

APPENDIX 1

APPENDIX 1

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

OCT 10 2017

FOR THE NINTH CIRCUIT

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

ANTHONY PAUL HERNANDEZ
NAVARRO,

Petitioner-Appellant,

v.

KIM HOLLAND, Warden,

Respondent-Appellee.

No. 15-55152

D.C. No. 5:14-cv-00210-DOC-SH

MEMORANDUM *

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

Submitted October 2, 2017 **
Pasadena, California

Before: M. SMITH and NGUYEN, Circuit Judges, and SETTLE, District Judge. ***

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

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

*** The Honorable Benjamin H. Settle, United States District Judge for the Western District of Washington, sitting by designation.

Petitioner-Appellant Anthony Paul Hernandez Navarro (“Navarro”) appeals the district court’s denial of his petition for writ of habeas corpus seeking relief from a jury conviction in state court. Specifically, he argues that the state appellate court erred in upholding (1) the state trial court’s credibility determination and (2) the state trial court’s denial of his motion for a new trial. We review *de novo* a district court’s decision on a petition for writ of habeas corpus. *Hall v. Haws*, 861 F.3d 977, 988 (9th Cir. 2017). We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.¹

1. Navarro argues that the state appellate court’s decision upholding the trial court’s adverse credibility determination was objectively unreasonable. This court may grant relief if the state court’s adjudication on the merits “resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.” 28 U.S.C. § 2254(d)(2). “[A] federal court may not second-guess a state court’s fact-finding process unless, after review of the state-court record, it determines that the state court was not merely wrong, but actually unreasonable.” *Taylor v. Maddox*, 366 F.3d 992, 999 (9th Cir. 2004), *abrogated on other grounds by Murray v. Schriro*, 745 F.3d 984,

¹ The request for judicial notice, filed by Navarro on December 13, 2016, is granted.

999–1000 (9th Cir. 2014). Federal habeas courts have “no license to redetermine credibility of witnesses whose demeanor has been observed by the state trial court, but not by them.” *Marshall v. Lonberger*, 459 U.S. 422, 434 (1983); *accord Mann v. Ryan*, 828 F.3d 1143, 1153 (9th Cir. 2016) (en banc), *cert. denied*, 137 S. Ct. 1091 (2017). The state appellate court concluded that there was sufficient evidence to support the trial court’s adverse credibility determination, including because the witness had a criminal history and had an incentive not to be labeled a “snitch.” Navarro has failed to show that this decision was more than wrong and actually unreasonable. *Taylor*, 366 F.3d at 999. Moreover, federal habeas courts afford great deference to the credibility determinations of the state trial court. *Marshall*, 459 U.S. at 434. Therefore, the district court properly denied Navarro’s petition on this issue.

2. Navarro argues that the state court’s denial of his motion for new trial violated his due process right to a fair trial. “The mere existence of newly-discovered evidence does not constitute grounds for federal habeas corpus relief unless the evidence bears upon the constitutionality of the petitioner’s detention.” *Quigg v. Crist*, 616 F.2d 1107, 1112 (9th Cir.), *cert. denied*, 449 U.S. 922 (1980) (citing *Townsend v. Sain*, 372 U.S. 293, 317 (1963)). “It must be shown that the newly discovered evidence would probably have resulted in the defendant’s

acquittal.” *Gordon v. Duran*, 895 F.2d 610, 615 (9th Cir. 1990) (citing *Quigg*, 616 F.2d at 1112). In this case, the state court fulfilled its constitutional duties by accepting the proffered testimony and determining that it would not probably result in Navarro’s acquittal. Therefore, Navarro has failed to show that the state appellate court’s decision affirming the trial court’s denial of a new trial resulted in a decision that was contrary to or an unreasonable application of clearly established federal law. 28 U.S.C. § 2254(d)(1).

3. Finally, Navarro moves the panel to expand the certificate of appealability pursuant to Ninth Circuit Rule 22-1(e). We have reviewed the issue and conclude that reasonable jurists would not disagree with the district court’s resolution of his sufficiency of the evidence claim. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Thus, we decline to expand the certificate of appealability.

AFFIRMED.

United States Court of Appeals for the Ninth Circuit

Office of the Clerk
95 Seventh Street
San Francisco, CA 94103

Information Regarding Judgment and Post-Judgment Proceedings**Judgment**

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)**Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)****(1) A. Purpose (Panel Rehearing):**

- A party should seek panel rehearing only if one or more of the following grounds exist:
 - ▶ A material point of fact or law was overlooked in the decision;
 - ▶ A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
 - ▶ An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- ▶ Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- ▶ The proceeding involves a question of exceptional importance; or
- ▶ The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- See Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at www.ca9.uscourts.gov under *Forms*.
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at www.ca9.uscourts.gov under *Forms*.

Attorneys Fees

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at www.ca9.uscourts.gov under *Forms* or by telephoning (415) 355-7806.

Petition for a Writ of Certiorari

- Please refer to the Rules of the United States Supreme Court at www.supremecourt.gov

Counsel Listing in Published Opinions

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
 - ▶ Thomson Reuters; 610 Opperman Drive; PO Box 64526; Eagan, MN 55123 (Attn: Jean Green, Senior Publications Coordinator);
 - ▶ and electronically file a copy of the letter via the appellate ECF system by using “File Correspondence to Court,” or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

United States Court of Appeals for the Ninth Circuit

BILL OF COSTS

This form is available as a fillable version at:

<http://cdn.ca9.uscourts.gov/datastore/uploads/forms/Form%2010%20-%20Bill%20of%20Costs.pdf>.

Note: If you wish to file a bill of costs, it MUST be submitted on this form and filed, with the clerk, with proof of service, within 14 days of the date of entry of judgment, and in accordance with 9th Circuit Rule 39-1. A late bill of costs must be accompanied by a motion showing good cause. Please refer to FRAP 39, 28 U.S.C. § 1920, and 9th Circuit Rule 39-1 when preparing your bill of costs.

v. 9th Cir. No.

The Clerk is requested to tax the following costs against:

Cost Taxable under FRAP 39, 28 U.S.C. § 1920, 9th Cir. R. 39-1	REQUESTED <i>(Each Column Must Be Completed)</i>				ALLOWED <i>(To Be Completed by the Clerk)</i>			
	No. of Docs.	Pages per Doc.	Cost per Page*	TOTAL COST	No. of Docs.	Pages per Doc.	Cost per Page*	TOTAL COST
Excerpt of Record			\$	\$			\$	\$
Opening Brief			\$	\$			\$	\$
Answering Brief			\$	\$			\$	\$
Reply Brief			\$	\$			\$	\$
Other**			\$	\$			\$	\$
TOTAL:				\$	TOTAL: \$			

* *Costs per page:* May not exceed .10 or actual cost, whichever is less. 9th Circuit Rule 39-1.

** *Other:* Any other requests must be accompanied by a statement explaining why the item(s) should be taxed pursuant to 9th Circuit Rule 39-1. Additional items without such supporting statements will not be considered.

Attorneys' fees **cannot** be requested on this form.

Continue to next page
APP 008

Form 10. Bill of Costs - Continued

I, , swear under penalty of perjury that the services for which costs are taxed were actually and necessarily performed, and that the requested costs were actually expended as listed.

Signature

("s/" plus attorney's name if submitted electronically)

Date

Name of Counsel:

Attorney for:

(To Be Completed by the Clerk)

Date

Costs are taxed in the amount of \$

Clerk of Court

By:

, Deputy Clerk

APPENDIX 2

APPENDIX 2

JS-6

1
2
3
4
5
6
7
8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA-WESTERN DIVISION
10
11

12 ANTHONY PAUL HERNANDEZ
13 NAVARRO,

14 Petitioner,

15 v.

16 KIM HOLLAND (Warden),

17 Respondent.
18

No. ED CV 14-210-DOC (SH)

JUDGMENT

19 Pursuant to the Order of the court adopting the conclusions and
20 recommendations of the United States Magistrate Judge,

21 IT IS ADJUDGED that the Petition for Writ of Habeas Corpus is denied and
22 the action is dismissed with prejudice.
23

24 DATED: December 22, 2014
25

26
27 David O. Carter
28 DAVID O. CARTER
UNITED STATES DISTRICT JUDGE

APPENDIX 3

APPENDIX 3

1
2
3
4
5
6
7
8
9 UNITED STATES DISTRICT COURT
10 CENTRAL DISTRICT OF CALIFORNIA-WESTERN DIVISION
11
12
13
14

15 ANTHONY PAUL HERNANDEZ
16 NAVARRO,

17 Petitioner,

18 v.

19 KIM HOLLAND (Warden),
20

21 Respondent.

No. ED CV 14-210-D0C (SH)

} ORDER ACCEPTING REPORT AND
} RECOMMENDATION OF UNITED
} STATES MAGISTRATE JUDGE

22 Pursuant to 28 U.S.C. Section 636, the court has reviewed the Petition, the
23 other records on file herein, and the Report and Recommendation of the United
24 States Magistrate Judge. Further, the Court has engaged in a de novo review of
25 those portions of the Report and Recommendation to which objections have been
26 made. The court accepts the findings and recommendations of the Magistrate
27 Judge.
28

1 IT IS THEREFORE ORDERED that Judgment be entered denying the
2 Petition and the action is dismissed with prejudice.

3 DATED: December 22, 2014
4
5

6 David O. Carter
7 DAVID O. CARTER
8 UNITED STATES DISTRICT JUDGE
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

APPENDIX 4

APPENDIX 4

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

ANTHONY PAUL HERNANDEZ
NAVARRO,

Petitioner,

v.

KIM HOLLAND (Warden),

Respondent.

No. ED CV 14-210-DOC (SH)

REPORT AND RECOMMENDATION OF
UNITED STATES MAGISTRATE JUDGE

This Report and Recommendation is submitted to the Honorable David O. Carter, United States District Judge, pursuant to 28 U.S.C. § 636 and General Order 194 of the United States District Court for the Central District of California. For reasons stated below, the petition for habeas corpus relief should be denied and this action dismissed with prejudice.

I. PROCEDURAL HISTORY

Petitioner, a prisoner in state custody, challenges a conviction in California Superior Court, San Bernardino County, Case No. FBA900385. On April 12, 2010, a jury convicted Petitioner of aggravated mayhem, two counts of assault with a firearm, assault with a deadly weapon, and prevent/dissuade witness. [Lodged Documents (“LD”)]

1 1A at 49 (Clerk’s Transcript).] The trial court sentenced Petitioner to state prison for one
 2 hundred years to life, staying the sentence for count 4, assault with a deadly weapon. [LD
 3 1A at 49.]

4 On July 10, 2012, the California Court of Appeal affirmed Petitioner’s conviction
 5 and sentence. [LD 5.] On October 17, 2012, the California Supreme Court denied
 6 Petitioner’s Petition for Review. [LD 7.]

7 Petitioner filed a petition for writ of habeas corpus in the state supreme court , and
 8 that petition was denied on January 15, 2014. [LD 9.]

9 Petitioner filed the present Petition for Writ of Habeas Corpus (“Pet.”) in federal
 10 court on February 4, 2014. Respondent filed an Initial Answer on February 25, 2014, and
 11 a Memorandum of Points and Authorities in Support of Answer (“Ret.”) on March 26,
 12 2014. Petitioner filed a Traverse (“Trav.”) on April 9, 2014.

13 Pursuant to the court’s order, Respondent filed a Supplemental Return (“Supp.
 14 Ret.”) on July 23, 2014, and Petitioner filed a Supplemental Traverse (“Supp. Trav.”) on
 15 August 19, 2014.

16 **II. FACTUAL BACKGROUND**¹

17 The California Court of Appeal summarized the trial evidence as follows:

18 Jessica and Robles were sitting outside Robles’ apartment complex one
 19 evening while their children played nearby. As Jessica was talking to a friend, a

20
 21 ¹ The following summary of the trial evidence derives from the court of appeal
 22 opinion. “Factual determination by state courts are presumed correct absent clear and
 23 convincing evidence to the contrary.” Miller-El v. Cockrell, 537 U.S. 322, 340, 123 S.
 24 Ct. 1029, 154 L.Ed.2d 931 (2003)(citing 28 U.S.C. § 2254(e)(1)). The undersigned
 25 Magistrate Judge has reviewed the factual summary and the record, and accords the
 26 factual summary set forth in an opinion of the California Court of Appeal a presumption
 27 of correctness pursuant to 28 U.S.C. § 2254(e)(1). See Thompson v. Runnels, 705 F.3d
 28 1089, 1091–92 (9th Cir. 2013)(“We begin with the facts found by the California Court of
 Appeal, which are presumed to be correct. See 28 U.S.C. § 2254(e)(1).”); Cudjo v. Ayers,
 698 F.3d 752, 755 n. 2, 762 (9th Cir. 2012)(stating that state court facts are “afforded a
 presumption of correctness that may be rebutted only by clear and convincing evidence”);
Briggs v. Grounds, 682 F.3d 1165, 1171 (9th Cir.2012)(citing
 § 2254(e)(1) for the proposition that “[t]he burden to disprove the factual findings rests
 with [the petitioner]”). But see Murray v. Schriro, 745 F.3d 984, 1000-1001 (9th Cir.
 2014)(recognizing tension between the “unreasonable factual determination” language of
 § 2254(d)(2) and the “presumption of correctness” language in § 2254(e)(1)).

1 van drove out of the complex and stopped between them.

2 Michael exited the passenger side of the van, yelled Jessica and Robles, and
3 asked whether they had a problem. Michael pointed a gun and told Robles he was
4 going to “light up” the house and “shoot anybody over there.” He told Jessica he
5 was going to shoot her three-month-old daughter, whom she was holding at the
6 time.

7 Anthony exited the driver’s side of the van, approached Jessica and told her
8 he wanted to fight Jesse. While Jessica and Anthony were arguing, Jesse arrived.
9 Anthony then began arguing with Jesse, swung at him and stabbed him in the chin
10 with a box cutter.

11 Jessica tried to break up the fight by stepping between Jesse and Anthony,
12 but Anthony stabbed her. She fell to the ground and shouted that she had been
13 stabbed. Jessica then saw a “flash” and heard a “loud bang” as Anthony and
14 Michael ran toward the van and then drove away.

15 Jessica went to the hospital for treatment of stab wounds to her neck and
16 right arm. While at the hospital, Jessica told a police officer that during the
17 confrontation outside Robles’s apartment, Michael pulled a black handgun from
18 his waistband, pointed it at her and Robles, and shouted an obscenity.

19 Later that evening, the police officer interviewed Robles about the
20 confrontation at her apartment complex. Robles also told him that Michael had a
21 gun.

22 The following day, Anthony telephoned Jessica and Robles and warned
23 them not to go to the police or he would harm their children. After having received
24 these threats, Jessica and Robles testified at trial that they did not see a gun during
25 the confrontation with Anthony and Michael.

26 [LD 5 at 3-4.]
27
28

III. PETITIONER'S CLAIMS

Petitioner states the following claims for federal habeas relief:

1. The court denied Petitioner the legal right to have a jury hear and decide the credibility of all material witnesses in violation of due process. [Pet. 5 & Attachment A at 1-4; Trav. 2-6.]
2. The evidence was insufficient to support Petitioner's convictions. [Pet. 6 & Attachment A at 7-8; Trav. 6-11.]
3. Trial counsel provided ineffective assistance by failing to object to the use of exhibits not introduced into evidence, and failing to investigate prosecution witnesses. [Pet. 6 & Attachment A at 6-7; Trav. 11-14.]
4. Appellate counsel provided ineffective assistance by failing to assert claims on appeal and failing to "federalize" the claims counsel did assert. [Pet. 5-6 & Attachment A at 5-6 ; Trav. 14-15.]
5. The cumulative effect of trial court errors deprived Petitioner of a fair trial. [Pet. 6 & Attachment A at 4-5; Trav. 15-17.]

IV. STANDARD OF REVIEW

A federal court may review a habeas petition by a person in custody under a state court judgment "only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). Federal habeas relief is not available for state law errors. Swarthout v. Cook, __ U.S. __, 131 S. Ct. 859, 861, 178 L. Ed. 2d 732 (2011)(per curiam)(citing Estelle v. McGuire, 502 U.S. 62, 67, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991)).

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

- (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

1 (2) resulted in a decision that was based on an unreasonable determination of
 2 the facts in light of the evidence presented in the State court proceeding.
 3 28 U.S.C. § 2254(d).

4 “Clearly established federal law” means federal law that is clearly defined by the
 5 holdings of the Supreme Court at the time of the state court decision. See, e.g., Cullen v.
 6 Pinholster, __ U.S. __, 131 S. Ct. 1388, 1399, 179 L. Ed. 2d 557 (2011)(citation omitted).
 7 Although only Supreme Court law is binding, “circuit court precedent may be persuasive
 8 in determining what law is clearly established and whether a state court applied that law
 9 unreasonably.” Stanley v. Cullen, 633 F.3d 852, 859 (9th Cir. 2011)(citation omitted).

10 In determining whether a decision is “contrary to” clearly established federal law, a
 11 reviewing court must evaluate whether the decision “‘applies a rule that contradicts
 12 [such] law’” and how the decision “confronts [the] set of facts that were before the state
 13 court.’” Cullen v. Pinholster, 131 S. Ct. at 1399 (quoting Williams v. Taylor, 529 U.S.
 14 362, 405-06, 120 S.Ct. 1495, 146 L. Ed. 2d 389 (2000)). If the state decision “‘identifies
 15 the correct governing legal principle’ in existence at the time,” a reviewing court must
 16 assess whether the decision “‘unreasonably applies that principle to the facts of the
 17 prisoner’s case.’” Id. (quoting Williams, 529 U.S. at 413). An “unreasonable
 18 application” of law is “‘different from an incorrect application’” of that law. Harrington
 19 v. Richter, __ U.S. __, 131 S. Ct. 770, 785, 178 L. Ed. 2d 624 (2011)(quoting Williams,
 20 529 U.S. at 410). Similarly, a state-court decision based upon a factual determination
 21 may not be overturned on habeas review unless the factual determination is “‘objectively
 22 unreasonable in light of the evidence presented in the state-court proceeding.’” Stanley,
 23 633 F.3d at 859 (quoting Davis v. Woodford, 384 F.3d 628, 638 (9th Cir. 2004)).

24 The AEDPA standard requires a high level of deference to state court decisions,
 25 such that a state decision that a claim lacks merit precludes federal habeas relief so long
 26 as “‘fairminded jurists could disagree’ on the correctness of the state court’s decision.”
 27 Harrington v. Richter, 131 S. Ct. at 786 (quoting Yarborough v. Alvarado, 541 U.S. 652,
 28 664, 124 S. Ct. 2140, 158 L. Ed. 2d 938 (2004)). Accordingly, to obtain federal habeas

1 relief a state prisoner must show that the state court's decision on a federal claim was "so
 2 lacking in justification that there was an error well understood and comprehended in
 3 existing law beyond any possibility for fairminded disagreement." Id. at 786-87.
 4 Moreover, even if this court finds such a state-court error of clear constitutional
 5 magnitude, habeas relief is not available unless the error "had substantial and injurious
 6 effect or influence in determining the jury's verdict." Fry v. Pliler, 551 U.S. 112, 116,
 7 121-22, 127 S. Ct. 2321, 168 L. Ed. 2d 16 (2007)(quoting Brecht v. Abrahamson, 507
 8 U.S. 619, 637, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1993)).

9 Here, the California Court of Appeal adjudicated Petitioner's denial of new trial
 10 motion claim on the merits in a reasoned decision on direct appeal, and the California
 11 Supreme Court thereafter summarily denied discretionary review. [LD 5; LD 7.] For
 12 purposes of AEDPA review, this court therefore looks to the court of appeal's opinion.
 13 See Stanley, 633 F.3d at 859 ("We review 'the state court's last reasoned decision.'"
 14 (quoting Maxwell v. Roe, 606 F.3d 561, 568 (9th Cir. 2010))); see also Williams v.
 15 Cavazos, 646 F.3d 626, 635 (9th Cir. 2011)(citing Ylst v. Nunnemaker, 501 U.S. 797,
 16 806, 111 S. Ct. 2590, 115 L. Ed. 2d 706 (1991)).

17 The California Supreme Court's denial of Petitioner's petition for writ of habeas
 18 corpus on January 15, 2014, without a statement of reasoning or authority, was the last
 19 decision concerning Petitioner's insufficiency, ineffective assistance, and cumulative
 20 error claims. Where a state court has reached a decision on the merits but provides no
 21 reasoning for the decision, the court will review the record to determine whether the state
 22 court decision was objectively unreasonable. Cullen v. Pinholster, 131 S.Ct. at 1402.
 23 The petitioner still has the burden to show that there was no reasonable basis for the state
 24 court to deny relief. Harrington v. Richter, 131 S.Ct. at 784. The correct analysis has
 25 been described by the Supreme Court as follows:

26 [A] habeas court must determine what arguments or theories ... could have
 27 supporte[d] the state court's decision; and then it must ask whether it is possible
 28 fairminded jurists could disagree that those arguments or theories are inconsistent

1 with the holding in a prior decision of this Court.

2 Cullen v. Pinholster, 131 S.Ct. at 1402 (citing Harrington v. Richter, 131 S.Ct. at 786).

3 **V. DISCUSSION**

4 **A. DUE PROCESS: DENIAL OF NEW TRIAL MOTION BASED ON NEW** 5 **EVIDENCE**

6 Petitioner contends that the court denied him the legal right to have a jury hear and
7 decide the credibility of all material witnesses in violation of due process. [Pet. 5 &
8 Attachment A at 1-4; Trav. 2-6.] Essentially, Petitioner claims error for denial of a new
9 trial motion based on new evidence. Indeed, on direct review, Petitioner framed this
10 claim as trial court abuse of discretion for denying his motion for a new trial, which was
11 based on new evidence from Jessica's brother Jesse that Petitioner was not present when
12 Jessica was assaulted. [LD 5 at 2; LD 3 at 15.] Review of the trial record reveals that this
13 claim is without merit.

14 **1. Court of Appeal Opinion:**

15 The court of appeal first provided background relevant to Petitioner's claim as
16 follows:

17 After the jury returned its guilty verdict but before sentencing, Anthony
18 moved the court to order a new trial based on testimony from Jesse that [Petitioner]
19 was unable to produce at the trial. [Petitioner's] attorney and investigators had
20 made several efforts to locate Jesse before trial; but in part because Jesse was in
21 and out of prison, they did not find him and obtain his testimony until after the jury
22 reached its verdicts.

23 At a hearing held before the new trial motion was actually filed, Jesse
24 testified on direct examination by [Petitioner's] counsel that the confrontation in
25 which Jessica was injured occurred in the following way:

26 "I was coming from the liquor store. Bought some beer. Went back to the
27 apartments, and there's a dark blue van outside. I walked up. There was a
28 lot of Black people outside. Got in an argument with one of the Blacks.
Black stabbed me. Ran inside [and] grabbed a rag, came back out, seen my
sister on the floor. Seen the Blacks jump in the van and take off."

1 Jesse also testified he did not see anyone cut Jessica, but did see a Black man
2 “[r]unning away from her.” When [Petitioner’s] counsel asked Jesse whether
3 [Petitioner] was present when Jessica was cut, Jesse responded, “No, sir.”

4 On cross-examination by the prosecutor, Jesse testified Jessica and Robles
5 would have been lying had they testified that [Petitioner] cut Jessica. Jesse also
6 testified his cousin would have been lying had he testified that he drove Jesse back
7 to the apartment complex and saw [Petitioner] there right before Jessica was cut.

8 In his written new trial motion, [Petitioner] described his unsuccessful
9 efforts to present Jesse as a witness at trial and argued Jesse’s “testimony was
10 immensely critical to the defense . . . and should be presented to a jury in the form
11 of a new trial.” The People opposed the motion on the grounds that Jesse’s
12 testimony was not credible and was not different from testimony the jury heard
13 from other witnesses favorable to [Petitioner].

14 At the hearing on the new trial motion, the parties agreed and the court
15 found that [Petitioner] had been diligent in trying to obtain Jesse’s testimony
16 before trial and that his testimony was material. The court, however, denied the
17 motion, noting Jesse was “well on his way to becoming a career criminal” and
18 “ha[d] every reason on earth not to want to be labeled . . . a snitch,” and finding his
19 testimony “completely unbelievable” and “entitled to no credibility.”

20 [LD 5 at 4-5.]

21 After review of the state law standards for grant of a new trial motion based on
22 new evidence, the court of appeal reasoned and concluded as follows:

23 [Petitioner] argues we should not defer to the trial court’s credibility
24 determination because no substantial evidence supports the trial court’s statements
25 that “Jesse was well on his way to being a career criminal” and “would not want to
26 be labeled a snitch.” He also surveys the conflicting testimony at trial to argue that
27 “[b]ecause the evidence in this matter was fairly balanced, [we] must conclude that
28 it is probable that [Petitioner] would have obtained a better result had Jesse

1 testified for the defense at trial.” We disagree.

2 First, there was substantial evidence to support the trial court’s statements
3 about Jesse’s lack of credibility. As to Jesse’s becoming a “career criminal,”
4 [Petitioner’s] counsel submitted a declaration as part of the new trial motion in
5 which he stated that (1) after the jury had found [Petitioner] guilty, counsel learned
6 Jesse was incarcerated; (2) at the trial court’s suggestion, counsel prepared a
7 transportation request and order to make Jesse available as a witness; (3) after
8 Jesse had been released, counsel spoke to Jesse’s parole officer; and (4) Jesse
9 finally became accessible “when he was taken into custody for new criminal
10 charges.” In addition, [Petitioner] acknowledges in his briefing that there was
11 testimony at trial that Jesse was involved with [Petitioner] and Michael in a
12 fraudulent check cashing scheme. As to Jesse’s desire to avoid being labeled a
13 “snitch,” the trial court heard testimony during trial that [Petitioner] threatened
14 harm to their children if Jessica or Robles went to the police; and that, after
15 [Petitioner] threatened them, they both changed their story about seeing Michael
16 with a gun. [Petitioner] reasonably concedes in his briefing that “there undoubtedly
17 is some truth to [the People’s] assertion that being labeled a snitch can be
18 hazardous to the individual’s well being.” Further, and perhaps most importantly,
19 we must give substantial deference to the trial court’s credibility assessment
20 because, although the court did not specifically comment on Jesse’s demeanor, the
21 court was able to observe him on the witness stand. [citations omitted.] Thus,
22 because the record supports the trial court’s stated reasons for doubting Jesse’s
23 testimony, the “weight and credibility to be attached to the . . . testimony . . . was
24 for the trial judge.” [citation omitted], and we defer to its determination [citation
25 omitted].

26 Second, it is not reasonably probable that [Petitioner] would obtain a better
27 result at a new trial were Jesse to testify. As just explained, the trial court could
28 properly determine that Jesse’s testimony was not credible; and it was entitled to

1 take that determination into account when deciding whether Jesse’s testimony
 2 would render a different result on retrial probable. [citations omitted.] Moreover,
 3 [Petitioner] correctly points out in his briefing that at trial the testimony regarding
 4 his involvement in the confrontation with Jessica and Robles was in conflict, and
 5 several witnesses (mostly family members) testified [Petitioner] was at a relative’s
 6 birthday party at the time Jessica was stabbed. Jesse’s testimony that [Petitioner]
 7 was not involved in the confrontation thus would have been “merely cumulative”
 8 of the testimony of the witnesses who testified on [Petitioner’s] behalf [citation
 9 omitted] and would have “simply corroborated [their] story” [citation omitted].

10 In sum, we hold that “[b]ecause the assertedly newly discovered evidence
 11 was cumulative and would not have rendered a different result on retrial probable
 12 for [Petitioner], the trial court did not abuse its discretion in denying his new trial
 13 motion.” [citations omitted.]

14 [LD 5 at 7-9.]

15 **2. Legal Standard:**

16 Federal habeas relief is limited to addressing violations of federal law and does not
 17 lie for errors of state law. See Estelle v. McGuire, 502 U.S. 62, 67–68, 112 S. Ct. 475,
 18 116 L. Ed. 2d 385 (1991); see also Pulley v. Harris, 465 U.S. 37, 41, 104 S. Ct. 871, 79 L.
 19 Ed. 2d 29 (1984)(“A federal court may not issue the writ on the basis of a perceived error
 20 of state law.”). Moreover, a petitioner “may not transform a state-law issue into a federal
 21 one merely by asserting a violation of due process.” Langford v. Day, 110 F.3d 1380,
 22 1389 (9th Cir. 1996). Thus, to establish a due process violation, a petitioner must show
 23 that the state court’s denial of his new trial motion was so prejudicial that it rendered his
 24 state court proceedings fundamentally unfair. See Ortiz–Sandoval v. Gomez, 81 F.3d
 25 891, 897 (9th Cir. 1996), as amended (May 8, 1996)(“While a petitioner for federal
 26 habeas relief may not challenge the application of state [court] rules, he is entitled to
 27 relief if the [state court’s] decision created an absence of fundamental fairness that
 28 ‘fatally infected the trial.’”); see also Gordon v. Duron, 895 F.2d 610, 615 (9th Cir.

1 1990)(“It must be shown that the newly discovered evidence would probably have
2 resulted in the defendant’s acquittal.”).

3 **3. Analysis:**

4 First, Petitioner’s challenge to the state court’s denial of his motion for a new trial
5 is not cognizable on federal habeas corpus review. See, e.g., Williams v. Swarthout,
6 2012 WL 6552147, at *22 (C. D. Cal. Sept.25, 2012)(no cognizable federal habeas claim
7 where petitioner argued state court’s denial of new trial motion violated his federal due
8 process rights); Washington v. Horel, 2008 WL 4427221, at *4 (C.D. Cal. Sept. 30, 2008)
9 (“[F]ederal courts generally are bound by a state court’s construction of state laws,
10 including the denial of a motion for new trial under state law [.]”).

11 Second, Petitioner suffered no deprivation of due process as a result of the denial.
12 Notably, the trial court determined that Jesse’s testimony lacked credibility. See, e.g.,
13 Marshall v. Lonberger, 459 U.S. 422, 434, 103 S. Ct. 843, 74 L. Ed. 2d 646 (1983)
14 (“[F]ederal habeas courts [have] “no license to redetermine the credibility of witnesses
15 whose demeanor has been observed by the state trial court[.]”); Simpson v. Evans, 435
16 Fed. Appx. 598, 600 (9th Cir. 2011)(holding no due process violation where state court
17 denied petitioner’s new trial motion after “[witness] testified before the state court judge,
18 and he concluded that [witness’] testimony was not credible enough to have caused a
19 different outcome at trial.”). Further, an independent review of the record confirms that:
20 (1) Jesse Dickinson had been in custody at the California Department of Corrections,
21 Chino, California, and then after being released, was subsequently taken into custody for
22 new criminal charges (LD 1A at 25-26), providing support for the court’s statement that
23 he was on his way to being a career criminal, and; (2) several defense witnesses testified
24 that Petitioner was at a birthday party the entire evening of the stabbing, rendering Jesse’s
25 testimony cumulative (LD 2 at 360-61, 390-91, 434-35).

26 Even if the exclusion of certain evidence violates a petitioner’s right to present a
27 defense, habeas corpus relief can only be granted if the constitutional error was not
28 harmless, that is, error that resulted in actual prejudice, or had a substantial and injurious

effect or influence in determining the jury's verdict. See Fry v. Pliler, 551 U.S. 112, 121–122, 127 S. Ct. 2321, 168 L. Ed. 2d 16 (2007); Brecht v. Abrahamson, 507 U.S. 619, 637, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1993). In determining whether the alleged error was harmless under Brecht, the court considers such factors as, “(1) the importance of the witness’ testimony in the prosecution’s case; (2) whether the testimony was cumulative; (3) the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points; (4) the extent of cross-examination otherwise permitted; and (5) the overall strength of the prosecution’s case. Merolillo v. Yates, 663 F.3d 444, 455 (9th Cir. 2011)(citing Delaware v. Van Arsdall, 475 U.S. 673, 684, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986)). In this case, Petitioner suffered no prejudice because Jesse Dickinson’s testimony was cumulative, the jury already was presented with contradictory evidence as to whether Petitioner was present when Jessica Dickinson was stabbed, and the overall strength of the prosecution’s case was substantial. Based on all of the foregoing, the state court’s denial of Petitioner’s new trial motion claim was not contrary to, or an unreasonable application of, clearly established Supreme Court law. 28 U.S.C. § 2254(d). This claim should be denied.

B. INSUFFICIENT EVIDENCE

Petitioner contends that the evidence was insufficient to support his convictions. [Pet. 6 & Attachment A at 7-8; Trav. 6-11.] Specifically, Petitioner contends the evidence is insufficient to support his guilty verdicts for aggravated mayhem, assault with a firearm, and dissuasion of a witness. [Pet., Attachment A at 7-8.] In his Supplemental Traverse, Petitioner clarifies that he did not assert insufficient evidence with respect to the assault with a deadly weapon conviction.² [Supp. Trav. 2.]

² While Petitioner states that he does not challenge the assault with a deadly weapon conviction on sufficiency grounds because the sentence was stayed, he simultaneously requests a stay and abeyance for purposes of exhausting that claim if he is “required” to challenge that conviction. [Supp. Trav. 2.] Petitioner “assures this court that he would challenge this conviction on the same claims and grounds as the rest of his conviction in this petition, for they all stem from the same alleged incident.” [Supp. Trav. (continued...)]

1 In AEDPA analysis of a sufficiency claim, the relevant “clearly established Federal
 2 law” is the standard set forth in Jackson v. Virginia, 443 U.S. 307, 99 S. Ct. 2781, 61 L.
 3 Ed. 2d 560 (1979).³ Smith v. Patrick, 519 F.3d 900, 901 (9th Cir. 2008). Under the
 4 Jackson standard, a federal habeas petitioner who claims that his state court conviction
 5 was based on insufficient evidence must show that, “considering the trial record in the
 6 light most favorable to the prosecution, ‘no rational trier of fact could have found proof
 7 of guilt beyond a reasonable doubt.’” Windham v. Merkle, 163 F.3d 1092, 1101 (9th Cir.
 8 1998)(citing Jackson, 443 U.S. at 324); see also Wright v. West, 505 U.S. 277, 290, 112
 9 S. Ct. 2482, 120 L. Ed. 2d 225 (1992).

10 A federal habeas petitioner “faces a heavy burden when challenging the sufficiency
 11 of the evidence used to obtain a state conviction on federal due process grounds.” Juan
 12 H. v. Allen, 408 F.3d 1262, 1274 (9th Cir. 2005). In federal habeas review of a state
 13 conviction, the essential elements of the crime are defined by state law, and the Jackson
 14 standard “must be applied with explicit reference to the substantive elements of the
 15 criminal offense as defined by state law.” Jackson, 443 U.S. at 324 n.16; Chein v.
 16 Shumsky, 373 F.3d 978, 983 (9th Cir. 2004)(*en banc*). Further, the federal court must
 17 defer to the state court’s interpretation of state law. See Wainwright v. Goode, 464 U.S.

18
 19
 20 ² (...continued)
 21 3.] Grant of a stay and abeyance would not be appropriate in this case because Petitioner
 22 has not shown good cause for failing to exhaust his claims with respect to the assault with
 23 a deadly weapon conviction at the same time he exhausted his other claims, and the
 24 claims are not potentially meritorious. See Rhines v. Weber, 544 U.S. 269, 278, 125 S.
 25 Ct. 1528, 161 L. Ed. 2d 440 (2005). Because Petitioner makes it clear that he does not
 26 assert a sufficiency claim with respect to the assault with a deadly weapon conviction,
 and further, because inclusion of that claim would render the Petition subject to dismissal
 as a mixed petition, the court construes the Petition as not containing that claim.
 See Rose v. Lundy, 455 U.S. 509, 510, 102 S. Ct. 1198, 71 L. Ed. 2d 379 (1982)(district
 courts “must dismiss . . . ‘mixed petitions,’ leaving the prisoner with the choice of
 returning to state court to exhaust his claims or of amending or resubmitting the habeas
 petition to present only exhausted claims to the court.”).

27 ³ The California Supreme Court has held that the state standard for determining
 28 the sufficiency of evidence to support a conviction is identical to the federal standard
 enunciated by the United States Supreme Court in Jackson v. Virginia. See People v.
Johnson, 26 Cal.3d 557, 576, 162 Cal. Rptr. 431 (1980).

78, 84, 104 S. Ct. 378, 78 L. Ed. 2d 187 (1983)(“the views of the state’s highest court with respect to state law are binding on the federal courts”).

Moreover, the fact-finder’s “credibility determinations are ... entitled to near-total deference under Jackson.” Bruce v. Terhune, 376 F.3d 950, 957 (9th Cir. 2004). The reviewing court must view the evidence in the light most favorable to the prosecution, and must presume that the trier of fact resolved conflicting evidence in favor of the prosecution. Wright, 505 U.S. at 295-297; Jackson, 443 U.S. at 319, 324, 326; see also McDaniel v. Brown, 558 U.S. 120, 132-33, 130 S. Ct. 665, 175 L. Ed. 2d 582 (2010)(noting that on federal habeas review the reviewing court must preserve the fact-finder’s role as weigher of the evidence, and when faced with a record of facts that supports conflicting inferences, must presume, even if it does not affirmatively appear in the record, that the jury resolved the conflicts in favor of the prosecution, and must defer to that resolution).

Finally, on federal habeas review, the AEDPA requires the court to “apply the standards of Jackson with an additional layer of deference.” Juan H., 408 F. 3d at 1274. The federal court must inquire whether a state court determination that the evidence was sufficient to support a conviction was an “objectively unreasonable” application of Jackson. See McDaniel, 558 U.S. at 133 (citing Williams, 529 U.S. at 409); see also Coleman v. Johnson, __ U.S. __, 132 S. Ct. 2060, 2065, 182 L. Ed. 2d 978 (2012)(under Jackson the only question to be asked about a jury’s finding was whether it was “so insupportable as to fall below the threshold of bare rationality.”); Williams, 529 U.S. at 409 (Under 28 U.S.C. § 2254(d)(1), the federal court asks “whether the state court’s application of clearly established federal law was objectively unreasonable.”).

1. Aggravated Mayhem:

Petitioner was charged with aggravated mayhem, in violation of California Penal Code § 205. [LD1 at 1.] Under California law:

A person is guilty of aggravated mayhem when he or she unlawfully, under circumstances manifesting extreme indifference to the physical or psychological

1 well-being of another person, intentionally causes permanent disability or
 2 disfigurement of another human being or deprives a human being of a limb, organ,
 3 or member of his or her body. For purposes of this section, it is not necessary to
 4 prove an intent to kill.

5 Cal. Penal Code § 205.

6 Aggravated mayhem is a “specific intent crime, such that conviction requires proof
 7 beyond a reasonable doubt ‘that the defendant acted with the specific intent to cause a
 8 maiming injury.’” People v. Manibusan, 58 Cal. 4th 40, 42, 165 Cal. Rptr. 3d 1
 9 (2013)(citing People v. Assad, 189 Cal. App. 4th 187, 195, 116 Cal. Rptr.3d 699 (2010)).
 10 “[S]pecific intent may be inferred from the circumstances attending an act, the manner in
 11 which it is done, and the means used, among other factors.” People v. Quintero, 135 Cal.
 12 App. 4th 1152, 1161, 37 Cal. Rptr. 3d 884 (2006)(citing People v. Lee, 220 Cal. App. 3d
 13 320, 325, 269 Cal. Rptr. 434 (1990)). Thus, evidence of a “controlled and directed”
 14 attack or an attack of “focused or limited scope” may provide substantial evidence of
 15 specific intent. Quintero, 135 Cal. App. 4th at 1161 (citing Lee, 220 Cal. App. 3d at
 16 326).

17 At trial, Jessica Dickinson testified that she tried to stop the fight between her
 18 brother, Jesse, and Petitioner by stepping between them and telling them to stop. [LD 2
 19 at 151.] Petitioner then pulled Jessica toward him with his left hand, and cut her with a
 20 box cutter from throat to ear. [Id.] The foregoing evidence, which was corroborated by
 21 other witness testimony, supports a finding of a controlled and directed attack against
 22 Jessica by Petitioner. This was not an instance where he was waiving the box cutter
 23 around and accidentally stabbed Jessica. On the contrary, Petitioner pulled her toward
 24 him and directed his attack at her neck.⁴ Considering the evidence in the light most
 25 favorable to the verdict, it cannot be found that “no rational trier of fact could have found
 26

27 ⁴ Petitioner’s suggestion that whether Jessica had a criminal record is in some way
 28 relevant, is wrong. There was ample evidence of Petitioner’s specific intent to maim her,
 and evidence of Jessica’s character or prior record would not justify or diminish
 Petitioner’s criminal conduct.

proof beyond a reasonable doubt” based on the foregoing evidence. Windham, 163 F.3d at 1101.

2. Assault With a Firearm:

Petitioner was charged with two counts of assault with a firearm pursuant to California Penal Code § 245(a)(2), against Jessica Dickinson and Sandra Robles. [LD 1 1-2.] He contends that three witnesses—Jessica Dickinson, Sandra Robles, and Marina Garcia— testified to never seeing Petitioner or his father with a weapon. [Pet. Attachment A at 8.] Officer Ugo Carlos testified that he did not recover a weapon from the scene, nor did he discover any other evidence that a weapon had been fired. Further, Petitioner asserts that Jessica and Ms. Garcia both testified under duress, and Ms. Robles was biased against Petitioner due to an “intimate history” and a “bad fallout.” [Id.]

The elements of assault with a firearm under Cal. Penal Code § 245(a)(2) include: (1) an assault, which requires the intent to commit a battery, and (2) the foreseeable consequence of which is the infliction of great bodily injury upon the subject of the assault. People v. Cook, 91 Cal. App. 4th 910, 920, 111 Cal. Rptr. 2d 204 (2001)(citing People v. Smith, 57 Cal. App. 4th 1470, 1484 67 Cal. Rptr. 2d 604 (1997)). Assault with a firearm is a general intent crime. [A]ssault only requires an intentional act and actual knowledge of those facts sufficient to establish that the act by its nature will probably and directly result in the application of physical force against another. People v. Williams, 26 Cal. 4th 779, 790, 111 Cal. Rptr.2d 114 (2001).

Petitioner was charged as an aider and abettor. [LD 2 at 620.] The jury was instructed as follows:

To prove that the defendant is guilty of a crime based on aiding and abetting that crime, the People must prove that:

1. The perpetrator committed the crime;
2. The defendant knew that the perpetrator intended to commit the crime;
3. Before or during the commission of the crime, the defendant intended to aid and abet the perpetrator in committing the crime; AND

1 4. The defendant's words or conduct did in fact aid and abet the
2 perpetrator's commission of the crime.

3 [LD 1 at 402.]

4 The evidence adduced at trial included Sandra Robles' testimony that she had told
5 Officer Carlos that Michael Navarro had a gun because he had his hand in his back
6 pocket and said he would "blow up the house," or "light up the house," which meant to
7 her that he would shoot the gun. [LD 2 at 130-31.] Marina Garcia testified that she saw
8 Petitioner wearing black gloves, holding what appeared to be a black pistol, and she left
9 the birthday party as a result because she did not feel safe. [LD 2 at 248-49.] Detective
10 Carlos testified that Jessica Dickinson told him that during the incident Michael Navarro
11 had a black handgun in his waistband and then pointed it at her and Sandra Robles,
12 saying, "What the fuck did you say, homey?" [LD 2 at 342-44.] Jessica Dickinson
13 testified that she did not see a gun, but had told officer Carlos that she thought Petitioner
14 had a gun because after he threatened her and Robles and was leaving, she heard a loud
15 pop. [LD 2 at 166.] Sandra Robles also testified that she heard a loud noise like a shot
16 and saw a flash as Petitioner and Michael got back into the van and left. [LD 2 at 229-
17 30.]

18 Construed in favor of the verdicts, the foregoing evidence provides a substantial
19 basis on which a rational jury could find that Petitioner had aided and abetted assault with
20 a firearm against Jessica Dickinson and Sandra Robles.

21 **3. Dissuading a Witness:**

22 Petitioner was also charged with dissuading a witness by force or threat in
23 violation of California Penal Code § 136.1(c)(1). [LD 1 at 84.] California Penal Code
24 § 136.1(a)(2) prohibits: "[k]nowingly and maliciously attempt[ing] to prevent or
25 dissuade any witness or victim from attending or giving testimony at any trial,
26 proceeding, or inquiry authorized by law." The crime of attempting to dissuade a witness
27 from testifying is a specific intent crime. People v. Young, 34 Cal.4th 1149, 1210, 24
28 Cal.Rptr.3d 112 (2005). "Unless the defendant's acts or statements are intended to affect

1 or influence a potential witness's or victim's testimony or acts, no crime has been
2 committed under this section.” People v. McDaniel, 22 Cal. App. 4th 278, 284, 27 Cal.
3 Rptr. 2d 306 (1994). The circumstances in which the defendant's statement is made, not
4 just the statement itself must be considered to determine whether the statement
5 constitutes an attempt to dissuade a witness from testifying. People v. Mendoza, 59 Cal.
6 App. 4th 1333, 1343, 69 Cal. Rptr. 2d 728 (1997).

7 Jessica Dickinson testified that Petitioner called her and Sandra Robles on Sandra's
8 house phone, and spoke to them on speaker phone. Petitioner told them that “if he goes
9 to jail, he's going to make – he's going to make it worth it.” He also said, “he didn't
10 care. He would kill all of them,” referring to Sandra's children. [LD 2 at 161-63.]
11 Petitioner further told Jessica not to go to the police, and not to talk to detective Cortinas.
12 [LD 2 at 164-65.] In support of his claim, Petitioner argues that Jessica Dickinson
13 testified that Petitioner did not threaten her. However in the portion of her testimony he
14 cites, she simply says that she has received threats from Petitioner's family. She does not
15 testify that she never received threats from Petitioner. [See LD 2 at 158-59.] Similarly,
16 Petitioner's citation to testimony by Sandra Robles refers to a page where she testified
17 that Jessica received a call from Petitioner the day after the incident, but she does not say
18 that she was not threatened by him. [See LD 2 at 230-31.] Finally, Petitioner's citation to
19 testimony by Marina Garcia also does not support his contention because she simply
20 testified that she did not speak with Petitioner on the night of the incident. [See LD 2 at
21 249.]

22 Considering the foregoing trial evidence in the light most favorable to the verdict,
23 it is clear that a rational jury could have found Petitioner guilty of dissuading a witness.
24 See Windham v. Merkle, 163 F.3d at 1101. Therefore, Petitioner has not made out a
25 cognizable claim of insufficiency of the evidence.

26 Based on the court's independent review of the trial record as discussed above, the
27 state courts' denial of Petitioner's insufficient evidence claims was not objectively
28 unreasonable. See McDaniel, 558 U.S. at 133 (citing Williams, 529 U.S. at 409); see also

1 Coleman v. Johnson, 132 S. Ct. at 2065; Cullen v. Pinholster, 131 S.Ct. at 1402.

2 Petitioner's insufficient evidence claim does not warrant federal habeas relief and should
3 be denied.

4 **C. INEFFECTIVE ASSISTANCE OF COUNSEL**

5 Petitioner asserts that trial counsel provided ineffective assistance by failing to
6 object to the use of exhibits not introduced into evidence, and failing to investigate
7 prosecution witnesses. [Pet. 6 & Attachment A at 6-7; Trav. 11-14.] Specifically,
8 Petitioner asserts that trial counsel's alleged failure to object to the physical introduction
9 of box cutters during detective Cortinas' testimony constituted ineffective assistance of
10 counsel. [Trav. 11-12.] Further, Petitioner contends that trial counsel failed to investigate
11 and present to the jury information about Jessica Dickinson's criminal history, which he
12 asserts would have diminished the credibility of both Jessica and Sandra Robles. [Trav.
13 14.]

14 **1. Legal Standard:**

15 To establish a claim of ineffective assistance of counsel, so as to warrant setting
16 aside a criminal conviction or sentence, a habeas petitioner must show both that
17 counsel's representation fell below an objective standard of reasonableness, and that
18 counsel's deficient performance actually prejudiced the defense. Strickland v.
19 Washington, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). "Without
20 proof of both deficient performance and prejudice to the defense ... it could not be said
21 that the sentence or conviction 'resulted from a breakdown in the adversary process that
22 rendered the result of the proceeding unreliable,' ... and the sentence or conviction should
23 stand." Bell v. Cone, 535 U.S. 685, 695, 122 S.Ct. 1843, 152 L.Ed.2d 914 (quoting
24 Strickland, 466 U.S. at 687). Consequently, a claim of ineffective assistance must be
25 rejected upon a finding either that counsel's performance was reasonable or that the
26 alleged error was not prejudicial. Strickland, 466 U.S. at 697.

27 To demonstrate deficient performance, petitioner bears the burden of showing that
28 his counsel's representation fell below an objective standard of reasonableness under

prevailing professional norms. Id. A court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. Id. at 689; Sanders v. Ratelle, 21 F.3d 1446, 1456 (9th Cir. 1994). The relevant inquiry is not whether another lawyer, with the benefit of hindsight, would have acted differently or whether defense counsel could have done differently, but rather, whether the choices made by defense counsel were reasonable. Babbitt v. Calderon, 151 F.3d 1170, 1173 (9th Cir. 1998).

Review of ineffective assistance claims under § 2254(d)(1) of AEDPA is “doubly deferential.” Knowles v. Mirzayance, 556 U.S. 111, 123, 129 S. Ct. 1411, 173 L. Ed. 2d 251 (2009). Unless there is a Supreme Court case directly on point, “relief may be granted only if the state-court decision unreasonably applied the more general standard for ineffective-assistance-of-counsel claims established by Strickland, in which [the Supreme Court] held that a defendant must show both deficient performance and prejudice in order to prove that he has received ineffective assistance of counsel.” Id. at 122. “Stated simply, a federal habeas court making the ‘unreasonable application’ inquiry should ask whether the state court’s application of clearly established federal law was objectively unreasonable.” Williams, 529 U.S. at 409. Thus, even if the state court arrived at what we think to be an incorrect result, that result must be upheld “so long as fairminded jurists could disagree on the correctness of the state court’s decision.” Richter, 131 S. Ct. at 786 (internal quotation marks omitted).

2. Analysis:

During the prosecution’s direct examination of Jessica Dickinson, she testified that she saw a box cutter with a blade approximately six inches long in Petitioner’s right hand after he swung at her brother. [LD 2 at 180, 182-83, 186.] Jessica talked to detective Cortinas six or seven times, and told him about seeing a box cutter each time they spoke. [LD 2 at 188.] At the hospital on the night of the incident, Jessica had described to officer Carlos that she saw a silver object in Petitioner’s hand. [LD 2 at 208.] To Jessica, the terms box cutter and knife mean the same thing. [LD 2 at 208, 212.] A folding pocket

1 knife is different from a box cutter, and what Jessica saw in Petitioner's hand was a box
2 cutter. [LD 2 at 212.]

3 Detective Cortinas testified that he brought box cutters with him to court, and that
4 he had investigated between five and ten crimes involving cutting instruments. [LD 2 at
5 309.] When asked to show the jury the different types of box cutters detective Cortinas
6 brought to court, defense counsel objected on the grounds of relevance and foundation.
7 [LD 2 at 309.] The court overruled that objection. [*Id.*] Detective Cortinas testified about
8 three different types of box cutters, including one that was a folding knife. [LD 2 at 310-
9 311.] None of the box cutters was admitted into evidence. [LD 1 at 506.]

10 Review of the record plainly reveals that when the prosecutor asked detective
11 Cortinas to show the jury the box cutters he had brought to court, trial counsel objected to
12 the showing the box cutters on two grounds. Petitioner is incorrect in contending that the
13 objection was limited to the line of questioning and not to introducing the physical box
14 cutters. [Trav. 12.] On the contrary, trial counsel had not objected to other questions
15 regarding box cutters and only asserted the objection when the prosecutor asked the
16 detective to show the box cutters. [*See* LD 2 at 309.] Accordingly, based on independent
17 review of the trial record, Petitioner's first ineffective assistance of counsel sub-claim is
18 without merit because trial counsel did assert the objection Petitioner contends he did not
19 assert.

20 Petitioner next contends that trial counsel should have further investigated Jessica
21 Dickinson's criminal background and presented it to the jury. However, Petitioner
22 himself states that trial counsel explained to him that "it would not be good to discredit
23 the accusers." [Pet. 6.] Trial counsel's tactical decision in this regard was reasonable
24 because attacking the victim's credibility quite conceivably may have alienated the jury,
25 and been harmful to Petitioner's defense.

26 A lawyer must make reasonable efforts, considering all the circumstances, to meet
27 standards of 'reasonable professional judgment.' Rompilla v. Beard, 545 U.S. 374, 396,
28 1225 S. Ct. 2456, 162 L. Ed. 2d 360 (2005). It is well settled that whether and how to

present evidence is a matter of trial tactics. Bashor v. Risley, 730 F.2d 1228, 1241 (9th Cir. 1984). Furthermore, a mere difference of opinion as to trial tactics does not constitute denial of effective assistance. United States v. Mayo, 646 F.2d 369, 375 (9th Cir. 1981). “[I]n applying Strickland generally, hindsight is discounted by pegging adequacy to ‘counsel’s perspective at the time’ investigative decisions are made[.]” Rompilla, 545 U.S. at 381. Under the circumstances reflected by the record in this case, trial counsel’s decision not to attack the credibility of the victims cannot be found unreasonable. See, e.g. Saffold v. Newland, 491 Fed. Appx. 834, 835 (9th Cir. 2012)(trial counsel made a reasonable tactical decision to temper his attack on the credibility of the prosecution’s key witness, the widow of the victim, who was present when her husband was shot and killed); Douglas v. Hyden, 264 Fed. Appx. 570, 572 (9th Cir. 2008)(failure to impeach victim with 911 call and recorded police interview not unreasonable tactical decision in light of victim’s admissions that he did not tell the 911 operator or police that petitioner had a weapon and the victim’s general nervous demeanor during cross-examination).

Petitioner clearly has not established deficient performance based on counsel’s decision not to attack the victim’s credibility. Nor could he establish prejudice based on the failure to do so, because the evidence of Petitioner’s guilt was substantial, regardless of whether the victim had a criminal background. Accordingly, Petitioner’s ineffective assistance of counsel claim should be denied.

D. INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

Petitioner contends that appellate counsel provided ineffective assistance by failing to assert claims on appeal and failing to “federalize” the claims counsel did assert. [Pet. 5-6 & Attachment A at 5-6 ; Trav. 14-15.] Specifically, Petitioner asserts that counsel should have “federalized” his new trial motion claim. [Pet., Attachment A at 5-6.]

The analytical framework of Strickland governs ineffective assistance of appellate counsel claims. The petitioner must show that appellate counsel’s performance fell below an objective standard of reasonableness, and that there is a reasonable probability

1 that but for counsel's errors, the petitioner would have prevailed on appeal. Cockett v.
 2 Ray, 333 F.3d 938, 944 (9th Cir. 2003); Miller v. Keeney, 882 F.2d 1428, 1434 (9th Cir.
 3 1989); see Strickland, 466 U.S. at 687, 694. "[A]ppellate counsel's failure to raise issues
 4 on direct appeal does not constitute ineffective assistance when appeal would not have
 5 provided grounds for reversal." Wildman v. Johnson, 261 F.3d 832, 840 (9th Cir. 2001).

6 Here, as discussed above, Petitioner's new trial motion claim does not merit relief
 7 under federal due process standards. Accordingly, appellate counsel did not provide
 8 ineffective assistance by failing to "federalize" the claim because that claim would not
 9 have provided grounds for reversal.

10 As to Petitioner's contention that appellate counsel failed to raise additional issues
 11 on appeal, the proper standard for evaluating a claim that appellate counsel was
 12 ineffective in neglecting to raise claims on appeal is that enunciated in Strickland,
 13 accordingly, a petitioner "must first show that his counsel was objectively unreasonable .
 14 . . in failing to find arguable issues for appeal," and then show prejudice resulting from
 15 that failure. Smith v. Robbins, 528 U.S. 259, 120 S. Ct. 746, 145 L. Ed. 2d 756 (2000).

16 Appellate counsel is entitled to make a tactical choice to raise certain claims and
 17 not others on direct review. Smith v. Murray, 477 U.S. 527, 536, 106 S. Ct. 2661, 91 L.
 18 Ed. 2d 434 (1986)(the process of "winnowing out weaker arguments on appeal and
 19 focusing on 'those more likely to prevail, far from being evidence of incompetence, is the
 20 hallmark of effective appellate advocacy'")(citing Jones v. Barnes, 463 U.S. 745, 751-52,
 21 103 S. Ct. 3308, 77 L. Ed. 2d 987 (1983)). Under Strickland, counsel's tactical choices
 22 are entitled to a strong presumption of correctness. Strickland, 466 U.S. at 690.

23 Not only is Petitioner not entitled to relief based on appellate counsel's tactical
 24 decision to assert some claims and not others, but Petitioner does not identify a single
 25 claim that he contends appellate counsel should have raised but did not. Accordingly,
 26 Petitioner's claim is subject to dismissal as vague and conclusory as well.

27 28 **E. CUMULATIVE ERROR**

1 Finally, Petitioner asserts that the cumulative effect of trial court errors deprived
 2 him of a fair trial. [Pet. 6 & Attachment A at 4-5; Trav. 15-17.] He contends that the
 3 court: violated its own *in limine* ruling keeping from the jury the knowledge of
 4 Petitioner's prior convictions, parole, and custody status; failed to grant Petitioner's
 5 motions for new trial, and; failed "to impeach" Sandra Robles' testimony after
 6 discovering that an audience member was making hand signals to her during her trial
 7 testimony. [Pet., Attachment A at 4-5.]

8 In certain circumstances, where no single error is sufficiently prejudicial to warrant
 9 habeas relief, the cumulative effect of multiple errors may be prejudicial. Wooten v.
 10 Kirkland, 540 F.3d 1019, 1022 n.1 (9th Cir. 2008)(citing Whelchel v. Washington, 232
 11 F.3d 1197, 1212 (9th Cir. 2000)(internal quotation marks omitted)); Killian v. Poole, 282
 12 F.3d 1204, 1211 (9th Cir. 2002)(stating, "even if no single error were prejudicial, where
 13 there are several substantial errors, their cumulative effect may nevertheless be so
 14 prejudicial as to require reversal."); Karis v. Calderon, 283 F.3d 1117, 1132 (9th Cir.
 15 2002)(stating, "[a]lthough no single alleged error may warrant habeas corpus relief, the
 16 cumulative effect of errors may deprive a petitioner of the due process right to a fair
 17 trial.").

18 Petitioner's contentions involving evidentiary rulings and the denial of mistrial
 19 motions do not raise federally cognizable claims. Habeas relief is not available for errors
 20 of state law as it is not the province of a federal habeas court to re-examine state court
 21 determinations of state law questions. Estelle, 502 U. S. at 67-68.

22 With regard to Petitioner's contention that the court violated its own pre-trial
 23 rulings regarding his priors and custody status, trial counsel moved for a mistrial when
 24 detective Cortinas testified that in connection with Petitioner's arrest, he was contacted by
 25 a "CDC agent." [LD 2 at 295-96.] The court denied the mistrial motion, noting that
 26 although the court shared defense counsel's concerns, it did not warrant a mistrial. [Id.]
 27 Another motion for mistrial was asserted by defense counsel when the prosecutor
 28 inadvertently mentioned that Petitioner was in custody. The mistrial motion was denied

1 on the ground that no prejudice to Petitioner could have resulted because “everybody
2 knows that these guys are in custody,” and that the court did “not think it w[ould] change
3 much of anything.” [LD 2 at 514-15.]⁵

4 Under both California and federal law, the decision whether to grant a mistrial
5 motion is within the trial court’s discretion. See Corley v. Cardwell, 544 F.2d 349, 351
6 (9th Cir. 1976)(“The trial judge has a broad discretion in granting a mistrial ... and the
7 burden is on the defendant to establish an abuse of that discretion.” (citing Illinois v.
8 Somerville, 410 U.S. 458, 93 S. Ct. 1066, 35 L. Ed. 2d 425 (1973); Oelke v. United States,
9 389 F.2d 668 (9th Cir. 1967))); People v. Cox, 30 Cal.4th 916, 953, 135 Cal. Rptr. 2d 272
10 (2003)(“We review the denial of a motion for mistrial under the deferential abuse of
11 discretion standard. A motion for mistrial is directed to the sound discretion of the trial
12 court.” (citations omitted)). To establish a due process violation from trial-type error,
13 such as the denial of a mistrial motion, the petitioner must show that the error resulted in a
14 trial that was fundamentally unfair. See Estelle v. McGuire, 502 U.S. at 70–71;
15 Kealohapauole v. Shimoda, 800 F.2d 1463, 1465 (9th Cir. 1986)(as amended).

16 The trial court’s finding that everyone knew that Petitioner was in custody is
17 entitled to deference. In light of that finding, no prejudice could have resulted from the
18 mention of a CDC agent, or the prosecutor’s inadvertent comment about Petitioner being
19 in custody. Moreover, the evidence against Petitioner was substantial, thus any error in
20 disclosing his custody status could not have had a substantial or injurious effect or
21 influence on determining the jury’s verdict. Brecht v. Abrahamson, 507 U.S. 619, 637,
22 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1993)(error harmless unless it has a substantial or
23

24 ⁵ Petitioner refers to seven other mistrial motions that the court denied, but does
25 not specifically cite to or discuss any of them. [Pet., Attachment A at 4.] He also makes a
26 vague and conclusory allegation regarding the jury learning of his custody status and
27 priors during jury selection, without citing to specific portions of the record to support his
28 claim of error. [See Pet., Attachment A at 4 (citing generally LD 2 at 48-71).] These
vague and conclusory contentions do not support his claim of cumulative error. A
prisoner’s “ cursory and vague claim cannot support habeas relief.” Greenway v. Schriro,
653 F.3d 790, 804 (9th Cir. 2011). This is because “[c]onclusory allegations which are
not supported by a statement of specific facts” do not set forth a constitutional violation
that a court may fairly review. James v. Borg, 24 F.3d 20, 26 (9th Cir. 1994).

1 injurious effect or influence on determining the jury's verdict).

2 As to Petitioner's contention that nurse Hogan revealed that Michael Navarro was
3 in custody during trial, to the extent that Michael Navarro's custody status is at all relevant
4 at all to Petitioner's custody status, this contention is meritless. First, the prosecutor and
5 the witness made every attempt to ask and answer questions concerning Michael
6 Navarro's back problems without referring to his custody status. Finally, when Michael
7 Navarro's counsel realized that it would reflect positively on his client that jail officials
8 allowed him a cane while in custody, despite the fact that it could be used as a weapon,
9 defense counsel purposely put before the jury the fact that Michael Navarro was in
10 custody. [See LD 2 at 525-60.] No error reasonably can be claimed based on the
11 foregoing, especially with respect to Petitioner.

12 Petitioner's final contention to support his claim of cumulative error is that the court
13 should have impeached Sandra Robles' testimony because an audience member made
14 hand signals to her while she was testifying. The record reflects that the hand signals
15 occurred three pages into Ms. Robles' direct examination testimony, "when [the] witness
16 on the stand was talking about the timeframe..." [LD 2 at 113.] The court excluded that
17 audience member from the courthouse immediately, and the remaining forty-one pages of
18 Ms. Robles' testimony occurred without that audience member present. There is no
19 reasonable indication that the hand signals caused any change in Ms. Robles' testimony.
20 The court took immediate action to exclude the audience member, eliminating any further
21 possibility of prejudice. Accordingly, this contention does not support Petitioner's claim.

22 Based on all of the foregoing, none of Petitioner's contentions, individually, states a
23 cognizable error. Therefore, there is no basis for a finding of cumulative error.

24 25 26 27 **VI. RECOMMENDATION**

28 For the reasons discussed above, it is recommended that the court issue an order

1 accepting this Report and Recommendation and directing that judgment be entered
2 denying the Petition and dismissing this action with prejudice.

3
4 DATED: October 10, 2014

A handwritten signature in black ink, appearing to read "Stephen Hillman". The signature is written in a cursive, flowing style.

5
6
7 STEPHEN J. HILLMAN
United States Magistrate Judge
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

PROPOSED

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA-WESTERN DIVISION

ANTHONY PAUL HERNANDEZ
NAVARRO,

Petitioner,

v.

KIM HOLLAND (Warden),

Respondent.

No. ED CV 14-210-DOC (SH)

JUDGMENT

Pursuant to the Order of the court adopting the conclusions and
recommendations of the United States Magistrate Judge,

IT IS ADJUDGED that the Petition for Writ of Habeas Corpus is denied and
the action is dismissed with prejudice.

DATED: _____

DAVID O. CARTER
UNITED STATES DISTRICT JUDGE

PROPOSED

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA-WESTERN DIVISION

ANTHONY PAUL HERNANDEZ
NAVARRO,

Petitioner,

v.

KIM HOLLAND (Warden),

Respondent.

No. ED CV 14-210-DOC (SH)

ORDER ACCEPTING REPORT AND
RECOMMENDATION OF UNITED
STATES MAGISTRATE JUDGE

Pursuant to 28 U.S.C. Section 636, the court has reviewed the Petition, the other records on file herein, and the Report and Recommendation of the United States Magistrate Judge. Further, the Court has engaged in a de novo review of those portions of the Report and Recommendation to which objections have been made. The court accepts the findings and recommendations of the Magistrate Judge.

1 IT IS THEREFORE ORDERED that Judgment be entered denying the
2 Petition and the action is dismissed with prejudice.

3 DATED: _____
4
5
6

7 _____
8 DAVID O. CARTER
9 UNITED STATES DISTRICT JUDGE
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

APPENDIX 5

APPENDIX 5

AS

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.

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

Court of Appeal Fourth District
FILED
JUL 10 2012
Stephen M. Kelly, Clerk
DEPUTY

THE PEOPLE,

Plaintiff and Respondent,

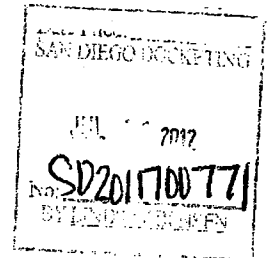
v.

ANTHONY PAUL NAVARRO,

Defendant and Appellant.

D058994

(Super. Ct. No. FBA900385)



APPEAL from a judgment of the Superior Court of San Bernardino County, John B. Gibson, Judge. Affirmed as modified.

A jury found Anthony Paul Navarro guilty of one count of aggravated mayhem (Pen. Code, § 205),¹ two counts of assault with a firearm (§ 245, subd. (a)(2)), one count of assault with a deadly weapon (§ 245, subd. (a)(1)), and one count of intimidation of a witness (§ 136.1, subd. (c)(1)) arising out of a confrontation he and his father, Michael

¹ Subsequent undesignated statutory references are to the Penal Code.

Ray Navarro, had with Jessica Dickinson and Sandra Robles.² The jury also found true allegations that Anthony had two prior felony convictions for purposes of the "Three Strikes" law. (§§ 667, subds. (b)-(i), 1170.12.)

The trial court sentenced Navarro to prison for 100 years to life, imposing a consecutive prison term of 25 years to life for each conviction (§§ 667, subd. (e)(2)(A)(ii), 1170.12, subd. (c)(2)(A)(ii)), but staying execution of the term imposed for the conviction of assault with a deadly weapon (§ 654). The court also ordered Anthony to pay \$70 per conviction for court security and facilities fees. (§ 1465.8, subd. (a)(1); Gov. Code, § 70373, subd. (a).)

On appeal, Anthony contends the trial court erred in denying his motion for new trial, which was based on new evidence from Jessica's brother Jesse that Anthony was not present when Jessica was assaulted. Anthony also contends the court imposed an excessive amount of court security fees.

We modify the judgment to reduce the amount of court security fees and also to add to the sentence for each of Anthony's current convictions the mandatory consecutive prison term of five years for each of his prior serious felony convictions, which the superior court failed to impose. In all other respects, we affirm the judgment.

² Michael was a codefendant at trial but filed a separate appeal, which we decided in an unpublished opinion. (*People v. Navarro* (Aug. 24, 2011, D058176).) Because Anthony and Michael have the same surname, we use their first names for clarity and brevity; in doing so, we intend no disrespect or undue familiarity. We shall do the same with respect to Jessica and her brother Jesse Dickinson.

FACTUAL BACKGROUND

Jessica and Robles were sitting outside Robles's apartment complex one evening while their children played nearby. As Jessica was talking to a friend, a van drove out of the complex and stopped between them.

Michael exited the passenger side of the van, yelled at Jessica and Robles, and asked whether they had a problem. Michael pointed a gun and told Robles he was going to "light up" the house and "shoot anybody over there." He told Jessica he was going to shoot her three-month-old daughter, whom she was holding at the time.

Anthony exited the driver's side of the van, approached Jessica and told her he wanted to fight Jesse. While Jessica and Anthony were arguing, Jesse arrived. Anthony then began arguing with Jesse, swung at him and stabbed him in the chin with a box cutter.

Jessica tried to break up the fight by stepping between Jesse and Anthony, but Anthony stabbed her. She fell to the ground and shouted that she had been stabbed. Jessica then saw a "flash" and heard a "loud bang" as Anthony and Michael ran toward the van and then drove away.

Jessica went to the hospital for treatment of stab wounds to her neck and right arm. While at the hospital, Jessica told a police officer that during the confrontation outside Robles's apartment, Michael pulled a black handgun from his waistband, pointed it at her and Robles, and shouted an obscenity.

Later that evening, the police officer interviewed Robles about the confrontation at her apartment complex. Robles also told him that Michael had a gun.

The following day, Anthony telephoned Jessica and Robles and warned them not to go to the police or he would harm their children. After having received these threats, Jessica and Robles testified at trial that they did not see a gun during the confrontation with Anthony and Michael.

DISCUSSION

A. *The Trial Court Did Not Abuse Its Discretion in Denying the Motion for New Trial*

Anthony contends the trial court abused its discretion by denying his motion for new trial, which was based on new testimony from Jesse that Anthony was not present during the confrontation. After setting forth additional background information and the generally applicable rules governing the determination of Anthony's motion, we shall analyze and ultimately reject this contention.

1. *Additional Background*

After the jury returned its guilty verdicts but before sentencing, Anthony moved the court to order a new trial based on testimony from Jesse that Anthony was unable to produce at the trial. Anthony's attorney and investigators had made several efforts to locate Jesse before trial; but in part because Jesse was in and out of prison, they did not find him and obtain his testimony until after the jury reached its verdicts.

At a hearing held before the new trial motion was actually filed, Jesse testified on direct examination by Anthony's counsel that the confrontation in which Jessica was injured occurred in the following way:

"I was coming from the liquor store. Bought some beer. Went back to the apartments, and there's a dark blue van outside. I walked up. There was a lot of Black people outside. Got in an argument with one of the Blacks.

Black stabbed me. Ran inside [and] grabbed a rag, came back out, seen my sister on the floor. Seen the Blacks jump in the van and take off."

Jesse also testified he did not see anyone cut Jessica, but did see a Black man "[r]unning away from her." When Anthony's counsel asked Jesse whether Anthony was present when Jessica was cut, Jesse responded, "No, sir."

On cross-examination by the prosecutor, Jesse testified Jessica and Robles would have been lying had they testified that Anthony cut Jessica. Jesse also testified his cousin would have been lying had he testified that he drove Jesse back to the apartment complex and saw Anthony there right before Jessica was cut.

In his written new trial motion, Anthony described his unsuccessful efforts to present Jesse as a witness at trial and argued Jesse's "testimony was immensely critical to the defense . . . and should be presented to a jury in the form of a new trial." The People opposed the motion on the grounds that Jesse's testimony was not credible and was not different from testimony the jury heard from other witnesses favorable to Anthony.

At the hearing on the new trial motion, the parties agreed and the court found that Anthony had been diligent in trying to obtain Jesse's testimony before trial and that his testimony was material. The court, however, denied the motion, noting Jesse was "well on his way to becoming a career criminal" and "ha[d] every reason on earth not to want to be labeled . . . a snitch," and finding his testimony "completely unbelievable" and "entitled to no credibility."

2. General Legal Principles

A trial court "may, upon [a defendant's] application, grant a new trial" when "new evidence is discovered material to the defendant, and which he could not, with reasonable diligence, have discovered and produced at the trial." (§ 1181, subd. 8.) For a court to grant a new trial on this ground, the newly discovered evidence must not "simply corroborate[] the defendant's story" (*People v. Cooper* (1979) 95 Cal.App.3d 844, 852 (*Cooper*)) or "simply contradict[] . . . the testimony of the people" (*People v. Cesena* (1891) 90 Cal. 381, 383; accord, *People v. Hall* (2010) 187 Cal.App.4th 282, 299 (*Hall*)). Nor is a new trial warranted if the new evidence is "merely cumulative" (*People v. Fong Ah Sing* (1886) 70 Cal. 8, 10 (*Fong Ah Sing*); *People v. Butts* (1965) 236 Cal.App.2d 817, 827 (*Butts*)) or "merely impeaching in character" (*People v. Snyder* (1940) 36 Cal.App.2d 528, 535; accord, *Hall*, at p. 299). Rather, to justify a new trial the "'newly discovered evidence . . . must make a different result probable on retrial.'" (*People v. Verdugo* (2010) 50 Cal.4th 263, 308 (*Verdugo*)). To determine whether a different result is likely on retrial, "the trial court may consider the credibility as well as materiality of the evidence." (*People v. Beyea* (1974) 38 Cal.App.3d 176, 202 (*Beyea*), disapproved on other grounds by *People v. Blacksher* (2011) 52 Cal.4th 769, 808; accord, *People v. Delgado* (1993) 5 Cal.4th 312, 329 (*Delgado*)).

On appeal from an order denying a motion for new trial, we apply the deferential abuse of discretion standard. (E.g., *Verdugo, supra*, 50 Cal.4th at p. 308; *People v. Earp* (1999) 20 Cal.4th 826, 890.) "[W]e accept the trial court's credibility determinations and findings on questions of historical fact if supported by substantial evidence." (*Verdugo*,

at p. 308.) In addition, "we justifiably accord considerable deference to the trial judge 'because of "his observation of the witnesses, [and] his superior opportunity to get 'the feel of the case.'"" (*People v. Hayes* (1985) 172 Cal.App.3d 517, 524-525 (*Hayes*); accord, *People v. Cua* (2011) 191 Cal.App.4th 582, 608 (*Cua*).)

3. *Analysis of Anthony's Claim*

Anthony argues we should not defer to the trial court's credibility determination because no substantial evidence supports the trial court's statements that "Jesse was well on his way to being a career criminal" and "would not want to be labeled a snitch." He also surveys the conflicting testimony at trial to argue that "[b]ecause the evidence in this matter was fairly balanced, [we] must conclude that it is probable that [Anthony] would have obtained a better result had Jesse testified for the defense at trial." We disagree.

First, there was substantial evidence to support the trial court's statements about Jesse's lack of credibility. As to Jesse's becoming a "career criminal," Anthony's counsel submitted a declaration as part of the new trial motion in which he stated that (1) after the jury had found Anthony guilty, counsel learned Jesse was incarcerated; (2) at the trial court's suggestion, counsel prepared a transportation request and order to make Jesse available as a witness; (3) after Jesse had been released, counsel spoke to Jesse's parole officer; and (4) Jesse finally became accessible "when he was taken into custody for new criminal charges." In addition, Anthony acknowledges in his briefing that there was testimony at trial that Jesse was involved with Anthony and Michael in a fraudulent check cashing scheme. As to Jesse's desire to avoid being labeled a "snitch," the trial court heard testimony during trial that Anthony threatened harm to their children if

Jessica or Robles went to the police; and that, after Anthony threatened them, they both changed their story about seeing Michael with a gun. Anthony reasonably concedes in his briefing that "there undoubtedly is some truth to [the People's] assertion that being labeled a snitch can be hazardous to the individual's well being." Further, and perhaps most importantly, we must give substantial deference to the trial court's credibility assessment because, although the court did not specifically comment on Jesse's demeanor, the court was able to observe him on the witness stand. (*Cua, supra*, 191 Cal.App.4th at p. 608; *Hayes, supra*, 172 Cal.App.3d at pp. 524-525.) Thus, because the record supports the trial court's stated reasons for doubting Jesse's testimony, the "weight and credibility to be attached to the . . . testimony . . . was for the trial judge" (*People v. Hill* (1969) 70 Cal.2d 678, 699), and we defer to its determination (*Verdugo, supra*, 50 Cal.4th at p. 308).

Second, it is not reasonably probable that Anthony would obtain a better result at a new trial were Jesse to testify. As just explained, the trial court could properly determine that Jesse's testimony was not credible; and it was entitled to take that determination into account when deciding whether Jesse's testimony would render a different result on retrial probable. (*Delgado, supra*, 5 Cal.4th at p. 329; *Beyea, supra*, 38 Cal.App.3d at p. 202.) Moreover, Anthony correctly points out in his briefing that at trial the testimony regarding his involvement in the confrontation with Jessica and Robles was in conflict, and several witnesses (mostly family members) testified Anthony was at a relative's birthday party at the time Jessica was stabbed. Jesse's testimony that Anthony was not involved in the confrontation thus would have been "merely cumulative" of the testimony

of the witnesses who testified on Anthony's behalf (*Butts, supra*, 236 Cal.App.2d at p. 827) and would have "simply corroborated [their] story" (*Cooper, supra*, 95 Cal.App.3d at p. 852). Although Jesse's testimony clearly would have contradicted that of Jessica and Robles, "[a] new trial on the ground of newly discovered evidence is not granted where the only value of the newly discovered evidence is as impeaching evidence' or to contradict a witness of the opposing party." (*Hall, supra*, 187 Cal.App.4th at p. 299.)

In sum, we hold that "[b]ecause the assertedly newly discovered evidence was cumulative and would not have rendered a different result on retrial probable for [Anthony], the trial court did not abuse its discretion in denying his new trial motion." (*People v. Gonzales* (2011) 52 Cal.4th 254, 333; see also *Fong Ah Sing, supra*, 70 Cal. at p. 10 ["It is well settled that in cases of conflicting testimony, newly discovered evidence merely cumulative will not furnish ground for new trial."].)

B. *The Trial Court Imposed an Incorrect Amount for Court Security Fees*

Anthony contends the trial court erred by imposing \$40 per conviction in court security fees under the version of section 1465.8, subdivision (a)(1) in effect at the time of sentencing. He argues the court should have charged him only \$30 per conviction, the amount specified by the version of the statute in effect when the jury found him guilty. The People agree with Anthony, and so do we.

As originally enacted in 2003, section 1465.8, subdivision (a)(1) stated in relevant part: "To ensure and maintain adequate funding for court security, a fee of twenty dollars (\$20) shall be imposed on every conviction for a criminal offense, including a traffic

offense, except parking offenses" (Stats. 2003, ch. 159, § 25.) The fee increased to \$30 effective July 28, 2009 (Stats. 2009-2010, 4th Ex. Sess., ch. 22, § 29), and to \$40 effective October 19, 2010 (Stats. 2010, ch. 720, § 33).³ The \$30 fee applied when the jury returned guilty verdicts against Anthony; but the \$40 fee applied when the court sentenced him to prison. The question, therefore, is on which of these dates Anthony was convicted.

The Court of Appeal answered a similar question in *People v. Davis* (2010) 185 Cal.App.4th 998 when construing Government Code section 70373, subdivision (a)(1), which provides: "To ensure and maintain adequate funding for court facilities, an assessment shall be imposed on every conviction for a criminal offense, including a traffic offense, except parking offenses" The court asked, "what constitutes a 'conviction'—is it the verdict or guilty plea, or the ensuing sentence and judgment of conviction?" (*Davis*, at p. 1001.) The court noted the ordinary rule that "a person stands 'convicted' upon the return of a guilty verdict by the jury or by the entry of a plea admitting guilt," and held "the ordinary rule applie[d]" to construction of the term "conviction" as used in the statute. (*Ibid.*) Given that the language and purpose of the statute construed in *Davis* are nearly identical to those of section 1465.8, we adopt the same construction of "conviction" for section 1465.8, subdivision (a)(1). Accordingly,

³ Amendments that took effect after Anthony was sentenced retained the \$40 figure; changed the term "fee" to "charge" and then to "assessment"; and broadened the scope of use of the funds from "court security" to "court operations." (Stats. 2011, ch. 10, § 8, ch. 40, § 6.)

because the amount of the court security fee in effect on the date the jury found Anthony guilty was \$30 per conviction, we will modify the judgment to impose that amount.

C. *The Trial Court Erred by Not Imposing Mandatory Five-year Enhancements Based on Anthony's Prior Convictions*

After briefing was completed, we noticed the trial court had not imposed the five-year enhancements for Anthony's two prior serious felony convictions prescribed by section 667, subdivision (a)(1) and requested letter briefs from the parties on the issue. (See Gov. Code, § 68081.) Anthony contends the trial court was not authorized to impose the five-year enhancements because the accusatory pleadings identified the prior convictions as serious or violent felonies for purposes of enhancement under section 667, subdivisions (b) through (i), not subdivision (a)(1). The People contend that the pleadings provided adequate notice that they were alleging Anthony had two prior serious felony convictions, and that the trial court was required to impose the five-year enhancements. We agree with the People.

As pertinent here, section 667, subdivision (a)(1) provides that "any person convicted of a serious felony who previously has been convicted of a serious felony in this state . . . *shall receive*, in addition to the sentence imposed by the court for the present offense, *a five-year enhancement for each such prior conviction* on charges brought and tried separately." (Italics added.) Under this statute, "when the defendant is convicted of a current serious felony . . . and has been previously convicted of a serious felony, the trial court must impose a five-year enhancement for each such prior conviction that was brought and tried separately. The terms of the present offense and

each section 667[, subdivision (a)(1)] enhancement must run consecutively." (*People v. Dotson* (1997) 16 Cal.4th 547, 553 (*Dotson*).) Further, "under the Three Strikes law, section 667[, subdivision (a)(1)] enhancements are to be applied individually to each count of a third strike sentence." (*People v. Williams* (2004) 34 Cal.4th 397, 405 (*Williams*); see also *People v. Garcia* (2008) 167 Cal.App.4th 1550, 1560 ["in cases where multiple indeterminate terms are imposed, all section 667, subdivision (a) five-year serious felony enhancements must be imposed on every count"].) "The trial court has no discretion and the sentence is mandatory." (*People v. Purata* (1996) 42 Cal.App.4th 489, 498 (*Purata*).) The conditions for imposition of the mandatory five-year enhancements are satisfied here.

In the current case Anthony was convicted of five serious felonies: aggravated mayhem, assault with a deadly weapon (two counts), assault with a firearm and intimidation of a witness. (§§ 667, subd. (a)(4), 1192.7, subd. (c)(2), (31), (37).) In the current case, the People also alleged Anthony previously had been convicted of two serious felonies: attempted robbery and assault with a deadly weapon (§§ 667, subd. (a)(4), 1192.7, subd. (c)(19), (31), (39)); and the jury found these allegations true. On this record, the trial court was required to impose a consecutive 10-year prison term based on Anthony's two prior serious felony convictions. (§ 667, subd. (a)(1); *Dotson*, *supra*, 16 Cal.4th at p. 553; *Purata*, *supra*, 42 Cal.App.4th at p. 498.) Further, under the Three Strikes law, the consecutive 10-year term based on those prior convictions had to be added to the sentence imposed on each of Anthony's five current convictions. (§§ 667, subd. (e)(2)(B), 1170.12, subd. (c)(2)(B); *Williams*, *supra*, 34 Cal.4th at p. 405.)

Anthony argues, however, that the trial court was not authorized to impose the section 667, subdivision (a)(1) enhancements because they were never specifically charged. Although the prior conviction allegations listed only statutory sections and subdivisions corresponding to the Three Strikes law, "the imposition of the five-year enhancement for the prior serious felony conviction [is] part and parcel of the Three Strikes statutory scheme." (*People v. Dominguez* (1995) 38 Cal.App.4th 410, 425.) Moreover, "it is clear that a valid accusatory pleading need not specify by number the statute under which the accused is being charged" (*People v. Thomas* (1987) 43 Cal.3d 818, 826); it is sufficient that the pleading identify the *factual basis* for imposition of an enhanced penalty (*People v. Flynn* (1995) 31 Cal.App.4th 1387, 1392-1395; *People v. Shoaff* (1993) 16 Cal.App.4th 1112, 1118). Here, the People alleged in separate allegations that Anthony "suffered the following prior conviction(s) of a serious or violent felony," and then identified two prior convictions by court case number, Penal Code section violated, date of conviction, county and state of conviction, and court type. The facts that Anthony had two prior serious felony convictions were thus adequately charged. (§ 969; *People v. Ashcraft* (1956) 138 Cal.App.2d 820, 825.) Although it would be better practice for the People to allege the specific statutes by which they seek to enhance a defendant's sentence, we conclude the information here provided sufficient notice of the potential five-year enhancements by stating the facts supporting them in separate allegations.⁴

⁴ A contrary conclusion is not required by *People v. Mancebo* (2002) 27 Cal.4th

In sum, we conclude that based on Anthony's two prior serious felony convictions the trial court was required to impose a consecutive 10-year term on the sentence for each of his five current convictions. Its failure to do so resulted in an unauthorized sentence. (*People v. Turner* (1998) 67 Cal.App.4th 1258, 1269.) It is our duty to correct an unauthorized sentence on appeal even where, as here, doing so results in a longer prison sentence. (*People v. Serrato* (1973) 9 Cal.3d 753, 764, disapproved on unrelated grounds by *People v. Fosselman* (1983) 33 Cal.3d 572, 583, fn. 1; *People v. Solórzano* (2007) 153 Cal.App.4th 1026, 1040-1041.) Further, because imposition of the prior serious felony conviction enhancements is mandatory, we need not remand for resentencing, as suggested by the People, but instead modify the judgment to impose the enhancements. (*Purata, supra*, 42 Cal.App.4th at pp. 498, 499.)

735, on which Anthony relies. In *Mancebo*, the information charged the defendant with various sex crimes against multiple victims, and alleged firearm use and kidnapping to support an enhancement under section 667.61. At the sentencing hearing, the trial court sua sponte substituted a multiple-victim circumstance for the firearm-use allegation to support the enhancement under section 667.61 and to free up the firearm-use allegation for use to support other enhancements, even though the multiple-victim circumstance had not been alleged by either statute number or descriptive facts. The Supreme Court reversed the sentence, holding that the trial court erred when it used an unpled multiple-victim circumstance to support an enhanced sentence under section 667.61. (*Mancebo*, at pp. 742-745.) "*Mancebo* thus stands for the limited proposition that a defendant is entitled to notice of the specific facts that will be used to support an enhanced sentence. Facts alleged and proved only as part of the substantive crime charged cannot later be used to support a sentencing enhancement." (*People v. Tardy* (2003) 112 Cal.App.4th 783, 789.) *Mancebo* is therefore not on point because Anthony's sentence, unlike the defendant's in *Mancebo*, will be enhanced on the basis of facts that were specifically and separately pleaded and proved for the purpose of enhancement.

DISPOSITION

The judgment is modified (1) to reduce the amount of court security fees imposed pursuant to section 1465.8, subdivision (a)(1) to \$30 for each current conviction, for a total of \$150; and (2) to add to the prison term imposed for each current conviction a consecutive term of 10 years based on Anthony's two prior serious felony convictions pursuant to section 667, subdivisions (a)(1) and (e)(2)(B), with execution of the additional 10-year term to be stayed pursuant to section 654 for the conviction on count 4 (assault with a deadly weapon), for a total additional consecutive prison term of 40 years. As so modified, the judgment is affirmed.

Upon remand, the superior court is directed to prepare an amended abstract of judgment reflecting the above modifications and to forward a certified copy of the abstract to the Department of Corrections and Rehabilitation.

IRION, J.

WE CONCUR:

BENKE, Acting P. J.

NARES, J.

2012 JUL 10 PM 3:46

ATTORNEY GENERAL
SAN DIEGO