

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

AUG 18 2017

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

JERRY WIZAR,

Petitioner-Appellant,

v.

STU SHERMAN,

Respondent-Appellee.

No. 17-55209

D.C. No. 2:15-cv-03717-PSG-KES
Central District of California,
Los Angeles

ORDER

Before: FARRIS and LEAVY, Circuit Judges.

The court grants appellant's request for judicial notice (Docket Entry No. 3).

The request for a certificate of appealability (Docket Entry No. 2) is denied.

The underlying 28 U.S.C. § 2254 petition fails to state any federal constitutional claims debatable among jurists of reason. *See* 28 U.S.C. § 2253(c)(2)-(3); *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012) ("When ... the district court denies relief on procedural grounds, the petitioner seeking a COA must show both 'that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.'") (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)).

Any pending motions are denied as moot.

DENIED.

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No. 17-55209

D.C. No. 2:15-cv-03717-PSG-KES
Central District of California,
Los Angeles

ORDER

Before: CHRISTEN and OWENS, Circuit Judges.

The motion for reconsideration (Docket Entry No. 6) is denied and the motion for reconsideration en banc is denied on behalf of the court. *See* 9th Cir. R. 27-10; 9th Cir. Gen. Ord. 6.11.

No further filings will be entertained in this closed case.

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JS-6

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JERRY WIZAR,

Petitioner,

v.

STU SHERMAN, Warden,

Respondent.

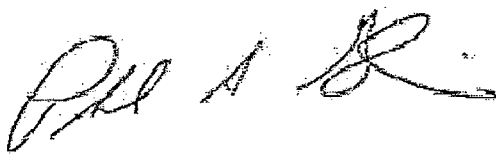
Case No. CV 15-03717-PSG (KES)

JUDGMENT

Pursuant to the Court's Order Accepting Findings and Recommendations of
the United States Magistrate Judge,

IT IS ADJUDGED that the Petition is dismissed with prejudice.

DATED: 1/12/17



PHILIP S. GUTIERREZ
UNITED STATES DISTRICT JUDGE

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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA
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11 JERRY WIZAR,

12 Petitioner,

13 v.

14 STU SHERMAN, Warden,

15 Respondent.
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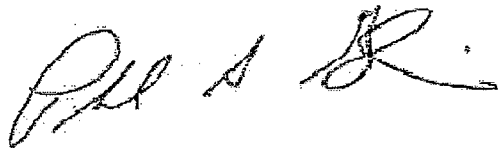
Case No. CV 15-03717-PSG (KES)

ORDER ACCEPTING FINDINGS AND
RECOMMENDATIONS OF UNITED
STATES MAGISTRATE JUDGE

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

22 IT IS THEREFORE ORDERED that Judgment be entered dismissing the
23 Petition with prejudice.
24

25 DATED: 1/12/17
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27 PHILIP S. GUTIERREZ
28 UNITED STATES DISTRICT JUDGE

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JERRY WIZAR

Petitioner,

v.

STU SHERMAN, Warden,

Respondent.

Case No. CV 15-03717-PSG (KES)

ORDER DENYING CERTIFICATE
OF APPEALABILITY

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

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

1 not extend the time to appeal.

2 (b) **Time to Appeal.** Federal Rule of Appellate Procedure 4(a)
3 governs the time to appeal an order entered under these rules. A
4 timely notice of appeal must be filed even if the district court issues a
5 certificate of appealability.

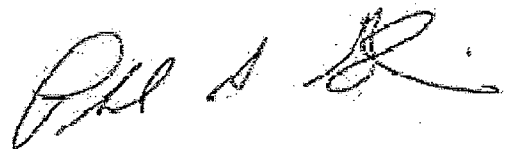
6 Rule 11, Rules Governing 28 U.S.C. § 2254 Cases.

7 Under 28 U.S.C. § 2253(c)(2), a Certificate of Appealability (“COA”) may
8 issue “only if the applicant has made a substantial showing of the denial of a
9 constitutional right.” In Slack v. McDaniel, 529 U.S. 473 (2000), the United States
10 Supreme Court held that, to obtain a COA under § 2253(c), a habeas petitioner
11 must show that “reasonable jurists could debate whether (or for that matter, agree
12 that) the petition should have been resolved in a different manner or that the issues
13 presented were adequate to deserve encouragement to proceed further.” Id. at 483-
14 84 (citation omitted); see also Miller-El v. Cockrell, 537 U.S. 322, 336 (2003).

15 In the present case, the Court finds that Petitioner has not made the foregoing
16 showing with respect to any of the grounds for relief alleged in the Petition.

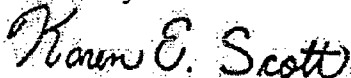
17 Accordingly, a COA is denied in this case.

18
19 DATED: 1/12/17



22 PHILIP S. GUTIERREZ
23 UNITED STATES DISTRICT JUDGE

24 Presented by:



25 KAREN E. SCOTT
26 United States Magistrate Judge

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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA
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11 JERRY WIZAR,

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14 STU SHERMAN, Warden,

15 Respondent.
16

Case No. CV15-03717-PSG (KES)

REPORT AND RECOMMENDATION OF
UNITED STATES MAGISTRATE JUDGE

17 This Report and Recommendation is submitted to the Honorable Philip
18 S. Gutierrez, United States District Judge, pursuant to the provisions of 28
19 U.S.C. § 636 and General Order 05-07 of the United States District Court for
20 the Central District of California.
21

22 Jerry Wizar ("Petitioner"), a prisoner in state custody, has filed a petition for
23 writ of habeas corpus pursuant to 28 U.S.C. § 2254. He argues there was
24 insufficient evidence to support his conviction for second degree murder. For the
25 reasons set forth below, the Court recommends that the petition be denied.

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I.

BACKGROUND

A. Conviction and Sentence.

A California jury convicted Petitioner of second degree murder in violation of California Penal Code § 187, and found that Petitioner used a deadly weapon (a knife) within the meaning of California Penal Code § 12022(b)(1). (Dkt. 28-2 [Lodged Document or “LD” 20 (Clerk’s Transcript or “CT”)] at 518.¹) The trial court sentenced Petitioner to fifteen years to life for second degree murder, plus one year for the deadly weapon enhancement. (LD 20, CT at 559-60.)

B. Summary of the Evidence Presented at Trial.²

[1.] Preliminary Facts

[Petitioner], his mother Barbara Lagunas, stepfather Frank Lagunas, half-sister Monique Lagunas, and cousin Richard Olivas, lived in the Lagunas home in Canoga Park.³ On the evening of June 4, 2010 Michael Silva, Frank’s employer whom he met while incarcerated in state prison, was loitering in front of the house, “high as a kite,” drinking beers and smoking cigarettes. According to a voicemail on Frank’s cell phone, Silva was waiting for Frank and insisted on staying until Frank came out with him. Silva claimed Frank owed him money. A DVR recording

¹ All page citations are to the CM/ECF pagination, except citations to the Clerk’s Transcript (“CT”) at LD 20 and the Reporter’s Transcript (“RT”) at LD 21.

² The Court adopts the factual summary from the California Court of Appeal opinion as a fair and accurate summary of the evidence presented at trial. (Dkt. 24-5 [LD 5].) See 28 U.S.C. § 2254(e)(1) (“a determination of a factual issue made by a State court shall be presumed to be correct” unless the petitioner “rebut[s] the presumption ... by clear and convincing evidence”); see e.g., Brown v. Horrell, 644 F.3d 969, 972 (9th Cir. 2011).

³ *We use the Lagunas family members’ first names to avoid confusion and intend no disrespect. (See People v. Nguyen (2010) 184 Cal. App. 4th 1096, 1104 fn. 2, In re Marriage of Simundza (2004) 121 Cal. App. 4th 1513, 1514, fn. 1.)*

1 from a surveillance camera attached to the Lagunases' home showed Silva
2 loitering in the yard for more than four hours that night, interacting with
3 [Petitioner] and various family members. The recording showed Silva and
4 [Petitioner] talking throughout the night, drinking beers, and driving and smoking
5 in Silva's truck. At one point, Silva sent [Petitioner] in his truck to buy more
6 cigarettes.

7 **[2.] The Struggle**

8 At approximately 1:00 a.m. on June 5, 2010 Silva's girlfriend, Victoria
9 Wallace, received phone calls from Barbara and [Petitioner] alerting her that Silva
10 was very drunk. According to Wallace and Silva's ex-wife, Silva was an alcoholic
11 who became angry and abusive when drunk. In the past, he had set his ex-wife's
12 car on fire, and he had numerous physical altercations with Wallace when drunk.

13 The surveillance video, although not entirely clear, showed that at 1:54 a.m.
14 an individual came quickly down the driveway, and headlights flashed from the
15 street in front of the house where Monique had parked her Nissan. Los Angeles
16 Police Detective Ammon Williams testified that the individual on the video
17 appeared to be a female of smaller stature. Less than a minute after the figure went
18 back toward the house, two individuals appeared on the video, moving down the
19 driveway next to where [Petitioner] had parked his truck. One of the individuals
20 appeared to move backwards and the other appeared to pursue him. A struggle
21 ensued next to the driver's side of [Petitioner's] truck. The video showed a
22 metallic flash near the chest area of the pursuer, followed by both individuals
23 falling to the ground. Detective Williams testified that the DVR recording showed a
24 flash of reflective material that he had previously identified on [Petitioner's] shoes.
25 Following the struggle, one of the two individuals involved in the struggle entered
26 [Petitioner's] truck and drove away.

27 Los Angeles Police Detectives Patrick McCarty and Nick Pikor responded to
28 the crime scene. Detective Pikor observed Silva's dead body half on the driveway

1 and half on the grass. Beer bottles and other items littered the ground. A large
2 blade was sticking out of the back of Silva's neck, and Silva's shirt and pants were
3 soaked in blood. Detective Pikor also observed tire marks on Silva's pants just
4 above the knee where [Petitioner's] truck had driven over Silva's leg as the truck
5 left the scene.

6 Detective McCarty interviewed Barbara, Richard, and Monique as potential
7 witnesses. The police identified Frank and [Petitioner] as potential suspects and
8 detained Frank near the house but did not find [Petitioner]. After Barbara stated
9 that her son had been involved in a physical altercation with a man at her house, the
10 police began to look for [Petitioner].

11 On June 30, 2010 [Petitioner] surrendered to the Los Angeles Police
12 Department. Detectives visually inspected his body and saw no signs of injury.

13 **[3.] Barbara's Testimony**

14 Barbara testified that she feared Silva was going to harm her family that
15 night. Throughout the night, Silva boasted about killing people and made
16 derogatory and sexually vulgar comments to Barbara. He repeatedly threatened,
17 "I'm not leaving until Poncho [Frank] gets here, he owes me money and he's going
18 to make it right and when he gets here I'm gonna put him on his fuckin' knees and
19 show him who's boss." According to Barbara, Silva threatened to kill both Frank
20 and [Petitioner].

21 When [Petitioner] asked Silva to stop disrespecting his mother, things got
22 physical. Barbara saw Silva pin [Petitioner] in a corner with his hands on
23 [Petitioner's] throat so that he could not move. She thought Silva was going to go
24 after her daughter, Monique, so she ran into the house to call 911. The call did not
25 go through, however, because Barbara hung up the phone. Even though she
26 testified that she feared Silva's threats to her family, Barbara attempted to call 911
27 only once that night. After realizing that [Petitioner] was involved in something
28 serious, Barbara removed the DVR recording from the surveillance camera and

1 gave it to Monique.

2 **[4.] Richard's Testimony**

3 Richard testified that when he arrived home earlier that night, Silva
4 confronted him outside and spoke to him in an angry and aggressive manner. Silva
5 showed Richard the tattoos on his arms and said he was from the Mexican Mafia
6 and that he had harmed some people.

7 After Richard was able to get inside the house, he went to his room and fell
8 asleep. A few hours later, he awoke to the sound of shouting and heard
9 [Petitioner] say, "You're gonna kill me?" as though responding to someone's
10 threat. He heard two people fighting, followed by a woman's scream. He ran to
11 the fence, peered over the hedge, and saw [Petitioner] bending down right beside
12 his truck. Once he determined that [Petitioner] was alive, he went back to comfort
13 Monique, who was worried about [Petitioner's] safety. Richard testified that he
14 did not see the struggle because it had ended by the time he went outside.

15 **[5.] The Stab Wounds and Toxicology Report**

16 The medical examiner who performed Silva's autopsy determined that Silva
17 had suffered 16 stab wounds to his body, two of which were fatal. The examiner
18 characterized six of the wounds as defensive wounds resulting from the victim
19 raising his arms to fend off an attack. One of the fatal stab wounds went seven
20 inches into Silva's chest cavity and pierced the right lung. The second fatal wound
21 pierced five and one-half inches into the pulmonary artery, aorta, and heart,
22 causing hemorrhaging from the heart and blood vessels. Based on the wounds, it
23 was not possible to tell who was the initial aggressor.

24 At the time of his death, Silva had a blood-alcohol concentration of between
25 .31 and .36. In an interview at the police station the night of the incident, Barbara
26 said that Silva was drunk and could barely stand, although at trial she denied
27 saying this. The toxicology report also showed the presence of cocaethylene, which
28 only occurs when cocaine and alcohol are ingested at the same time. The

1 toxicologist testified that this combination of drugs sometimes leads to violent,
2 aggressive, and confrontational behavior, but an individual's reaction to cocaine
3 and alcohol is not entirely predictable.

4 ***[6.] Blood Evidence on [Petitioner's] Truck***

5 Two days after the homicide, police officers found [Petitioner's] truck
6 approximately 1.5 miles from the crime scene. They found bloodstains on the rim
7 of the driver's side wheel, the handle to the tailgate, the driver's side door handle,
8 and the steering wheel. Several bloodstains from the truck's exterior and interior
9 matched Silva's DNA profile, including a mixture in which [Petitioner] and Silva
10 were both possible contributors.

11 **C. Direct Appeal.**

12 Petitioner appealed his conviction to the California Court of Appeal. (Dkt.
13 24-2 [LD 2].) He argued, in relevant part, that there was insufficient evidence to
14 support the jury's verdict because the evidence showed he acted in self-defense.
15 (*Id.* at 26-34.) Accordingly, he argued, his second degree murder conviction should
16 be reduced to voluntary manslaughter. (*Id.* at 34.) The California Court of Appeal
17 affirmed the second degree murder conviction in a reasoned decision. (Dkt. 24-5
18 [LD 5].)

19 Petitioner then filed a petition for review in the California Supreme Court,
20 again arguing insufficiency of the evidence. (Dkt. 24-6 [LD 6].) The California
21 Supreme Court summarily denied review on November 20, 2013. (Dkt. 24-7 [LD
22 7].)

23 **D. State Habeas Proceedings.**

24 In July 2014, Petitioner filed a habeas corpus petition in the Los Angeles
25 County Superior Court. (Dkt. 24-8 [LD 8].) As on direct appeal, he argued there
26 was insufficient evidence to support his conviction for second degree murder. (*Id.*
27 at 4.) The District Attorney filed an informal response. (Dkt. 24-9 [LD 9].) In
28 October 2014, the Los Angeles County Superior Court denied the petition, holding

1 that: (1) a claim of insufficiency of the evidence is not cognizable on habeas
2 corpus; and (2) Petitioner was barred from re-litigating this claim, because it had
3 already been denied on direct appeal. (Dkt. 24-10 [LD 10].)

4 In January 2015, Petitioner filed a habeas petition in the California Court of
5 Appeal, arguing: (1) he was denied due process because the Los Angeles Superior
6 Court did not allow him to reply to the District Attorney's informal response; (2) he
7 received ineffective assistance of counsel ("IAC") on appeal. (Dkt. 24-11 [LD 11].)
8 The petition was summarily denied. (Dkt. 24-12 [LD 12].)

9 In February 2015, Petitioner filed a habeas petition in the California Supreme
10 Court raising the same claims. (Dkt. 24-13 [LD 13].) The petition was denied on
11 April 29, 2015. (Dkt. 24-14 [LD 14].)

12 **E. Federal Habeas Proceedings.**

13 Petitioner filed his initial federal petition under § 2254 on May 18, 2015.
14 (Dkt. 1.) The Court dismissed the petition with leave to amend, directing Petitioner
15 to use the standard form for habeas petitions. (Dkt. 5.) See Local Rule 83-16.1.
16 After Petitioner failed to timely amend, the Court issued a Report and
17 Recommendation ("R&R") recommending that the action be dismissed for failure
18 to prosecute. (Dkt. 7.)

19 Petitioner objected to the R&R and filed a First Amended Petition. (Dkt. 9
20 [Objections]; Dkt. 10 [First Amended Petition]; Dkt. 11 [Addendum to the First
21 Amended Petition], collectively "FAP".) On October 26, 2015, the Court vacated
22 the R&R and allowed Petitioner to proceed with the FAP. (Dkt. 13.) The FAP
23 raised two grounds: (1) Petitioner's due process rights were violated because there
24 was insufficient evidence to support his convictions (Dkt. 11 at 2-10); and
25 (2) Petitioner received IAC from trial counsel because, when the prosecution
26 offered Petitioner a plea deal for manslaughter, Petitioner's counsel "did not give
27 Petitioner any advice whatsoever and left it up to Petitioner to decide on his own ...
28 whether to accept[.]" (Dkt. 11 at 12.)

1 In his objections, Petitioner asked the Court to hold the FAP in abeyance
2 until he exhausted his state remedies with respect to Ground Two, the IAC claim.
3 (Dkt. 9 at 1, 5.) At the same time, Petitioner sought to exhaust his IAC claim in the
4 state courts. On October 19, 2015, he filed a habeas petition in the Los Angeles
5 County Superior Court, which was denied on November 19, 2015. (Dkt. 24-15 [LD
6 15]; Dkt. 24-16 [LD 16].) On December 28, 2015, he filed a habeas petition in the
7 California Court of Appeal, which was denied on January 13, 2016. (Dkt. 24-17
8 [LD 17]; Dkt. 24-18 [LD 18].) On February 9, 2016, Petitioner filed a habeas
9 petition in the California Supreme Court, which was denied on May 18, 2016.
10 (Dkt. 28-11 [LD 22].)

11 Meanwhile, in federal court, Respondent opposed Petitioner's request for a
12 stay. (Dkt. 23.) The Court issued an R&R recommending that the motion for a
13 stay be denied, because Petitioner had failed to show good cause for a stay under
14 Rhines v. Webber, 544 U.S. 269 (2005) and a stay under Kelly v. Small, 315 F.3d
15 1063 (9th Cir. 2003) was unavailable because Ground Two was untimely. (Dkt.
16 31.) On June 27, 2016, the District Judge adopted that recommendation and
17 ordered Respondent to file an Answer only as to Ground One, the insufficiency of
18 the evidence claim. (Dkt. 33.)

19 Respondent timely filed an Answer, arguing that Ground One should be denied
20 on the merits. (Dkt. 45.) Respondent admits that Petitioner is in custody, that the
21 claim is timely, and that the claim was properly exhausted in the California Supreme
22 Court. (Id. at 7.) Petitioner timely filed a traverse on October 2, 2016. (Dkt. 47.)

23 Because the unexhausted and untimely ineffective assistance of counsel
24 claim raised in Ground Two was effectively dismissed by the District Judge's
25 earlier Order, the Court will consider the merits of the sufficiency of the evidence
26 claim raised in Ground One, rather than recommending that the FAP be dismissed
27 as a "mixed" petition. For the reasons discussed below, the Court finds that Ground
28 One is without merit.

1 II.

2 STANDARD OF REVIEW

3 A. Federal Habeas Review under § 2254.

4 The federal Antiterrorism and Effective Death Penalty Act of 1996
5 (“AEDPA”) provides as follows:

6 An application for a writ of habeas corpus on behalf of a person in
7 custody pursuant to the judgment of a State court shall not be granted
8 with respect to any claim that was adjudicated on the merits in State
9 court proceedings unless the adjudication of the claim--

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

13 (2) resulted in a decision that was based on an unreasonable
14 determination of the facts in light of the evidence presented in the State
15 court proceeding.

16 28 U.S.C.A. § 2254(d).

17 The “clearly established Federal law” that controls federal habeas review
18 of state court decisions consists of holdings (as opposed to dicta) of Supreme
19 Court decisions “as of the time of the relevant state-court decision.” Williams
20 v. Taylor, 529 U.S. 362, 412 (2000); see also Carey v. Musladin, 549 U.S. 70,
21 74 (2006). Although a particular state court decision may be both “contrary to”
22 and “an unreasonable application of” controlling Supreme Court law, the two
23 phrases have distinct meanings. Williams, 529 U.S. at 391, 413. A state court
24 decision is “contrary to” clearly established federal law if the decision either
25 applies a rule that contradicts the governing Supreme Court law, or reaches a
26 result that differs from the result the Supreme Court reached on “materially
27 indistinguishable” facts. Early v. Packer, 537 U.S. 3, 8 (2002) (per curiam).

28 The state court need not cite or even be aware of the controlling Supreme Court

1 cases, “so long as neither the reasoning nor the result of the state-court decision
2 contradicts them.” Early, 537 U.S. at 8.

3 State court decisions that are not “contrary to” Supreme Court law may be set
4 aside on federal habeas review only “if they are not merely erroneous, but ‘an
5 *unreasonable* application’ of clearly established federal law, or based on ‘an
6 *unreasonable* determination of the facts.’” Id. at 11 (emphasis added). A state-
7 court decision that correctly identified the governing legal rule may be rejected if it
8 unreasonably applied the rule to the facts of a particular case. Williams, 529 U.S. at
9 406-10, 413 (e.g., the rejected decision may state the Strickland standard correctly
10 but apply it unreasonably); Woodford v. Visciotti, 537 U.S. 19, 24-27 (2002) (per
11 curiam). However, to obtain federal habeas relief for such an “unreasonable
12 application,” a petitioner must show that the state court’s application of Supreme
13 Court law was “objectively unreasonable.” Williams, 529 U.S. at 413; Visciotti,
14 537 U.S. at 24-27. An “unreasonable” application is different from an erroneous or
15 incorrect one. Williams, 529 U.S. at 409-10; Visciotti, 537 U.S. at 25; Bell v.
16 Cone, 535 U.S. 685, 699 (2002). As the Supreme Court has explained: “[a]s a
17 condition for obtaining habeas corpus from a federal court, a state prisoner must
18 show that the state court’s ruling on the claim being presented in federal court was
19 so lacking in justification that there was an error well understood and
20 comprehended in existing law beyond any possibility for fairminded disagreement.”
21 Harrington v. Richter, 562 U.S. 86, 10, 103 (2011).

22 **B. Insufficiency of the Evidence Claims under § 2254.**

23 As a matter of federal constitutional law, “[t]he Due Process Clause protects
24 [a criminal defendant] against conviction except upon proof beyond a reasonable
25 doubt of every fact necessary to constitute the crime with which he is charged.” In
26 re Winship, 397 U.S. 358, 364 (1970); see also Juan H. v. Allen, 408 F.3d 1262,
27 1274 (9th Cir. 2005). Thus, a state prisoner who alleges that the evidence
28 introduced at trial was insufficient to support the jury’s findings states a cognizable

1 federal habeas claim. Herrera v. Collins, 506 U.S. 390, 401-02 (1993). But the
2 prisoner faces a “heavy burden” to prevail on such a claim. Juan H., 408 F.3d at
3 1274. In Jackson v. Virginia, 443 U.S. 307 (1979), the Supreme Court held that the
4 appropriate test is whether “*any* rational trier of fact could have found the essential
5 elements of the crime beyond a reasonable doubt.” Id. at 319.

6 When determining the sufficiency of the evidence, the reviewing court “must
7 respect the province of the jury to determine the credibility of witnesses, resolve
8 evidentiary conflicts, and draw reasonable inferences from proven facts by
9 assuming that the jury resolved all conflicts in a manner that supports the verdict.”
10 Walters v. Maass, 45 F.3d 1355, 1358 (9th Cir. 1995). “[T]his inquiry does not
11 require a court to ‘ask itself whether *it* believes that the evidence at trial established
12 guilty beyond a reasonable doubt.’ ... [It is] the responsibility of the trier of fact
13 fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw
14 reasonable inferences from basic facts to ultimate facts.” Jackson, 443 U.S. at 318-
15 19.

16 While “mere suspicion or speculation cannot be the basis for the creation of
17 logical inferences,” Maass, 45 F.3d at 1358, “[c]ircumstantial evidence can be used
18 to prove any fact, including facts from which another fact is to be inferred, and is
19 not to be distinguished from testimonial evidence insofar as the jury’s fact-finding
20 function is concerned.” United States v. Stauffer, 922 F.2d 508, 514 (9th Cir.1990).
21 Furthermore, “to establish sufficient evidence, ‘the prosecution need not
22 affirmatively rule out every hypothesis except that of guilt.’” Schell v. Witek, 218
23 F.3d 1017, 1023 (9th Cir. 2000) (en banc) (quoting Wright v. West, 505 U.S. 277,
24 296 (1992) (plurality opinion)).

25 Where, as here, a state court has issued a reasoned decision rejecting a claim
26 of insufficient evidence under a standard that is not “contrary to” Jackson,⁴ a

27 ⁴ The California Supreme Court has held that the California standard for
28 determining the sufficiency of evidence to support a conviction is identical to the

1 reviewing federal court applies an additional layer of deference. Juan H., 408 F.3d
2 at 1274. Namely, “a federal court may not overturn a state court decision rejecting
3 a sufficiency of the evidence challenge simply because the federal court disagrees
4 with the state court. The federal court instead may do so only if the state court
5 decision was *objectively unreasonable*.” Cavazos v. Smith, -- U.S. --, 132 S. Ct. 2,
6 4 (2011) (per curiam) (emphasis added); see also Juan H., 408 F.3d at 1275 n.13.
7 This “double dose of deference ... can rarely be surmounted.” Boyer v. Belleque,
8 659 F.3d 957, 964 (9th Cir. 2011); see also Coleman v. Johnson, -- U.S. --, 132 S.
9 Ct. 2060, 2062 (2012) (per curiam) (“We have made clear that Jackson claims face
10 a high bar in federal habeas proceedings because they are subject to two layers of
11 judicial deference.”).

12 Thus, a state court’s resolution of an insufficiency of the evidence claim is
13 evaluated under 28 U.S.C. § 2254(d)(1), not § 2254(d)(2). See Emery v. Clark, 643
14 F.3d 1210, 1213-14 (9th Cir. 2011) (“When we undertake collateral review of a
15 state court decision rejecting a claim of insufficiency of the evidence pursuant to 28
16 U.S.C. § 2254(d)(1) . . . we ask only whether the state court’s decision was contrary
17 to or reflected an unreasonable application of Jackson to the facts of a particular
18 case”); see also Long v. Johnson, 736 F.3d 891, 896 (9th Cir. 2013) (“The pivotal
19 question, then, is whether the California Court of Appeal, which issued the last
20 reasoned state-court decision, unreasonably applied Jackson in affirming
21 Petitioner’s conviction for second-degree murder”).

22 Finally, in adjudicating an insufficiency of the evidence claim, a federal
23 habeas court “look[s] to [state] law only to establish the elements of [the crime] and
24 then turn[s] to the federal question of whether the [state court] was objectively
25 unreasonable in concluding that sufficient evidence supported” the conviction.
26 Juan H., 408 F.3d at 1278 n.14; see also Chein v. Shumsky, 373 F.3d 978, 983 (9th
27 federal standard enunciated by the U.S. Supreme Court in Jackson. People v.
28 Johnson, 26 Cal. 3d 557, 576 (1980).

1 Cir. 2004) (en banc) (“The Jackson standard must be applied with explicit reference
 2 to the substantive elements of the criminal offense as defined by state law”)
 3 (citation omitted). In determining whether the evidence was sufficient, “a state
 4 court’s interpretation of state law, including one announced on direct appeal of the
 5 challenged conviction, binds a federal court sitting in habeas corpus.” Bradshaw v.
 6 Richey, 546 U.S. 74, 76 (2005); see also Emery, 643 F.3d at 1214.

7 III.

8 DISCUSSION

9 A. Elements of Murder, Voluntary Manslaughter, and Self-Defense under 10 California Law.

11 California law recognizes two degrees of murder, which are “distinguished
 12 by the mental state with which the killing is done.” People v. Gonzalez, 54 Cal. 4th
 13 643, 653 (2012). Both require a finding of malice. Id. “A person who kills
 14 unlawfully and intentionally [i.e., with *express* malice] is guilty of first degree
 15 murder if the intent to kill is formed after premeditation and deliberation.” Id. On
 16 the other hand, “[a] person who kills unlawfully with *implied* malice is guilty of
 17 second degree murder.” Id. (emphasis added)

18 “Malice is implied when a person willfully does an act, the natural and
 19 probable consequences of which are dangerous to human life, and the person
 20 knowingly acts with conscious disregard for the danger to life that the act poses.”
 21 Id.; see also Cal. Penal Code § 188 (providing that malice is implied “when no
 22 considerable provocation appears, or when the circumstances attending the killing
 23 show an abandoned and malignant heart”); see, e.g., People v. Cravens, 53 Cal. 4th
 24 500, 508-09 (2012) (finding sufficient evidence of implied malice where defendant
 25 “targeted a smaller and shorter victim who was intoxicated, exhausted, and
 26 vulnerable,” and defendant was “rested and sober” and threw “a very hard punch”);
 27 People v. Matta, 57 Cal. App. 3d 472, 480 (1976) (finding sufficient evidence of
 28 implied malice “from the repeated violent beatings [defendant] inflicted upon the

1 victim” where “the assault was neither justified nor the act of one incapable through
2 intoxication of entertaining malice”).

3 A defendant is guilty of voluntary manslaughter, rather than murder, if he
4 kills intentionally but without malice. People v. Barton, 12 Cal. 4th 186, 199
5 (1995). Malice is found lacking “only in limited, explicitly defined circumstances:
6 either when the defendant acts in a sudden quarrel or heat of passion ... or when the
7 defendant kills in unreasonable self-defense[.]” Id. (citations omitted); see also Cal.
8 Penal Code § 192 (Manslaughter; voluntary, involuntary, and vehicular).

9 Thus, a homicide will be deemed voluntary manslaughter where the
10 defendant possesses “the unreasonable but good faith belief in having to act in self-
11 defense.” Barton, 12 Cal. 4th at 199. In contrast, self-defense completely justifies
12 a homicide, rendering it noncriminal, where the defendant “possessed both an
13 actual and reasonable belief in the need to defend.” People v. Stitely, 35 Cal. 4th
14 514, 551 (2005).

15 “In either case, the fear must be of imminent harm. Fear of future harm—no
16 matter how great the fear and no matter how great the likelihood of harm—will not
17 suffice. The defendant’s fear must be of *imminent* danger to life or great bodily
18 injury.” Id. Furthermore, to act lawfully in self-defense, “the defendant may use
19 whatever force is reasonably necessary A defendant is not required to retreat
20 and may in fact pursue the assailant until the danger of injury ... has passed ..., but
21 a defendant may use force only as long a[s] the danger exists or reasonably appears
22 to exist[.]” People v. Clark, 201 Cal. App. 4th 235, 250 (2011) (citations omitted);
23 see also CALCRIM 3470 (California standard jury instruction, providing that the
24 defendant must “use[] no more force than was reasonably necessary to defend
25 against that danger”). “If a person attacked defends himself so successfully that his
26 attacker is rendered incapable of inflicting injury, or for any other reason the danger
27 no longer exists, there is no justification for further retaliation.” People v.
28 Gleghorn, 193 Cal. App. 3d 196, 202 (1987); see also People v. Perez, 12 Cal. App.

3d 232, 236 (1970) (“When the danger has passed and the attacker has withdrawn, there can be no justification for the use of further force.”). Thus, “[u]nder California law, the right to use force in self-defense continues only as long as the danger exists.” Doherty v. Valenzuela, 2013 WL 1912534, at *8 (C.D. Cal. Apr. 4, 2013), R&R adopted at 2013 WL 1912504 (C.D. Cal. May 7, 2013).

B. The California Court of Appeal Did Not Unreasonably Apply Jackson.

Here, Petitioner’s insufficiency of the evidence claim was raised on direct review and denied by the California Court of Appeal in a reasoned decision. (LD 5.) Petitioner then presented that same claim in a petition for review, which the California Supreme Court summarily denied. (LD 6, 7.) Accordingly, for purposes of applying the AEDPA standard of review, the Court of Appeal’s decision on direct appeal constitutes the relevant state court adjudication on the merits. See Berghuis v. Thompkins, 560 U.S. 370, 380 (2010) (where state supreme court denied discretionary review of Court of Appeal’s decision on direct appeal, the decision on direct appeal is the relevant state court decision for purposes of the AEDPA standard of review).

The Court of Appeal found that the evidence was “sufficient to find that [Petitioner] acted with conscious disregard for human life or an abandoned and malignant heart,” i.e., with the intent necessary for second degree murder. (LD 5 at 7-8.) The court noted that the victim had 16 stab wounds, including 2 fatal wounds to his chest and neck and multiple defensive wounds on his arms; that Petitioner fled the scene after the altercation, running over Silva’s leg with his truck; and that there were no visible signs of injury to Petitioner when he turned himself in 25 days after the altercation. (Id. at 7-10.) The court also reasoned:

Even if [Petitioner] reasonably feared Silva’s threats of serious bodily injury or death, that fear was no longer reasonable after [Petitioner] had inflicted enough stab wounds to render Silva incapable of harming him.

... [T]he jury reasonably could have found that even if [Petitioner]

1 initially acted in justifiable self-defense in response to Silva's threats,
2 [Petitioner's] need for self-defense did not exist throughout the duration
3 of the struggle. It is a very reasonable inference from the evidence that
4 at some point Silva was defending himself from [Petitioner] and was
5 no longer an imminent threat.

6 (Id. at 8-9.)

7 This decision was not an objectively unreasonable application of Jackson.
8 Petitioner argues that, because there was no evidence to show whether he or Silva
9 was the aggressor, "that alone gives reasonable doubt in the killing of Silva[.]" (Dkt.
10 11 at 8-9.) He argues that circumstantial evidence in the record—such as Silva's
11 intoxication, Silva's history of violence when intoxicated, and things overheard by
12 Petitioner's family members during the altercation—give rise to "reasonable
13 inferences" indicating that Silva was the aggressor. (Id. at 9.) Yet it is the role of the
14 jury, not this Court, to "draw reasonable inferences from proven facts." Maas, 45
15 F.3d at 1358. The test is whether "*any* rational trier of fact could have found the
16 essential elements of the crime beyond reasonable doubt," Jackson, 443 U.S. at 319,
17 "assuming that the jury resolved all conflicts in a manner that supports the verdict."
18 Maas, 45 F.3d at 1358.

19 Furthermore, even if Silva was the initial aggressor, as Petitioner argues, this
20 does not foreclose a finding that Petitioner acted with the implied malice necessary
21 for second degree murder. Under California law, Petitioner's: "right to use force in
22 self-defense ended when the threat was no longer imminent or when Silva no longer
23 appeared capable of inflicting any injury." (LD 5 at 10.) See Clark, 201 Cal. App.
24 4th at 250 ("a defendant may use force only as long as the danger exists or reasonably
25 appears to exist"); Gleghorn, 193 Cal. App. 3d at 202 ("If a person attacked defends
26 himself so successfully that his attacker is rendered incapable of inflicting injury ...
27 there is no justification for further retaliation"); Doherty, 2013 WL 1912534, at *8
28 ("the right to use self-defense continues only as long as the danger exists"). There

1 was circumstantial evidence from which a reasonable fact-finder could conclude that
2 the deadly force used by Petitioner on Silva was not reasonably necessary to defend
3 himself: for example, the defensive wounds suffered by Silva (4 RT 1310-12),
4 evidence that Silva was so intoxicated he could barely stand (4 RT 1313-20, 1547-
5 48), and the fact that Petitioner fled the scene after the altercation, running over the
6 victim's leg with his truck (2 RT 662, 666-67; 3 RT 946, 1014; 4 RT 1271, 1309; 5
7 RT 1872; 6 RT 2139-41, 2421). There was additional evidence of implied malice:
8 for example, that Petitioner was angered by Silva's words and actions (4 RT 1252-
9 55; 7 RT 3046); that, during the many hours Silva loitered in front of Petitioner's
10 home, there was no evidence that Silva attempted to break into the home; and that
11 the home had an operational telephone line that Petitioner could have used to call the
12 police instead (4 RT 1242-51, 1280-81).

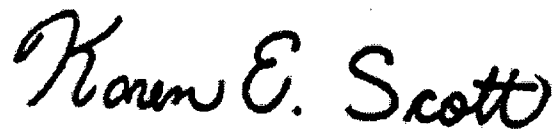
13 Accordingly, the California Court of Appeal reasonably rejected Petitioner's
14 sufficiency of the evidence claim, and Petitioner is not entitled to habeas relief.

15 **IV.**

16 **RECOMMENDATION**

17 IT IS THEREFORE RECOMMENDED that the District Court issue an order:
18 (1) approving and accepting this Report and Recommendation; and (2) directing that
19 Judgment be entered denying the First Amended Petition and dismissing this action
20 with prejudice.

21
22 DATED: December 01, 2016



23 KAREN E. SCOTT
24 UNITED STATES MAGISTRATE JUDGE

25
26 **NOTICE**

27 Reports and Recommendations are not appealable to the Court of Appeals, but
28 are subject to the right of any party to timely file Objections as provided in the Federal

1 Rules of Civil Procedure and the instructions attached to this Report. This Report and
2 any Objections will be reviewed by the District Judge whose initials appear in the
3 case docket number.

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JERRY WIZAR,

Petitioner(s),

v.

STU SHERMAN, Warden,

Respondent(s).

CASE NUMBER:

CV 15-03717-PSG (KES)

NOTICE OF FILING
OF MAGISTRATE JUDGE'S REPORT
AND RECOMMENDATION (COA)

TO: All Parties of Record

You are hereby notified that the Magistrate Judge's report and recommendation has been filed on
December 1, 2016

Any party having Objections to the report and recommendation and/or order shall, not later than
December 27, 2016, file and serve a written statement of Objections with points and
authorities in support thereof before the Honorable Karen E. Scott, U.S. Magistrate
Judge. A party may respond to another party's Objections within 14 days after being served with a copy of the
Objections.

Failure to object within the time limit specified shall be deemed a consent to any proposed findings of fact.
Upon receipt of Objections and any Response thereto, or upon lapse of the time for filing Objections, the case will
be submitted to the District Judge for disposition. Following entry of Judgment and/or order, all motions or other
matters in the case will be considered and determined by the District Judge.

Parties are advised that, effective December 1, 2009, Rule 11 of the Rules Governing Section 2254 Cases
was amended. Rule 11 now provides that in habeas corpus matters pursuant to 28 U.S.C. § 2254, the District Judge
must issue or deny a Certificate of Appealability when a final order adverse to the applicant is entered. Parties may
wish to take this Rule into consideration at the time they file any Objections to the report and recommendation.

The report and recommendation of a Magistrate Judge is not a final appealable order. A notice of appeal
pursuant to Federal Rules of Appellate Procedure 4(a)(1) should not be filed until entry of a judgment and/or order
by the District Judge.

CLERK, UNITED STATES DISTRICT COURT

Dated: December 1, 2016

By: Jazmin Dorado

Deputy Clerk

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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA
10

11 JERRY WIZAR,

12 Petitioner,

13 v.

14 STU SHERMAN, Warden,

15 Respondent.
16

Case No. CV 15-3717-PSG (KES)

ORDER DENYING MOTION
TO ALTER OR AMEND
JUDGMENT (Dkt. 37)

17
18 I.

19 PRIOR PROCEEDINGS

20 Petitioner initially filed a Petition for Writ of Habeas Corpus by Person
21 in State Custody asserting four grounds for relief. (Dkt. 1 at 3-4.) The Court
22 dismissed the petition with leave to amend, directing Petitioner to use the
23 approved form. (Dkt. 5.)

24 Petitioner filed his First Amended Petition ("FAP") filed on October 19,
25 2015. (Dkt. 10, 11.) The FAP asserts two ground for relief: (1) there was
26 insufficient evidence to convict Petitioner of second degree murder violating
27 Petitioner's due process rights; and (2) Petitioner's Sixth Amendment right to
28

1 effective assistance of trial counsel was violated when counsel failed to advise
2 Petitioner to accept a plea deal for manslaughter. (Dkt. 10 at 5; Dkt. 11 at 2-
3 14.) Ground One was included in the original petition, but Ground Two was
4 not.

5 Concurrently with filing the FAP, Petitioner requested that the Court
6 stay and hold his FAP in abeyance until he exhausted Ground Two in state
7 court. (Dkt. 9 at 1.) The Court permitted briefing on the stay motion. (Dkt.
8 13, 15.) Respondent filed an opposition, and Petitioner filed a reply. (Dkt. 23,
9 25.)

10 On May 19, 2016, the Magistrate Judge issued a Report and
11 Recommendation ("R&R") denying Petitioner's stay motion. (Dkt. 31.) The
12 R&R identified Petitioner's exhaustion petition in the California Supreme
13 Court as currently "pending." (Dkt. 31 at 4.) In fact, the California Supreme
14 Court denied Petitioner's exhaustion petition one day earlier, on May 18,
15 2016, but that order was not publically posted when the R&R was finalized.
16 (Dkt. 37 at 4.) The R&R found that Petitioner was not entitled to a stay under
17 either Rhines or Kelly. In discussing Kelly, the R&R found that Ground Two
18 was untimely as of the date Petitioner filed the FAP and did not relate back to
19 any of the claims in the original petition. (Dkt. 31 at 11-22.)

20 On June 13, 2016, Petitioner filed Objections to the R&R. (Dkt. 32.)
21 The Objections did not advise the Court that his exhaustion petition had
22 already been denied.

23 On June 27, 2016, the Court entered an order denying Petitioner's
24 request for a stay under Rhines or Kelly and ordering Respondent to file an
25 Answer to Ground One of the FAP (the "Order Denying Stay"). (Dkt. 33.)

26 On July 22, 2015, Petitioner filed a motion titled "Motion to Alter or
27 Amend Judgment – Rule 59(e)" seeking reconsideration of the Order Denying
28 Stay. Petitioner contends that rather than accepting the R&R, the Court

1 should have determined that his request for a stay was moot due to the denial
2 of his exhaustion petition in May 2016 and ordered Respondent to answer
3 both grounds.¹

4
5 **II.**
LEGAL STANDARD

6 A motion pursuant to Rule 59(e) of the Federal Rules of Civil Procedure
7 is appropriate when a party seeks to “alter or amend” a judgment. Fed. R.
8 Civ. P. 59(e). The language “alter or amend” contemplates “a substantive
9 change of mind” by the Court. Miller v. Transamerican Press, Inc., 709 F.2d
10 524, 527 (9th Cir. 1983). “Under Rule 59(e), a motion for reconsideration
11 should not be granted, absent highly unusual circumstances, unless the district
12 court is presented with newly discovered evidence, committed clear error, or
13 there is an intervening change in the controlling law.” 389 Orange Street
14 Partners v. Arnold, 179 F.3d 656, 665 (9th Cir. 1999); see also Kona Enter.,
15 Inc. v. Estate of Bishop, 229 F.3d 877, 890 (9th Cir. 2000) (“Although Rule
16 59(e) permits a district court to reconsider and amend a previous order, the
17 rule offers an ‘extraordinary remedy to be used sparingly in the interests of
18 finality and conservation of judicial resources.’”).

19 “There are four grounds upon which a Rule 59(e) motion may be
20 granted: (1) the motion is necessary to correct manifest errors of law or fact
21 upon which the judgment is based; (2) the moving party presents newly
22 discovered or previously unavailable evidence; (3) the motion is necessary to
23 prevent manifest injustice; or (4) there is an ‘intervening change in controlling

24 ¹ Petitioner also contends that it was an abuse of discretion to deem
25 Ground Two “procedurally defaulted” before letting him brief the issues of
26 cause and prejudice. (Dkt. 37 at 3.) Petitioner’s Ground Two was not
27 dismissed due to a procedural default; it was dismissed upon a finding that it
28 was unexhausted and untimely when filed.

1 law.” Turner v. Burlington N. Santa Fe R.R., 338 F.3d 1058, 1063 (9th Cir.
2 2003); see also Local Rule 7-18.

3 III.

4 ANALYSIS

5 Petitioner has presented new information to the Court, i.e., the fact that
6 the California Supreme Court denied his exhaustion petition on May 18, 2016.
7 (Dkt. 37 at 4.) This new information, however, does not compel a different
8 legal result.

9 “To be properly filed, a claim must have been exhausted at the time of
10 filing.” Nguyen v. Curry, 736 F.3d 1287, 1296 (9th Cir. 2013); see also Rose v.
11 Lundy, 455 U.S. 509, 520 (1982) (“[B]efore you bring any claims to federal
12 court, be sure that you first have taken each one to state court.”)]. There is no
13 dispute that Petitioner’s Ground Two was not exhausted at the time he filed it
14 in the FAP. It was, therefore, properly dismissed for lack of exhaustion. The
15 date of the California Supreme Court’s denial of the exhaustion petition
16 relative to the R&R or the Order Denying Stay is irrelevant; it only matters
17 that the denial occurred *after* Ground Two was filed in the FAP.

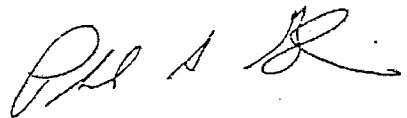
18 Moreover, a “claim added to a timely filed habeas petition after the
19 expiration of the statute of limitations is timely only if the new claim relates
20 back to a properly filed claim contained in the original petition.” Nguyen, 736
21 at 1296. Here, Petitioner filed his timely initial petition in May 2015, his
22 federal statute of limitations expired in September 2015, and the FAP was not
23 filed until October 2015. (Dkt. 31 at 18-19.) Ground Two does not “relate
24 back” to any of the claims in the original petition, none of which had anything
25 to do with trial counsel’s performance or the plea bargaining process. (Dkt. 1
26 at 3-4.) Thus, regardless of exhaustion, Ground Two is also untimely.

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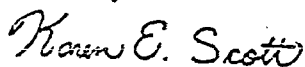
1 For these reasons, the Court affirms its prior decision to dismiss Ground
2 Two and order Respondent to answer only Ground One of the FAP.
3 Petitioner's Motion to Alter or Amend Judgment is DENIED.

4
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6 Dated: 8/1/16



PHILIP S. GUTIERREZ
United States District Judge

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9 Presented by:



KAREN E. SCOTT
United States Magistrate Judge

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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA
10

11 JERRY WIZAR,

12 Petitioner,

13 v.

14 STU SHERMAN, Warden,

15 Respondent.
16

Case No. CV 15-3717 PSG (KES)

ORDER DENYING PETITIONER'S
"MARTINEZ MOTION"

17 I.
18

19 BACKGROUND

20 On May 18, 2015, Petitioner, a California state prisoner
21 proceeding pro se, constructively filed a Petition for Writ of
22 Habeas Corpus pursuant to 28 U.S.C. section 2254 (the
23 "Petition"). (Dkt. No. 1). Petitioner was convicted of second
24 degree murder with personal use of a deadly weapon in violation
25 of California Penal Code ("PC") §§ 187(a) and 12022(b)(1). (Dkt.
26 1 at 36.) Petitioner raised four claims: (1) there was
27 insufficient evidence to convict Petitioner of second degree
28 murder; (2) ineffective assistance of appellate counsel for

1 failing to argue that Petitioner should have been sentenced based
2 on voluntary manslaughter rather than second degree murder;
3 (3) ineffective assistance of appellate counsel for failing to
4 argue that Petitioner was guilty only of the lesser-included
5 offenses; and (4) the superior court erred in failing to allow
6 Petitioner to file an Informal Brief after allowing the district
7 attorney to informally respond to Petitioner's habeas brief. (Id.
8 at 3-33.)

9 On June 22, 2015, the previously assigned Magistrate Judge
10 issued an Order Dismissing Petition with Leave to Amend. (Dkt.
11 5.) Petitioner was granted 30 days from the date of the Order to
12 cure the defects and file a First Amended Petition.

13 On October 19, 2015, Petitioner filed a First Amended
14 Petition (Dkt. 10) along with an Addendum to Petition (Dkt. 11)
15 (collectively "FAP"). The FAP contains only two claims for
16 relief: (1) insufficiency of the evidence to convict Petitioner
17 of second degree murder, violating Petitioner's due process
18 rights; and (2) Petitioner received ineffective assistance of
19 counsel ("IAC") when trial counsel failed to advise Petitioner
20 competently to accept a plea deal for manslaughter. (Dkt. 10 at
21 5; Dkt. 11 at 2-14.)

22 Concurrently with the filing of the FAP, Petitioner filed
23 "Objections to Magistrate; Declaration in Support." (Dkt. 9.) In
24 his objections, Petitioner requested the Court to hold his FAP in
25 abeyance until he exhausts Ground Two in state court. (Id. at 1.)
26 Petitioner contended good cause prevented him from presenting his
27 claim sooner. (Id.) Petitioner alleged that Ground Two was
28 pending in a habeas petition he filed on October 13, 2015 in the

1 Los Angeles County Superior Court. (Id. at 3-20.)

2 On October 27, 2015, the Court issued an Order Re Further
3 Proceedings affording Respondent an opportunity to address
4 Petitioner's motion for a stay. (Dkt. 15.)

5 On February 1, 2016, Respondent filed an "Opposition To
6 Motion for Stay and Abeyance; Memorandum of Points and
7 Authorities." (Dkt. 23.) Respondent contended that Petitioner
8 failed to show good cause under Rhines v. Weber, 544 U.S. 269
9 (2005) for his failure to exhaust Ground Two. (Id. at 3-8.)
10 Respondent also contended that Ground Two is untimely. (Id. at 8-
11 17.)

12 On March 14, 2016, Petitioner filed a "Reply To Opposition
13 On Motion To Stay And Abeyance." (Dkt. 25.) Petitioner argued
14 that good cause for a Rhines stay exists, because his appellate
15 counsel failed to raise the unexhausted IAC claim on direct
16 appeal. (Id. at 2-7.) Petitioner also argued that his IAC claim
17 is meritorious and he has been diligent. (Id.) Petitioner
18 constructively filed a habeas petition raising Ground Two on
19 February 9, 2016 in the California Supreme Court; it was denied
20 on May 18, 2016. (Id. at 7; Dkt. 37 at 4.)

21 On May 19, 2016, the Magistrate Judge issued a Report and
22 Recommendation ("R&R") recommending that Petitioner's motion for
23 a stay be denied and that Ground Two be dismissed as both
24 unexhausted and untimely. (Dkt. 31.) On June 27, 2016, the Court
25 accepted the R&R and ordered Respondent to answer Ground One
26 only. (Dkt. 33.)

27 On July 22, 2016, Petitioner moved to alter or amend the
28 order dismissing Ground Two, arguing that he had shown

1 sufficiently good cause to obtain a Rhines stay. (Dkt. 37.) On
2 August 8, 2016, the Court denied Petitioner's motion. (Dkt. 38.)
3 The Court explained that even if Petitioner could demonstrate
4 sufficiently good cause to obtain a Rhines stay (which would
5 "freeze" his federal statute of limitations as of the date he
6 filed Ground Two in the FAP), he would still not be able to
7 pursue Ground Two, because Ground Two was untimely as of the date
8 Petitioner filed the FAP. (Dkt. 31 at 11-22.)

9 **II.**

10 **THE INSTANT MOTION**

11 On August 30, 2016, Petitioner filed a motion titled
12 "Martinez Motion" asking yet again to have Ground Two reinstated
13 and heard on the merits. (Dkt. 44.) Plaintiff argues that he
14 has shown sufficiently good cause to overcome any procedural
15 default that might otherwise bar federal habeas review of Ground
16 Two, citing Martinez v. Ryan, 566 U.S. 1, 132 S. Ct. 1309, 1311
17 (2012) (holding a procedural default will not bar a federal
18 habeas court from hearing a substantial claim of IAC at trial if,
19 in the [State's] initial-review collateral proceeding, there was
20 no counsel or counsel in that proceeding was ineffective).

21 Nothing in the instant motion, however, addresses the fact
22 that Petitioner did not constructively file his FAP containing
23 Ground Two until October 13, 2015, over a month after his federal
24 statute of limitations (calculated in light of all available
25 tolling, per the R&R) expired. Because Ground Two does not share
26 a common core of operative facts with the previously asserted
27 grounds for relief, it does not relate back to Petitioner's
28 filing of the original Petition and is untimely.

1 For these reasons, Petitioner's Martinez motion is DENIED.

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3 DATED: _____ 9/13/16 _____

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PHILIP S. GUTIERREZ
UNITED STATES DISTRICT JUDGE

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9 PRESENTED BY:

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Karen E. Scott

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KAREN E. SCOTT
UNITED STATES MAGISTRATE JUDGE

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