began to move toward Los Angeles along US-101 at 11:46 p.m. The [personal cell] phone had little or no activity when the robberies occurred, in contrast to many other nights when the [personal cell] phone showed significant activity between 10:00 p.m. and 7:00 a.m. The dates and times of the robberies were among the few occasions Love's [personal] cell phone was in Ventura County at night.

Detectives executed a series of search warrants one month after the Cisco's robbery. At Love's apartment they found bandanas, hoodies, a beanie, ski masks, a wig, and several pairs of gloves. Inside his work locker were several pairs of gloves, a beanie, a ski mask, and a backpack that contained more than $ 1,900. At his mother's house were three more wigs. Detectives were unable to match any of the clothing found during the searches to that shown in surveillance videos of the robberies. They recovered no firearms.

Prior to trial, the prosecutor moved to admit evidence of a 2011 traffic stop involving Love. When a sheriff's deputy pulled over the car Love was driving, he saw a firearm and 10 rounds of ammunition on the floorboard. Also in the car were "robbery tools": a crowbar, duct tape, rope, binoculars, two pairs of handcuffs, and a wig. The deputy confiscated Love's firearm after the stop.

The prosecutor also moved to admit evidence of a robbery Love committed at a restaurant near a Florida highway in 2006. Around 11:30 p.m., Love emerged from behind the restaurant's dumpster and told two workers to go inside. He was carrying a pellet gun. Love forced the restaurant workers into an office and demanded money and cell phones. He threatened to shoot the workers if they left the office.

During the robbery, Love wore a baseball cap, a bandana over his face, and gloves. He had ponytails in his hair. Later that night, police found a baseball cap with a wig attached to it in Love's rental car.

The prosecutor claimed the uncharged crimes evidence was admissible to prove the identity of the Thousand Oaks robber and that the robber acted according to a common plan or scheme. Love objected. He argued the evidence was irrelevant, remote in time, inadmissible character or propensity evidence, and unduly prejudicial. The trial court disagreed. It deemed the evidence of both incidents more probative than prejudicial, and noted that the jury would be instructed not to consider it for propensity purposes.

At trial, Love's wife testified that she and Love were saving money for a vacation. She said that Love lived within his means and that she had not seen him with an excessive amount of cash. There was never a Sunday she did not see her husband for an extended period of time. He did not ski or snowboard. The wigs police found at their apartment were hers.

Love's mother testified that she owned the wigs police found at her house. She had never seen Love wear them. Love had not lived with her for nearly a decade, though he did visit.

A coworker testified that Love occasionally worked in Thousand Oaks. He worked all hours of the day, sometimes in remote, high-elevation locations, and needed cold-weather clothing. Because Love rode a motorcycle, his company provided him with a locker to store his clothing.

A cousin testified that Love had taken out a loan of $13,000 to $14,000 to buy his motorcycle.

Lodg. 1 at 2-6.

IV.

PETITIONER'S CLAIMS FOR RELIEF

Petitioner presents the following claims in the Petition:

1. The trial court's error in admitting evidence of Petitioner's 2006 Florida robbery conviction deprived Petitioner of due process and a fair trial (Claim One);

2. The trial court's error in admitting evidence of Petitioner's 2011 possession of a firearm and "robbery tools"[6] deprived Petitioner of due process and a fair trial (Claim Two);

3. The trial court erred by omitting the 2011 possession of a firearm and "robbery tools" evidence from jury instruction CALCRIM No. 375 (Claim Three); and

4. Cumulative error (Claim Four).

Pet. at 5-6, 21-181.

Respondent contends Claims One and Two are procedurally barred[7] and all claims fail on their merits. Dkt. 31 at 10.

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[6] The trial court admitted evidence of Petitioner's 2011 traffic stop where a firearm and "robbery tools" – a crowbar, duct tape, rope, binoculars, two pairs of handcuffs, and a wig – were found in the vehicle Petitioner was driving. See 2 RT at 535-38. The prosecution did not seek to admit evidence of Petitioner's prior conviction that resulted from the possession of the firearm.

[7] Because Petitioner's claims are easily resolved on the merits, while the procedural default argument is more complex, in the interest of judicial economy, this Court considers the claims on the merits rather than addressing the procedural default issue. See 28 U.S.C. § 2254(b)(2) (district court has authority to deny unexhausted claims on their merits); see also Lambrix v. Singletary, 520 U.S. 518, 525 (1997); Franklin v. Johnson, 290 F.3d 1223, 1232 (9th Cir. 2002).

V.

STANDARD OF REVIEW

Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), a federal court may not grant habeas relief on a claim adjudicated on its merits in state court unless the adjudication:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

"'[C]learly established Federal law' for purposes of § 2254(d)(1) includes only 'the holdings, as opposed to the dicta, of th[e] [United States Supreme] Court's decisions'" in existence at the time of the state court adjudication. White v. Woodall, 572 U.S. 415, 419, 426 (2014). However, "circuit court precedent may be 'persuasive' in demonstrating what law is 'clearly established' and whether a state court applied that law unreasonably." Maxwell v. Roe, 628 F.3d 486, 494 (9th Cir. 2010).

Overall, AEDPA presents "a formidable barrier to federal habeas relief for prisoners whose claims have been adjudicated in state court." Burt v. Titlow, 571 U.S. 12, 19 (2013). The federal statute presents "a difficult to meet . . . and highly deferential standard for evaluating state-court rulings, which demands that state-court decisions be given the benefit of the doubt." Cullen v. Pinholster, 563 U.S. 170, 181 (2011) (internal citation and quotation marks omitted). On habeas review, AEDPA places the burden on petitioners to show the state court's decision "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). Put another way, a state court determination that a claim lacks

merit "precludes federal habeas relief so long as fairminded jurists could disagree" on the correctness of that ruling. Id. at 101. Federal habeas corpus review therefore serves as "a guard against extreme malfunctions in the state criminal justice systems, not a substitute for ordinary error correction through appeal." Id. at 102-03 (internal citation and quotation marks omitted).

Where the last state court disposition of a claim is a summary denial, this Court must review the last reasoned state court decision addressing the merits of the claim under AEDPA's deferential standard of review. Maxwell, 628 F.3d at 495; see also Berghuis v. Thompkins, 560 U.S. 370, 380 (2010); Ylst v. Nunnemaker, 501 U.S. 797, 803-04 (1991). Here, the California Court of Appeal's February 5, 2019 opinion on direct review (see lodg. 1) stands as the last reasoned decision with respect to Petitioner's claims.

VI.

DISCUSSION

A. EVIDENTIARY ERRORS (CLAIMS ONE AND TWO)

1. Background

In Claim One, Petitioner argues the trial court deprived him of due process and a fair trial by admitting evidence of his 2006 Florida robbery conviction. Pet. at 5, 21-75. In Claim Two, Petitioner argues the trial court deprived him of due process and a fair trial by admitting evidence of his 2011 possession of a firearm and "robbery tools." Id. at 5-6, 76-107.

2. State Court Opinion

The California Court of Appeal denied Petitioner's claims on appeal, finding any error was harmless. Lodg. 1 at 8-12, 15-17. The state court first found Petitioner's federal evidentiary error claims were forfeited because Petitioner failed to "analyze how the erroneous admission of uncharged crimes evidence deprived him of a fair trial." Id. at 15-16 n.5. The state court, therefore, held it was not required to apply the "harmless-beyond-a-reasonable-doubt standard" of Chapman v. California,

386 U.S. 18, 24 (1967). Id. Nevertheless, the state court went on to apply Chapman and found the evidentiary errors were harmless beyond a reasonable doubt. Id. at 17 n.6.

3. Analysis

a. The Court will review the state court decision under AEDPA's deferential standard of review.

Petitioner argues he is entitled to de novo review of his evidentiary error claims because the state court erroneously found Petitioner had forfeited the federal evidentiary error claims and failed to apply the Chapman harmlessness standard to the evidentiary error claims. Dkt. 38 at 9-11. However, while the state court initially found it was not required to apply Chapman, it did ultimately cite Chapman and find the trial court's evidentiary errors "were harmless beyond a reasonable doubt" because of "the strong evidence tying [Petitioner] to the [instant] robberies and the low likelihood the erroneously admitted evidence inflamed the jury's passions." Lodg. 1 at 17 & n.6. The state court's ruling that the evidentiary errors were harmless beyond a reasonable doubt under Chapman is a ruling on the merits of Petitioner's federal evidentiary claims. See Brown v. Davenport, __ U.S. __, 142 S. Ct. 1510, 1520 (2022) ("[A] state court's harmless-error determination qualifies as an adjudication on the merits under AEDPA."). Hence, Claims One and Two will be reviewed under AEDPA's deferential standard of review for claims "adjudicated on the merits." 28 U.S.C. § 2254(d); Richter, 562 U.S. at 99.

b. Claims One and Two fail to state a cognizable federal due process claim.

As an initial matter, violations of state law are not cognizable on federal habeas review. See Estelle v. McGuire, 502 U.S. 62, 67-68 (1991); see also Wilson v. Corcoran, 562 U.S. 1, 5 (2010) ("[I]t is only noncompliance with *federal* law that renders a State's criminal judgment susceptible to collateral attack in the federal courts." (emphasis in original)); Hendricks v. Vasquez, 974 F.2d 1099, 1105 (9th Cir.

1992) ("Federal habeas will not lie for errors of state law."). Therefore, the fact that the state court found admission of evidence of Petitioner's 2011 possession of a firearm and "robbery tools" was erroneous under state law is not relevant to this Court's federal habeas review.[8] Larson v. Palmateer, 515 F.3d 1057, 1065 (9th Cir. 2008) (holding whether state trial court's admission of evidence of petitioner's prior conduct was correct under state law is "irrelevant" on federal habeas review).

In addition, assuming Petitioner has raised cognizable federal claims based upon the alleged erroneous admission of evidence, he is not entitled to relief because the United States Supreme Court "has not yet made a clear ruling that admission of irrelevant or overtly prejudicial evidence constitutes a due process violation sufficient to warrant issuance of the writ." Holley v. Yarborough, 568 F.3d 1091, 1101 (9th Cir. 2009). In fact, the United States Supreme Court has specifically left open the question of whether the admission of prior conviction evidence to prove propensity violates a criminal defendant's federal constitutional due process right to a fair trial. See Estelle, 502 U.S. at 75 n.5 ("[W]e express no opinion on whether a state law would violate the Due Process Clause if it permitted the use of 'prior crimes' evidence to show propensity to commit a charged crime."). Therefore, because the United States Supreme Court has not held that the admission of prejudicial evidence violates the Constitution, the state court's determination of Petitioner's claims cannot be contrary to, or an unreasonable application of, clearly established federal law. See Carey v.

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[8] The state court found the trial court "abused its discretion [under state law] when it admitted evidence of [Petitioner's] 2011 possession of a firearm and "robbery tools" on the issue of identity because the evidence was not relevant to prove that [Petitioner] committed the [instant] robberies." Lodg. 1 at 10. Applying state law, the state court then found "[t]hough a closer call" an argument "can be made" that the trial court's admission of evidence of Petitioner's 2006 robbery conviction was unduly prejudicial because evidence of a common plan or scheme is merely cumulative where the only issue to be determined was whether Petitioner was the person who committed the charged offense. Id. at 12. However, the state court declined to resolve the issue of whether evidence of the 2006 robbery conviction was erroneously admitted because "any error in admitting that evidence was harmless." Id.

Musladin, 549 U.S. 70, 77 (2006); Moses v. Payne, 555 F.3d 742, 758-59 (9th Cir. 2009); Larson, 515 F.3d at 1066 (holding where the Supreme Court has "expressly left [the] issue an 'open question,'" habeas relief is unavailable); Mejia v. Garcia, 534 F.3d 1036, 1046 (9th Cir. 2008) (holding admission of propensity evidence does not violate clearly established law because the United States Supreme Court expressly reserved consideration of the issue in Estelle).

c. Petitioner is not entitled to relief on Claims One and Two because he has not established the alleged erroneous admission of evidence had a substantial and injurious effect or influence in determining the jury's verdict.

Finally, even assuming Petitioner could establish a federal due process error, "[w]hen a Chapman decision is reviewed under AEDPA, 'a federal court may not award habeas relief under § 2254 unless *the harmlessness determination itself* was unreasonable.'" Davis v. Ayala, 576 U.S. 257, 269 (2015) (quoting Fry v. Pliler, 551 U.S. 112, 119 (2007)) (emphasis in original). Moreover, a federal court may grant an application for habeas relief regarding an evidentiary error only where the petitioner establishes the error "had substantial and injurious effect or influence in determining the jury's verdict." Brecht v. Abrahamson, 507 U.S. 619, 637 (1993) (citation omitted); see also Plascencia v. Alameida, 467 F.3d 1190, 1203 (9th Cir. 2006) (applying Brecht harmless error analysis to claim that admission of evidence was improper). Here, for the reasons set forth below in Section VI.C.4., the Court cannot find the admission of evidence of Petitioner's 2006 Florida robbery conviction or his 2011 possession of a firearm and "robbery tools" – either individually or in combination with any other errors – had a substantial and injurious effect or influence on the jury's verdict. Thus, habeas relief is not warranted on Claims One and Two.

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B. INSTRUCTIONAL ERROR (CLAIM THREE)

1. Background

In Claim Three, Petitioner argues the trial court erred by omitting any reference to the evidence of Petitioner's 2011 possession of a firearm and "robbery tools" from CALCRIM No. 375. Pet. at 6, 108-34. At trial, the jury was instructed with CALCRIM No. 375 as follows:

> The People presented evidence that the defendant committed the offense of robbery that was not charged in this case. You may consider this evidence only if the People have proved by a preponderance of the evidence that the defendant, in fact, committed the uncharged offense.
>
> Proof by a preponderance of the evidence is a different burden of proof than proof beyond a reasonable doubt. A fact is proved by a preponderance of the evidence if you conclude that it is more likely than not that the fact is true. If the People have not met this burden, you must disregard this evidence entirely. If you decide that the defendant committed the uncharged offense, you may but are not required to consider that evidence for the limited purpose of deciding whether first, the defendant was the person who committed the offenses alleged in this case and/or the defendant had a plan or scheme to commit the offenses alleged in this case.
>
> In evaluating this evidence, consider the similarity or lack of similarities between the uncharged offense and the charged offenses. Do not consider this evidence for any other purpose except for the limited purpose of determining identity or common scheme or plan. Do not conclude from this evidence that the defendant has a bad character or is disposed to commit crime.
>
> If you conclude that the defendant committed the uncharged offense, that conclusion is only one factor to consider along with all the

other evidence. It is not sufficient by itself to prove that the defendant is guilty of robbery. The People must still prove that charge beyond a reasonable doubt.

3 RT at 666-67; 2 CT at 396.

2. State Court Opinion

The California Court of Appeal denied Petitioner's claim on appeal, finding any error was harmless. Lodg. 1 at 12-17. The state court first found the instructional error did not lower the prosecution's burden of proof because the trial court instructed the jury multiple times that it had to find Petitioner guilty beyond a reasonable doubt. Id. at 15-16 n.5. Therefore, the state court concluded it was not required to apply the "harmless-beyond-a-reasonable-doubt standard" of Chapman. Id. Nevertheless, the state court went on to find the instructional error was harmless beyond a reasonable doubt under Chapman. Id. at 17 n.6.

3. Applicable Law

A challenge to a jury instruction solely as an error under state law does not state a claim cognizable in a federal habeas corpus action. See Estelle, 502 U.S. at 71-72. Rather, on federal habeas review, a jury instruction violates due process only if "the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process." Id. at 72 (quoting Cupp v. Naughten, 414 U.S. 141, 147 (1973)). The relevant question is not whether a jury "*could have*" "applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence," but rather "whether there is a reasonable likelihood it *did*." Rhoades v. Henry, 638 F.3d 1027, 1042 (9th Cir. 2011) (emphasis in original; citation omitted); see also Weeks v. Angelone, 528 U.S. 225, 236 (2000) (declining to grant relief where the petitioner had shown only a "slight possibility" that the jury misapplied an instruction). The instruction must be considered in the context of the trial record and the instructions as a whole. Henderson v. Kibbe, 431 U.S. 145, 154 (1977); see also Middleton v. McNeil, 541 U.S. 433, 437-38 (2004). A petitioner

challenging the omission of an instruction faces an especially heavy burden because "[a]n omission, or an incomplete instruction, is less likely to be prejudicial than a misstatement of the law." Henderson, 431 U.S. at 155.

Ultimately, instructional errors of constitutional magnitude are subject to harmless error analysis. Hedgpeth v. Pulido, 555 U.S. 57, 60-61 (2008); Neder v. United States, 527 U.S. 1, 10-11 (1999); Pensinger v. Chappell, 787 F.3d 1014, 1029 (9th Cir. 2015). Therefore, "[w]hen a Chapman decision is reviewed under AEDPA, 'a federal court may not award habeas relief under § 2254 unless *the harmlessness determination itself* was unreasonable.'" Davis, 576 U.S. at 269 (quoting Fry, 551 U.S. at 119) (emphasis in original). Moreover, a habeas petitioner is not entitled to relief unless the instructional error had a substantial and injurious effect or influence in determining the jury's verdict. Brecht, 507 U.S. at 637; see also Fry, 551 U.S. at 121-22 (in federal habeas cases the Brecht harmlessness standard applies regardless of whether the state court performed harmless error analysis or what standard it employed).

4. Analysis

Once again, Petitioner argues he is entitled to de novo review of his federal instructional error claim because the state court erroneously found the Chapman harmlessness standard was not applicable to the instructional error claim. Dkt. 38 at 22-25. However, while the state court initially found it was not required to apply Chapman, it did ultimately cite Chapman and find the instructional error was "harmless beyond a reasonable doubt" because of "the strong evidence tying [Petitioner] to the [instant] robberies and the low likelihood the erroneously admitted evidence inflamed the jury's passions." Lodg. 1 at 17 & n.6. Hence, Claim Three will be reviewed under AEDPA's deferential standard of review for claims "adjudicated on the merits." 28 U.S.C. § 2254(d); Richter, 562 U.S. at 99; see also Brown, 142 S. Ct. at 1520.

First, violations of state law are not cognizable on federal habeas review. See Estelle, 502 U.S. at 67-68. Therefore, the fact that the state court found the trial court's failure to mention the evidence of Petitioner's 2011 possession of a firearm and "robbery tools" from its limiting instruction was erroneous under state law is not relevant on federal habeas review.[9]

Second, for the reasons set forth below in Section VI.C.4., even assuming Petitioner could establish a due process error, Petitioner has not established the instructional error – either individually or in combination with any other errors – had a substantial and injurious effect or influence on the jury's verdict. See Davis, 576 U.S. at 269; Brecht, 507 U.S. at 637. Thus, habeas relief is not warranted on Claim Three.

C. CUMULATIVE ERROR (CLAIM FOUR)

1. Background

In Claim Four, Petitioner argues the cumulative impact of the evidentiary and instructional errors alleged in Claims One, Two, and Three resulted in a denial of Petitioner's rights to due process and a fair trial. Pet. at 6, 135-81.

2. State Court Opinion

The California Court of Appeal denied Petitioner's claim on appeal, finding the evidentiary and instructional error claims were cumulatively harmless beyond a reasonable doubt under Chapman because of "the strong evidence tying [Petitioner] to the [instant] robberies and the low likelihood the erroneously admitted evidence inflamed the jury's passions." Lodg. 1 at 17 & n.6.

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[9] The state court found "it is reasonably likely the jury misapplied the trial court's limiting instruction on the use of uncharged crimes evidence" because "by omitting the 2011 incident from CALCRIM No. 375, the court erroneously permitted the jury to consider it for any purpose." Lodg. 1 at 14.

3. Applicable Law

Cumulative error applies where, "although no single trial error examined in isolation is sufficiently prejudicial to warrant reversal, the cumulative effect of multiple errors may still prejudice a defendant." Mancuso v. Olivarez, 292 F.3d 939, 957 (9th Cir. 2002) (as amended June 11, 2002) (quoting United States v. Frederick, 78 F.3d 1370, 1381 (9th Cir. 1996)). However, habeas relief is warranted only where the federal court has "grave doubt" about whether the combined effect of the errors had a "substantial and injurious effect or influence on the jury's verdict." Brecht, 507 U.S. at 637; Davis, 576 U.S. at 267-68; see also Fry, 551 U.S. at 121-22 (holding in federal habeas proceedings "a court must assess the prejudicial impact of constitutional error in a state-court criminal trial under the 'substantial and injurious effect' standard set forth in Brecht, supra, whether or not the state appellate court recognized the error and reviewed it for harmlessness under the 'harmless beyond a reasonable doubt' standard set forth in Chapman"). "There must be more than a 'reasonable possibility' that the error was harmful." Davis, 576 U.S. at 268 (quoting Brecht, 507 U.S. at 268). The Brecht standard reflects the view that a "State is not to be put to th[e] arduous task [of retrying a defendant] based on mere speculation that the defendant was prejudiced by trial error; the court must find that the defendant was actually prejudiced by the error." Calderon v. Coleman, 525 U.S. 141, 146 (1998) (per curiam); see also Brecht, 507 U.S. at 637 (holding habeas petitioners "are not entitled to habeas relief based on trial error unless they can establish that it resulted in 'actual prejudice'").

4. Analysis

Here, Petitioner has not established that the combined effect of the evidentiary and instructional errors had a substantial and injurious effect or influence on the jury's verdict.

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a. Substantial evidence supports the jury's verdict.

First, there was substantial evidence presented at trial for the jury to find Petitioner committed the instant offenses beyond a reasonable doubt. Petitioner's DNA and fingerprint were found on the burner phone at the scene of the Cisco's robbery. 1 RT at 182, 184; 2 RT at 342, 499. In addition, a match between the DNA on the zip ties used during the Al Mulino robbery and Petitioner "is 246 times more probable than a coincidental match to an un unrelated African American person," and the chance of a false positive is 1 in 3.43000 or one in over 3000 unrelated African Americans. 2 RT at 505-08.

Data from Petitioner's personal cell phone also tied him to the offenses. His personal cell phone was turned off at the time of each of the robberies for several hours, whereas most Sunday nights Petitioner's personal cell phone was very active. 2 RT at 426, 428-31, 433-34. On the night of the Bandits robbery, Petitioner's personal cell phone was turned off from 9:39 p.m. to 12:21 p.m. the next day. 2 RT at 429-30. On the night of the Al Mulino robbery, Petitioner's personal cell phone was turned off from 9:06 p.m. to 11:13 p.m. 2 RT at 431-32. Finally, on the night of the Cisco's robbery, his personal cell phone was turned off from 7:39 p.m. to 11:09 p.m. 2 RT at 433-34. Data from Petitioner's personal cell phone also revealed that the nights of the robberies were some of the few evenings when his phone was in Ventura County. 2 RT at 426. For example, on the night of the Bandits robbery, Petitioner's personal cell phone was used in Thousand Oaks, near US-101, at 9:39 p.m. 2 RT at 430-31. On the night of the Al Mulino robbery, Petitioner's personal cell phone was used along US-101 between San Fernando and Thousand Oaks at 9:05 p.m. 2 RT at 432, 465. His personal cell phone was used several times near Cisco's starting at 11:09 p.m. the night of the robbery there, but began to move toward Los Angeles along US-101 at 11:46 p.m. 2 RT at 435-37.

Finally, there were several relevant similarities between the robberies indicating that they were all committed by the same individual. The investigating officer testified

he found it significant that all three robberies occurred at restaurants in Thousand Oaks near freeway off-ramps and each occurred on a Sunday night at or just after closing time. 2 RT at 362-63; see also 1 RT at 58-59, 141-42, 209-11. The perpetrator was a dark-skinned male who wore similar clothing – hoodie and bandana covering his face – and appeared to have a similar crouching gait. 1 RT at 61, 142, 145, 155, 211, 251; 2 RT at 383-84. In each robbery, the perpetrator entered through the back door, demanded money from the employees, and threatened the employees with what appeared to be a gun.[10] 1 RT at 59, 61, 142, 146; 2 RT at 362-63.

b. The jury was properly instructed on the burden of proof.

Second, the trial court properly instructed the jury on the burden of proof that applied to each separately charged offense. The jury was repeatedly instructed of the requirement that it find proof of each offense beyond a reasonable doubt. 2 CT at 379, 393, 394, 396, 398, 399. Additionally, the jury was specifically instructed it "must consider each count separately and return a separate verdict for each one." Id. at 401. Jurors are presumed to follow instructions as issued by the trial court. Weeks, 528 U.S. at 234. Therefore, the jury is presumed to have followed the court's instructions and found Petitioner guilty of each offense beyond a reasonable doubt. See Lopez v. Louis, No. 1:12-CV-01777-DAD-MJS (HC), 2016 WL 792556, at *18 (E.D. Cal. Mar. 1, 2016), report and recommendation adopted, 2016 WL 1243533 (E.D. Cal. Mar. 30, 2016) (finding any risk of prejudice from a joint trial was "cured" by giving a proper "beyond a reasonable doubt" instruction and instructing the jury that it must "separately consider the evidence as it applies to each defendant" because juries are presumed to follow their instructions).

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10 Petitioner argues the robberies were not similar because the perpetrator did not use the same threat each time. Dkt. 28 at 30. However, in each robbery, the victims understood from the perpetrator's words and actions that they would be shot if they called for help before the perpetrator left because after he was gone, he would clearly not be in a position to shoot them. See 1 RT at 70-71, 144-45, 214-15.

c. The jury considered the evidence critically.

Third, the jury appears to have considered the evidence critically because they did not simply find Petitioner guilty of all charges and allegations. Rather, they concluded no firearm was used in the instant robberies and found the firearm allegations "not true," despite the evidence of Petitioner's 2011 possession of a firearm. See 2 CT 407-11. This split verdict demonstrates the jury carefully considered the evidence and circumstances surrounding the instant offenses and did not merely assume the evidence of Petitioner's possession of a firearm in 2011 proved he also possessed a firearm in committing the instant offenses. Beardslee v. Brown, 393 F.3d 1032, 1044 (9th Cir. 2004) (finding the jury's consideration of an invalid special circumstance did not have a substantial and injurious effect on the jury's verdict because the split verdict established the jury differentiated between the circumstances surrounding the two crimes); see also Brady v. Long, No. EDCV 15-2123-GW (RAO), 2016 WL 6574148, at *18 (C.D. Cal. May 3, 2016), report and recommendation adopted, 2016 WL 6574002 (C.D. Cal. Nov. 3, 2016) ("The split verdicts are strong indication that the alleged-picture taking incident did not compromise any juror's impartiality; on the contrary, the mix of verdicts reflects that each juror deliberated fully, actively, and without reservation, considered the evidence, and reached consensus based on the facts as they found them.").

d. The likely impact of the allegedly erroneously admitted evidence is low because of the numerous differences between the prior conduct and the instant offenses.

In addition, there are numerous differences between the allegedly erroneously admitted evidence and the instant offenses. For example, in the 2006 robbery Petitioner used handcuffs and wore a wig, but no handcuffs or wigs were used in the instant robberies. Moreover, a firearm was found in the car Petitioner was driving in 2011, but the jury found no firearm was used in the instant robberies. Also, there were handcuffs, duct tape, and a crowbar found in the car Petitioner was driving in

2011, but no handcuffs, duct tape, or crowbar were used in the instant robberies. In light of those differences, the jury could just as reasonably have concluded the lack of similarities weighed against a finding Petitioner committed the instant robberies. See Rials v. Grounds, No. EDCV 13-2152-JVS (PLA), 2015 WL 1893199, at *11 (C.D. Cal. Jan. 29, 2015), report and recommendation adopted sub nom. Rials v. R.T.C. Grounds, 2015 WL 1910420 (C.D. Cal. Apr. 23, 2015) (finding petitioner failed to show prejudice under Brecht because "the [trial] court noted that the jurors were not *required* to consider the prior crimes evidence, but were free to disregard it" (emphasis in original)).

e. The prosecutor did not emphasize the allegedly erroneously admitted evidence.

Finally, Petitioner argues he was prejudiced by the prosecutor's "repeated reliance on the 2006 and 2011 evidence." Dkt. 38 at 27-29 (citing RT 681, 688). However, Petitioner cites to only two brief references in the prosecutor's twenty-four-page closing argument after six days of testimony. See Brecht, 507 U.S. at 639 (finding petitioner was not entitled to habeas relief where the State's references to the erroneously admitted evidence "were infrequent, comprising less than two pages of the 900-page trial transcript").

Accordingly, in light of the substantial evidence establishing Petitioner committed the instant robberies, the jury instructions' emphasis that the jury must find Petitioner guilty of each offense beyond a reasonable doubt, the jury's critical consideration of the evidence, the differences between the allegedly erroneously admitted evidence and the instant offenses, and the prosecutor's limited references to the allegedly erroneously admitted evidence, this Court cannot conclude the combined effect of the evidentiary and instructional errors had a substantial and injurious effect on the verdict. Thus, habeas relief is not warranted. See Brecht, 507 U.S. at 637.

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VII.

RECOMMENDATION

IT IS THEREFORE RECOMMENDED that the District Court issue an Order: (1) accepting this Report and Recommendation; (2) denying the Petition; and (3) dismissing this action with prejudice.

Dated: April 5, 2023

HONORABLE KENLY KIYA KATO
United States Magistrate Judge

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