No.

In the
United States Supreme Court

Marco Antonio Casillas,

Petitioner,

v.

Janan Cavagnolo, Warden,

Respondent.

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

Petitioner's Appendix

CUAUHTEMOC ORTEGA
Federal Public Defender
DALE F. OGDEN
Counsel of Record
Deputy Federal Public Defender
321 East 2nd Street
Los Angeles, California 90012
(213) 894-2854
dale_ogden@fd.org

Counsel for Petitioner
MARCO ANTONIO CASILLAS

Appendix

Appendix A
1a

NOT FOR PUBLICATION

FILED

MAR 25 2025

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MARCO ANTONIO CASILLAS, Petitioner - Appellant, v. KEN CLARK, Warden, Respondent - Appellee.	No. 23-2213 D.C. No. 2:21-cv-01267-SPG-MAR MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Sherilyn Peace Garnett, District Judge, Presiding

Argued and Submitted March 5, 2025
Pasadena, California

Before: TALLMAN, CLIFTON, and CHRISTEN, Circuit Judges.

Petitioner Marco Antonio Casillas appeals the district court's order denying his 28 U.S.C. § 2254 habeas corpus petition challenging his conviction for first degree murder committed during a burglary, for which he received a life sentence without parole. Because the parties are familiar with the facts, we do not recount them here. We have jurisdiction pursuant to 28 U.S.C. §§ 1291 and 2253. We

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

review de novo the denial of a petition for writ of habeas corpus. *Earp v. Davis*, 881 F.3d 1135, 1142 (9th Cir. 2018). We affirm.

1. We review Casillas' claim that the trial court deprived him of his constitutional right to present a complete defense pursuant to the Antiterrorism and Effective Death Penalty Act (AEDPA). Casillas argues that in resolving this claim on state evidentiary grounds, the California Court of Appeal inadvertently overlooked his federal constitutional claim, warranting de novo review on appeal. *See Johnson v. Williams*, 568 U.S. 289, 301–03 (2013) (holding that 28 U.S.C. § 2254(d) applies only to claims adjudicated on the merits). We disagree. In his brief on direct appeal, Casillas presented his third-party defense claim as one implicating his federal constitutional rights. Thus, we "presume[] that the state court adjudicated the claim on the merits." *Harrington v. Richter*, 562 U.S. 86, 99 (2011). So long as the state court "heard and *evaluated* the evidence and the parties' substantive arguments," this presumption applies. *Johnson*, 568 U.S. at 302 (quoting Black's Law Dictionary 1199 (9th ed. 2009)).

2. The California Court of Appeal's conclusion that the trial court's exclusion of Casillas' third-party culpability evidence did not violate due process was not an unreasonable application of clearly established federal law. In rare cases, the application of an otherwise valid state evidentiary rule can violate due process. *See Chambers v. Mississippi*, 410 U.S. 284, 302 (1973). However, the

trial court's exclusion of the evidence in *Chambers* violated due process because that evidence "bore persuasive assurances of trustworthiness." *Id.*

The evidence here does not have that same level of trustworthiness. At the trial court evidentiary hearing, Miller, a former police jailhouse informant, did not remember writing the three-page letter that Casillas sought to introduce detailing alleged third-party involvement in the murder. Miller also did not remember making statements regarding third-party involvement that Volpei, the District Attorney investigator, attributed to him. While Casillas argues that Miller's letter and statements provided non-public details that bolstered the trustworthiness of this evidence, *see Gable v. Williams*, 49 F.4th 1315, 1330 (9th Cir. 2022), Miller's letter also included some facts that were demonstrably incorrect; for example, the letter stated that Perez disposed of the murder weapon by throwing it in the ocean, when in fact, a knife containing fibers that matched the victim's shirt was found in the neighborhood of the victim's house. Plus, Miller testified that his motivation as an informant was to escape his own criminal charges and that he was willing to tell the police whatever it took to do so.

The exculpatory value of the excluded evidence is also minimal in light of the overwhelming physical evidence placing Casillas at the scene of the crime shortly before the murder took place. *See Perry v. Rushen*, 713 F.2d 1447, 1452 (9th Cir. 1983) (observing that the third-party culpability evidence in *Chambers*

was "highly exculpatory," and "if believed, would *necessarily* exonerate the defendant of the primary offense.").

3. We decline to issue a certificate of appealability as to whether the admission of Semchenko's identification of Casillas violated Casillas' due process rights.[1] To obtain a certificate of appealability, Casillas "must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Although the identification may have been the product of impermissibly suggestive circumstances, Casillas was not prejudiced by its admission. *See Neil v. Biggers*, 409 U.S. 188, 199–200 (1972); *Simmons v. United States*, 390 U.S. 377, 384 (1968). Even without Semchenko's identification, the DNA evidence, fingerprints, palmprint, and internet searches the police discovered on Casillas' computers provided powerful evidence that Casillas murdered Bush.

AFFIRMED.

[1] We deny Casillas' motion for judicial notice of the color version of the press release image. Dkt. No. 14.

JS-6

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

MARCO ANTONIO CASILLAS, Petitioner, v. KEN CLARK, Respondent.	Case No. 2:21-cv-01267-SPG (MAR) JUDGMENT

Pursuant to the Order Accepting Findings and Recommendation of United States Magistrate Judge, **IT IS HEREBY ADJUDGED** that this action is **DISMISSED** with prejudice.

Dated: August 10, 2023

HONORABLE SHERILYN PEACE GARNETT
United States District Judge

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

MARCO ANTONIO CASILLAS, Petitioner, v. KEN CLARK, Respondent.	Case No. 2:21-cv-01267-SPG (MAR) 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 engaged in *de novo* review of those portions of the Report to which Respondent and Plaintiff have objected. The Court accepts the findings and recommendation of the Magistrate Judge.

Within Claim Four, Petitioner has presented an argument pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966), ECF No. 1 at 10, ECF No. 1-5 at 14-17, which was not explicitly addressed in the Report and Recommendation. The Court has considered Petitioner's argument and finds it does not warrant federal habeas relief. Even if the Court were to assume, without deciding, that police elicited statements from Petitioner in violation of *Miranda*, any alleged error is harmless under the circumstances of Petitioner's trial. *See Ghent v. Woodford*, 279 F.3d 1121, 1126 (9th Cir.

2002), *as amended* (Mar. 11, 2002) ("The erroneous admission of statements taken in violation of a defendant's Fifth Amendment rights is subject to harmless error analysis.").

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: August 10, 2023

HONORABLE SHERILYN PEACE GARNETT
United States District Judge

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

MARCO ANTONIO CASILLAS, Petitioner, v. KEN CLARK, Respondent.	Case No. 2:21-cv-01267-SPG (MAR) REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This Report and Recommendation is submitted to the Honorable Sherilyn Peace Garnett, 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 Marco Antonio Casillas ("Petitioner"), a California state prisoner proceeding pro se, has filed a Petition for Writ of Habeas Corpus ("Petition") pursuant to 28 U.S.C. § 2254 ("section 2254") challenging his 2017 murder conviction. ECF Docket No. ("Dkt.") 1. For the reasons discussed below, the Court recommends denying the Petition with prejudice.

///

///

II.

PROCEDURAL HISTORY

On February 10, 2017, a Ventura County Superior Court jury convicted Petitioner of first-degree felony murder (Cal. Penal Code §§ 187(a), 189). Lodg.[1] 12, Vol. V at 53.[2] Additionally, the jury found true the special-circumstance allegation that the murder was committed during a burglary (Cal. Penal Code § 190.2(a)(17)). Id. Petitioner also admitted that he had suffered a prior serious felony conviction within the meaning of Cal. Penal Code § 667(a)(1). Id. at 56. On March 15, 2017, the trial

---

[1] The Court's citations to Lodged Documents refer to documents lodged in support of Respondent's March 11, 2021 Motion to Dismiss and November 2, 2021 Answer. See Dkts. 8–9, 22–23. Respondent identifies the documents as follows:

(1) Relevant portions from the Clerk's Transcript in Ventura County Superior Court case number LA2014018724 ("Lodg. 1");
(2) Appellant's Opening Brief filed in California Court of Appeal case number B281363 ("Lodg. 2");
(3) Respondent's Brief filed in California Court of Appeal case number B281363 ("Lodg. 3");
(4) Reply Brief filed in California Court of Appeal case number B281363 ("Lodg. 4");
(5) Supplemental Appellant's Opening Brief filed in California Court of Appeal case number B281363 ("Lodg. 5");
(6) Supplemental Respondent's Brief filed in California Court of Appeal case number B281363 ("Lodg. 6");
(7) Appellant's letter re additional citations filed in California Court of Appeal case number B281363 ("Lodg. 7");
(8) Appellant's second letter re additional citations filed in California Court of Appeal case number B281363 ("Lodg. 8");
(9) Opinion filed in California Court of Appeal case numbers B286320 and B281363 ("Lodg. 9");
(10) Petition for Review filed in California Supreme Court case number S259441 ("Lodg. 10");
(11) Docket showing denial of Petition for Review in California Supreme Court case number S259441 ("Lodg. 11");
(12) Clerk's Transcript in Ventura County Superior Court case number LA2014018724: six volumes ("Lodg. 12, Vol. I–VI");
(13) Reporter's Transcript in Ventura County Superior Court case number LA2014018724: ten volumes ("Lodg. 13, Vol. I–X"); and
(14) Petition for writ of habeas corpus filed in California Supreme Court case number S268228 ("Lodg. 14").

Dkts. 9, 23.

[2] All citations to electronically filed documents refer to the CM/ECF pagination.

court sentenced Petitioner to a state prison for life without the possibility of parole, plus five years. Id. at 59–63.

Petitioner appealed his conviction and sentence to the California Court of Appeal. Id. at 64; Lodgs. 2–8. On October 28, 2019, the California Court of Appeal affirmed the judgment. Lodg. 9. On February 11, 2020, the California Supreme Court denied discretionary review. Lodgs. 10–11.

On February 9, 2021, Petitioner filed the instant Petition, containing seven (7) claims. Dkt. 1. On March 11, 2021, Respondent filed a Motion to Dismiss contending Petitioner failed to exhaust his state remedies for some of his claims. Dkt. 8 at 3–4.

On March 24, 2021, Petitioner filed a petition for writ of habeas corpus in the California Supreme Court. Lodg. 14. Petitioner subsequently filed a Motion for a Stay in this Court, so that he could exhaust his claims. Dkt. 11. On June 10, 2021, the Court granted Petitioner's Motion for a stay. Dkt. 13. The California Supreme Court denied Petitioner's state petition on June 23, 2021. Dkt. 14 at 5.

On July 5, 2021, Petitioner notified this Court that the California Supreme Court had denied his petition. Dkt. 14. On August 12, 2021, the Court lifted the stay and ordered Respondent to file an answer. Dkt. 15. On November 2, 2021, Respondent filed an Answer. Dkt. 22. On May 17, 2022, Petitioner filed a Reply. Dkt. 35. The matter thus stands submitted and ready to decide.

III.

SUMMARY OF FACTS

The California Court of Appeal summarized the facts as follows: [3]

> In June 1997, James Bush lived with his mother Gail Shirley in a house in Ventura. Bush was 16 years old. On June 24, Bush and Shirley

[3] Petitioner does not appear to argue that this portion of the California Court of Appeal opinion was based on an unreasonable determination of the facts. Furthermore, the Court has independently reviewed the trial record and finds this portion of the Court of Appeal's summary accurate.

left the house at 8:40 a.m. so that Bush could take his driver's test. When they returned at about 10:00 a.m., Shirley did not notice anything amiss.

Shirley and Bush left the house again at about 10:30 a.m. to run some errands. The doors were locked and the windows were secured with stop locks, which permitted them to be only partially opened. When they returned at about 11:45 a.m., they noticed some things in the house were slightly askew. Bush showed Shirley how the stop lock on his bedroom window had been moved and the screen had been removed.

Shirley went to the den to call 911. Bush went to the study to check for missing items. Shirley heard the front door slam. She thought Bush had fallen. When he was not at the front door, she went to the study. She found Bush lying on the floor with stab wounds to his neck and stomach. Bush told her his assailant had just run out.

Ventura Police Officer Michael Van Atta was less than a mile away from Bush when the 911 call came in. Van Atta administered CPR to Bush until the paramedics arrived. Bush died at the hospital.

Witnesses

Lorayne Snyder lived a few houses away from Bush. Sometime before noon on the day of the murder, a short Hispanic man, teenage or possibly 20 years old, came to the door. He spoke to Snyder's husband. Snyder was near the door. She referred the young man to a house across the street where a Hispanic family lived. She watched as the young man crossed the street and knocked on the door. A young girl answered the door and pointed to Bush's house. Snyder saw the young man standing at Bush's front door. Then she stopped watching.

Yomaira Falcon was 10 or 11 years old when she lived near Bush's house. She was home alone when a short Hispanic man in his late teens or early 20's knocked on her door. The young man asked if anyone was at home. She said her parents were upstairs, and asked him to leave. She saw him walk across the street toward Bush's home.

On the morning of the murder, Lauren Semchenko, 11 years old, and her friend Heather McNally were riding their bicycles. They saw a young man run out from an area in front of Bush's home. The man had a long knife in his hand. He slowed to put the knife in his waistband, tucked his shirt over it and continued to run. McNally yelled at the man. He appeared to be surprised and scared. The man wore a green, long-

sleeved plaid shirt. McNally believed he was about 14 years old. Semchenko also believed he was about 14 years old.

McNally told her mother about the encounter because it was unusual. Her mother contacted the police. The police interviewed McNally and Semchenko separately. Semchenko helped the police complete a composite sketch of the man. McNally reviewed the sketch and declined to make changes. But McNally believed the hairline was different and the sketch appeared a little too feminine.

Rochelle Stock saw a Hispanic man who was not very tall and who appeared to be in his late teens in the neighborhood. He wore a green and black plaid shirt. He looked "very, very nervous" and anxious. He kept looking around. She told the police the composite drawing looked like the man she saw.

A Department of Motor Vehicles photograph taken of [Petitioner] around the time of the murder shows him wearing a green plaid shirt. When [Petitioner] was arrested, a newspaper published the picture. Semchenko recognized the picture as that of the man she saw on the day of the murder.

Investigation

Ventura Police Detectives William Dzuro and Harold Scott investigated the crime scene. A screen had been removed from Bush's bedroom window and a sliding lock had been moved. The detectives determined that the window was the point of entry. Detectives lifted 23 latent prints from around the house. Detectives lifted a partial palm print from the window sill at the point of entry. Because the sun shining on the window sill would have quickly dried out the palm print, Detective Scott believed the palm print was left on the window sill after 10:00 a.m. on the day of the murder.

Detective Dzuro opened the closet doors in Shirley's dressing room and found fresh feces on top of some clothing in a laundry basket. The detective took a sample for DNA testing.

One of Bush's neighbors found a folding knife in the neighborhood. The blade matched cuts in the T-shirt that Bush was wearing and contained cotton fibers that matched the T-shirt. The police were unable to lift fingerprints from the knife.

In 1997, DNA technology had not advanced enough to identify a person from feces. California did not begin to add palm prints to its fingerprint database until 2003.

In February of 2002, the police obtained a DNA profile from the fecal matter left at Bush's house. In March of 2014, nearly 17 years after Bush's death, a latent print examiner found a match between [Petitioner]'s palm print and the palm print left on Bush's window sill. [Petitioner]'s probation officer obtained a buccal swab from [Petitioner]. The DNA taken from the fecal material matched [Petitioner]'s DNA.

Fingerprint Expert

Martin Collins is a latent print supervisor with the California Department of Justice. Collins testified the palm print left in Bush's window sill was made by [Petitioner]'s right palm. Collins also identified a print from Bush's hallway closet as [Petitioner]'s left thumbprint. Collins testified he excluded Shirley and Bush as potential contributors to a print taken from a dressing room closet door knob, but he could not exclude [Petitioner]. Collins testified that prints shown on four other exhibits were inconclusive. He said that neither Shirley, Bush, [Petitioner], nor anyone else could be excluded. He agreed with the prosecutor's statement that [Petitioner] could not be excluded as a potential contributor to those prints. At the prosecutor's request, Collins circled "not" on a notation on top of the exhibits stating, "Unidentified: Defendant (is/is not) excluded."

Interview with [Petitioner]

In April 2014, Ventura police detectives went to [Petitioner]'s place of work where he was on work furlough from a different offense. The detectives asked if [Petitioner] could provide some general information about burglaries to help them in their work. They told [Petitioner] he was not required to talk to them. They sat outside at a picnic table. The detectives surreptitiously recorded the conversation.

[Petitioner] told the detectives that unless the burglar was a drug addict, most burglars commit burglaries for the thrill of doing something bad. The detectives asked [Petitioner] about his 1997 burglary conviction. He said he met a girl at a club who called him the next day to ask for a ride. They stopped at a house. She went in the house and came out with some things. When a police car drove by he panicked and drove off. The police pulled him over. They wrongly believed he was the girl who committed the burglary because he had long hair and no girl was ever found. He was 18 years old. He pleaded guilty and served three years in prison.

When he got out of prison, he got involved with people who burglarized places. He got caught with stolen property, and did 16 months in prison. He was released on parole. After he completed parole, someone offered him a stove for $50. He bought the stove and listed it on Craigslist. He was arrested. [Petitioner] said that when he got married, he stopped associating with people who are a bad influence on him.

The detectives showed [Petitioner] pictures of people who were arrested at the same time as he was. [Petitioner] recognized Ruben Ramirez. He said he and Ramirez committed a burglary together in Oxnard. Ramirez was arrested for burglary and he was arrested for receiving stolen property. [Petitioner] also recognized Juan Gutierrez. He said Gutierrez burglarized his house while he was away.

The detectives showed [Petitioner] photographs of homes in Ventura, including Bush's home. He denied he burglarized Bush's home or any home in Ventura. He denied carrying any weapons during the burglaries.

Detectives seized [Petitioner]'s computer pursuant to a search warrant. His computer contained numerous bookmarks on internet topics related to DNA including DNA from human feces and how to cheat a DNA swab test. His laptop showed searches for unsolved murders in Ventura County and the elements necessary for the crime of murder in California.

Prior Convictions

[Petitioner] was convicted of burglary in 1996. A neighbor of the victim saw [Petitioner] knock on the victim's front door. Then [Petitioner] entered the victim's side yard and came out of the victim's front door about ten minutes later. [Petitioner] had a black bag on his shoulder. The neighbor called the police. The police saw [Petitioner] get into his car with the black bag. A police officer detained [Petitioner], then arrested him for giving a false name. The officer spread the items in the black bag on the hood of his car just as the victim was arriving home. The victim identified the items as her property.

[Petitioner] was convicted of receiving stolen property in 1997. Police officers responded to a call about a residential burglary involving two suspects. When the officers arrived at the victim's home, they arrested one of the suspects. Officers saw [Petitioner] crawl into a nearby home through the window. [Petitioner] ignored their command to stop.

[Petitioner] left the house through the front door. He told the officers that the house belonged to a relative and that he had been in the house for about four hours. An officer searched [Petitioner] and found jewelry that had been taken in the burglary.

DEFENSE

Falcon's Interview

Falcon's description of the person who knocked on her door differed from that of other witnesses. Falcon, who was 11 years old at the time, described the person who knocked on her door as having baggy eyes and a five-o'clock shadow with hair shaved on both sides but combed back on top. He had an accent like a Mexican gangster. He wore a T-shirt with a logo on it, long, bluish, baggy pants, and a black shiny belt. He had a green hat that he took off before knocking on the door and put on backwards as he was leaving.

Investigation

Kenneth Moses is a crime scene investigator with extensive experience in fingerprint analysis. Moses criticized the crime scene investigation as conducted more like a burglary investigation than a homicide investigation. No fingerprint expert was called to the scene; the detectives failed to use chemical, non-chemical or light sources available at the time to help identify additional latent prints; and areas of the house that appeared undisturbed were not processed for prints. Moses believed that there could have been other prints on the window sill, that it was a mistake not to lift prints from the knife by using super glue, and that some of the unidentified prints had more than enough characteristics for an identification.

[Petitioner] did not testify.

Lodg. 9 at 1–8.

IV.

PETITIONER'S CLAIMS FOR RELIEF

Petitioner presents the following seven (7) claims:

(1) There was insufficient evidence to support Petitioner's first-degree murder conviction as the actual killer or accomplice and to support the burglary

special-circumstance finding ("Claim One (a)") and a witness's identification was "highly suggestive" ("Claim One (b)"); and

(2) The trial court's failure to instruct on the mental state required for accomplice liability with respect to the burglary special-circumstance allegation violated Petitioner's state and federal due process rights ("Claim Two");

(3) The trial court erroneously admitted several pieces of irrelevant evidence which had little to no probative value, inflamed and swayed the passions of the jury, and was used to erode the presumption of innocence and unfairly find Petitioner guilty ("Claim Three");

(4) The trial court committed error when it admitted evidence of Petitioner's prior uncharged conduct ("Claim Four");

(5) The trial court erroneously excluded third-party culpability evidence ("Claim Five");

(6) The cumulative effect of the errors in light of the exculpatory evidence negatively affected Petitioner's trial ("Claim Six"); and

(7) Petitioner is eligible to be resentenced under California Senate Bill 1437 ("Claim Seven").

Dkt. 1 at 5–14, 19–20.

Respondent contends that: (1) Claim Seven is unexhausted; (2) Claims One (b), Three, Four, and Six are procedurally defaulted; and (3) all Claims fail on their merits. Dkt. 22 at 20.

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). Here, both Petitioner's claims arise under § 2254(d)(1).

"Clearly established Federal law" for purposes of § 2254(d)(1) consists of the "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. Williams v. Taylor, 529 U.S. 362, 412 (2000). 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).

A state court decision rests on an "unreasonable application" of federal law for purposes of § 2254(d)(1) where a state court identifies the correct governing rule, but unreasonably applies that rule to the facts of the particular case. Andrews v. Davis, 944 F.3d 1092, 1107 (9th Cir. 2019) (citing Williams, 529 U.S. at 407–08). "It is not enough that a federal habeas court concludes 'in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly.'" Andrews, 944 F.3d at 1107 (citing Lockyer v. Andrade, 538 U.S. 63, 76 (2003)). "The state court's application of clearly established law must be objectively unreasonable." Lockyer, 538 U.S. at 75.

Overall, AEDPA established "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). "That deference, however, 'does not by definition preclude relief.'" Andrews, 944 F.3d at 1107 (citing Miller-El v. Cockrell, 537 U.S. 322, 340 (2003)).

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 Ylst v. Nunnemaker, 501 U.S. 797, 803–04 (1991).

Here, the California Court of Appeal's June 20, 2018 opinion is the last reasoned decision addressing the merits of Petitioner's claims. Dkt. 1 at 2–3; Lodgs. 1, 4, 6.

VI.

DISCUSSION

A. RESPONDENT HAS NOT SHOWN THAT CLAIMS ONE (b), THREE, FOUR, AND SIX ARE PROCEDURALLY DEFAULTED

1. Applicable law

"A federal habeas court will not review a claim rejected by a state court if the decision ... rests on a state law ground that is independent of the federal question and adequate to support the judgment." Walker v. Martin, 562 U.S. 307, 315 (2011) (internal quotation marks omitted). These claims are considered "procedurally defaulted." In order for a claim to be procedurally defaulted, "the application of the state procedural rule must provide 'an adequate and independent state law basis' on which the state court can deny relief." Park v. California, 202 F.3d 1146, 1151 (9th Cir. 2000) (quoting Coleman v. Thompson, 501 U.S. 722, 729–30 (1991)).

Furthermore, the opinion of the last state court rendering a judgment in the case must "clearly and expressly" state that its judgment rests on a state procedural bar. Harris v. Reed, 489 U.S. 255, 263 (1989). Accordingly, if the state court cites several procedural bars without specifying which bar applies to which claim, and at least one of the cited procedural bars is not independent and adequate, the state court ruling is ambiguous and cannot render the claims procedurally defaulted. See Valerio v. Crawford, 306 F.3d 742, 773-74 (9th Cir. 2002) (no bar where state court ruling did not specify which claims were barred for what reason), cert. denied, 538 U.S. 994 (2003).

///

2. Analysis

Here, as noted above, the Court granted Petitioner a stay to exhaust Claims One (b), Three, Four, and Six. Dkt. 13. Petitioner subsequently filed a habeas petition with the California Supreme Court containing these claims. Lodg. 14. The California Supreme Court denied the petition with the following citation:

> The petition for writ of habeas corpus is denied. (See People v. Duvall (1995) 9 Cal.4th 464, 474 [a petition for writ of habeas corpus must include copies of reasonably available documentary evidence].) Individual claims are denied, as applicable. (See In re Waltreus (1965) 62 Ca1.2d 218, 225 [courts will not entertain habeas corpus claims that were rejected on appeal]; In re Dixon (1953) 41 Ca1.2d 756, 759 [courts will not entertain habeas corpus claims that could have been, but were not, raised on appeal].)

Dkt. 14 at 5.

Respondent argues that this ruling is sufficient to render Petitioner's claims procedurally defaulted because: (1) both Waltreus and Dixon are independent and adequate procedural bars and (2) despite the fact that the California Supreme Court cited multiple procedural bars without specifying which bar applies to which claim, it is logically clear which citation applies to which claim, and thus the ruling is not ambiguous. Dkt. 22 at 31–37.

As an initial matter, this Court declines to attempt to deduce which citations apply to which claims, as Respondent suggests. The Ninth Circuit has indicated that, where a state supreme court order fails to explain which state law rule applies to which claim, federal courts should not "usurp the role of the state courts and determine which state law rules apply to which claims[.]" See Koerner v. Grigas, 328 F.3d 1039, 1049–53 (9th Cir. 2003) (rejecting the dissent's view that state law rulings are only ambiguous "where, after reviewing the record, the federal court cannot guess at which grounds might be applicable to which claims"); see also Hunt v. Kernan, No. CV-98-5280-WDK(AN), 2006 WL 5819789, at *2–3 (C.D. Cal. Mar. 31, 2006) ("A state court order denying a multi-claim habeas petition without expressly identifying

which procedural bar was invoked against a specific claim is ambiguous despite any determination that can be logically deduced or extrapolated. Indeed, the Ninth Circuit has made it clear that federal courts cannot engage in this type of divine interpretation." (citing Koerner, 328 F.3d at 1049–53)), report and recommendation adopted as modified, No. CV-98-5280-AHS (AN), 2008 WL 2446064 (C.D. Cal. June 17, 2008).

Rather, because the California Supreme Court failed to explicitly specify the grounds on which each claim was denied, the ruling can only procedurally bar Plaintiff's claims if Respondent has shown that all the cited state law rules are independent and adequate bars. See Washington v. Cambra, 208 F.3d 832, 834 (9th Cir.2000) ("In examining the [two procedural bars cited by the state court], we may reverse the dismissal if either rule is not adequate and independent. This is so because the California Supreme Court invoked both rules without specifying which rule applied to which of [the petitioner's] two claims."). This is not the case here.

First, Respondent does not argue that a citation to Duvall represents an independent and adequate procedural bar. Indeed, it is unclear whether a citation to Duvall constitutes an independent and adequate procedural bar. See Hoang v. Madden, No. 8:17-CV-00495-RGK (KES), 2020 WL 5665809, at *7 (C.D. Cal. Aug. 14, 2020) ("[I]t is unclear whether Duvall is an adequate and independent state law rule that would support a procedural bar."), report and recommendation adopted sub nom. Hung Linh Hoang v. Madden, No. 8:17-CV-00495-RGK (KES), 2020 WL 5658346 (C.D. Cal. Sept. 21, 2020), certificate of appealability denied sub nom. Hoang v. Madden, No. 20-56054, 2020 WL 8642143 (9th Cir. Dec. 3, 2020), cert. denied, 141 S. Ct. 2575 (2021); see also Kamfolt v. Lizarraga, No. 17-cv-00970-HSG, 2019 WL 917424, at *6 (N.D. Cal. Feb. 25, 2019) (collecting cases).

Furthermore, Respondent is incorrect that a citation to Waltreus constitutes an independent and adequate state law ground. As Respondent notes, the Ninth Circuit has held "that an In re Waltreus citation is neither a ruling on the merits nor a denial

on procedural grounds and, therefore, has no bearing on a California prisoner's ability to raise a federal constitutional claim in federal court." Hill v. Roe, 321 F.3d 787, 789 (9th Cir. 2002). Nevertheless, Respondent argues that the Ninth Circuit has held there is "an occasion" where citation to Waltreus results in a procedural default—specifically, "when a claim is raised on direct appeal to the California Court of Appeal, but not thereafter in a petition for review to the California Supreme Court." Dkt. 22 at 36 (citing Forrest v. Vasquez, 75 F.3d 562, 564 (9th Cir. 1996)). However, Respondent overstates the Ninth Circuit's holding in Forrest.

In Forrest, the petitioner had raised a claim on direct appeal to the Court of Appeal, but failed to submit it to the California Supreme Court in a timely petition for review, as required by Rule 28(b) of the California Rules of Court. Forrest, 75 F.3d at 563. The petitioner filed an application seeking relief from the default in the California Supreme Court, which the court denied. Id. The petitioner subsequently filed a habeas petition in the California Supreme Court containing the same claim, which the court denied, citing to Waltreus. Id. The Ninth Circuit "looked through" this Waltreus citation to the California Supreme Court's previous ruling— the denial of the petitioner's application for relief from the default arising from his failure to file a timely petition for review. Id. at 564. Accordingly, the Ninth Circuit concluded that the citation to Waltreus indicated that the petitioner's procedural default arose "not from his violation of the Waltreus rule, but from his failure to follow Rule 28(b) of the California Rules of Court." Id. at 563.

Respondent's argument that Forrest establishes that a citation to Waltreus constitutes and independent and adequate bar whenever "a claim is raised on direct appeal to the California Court of Appeal, but not thereafter in a petition for review to the California Supreme Court" is unpersuasive. Indeed, courts in this district have consistently clarified that Forrest does not establish Waltreus as an independent and adequate procedural bar; rather, Forrest merely establishes that courts may "look through" a Waltreus citation to a previous ruling to determine whether the citation

constitutes a denial on substantive or procedural grounds. See Anderson v. Moss, No. 2:18-CV-02639-CAS (MAA), 2019 WL 8168056, at *7 (C.D. Cal. May 15, 2019) (discussing Forrest), report and recommendation adopted, No. 2:18-CV-02639-CAS (MAA), 2019 WL 8167932 (C.D. Cal. June 17, 2019); McCoy v. Vasquez, No. CV-16-08355-RGK (JDE), 2018 WL 816816, at *6 (C.D. Cal. Jan. 5, 2018) (noting that "[c]ourts within the Ninth Circuit have clarified that Forrest does not rely upon the Waltreus rule, and stated further that the Waltreus rule at '62 Cal. 2d at 225' does not by itself impose a procedural bar that precludes federal habeas review" and collecting cases), report and recommendation adopted sub nom. Mccoy v. Warden, No. CV-16-08355-RGK (JDE), 2018 WL 813350 (C.D. Cal. Feb. 9, 2018). Here, unlike in Forrest, there is no previous procedural ruling to look to, and thus the Waltreus citation, alone, cannot constitute an independent and adequate procedural bar. Morales v. Montgomery, No. CV 14-675-FMO (SP), 2017 WL 11633160, at 4 (C.D. Cal. Mar. 24, 2017) (holding claim was not procedurally defaulted by a citation to Waltreus where the last reasoned state court decision was a decision on the merits), report and recommendation adopted, No. CV 14-675-FMO (SP), 2017 WL 11633135 (C.D. Cal. June 26, 2017).

Ultimately, because the California Supreme Court failed to explicitly specify the grounds on which each claim was denied and at least one of the grounds the court cited is not independent and adequate, this Court cannot find that Petitioner's claims are procedurally defaulted. See Calderon v. United States District Court (Bean), 96 F.3d 1126, 1131 (9th Cir.1996) (holding district court properly found California Supreme Court order was ambiguous and did not bar federal habeas review where the order did not specify which of claims were rejected under Waltreus as opposed to the claims rejected under the Harris/Dixon procedural rules).

///

///

///

B. CLAIM ONE (a): SUFFICIENCY OF THE EVIDENCE

1. Background and state court decision

The California Court of Appeal denied Petitioner's claim as to the sufficiency of the evidence underlying Petitioner's conviction for felony murder as follows:

> Here, the evidence including the reasonable inferences that could be drawn therefrom shows: [Petitioner] had prior convictions for burglary and receiving stolen property, and admitted to police detectives that he had committed those crimes. On the day of the murder, [Petitioner] was seen knocking on doors to determine whether anyone was home. Bush and his mother left their home at about 10:30 a.m. to run errands. When they left, nothing was amiss. [Petitioner] was seen standing at Bush's front door. Having discovered no one was at home, [Petitioner] went around the side of the house and entered through a window, leaving his palm print on the sill. [Petitioner] rummaged through the house and defecated in a closet, leaving a sample of his DNA. When Bush and his mother returned home, they noticed some things in the house were askew. Bush went to search the house. He found [Petitioner] in the study. [Petitioner] stabbed Bush and escaped. [Petitioner] was seen coming from Bush's house with a knife. Semchenko identified [Petitioner] from a picture in a newspaper as the person she saw with the knife.
>
> There is more than sufficient evidence from which a reasonable jury could find [Petitioner] killed Bush during the commission of a burglary.
>
> [Petitioner] argues there was no evidence he was in Bush's house at the time Bush was murdered. He argues he could have been there between 8:40 and 10:00 a.m. when Bush and Shirley were out of the house for Bush's driver's test.
>
> But when Shirley and Bush returned from the driver's test, Shirley noticed nothing amiss. It was only after they returned home from running errands at 11:45 a.m. that they noticed signs of a burglary. There is substantial evidence that [Petitioner] was in Bush's house when Bush was stabbed.
>
> Moreover, [Petitioner] was compelled by incontrovertible evidence to admit that he broke into Bush's house on the day of the murder. [Petitioner] asks the jury to believe that he broke into Bush's house, deposited a palm print and his DNA, and left the house before Bush returned from his driver's test. Thereafter, some unknown person broke into Bush's house and stabbed him. Any reasonable juror would recognize [Petitioner's] defense as pure fantasy.

Lodg. 9 at 9–10.

The California Court of Appeal also found that there was substantial evidence to support jury's special circumstance finding:

> [Petitioner] argues even if there is substantial evidence that he was in Bush's house when Bush was stabbed, there is no substantial evidence to support the special circumstances finding. [Petitioner] points out the court instructed the jury that he could be found guilty of murder as the perpetrator or alternatively as an aider and abettor. [Petitioner] asserts that if the jury found him guilty as an aider and abettor, there is no substantial evidence to support a finding of special circumstances.
>
> It is true the trial court instructed the jury on alternate theories for murder. But the court did not instruct the jury on alternate theories for special circumstances. Instead, the court instructed that to find special circumstances, the jury must find the defendant committed burglary; the defendant intended to commit burglary; and the "defendant did an act that caused the death of another person." (CALCRIM No. 730.) We presume the jury followed the trial court's instructions. … Thus, we conclude the jury found [Petitioner] was the direct perpetrator of the murder.

Lodg. 9 at 10 (citation omitted).

2. Applicable law

The Fourteenth Amendment's Due Process Clause guarantees a criminal defendant may be convicted only "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). The Supreme Court announced the federal standard for determining the sufficiency of the evidence to support a conviction in Jackson v. Virginia, 443 U.S. 307 (1979). Under Jackson, "[a] petitioner for a federal writ of habeas corpus faces a heavy burden when challenging the sufficiency of the evidence used to obtain a state conviction on federal due process grounds." Juan H. v. Allen, 408 F.3d 1262, 1274 (9th Cir. 2005). The Supreme Court has held "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, 443 U.S. at 319 (emphasis in original). "Put another way, the dispositive question under Jackson is 'whether the record

evidence could reasonably support a finding of guilt beyond a reasonable doubt.' " Chein v. Shumsky, 373 F.3d 978, 982–83 (9th Cir. 2004) (en banc) (quoting Jackson, 443 U.S. at 318).

When the factual record supports conflicting inferences, the federal court must presume, even if it does not affirmatively appear on the record, that the trier of fact resolved any such conflicts in favor of the prosecution, and the court must defer to that resolution. Jackson, 443 U.S. at 326. "Jackson cautions reviewing courts to consider the evidence 'in the light most favorable to the prosecution.' " Bruce v. Terhune, 376 F.3d 950, 957 (9th Cir. 2004) (quoting Jackson, 443 U.S. at 319). Additionally, "[c]ircumstantial evidence and inferences drawn from it may be sufficient to sustain a conviction." Walters v. Maass, 45 F.3d 1355, 1358 (9th Cir. 1995) (citation omitted).

The Jackson standard applies to federal habeas claims attacking the sufficiency of the evidence to support a state conviction. Juan H., 408 F.3d at 1274; Chein, 373 F.3d at 983; see also Bruce, 376 F.3d at 957. The federal court must refer to the substantive elements of the criminal offense as defined by state law and look to state law to determine what evidence is necessary to convict on the crime charged. Jackson, 443 U.S. at 324 n.16; Juan H., 408 F.3d at 1275. AEDPA, however, requires the federal court to "apply the standards of Jackson with an additional layer of deference." Juan H., 408 F.3d at 1274. The federal court must ask "whether the decision of the California Court of Appeal reflected an 'unreasonable application' of Jackson and Winship to the facts of this case." Id. at 1275 & n.13.

3. Analysis

a. Murder

Under the felony-murder doctrine, a killing is first degree murder if committed in the actual or attempted perpetration of an enumerated felony—in this case, burglary. Cal. Penal Code, § 189. In California, a burglary is defined as the entry into

an inhabited dwelling or other structure with the intent to commit larceny or any felony. Cal. Penal Code § 459.

Here, Petitioner does not contest that he was inside Bush's home on the day of the incident; in fact, he admits that he entered through the window and burglarized Bush's home. Dkts. 1-2 at 14–15; 1-3 at 1–6. Rather, Petitioner argues there was insufficient evidence to show that he was "the actual perpetrator who killed the victim." Dkt. 1-3 at 1. Petitioner's theory is that he committed the burglary with Raymond Perez, who, after burglarizing the Bush residence with Petitioner, returned to the residence a short time later with another individual, Russel Scott. Dkt. 1-2 at 14–15. Petitioner argues that Perez later admitted to Petitioner that he and Scott killed Bush when they had returned to the residence to burglarize it a second time. Id. This theory would still account for Petitioner's DNA and fingerprints being present at the scene. However, Petitioner argues the DNA and evidence and fingerprints do not prove anything other than his presence at the house; they do not show Petitioner, rather than Perez or Scott, was the one who killed Bush, nor do they show Petitioner was even inside the house at the same time Bush was killed. Dkts. 1-2 at 14–15; 1-3 at 1–6.

This Court finds Petitioner's theory less "fantastic" than the California Court of Appeal, particularly considering the excluded third-party culpability evidence discussed in Claim Five, below. See below, subsection VI.F. Still, this Court cannot find that, resolving all inferences in the prosecution's favor, the California Court of Appeal unreasonably applied Jackson and Winship. As Petitioner admits, there was DNA evidence showing that he was present in the Bush residence on the morning of the incident. Lodgs. 13, Vol. VII at 82–85 (palmprint on windowsill), 87–89 (thumbprint on hallway closet doorknob); 13, Vol. VIII at 70–75 (DNA from feces inside Shirley's dressing room closet). There were eyewitnesses who saw a young Hispanic man knocking on doors and heading to the Bush residence before the incident, and a similar looking man running from the Bush residence after the

incident. Lodgs. 13, Vol. V at 22–29; 13, Vol. VIII at 147–150, 165. At trial, Semchenko testified that this individual had a knife, and that she believed this individual was Petitioner. Lodg. 13, Vol. V at 76–77. All witnesses mentioned just one (1) individual; there was no evidence of a second or third induvial. There was also evidence showing that, after speaking with detectives about the incident, Petitioner researched whether DNA could be pulled from feces, how to cheat a DNA swab test, and what the elements of murder are. Lodgs. 13, Vol. VII at 257–61, 265–68; 13, Vol. VIII at 21–29, 65–67.

Considering all of this evidence, both the forensic and the circumstantial, a rational jury could have concluded, beyond a reasonable doubt, that Petitioner killed Bush in the process of burglarizing his home. See Desert Palace, Inc. v. Costa, 539 U.S. 90, 100 (2003) ("[W]e have never questioned the sufficiency of circumstantial evidence in support of a criminal conviction, even though proof beyond a reasonable doubt is required.") (citing Holland v. United States, 348 U.S. 121, 140 (1954) (observing that, in criminal cases, circumstantial evidence is "intrinsically no different from testimonial evidence")). Even crediting Petitioner's alternative theory as plausible, the mere possibility that a rational jury could have instead found that Petitioner did not kill Bush cannot sustain a claim for federal habeas relief under the strict standards of AEDPA; rather, Petitioner must show the California Court of Appeal's conclusion that a rational jury could have found that Petitioner killed bush was "objectively unreasonable." See Juan H., 408 F.3d at 1275 & n.13. Petitioner has not shown as much here, and thus this Court is powerless to grant relief.

b. Burglary special circumstance

Under California law, a defendant "who is found guilty of murder in the first degree" may be sentenced to death or imprisonment for life if "[t]he murder was committed while the defendant was engaged in, or was an accomplice in, the commission of … [b]urglary in the first or second degree in violation of [Cal. Penal Code section 460]." Cal. Penal. Code § 190.2(a)(17).

Petitioner notes that the jury was instructed on an aider and abettor theory for the murder conviction, but not for the special circumstance. See Dkt. 1-3 at 5–13. Accordingly, Petitioner argues, the murder conviction does not necessarily imply the special circumstance finding—the jury could have found Petitioner guilty of the murder as an aider and abettor, in which case there was not sufficient evidence to find the special circumstance true, as it was presented to the jury. Id. However, Petitioner's argument still boils down to the same issue discussed above—whether there was sufficient evidence to support the theory that Petitioner personally killed Bush while committing a burglary.

As noted above, based on the evidence presented at trial, a rational jury could have convicted Petitioner of felony murder based on the theory that he was the actual killer. It follows that a rational jury could have found the special circumstance true under the theory that Petitioner was the actual killer. In any case, as the California Court of Appeal noted, there was virtually no evidence presented at trial that could show another individual was present for the burglary and murder. Accordingly, even though the jury was instructed on an aider and abettor theory for the murder, there is no reason to assume the jury found Petitioner liable for the murder based on this theory. Ultimately, because a rational jury could have found, beyond a reasonable doubt, that Petitioner killed Bush during a burglary, the California Court of Appeal's conclusion that there was sufficient evidence to support the special circumstance finding was not an unreasonable application of Jackson and Winship.

C. CLAIM ONE(b): SUGGESTIVE IDENTIFICATION

1. Background and factual record

In 1997, Lauren Semchenko was eleven (11) years old, living in Ventura County, in the same neighborhood where the burglary and murder took place. Lodg. 13, Vol. V at 22–24. She testified that, on a particular day in 1997, she was riding bikes with her friend Heather McNally when she saw someone running out the door of a residence with something shiny and pointy in their hand. Id. at 24–27. The

person stuck what was in his hand into his pants and tucked his shirt over it, and continued to run. Id. at 28–29. He was wearing a green and black plaid shirt and black baggy pants. Id. Semchenko and McNally told McNally's mother about what they saw, and, about fifteen (15) minutes after they saw the man, they got in a police car to head to the station to give the officers a statement. Id. at 33, 36.

At the time, Semchenko described the person as a young Hispanic man with buzzed black or dark brown hair and eyebrows. Id. at 28–29, 37. She assisted the police in making a sketch of the individual. Id. at 38. At trial, twenty (20) years after the sketch was produced, Semchenko confirmed that the sketch looked like the person she saw. Id. at 39.

When Petitioner was arrested in 2014, Semchenko's friend sent her, via the internet, a "diagram that showed [her] sketch and then a photo of the young man getting arrested and then again getting arrested and things on a timeline that at happened." Id. at 39, 59, 67. Semchenko testified that it was not an article that her friend sent her, but rather just the timeline.[4] Id. When Semchenko saw the timeline, she "just knew" the photograph of Petitioner showed the same person she saw seventeen (17) years prior. Id. at 40, 67.

Semchenko did not call the police, but was contacted by an investigator with the district attorney's office months later. Id. at 41, 69. The investigator sent her a report and asked her to read it over and contact him if she remembered something differently. Id. at 70. At trial, she did not remember the conversations she had with the investigator, but was sure she communicated to him that she believed the sketch and the picture of Petitioner portrayed the same person. Id. at 71. Other than scheduling updates, Semchenko had minimal contact with the district attorney's office until a week before the trial in 2017. Id. at 73. Before that meeting, no law

---

[4] The prosecution identifies the timeline as People's Exhibit 91, though the record before this Court does not seem to include an exhibit 91. Lodg. 13, Vol. V at 39; see Lodg. 12, Vol. I at 2–16 (index showing no exhibit 91). However, People's Exhibit 92a appears to be a full article that includes the timeline Semchenko described. Lodg. 12, Vol. VI at 12–14.

enforcement officer or associate of the district attorney's office asked her to come in or sent her a photograph array. Id.

At the 2017 meeting, the prosecutor and investigator had Semchenko listen to her original statement. Id. at 74. They showed her a picture of the timeline her friend had sent her, but did not show her any other pictures of other Hispanic males. Id. at 75.

At trial, Semchenko confirmed that the person she saw in the photograph (Petitioner) was the same person she had seen in 1997 and that she believed the photograph of Petitioner looks similar to the police sketch she helped produce in 1997. Id. at 76–77.

2. Applicable law

Due process requires suppression of eyewitness identification evidence "when law enforcement officers use an identification procedure that is both suggestive and unnecessary." Perry v. New Hampshire, 565 U.S. 228, 238–39 (2012). A pretrial identification violates due process where the identification procedure is so impermissibly suggestive that it gives rise to a very substantial likelihood of misidentification. Neil v. Biggers, 409 U.S. 188 (1972); Manson v. Braithwaite, 432 U.S. 98, 114, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977) (due process challenges to identification procedures are reviewed using Biggers' test).

"To determine if an identification procedure was unduly suggestive, the court must examine the totality of the surrounding circumstances." United States v. Carr, 761 F.3d 1068, 1074 (9th Cir. 2014) (citing United States v. Bagley, 772 F.2d 482, 492 (9th Cir. 1985)). Furthermore, even if the identification procedure is unnecessarily suggestive, the court must consider "whether under the 'totality of the circumstances' the identification is reliable." Biggers, 409 U.S. at 199. In evaluating the reliability of an identification after a suggestive procedure, courts should consider: (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description of the

criminal; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the length of time between the crime and the confrontation. Id. at 199-200 (finding no substantial likelihood of misidentification where victim spent up to half an hour with assailant, under adequate artificial light, was able to describe assailant to police in considerable detail, and expressed certainty in the identification, despite a lapse of seven months).

However, "the Due Process Clause does not require a preliminary judicial inquiry into the reliability of an eyewitness identification when the identification was not procured under unnecessarily suggestive circumstances arranged by law enforcement." Perry, 565 U.S. at 236, 248.

Here, Petitioner did not raise his suggestive identification claim in his direct appeal. See Lodg. 2 at 3–8, 68–71. Petitioner raised the claim in a habeas petition to the California Supreme Court; however, as noted above, the court summarily denied Petitioner's suggestive identification claim in an ambiguous ruling. See above, subsection VI.A.2. Accordingly, no state court has addressed the merits of this claim in a reasoned decision. In this situation, the Court must review the factual record de novo to determine whether the California Supreme Court's summary denial of the claim constituted an unreasonable application of the above-cited clearly established federal law. See Maxwell, 628 F.3d at 495.

3. Analysis

Noting that Lauren Semchenko was the only witness at trial who identified Petitioner as the person fleeing Bush's home, Petitioner argues that Semchenko's testimony is highly unreliable due to the passage of time. Dkts. 1-3 at 14–17; 1-4 at 1–8. To be sure, Petitioner's point is well taken; the fact that Semchenko only briefly saw Petitioner when she was eleven (11) years old, seventeen years (17) prior to her pretrial identification, cuts sharply against the reliability of her identification. However, Semchenko apparently identified Petitioner of her own volition, after being sent a link to Petitioner's photo by her friend. This fact would appear to squarely

preclude Petitioner's due process claim, since the Supreme Court has held that due process does not require trial courts to "conduct a preliminary assessment of the reliability of an eyewitness identification made under suggestive circumstances not arranged by the police." Perry, 565 U.S. at 236, 248 (emphasis added).

However, Petitioner argues that "a reasonable inference could be drawn that the state sent and showed Lauren Semchenko the pictures of Petitioner prior to trial." Dkt. 1-4 at 2–4. Specifically, Petitioner appears to imply that Semchenko was lying when she testified that her friend, not law enforcement, sent her the link to Petitioner's photo. Id. Petitioner also argues that the state "strategically waited until [August] 2014, 5 months after they knew Petitioner was a suspect," to contact Semchenko, apparently in the hopes that Semchenko would have already seen Petitioner's photo in the news and formed a belief that Petitioner was the person she saw seventeen (17) years prior. Id. Petitioner provides no evidence to support this alternative sequence of events. Therefore, this Court is bound to the record before it, which clearly indicates that Semchenko initially made her identification without prompting from law enforcement. See Pinholster, 563 U.S. at 180-85 (holding that review under § 2254(d)(1) is limited to the record available before the state courts, including cases "where there has been a summary denial").

Ultimately, even if there are significant questions regarding the reliability of Semchenko's identification, there is no evidence in the record showing that law enforcement arranged unnecessarily suggestive circumstances to produce the identification. The Supreme Court held in Perry that the Due Process Clause is not implicated in such circumstances. See Perry, 565 U.S. at 245 ("The fallibility of eyewitness evidence does not, without the taint of improper state conduct, warrant a due process rule requiring a trial court to screen such evidence for reliability before allowing the jury to assess its creditworthiness."). Accordingly, the California Supreme Court did not unreasonably apply clearly established federal law in rejecting Petitioner's claim.

D. CLAIM TWO: INSTRUCTIONAL ERROR

1. Background and state court decision

The California Court of Appeal rejected Petitioner's instructional error claim as follows:

> [Petitioner] contends the trial court erred in failing to give sua sponte instructions defining accomplice liability for special circumstances. …
>
> Here, the prosecutor expressly asked the trial court to omit any reference to aiding and abetting from the special circumstances instruction because the prosecutor was proceeding on the theory [Petitioner] was the actual killer. [Petitioner] did not object. The court omitted reference to aiding and abetting from the instruction.
>
> The trial court did not err. There is no substantial evidence that [Petitioner] committed the burglary with any other person. No person saw two or more people acting in concert on the day of the murder. They saw a single person knocking on doors, standing in front of Bush's house, and emerging from the area of Bush's house with a knife. There were inconclusive fingerprints in the house. But fingerprint experts could not eliminate Bush, Shirley, or [Petitioner] himself as donors of those fingerprints. Such inconclusive fingerprints do not constitute substantial evidence of an accomplice. Fingerprint, palm print, and DNA evidence identified only one person who had no legitimate reason for being in the house. That person is [Petitioner].
>
> [Petitioner] points out that the trial court gave an accomplice instruction for murder. He reasons that for the court to give such an instruction, it must have found substantial evidence of an accomplice. He concludes there must be substantial evidence of an accomplice for special circumstances. Whether the court believed there was substantial evidence of an accomplice is irrelevant. There simply is no such evidence. The jury was instructed that to find special circumstances, it had to find that [Petitioner] caused Bush's death. The jury so found. They did not find an accomplice caused Bush's death.

Lodg. 9 at 11–12.

2. Applicable law

To merit habeas relief based on an erroneous jury instruction, a petitioner must show that "the ailing instruction by itself so infected the entire trial that the resulting

conviction violates due process." Estelle v. McGuire, 502 U.S. 62, 72 (1991) (citation omitted); see also Waddington v. Sarausad, 555 U.S. 179, 191 (2009); Henderson v. Kibbe, 431 U.S. 145, 154 (1977). Instructional errors must be considered in the context of the instructions as a whole and the trial record. McGuire, 502 U.S. at 72; Cupp v. Naughten, 414 U.S. 141, 147 (1973). "Where the alleged error is the failure to give an instruction the burden on petitioner is 'especially heavy,'" Hendricks v. Vasquez, 974 F.2d 1099, 1106 (9th Cir. 1992) (as amended) (quoting Kibbe, 431 U.S. at 155), because "[a]n omission, or an incomplete instruction, is less likely to be prejudicial than a misstatement of the law." Kibbe, 431 U.S. at 155. Additionally, habeas relief is warranted only where the error had "substantial and injurious effect or influence in determining the jury's verdict." Hedgpeth v. Pulido, 555 U.S. 57, 58, 61–62 (2008) (per curiam) (quoting Brecht v. Abrahamson, 507 U.S. 619, 623 (1993)); see also Clark v. Brown, 450 F.3d 898, 905 (9th Cir. 2006) (as amended).

3. Analysis

Because the California Court of Appeal's rejection of Petitioner's argument was not contrary to, nor an unreasonable application of the relevant federal law clearly established in McGuire, Petitioner's argument that the trial court should have sua sponte instructed the jury on accomplice liability for the special circumstance must fail.

First, Petitioner largely relies on state law for his instructional error claim. See Dkt. 1-4 at 9–18. To the extent Petitioner argues that the trial court either misstated or misinterpreted state law, his claim may not form the basis for federal habeas relief. See Gilmore v. Taylor, 508 U.S. 333, 343–44 (1993) (reiterating that "instructional errors of state law generally may not form the basis for federal habeas relief"); see also 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."); see also McNeely v. Sherman, No. C 18-3250 WHA (PR), 2021 WL 1391562, *4 (N.D. Cal.

Apr. 13, 2021) (state court's "rejection of petitioner's interpretation of state law and its holding that CALCRIM No. 3472 correctly stated California law are interpretations of state law that bind the federal court in habeas review").

Second, Petitioner has identified no Supreme Court case stating that the trial court's failure to sua sponte provide a particular instruction, even a potentially helpful one, violates due process. Accordingly, the California Court of Appeal's decision that Petitioner was not entitled to such an instruction cannot be contrary to clearly established federal law. See Lockyer, 538 U.S. at 72-77 (considering unclear contours of Eighth Amendment, state-court decision rejecting petitioner's cruel-and-unusual punishment claim was not unreasonable); Holley v. Yarborough, 568 F.3d 1091, 1101 (9th Cir. 2009) ("Although the Court has been clear that a writ should be issued when constitutional errors have rendered the trial fundamentally unfair, it 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… Under the strict standards of AEDPA, we are therefore without power to issue the writ on the basis of [the petitioner's evidentiary] claims.").

Third, even assuming a trial court's failure to sua sponte instruct the jury with a relevant instruction could warrant federal habeas relief, the California Court of Appeal's conclusion that the accomplice liability instruction was inapplicable to Petitioner's case is not unreasonable; accordingly, Petitioner has not shown the trial court's failure to give the instruction "so infected the entire trial that the resulting conviction violates due process." See Estelle, 502 U.S. at 72. As discussed above, there was no evidence presented at trial that another individual was present at any point during the morning of the incident, despite the fact that there was plenty of evidence that Petitioner was present in the neighborhood and had entered the Bush residence. In fact, the prosecutor's sole theory of liability was that Petitioner was the actual killer. Lodg. 13, Vol. IX at 1852 (prosecutor stating that "[t]he People are proceeding on the theory that the defendant committed this crime himself personally

as the perpetrator."). Indeed, Petitioner's counsel admitted there was no evidence to support evidence of a coparticipant, and did not object when the prosecutor requested that the trial court omit the accomplice liability instruction for the special circumstance. Id. at 186 (defense counsel stating "I don't think there's any evidence to support [the aiding and abetting instruction for felony murder]. … There's no evidence of a co-participant period[.]"), 199 (prosecutor stating that "under the facts of our case, the defendant could only be guilty of the special if he is the killer and not an aider and abettor" and asking to remove accomplice liability sentence from the special circumstance instruction; defense counsel and trial court agreeing, with the trial court noting "I think that is a change beneficial to the defendant.").

Ultimately, Petitioner has failed to show the California Court of Appeal's rejection of Petitioner's instructional-error claim was "contrary to, or . . . an unreasonable application of, clearly established Federal law." See 28 U.S.C. § 2254(d)(1). Accordingly, habeas relief is not warranted on Claim Two.

E. CLAIMS THREE AND FOUR: IMPROPER ADMISSION OF EVIDENCE

1. Background and state court decision

The California Court of Appeal rejected Petitioner's claims regarding improper admission of evidence as follows:

> [Petitioner] contends the trial court erred in admitting evidence that had little or no probative value, but that inflamed the jury's passion. Evidence Code section 352 (section 352) provides: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."
>
> (a) 911 Call
>
> Prior to trial, [Petitioner] moved to exclude a recording of Shirley's 911 call. [Petitioner] offered to stipulate that the call was made, the time of the call, and that Bush was stabbed during the call.

Shirley began the call while Bush searched the house for other signs of burglary. Shirley described how her home was burglarized and how she believed the burglar gained entrance. Bush interrupted her and told her he had been stabbed. Shirley could be heard pleading with her son to breathe while Officer Van Atta tried to revive him.

The trial court found the call admissible as a spontaneous utterance. (Evid. Code, § 1240.) The trial court denied [Petitioner]'s motion to exclude the recording of the call, and the call was played for the jury.

After the call was played for the jury, the court called a recess. The court said it called a recess because several members of the audience were emotional and several jurors were weeping.

Here, the 911 call was highly probative as contemporaneous evidence of the circumstances of the murder. Nor was it unduly prejudicial. The prosecution in a murder case is entitled to present evidence of the circumstances attending to the murder scene even if the evidence is grim, duplicates testimony, depicts uncontested facts, or triggers an offer to stipulate. … That jurors were moved to tears does not mean the evidence was unduly prejudicial.

(b) Exhibit 57

People's Exhibit 57 contains two photographs. One shows a closed blue body bag on a gurney. The other shows Bush's head and unclothed upper body. [Petitioner] objected that the photograph of the body bag was not relevant and the photograph of Bush's upper body was duplicative of other photographs. The prosecutor stated that the medical examiner selected the photographs to explain her examination.

At trial, the medical examiner, Dr. Janice Frank, testified that the body arrives in the autopsy room in a blue plastic bag. She said photograph A on exhibit 57 shows the body in a pouch and that photograph B of the exhibit shows the body after the bag has been opened and pushed back. Frank used the photographs in exhibit 57 to illustrate the autopsy procedure. The evidence was neither duplicative nor unduly prejudicial.

(c) Fingerprints Not Excluded

At trial, the prosecutor introduced five exhibits containing photographs of unidentified fingerprints lifted from Bush's house. At the top of each exhibit is a printed notation, "Unidentified: Defendant (is/is not) excluded." [Petitioner] objected that the notation was pointless if the results were inconclusive, and that the notation had the effect of singling out [Petitioner]. The trial court overruled the objection.

At trial, the People's fingerprint expert testified the latent prints shown on the exhibits were inconclusive, and that no one, including Bush, the Shirleys, and [Petitioner] could be excluded. Over [Petitioner]'s objection, the expert was allowed to circle "not" on the notation.

The notation on the exhibits simply reflected the prosecution's expert's testimony that [Petitioner] could not be excluded. [Petitioner] was free to offer the same exhibits with a different notation reflecting his expert's testimony. [Petitioner] argues his own notation would add to the confusion. But no more so than experts testifying for opposing parties.

(d) Detective Scott's Testimony

During direct examination, the prosecutor asked Detective Scott without objection what he did with the palm print he took from Bush's home. Scott replied that he kept it on his desk for the next two and a half years until he retired, and compared it to every palm print that came across his desk. The next day at the end of direct examination, the prosecutor asked Scott the same question. This time [Petitioner] objected to the question as asked and answered. The trial court overruled the objection; Scott gave the same answer, but this time he showed some emotion. Afterward, the court stated it forgot the prosecutor had asked the same question the day before.

[Petitioner] argues the related question and answer interjected more emotion into an already emotional trial. But the error was harmless by any standard. The trial evoked emotions because of its facts. A sixteen-year-old boy was brutally murdered in his own home. There is nothing to suggest Scott's brief display of emotion had any effect on the outcome of the trial.

(e) Detective Conroy

Detective Sean Conroy interviewed Falcon, who was 10 or 11 years old when she encountered a young Hispanic man at her door. On direct examination, the prosecutor asked Conroy his impression about Falcon's ability to remember and relate details. [Petitioner] objected that the question calls for speculation. The trial court overruled the objection.

In overruling the objection, the court instructed the jury that the evidence was being admitted only "for the limited purpose of assessing the capacity and competency of [Falcon] to relay information and for no other purpose."

Conroy answered: "My impression was that she is an 11-year old and she was relating things as best she could; but she was young and immature, and the sequence of events and her descriptions needed to be

> put in a context of her youth." When the prosecutor asked Conroy if Falcon seemed "somewhat confused" in relating the information, Conroy answered, "Yes. Yes. We tried to clear those up in a gentle way. You can't cross-examine an 11-year old. You know, you have to be very gentle with them."
>
> The admission of lay opinion testimony is within the discretion of the trial court and will not be disturbed absent a clear abuse of discretion. … That a person seemed somewhat confused is an observation a lay person is competent to make. The court did not abuse its discretion.
>
> [Petitioner] argues that if the trial court was referring to Falcon's competency as a witness under Evidence Code section 701, that is a question for the trial court outside the presence of the jury. … Evidence Code section 701, subdivision (a) (hereafter section 701) provides: "(a) A person is disqualified to be a witness if he or she is: [¶] (1) Incapable of expressing himself or herself concerning the matter so as to be understood, either directly or through interpretation by one who can understand him; or [¶] (2) Incapable of understanding the duty of a witness to tell the truth."
>
> First, [Petitioner] never objected under section 701. Second, "somewhat confused" is far from the findings required under section 701. [Petitioner] argues Conroy's testimony that Falcon was somewhat confused is inadmissible because Conroy did not offer any specifics as to why it was his impression. But Conroy testified Falcon was young and immature and had difficulty with the sequence of events and her descriptions. If [Petitioner] needed more specifics than that, he could have asked. [Petitioner] points out that Semchenko and McNally were also young. But for any chronological age there is a wide range of maturity and abilities.

Lodg. 9 at 12–16 (citations omitted). The California Court of Appeal rejected Petitioner's claim regarding the admission of his prior uncharged conduct as follows:

> [Petitioner] contends the trial court erred in admitting his two prior convictions and a recording of a 2014 interview with police detectives while he was on work furlough.
>
> [Petitioner] argues the recording of the interview constitutes propensity evidence in violation of Evidence Code section 1101 (hereafter section 1101). Section 1101, subdivision (a) prohibits evidence of a person's character or trait when offered to prove his or her conduct on a specified occasion. Subdivision (b) of the section provides: "Nothing in

this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented) other than his or her disposition to commit such an act."

Here, the trial court admitted [Petitioner]'s prior 1996 conviction for burglary and a 1997 conviction for receiving stolen property to show intent. The court ruled inadmissible [Petitioner]'s 2013 conviction for receiving stolen property under Evidence Code section 352 as too remote in time. During the interview with detectives, [Petitioner] discussed his 1996 and 1997 convictions as well as his 2013 conviction. The court allowed the entire conversation into evidence without redaction. The court stated it could not excise the part of the interview in which [Petitioner] referred to the 2013 conviction without affecting the integrity of the interview.

The trial court instructed the jury with CALCRIM No. 375 that it could only consider evidence of [Petitioner]'s 1996 and 1997 convictions for the purpose of deciding whether he acted with the intent to commit burglary or had a plan or scheme to commit burglary in this case. The court drafted a special instruction telling the jury not to conclude from the recording that the defendant has a bad character or is disposed to commit crime. Neither party wanted the special instruction.

To establish relevance on the issue of intent, the uncharged crimes need only be sufficiently similar to the charged offenses to support the inference that the defendant probably harbored the same intent. … Here, in both the 1996 burglary and the 1997 receiving stolen property convictions, [Petitioner] entered by a back window and left by the front door. That is sufficient to support the inference that [Petitioner] entered Bush's house with the intent to commit burglary.

[Petitioner] argues he conceded intent to commit burglary. But the prosecution is not required to accept the defendant's concession. The prosecutor is entitled to prove the elements of the crime. … The trial court did not abuse its discretion in admitting [Petitioner]'s prior convictions.

As to the recording of the interview, the trial court properly ruled that evidence of [Petitioner]'s 1996 and 1997 convictions is admissible. There is no reason why such evidence cannot be supported by [Petitioner]'s admissions in a recorded interview.

> The trial court's decision to allow into evidence [Petitioner]'s brief mention of his 2013 receiving stolen property conviction did not constitute an abuse of discretion. [Petitioner] was on work furlough at the time the interview took place. The jury was entitled to consider the entire context of the interview. The trial court offered to instruct the jury that it should not conclude from the interview that [Petitioner] has a bad character or is disposed to commit crime. [Petitioner] rejected the offer.

Lodg. 9 at 16–18 (citations omitted).

2. Applicable law and analysis

As an initial matter, the exclusion or admission of evidence under state evidentiary rules generally does not present a federal question. McGuire, 502 U.S. 62, 67–68 (1991) (state evidentiary ruling does not give rise to a cognizable federal habeas claim unless the ruling violated a petitioner's due process right to a fair trial); Rhoades v. Henry, 638 F.3d 1027, 1034 n.5 (9th Cir. 2011). In fact, the United States Supreme Court "has not yet made a clear ruling that admission of irrelevant or overly 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). More specifically, the Supreme Court has never held that 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[.]"). This lack of Supreme Court precedent stating that the admission of prejudicial evidence can violate due process likely forecloses Petitioner's claim. See Carey v. Musladin, 549 U.S. 70, 77 (2006); Larson v. Palmateer, 515 F.3d 1057, 1066 (9th Cir. 2008) (holding where the Supreme Court has "expressly left [the] issue an 'open question,' " habeas relief is unavailable); Jennings v. Runnels, 493 Fed. App'x. 903, 906 (9th Cir. 2012) (The "absence of Supreme Court precedent on point forecloses any argument that the state court's decision [denying a challenge to the admission of propensity evidence] was contrary to or an unreasonable application of clearly established federal law.").

Furthermore, to the extent the admission of evidence can violate due process, it is "only when there are no permissible inferences the jury may draw from the evidence." Windham v. Merkle, 163 F.3d 1092, 1103 (9th Cir. 1998) (emphasis in original; citation and internal quotations omitted); see also Estelle, 502 U.S. at 70. Here, the California Court of Appeal ruled that, under state law, the challenged pieces of evidence had probative value and therefore were properly admitted under California Evidence Code section 352.[5] Lodg. 9 at 12–16. The court also ruled that Petitioner's prior uncharged conduct was properly admitted under California Evidence Code section 1101 as evidence of Petitioner's intent to burglarize the Bush residence on the day of the incident. Lodg. 9 at 16–18. The Court is bound by the state court's conclusion that the trial court correctly applied the California Evidence Code. Bradshaw, 546 U.S. 74, 76 (2005) ("[A] state court's interpretation of state law, including one announced on direct appeal of the challenged conviction, binds a federal court sitting in federal habeas[.]"). Because the California Court of Appeal found there were permissible inferences to be drawn from the challenged evidence under California law, the Court of Appeal did not unreasonably apply federal law in rejecting Petitioner's due process claim. See Smith v. Lizarraga, No. LACV 15-8943-JFW (JCG), 2016 WL 5867439, at *3 (C.D. Cal. Aug. 23, 2016) ("[S]ince there was a 'permissible inference' that the jury could draw from Petitioner's prior convictions – namely, that Petitioner had a disposition to commit sex offense crimes – the trial court's admission of those convictions did not violate due process[.]").

///

///

[5] It is not clear that the California Court of Appeal found Detective Scott's emotional response to a question he had already been asked the day before had any probative value or another permissible purpose. Lodg. 9 at 14–15. In any case, the court found any error harmless. Id. To the extent Detective Scott's response had no permissible purpose, this Court finds the California Court of Appeal did not unreasonably apply clearly established federal law when it determined that any error in allowing Scott to respond was harmless. See Mays v. Clark, 807 F.3d 968, 979–80 (9th Cir. 2015) (applying harmless error standard to potentially erroneous evidentiary decision).

F. CLAIM FIVE: IMPROPER EXCLUSION OF THIRD-PARTY CULPABILITY EVIDENCE

1. Background and state court decision

The California Court of Appeal rejected Petitioner's claim regarding the exclusion of third-party culpability evidence as follows:

> [Petitioner] contends the trial court's exclusion of third-party culpability evidence deprived him of the right to a complete defense.
>
> Roy Miller was a confidential police informant. Eighteen months after Bush's murder, Miller told his probation officer that Raymond Perez and Russell Scott told him of their involvement in the murder. District Attorney's investigator Mark Volpei had been assigned to the Bush case. He worked with Miller in investigating Perez and Scott's alleged involvement. No physical evidence links Perez or Scott to Bush's house. Neither Perez nor Scott were arrested for Bush's murder. Both Perez and Scott died before trial.
>
> [Petitioner] moved the trial court to admit into evidence a three-page letter Miller wrote to investigators about his conversation with Perez and Scott in which they allegedly admitted involvement in Bush's murder, as well as police reports.
>
> The prosecution objected on the grounds of hearsay and reliability. The trial court stated that the only basis for the admission of the evidence would be Evidence Code section 1237, past recollection recorded (section 1237).
>
> The trial court held a hearing pursuant to Evidence Code section 402 on the admissibility of evidence. Miller testified at the hearing. Miller said that he and Perez and Scott were not friends, but they did drugs together. Miller met with them on many occasions in the 1990's and discussed various topics, including crimes they committed. They did a lot of meth. Everybody was stealing things.
>
> Miller could not recall telling his probation officer that he had information on the Bush murder; meeting with police to discuss the case; or telling Volpei that Perez told him he killed Bush. Miller did not recall writing the three-page letter in which he implicated Perez and Scott in Bush's murder, but he conceded it looked like his handwriting.
>
> Miller said it is "more than likely" he told Volpei that Perez stabbed Bush. Miller added, "Like I said, I did a lot of things back then, a lot of

drugs were involved, and I did everything I could possibly to stay out of jail or get less time, you know, so it is a good possibility I said a lot of things. What exactly they were, I couldn't tell you."

Miller said he did not know why he wrote the letter to Volpei, but he is "sure it was try[ing] to get myself out of trouble for something." Miller said he had a "give and take" relationship with Volpei and that Volpei had "got me out of a couple jambs [sic]." In speaking to Volpei about Bush's murder, Miller viewed Volpei as his "ticket out of jail." Miller agreed that he was "taking [Volpei] for a ride regarding this case and the information [he] provided."[6]

The trial court found the evidence unreliable and excluded the evidence.

A criminal defendant has the right to present evidence of third party culpability. … But the right to present such a defense is subject to the rules of evidence. …

[Petitioner] relies on section 1237. That section provides: "(a) Evidence of a statement previously made by a witness is not made inadmissible by the hearsay rule if the statement would have been admissible if made by him while testifying, the statement concerns a matter as to which the witness has insufficient present recollection to enable him to testify fully and accurately, and the statement is contained in a writing which: [¶] (1) Was made at a time when the fact recorded in the writing actually occurred or was fresh in the witness' memory; [¶] (2) Was made (i) by the witness himself or under his direction or (ii) by some other person for the purpose of recording the witness' statement at the time it was made; [¶] (3) Is offered after the witness testifies that the statement he made was a true statement of such fact; and [¶] (4) Is offered after the writing is authenticated as an accurate record of the statement. [¶] (b) The writing may be read into evidence, but the writing itself may not be received in evidence unless offered by an adverse party."

Section 1237, subdivision (a)(3) requires the witness to vouch for the truthfulness of the writing. Here, far from vouching for the truthfulness of the letter, Miller testified he did not recall writing the letter and in essence admitted he made up the accusation against Perez and Scott in order to curry favor with Volpei, Miller's ticket out of jail. The trial

[6] When asked to clarify, Miller explained by "taking for a ride" he meant he "twisted up what the truth was"; he reiterated that he could not remember whether Perez ever admitted to him that he committed the Jake Bush murder. Lodg. 13, Vol. III at 63–63.

court did not abuse its discretion in refusing to admit evidence of third party culpability.

Lodg. 9 at 19–21 (citations omitted).

2. Applicable law

As noted above, to the extent Petitioner challenges the exclusion of evidence under state law, such a claim does not typically implicate the federal Constitution. See McGuire, 502 U.S. at 67–68; Rhoades, 638 F.3d at 1034; Binns v. Allison, 2013 WL 3200503, *10 (C.D. Cal. June 24, 2013) ("[T]o the extent petitioner contends that the trial court erroneously excluded the toxicologist's testimony under California law, petitioner is not entitled to federal habeas relief.").

However, the Due Process Clause and Sixth Amendment do "guarantee[]criminal defendants 'a meaningful opportunity to present a complete defense.'" Crane v. Kentucky, 476 U.S. 683, 690 (1986) (quoting Trombetta, 467 U.S. at 485). Nevertheless, "'[a] defendant's right to present relevant evidence is not unlimited, but rather is subject to reasonable restrictions,' such as evidentiary and procedural rules." Moses v. Payne, 555 F.3d 742, 757 (9th Cir. 2008) (quoting United States v. Scheffer, 523 U.S. 303, 308 (1998)). Well-established rules of evidence permit trial judges to exclude evidence if its probative value is outweighed by certain other factors, such as unfair prejudice, irrelevance, confusion of the issues, or potential to mislead the jury. See Holmes v. South Carolina, 547 U.S. 319, 326 (2006) (citations omitted); see also Cudjo v. Ayers, 698 F.3d 752, 766 (9th Cir. 2012). The Supreme Court has noted "[o]nly rarely have we held that the right to present a complete defense was violated by the exclusion of defense evidence under a state rule of evidence." Nevada v. Jackson, 569 U.S. 505 (2013) (citations omitted).

Moreover, even if a state court's evidentiary decision constitutes error under the federal constitution, habeas relief is not automatic. Rather, the claim is reviewed under a harmless error standard. Mays v. Clark, 807 F.3d 968, 979–81 (9th Cir. 2015). As mentioned, an error cannot lead to habeas relief "unless it results in 'actual prejudice'" that had a "substantial and injurious effect or influence in determining the

jury's verdict" under Brecht, 507 U.S. at 637. Mays, 807 F.3d at 980. Habeas relief is required when "the record is so evenly balanced that a conscientious judge is in grave doubt as to the harmlessness of an error." Gautt v. Lewis, 489 F.3d 993, 1016 (9th Cir. 2007).

3. Analysis

a. Challenge to the Hall California evidentiary rule

As noted above, in Holmes, the Supreme Court indicated that a defendant's constitutional right to present a complete defense could be violated by state evidence rules that lead to the "arbitrary" or "disproportionate" exclusion of evidence. Holmes, 547 U.S. at 324–25. However, in Moses, the Ninth Circuit observed that the Supreme Court has articulated these principles in cases where defendants challenged a state evidentiary rule generally, rather than a trial court's specific application of the rule. Moses, 555 F.3d at 757–58. Here, to the extent Petitioner challenges the constitutionality of California evidentiary rule set forth in People v. Hall, 41 Cal.3d 826, 718 P.2d 99 (1986), which allows a trial court to exclude evidence of third-party culpability, Petitioner's claim lacks merit.

In California, evidence may be excluded where the probative value of the evidence is "substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." Cal. Evid. Code § 352.7. California case law stemming from Cal. Evid. Code § 352.7 allows the exclusion of evidence of third-party culpability when it is not capable of raising a reasonable doubt of defendant's guilt. Hall, 41 Cal. 3d at 833 ("[E]vidence of mere motive or opportunity to commit the crime in another person, without more, will not suffice to raise a reasonable doubt about a defendant's guilt: there must be direct or circumstantial evidence linking the third person to the actual perpetration of the crime."). The "Hall" rule purports "to place reasonable limits on the trial of collateral issues ... and to avoid undue prejudice to the People from unsupported jury

speculation as to the guilt of other suspects." Perry v. Rushen, 713 F.2d 1447, 1453 (9th Cir. 1983).

As Respondent notes, in Holmes, the Supreme Court specifically cited Hall as an example of a state "approach that [is] consistent with constitutional requirements." Holmes, 547 U.S. at 326-27. Furthermore, in Perry, the Ninth Circuit held the California rule is facially constitutional. Perry, 713 F.2d at 1451, 1455. Accordingly, to the extent Petitioner claims his evidence of third-party culpability was excluded because the evidentiary rule established in Hall violates the Constitution, his claim must fail.

b. Challenge to the trial court's discretion in applying Hall

To the extent Petitioner's claim challenges the trial court's discretion in applying Hall to exclude Petitioner's evidence, the Supreme Court has not squarely addressed whether a trial court's discretionary exclusion of evidence pursuant to an otherwise valid evidentiary rule can violate a defendant's constitutional rights, nor has it set forth applicable standards for considering such a claim. Moses, 555 F.3d at 758–59. Accordingly, the Ninth Circuit has held that a state court's decision rejecting such claims cannot constitute an unreasonable application of clearly established Supreme Court precedent. Id. at 759 (rejecting claim that trial court' exercise of discretion to exclude expert testimony violated constitutional right to present a defense); see also White v. Knipp, No. 2:11-CV-3016-TLN, 2013 WL 5375611, at *19 (E.D. Cal. Sept. 24, 2013) (citing Moses and finding state court's exclusion of third-party culpability evidence did not warrant relief under AEDPA); Gonzalez v. Kernan, No. CV 06-03438, 2009 WL 1110793, at *18 (C.D. Cal. Apr. 21, 2009) (same).

Accordingly, to the extent Petitioner challenges the trial court's discretion in excluding his evidence pursuant to Hall, his claim still fails because the California Court of Appeal's rejection of his claim cannot be "contrary to, or ... an unreasonable application of clearly established Federal law." 28 U.S.C. § 2254(d)(1).

///

G. CLAIM SIX: CUMULATIVE ERROR

Even where "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), overruled on other grounds by Slack v. McDaniel, 529 U.S. 473 (2000) (internal quotation marks omitted). However, here, there are no individual errors, and thus there can be no cumulative error. See Mancuso, 292 F.3d at 957 ("Because there is no single constitutional error in this case, there is nothing to accumulate to a level of a constitutional violation.").

H. CLAIM SEVEN: RESENTENCING UNDER SENATE BILL 1437

1. Applicable law

California Senate Bill 1437 ("SB 1437") took effect on January 1, 2019, and sought to amend "the felony murder rule and the natural and probable consequences doctrine, as it relates to murder, to ensure that murder liability is not imposed on a person who is not the actual killer, did not act with the intent to kill, or was not a major participant in the underlying felony who acted with reckless indifference to human life." People v. Martinez, 31 Cal. App. 5th 719, 723 (Cal. App. 2 Dist. 2019) (internal quotation marks omitted). To accomplish this purpose, SB 1437 amended California Penal Code sections 188 and 189 in a manner that limited criminal liability for accomplices to the crime of felony murder, and added California Penal Code section 1170.95, which allows those "convicted of felony murder or murder under a natural and probable consequences theory ... [to] file a petition with the court that sentenced the petitioner to have the petitioner's murder conviction vacated and to be resentenced on any remaining counts ...." Id.

As noted above, a district court may entertain a petition for writ of habeas corpus filed by a person in state custody "only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States;" federal habeas relief is unavailable for violations of state law. 28 U.S.C. § 2254(a); Estelle, 502 U.S. at

68. Matters relating to state sentencing are governed by state law and generally are not cognizable on federal habeas review. See, e.g., Watts v. Bonneville, 879 F.2d 685, 687 (9th Cir. 1989) (holding the sentencing error claim under section 654 of the California Penal Code is not cognizable on federal habeas review); see also Corder v. Clark, No. CV-21-01710-DMG (RAO), 2021 WL 6496743, at *10 (C.D. Cal. Oct. 8, 2021) (holding Petitioner's challenge to murder conviction based solely on changes to California law made by SB 1437 was not cognizable on federal habeas review), report and recommendation adopted, No. CV-21-01710-DMG (RAO), 2022 WL 1452744 (C.D. Cal. May 9, 2022).

3. Analysis

Here, Petitioner argues he is entitled to resentencing under SB 1437. Dkt. 1-6 at 20–22. Petitioner's claim regarding SB 1437 appears to relate only to state sentencing and therefore is not cognizable on federal habeas review. See, e.g., Mays v. Montgomery, No. 2:20-CV-11614-PSG (AFM), 2021 WL 2229082, at *3 (C.D. Cal. Apr. 22, 2021) (collecting cases), report and recommendation adopted sub nom. Mays v. W.L. Montgomery, No. 2:20-CV-11614-PSG (AFM), 2021 WL 2223276 (C.D. Cal. June 1, 2021).

Furthermore, even assuming Petitioner's claim does present a federal question, Petitioner's claim appears meritless because California Penal Code section 1170.95 only sought to limit accomplice liability for individuals convicted under the felony murder rule, where, as discussed above, Petitioner was apparently convicted on the theory that he was the actual killer. Lodg. 12, Vol. V at 41(burglary special circumstance instruction given to the jury requiring the jury to find Petitioner "did an act that caused the death of another person"), 53 (verdict form indicating the jury found Petitioner guilty of the burglary special circumstance); see also Lodg. 9 at 11–12 ("The jury was instructed that to find special circumstances, it had to find that [Petitioner] caused Bush's death. The jury so found. They did not find an accomplice caused Bush's death.").

VII.

CERTIFICATE OF APPEALABILITY

Under 28 U.S.C. § 2253(c)(2), a Certificate of Appealability may issue "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 showing 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, 483–84 (2000).

The undersigned finds that reasonable jurists could debate whether Claim Five should have been resolved differently. Thus, it is recommended that a Certificate of Appealability be **GRANTED**.

VIII.

RECOMMENDATION

IT IS THEREFORE RECOMMENDED that the Court issue an Order:

(1) accepting this Report and Recommendation;

(2) denying the Petition;

(3) dismissing this action with prejudice;

(4) granting a Certificate of Appealability with respect to Claim Five.

Dated: August 24, 2022

HONORABLE MARGO A. ROCCONI
United States Magistrate Judge

Appendix E
51a

S268228

IN THE SUPREME COURT OF CALIFORNIA

En Banc

In re MARCO ANTONIO CASILLAS on Habeas Corpus.

The petition for writ of habeas corpus is denied. (See *People v. Duvall* (1995) 9 Cal.4th 464, 474 [a petition for writ of habeas corpus must include copies of reasonably available documentary evidence].) Individual claims are denied, as applicable. (See *In re Waltreus* (1965) 62 Cal.2d 218, 225 [courts will not entertain habeas corpus claims that were rejected on appeal]; *In re Dixon* (1953) 41 Cal.2d 756, 759 [courts will not entertain habeas corpus claims that could have been, but were not, raised on appeal].)

CANTIL-SAKAUYE
Chief Justice

Appellate Courts Case Information

Supreme Court

Change court

Case Summary
Docket
Briefs
Disposition
Parties and Attorneys
Lower Court

Docket (Register of Actions)

PEOPLE v. CASILLAS
Division SF
Case Number S259441

Date	Description	Notes
12/04/2019	Petition for review filed	Defendant and Appellant: Marco Antonio Casillas Attorney: Nancy L. Tetreault
12/04/2019	Record requested	Appellate record imported and available in electronic format.
12/16/2019	Received:	Service copy of petition for review electronically filed on 12/4/19.
01/27/2020	Time extended to grant or deny review	The time for granting or denying review in the above-entitled matter is hereby extended to and including March 3, 2020, or the date upon which review is either granted or denied.
02/11/2020	Petition for review denied	

Click here to request automatic e-mail notifications about this case.

Filed 10/28/19 P. v. Casillas CA2/6

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. MARCO ANTONIO CASILLAS, Defendant and Appellant.	2d Crim. No. B281363 (Super. Ct. No. 2014018724) (Ventura County)

A jury found Marco Antonio Casillas guilty of first degree murder (Pen. Code, §§ 187, subd. (a), 189, subd. (a)) and found true the special circumstances allegation that he committed the murder while he was engaged in burglary (Pen. Code, § 190.2, subd. (a)(17)(G)). The trial court sentenced Casillas to life without the possibility of parole (LWOP). We affirm.

FACTS

In June 1997, James Bush lived with his mother Gail Shirley in a house in Ventura. Bush was 16 years old. On June 24, Bush and Shirley left the house at 8:40 a.m. so that Bush

could take his driver's test. When they returned at about 10:00 a.m., Shirley did not notice anything amiss.

Shirley and Bush left the house again at about 10:30 a.m. to run some errands. The doors were locked and the windows were secured with stop locks, which permitted them to be only partially opened. When they returned at about 11:45 a.m., they noticed some things in the house were slightly askew. Bush showed Shirley how the stop lock on his bedroom window had been moved and the screen had been removed.

Shirley went to the den to call 911. Bush went to the study to check for missing items. Shirley heard the front door slam. She thought Bush had fallen. When he was not at the front door, she went to the study. She found Bush lying on the floor with stab wounds to his neck and stomach. Bush told her his assailant had just run out.

Ventura Police Officer Michael Van Atta was less than a mile away from Bush when the 911 call came in. Van Atta administered CPR to Bush until the paramedics arrived. Bush died at the hospital.

Witnesses

Lorayne Snyder lived a few houses away from Bush. Sometime before noon on the day of the murder, a short Hispanic man, teenage or possibly 20 years old, came to the door. He spoke to Snyder's husband. Snyder was near the door. She referred the young man to a house across the street where a Hispanic family lived. She watched as the young man crossed the street and knocked on the door. A young girl answered the door and pointed to Bush's house. Snyder saw the young man standing at Bush's front door. Then she stopped watching.

Yomaira Falcon was 10 or 11 years old when she lived near Bush's house. She was home alone when a short Hispanic man in his late teens or early 20's knocked on her door. The young man asked if anyone was at home. She said her parents were upstairs, and asked him to leave. She saw him walk across the street toward Bush's home.

On the morning of the murder, Lauren Semchenko, 11 years old, and her friend Heather McNally were riding their bicycles. They saw a young man run out from an area in front of Bush's home. The man had a long knife in his hand. He slowed to put the knife in his waistband, tucked his shirt over it and continued to run. McNally yelled at the man. He appeared to be surprised and scared. The man wore a green, long-sleeved plaid shirt. McNally believed he was about 14 years old. Semchenko also believed he was about 14 years old.

McNally told her mother about the encounter because it was unusual. Her mother contacted the police. The police interviewed McNally and Semchenko separately. Semchenko helped the police complete a composite sketch of the man. McNally reviewed the sketch and declined to make changes. But McNally believed the hairline was different and the sketch appeared a little too feminine.

Rochelle Stock saw a Hispanic man who was not very tall and who appeared to be in his late teens in the neighborhood. He wore a green and black plaid shirt. He looked "very, very nervous" and anxious. He kept looking around. She told the police the composite drawing looked like the man she saw.

A Department of Motor Vehicles photograph taken of Casillas around the time of the murder shows him wearing a green plaid shirt. When Casillas was arrested, a newspaper

published the picture. Semchenko recognized the picture as that of the man she saw on the day of the murder.

Investigation

Ventura Police Detectives William Dzuro and Harold Scott investigated the crime scene. A screen had been removed from Bush's bedroom window and a sliding lock had been moved. The detectives determined that the window was the point of entry. Detectives lifted 23 latent prints from around the house. Detectives lifted a partial palm print from the window sill at the point of entry. Because the sun shining on the window sill would have quickly dried out the palm print, Detective Scott believed the palm print was left on the window sill after 10:00 a.m. on the day of the murder.

Detective Dzuro opened the closet doors in Shirley's dressing room and found fresh feces on top of some clothing in a laundry basket. The detective took a sample for DNA testing.

One of Bush's neighbors found a folding knife in the neighborhood. The blade matched cuts in the T-shirt that Bush was wearing and contained cotton fibers that matched the T-shirt. The police were unable to lift fingerprints from the knife.

In 1997, DNA technology had not advanced enough to identify a person from feces. California did not begin to add palm prints to its fingerprint database until 2003.

In February of 2002, the police obtained a DNA profile from the fecal matter left at Bush's house. In March of 2014, nearly 17 years after Bush's death, a latent print examiner found a match between Casillas's palm print and the palm print left on Bush's window sill. Casillas's probation officer obtained a buccal swab from Casillas. The DNA taken from the fecal material matched Casillas's DNA.

Fingerprint Expert

Martin Collins is a latent print supervisor with the California Department of Justice. Collins testified the palm print left in Bush's window sill was made by Casillas's right palm. Collins also identified a print from Bush's hallway closet as Casillas's left thumbprint. Collins testified he excluded Shirley and Bush as potential contributors to a print taken from a dressing room closet door knob, but he could not exclude Casillas. Collins testified that prints shown on four other exhibits were inconclusive. He said that neither Shirley, Bush, Casillas, nor anyone else could be excluded. He agreed with the prosecutor's statement that Casillas could not be excluded as a potential contributor to those prints. At the prosecutor's request, Collins circled "not" on a notation on top of the exhibits stating, "Unidentified: Defendant (is/is not) excluded."

Interview with Casillas

In April 2014, Ventura police detectives went to Casillas's place of work where he was on work furlough from a different offense. The detectives asked if Casillas could provide some general information about burglaries to help them in their work. They told Casillas he was not required to talk to them. They sat outside at a picnic table. The detectives surreptitiously recorded the conversation.

Casillas told the detectives that unless the burglar was a drug addict, most burglars commit burglaries for the thrill of doing something bad. The detectives asked Casillas about his 1997 burglary conviction. He said he met a girl at a club who called him the next day to ask for a ride. They stopped at a house. She went in the house and came out with some things. When a police car drove by he panicked and drove off. The police

pulled him over. They wrongly believed he was the girl who committed the burglary because he had long hair and no girl was ever found. He was 18 years old. He pleaded guilty and served three years in prison.

When he got out of prison, he got involved with people who burglarized places. He got caught with stolen property, and did 16 months in prison. He was released on parole. After he completed parole, someone offered him a stove for $50. He bought the stove and listed it on Craigslist. He was arrested. Casillas said that when he got married, he stopped associating with people who are a bad influence on him.

The detectives showed Casillas pictures of people who were arrested at the same time as he was. Casillas recognized Ruben Ramirez. He said he and Ramirez committed a burglary together in Oxnard. Ramirez was arrested for burglary and he was arrested for receiving stolen property. Casillas also recognized Juan Gutierrez. He said Gutierrez burglarized his house while he was away.

The detectives showed Casillas photographs of homes in Ventura, including Bush's home. He denied he burglarized Bush's home or any home in Ventura. He denied carrying any weapons during the burglaries.

Detectives seized Casillas's computer pursuant to a search warrant. His computer contained numerous bookmarks on internet topics related to DNA including DNA from human feces and how to cheat a DNA swab test. His laptop showed searches for unsolved murders in Ventura County and the elements necessary for the crime of murder in California.

Prior Convictions

Casillas was convicted of burglary in 1996. A neighbor of the victim saw Casillas knock on the victim's front door. Then Casillas entered the victim's side yard and came out of the victim's front door about ten minutes later. Casillas had a black bag on his shoulder. The neighbor called the police. The police saw Casillas get into his car with the black bag. A police officer detained Casillas, then arrested him for giving a false name. The officer spread the items in the black bag on the hood of his car just as the victim was arriving home. The victim identified the items as her property.

Casillas was convicted of receiving stolen property in 1997. Police officers responded to a call about a residential burglary involving two suspects. When the officers arrived at the victim's home, they arrested one of the suspects. Officers saw Casillas crawl into a nearby home through the window. Casillas ignored their command to stop. Casillas left the house through the front door. He told the officers that the house belonged to a relative and that he had been in the house for about four hours. An officer searched Casillas and found jewelry that had been taken in the burglary.

DEFENSE

Falcon's Interview

Falcon's description of the person who knocked on her door differed from that of other witnesses. Falcon, who was 11 years old at the time, described the person who knocked on her door as having baggy eyes and a five-o'clock shadow with hair shaved on both sides but combed back on top. He had an accent like a Mexican gangster. He wore a T-shirt with a logo on it, long, bluish, baggy pants, and a black shiny belt. He had a green hat

that he took off before knocking on the door and put on backwards as he was leaving.

Investigation

Kenneth Moses is a crime scene investigator with extensive experience in fingerprint analysis. Moses criticized the crime scene investigation as conducted more like a burglary investigation than a homicide investigation. No fingerprint expert was called to the scene; the detectives failed to use chemical, non-chemical or light sources available at the time to help identify additional latent prints; and areas of the house that appeared undisturbed were not processed for prints. Moses believed that there could have been other prints on the window sill, that it was a mistake not to lift prints from the knife by using super glue, and that some of the unidentified prints had more than enough characteristics for an identification.

Casillas did not testify.

DISCUSSION

I.

In reviewing the sufficiency of the evidence, we view the evidence in a light most favorable to the judgment. (*People v. Johnson* (1980) 26 Cal.3d 557, 578.) We discard evidence that does not support the judgment as having been rejected by the trier of fact for lack of sufficient verity. (*People v. Ryan* (1999) 76 Cal.App.4th 1304, 1316.) We have no power on appeal to reweigh the evidence or judge the credibility of witnesses. (*People v. Stewart* (2000) 77 Cal.App.4th 785, 790.) We presume the trier of fact drew every reasonable inference that could be drawn in favor of the judgment from the evidence. (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.) We must affirm if we determine that any

rational trier of fact could find the elements of the crime beyond a reasonable doubt. (*Johnson*, at p. 578.)

Here, the evidence including the reasonable inferences that could be drawn therefrom shows: Casillas had prior convictions for burglary and receiving stolen property, and admitted to police detectives that he had committed those crimes. On the day of the murder, Casillas was seen knocking on doors to determine whether anyone was home. Bush and his mother left their home at about 10:30 a.m. to run errands. When they left, nothing was amiss. Casillas was seen standing at Bush's front door. Having discovered no one was at home, Casillas went around the side of the house and entered through a window, leaving his palm print on the sill. Casillas rummaged through the house and defecated in a closet, leaving a sample of his DNA. When Bush and his mother returned home, they noticed some things in the house were askew. Bush went to search the house. He found Casillas in the study. Casillas stabbed Bush and escaped. Casillas was seen coming from Bush's house with a knife. Semchenko identified Casillas from a picture in a newspaper as the person she saw with the knife.

There is more than sufficient evidence from which a reasonable jury could find Casillas killed Bush during the commission of a burglary.

Casillas argues there was no evidence he was in Bush's house at the time Bush was murdered. He argues he could have been there between 8:40 and 10:00 a.m. when Bush and Shirley were out of the house for Bush's driver's test.

But when Shirley and Bush returned from the driver's test, Shirley noticed nothing amiss. It was only after they returned home from running errands at 11:45 a.m. that they noticed signs

of a burglary. There is substantial evidence that Casillas was in Bush's house when Bush was stabbed.

Moreover, Casillas was compelled by incontrovertible evidence to admit that he broke into Bush's house on the day of the murder. Casillas asks the jury to believe that he broke into Bush's house, deposited a palm print and his DNA, and left the house before Bush returned from his driver's test. Thereafter, some unknown person broke into Bush's house and stabbed him. Any reasonable juror would recognize Casillas' defense as pure fantasy.

Casillas argues even if there is substantial evidence that he was in Bush's house when Bush was stabbed, there is no substantial evidence to support the special circumstances finding. Casillas points out the court instructed the jury that he could be found guilty of murder as the perpetrator or alternatively as an aider and abettor. Casillas asserts that if the jury found him guilty as an aider and abettor, there is no substantial evidence to support a finding of special circumstances.

It is true the trial court instructed the jury on alternate theories for murder. But the court did not instruct the jury on alternate theories for special circumstances. Instead, the court instructed that to find special circumstances, the jury must find the defendant committed burglary; the defendant intended to commit burglary; and the "defendant did an act that caused the death of another person." (CALCRIM No. 730.) We presume the jury followed the trial court's instructions. (*People v. Johnson* (2015) 61 Cal.4th 734, 770.) Thus, we conclude the jury found Casillas was the direct perpetrator of the murder.

II.

Casillas contends the trial court erred in failing to give sua sponte instructions defining accomplice liability for special circumstances.

Where there is evidence from which a jury could have based its special circumstances verdict on an accomplice theory, the court must instruct that the jury must find the defendant intended to aid another in the killing. (*People v. Jones* (2003) 30 Cal.4th 1084, 1117.)

Here, the prosecutor expressly asked the trial court to omit any reference to aiding and abetting from the special circumstances instruction because the prosecutor was proceeding on the theory Casillas was the actual killer. Casillas did not object. The court omitted reference to aiding and abetting from the instruction.

The trial court did not err. There is no substantial evidence that Casillas committed the burglary with any other person. No person saw two or more people acting in concert on the day of the murder. They saw a single person knocking on doors, standing in front of Bush's house, and emerging from the area of Bush's house with a knife. There were inconclusive fingerprints in the house. But fingerprint experts could not eliminate Bush, Shirley, or Casillas himself as donors of those fingerprints. Such inconclusive fingerprints do not constitute substantial evidence of an accomplice. Fingerprint, palm print, and DNA evidence identified only one person who had no legitimate reason for being in the house. That person is Casillas.

Casillas points out that the trial court gave an accomplice instruction for murder. He reasons that for the court to give such an instruction, it must have found substantial evidence of an

accomplice. He concludes there must be substantial evidence of an accomplice for special circumstances. Whether the court believed there was substantial evidence of an accomplice is irrelevant. There simply is no such evidence. The jury was instructed that to find special circumstances, it had to find that Casillas caused Bush's death. The jury so found. They did not find an accomplice caused Bush's death.

III.

Casillas contends the trial court erred in admitting evidence that had little or no probative value, but that inflamed the jury's passion.

Evidence Code section 352 (section 352) provides: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

(a) 911 Call

Prior to trial, Casillas moved to exclude a recording of Shirley's 911 call. Casillas offered to stipulate that the call was made, the time of the call, and that Bush was stabbed during the call.

Shirley began the call while Bush searched the house for other signs of burglary. Shirley described how her home was burglarized and how she believed the burglar gained entrance. Bush interrupted her and told her he had been stabbed. Shirley could be heard pleading with her son to breathe while Officer Van Atta tried to revive him.

The trial court found the call admissible as a spontaneous utterance. (Evid. Code, § 1240.) The trial court denied Casillas's

motion to exclude the recording of the call, and the call was played for the jury.

After the call was played for the jury, the court called a recess. The court said it called a recess because several members of the audience were emotional and several jurors were weeping.

Here, the 911 call was highly probative as contemporaneous evidence of the circumstances of the murder. Nor was it unduly prejudicial. The prosecution in a murder case is entitled to present evidence of the circumstances attending to the murder scene even if the evidence is grim, duplicates testimony, depicts uncontested facts, or triggers an offer to stipulate. (*People v. Boyce* (2014) 59 Cal.4th 672, 687-688.) That jurors were moved to tears does not mean the evidence was unduly prejudicial.

(b) Exhibit 57

People's Exhibit 57 contains two photographs. One shows a closed blue body bag on a gurney. The other shows Bush's head and unclothed upper body. Casillas objected that the photograph of the body bag was not relevant and the photograph of Bush's upper body was duplicative of other photographs. The prosecutor stated that the medical examiner selected the photographs to explain her examination.

At trial, the medical examiner, Dr. Janice Frank, testified that the body arrives in the autopsy room in a blue plastic bag. She said photograph A on exhibit 57 shows the body in a pouch and that photograph B of the exhibit shows the body after the bag has been opened and pushed back. Frank used the photographs in exhibit 57 to illustrate the autopsy procedure. The evidence was neither duplicative nor unduly prejudicial.

(c) Fingerprints Not Excluded

At trial, the prosecutor introduced five exhibits containing photographs of unidentified fingerprints lifted from Bush's house. At the top of each exhibit is a printed notation, "Unidentified: Defendant (is/is not) excluded." Casillas objected that the notation was pointless if the results were inconclusive, and that the notation had the effect of singling out Casillas. The trial court overruled the objection.

At trial, the People's fingerprint expert testified the latent prints shown on the exhibits were inconclusive, and that no one, including Bush, the Shirleys, and Casillas could be excluded. Over Casillas's objection, the expert was allowed to circle "not" on the notation.

The notation on the exhibits simply reflected the prosecution's expert's testimony that Casillas could not be excluded. Casillas was free to offer the same exhibits with a different notation reflecting his expert's testimony. Casillas argues his own notation would add to the confusion. But no more so than experts testifying for opposing parties.

(d) Detective Scott's Testimony

During direct examination, the prosecutor asked Detective Scott without objection what he did with the palm print he took from Bush's home. Scott replied that he kept it on his desk for the next two and a half years until he retired, and compared it to every palm print that came across his desk. The next day at the end of direct examination, the prosecutor asked Scott the same question. This time Casillas objected to the question as asked and answered. The trial court overruled the objection; Scott gave the same answer, but this time he showed some emotion.

Afterward, the court stated it forgot the prosecutor had asked the same question the day before.

Casillas argues the related question and answer interjected more emotion into an already emotional trial. But the error was harmless by any standard. The trial evoked emotions because of its facts. A sixteen-year-old boy was brutally murdered in his own home. There is nothing to suggest Scott's brief display of emotion had any effect on the outcome of the trial.

(e) Detective Conroy

Detective Sean Conroy interviewed Falcon, who was 10 or 11 years old when she encountered a young Hispanic man at her door. On direct examination, the prosecutor asked Conroy his impression about Falcon's ability to remember and relate details. Casillas objected that the question calls for speculation. The trial court overruled the objection.

In overruling the objection, the court instructed the jury that the evidence was being admitted only "for the limited purpose of assessing the capacity and competency of [Falcon] to relay information and for no other purpose."

Conroy answered: "My impression was that she is an 11-year old and she was relating things as best she could; but she was young and immature, and the sequence of events and her descriptions needed to be put in a context of her youth." When the prosecutor asked Conroy if Falcon seemed "somewhat confused" in relating the information, Conroy answered, "Yes. Yes. We tried to clear those up in a gentle way. You can't cross-examine an 11-year old. You know, you have to be very gentle with them."

The admission of lay opinion testimony is within the discretion of the trial court and will not be disturbed absent a

clear abuse of discretion. (*People v. Mixon* (1982) 129 Cal.App.3d 118, 127.) That a person seemed somewhat confused is an observation a lay person is competent to make. The court did not abuse its discretion.

Casillas argues that if the trial court was referring to Falcon's competency as a witness under Evidence Code section 701, that is a question for the trial court outside the presence of the jury. (Citing *People v. Knox* (1979) 95 Cal.App.3d 420, 431.) Evidence Code section 701, subdivision (a) (hereafter section 701) provides: "(a) A person is disqualified to be a witness if he or she is: [¶] (1) Incapable of expressing himself or herself concerning the matter so as to be understood, either directly or through interpretation by one who can understand him; or [¶] (2) Incapable of understanding the duty of a witness to tell the truth."

First, Casillas never objected under section 701. Second, "somewhat confused" is far from the findings required under section 701.

Casillas argues Conroy's testimony that Falcon was somewhat confused is inadmissible because Conroy did not offer any specifics as to why it was his impression. But Conroy testified Falcon was young and immature and had difficulty with the sequence of events and her descriptions. If Casillas needed more specifics than that, he could have asked. Casillas points out that Semchenko and McNally were also young. But for any chronological age there is a wide range of maturity and abilities.

IV.

Casillas contends the trial court erred in admitting his two prior convictions and a recording of a 2014 interview with police detectives while he was on work furlough.

Casillas argues the recording of the interview constitutes propensity evidence in violation of Evidence Code section 1101 (hereafter section 1101). Section 1101, subdivision (a) prohibits evidence of a person's character or trait when offered to prove his or her conduct on a specified occasion. Subdivision (b) of the section provides: "Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented) other than his or her disposition to commit such an act."

Here, the trial court admitted Casillas's prior 1996 conviction for burglary and a 1997 conviction for receiving stolen property to show intent. The court ruled inadmissible Casillas's 2013 conviction for receiving stolen property under Evidence Code section 352 as too remote in time. During the interview with detectives, Casillas discussed his 1996 and 1997 convictions as well as his 2013 conviction. The court allowed the entire conversation into evidence without redaction. The court stated it could not excise the part of the interview in which Casillas referred to the 2013 conviction without affecting the integrity of the interview.

The trial court instructed the jury with CALCRIM No. 375 that it could only consider evidence of Casillas's 1996 and 1997 convictions for the purpose of deciding whether he acted with the intent to commit burglary or had a plan or scheme to commit burglary in this case. The court drafted a special instruction

telling the jury not to conclude from the recording that the defendant has a bad character or is disposed to commit crime. Neither party wanted the special instruction.

To establish relevance on the issue of intent, the uncharged crimes need only be sufficiently similar to the charged offenses to support the inference that the defendant probably harbored the same intent. (*People v. Carter* (2005) 36 Cal.4th 1114, 1149.) Here, in both the 1996 burglary and the 1997 receiving stolen property convictions, Casillas entered by a back window and left by the front door. That is sufficient to support the inference that Casillas entered Bush's house with the intent to commit burglary.

Casillas argues he conceded intent to commit burglary. But the prosecution is not required to accept the defendant's concession. The prosecutor is entitled to prove the elements of the crime. (See *People v. Ewoldt* (1994) 7 Cal.4th 380, 400, fn. 4.) The trial court did not abuse its discretion in admitting Casillas's prior convictions.

As to the recording of the interview, the trial court properly ruled that evidence of Casillas's 1996 and 1997 convictions is admissible. There is no reason why such evidence cannot be supported by Casillas's admissions in a recorded interview.

The trial court's decision to allow into evidence Casillas's brief mention of his 2013 receiving stolen property conviction did not constitute an abuse of discretion. Casillas was on work furlough at the time the interview took place. The jury was entitled to consider the entire context of the interview. The trial court offered to instruct the jury that it should not conclude from the interview that Casillas has a bad character or is disposed to commit crime. Casillas rejected the offer.

V.

Casillas contends the trial court's exclusion of third party culpability evidence deprived him of the right to a complete defense.

Roy Miller was a confidential police informant. Eighteen months after Bush's murder, Miller told his probation officer that Raymond Perez and Russell Scott told him of their involvement in the murder. District Attorney's investigator Mark Volpei had been assigned to the Bush case. He worked with Miller in investigating Perez and Scott's alleged involvement. No physical evidence links Perez or Scott to Bush's house. Neither Perez nor Scott were arrested for Bush's murder. Both Perez and Scott died before trial.

Casillas moved the trial court to admit into evidence a three-page letter Miller wrote to investigators about his conversation with Perez and Scott in which they allegedly admitted involvement in Bush's murder, as well as police reports.

The prosecution objected on the grounds of hearsay and reliability. The trial court stated that the only basis for the admission of the evidence would be Evidence Code section 1237, past recollection recorded (section 1237).

The trial court held a hearing pursuant to Evidence Code section 402 on the admissibility of evidence. Miller testified at the hearing. Miller said that he and Perez and Scott were not friends, but they did drugs together. Miller met with them on many occasions in the 1990's and discussed various topics, including crimes they committed. They did a lot of meth. Everybody was stealing things.

Miller could not recall telling his probation officer that he had information on the Bush murder; meeting with police to

discuss the case; or telling Volpei that Perez told him he killed Bush. Miller did not recall writing the three-page letter in which he implicated Perez and Scott in Bush's murder, but he conceded it looked like his handwriting.

Miller said it is "more than likely" he told Volpei that Perez stabbed Bush. Miller added, "Like I said, I did a lot of things back then, a lot of drugs were involved, and I did everything I could possibly to stay out of jail or get less time, you know, so it is a good possibility I said a lot of things. What exactly they were, I couldn't tell you."

Miller said he did not know why he wrote the letter to Volpei, but he is "sure it was try[ing] to get myself out of trouble for something."

Miller said he had a "give and take" relationship with Volpei and that Volpei had "got me out of a couple jambs [*sic*]." In speaking to Volpei about Bush's murder, Miller viewed Volpei as his "ticket out of jail." Miller agreed that he was "taking [Volpei] for a ride regarding this case and the information [he] provided."

The trial court found the evidence unreliable and excluded the evidence.

A criminal defendant has the right to present evidence of third party culpability. (*People v. Panah* (2005) 35 Cal.4th 395, 481.) But the right to present such a defense is subject to the rules of evidence. (*People v. Robinson* (2005) 37 Cal.4th 592, 626-627.)

Casillas relies on section 1237. That section provides: "(a) Evidence of a statement previously made by a witness is not made inadmissible by the hearsay rule if the statement would have been admissible if made by him while testifying, the

statement concerns a matter as to which the witness has insufficient present recollection to enable him to testify fully and accurately, and the statement is contained in a writing which: [¶] (1) Was made at a time when the fact recorded in the writing actually occurred or was fresh in the witness' memory; [¶] (2) Was made (i) by the witness himself or under his direction or (ii) by some other person for the purpose of recording the witness' statement at the time it was made; [¶] (3) Is offered after the witness testifies that the statement he made was a true statement of such fact; and [¶] (4) Is offered after the writing is authenticated as an accurate record of the statement. [¶] (b) The writing may be read into evidence, but the writing itself may not be received in evidence unless offered by an adverse party."

Section 1237, subdivision (a)(3) requires the witness to vouch for the truthfulness of the writing. Here, far from vouching for the truthfulness of the letter, Miller testified he did not recall writing the letter and in essence admitted he made up the accusation against Perez and Scott in order to curry favor with Volpei, Miller's ticket out of jail. The trial court did not abuse its discretion in refusing to admit evidence of third party culpability.

VI.

Casillas contends his LWOP sentence violates the Eighth Amendment's bar against mandatory life sentences for youthful offenders.

Casillas relies on cases holding that mandatory LWOP sentences for juvenile offenders violate the Eighth Amendment prohibition on cruel and unusual punishment. (*Miller v. Alabama* (2012) 567 U.S. 460.)

At the time of the murder, Casillas was 19 years old, not a juvenile. His LWOP sentence was mandated by law. Casillas did not object that his sentence violated the Eighth Amendment. His claim is forfeited on appeal. (*People v. Norman* (2003) 109 Cal.App.4th 221, 229.)

In any event, as Casillas acknowledges, Courts of Appeal have rejected his claim. In *People v. Argeta* (2012) 210 Cal.App.4th 1478, the defendant was sentenced to the equivalent of LWOP for murder and attempted murder. He committed the offenses only five months after his 18th birthday. He argued that the rationale to the sentencing of juveniles should apply to him. In rejecting his argument, the Court of Appeal said that although drawing the line at 18 may seem arbitrary, the line must be drawn somewhere. (*Id.* at p. 1482.) The court said it respects the line society has drawn and on which the United States Supreme Court has relied for sentencing purposes. (*Ibid.*)

Nor is Casillas entitled to a youthful offender parole hearing pursuant to Penal Code section 3051 (section 3051). Subdivision (h) of the section expressly provides that the section does not apply "to cases in which an individual is sentenced to life in prison without the possibility of parole for a controlling offense that was committed after the person had attained 18 years of age."

Casillas's equal protection challenge to section 3051 is also unavailing. Casillas points out that under section 3051, a person who was under 18 years of age when he committed an LWOP offense is entitled to a parole hearing after 25 years of incarceration. But a person who committed an LWOP offense when he was over 18 years of age is not entitled to a parole hearing.

The equal protection clause requires that persons similarly situated be treated equally. (*People v. Brown* (2012) 54 Cal.4th 314, 328.) But children and adults are not similarly situated for the purposes of sentencing. (*Miller v. Alabama*, *supra*, 567 U.S. at p. 471.) ["[C]hildren are constitutionally different from adults for purposes of sentencing"].) Treating persons who commit crimes as adults, such as Casillas, differently than persons who commit crimes as juveniles for the purpose of sentencing does not violate equal protection.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

GILBERT, P. J.

We concur:

YEGAN, J.

TANGEMAN, J.

Matthew P. Guasco, Judge

Superior Court County of Ventura

Melanie K. Dorian and Nancy Tetreault, under appointments by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Margaret E. Maxwell, Shawn McGahey Webb and Yun K. Lee, Deputy Attorneys General, for Plaintiff and Respondent.

01156

Appendix H
77a

ABSTRACT OF JUDGMENT - PRISON COMMITMENT - INDETERMINATE

[NOT VALID WITHOUT COMPLETED PAGE TWO OF CR-292 ATTACHED]

CR-292

SUPERIOR COURT OF CALIFORNIA, COUNTY OF: Ventura		
PEOPLE OF THE STATE OF CALIFORNIA vs. DEFENDANT: CASILLAS, MARCO ANTONIO AKA: Jose Torres, Marvin Garcia CII NO.: A10037834 BOOKING NO.: 275254	DOB: 11-23-79 ☐ NOT PRESENT	2014018724 -A -B -C -D
COMMITMENT TO STATE PRISON ABSTRACT OF JUDGMENT	☐ AMENDED ABSTRACT	
DATE OF HEARING: 03-15-17	DEPT. NO.: 46	JUDGE: Matthew Guasco
CLERK: I. Robles	REPORTER: Mary Wu	PROBATION NO. OR PROBATION OFFICER: Danielle Matsuda ☐ IMMEDIATE SENTENCING
COUNSEL FOR PEOPLE: Rebecca Day		COUNSEL FOR DEFENDANT: Stephen Bernard / Alena Klimianok ☐ APPTD.

1. Defendant was convicted of the commission of the following felonies:
   ☐ Additional counts are listed on attachment
   ___ (number of pages attached)

COUNT	CODE	SECTION NO.	CRIME	YEAR CRIME COMMITTED	DATE OF CONVICTION (MO./DATE/YEAR)	CONVICTED BY: JURY	CONVICTED BY: COURT	CONVICTED BY: PLEA	CONCURRENT	CONSECUTIVE	654 STAY
1	PC	187(a)	Murder	1997	02-10-17	X					
					- -						
					- -						
					- -						
					- -						
					- -						

2. ENHANCEMENTS charged and found to be true TIED TO SPECIFIC COUNTS (mainly in the PC 12022 series). List each count enhancement horizontally. Enter time imposed for each or "S" for stayed. DO NOT LIST ANY STRICKEN ENHANCEMENT(S).

COUNT	ENHANCEMENT	TIME IMPOSED OR "S" FOR STAYED	ENHANCEMENT	TIME IMPOSED OR "S" FOR STAYED	ENHANCEMENT	TIME IMPOSED OR "S" FOR STAYED	TOTAL	

3. ENHANCEMENTS charged and found to be true FOR PRIOR CONVICTIONS OR PRISON TERMS (mainly in the PC 667 series). List all enhancements horizontally. Enter time imposed for each or "S" for stayed. DO NOT LIST ANY STRICKEN ENHANCEMENT(S).

ENHANCEMENT	TIME IMPOSED OR "S" FOR STAYED	ENHANCEMENT	TIME IMPOSED OR "S" FOR STAYED	ENHANCEMENT	TIME IMPOSED OR "S" FOR STAYED	TOTAL	
PC 667(a)(1)	5					5	00

Defendant was sentenced to State Prison for an INDETERMINATE TERM as follows:

4. ☒ LIFE WITHOUT THE POSSIBILITY OF PAROLE on counts 1
5. ☐ LIFE WITH THE POSSIBILITY OF PAROLE on counts _____
6. a. ☐ 15 years to Life on counts _____ c. ☐ _____ years to Life on counts _____
   b. ☐ 25 years to Life on counts _____ d. ☐ _____ years to Life on counts _____
   PLUS enhancement time shown above.
7. ☐ Additional determinate term (see CR-290).
8. Defendant was sentenced pursuant to ☐ PC 667(b)-(i) or PC 1170.12 ☐ PC 667.61 ☐ PC667.7 ☐ other *(specify)*:

This form is prescribed under PC 1213.5 to satisfy the requirements of PC 1213 for indeterminate sentences. Attachments may be used but must be referred to in this document.

Form Adopted for Mandatory Use
Judicial Council of California
CR –292 (Rev. January 1, 2007)

ABSTRACT OF JUDGMENT – PRISON COMMITMENT – INDETERMINATE

Penal Code, §§ 1213, 1213.5

01157

Appendix H
78a

PEOPLE OF THE STATE OF CALIFORNIA vs. DEFENDANT: CASILLAS, MARCO ANTONIO			
2014018724 -A	-B	-C	-D

9. FINANCIAL OBLIGATIONS (plus any applicable penalty assessments):

a. Restitution Fine(s):

Case A: $10,000. per PC 1202.4(b) forthwith per PC 2085.5; $10,000. per PC 1202.45 suspended unless parole is revoked.
$_____ per PC 1202.44 is now due, probation having been revoked.

Case B: $_____ per PC 1202.4(b) forthwith per PC 2085.5; $_____ per PC 1202.45 suspended unless parole is revoked.
$_____ per PC 1202.44 is now due, probation having been revoked.

Case C: $_____ per PC 1202.4(b) forthwith per PC 2085.5; $_____ per PC 1202.45 suspended unless parole is revoked.
$_____ per PC 1202.44 is now due, probation having been revoked.

Case D: $_____ per PC 1202.4(b) forthwith per PC 2085.5; $_____ per PC 1202.45 suspended unless parole is revoked.
$_____ per PC 1202.44 is now due, probation having been revoked.

b. Restitution per PC 1202.4(f):

Case A: $2,000.00 ☒ Amount to be determined to ☒ victim(s)* ☐ Restitution Fund
Case B: $_____ ☐ Amount to be determined to ☐ victim(s)* ☐ Restitution Fund
Case C: $_____ ☐ Amount to be determined to ☐ victim(s)* ☐ Restitution Fund
Case D: $_____ ☐ Amount to be determined to ☐ victim(s)* ☐ Restitution Fund

☒ * Victim name(s), if known, and amount breakdown in item 11, below. ☐ * Victim names(s) in probation officer's report.

c. Fine(s):

Case A: $_____ per PC 1202.5. $_____ per VC 23550 or _____ days ☐ county jail ☐ prison in lieu of fine ☐ concurrent ☐ consecutive
☐ includes: ☐ $50 Lab Fee per HS 11372.5(a) ☐ $_____ Drug Program Fee per HS 11372.7(a) for each qualifying offense.

Case B: $_____ per PC 1202.5. $_____ per VC 23550 or _____ days ☐ county jail ☐ prison in lieu of fine ☐ concurrent ☐ consecutive
☐ includes: ☐ $50 Lab Fee per HS 11372.5(a) ☐ $_____ Drug Program Fee per HS 11372.7(a) for each qualifying offense.

Case C: $_____ per PC 1202.5. $_____ per VC 23550 or _____ days ☐ county jail ☐ prison in lieu of fine ☐ concurrent ☐ consecutive
☐ includes: ☐ $50 Lab Fee per HS 11372.5(a) ☐ $_____ Drug Program Fee per HS 11372.7(a) for each qualifying offense.

Case D: $_____ per PC 1202.5. $_____ per VC 23550 or _____ days ☐ county jail ☐ prison in lieu of fine ☐ concurrent ☐ consecutive
☐ includes: ☐ $50 Lab Fee per HS 11372.5(a) ☐ $_____ Drug Program Fee per HS 11372.7(a) for each qualifying offense.

d. Court Security Fee: $40.00 per PC 1465.8. e. Criminal Conviction Assessment $30.00 per GC 70373

10. TESTING a. ☒ Compliance with PC 296 verified b. ☐ AIDS per PC 1202.1 d. ☐ other *(specify)*:

11. Other orders *(specify)*:

***Victim Restitution - Victim Compensation Board claim number #477076 in the amount of $2,000.00 on behalf of victim Gail Shirley for funeral/burial pursuant to PC 1202.4; Victim Compensation Board claim number #477077 on behalf of Gail Shirley, in an amount to be determined; Victim Compensation Board claim number behalf of Robert Shirley, in an amount to be determined.**
- Court recommends a counseling or educational program pursuant to PC 1203.096
- No contact with Gail Shirley and Robert Shirley in person, by mail, by phone - directly or indirectly
- Credit for 983 actual days served. The Defendant is not entitled to conduct credits pursuant to Penal Code Section 2933.2

12. IMMEDIATE SENTENCE:

☐ Probation to prepare and submit Post-sentence report to CDCR per PC 1203c.

Defendant's race/national origin: **Hispanic**

13. EXECUTION OF SENTENCE IMPOSED:

a. ☒ at initial sentencing hearing.
b. ☐ at resentencing per decision on appeal.
c. ☐ after revocation of probation.
d. ☐ at resentencing per recall of commitment. (PC1170(d).)
e. ☐ other *(specify)*:

14. CREDIT FOR TIME SERVED

CASE	TOTAL CREDITS	ACTUAL	LOCAL CONDUCT
A			☐ 4019 ☐ 2933.1
B			☐ 4019 ☐ 2933.1
C			☐ 4019 ☐ 2933.1
D			☐ 4019 ☐ 2933.1
Date Sentence Pronounced: 03-15-17		Time Served in State Institution: DMH [ ] CDCR [ ] CRC [ ]	

15. The defendant is remanded to the custody of the sheriff ☒ forthwith ☐ after 48 hours excluding Saturdays, Sundays, and holidays.
To be delivered to ☒ the reception center designated by the director of the California Department of Corrections and Rehabilitation.
☒ other *(specify)*: **Wasco**

CLERK OF THE COURT

I hereby certify the foregoing to be a correct abstract of the judgment made in this action.

DEPUTY'S SIGNATURE	DATE
Inez Robles	03-15-17

01147

Appendix H
79a

VENTURA
SUPERIOR COURT
FILED
FEB 10 2017
MICHAEL D. PLANET
Executive Officer and Clerk
BY: [signature] Deputy

SUPERIOR COURT OF CALIFORNIA, COUNTY OF VENTURA

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff,

vs.

MARCO ANTONIO CASILLAS,

Defendant.

CASE NO: 2014018724

VERDICT

COUNT 1

We, the jury in the above-entitled action, find the defendant, MARCO ANTONIO CASILLAS **GUILTY** of the crime of First Degree Felony Murder, murder in the perpetration of burglary, of James Kenneth Bush, in violation of Penal Code section 187(a), as alleged in the Indictment.

We further find the allegation that the murder of James Kenneth Bush was committed while the defendant was engaged in the commission of the crime of burglary, in violation of Penal Code section 190.2(a)(17), to be:

TRUE ✓ NOT TRUE _____

Dated: February 10, 2017

FJ08

Foreperson