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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
AUG 23 2024
MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

EDDIE LEE EVANS,
Petitioner-Appellant,

v. No. 23-55630

KELLY SANTORO, Acting Warden,
Respondent-Appellee.

D.C. No. 2:21-cv-04812-SSS-MAA
Central District of California, Los Angeles

ORDER

Before: SCHROEDER and NGUYEN, Circuit Judges.

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

Any pending motions are denied as moot.

DENIED.

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

EDDIE LEE EVANS,
Petitioner,

v.

KELLY SANTORO,
Respondent.

Case No. 2:21-cv-04812-SSS-MAA

ORDER DENYING CERTIFICATE OF APPEALABILITY

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

> (a) **Certificate of Appealability.** The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant. Before entering the final order, the court may direct the parties to submit arguments on whether a certificate should issue. If the court issues a certificate, the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. § 2253(c)(2). If the court denies a certificate, a party may not appeal the

> denial but may seek a certificate from the court of appeals under Federal Rule of Appellate Procedure 22. A motion to reconsider a denial does not extend the time to appeal.
>
> (b) **Time to Appeal.** Federal Rule of Appellate Procedure 4(a) governs the time to appeal an order entered under these rules. A timely notice of appeal must be filed even if the district court issues a certificate of appealability. These rules do not extend the time to appeal the original judgment of conviction.

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

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

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

DATED: May 5, 2023

/s/
HONORABLE SUNSHINE S. SYKES
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

EDDIE LEE EVANS,
Petitioner,

v. Case No. 2:21-cv-04812-SSS-MAA

KELLY SANTORO,
Respondent.

JUDGMENT

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

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

DATED: May 5, 2023

/s/
HONORABLE SUNSHINE S. SYKES
UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

EDDIE LEE EVANS,
Petitioner,

v. Case No. 2:21-cv-04812-SSS-MAA

WARDEN KELLY SANTORO,
Respondent.

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This Report and Recommendation is submitted to the Honorable Sunshine Suzanne Sykes, United States District Judge, pursuant to 28 U.S.C. § 636 and General Order 05-07 of the United States District Court for the Central District of California.

I. INTRODUCTION

On June 14, 2021, Petitioner Eddie Lee Evans ("Petitioner"), through counsel, initiated this action by filing a Petition for Writ of Habeas Corpus by a Person in State Custody pursuant to 28 U.S.C. § 2254 ("Petition") and an attached Memorandum of Points and Authorities. (Pet., ECF No. 1; Pet. Mem. P. & A., ECF No. 1-1.) The Petition challenges a conviction Petitioner sustained in the San Bernardino County Superior Court in 2021 for the murder of Robert

Goodson[1] in 2000. (Pet. 2; Pet. Mem. P. & A. 6.)[2] Petitioner asserts one ground for federal habeas relief: the prosecution's seventeen-year delay in bringing charges violated his rights to due process, the trial court erred by denying Petitioner's motion to dismiss the charges based on this claim ("Motion to Dismiss"), and the Court of Appeal's rejection of this claim was contrary to clearly established Supreme Court precedent. (Pet. 6–7; Pet. Mem. P. & A. 16–30.)

On September 2, 2021, Respondent filed an Answer to Petition for Writ of Habeas Corpus ("Answer") and an attached Memorandum of Points and Authorities, arguing that the Petition should be denied on the merits. (Answer, ECF No. 8; Answer Mem. P. & A., ECF No. 8-1.) On September 29, 2021, Petitioner filed a Traverse. (Traverse, ECF No. 10.) The matter is now ready for decision. As discussed below, the Court recommends that the Petition be denied with prejudice.

II. PROCEDURAL SUMMARY

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[1] Where individuals referenced in this Report and Recommendation share the same last name, the Court refers to them by their first name.

[2] Pinpoint citations of briefs, exhibits, and Lodged Documents ("LD") in this Order refer to the page numbers appearing in the ECF-generated headers. Pinpoint citations of the Clerk's Transcript ("CT," ECF Nos. 9-13 to 9-15) and Reporter's Transcript ("RT," ECF Nos. 9-8 to 9-12) refer to the transcripts' own volume and page-numbering schemes.

In 2017, Petitioner was charged with the 2000 murder of Robert. (1 CT, ECF No. 9-13, at 11-1.) Petitioner filed a Motion to Dismiss, claiming that the preaccusation delay violated his due process rights under the Fifth and Fourteenth Amendments to the United States Constitution and the due process clause of Article I, § 7 of the California Constitution. (2 CT, ECF No. 9-14, at 291–323.) He argued that the pre-accusation delay prejudiced him due to the death of witnesses, loss of evidence, and the diminished memories of other witnesses, and the prosecutors had no justification for the delay. (*Id.* at 299–300.) The Superior Court considered the Motion to Dismiss concurrently with the jury trial. (1 RT, ECF No. 9-8, at 3-2, 3-3, 4.)

On March 8, 2018, a jury convicted Petitioner of first-degree murder (Cal. Penal Code § 187(a)). (2 CT 485.) The jury found that, in the commission of the murder, Petitioner personally used a firearm (Cal. Penal Code § 12022.53(b)), intentionally discharged the firearm (Cal. Penal Code § 12022.53(c)), and thereby caused the death of Robert (Cal. Penal Code § 12022.53(d)). (*Id*. at 486–90.) The court sentenced Petitioner to a term of twenty-five years to life on the first-degree murder conviction and a consecutive term of twenty-five years to life on the gun use enhancement pursuant to California Penal Code section 12022.53(d), for a total term of fifty years to life in state prison. (*Id*. at 546.) Upon the return of the jury verdict, the Superior Court denied the Motion to Dismiss. (2 CT 545–46; 4 RT, ECF No. 9-11, at 957–71.)

Petitioner appealed his judgment of conviction to the California Court of Appeal, arguing several errors, including that the pre-accusation delay violated his rights to due process. (LD 3, ECF No. 13-1, at 44–59.) On January 6, 2020, the Court of Appeal rejected this claim and affirmed the judgment. *People v. Evans*, No. E070871, 2020 Cal. App. Unpub. LEXIS 53, at *9–15, 25 (Jan. 6, 2020). (LD 1, ECF No. 9-1, at 9–13.) Petitioner then filed a petition for review in the California Supreme Court. (LD 6, ECF No. 9-6.) On April 1, 2020, the Supreme Court summarily denied the petition for review. *People v. Evans*, No. S260529, 2020 Cal. LEXIS 2338 (Apr. 1, 2020). (LD 7, ECF No. 9-7.) Petitioner initiated this action by filing the Petition on June 14, 2021.

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III. FACTUAL SUMMARY

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

> Robert Goodson was killed in his home in Rancho Cucamonga on February 16, 2000. He had moved into the home

just a few months prior with his wife Arlene Goodson, their young daughter, and a friend, Patrick Gordon. Before, all had lived in Guam for a number of years.

In January 2000, [Petitioner] approached the home and asked for someone whose name sounded like "Yolie." Gordon told [Petitioner] that no one by that name lived there, and [Petitioner] left. A week or two later, [Petitioner] returned and again asked for "Yolie." Gordon answered, again telling the man that no one by that name lived there. On either this visit or the first one, [Petitioner] handed Gordon a business card.

Around 12:30 p.m. on February 12, 2000, four days before Robert was killed, [Petitioner] appeared at the house a third time, again asking for "Yolie." Several people were in the house at the time. Gordon answered and again told [Petitioner] that "Yolie" did not live there. [Petitioner] then became "loud," "very aggressive," and "threatening," saying: "Tell her to come out of the house. I know she's in there." According to Gordon, [Petitioner] also stated that "if we didn't get out of the house and produce Yolie ... people were going to get hurt." Robert's father, Allen Goodson, pushed Gordon aside, stepped in front of

[Petitioner], and insisted that [Petitioner] leave.

Unbeknownst to the residents at the time, a woman named Yolanda Estrada dated a married man in the late 1990's whose mother once lived at that house. The woman, who goes by the nickname "Yolly," had once spent a night at the home.

In the early afternoon on the day Robert was killed, Arlene was away at work, Robert was asleep on the couch, and Gordon, who often took care of Robert and Arlene's daughter, went to help a friend move, taking Robert and Arlene's daughter with him. Gordon usually did not lock the front door if there were others inside when he left. While driving to the friend's home, Gordon saw [Petitioner] walking on the street toward the home. When Gordon returned home sometime later, he found Robert dead on the couch. Robert had been shot in the head at very close range with a shotgun. No valuables had been taken from the home.

Law enforcement interviewed [Petitioner] on February 18 and March 16, 2000. During the March 16 interview, [Petitioner] denied ever being at the Rancho Cucamonga home; ever knowing

Arlene, Gordon, or "Yolie"; or being in Rancho Cucamonga on the day of the murder. [Petitioner] also stated that he was "[a]bsolutely not" in the Rancho Cucamonga area between 11:00 a.m. and 1:00 p.m. on February 12 and that he remained in the "general area" of his home in Glendora on the day of the murder. [Petitioner] stated that his truck had been broken down and that he did not get rides from others during those times. When asked how his business card ended up at the house, [Petitioner] stated that he hands them out in "a lot of places." [Petitioner] denied owning any firearms and stated that he had not shot a firearm in several years.

Late in the night after that interview—that is, in the early morning hours of March 17—[Petitioner] was arrested for carrying a loaded shotgun into a bar. When interrogated later that day, [Petitioner] told law enforcement: "I have a shotgun. I bought it from a friend." [Petitioner] could not remember when he purchased the firearm, other than that it was "[a] while back" and that "[i]t's been a while." [Petitioner] said he purchased it from Lawrence Kraus, although he did not know how to spell the name. [Petitioner] denied owning the shotgun, saying "it doesn't belong to me," but did state that he "bought it from"

Kraus.

A criminalist who examined the shotgun at the time observed that it had recently been cleaned and contained biological material which "very likely ... came from a blow back event." The criminalist concluded that the ammunition recovered with [Petitioner's] shotgun was consistent with that recovered at the murder scene.

According to the analyst who first tested the biological material recovered from the shotgun in 2000, the biological material contained a "very low level of human DNA." Law enforcement also ran the serial number of [Petitioner's] shotgun through two databases in 2000, CLETS and NCIC, neither of which yielded results. Law enforcement did not run the serial number through the ATF database at the time.

In 2017, when the file for Robert's murder was reopened, a search of the serial number through the ATF database showed Kraus as the registered owner. Police then interviewed Kraus in May 2017, who said that he gave the shotgun to [Petitioner] in 1999 as partial payment for some carpentry work [Petitioner] had done for Kraus. [Petitioner] was charged with the murder shortly thereafter.

Evidence of [Petitioner's] cell location on the day of the murder also contradicted his post arrest statements. Cell tower data showed that a call was made from [Petitioner's] number at 12:27 p.m. on February 12 within one to one and a half miles from a tower located in Rancho Cucamonga. Data also showed that [Petitioner's] number received or placed two calls on February16, one at 11:14 a.m. near Glendora, and the other at 12:27 p.m. in the Rubidoux area. Furthermore, according to [Petitioner's] landlord at the time, [Petitioner] both had access to other vehicles when his truck was broken, and was seen with a shotgun in the months surrounding Robert's murder.

As well, the prosecution relied on statements [Petitioner] made about nine years after the murder. In 2009, [Petitioner] drove to Las Vegas with George Lewis, his brother-in-law; at the time, [Petitioner] and George were married to sisters. According to George, during the drive, [Petitioner] stated that he was having personal problems with his wife and "basically ... said he wanted her whacked." [Petitioner] stated that he was "going to do her that day," that he needed to "get on with his own life," that he "knew how to do it without being caught," and that he was "going to get

> drunk and take care of it." On the return drive, [Petitioner] thought aloud about how he was going to have his wife killed. When George objected, [Petitioner] stated something to the effect that "it was in his blood." On the phone a few days later, [Petitioner] told George that he "needed to go to bat for" [Petitioner]. [Petitioner] also stated on that phone call that "it wasn't his first rodeo."
>
> [Petitioner's] theory at trial was that Gordon was the real killer. The defense asserted, for instance, that Gordon and Arlene began having an affair after moving to Rancho Cucamonga; that Robert and Arlene's marriage was deteriorating; that Gordon and Arlene had lunch together on Valentine's Day, two days before Robert's death; that Gordon recently inherited a large sum of money; and that Gordon and Arlene had sex two days after the murder.

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Evans, 2020 Cal. App. Unpub. LEXIS 53 at *1–7 (footnotes omitted). (LD 1, at 2– 7 (footnotes omitted).)

IV. STANDARD OF REVIEW

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

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

Pursuant to AEDPA, the "clearly established Federal law" that controls federal habeas review of state-court decisions consists of the holdings, as opposed to the dicta, of Supreme Court decisions "as of the time of the relevant state-court decision." *Williams v. Taylor*, 529 U.S. 362, 412 (2000). Although a state-court decision may be both "contrary to" and "an unreasonable application of" controlling Supreme Court law, the two phrases have distinct meanings. *See id.* at 391, 412–13. A state-court decision is "contrary to" clearly established federal law if the decision either applies a rule that contradicts binding governing Supreme Court law or reaches a result that differs from the result the Supreme Court reached on "materially indistinguishable" facts. *Early v. Packer*, 537 U.S. 3, 8 (2002) (per curiam); *see also Woods v. Donald*, 575 U.S. 312, 317, 1377 (2015) ("[I]f the

circumstances of a case are only 'similar to' our precedents, then the state court's decision is not 'contrary to' the holdings in those cases."). When a state-court decision adjudicating a claim is contrary to controlling Supreme Court law, the reviewing federal habeas court is "unconstrained by § 2254(d)(1)." *See Williams*, 529 U.S. at 406.

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

disagreement." *Harrington v. Richter*, 562 U.S. 86, 103 (2011). The same standard of objective unreasonableness applies where the petitioner is challenging the state court's factual findings pursuant to Section 2254(d)(2). *See Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003) ("[A] decision adjudicated on the merits in a state court and based on a factual determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state-court proceeding ....").

In this case, the California Supreme Court summarily denied Petitioner's petition for review in her habeas proceedings without comment or citation of authority. *Evans*, 2020 Cal. LEXIS 2338. (LD 7.) For the purpose of AEDPA review, the Court looks through the California Supreme Court's summary denial of Petitioner's claim to the "last reasoned decision" on the claim. *See Wilson v. Sellers*, 138 S. Ct. 1188, 1192–97 (2018); *Valdez v. Montgomery*, 918 F.3d 687, 691 (9th Cir. 2019), *cert. denied*, 140 S. Ct. 252, 2019 LEXIS 6050 (Oct. 7, 2019). Here, the Court of Appeal denied habeas relief in a reasoned decision, which therefore is the relevant state court decision for purposes of AEDPA review.

V. DISCUSSION

Petitioner raises one claim for federal habeas relief: that the seventeen-year delay in bringing charges against him violated his due process rights, the trial court erred by denying Petitioner's Motion to Dismiss the charges based on this claim, and the Court of Appeal's rejection of this claim was contrary to

clearly established Supreme Court precedent. (Pet. 6–7.) Specifically, Petitioner argues that that he was prejudiced due to the deaths of five material witnesses, memory loss of certain witnesses, memory "gain" of other witnesses, and loss of evidence, including the home where the Robert was killed, telephone records from the home, and a 2009 recording of a police interview. (Pet. Mem. P. & A. 18–24.) Petitioner further argues that there is no legitimate justification for the delay. (*Id*. at 24–30.)

Respondent argues that Petitioner's claim must be rejected on the merits because the Court of Appeal reasonably rejected Petitioner's due process claim after finding that he "failed to 'show that any potential prejudice resulting from the delay was more than speculative.'" (Answer Mem. P. & A. 12–13 (quoting LD 1, at 9).) In his Traverse, Petitioner argues that "[t]he only logical conclusion" for the seventeen-year delay was that the "state made no effort to investigate" the case until 2017, at a time that would hurt Petitioner's chances of defending against the charges. (Traverse 5.) He concludes that the delay was a "product of reckless disregard for circumstances known to the prosecution suggesting an appreciable risk that delay would impair [Petitioner's] ability to mount an effective defense" and "a product of neglect." (*Id*. at 11.) He further argues that the "Court of Appeal was unreasonable in concluding that any claims regarding prejudice were speculative." (*Id*. at 11–12.)

A. Legal Standard

The Supreme Court cases governing the issue of whether a pre-accusation delay violates due process are *United States v. Marion*, 404 U.S. 307 (1971), and *United States v. Lovasco*, 431 U.S. 783 (1977). In *Marion*, the Supreme Court explained that while statutes of limitations provide "the primary guarantee against bringing overly stale criminal charges," the Due Process Clause also has a limited role to play in protecting against oppressive pre-accusation delay. 404 U.S. at 322– 24 (internal quotation marks and citation omitted). Specifically, due process would require dismissal of criminal charges if it were shown that the pre-charging delay "caused substantial prejudice to [the defendant's] rights to a fair trial and that the delay was an intentional device to gain tactical advantage over the accused." *Id.* at 324. Nonetheless, the Supreme Court held that there was no due process violation in *Marion* because the defendants did not allege or prove "actual prejudice"—as opposed to speculative assertions regarding a possibility of prejudice at trial—and there was "no showing that the Government intentionally delayed to gain some tactical advantage over [the defendants] or to harass them." *Id.* at 325–26.

In *Lovasco*, the Supreme Court stated that "proof of prejudice is generally a necessary but not sufficient element of a due process claim" in cases of preaccusation delay. 431 U.S. at 790. The due process inquiry must "consider the reasons for the delay as well as the prejudice to the accused," taking into account "fundamental conceptions of justice" and "the community's sense of fair play and decency." *Id.* (internal quotation marks and citations omitted).

Lovasco /// distinguished between investigative delay, on the one hand, and tactical delay, on the other:

> In our view, investigative delay is fundamentally unlike delay undertaken by the Government solely to gain tactical advantage over the accused, precisely because investigative delay is not so one-sided. Rather than deviating from elementary standards of fair play and decency, a prosecutor abides by them if he refuses to seek indictments until he is completely satisfied that he should prosecute and will be able promptly to establish guilt beyond a reasonable doubt. Penalizing prosecutors who defer action for these reasons would subordinate the goal of orderly expedition to that of mere speed. This the Due Process Clause does not require.

Id. at 795–96 (internal quotation marks and citations omitted). The Supreme Court held that "to prosecute a defendant following investigative delay does not deprive him of due process, even if his defense might have been somewhat prejudiced by the lapse of time." *Id.* at 796.

In addition to tactical delay, a due process violation also may be found where pre-accusation delay was a product of "reckless disregard for circumstances, known to the prosecution, suggesting that there existed an appreciable risk that delay would impair the defendant's ability to mount an effective defense."

Id. at 796 n.17 (internal quotations and citations omitted); *see also United States v. Eight Thousand Eight Hundred & Fifty Dollars ($8,850) in United States Currency*, 461 U.S. 555, 563 (1983) (explaining that *Lovasco* articulated that a claim of pre-indictment delay "can prevail only upon a showing that the Government delayed seeking an indictment in a deliberate attempt to gain an unfair tactical advantage over the defendant or in reckless disregard of its probable prejudicial impact upon the defendant's ability to defend against the charges.")

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However, *Lovasco* declined to set out a precise test for determining when pre-accusation delay violates due process, and instead left "to the lower courts, in the first instance, the task of applying the settled principles of due process that we have discussed to the particular circumstances of individual cases." *Id.* at 797. The Ninth Circuit has recognized that the Supreme Court has not established a definitive test for evaluating due process claims premised on pre-accusation delay, for purposes of federal habeas claims governed by 28 U.S.C. § 2254(d)(1). *See Shammam v. Paramo*, 664 F. App'x 629, 631 (9th Cir. 2016) (Mem.); *New v. Uribe*, 532 F. App'x 743, 744 (9th Cir. 2013) (Mem.); *Reed v. Schriro*, 290 F. App'x 982, 985 (9th Cir. 2008) (Mem.).

Since the Supreme Court's decision in *Lovasco*, the federal courts of appeals have split on the proper standard to apply in analyzing a due process violation based on pre-accusation delay. *See Jones v. Angelone*,

94 F.3d 900, 905 (4th Cir. 1996) (describing circuit split); *Hoo v. United States*, 484 U.S. 1035, 1036 (1988) (recognizing the circuit split as to the proper test for pre-indictment delay, including a split as to whether intentional misconduct is a *sine qua non* for a due process violation) (dissenting op. of White, J.). The Ninth Circuit applies a two-pronged standard under which the defendant first must prove "actual, nonspeculative prejudice from the delay." *United States v. Corona-Verbera*, 509 F.3d 1105, 1112 (9th Cir. 2007) (internal quotation marks and citation omitted). This burden for establishing prejudice, the Ninth Circuit has cautioned, is a heavy one that is "rarely met." *Id.* Upon a defendant's showing of actual prejudice, the court must balance the length of the delay against the reasons for the delay, and the defendant must show that the delay offends the "fundamental conceptions of justice which lie at the base of our civil and political institutions." *Id.* (internal quotation marks and citation omitted); *see also United States v. Moran*, 759 F.2d 777, 781–82 (9th Cir. 1985). However, most other circuits have held that, to prevail on a pre-indictment delay claim, a defendant must show, in addition to actual prejudice, intentional delay by the government to gain an unfair tactical advantage or for another bad faith motive. *Jones,* 94 F.3d at 905 (collecting cases); *see also United States v. Crouch*, 84 F.3d 1497, 1510, 1511 (5th Cir. 1996) (en banc) (recognizing that "neither *Marion* nor *Lovasco* is crystal clear on this issue" but also agreeing with a "significant majority of our sister circuits" requiring a showing that the prosecutor "intentionally delayed to gain tactical advantage or to advance some other improper purpose").

B. Background

1. Pre-trial Motion to Dismiss

On January 5, 2018, Petitioner filed his Motion to Dismiss in the San Bernardino County Superior Court, arguing that the prosecution's seventeen-year delay in charging him with Robert's murder prejudiced his ability to prepare a defense and was not justified. (2 CT 291–301.) In particular, Petitioner asserted that the loss of Robert's home phone records prevented him from being able to find individuals who Robert contacted about drug use and dealing, who might have had a motive to kill him. (*Id*. at 294.) Petitioner argued that the destruction of a recording of a 2009 police interview with George Lewis, during which George indicated that he was told Petitioner had an alibi for Robert's murder, hindered Petitioner's understanding of exactly what took place in that interview. (*Id*. at 294– 95.) Petitioner also averred that because Robert's home no longer existed, he lost the opportunity to investigate and analyze the crime scene in order to mount a defense. (*Id*. at 295–96.) Finally, Petitioner claimed that the deaths of material witnesses, including Allen Goodson and Charlie Cioni, prejudiced his ability to defend against the charges. (*Id*. at 296–300.) Though Petitioner did not specify what he believed Allen's trial testimony would have been, he contended that Allen had maintained throughout the investigation that Patrick Gordon and Arlene Goodson were responsible for the murder, that Allen kicked Arlene out of the house the night of the murder, and that Allen did not like how Arlene and Gordon spoke about the death. (*Id*. at 296.) He noted that Charlie

would have testified to Robert's drug use, gambling, and drug dealing. (*Id.* at 296–298.) Petitioner maintained that there was no justification for the delay, in contrast to reasons for pre-accusation delays that courts previously had found justified, such as the discovery of a new witness, new evidence, or where a defendant was unable to be found, which did not apply to his case. (*Id.* at 300.)

The trial court considered the Motion to Dismiss concurrently with the jury trial and held a hearing after the jury returned the guilty verdicts. (1 RT 3-2, 3-3, 4; 4 RT 957–71.) After hearing arguments from the parties, the trial court denied the Motion to Dismiss explaining that the federal due process claim failed because there was "no evidence that the delay was undertaken to gain a tactical advantage." (4 RT 963–64; *see* 2 CT 545–46.) In considering the due process claim under state law, the court found that Petitioner "did not demonstrate any prejudice due to the delay," reasoning that the witnesses who testified either recollected the events to which they testified, or had their memories adequately refreshed by prior statements that primarily had been taped and transcribed. (4 RT 964.) The court found that the absence of Robert's home phone records did not prejudice him because counsel could have questioned the detective who reviewed the records, but did not. (*Id.* at 967–68.) The court did not specifically address the destruction of the recording of George's 2009 interview in its reasoning on the record. (*See generally id.* at 963– 71.) The court found that the loss of the house did not prejudice Petitioner because photos of the home had been taken, and the absence of DNA or

fingerprints connecting Petitioner to the scene supported his defense. (*Id*. at 968–69.) The court considered the loss of Allen and Charlie, concluding that their absence did not prejudice the defense because their testimony would have been inadmissible as opinion evidence, cumulative to facts already testified about by Gordon and Arlene, or speculation. (*Id*. at 964–67.)

Although the court found no prejudice from the seventeen-year preaccusation delay, it nevertheless considered the reasons for the delay and found no evidence that the prosecution "deliberately delayed the investigation in order to gain tactical advantage" over Petitioner. (*Id*. at 969.) In addition, the court found no negligence on the part of the government in not investigating further because "[i]t was not unreasonable to make a decision that with further time and the development of DNA analysis, the biological material found on the shotgun could later lead to further evidence against [Petitioner], even though that wasn't the case." (*Id*. at 970.)

2. Direct Appeal

On direct appeal, Petitioner reiterated his claim that the pre-accusation delay violated due process. (LD 3, at 44–58.) In its opinion affirming the criminal judgment, the California Court of Appeal rejected this claim. *Evans*, 2020 Cal. App. Unpub. LEXIS 53, at *9–15. (LD 1, at 9–13.) The Court of Appeal applied California law, rather than federal law, to Petitioner's due process claim based on its reasoning that the federal standard governing due process claims based

on preaccusation delay was unclear, but that California law was at least as favorable for defendants as federal law. *Evans*, 2020 Cal. App. Unpub. LEXIS 53, at *8. (LD 1, at 8.) The Court of Appeal noted the standard that a defendant seeking to dismiss a charge based on pre-accusation delay must first demonstrate non-speculative prejudice arising from the delay. *Evans*, 2020 Cal. App. Unpub. LEXIS 53, at *8 (citing *People v. Catlin*, 26 Cal. 4th 81, 107 (2001), *People v. Jones*, 57 Cal. 4th 899, 923 (2013)). (LD 1, at 8 (same).) The Court of Appeal explained that a court then balances the harm to the defendant against the justification for the delay. (*Id.* (citing *Catlin*, 26 Cal. 4th at 107).) The Court of Appeal found that the "trial court acted within its broad discretion" in denying the Motion to Dismiss because Petitioner failed to "show that any potential prejudice resulting from the delay was more than speculative." *Evans*, 2020 Cal. App. Unpub. LEXIS 53, at *9. (LD 1, at 9.) As explained in more detail below, the Court of Appeal found that Petitioner's claims of prejudice relating to the loss of witnesses and evidence and memories that faded or improved over time were speculative and therefore insufficient to demonstrate prejudice. *Evans*, 2020 Cal. App. Unpub. LEXIS 53, at *9–15. (LD 1, at 9–12.) Next, the Court of Appeal concluded that, in the absence of prejudice, it "need not address [Petitioner's] further argument challenging the prosecutor's multiple justifications for the delay or the trial court's acceptance of those reasons." *Evans*, 2020 Cal. App. Unpub. LEXIS 53, at *14–15 (quoting *Jones*, 57 Cal. 4th at 924). (LD 1, at 12–13 (same).)

C. Analysis

The Court of Appeal's rejection of Petitioner's claim of pre-accusation delay was not an unreasonable application of, or contrary to, Supreme Court precedent. The Court reviews each of Petitioner's claims of prejudice in Section V.C.1 below, concluding that the Court of Appeal was not objectively unreasonable in finding no actual prejudice from the seventeen-year delay in bringing charges against Petitioner. The Court reviews Petitioner's claims as to why the delay was not justified in Section V.C.2 below, concluding that even if the Court of Appeal had been objectively unreasonable in its finding of no actual prejudice, the record shows evidence of neither an intentional delay by the government in bringing charges to gain a tactical advantage nor recklessness.

1. Petitioner Has Not Established the Court of Appeal Was Objectively Unreasonable In Finding No Actual Prejudice.

Petitioner's claim fails because he has not established that the Court of Appeal was objectively unreasonable in finding no actual prejudice stemming from the pre-accusation delay. A claim that a charging delay denied a defendant due process requires proof of "actual, nonspeculative prejudice from the delay, meaning proof that demonstrates exactly how the loss of evidence or witnesses was prejudicial." *United States v. Barken*, 412 F.3d 1131, 1134 (9th Cir. 2005) (internal quotation marks and citation omitted); *see also United States v. Ross*, 123 F.3d 1181, 1185 (9th Cir. 1997) ("A defendant claiming preindictment delay carries a 'heavy burden' of showing actual prejudice that is 'definite and not speculative.'" (citations

omitted)). To establish prejudice, the defendant must show that the loss of testimony "meaningfully has impaired his ability to defend himself." *United States v. Huntley*, 976 F.2d 1287, 1290 (9th Cir. 1992); *see also United States v. Gonzalez-Sandoval*, 894 F.2d 1043, 1050 (9th Cir. 1999) (to show prejudice from pre-accusation delay, a defendant must demonstrate "how the loss of a witness and/or evidence is prejudicial to his case"). The "[m]ere passage of time," by itself, "does not give rise to a constitutional violation." *United States v. Doe*, 642 F.2d 1206, 1208 (9th Cir. 1981). Similarly, "[g]eneralized assertions of the loss of memory, witnesses, or evidence are insufficient to establish actual prejudice." *Corona-Verbera*, 509 F.3d at 1112 (internal citations and quotation marks omitted).

Petitioner contends that he was prejudiced by the pre-accusation delay, specifically relating to the loss of witnesses and evidence and memories that either faded or improved during the passage of time prior to charging him. (Pet. Mem. P. & A. 18–24; Traverse 7–11.) The Court addresses each argument in turn.

As an initial matter, Petitioner notes that the requirement, cited by Respondent, that he provide "definitive and non-speculative evidence" demonstrating prejudice, is not found in the controlling cases of *Lovasco* and *Marion*. (Traverse 7 (quoting Answer Mem. P. & A. 13–14 (quoting *United States v. Bischel*, 61 F.3d 1429, 1436 (9th Cir. 1995), *United States v. DeGeorge*, 380 F.3d 1203, 1211 (9th Cir. 2004))).) However, the Supreme Court declined to

set out a precise test for determining when pre-accusation delay violates due process and left "to the lower courts, in the first instance, the task of applying the settled principles of due process . . . ." *Lovasco*, 431 U.S. at 797. Though *Bischel* and *DeGeorge* are Ninth Circuit cases that were not cited by the Court of Appeal, the standard applied by the Court of Appeal also required that evidence of prejudice be more than speculative. (*Compare Evans*, 2020 Cal. App. Unpub. LEXIS 53, at *14–15 (quoting *Jones*, 57 Cal. 4th at 924) *and* LD 1, at 8 (same) *with Bischel*, 61 F.3d at 1436 *and DeGeorge*, 380 F.3d at 1211.) In the absence of contrary Supreme Court precedent, it cannot be said that consideration of the speculative nature of the alleged prejudice within the prejudice analysis is improper. *See Perez v. Cate*, No. ED CV 12-01675-PSG (VBK), 2013 U.S. Dist. LEXIS 163273, at *65 (explaining that, where the Supreme Court has not squarely addressed an issue, it cannot be said that a state court's decision regarding that issue is contrary to Supreme Court precedent); *see, e.g., Shammam*, 664 F. App'x. at 631 (finding that, in the absence of clearly established Supreme Court precedent barring consideration of the seriousness of offense in analyzing a pre-indictment delay due process claim, the state court's consideration of such was not contrary to *Lovasco*).

a. *Death of Witnesses*

Petitioner argues that the death of material witnesses—Allen, Vivian Cioni, Shana Hebner, Detective Duffy, and Charlie—during the seventeen-year preaccusation delay prejudiced him at trial. (Pet.

Mem. P. & A. 18–22; Traverse 7–8.)

i. Vivian Cioni, Shana Hebner, and Allen

First, with respect to Vivian, Hebner, and Allen, Petitioner contended for the first time on appeal that the absence of these witnesses prejudiced his ability to defend against the charges. (LD 3, at 52.) Here, he mentions these witnesses in passing, does not present argument as to how their absence prejudiced him, and concedes that "any help to be provided by [these three] witnesses . . . would be speculative." (Traverse 7.) The Court of Appeal found that Petitioner had waived any arguments relating to Vivian and Hebner since, like here, they were mentioned in passing and Petitioner conceded in his reply brief on appeal that no arguments were made regarding them. *Evans*, 2020 Cal. App. Unpub. LEXIS 53, at *10. (LD 1, at 9.) As for Allen, father of Robert, the Court of Appeal found that, because he identified Petitioner as the man who showed up to the house prior to the killing and made threats at that time, any claim that his testimony at trial, to the extent admissible, would have helped Petitioner was "simply a guess." *Evans*, 2020 Cal. App. Unpub. LEXIS 53, at *12. (LD 1, at 11.)

The Court of Appeal was not objectively unreasonable in concluding that Petitioner was not prejudiced by the absence of these three witnesses. "Generalized assertions of the loss of memory, witnesses, or evidence are insufficient to establish actual prejudice." *Corona-Verbera*, 509 F.3d at 1112 (internal citations and quotation marks omitted).

Petitioner's mention of these witnesses in passing is insufficient to establish actual prejudice. Furthermore, Petitioner's concession that the prejudice claimed from their absence is speculative further supports the Court of Appeal's conclusion.

ii. Detective Duffy

Petitioner argues that the absence of Detective Duffy, who interviewed Arlene and Petitioner the night of the killing, meant that no one could say what were his impressions of the witnesses, who else he intended to interview, or whether he included all of the relevant facts in his reports. (Pet. Mem. P. & A. 18–19; Traverse 7–8.) The Court of Appeal concluded that any potential prejudice from Duffy's inability to testify was speculative because Petitioner "did not elaborate how Duffy's potential memories could have helped [him] in any way. . . ." *Evans*, 2020 Cal. App. Unpub. LEXIS 53, at *10. (LD 1, at 9–10.)

It was not objectively unreasonable for the Court of Appeal to conclude that Petitioner failed to show actual prejudice from Detective Duffy's absence at trial. A petitioner must demonstrate, "by definite and non-speculative evidence[,] how the loss of a witness" prejudices the ability to defend against the charges. *Huntley*, 976 F.2d at 1290; *see Corona-Verbera*, 509 F.3d at 1112, 1113 (finding no prejudice where petitioner provided "no affidavits nor any non-speculative proof as to how he was prejudiced by the loss of his witnesses."). Petitioner puts forth no arguments that any of Detective Duffy's memories relating to his witness interviews, who else he

intended to interview, or whether he included all relevant facts in his report, would have been favorable or exculpatory. As a result, Petitioner's general assertions of prejudice lack the support of definite and nonspeculative evidence to demonstrate actual prejudice from Detective Duffy's absence at trial.

iii. Charlie

Petitioner argues that Charlie, who was a close friend of Robert, was "perhaps the most important witness who had died by the time of trial." (Pet. Mem. P. & A. 19.) Petitioner contends that Charlie would have strengthened the theory that Gordon killed Robert by testifying about "relevant, non-speculative facts," including that Petitioner was polite when he visited Robert's home prior to his death, and about Robert's drug dealing and abusive actions toward Gordon. (Traverse 8; *see* Pet. Mem. P. & A. 19–20.) The Court of Appeal found that Charlie's absence at trial did not prejudice Petitioner because he failed to establish that, on balance, Charlie's testimony would have been helpful to the defense. *Evans*, 2020 Cal. App. Unpub. LEXIS 53, at *11–12. (LD 1, at 10–11.) The court reasoned that Petitioner chose not to introduce Charlie's statements to police at trial via stipulation for tactical reasons given that Charlie had identified Petitioner as the man who showed up to Robert's home prior to the killing, which contradicted Petitioner's claim that he had not been there. *Evans*, 2020 Cal. App. Unpub. LEXIS 53, at *11–12. (LD 1, at 10.) In addition, the court noted that the trial court had found that Charlie's testimony would have been inadmissible as speculative or cumulative and

Petitioner had not challenged that finding on appeal. *Evans*, 2020 Cal. App. Unpub. LEXIS 53, at *11. (LD 1, at 10.)

It was not objectively unreasonable for the Court of Appeal to conclude that Petitioner failed to show actual prejudice from Charlie's absence at trial. Where a lost witness's testimony would not necessarily be favorable to the defense, a claim of prejudice arising from that lost witness is too speculative to establish prejudice. *See United States v. Wallace*, 848 F.3d 1464, 1470 & n.6 (9th Cir. 1988) (no actual prejudice where there was little indication in the record to suggest that the lost witness's testimony would have been favorable to the defense). Defense counsel could have stipulated to the introduction of Charlie's statements at trial, but decided against it given that Charlie also stated that Petitioner had visited Robert's home previously, which was contrary to Petitioner's claim that he had not been there. Indeed, Petitioner told police that he had never visited Robert's home (3 CT 573– 74, 589), such that Charlie's testimony that Petitioner was polite when he visited would not necessarily have been helpful to the defense.

In any event, the facts to which Petitioner claims Charlie would have testified were introduced to the jury through Arlene and Gordon's testimony. "The loss of cumulative witness testimony does not establish prejudice." *United States v. Ashe*, No. 93-50428, 1994 U.S. App. LEXIS 11912, at *6 (9th Cir. May 5, 1994); *see Huntley*, 976 F.2d at 1290, 1291 (finding no actual prejudice from unavailable witness whose purported testimony would have been cumulative with other

witness's testimony). The jury heard evidence that Robert used drugs and verbally abused Gordon through the testimony of Gordon and Arlene, such that the trial court found that Charlie's testimony would have been inadmissible as cumulative. (4 RT 966; *see* 2 RT, ECF No. 9-9, at 327–28.) Petitioner asserted neither on appeal, nor in his Petition, that Charlie's testimony would not be cumulative. As /// such, Petitioner has not established that the Court of Appeal was objectively unreasonable in finding no prejudice from Charlie's absence at trial.

b. *Memory Loss and Gain*

Petitioner argues that "memory loss was perhaps the most common feature" of the witnesses who testified at trial because a majority of witness testimony consisted of the attorneys reading previous statements the witnesses had made and asking if that was their testimony. (Pet. Mem. P. & A. 22.) The Court of Appeal concluded that Petitioner waived this argument because, like here, Petitioner did not provide specific instances of witnesses failing to recall facts or their potentially exculpatory effect. *Evans*, 2020 Cal. App. Unpub. LEXIS 53, at *12. (LD 1, at 11.)

It was not objectively unreasonable for the Court of Appeal to find no prejudice from the purported memory loss of the witnesses at trial. Petitioner does not elaborate on which witnesses' memories had faded or how they would have testified if their memories had not needed refreshing, and such speculation is insufficient to support a finding of prejudice. *See Corona-Verbera*, 509 F.3d at 1112.

Petitioner next maintains that Gordon and Arlene had improved memories at trial because they testified to facts about Petitioner and his visit to their home prior to Robert's death that were not reported during their police interviews conducted shortly after Robert's death. (Pet. Mem. P. & A. 22–23; Traverse 8–9.) He notes that Arlene testified that she was headed to the door and Petitioner saw her and accused Robert of lying, but she did not tell the police this information during any of the four interviews that took place in February and March 2000. (Pet. Mem. P. & A. 22 (citing 2 RT 393–94, 415–17).) Petitioner argues that the only logical explanation for these new details is that Arlene was lying to improve the prosecution's case. (Traverse 9.) He also notes that Gordon testified that, upon Petitioner's visits to his home prior to the killing, he claimed someone named "Yell" was hiding in the house and that he knew she was there, but Gordon never mentioned that to the police. (Pet. Mem. P. & A. 23 (citing 2 RT 503–05).) The Court of Appeal "fail[ed] to see how this [claim of improved memories was] relevant to a claim of precharging delay as opposed to an attack on witness credibility." *Evans*, 2020 Cal. App. Unpub. LEXIS 53, at *13. (LD 1, at 11.)

It was not objectively unreasonable for the Court of Appeal to conclude that Petitioner was not prejudiced from Arlene and Gordon's purported improved memories at trial. Petitioner does not offer non-speculative evidence that these witnesses would have testified differently at an earlier trial, the absence of which, as discussed above, is insufficient to establish actual prejudice. *See Corona- Verbera*, 509 F.3d at 1112. Additionally, at trial, Petitioner elicited

from Arlene and Gordon testimony that these "new" facts had not been included in their police interviews, thereby highlighting the discrepancy for the jury. (2 RT 292–95, 343–44.)

c. *Lost Evidence*

Petitioner argues that he was prejudiced from the loss of evidence consisting of the home in which the killing took place, Robert's home phone records, and a 2009 recording of a police interview of George. (Pet. Mem. P. & A. 23–24.)

First, with respect to the home and phone records, the Court of Appeal found no prejudice from their absence because Petitioner made "no attempt to articulate what facts such physical evidence would have established or how they would have helped his defense." *Evans*, 2020 Cal. App. Unpub. LEXIS 53, at *13. (LD 1, at 11.) The Court of Appeal was not objectively unreasonable in concluding that Petitioner suffered no actual prejudice from the loss of the home and home phone records. As in Petitioner's appeal, here, Petitioner does not develop his argument as to why or how the absence of the home or phone records prejudiced his ability to defend against the charges other than stating that they were absent. This showing is insufficient to demonstrate prejudice. *See Corona-Verbera*, 509 F.3d at 1112.

Next, regarding the 2009 recording of George's interview, Petitioner argues that because the recording was destroyed, he lost the ability to establish evidence of his alibi. (Pet. Mem. P. & A. 23–24; Traverse 9–10.)

Petitioner explains that in the recording, George stated that his mother, Eleanor Lewis, "assured him that [P]etitioner had an alibi on the day that Robert Goodson was killed." (Pet. Mem. P. & A. 24.) At the preliminary hearing and trial, however, Eleanor testified that she did not tell her son that Petitioner had an alibi. (*Id*. (citing 1 CT 57, 4 RT 818).) Nevertheless, Petitioner argues that because the police summary only indicated that there was an alibi and the interviewing officer did not remember any other specifics, he lost the ability to establish evidence of an alibi. (*Id*. (citing 2 CT 294– 95).) The Court of Appeal found that any exculpatory value of the recording was speculative because Petitioner would have been in a better position to establish specific details of an alibi at trial than George, who would have heard any information relating to an alibi from his mother. *Evans*, 2020 Cal. App. Unpub. LEXIS 53, at *14. (LD 1, at 12.)

It was not objectively unreasonable for the Court of Appeal to find that Petitioner was not prejudiced from the destruction of the recording. Where there are adequate substitutes for missing evidence, prejudice does not exist. *See United States v. Horowitz*, 756 F.2d 1400, 1405 (9th Cir. 1985) (finding no actual prejudice where the absent witness was not "the sole source of [the] information" that petitioner claimed the absent witness would have testified about). Here, both Eleanor and George testified at trial (4 RT 817–18; 3 RT 540–47). As such, the jury heard that George told police in 2009 that he had heard Petitioner had an alibi for the killing, such that there were adequate substitutes for the recording introduced

at trial.

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In sum, the Court of Appeal was not objectively unreasonable in rejecting Petitioner's due process claim after finding no actual prejudice that arose from the seventeen-year pre-accusation delay. As a result, a consideration of the government's reasons for the delay is not necessary. *See Huntley*, 976 F.2d at 1291 (concluding that it is proper for a district court not to balance the length of delay against the reasons for it when it has found that prejudice had not been established). Indeed, the Court of Appeal ended its analysis after finding that the trial court did not abuse its discretion in finding that Petitioner suffered no actual prejudice due to the pre-accusation delay. *Evans*, 2020 Cal. App. Unpub. LEXIS 53, at *14–15. (LD 1, at 12–13.) However, as discussed below, even if Petitioner had established actual prejudice, the asserted reasons for delay do not support a claim for violation of Petitioner's due process rights.

2. Petitioner Has Not Established the Pre-Accusation Delay Was Tactical or Reckless.

Petitioner has not shown that the length of the delay, weighed against the reasons for delay, offends those "fundamental conceptions of justice which lie at the base of our civil and political institutions." *Lovasco*, 431 U.S. at 790. As explained above, the Supreme Court has established that, upon a showing of prejudice, pre-accusation delay may violate due process where the delay was an intentional device to

gain tactical advantage over the accused or a product of reckless disregard for its probable prejudicial impact. *Id*. at 796 n.17; *Marion*, 404 U.S. at 324. The Supreme Court has distinguished tactical or reckless delay from "investigative delay," which it describes as a prosecutor declining to seek an indictment "until he is completely satisfied that he should prosecute and will be able promptly to establish guilt beyond a reasonable doubt." *Lovasco*, 431 U.S. at 795. Prosecution following investigative delay does not deprive a defendant of due process, even if the defense was somewhat prejudiced by the delay. *Id*. at 796. The Supreme Court has never held that government *negligence* would be sufficient to satisfy a test for a due process violation based on pre-indictment delay. *See Oppelt v. Glebe*, 550 F. App'x 499, 500 (9th Cir. 2013) (recognizing that the Supreme Court "has never held that a due-process violation results from mere negligence" in claims of pre-indictment delay). In non-AEDPA cases, the Ninth Circuit does recognize negligent delay by the prosecution as a possible basis to test a due process claim. *See Moran*, 759 F.2d at 781. But circuit authority is insufficient to demonstrate that a legal proposition has been clearly established by the Supreme Court for purposes of 28 U.S.C. § 2254(d)(1). *See Lopez v. Smith*, 135 S. Ct. 1, 4 (2014) (per curiam); *Glebe v. Frost*, 135 S. Ct. 429, 431 (2014) (per curiam).

Petitioner argues that the prosecution's stated reasons for the delay—efforts to trace the shotgun Petitioner carried in March 2000 did not yield instant results, new evidence from Lawrence Krause was uncovered later, and the computerized system to trace

guns was not available until 2003—were not justified. (Pet. Mem. P. & A. 24–29; Traverse 10–11.) Petitioner explains that because he told the police in March 2000 that he obtained the shotgun from Kraus, though he did not provide the spelling of Kraus's name or where he lived, police could have tried to locate Kraus through different spellings in the databases available at the time. (Pet. Mem. P. & A. 24–25.) He further contends that the computerized system used to trace guns (Etrace) became available in 2003, but the police did not submit a request to the Etrace system until 2017. (*Id*. at 27.) He argues that the police did not adequately investigate other areas, such as Gordon's alibi witness. (*Id*.) He concludes that after reviewing the record, the only reasonable conclusion is that the delay was a "product of reckless[ness]" and a "product of neglect." (Traverse 11.)

To begin with, even if the delay in charging Petitioner was a product of negligence, because the Supreme Court "has never held that a due-process violation results from mere negligence" in claims of pre-indictment delay, *Oppelt*, 550 F. App'x at 500, a delay from such negligence is not contrary to Supreme Court precedent. Next, the Court carefully has reviewed the record and finds no evidence that the government was reckless in investigating Petitioner in this case or that the delay was caused in order to gain a tactical advantage. To the contrary, the record supports a finding that the pre-accusation delay was investigative in nature. While there was some evidence connecting Petitioner to the crime in 2000 (4RT 969), the prosecution uncovered additional evidence implicating Petitioner in later years (*id*. at 970–71). In

2017, the police searched the serial number of Petitioner's shotgun in the Etrace database, which showed Kraus as the registered owner. (1 RT 23.) In a subsequent interview with Kraus, he said that he gave the shotgun to Petitioner in 1999 as partial payment for carpentry work. (*Id*. at 23–24.) Petitioner was charged shortly thereafter. (1 CT 11-1.) The Supreme Court has afforded great deference to the prosecution deferring charges until it is "completely satisfied" that the case should be prosecuted and the prosecution "will be able to promptly establish guilt beyond a reasonable doubt." *Lovasco*, 431 U.S. 795. Here, the record shows that the prosecution waited until it had further evidence to charge Petitioner, which is not contrary to Supreme Court precedent.

VI. RECOMMENDATION

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

DATED: March 31, 2023

/s/
HONORABLE MARIA A. AUDERO
UNITED STATES MAGISTRATE JUDGE

APPENDIX E

Filed 1/6/20 P. v. Evans CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION TWO

THE PEOPLE,
Plaintiff and Respondent,

v.

EDDIE LEE EVANS,
Defendant and Appellant.

E070871
(Super.Ct.No. FWV17002253)

OPINION

APPEAL from the Superior Court of San Bernardino County. Ingrid A. Uhler, Judge. Affirmed.

Ronda G. Norris, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Assistant Attorney General, Margaret E. Maxwell and Marc A. Kohm, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Eddie Lee Evans appeals from his first degree murder conviction. Evans contends that (1) the 17-year delay between the crime and his arrest, often referred to as precharging delay, deprived him of due process; (2) the evidence was insufficient to uphold the conviction; (3) statements he made in 2009 to his brother-in-law were improperly admitted; and (4) the trial court improperly imposed fines and fees without considering his ability to pay. We reject each of these contentions and affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

Robert Goodson was killed in his home in Rancho Cucamonga on February 16, 2000. He had moved into the home just a few months prior with his wife Arlene Goodson, their young daughter, and a friend, Patrick Gordon.[1] Before, all had lived in Guam for a number of years.

In January 2000, defendant approached the home and asked for someone whose name sounded like

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[1] For clarity, where multiple people share a last name, we refer to them individually by using their first name.

"Yolie." Gordon told defendant that no one by that name lived there, and defendant left. A week or two later, defendant returned and again asked for "Yolie." Gordon answered, again telling the man that no one by that name lived there. On either this visit or the first one, defendant handed Gordon a business card.

Around 12:30 p.m. on February 12, 2000, four days before Robert was killed, defendant appeared at the house a third time, again asking for "Yolie." Several people were in the house at the time. Gordon answered and again told defendant that "Yolie" did not live there. Defendant then became "loud," "very aggressive," and "threatening," saying: "Tell her to come out of the house. I know she's in there." According to Gordon, defendant also stated that "if we didn't get out of the house and produce Yolie . . . people were going to get hurt." Robert's father, Allen Goodson, pushed Gordon aside, stepped in front of defendant, and insisted that defendant leave.

Unbeknownst to the residents at the time, a woman named Yolanda Estrada dated a married man in the late 1990's whose mother once lived at that house. The woman, who goes by the nickname "Yolly," had once spent a night at the home.[2]

In the early afternoon on the day Robert was killed, Arlene was away at work, Robert was asleep on

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[2] Both she and the married man testified that they did not know defendant. Whether defendant or Robert had any greater connection to "Yolie" (other than the fact that "Yolly" once spent a night at the house) was not pressed at trial.

the couch, and Gordon, who often took care of Robert and Arlene's daughter, went to help a friend move, taking Robert and Arlene's daughter with him. Gordon usually did not lock the front door if there were others inside when he left. While driving to the friend's home, Gordon saw defendant walking on the street toward the home. When Gordon returned home sometime later, he found Robert dead on the couch. Robert had been shot in the head at very close range with a shotgun. No valuables had been taken from the home.

Law enforcement interviewed defendant on February 18 and March 16, 2000. During the March 16 interview, defendant denied ever being at the Rancho Cucamonga home; ever knowing Arlene, Gordon, or "Yolie"; or being in Rancho Cucamonga on the day of the murder. Defendant also stated that he was "[a]bsolutely not" in the Rancho Cucamonga area between 11:00 a.m. and 1:00 p.m. on February 12 and that he remained in the "general area" of his home in Glendora on the day of the murder. Defendant stated that his truck had been broken down and that he did not get rides from others during those times. When asked how his business card ended up at the house, defendant stated that he hands them out in "a lot of places." Defendant denied owning any firearms and stated that he had not shot a firearm in several years.

Late in the night after that interview—that is, in the early morning hours of March 17—defendant was arrested for carrying a loaded shotgun into a bar. When interrogated later that day, defendant told law enforcement: "I have a shotgun. I bought it from a friend." Defendant could not remember when he

purchased the firearm, other than that it was "[a] while back" and that "[i]t's been a while." Defendant said he purchased it from Lawrence Kraus, although he did not know how to spell the name. Defendant denied owning the shotgun, saying "it doesn't belong to me," but did state that he "bought it from" Kraus.

A criminalist who examined the shotgun at the time observed that it had recently been cleaned and contained biological material which "very likely . . . came from a blow back event." The criminalist concluded that the ammunition recovered with defendant's shotgun was consistent with that recovered at the murder scene.

According to the analyst who first tested the biological material recovered from the shotgun in 2000, the biological material contained a "very low level of human DNA."[3] Law enforcement also ran the serial number of defendant's shotgun through two databases in 2000, CLETS and NCIC, neither of which yielded results.[4] Law enforcement did not run the serial number through the ATF database at the time.

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[3] In 2007, using updated techniques, another analyst also concluded that the biological material contained human DNA.

[4] The lack of results may have been due to the fact that defendant did not know how to spell Kraus's name and that the detectives originally assigned to the case spelled it as "Krause." Law enforcement testified at trial that although databases such as NCIC could be searched at the time with a name, "pretty specific" information was required to narrow down the number of potential hits. It is not clear, however, whether law enforcement tried running Kraus's name through any databases in 2000.

In 2017, when the file for Robert's murder was reopened, a search of the serial number through the ATF database showed Kraus as the registered owner. Police then interviewed Kraus in May 2017, who said that he gave the shotgun to defendant in 1999 as partial payment for some carpentry work defendant had done for Kraus. Defendant was charged with the murder shortly thereafter.

Evidence of defendant's cell location on the day of the murder also contradicted his post arrest statements. Cell tower data showed that a call was made from defendant's number at 12:27 p.m. on February 12 within one to one and a half miles from a tower located in Rancho Cucamonga. Data also showed that defendant's number received or placed two calls on February 16, one at 11:14 a.m. near Glendora, and the other at 12:27 p.m. in the Rubidoux area.[5] Furthermore, according to defendant's landlord at the time, defendant both had access to other vehicles when his truck was broken, and was seen with a shotgun in the months surrounding Robert's murder.

As well, the prosecution relied on statements defendant made about nine years after the murder. In 2009, defendant drove to Las Vegas with George

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[5] Rancho Cucamonga, where Robert was killed, is roughly halfway between Glendora, where defendant lived, and the Rubidoux area: the parties stipulated that Rancho Cucamonga is 17 miles from Rubidoux and 20 miles from Glendora, while Rubidoux is 33 miles from Glendora. Given the distances, defendant's cell phone traveled 33 miles in the span of roughly an hour on the day Robert was killed.

Lewis, his brother-in-law; at the time, defendant and George were married to sisters. According to George, during the drive, defendant stated that he was having personal problems with his wife and "basically . . . said he wanted her whacked." Defendant stated that he was "going to do her that day," that he needed to "get on with his own life," that he "knew how to do it without being caught," and that he was "going to get drunk and take care of it." On the return drive, defendant thought aloud about how he was going to have his wife killed. When George objected, defendant stated something to the effect that "it was in his blood." On the phone a few days later, defendant told George that he "needed to go to bat for" defendant. Defendant also stated on that phone call that "it wasn't his first rodeo."

Defendant's theory at trial was that Gordon was the real killer. The defense asserted, for instance, that Gordon and Arlene began having an affair after moving to Rancho Cucamonga; that Robert and Arlene's marriage was deteriorating; that Gordon and Arlene had lunch together on Valentine's Day, two days before Robert's death; that Gordon recently inherited a large sum of money; and that Gordon and Arlene had sex two days after the murder.

The jury rejected the defense's theory, finding defendant guilty of first degree murder and finding true certain special allegations, including that defendant personally and intentionally discharged a firearm causing death. (Pen. Code, §§ 187, subd. (a), 12022.53, subd. (d).) The trial court sentenced defendant to a total term of 50 years to life. The trial

court also imposed a $1,000 restitution fine (Pen. Code, § 1202.4, subd. (b)), a $40 court security fee (*id.*, § 1465.8), and a $30 criminal conviction assessment (Gov. Code, § 70373).

II. ANALYSIS

We address each of defendant's four arguments in turn.

A. *Precharging Delay*

"The due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution and article I, section 15 of the California Constitution protect a defendant from the prejudicial effects of lengthy, unjustified delay between the commission of a crime and the defendant's arrest and charging." (*People v. Cowan* (2010) 50 Cal.4th 401, 430 (*Cowan*).) "Such prearrest or precharging delay does not implicate the defendant's state and federal speedy trial rights [citations], as those rights do not attach until a defendant has been arrested or a charging document has been filed." (*Ibid.*)

"When, as here, a defendant does not complain of delay after his arrest and charging, but only of delay between the crimes and his arrest, he is 'not without recourse if the delay is unjustified and prejudicial. "[T]he right of due process protects a criminal defendant's interest in fair adjudication by preventing unjustified delays that weaken the defense through the dimming of memories, the death or disappearance of witnesses, and the loss or destruction of material

physical evidence.'"" (*Cowan*, *supra*, 50 Cal.4th at p. 430.) "[A]lthough the federal constitutional standard for what constitutes sufficient justification for delay is unclear [citation], we have noted that 'the law under the California Constitution is at least as favorable for defendant in this regard' as federal law [citation]. Accordingly . . . we apply California law here." (*Id.* at pp. 430-431.)

"A defendant seeking to dismiss a charge on this ground must [first] demonstrate prejudice arising from the delay. The prosecution may [then] offer justification for the delay, and the court considering a motion to dismiss balances the harm to the defendant against the justification for the delay." (*People v. Catlin* (2001) 26 Cal.4th 81, 107.) Any potential prejudice from a delay must be more than speculative. (See *People v. Jones* (2013) 57 Cal.4th 899, 923 [affirming denial of motion where the "evidence of prejudice is speculative"].)

"We review for abuse of discretion a trial court's ruling on a motion to dismiss for prejudicial prearrest delay." (*Cowan*, *supra*, 50 Cal.4th at p. 431.) "Under the abuse of discretion standard, 'a trial court's ruling will not be disturbed, and reversal of the judgment is not required, unless the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice.'" (*People v. Hovarter* (2008) 44 Cal.4th 983, 1004.) In reviewing for abuse of discretion, we "defer to any underlying factual findings if substantial evidence supports them." (*Cowan*, *supra*, at p. 431.)

In denying the motion, the trial court found that defendant "did not demonstrate any prejudice due to the delay." The trial court acted within its broad discretion in doing so because defendant fails to show that any potential prejudice resulting from the delay was more than speculative.

Defendant first contends that several "[m]aterial witnesses" died during the 17-year investigation: Shana Hebner, Vivian Cioni, Detective Duffy, Charlie Cioni, and Allen Goodson (Robert's father).

Defendant never elaborates on why Shana Hebner or Vivian Cioni would have been material witnesses or what exculpatory evidence they would have provided. Instead, he only mentions their name in passing in his opening brief and concedes in his reply brief that no argument was made regarding them. "When an appellant fails to raise a point, or asserts it but fails to support it with reasoned argument and citations to authority, we treat the point as waived." (*Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 784-785.) We need not address them further.

Defendant claims that Duffy was an important witness because he interviewed Arlene on the night of Robert's murder and defendant two days later. Defendant concedes that reports of those interviews were available but that prejudice results from Duffy not being able to testify as to his memories of those interviews. Defendant does not elaborate as to how Duffy's potential memories could have helped

defendant in any way, so any potential prejudice from Duffy's inability to testify is speculative.

Charlie Cioni was one of Robert's friends and was present when defendant arrived at the house on February 12. Defendant contends that statements Charlie made to law enforcement prior to his death in 2006 show that his testimony at trial would have been exculpatory. For instance, according to defendant, Charlie told law enforcement that Robert was a drug dealer and may have been killed in connection with a drug deal; that the man who arrived at the house on February 12 was "polite" instead of threatening; and that Robert was verbally abusive to Gordon. However, the trial court found that those statements (as well as others Charlie made) would have been inadmissible as speculative or cumulative, and defendant makes no effort to argue here that that finding was incorrect. Furthermore, as the trial court found, and which defendant does not contest, defendant "for tactical reasons" chose not to introduce Charlie's statements to police at trial via a stipulation "because there were several statements uttered by Charlie that were detrimental" to defendant's case. For instance, Charlie identified defendant as the man who showed up to the home on February 12, which would have contradicted defendant's claim that he was "[a]bsolutely not" there. Thus, defendant has not even demonstrated it likely that Charlie would have, on balance, been helpful to defendant.

The same analysis applies to Allen, Robert's father. Although, according to defendant, Allen would have testified he believed Gordon and Arlene were

having an affair and that they were responsible for Robert's death, the trial court ruled that such evidence would have been inadmissible, either because it was cumulative or because it was improper opinion evidence. Defendant does not challenge this on appeal. Allen also identified defendant as the man who showed up at the house on February 12 and had informed law enforcement that defendant made threats at that time. Any claim that Allen's or Charlie's testimony at trial, to the extent admissible, would have helped defendant is simply a guess.

Defendant next contends that prejudice arose from witnesses' "[m]emory loss" but provides no instances of any witnesses failing to recall facts (other than one from George that we consider below) or their potentially exculpatory effect. The argument is therefore waived. (*Badie v. Bank of America*, *supra*, 67 Cal.App.4th at pp. 784-785.) Defendant also argues that the delay resulted in "memory gain," in that Gordon and Arlene purportedly remembered more details at trial than they did when the investigation began, but we fail to see how this is relevant to a claim of precharging delay as opposed to an attack on witness credibility.

Defendant next claims that prejudice results from the fact that the Rancho Cucamonga home no longer exists and that phone records from the home phone were not preserved. Again, however, defendant makes no attempt to articulate what facts such physical evidence would have established or how they would have helped his defense. Photographs of the house, including many taken during the investigation,

were shown at trial. Moreover, Officer Kenneth Wolf had testified at the preliminary hearing that he went through home phone call records during his initial investigation. Defendant made no attempt to ask Wolf about those records at trial. As the trial court noted, defendant "could have questioned" Wolf about those records "but decided not to." The loss of these items did not prejudice defendant.

Finally, defendant contends that he is prejudiced from the destruction of an audio recording of George's 2009 statement to law enforcement about defendant expressing an interest in killing his wife. According to a written report documenting the statement, George's mother, Eleanor Lewis, told George that defendant had an alibi for Robert's murder in 2000. At trial, George could not recall relaying Eleanor's statement to law enforcement, even after reading the contents of the written report on the witness stand.

Because the audio recording no longer exists, defendant claims he "has lost out on a possible avenue of establishing an alibi." Again, this is speculative. First, defendant would hardly have established an alibi at trial merely by showing he told others about one. Second, defendant was in a much better position to establish any specific details of an alibi than George, whom, if told any details about an alibi at all, would have heard it from a third person. And third, that third person, Eleanor, testified at trial and denied ever telling George that defendant had an alibi. Defendant fails to show how the loss of the audio recording harms him here.

We therefore find the trial court did not abuse its discretion in finding no prejudice. "Because we conclude the trial court acted within its broad discretion in finding defendant was not prejudiced by the delay in charging him . . . we need not address defendant's further argument challenging the prosecutor's multiple justifications for the delay or the trial court's acceptance of those reasons." (*People v. Jones* (2013) 57 Cal.4th 899, 924.)

B. *Sufficiency of the Evidence*

Defendant contends that he was convicted on constitutionally insufficient evidence. "The proper test for determining a claim of insufficiency of evidence in a criminal case is whether, on the entire record, a rational trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] On appeal, we must view the evidence in the light most favorable to the People and must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.]

"Although we must ensure the evidence is reasonable, credible, and of solid value, nonetheless it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts on which that determination depends. [Citation.] Thus, if the verdict is supported by substantial evidence, we must accord due deference to the trier of fact and not substitute our evaluation of a witness's credibility for that of the fact finder. [Citations.]" (*People v. Jones* (1990) 51 Cal.3d 294, 314.) "The same standard applies when the conviction

rests primarily on circumstantial evidence." (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.) "If the circumstances reasonably justify the findings made by the trier of fact, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding." (*People v. Jennings* (2010) 50 Cal.4th 616, 639.) "It is well settled that 'unless the testimony is physically impossible or inherently improbable, testimony of a single witness is sufficient to support a conviction.'" (*People v. Ghobrial* (2018) 5 Cal.5th 250, 281.)

Solid, reasonable, credible evidence supports defendant's conviction. For one, the evidence showed that defendant appeared at the Rancho Cucamonga house on multiple occasions in the weeks leading up to the murder, looking for someone who had a connection to the home and making threats. The fact that he was there was corroborated not only by Gordon's testimony, but by cell tower data as well. The evidence also showed that, despite defendant's claim that he was in the "general area" of Glendora on the day of the murder because and had no means of transportation, he had traveled at least 33 miles away and had access to other vehicles. Furthermore, the ammunition recovered with defendant's shotgun was consistent with that recovered at the murder scene, and the shotgun, which had been recently cleaned, was shown to contain human DNA which "very likely . . . came from a blow back event." Defendant's claim that he owned no gun despite evidence to the contrary also showed consciousness of guilt, as did his other statements, such as his whereabouts, that were contradicted by the evidence. And finally, defendant's

statements in 2009 that "it wasn't his first rodeo" and that "it was in his blood," made in the context of wanting someone killed, is tantamount to an admission of involvement in a previous murder. No motive for the murder was ever established, but as defendant concedes, "motive is not an element of any crime." (*People v. Daly* (1992) 8 Cal.App.4th 47, 59). We therefore conclude on this record that defendant's conviction for first degree murder is supported by substantial evidence.

C. *Defendant's Statements to George in 2009*

At trial, George testified regarding the statements defendant made, described earlier, in 2009 during and after a trip to Las Vegas. Defendant makes two contentions regarding these statements. First, he contends that the statements "it was in his blood" and "it wasn't his first rodeo" were improperly admitted. Second, he contends that statements that he wanted someone to kill his wife were improperly admitted.

"We review for an abuse of discretion the trial court's rulings on the admissibility of evidence." (*People v. McCurdy* (2014) 59 Cal.4th 1063, 1095.) "[G]enerally, violations of state evidentiary rules do not rise to the level of federal constitutional error." (*People v. Benavides* (2005) 35 Cal.4th 69, 91.) As such, even when there is error, "a defendant must demonstrate that it is 'reasonably probable that a result more favorable to [the defendant] would have been reached in the absence of the error.'" (*People v. Sivongxxay* (2017) 3 Cal.5th 151, 178, citing *People v. Watson* (1956) 46 Cal.2d 818, 836.)

As an initial matter, because defendant did not object on these grounds at trial, he may not raise these issues on appeal. Evidence Code[6] section 353, subdivision (a) precludes reversal for the erroneous admission of evidence unless "[t]here appears of record an objection to or a motion to exclude . . . the evidence that was timely made and so stated as to make clear the specific ground of the objection or motion." Defendant concedes that "[h]ere, trial counsel made no specific on-the-record [objection] to admitting the evidence," and the defense's only motion in limine did not seek to exclude the 2009 statements.

In any event, the arguments have no merit. (See *People v. Williams* (2000) 78 Cal.App.4th 1118, 1126 [addressing on appeal issue that would otherwise be forfeited to "forestall a petition for writ of habeas corpus based on a claim of ineffectual counsel."].)

Defendant first argues that the statements "it was in his blood" and "it wasn't his first rodeo" were inadmissible because they do not fall under either sections 1101, subdivision (b) or 1220 and because they should have been barred by section 352.

"Section 1101, subdivision (a) generally prohibits the admission of evidence of a prior criminal act against a criminal defendant 'when offered to prove his or her conduct on a specified occasion.' Subdivision (b) of that section, however, provides that such

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[6] Further undesignated statutory references are to the Evidence Code.

evidence is admissible when relevant to prove some fact in issue, such as motive, intent, knowledge, identity, or the existence of a common design or plan." (*People v. Lindberg* (2008) 45 Cal.4th 1, 22.)

We agree with defendant that the statements "it was in his blood" and "it wasn't his first rodeo" "pertain[] to the crime for which [defendant] was *charged*" and not to some other act. However, that does not mean, as defendant contends, that the statements are excludable under section 1101, subdivision (a) under the thinking that the subdivision (b) exception only applies to *other* acts. Rather, the statements are not character evidence at all. To state, in the context of wanting someone killed, that it is not your "first rodeo" and that it is "in [your] blood" is to suggest involvement in a previous killing. Uttering those statements make it more probable that the speaker was involved in the *act* of a prior killing (such as Robert's), whether or not he or she possesses any particular character trait. Put another way, the statements here were not meant to establish first that defendant is homicidal and second that he acted in accordance with that character trait. Instead, the statements go directly toward whether defendant committed the only homicide that the record shows actually occurred.[7] By alluding to involvement in some previous murder, defendant's statements go directly to the question of whether defendant killed Robert.

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[7] The record does not indicate what became of defendant's desire to kill his wife in 2009 or that, in 2009, he could have been alluding to killing someone other than Robert.

Accordingly, the statements are not character evidence that would be barred under section 1101, subdivision (a), regardless of whether they fall under the exception described in subdivision (b).

Section 1220 provides in part that "[e]vidence of a statement is not made inadmissible by the hearsay rule when offered against the declarant in an action to which he is a party." According to defendant, the statements that "it was in [defendant's] blood" and "it wasn't his first rodeo" are too speculative and tenuous to be deemed admissions. It is well settled, however, that "ambiguity regarding the meaning of a party's out-of-court statement [does not] automatically render the party admissions exception inapplicable." (*People v. Cortez* (2016) 63 Cal.4th 101, 125; see also *People v. Prince* (2007) 40 Cal.4th 1179, 1237; *People v. Kraft* (2000) 23 Cal.4th 978, 1035.)[8] A statement need not be an explicit admission of guilt to be an admission. Section 1220 therefore did not bar the statements.

Under section 352, a trial court "may exclude evidence if its probative value is substantially outweighed by the probability that its admission will," among other things, "create substantial danger of undue prejudice . . . or of misleading the jury." ""'Evidence is not prejudicial, as that term is used in a section 352 context, merely because it undermines the

[8] Defendant appears to concede this in his reply brief, stating that "whether those statements did refer to a murder and whether they referred to a murder of [Robert] was a question for the jury to decide."

opponent's position or shores up that of the proponent. The ability to do so is what makes evidence relevant. The code speaks in terms of *undue* prejudice. Unless the dangers of undue prejudice, confusion, or time consumption "'substantially outweigh'" the probative value of relevant evidence, a section 352 objection should fail.'" (*People v. Scott* (2011) 52 Cal.4th 452, 490-491.)

As discussed above, defendant's statements to George that "it was in his blood" and "it wasn't his first rodeo" were highly probative on the question of whether he committed Robert's murder. The record does not indicate that defendant has been involved in any *other* murder, so when he alludes to involvement in 2009 to some prior murder, there is a strong possibility that he is referring to Robert's. Furthermore, the undue prejudice here would have arisen, according to defendant, from allowing the jury to rely on character evidence and ambiguous statements, but we have already rejected both of these premises. Given their strong probative value and the lack of any undue prejudice, the statements were not barred by section 352.

Defendant next contends that, outside of these two specific statements, statements that he wanted his wife killed should have been barred by section 1101, subdivision (a). We presume, as the trial court did, that these statements would not have been

admissible.[9] Defendant has not demonstrated, however, that it is "'reasonably probable that a result more favorable to [the defendant] would have been reached in the absence of the error.'" (*People v. Sivongxxay*, *supra*, 3 Cal.5th at p. 178.) Absent the statements about wanting his wife killed, and as discussed in part II.B above, there was substantial evidence of defendant's guilt, and it is not reasonably probable that the jury would have reached a different result had they been excluded. Accordingly, defendant provides no basis for reversal based on the admission of statements he made to George in 2009.

D. *Fines and Fees*

While this case was pending, another district of this Court of Appeal decided *People v. Dueñas* (2019) 30 Cal.App.5th 1157, which held that a trial court must "conduct an ability to pay hearing and ascertain a defendant's present ability to pay" before requiring a defendant to pay assessments under Government Code section 70373 and Penal Code section 1465.8 or a restitution fine under Penal Code section 1202.4. (*People v. Dueñas*, at p. 1164.) Defendant contends that the trial court improperly imposed a $1,000

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[9] In ruling on a pretrial motion, the trial court noted that "[i]n terms of any type of desire to do in or get rid of his wife, again, the 352 and 1101(b), that wouldn't be proper evidence." The trial court then urged the parties to cooperate in finding a "way of understanding that" defendant's statement about not being his first rodeo was "in regards to a commission of a murder." As noted, however, when George testified at trial about defendant wanting to have his wife killed, defendant made no objection.

restitution fine and $70 in fees under these statutes without first considering his ability to pay.

There is no reasonable argument that the $1,000 restitution fine was improper. To begin with, the amount is above the $300 minimum required for felony convictions. (Pen. Code, § 1202.4, subd. (b)(1).) Because it was above the minimum, the trial court had the ability to consider defendant's ability to pay. (*Id.*, § 1202.4, subd. (c) ["Inability to pay may be considered only in increasing the amount of the restitution fine in excess of the minimum fine . . . ."].) Defendant did not object to the fine before the trial court, so he has forfeited his challenge to that fine here. (*People v. Jones* (2019) 36 Cal.App.5th 1028, 1033; *People v. Frandsen* (2019) 33 Cal.App.5th 1126, 1154.) Moreover, defendant acknowledges in his opening brief that the trial court "did both find he was unable to pay other fees and reduced his [Penal Code] section 1202.4 fine to $1,000 based on his inability to pay."[10] Accordingly, there is no dispute that the trial court actually considered defendant's ability to pay with regard to the restitution fine. Defendant's argument here is thus based solely on the contention that the trial court did not conduct a separate *hearing* on his ability to pay. Defendant makes no attempt to explain why a separate hearing on the issue was necessary even though it is undisputed that the trial court considered the issue. The restitution fine here was

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[10] The People originally requested that the restitution fine be set at $10,000, the statutory maximum. (See Pen. Code, § 1202.4, subd. (b)(1).)

proper.

With regard to the remaining $70, defendant was sentenced to 50 years to life with 376 days of credit for time served. "Wages in California prisons currently range from $12 to $56 a month. [Citations.] And half of any wages earned (along with half of any deposits made into his trust account) are deducted to pay any outstanding restitution fine. [Citations.]" (*People v. Jones*, *supra*, 36 Cal.App.5th at p. 1035.) With a minimum of $6 a month going to pay the restitution fine and the other half of monthly prison wages available to pay the remaining $70, defendant will be able to pay off the $70 in less than one year into his nearly 50-year sentence. Thus, even assuming that the fines were wrongfully imposed under *Dueñas*,[11] the error was harmless beyond a reasonable doubt. (*People v. Jones*, at p. 1035.)

III. DISPOSITION

The judgment of conviction is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RAPHAEL
J.

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[11] The issue is currently pending before the California Supreme Court. (See *People v. Kopp* (2019) 38 Cal.App.5th 47, review granted Nov. 13, 2019, S257844.)

We concur:

CODRINGTON
Acting P.J.

SLOUGH
J.

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[DATE STAMP]
FILED
NOV 1 2024
MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

EDDIE LEE EVANS,
Petitioner-Appellant,

v. No. 23-55630

KELLY SANTORO, Acting Warden,
Respondent-Appellee.

D.C. No. 2:21-cv-04812-SSS-MAA
Central District of California, Los Angeles

ORDER

Before: RAWLINSON and BENNETT, Circuit Judges.

Appellant's motion for reconsideration (Docket Entry No. 4) is denied. *See* 9th Cir. R. 27-10.

No further filings will be entertained in this closed case.