

No.

IN THE SUPREME COURT OF THE UNITED STATES

HUMBERTO DIAZ,

Petitioner,

v.

G.D. LEWIS, Warden,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE NINTH CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

Walter K. Pyle
2039 Shattuck Avenue, Suite 202
Berkeley, CA 94704-1116
(510) 849-4424
walt@wfkplaw.com
Attorney for Petitioner

THE QUESTION PRESENTED

Does an attorney render ineffective assistance of counsel to her criminal defendant client when, in closing argument, she concedes a fact that incriminates the defendant and then argues a theory that is not supported by the evidence?

TABLE OF CONTENTS

THE QUESTION PRESENTED	i
PETITION FOR WRIT OF CERTIORARI	1
OPINIONS BELOW	1
JURISDICTION	2
THE CONSTITUTIONAL PROVISION INVOLVED.....	2
INTRODUCTION	2
STATEMENT OF THE CASE.....	4
1. The Only Testimony About a “Get a Gun” Statement Was That It Was Said Before Anyone Got Out of the Car.....	5
Testimony of Tykeymo Harrison	5
Testimony of Dorral Hicks	6
Testimony of Dorrata Hicks.....	7
Testimony of Jovan Gaut	8
2. Defense Counsel Based Her Closing Argument on the Mistaken Belief That the “Get a Gun” Statement Was Made After Everyone Got Out of the Car and Confronted Diaz in the Middle of the Street.....	9
3. The Courts’ Rulings on the Claim Are Not Based on the Record.....	12
LEGAL DISCUSSION	13
1. Making an Argument About a Crucial Point That Is Not Supported by the Record Is Not “Sound Trial Strategy.”	14
2. Absent Defense Counsel’s Gaffe, It is Reasonably Probable That the Outcome Would Have Been More Favorable to Petitioner.....	17
3. Reasons for Granting the Petition—The Prosecutor, Defense Counsel, One State Court Judge and Five Federal Judges Processed Petitioner’s Case on the Basis of Crucial Facts That Never Took Place. Such a Severe Breakdown of the Criminal Justice System Calls Out for Reversal of the Court of Appeals Decision, and a Remand to Consider Petitioner’s Case in Light of the True Facts.	19

CONCLUSION.....	15
-----------------	----

APPENDIX

Memorandum Decision of the Court of Appeals.....	App. 1
Order of District Court Denying Habeas Corpus Petition.....	App. 5
Magistrate Judge’s Findings and Recommendations, Recommending that Habeas Petition Be Denied	App. 7
Order of Sacramento County (California) Superior Court Denying State Habeas Corpus Petition.....	App. 27

TABLE OF AUTHORITIES CITED

CASES

<u>Buck v. Davis</u> , 137 S.Ct. 759, 580 US __, 197 L. Ed. 2d 1 (2017).....	24
<u>Cavazos v. Smith</u> , 565 U.S. 1, __, 132 S.Ct. 2, 181 L.Ed.2d 311 (2011)	18
<u>Dye v. Hofbauer</u> , 546 U.S. 1 (2005)	22
<u>Flippo v. West Virginia</u> , 528 U.S. 11 (1999)	22
<u>Harvard v. Florida</u> , 459 U.S. 1128 (1983)	18
<u>Herring v. New York</u> , 422 U.S. 853 (1975).....	14
<u>Holmes v. South Carolina</u> , 547 U.S. 319 (2006).....	18
<u>Juan H. v. Allen</u> 408 F.3d 1262 (9th Cir. 2005), cert. denied 546 U.S. 1137 (2007)	19
<u>Kimmelman v. Morrison</u> , 477 U.S. 365 (1986)	20
<u>Langston v. Smith</u> , 630 F.3d 310 (2d Cir.), cert. denied, 565 U.S. __, 132 S.Ct. 366 (2011).....	19
<u>Michel v. Louisiana</u> , 350 U.S. 91 (1955)	14
<u>Ohio v. Reiner</u> , 532 U.S. 17 (2001)	22
<u>Pennsylvania v. Labron</u> , 518 U.S. 938 (1996).....	22
<u>People v. Howard</u> , 190 Cal.App.3d 41 (1987).....	17
<u>People v. Romero</u> , 8 Cal.4th 728 (1994).....	12
<u>Rivera v. Cuomo</u> , 649 F.3d 132 (2d Cir. 2011).....	19
<u>Rompilla v. Beard</u> , 545 U.S. 374 (2005).....	17
<u>Sao Paulo v. American Tobacco Co.</u> , 535 U.S. 229 (2002).....	22
<u>Strickland v. Washington</u> , 466 U.S. 668 (1984)	14, 1516, 20, 21, 24
<u>Thompson v. Keohane</u> , 516 U.S. 99 (1995).....	20
<u>United States v. Bailey</u> , 444 U.S. 394 (1980).....	18
<u>Wiggins v. Smith</u> , 539 U.S. 510 (2003)	20
<u>Williams v. Taylor</u> , 529 U.S. 362 (2000)	17

<u>Yarborough v. Gentry</u> , 540 U.S. 1 (2003)	14, 19
<u>Ylst v. Nunnemaker</u> , 501 U.S. 797 (1991)	12

CALIFORNIA PATTERN JURY INSTRUCTIONS

CALCRIM 400	11
CALCRIM 401	11
CALCRIM 403	11
CALCRIM 875	11
CALCRIM 983	11

STATUTES

28 U.S.C. § 1254	2
28 U.S.C. § 1291	2
28 U.S.C. § 2254	2, 20

U. S. CONSTITUTION

Sixth Amendment	2
Fourteenth Amendment	2

RULES OF THE U. S. SUPREME COURT

Rule 13	2
Rule 16	22

CALIFORNIA RULES OF COURT

4.550	12
4.551	12

IN THE UNITED STATES SUPREME COURT

HUMBERTO DIAZ,

Petitioner,

v.

G.D. LEWIS, Warden,

Respondent.

PETITION FOR WRIT OF CERTIORARI

Humberto Diaz respectfully petitions for a writ of certiorari to the Ninth Circuit Court of Appeals, to review its decision denying habeas corpus relief from his state conviction of three counts of attempted murder.

OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals Memorandum Decision appears at App. 1, and is unreported.

The order of the District Court adopting the findings and recommendations of the magistrate judge and denying the habeas petition appears at App. 5, and is unreported. The Report and Recommendation of the Magistrate Judge, recommending that the habeas petition be denied, appears at App. 7, and is unreported.

The decision of the Superior Court of Sacramento County (California), denying Petitioner's state habeas corpus petition, appears at App. 27, and is unreported.

JURISDICTION

The Ninth Circuit Court of Appeals. denied relief in a memorandum decision on October 23, 2017. This petition is filed within 90 days, and is timely pursuant to Rule 13.1 of this Court.

The district court had jurisdiction of appellant's habeas petition pursuant to 28 U.S.C. § 2254.

The Court of Appeals had jurisdiction of the appeal from a final judgment of a district court pursuant to 28 U.S.C. § 1291.

The jurisdiction of this court is invoked pursuant to 28 U.S.C. §1254(1) as a petition to review a decision by a court of appeals.

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the U.S. Constitution provides in relevant part:

In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.

INTRODUCTION

A carload of young men drove up to a street corner where another group of men, including Petitioner Diaz, was hanging out, and got out of the car. A potentially dangerous confrontation was avoided when it turned out one of the young men in the car knew Diaz. The two shook hands, and as the group was getting back into their car, a person identified as the co-defendant Jamual Broadbent came up to the passenger side of the car and fired several shots.

Broadbent and Diaz were convicted of attempted murder. The State's theory against Diaz was that he aided and abetted Broadbent by making the statement, "Get a gun." The prosecutor argued that the statement verbally encouraged the use of deadly force.

Diaz did not testify, but he told his attorney he never made the statement.

The only evidence that Diaz made the statement was the testimony of one of the car's passengers, Dorral Hicks, who said he heard Diaz say it *before* he (Dorral) got out of the car. A second witness, the driver of the car, heard "somebody" say "get a gun," but he, too, heard the statement before he got out of the car.

In closing argument, defense counsel conceded Diaz had made the statement, but argued that he made it out of fear, only after an "aggressive" driver of the car and two of his cohorts had confronted Diaz in the middle of the street, and Diaz thought the driver might have a gun and it was the only thing he could think of that might keep him from getting shot.

The problem with counsel's argument was that there had been no testimony that the "get a gun" statement was made after Diaz had been threatened by anyone in the other group. The only evidence that such a statement was made placed the statement well before any confrontation. The jury seems to have been aware of the discrepancy. During deliberations, they asked several questions about what "statement" of Diaz the jury instructions referred to, and asked about aiding and abetting liability, and asked to hear a replay of a recording of a police interview with Dorral Hicks, where Hicks initially did not mention that Diaz said anything, but instead told the investigator that as the car drove up "my brother said one of them was going to go get a gun." Later in the interview, the investigator suggested to Hicks that he heard "someone say to tell someone to go and get a gun" and that the someone was Diaz. Hicks responded, "Uh-huh."

When defense counsel filed a notice of appeal, in her "Statement of Points on Appeal" she listed as Point No. 10 "IAC [ineffective assistance of counsel] for defense counsel's argument to jury conceding defendant made the statement

“Go get the gun.” Diaz also presented, in his state habeas petition, a letter from defense counsel to appellate counsel, in which she stated she did not know why she made the argument, that it was a “complete mistake” and had nothing to do with any tactical decision.

The state court that examined Diaz’s claim of ineffective assistance of counsel overlooked that the testimony established that the “get a gun” statement was made before anyone got out of the car, well before any confrontation with Diaz. The court concluded that counsel’s argument was a reasonable tactical decision.

So did the district court.

So did the Court of Appeals.

STATEMENT OF THE CASE

One evening Dorrante Hicks and Michael Jordan were walking by a group of young men hanging out on a Sacramento street corner. ER 295.¹ One of the group asked “where you all from,” ER 301, and Michael responded, “I’m from L.A. but I don’t gang bang.”² ER 302. Someone in the group told them they didn’t belong there, and that they had to get out of there. ER 303. When Dorrante said he was fixing to leave, the other person said, “Shut up, bitch, or I’ll slap you.” ER 304. After Dorrante and Michael walked on, Dorrante called his older brother, Tykeymo Harrison, ER 538, and asked him to pick them up, because the men on the street corner had been messing with him. ER 310.

Tykeymo, with three other youths—Anthony Watson, Jovan Gaut (also known as “B”), and Tykeymo’s brother Dorral Hicks, drove over to pick up

¹ We reference the Excerpts of Record (ER) filed in the court of Appeals. Tykeymo Harrison, Dorrante Hicks, and Dorral Hicks are brothers. We will use their first names in this narrative.

² We are informed that the phrase “Where you from?” is often interpreted to mean “What gang are you with?”

Dorrate. ER 557. After Dorrate got in the car, Tykeymo asked Dorrate to show him where the incident took place, because he wanted to find out why they had been messing with his little brother. ER 313, 422. Michael did not go with them. ER 312.

1.

The Only Testimony About a “Get a Gun” Statement Was That It Was Said Before Anyone Got Out of the Car.

At trial, the record reflects that Dorral Hicks was the only person to testify Diaz said to “get a gun.” Tykeymo Harrison said he heard “somebody” say to get a gun. But both witnesses said this took place before they got out of the car.

Of the five persons in the car, Anthony Watson did not testify.

Tykeymo Harrison testified that after he pulled up to the corner, Anthony and his brother Dorrate “bounced out” of the car. ER 546. Tykeymo then pulled the car over a little closer to the sidewalk, ER 547, and put the car in park. ER 549. He kept the car running, ER 548, and when he stepped out of the car, ER 550, he saw his brother Dorral shaking hands with a guy in the middle of the street [Diaz]. ER 551. He heard the guy in the middle of the street say “it’s all good.” ER 554. He testified that “before that I heard somebody saying get a gun.” ER 548. Tykeymo did not say who said it (if he knew), but when the prosecutor asked Tykeymo where he was when he heard the statement, he testified, “I was putting the car in park.” ER 550.

Tykeymo told his brothers to get back in the car, and at the same time he saw somebody in a jacket with a hood go to the side of a house. ER 555. Before they could close the door, someone came up and shots started going off from the passenger side of the car. ER 558.

Dorral Hicks testified that when he got out of the car at first he stayed near the car. ER 441. But then he recognized someone he saw standing in the

middle of the street, ER 442, someone he had seen some months before in a jewelry store that sells gold teeth. ER 443, 447. The person was the defendant, Mr. Diaz. ER 463. Dorral went over and told Diaz that he remembered seeing him earlier at a jewelry store, and "He [Diaz] said I remember," and "Then he shook my hand." ER 446-447. After they shook hands Diaz "just -- he was calm, I guess." ER 448.

When the prosecutor initially asked Dorral if he heard Diaz make conversation with anyone else, he said, "I don't remember." ER 450. The prosecutor asked Dorral a number of questions about the statement he had given Detective Poroli at the hospital. At first Dorral said he didn't remember talking to Detective Poroli, ER 462, 465, but the court allowed the prosecutor to ask a series of leading questions about the interview. ER 460. Many of Dorral's answers were, "I don't remember." ER 462, 466. When the prosecutor finally asked if he had told the detective that the guy in the street told one of the other guys to go get a gun, he responded, "Yes," ER 466, "I think, yes." ER 467.

After several further leading questions, Dorral said he now remembered that the guy in the middle of the street told somebody to go get a gun. In fact, "He yelled it out." ER 468.

The prosecutor's questions to Dorral on direct examination did not establish *when* he heard the "get a gun" statement. On redirect examination, however, he testified that the statement about getting the gun was made *before* he got out of the car:

Q How soon did you attempt to converse with him [the man in the middle of the street] to let him know that you had recognized him from a prior occasion?

A Same time I got out and seen him.

Q Was it before or after that time that you heard him say go get a gun?

A Before.

ER 524.

Dorrante Hicks (who stayed by the car) testified that when everybody got out of the car and met the person in the middle of the street, the person “turned back around and said something to two other ones that was with him.” ER 316. This was after Tykeymo told the person in the street that his brother had told him “someone down here was messing with him;” Hicks testified “I didn’t hear what he [the person in the street] said, but he looked back and said something to two of his friends.” ER 319. After Dorral told the guy in the middle of the street, “I know you . . . they was just shaking hands, and then they was like everything cool.” ER 320.

On cross examination Dorrate was asked:

Q Okay. So three guys are on the corner then?

A Yes.

Q All right. And you’re indicating that you -- you saw this man in the middle of the street turn around, but you didn’t hear words?

A No.

Q. Is that fair?

A Yes.

Q So you don’t know if he said anything at that point or not?

A No.

Q You didn’t hear anything?

A No.

ER 400.

On redirect examination, the prosecutor asked Dorrage if he heard anything at another time:

Q I'm going to hop around a little bit. Okay?

A Yes.

Q Okay. Now, from the point in time when those two guys start to walk over to that side yard or the side of a house, do you ever see that guy in the street ever say anything else, or appear to be saying anything else to those two guys?

A No.

ER 428-429.

Jovan Gaut testified he never heard the man in the middle of the street say anything to any of his companions. He testified that when his friends got out of the car, "they appeared hostile," ER 741, and there were some "hostile" words, aggressive words, but then things died down. "It's all three of the brothers in -- in a bit of circle -- half circle around the other guy talking, resolving it." ER 743.

Q You never hear the guy in the street actually say anything to anybody?

A No.

Q What -- any of his homies or any of his guys, right?

A No.

ER 743.

There was no evidence, then, that anybody heard anything about getting a gun after Tykeymo and his group got out of the car.

Diaz told his attorney he never made the statement. ER 171.

2.

Defense Counsel Based Her Closing Argument on the Mistaken Belief That the “Get a Gun” Statement Was Made After Everyone Got Out of the Car and Confronted Diaz in the Middle of the Street.

Why did defense counsel construct her argument around facts that never took place during the trial?

She may have been influenced by, and responding to, what the prosecutor told the jury, instead of recalling the actual trial testimony.

Because the prosecutor, too, got the facts wrong.

In closing argument, the prosecutor explained that Diaz was being prosecuted as an aider and abettor, someone who knows the perpetrator’s unlawful purpose and specifically intends to promote or encourage the perpetrator’s commission of the crime. ER 786-787. The prosecutor argued that Diaz told his “homeboy” to get the gun, and what Diaz did “verbally encouraged and promoted the use of lethal deadly force.” ER 788.

According to the prosecutor, Diaz made the “get a gun” statement *after* Tykeymo and his group were out of the car and facing Diaz on the street: “The victims jump out of the car. Diaz walks right to them. Telling his homeboy to go get the gun. Victims are out of the car.” ER 788.

The record does not support the prosecutor’s statements, but if defense counsel did not recall the actual testimony about this crucial point, what she heard the prosecutor say might explain why she told the jury that Diaz did, in fact, say “Get a gun,” and why she argued that he made it out of fear that the driver of the car was armed, *after* the driver had confronted Diaz in the middle of the street in an “aggressive” manner. She argued that Diaz didn’t make the statement to encourage Broadbent, but rather he said it for the Tykeymo’s benefit, “designed to get him to back off, designed to get him not to use a gun.” ER 820.

It was defense counsel herself who brought out on cross-examination that Dorral heard the statement “go get a gun” prior to the confrontation, even before he got out of the car:

Q [By defense counsel] You testified earlier that you heard someone say go get a gun?

A Yeah.

Q That was after Tykeymo had confronted the men there about messing with his little brother?

A It was before.

Q Isn't that correct?

A No.

Q Did you say before?

A It was before.

Q And you remember that, sir?

A Yes.

Q Are you sure?

A Yes.

3 ER 494-495.

Not only did counsel's closing argument not square with the testimony, but counsel conceded that Diaz was the person who had made the statement, when the State's evidence on that point was weak at best.

During deliberations, the jury asked the court, “What statements made by Diaz, before the trial, were referred to in the instructions?” ER 875. The response from the court was not much help: “It is for you to decide what if any statements were made by Mr. Diaz on January 13, 2006, that pertain to your deliberations.” ER 876. Later the jury asked, “Does aiding and abetting a crime mean setting any crime into motion or does it mean aiding and abetting

attempted murder? How ‘linked’ are the aiding and abetting charge to the attempted murder?” ER 883. The court responded by referring the jury to the standard pattern jury instructions: “Mr. Diaz is charged with attempted murder as an aider and abettor under either of two theories: see Principals, CALCRIM 400, CALCRIM 401, CALCRIM 403, CALCRIM 875 and CALCRIM 983.” ER 884. The jury then asked, “Can Diaz be convicted of a lesser crime than Broadbent may have been found guilty of?” ER 885. The court said he could. ER 886. The jury then asked to hear the tape recording (along with transcripts) of Dorral Hicks’s interview with Detective Poroli at the hospital. ER 887. The jury was brought into the courtroom and the recording was played for them. ER 881.

Diaz, as part of his state habeas corpus petition, presented a letter from defense counsel to his appellant counsel, in which defense counsel explained that Diaz had asked her not to argue he made the get-a-gun statement, but she did anyway. She said “I can’t explain why I did that,” and related how one of the jurors told her after the verdict they felt they had no choice but to convict Mr. Diaz because she told them Mr. Diaz said those words. “This was a complete mistake on my part, having nothing to do with any tactical decision I made.” ER 256.³

In an unsuccessful post-trial motion to disclose the jurors’ contact information, ER 213, defense counsel presented a declaration telling how one juror telephoned her after the verdict, expressing regret that he had voted for guilt, ER 218, and stating that everybody on the jury wanted to find Mr. Diaz guilty of a lesser crime but that attempted voluntary manslaughter “didn’t fit,”

³ Counsel’s letter, written three months after the trial, shows she was still under the impression that two witnesses, not one, had said Diaz said to get a gun, and that the witnesses said he said it after the confrontation in the middle of the street, and after Diaz had shook hands with Dorral Hicks. ER 255.

so he felt he had no choice but to vote for guilt on the attempted murder charge. ER 219.

3.

The Courts' Rulings on the Claim Are Not Based on the Record.

Defense counsel and the prosecutor were not the only one to misconstrue the evidence. So did one state court and two federal courts.

A habeas corpus petition filed in a California court is the prisoner's "initial filing that commences a proceeding." Rule 4.550(b)(1), Calif. Rules of Court. A judge "takes petitioner's factual allegations as true and makes a preliminary assessment regarding whether the petitioner would be entitled to relief if his or her factual allegations were proved. If so, the court must issue an order to show cause." Rule 4.551(c)(1), Calif. Rules of Court. A ruling by a California court on a habeas corpus petition without an evidentiary hearing (i.e., at the "allegation" stage) assumes that the allegations in the habeas corpus petition are true. People v. Romero, 8 Cal.4th 728, 740 (1994). Here the Superior Court of Sacramento County dismissed Diaz's petition at the "allegation stage," which means the court assumed his allegations were true, but thought even if they were true they did not establish a prima facie case. That ruling was the only reasoned decision by the California courts, so a federal habeas court "looks through" any silent denials, to that decision. Ylst v. Nunnemaker, 501 U.S. 797, 804 (1991).

Diaz's state habeas corpus petition was denied by the same judge who heard the trial. He may have looked only at the petition and trial counsel's attached letter, rather than his own trial notes, because he stated that defense counsel said in her letter to appellate counsel that two witnesses, not one, said Diaz said to get a gun. In any event, the judge's decision does not address the actual testimony, and merely says "even though after the fact trial counsel

stated it was not a tactical decision to admit Diaz made the statement, it actually was a tactical decision on counsel's one [sic], and a reasonable one at that, in deciding not to challenge strong testimony that petitioner had in fact made the statement and instead deciding to attempt to explain away the statement in hopes that the jury would believe that reasoning." App. 31.

The findings and recommendation of the magistrate judge in the district court stated that "witnesses testified that petitioner told one of his confederates to 'go get a gun' *during the confrontation* that immediately preceded the shooting," App. 13 [italics added], and that counsel's argument "gave the jury an exculpatory interpretation of the evidence that had been presented." App. 16. The district judge who adopted the findings and recommendations found, without further elaboration, "the findings and recommendations to be supported by the record and by proper analysis." App. 5.

Diaz emphasized in his federal appeal that the "get a gun" statement, if it was made at all, was made at the wrong time to support defense counsel's argument. However, the Memorandum Decision of the Court of Appeals summarily stated, without analysis, that the state court decision correctly concluded that "the record could support counsel's theory in closing that Diaz said 'get a gun' only to scare off potential assailants." App. 3.

LEGAL DISCUSSION

Closing argument is defense counsel's only opportunity, at the close of the case, to marshal the evidence for the jury, for example, by pointing out the inconsistencies between a witness's testimony and his earlier statement to an investigating detective, or calling the jury's attention to a leading question by a detective which might have influenced the witness's trial testimony. "[F]or the defense, closing argument is the last clear chance to persuade the trier of fact

that there may be reasonable doubt of the defendant's guilt.” Herring v. New York, 422 U.S. 853, 862 (1975).

In his federal appeal, Diaz emphasized that counsel’s concession that he had made the “get a gun” statement, in connection with presenting a defense based on facts that never occurred, constituted ineffective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984) teaches that ineffective assistance of counsel consists of (1) deficient performance, measured against an objective standard of reasonableness under prevailing professional norms, and (2) a reasonable probability that, but for counsel's failings, the result would have been more favorable to the petitioner. Id. at 687. The right to effective assistance extends to closing arguments. Yarborough v. Gentry 540 U.S. 1, 5 (2003) (per curiam).

1.

Making an Argument About a Crucial Point That Is Not Supported by the Record Is Not “Sound Trial Strategy.”

As a general rule, defense counsel must be given wide latitude to make tactical decisions, and for that reason the defendant must overcome a presumption that the challenged action “might be considered sound trial strategy.” Strickland, *supra* 466 U. S. at 689, citing Michel v. Louisiana, 350 U.S. 91, 101 (1955).

But here the only evidence connecting Diaz with the shooting was testimony that he said to get a gun. It is not unreasonable, in applying an “objective standard of reasonableness,” to expect that defense counsel should recall crucial evidence about the statement—especially when it was the only evidence connecting her client with the shooting. Diaz submits that an “objective standard of reasonableness” in the context of this case means, among other things, counsel maintaining a reasonable recollection of the testimony, at

least testimony that goes to the heart of the State's case, and having a reasonable recollection of the major weaknesses that showed up in the State's evidence. It is not difficult to conclude that "sound trial strategy" does not include presenting an argument that is not supported by the record, and for that reason there can be little question that Diaz's lawyer did not meet the standard of reasonableness here.

Defense counsel could not explain why she made the argument, ER 211, but it can be said with fair assurance that it was not the result of reasonable professional judgment, and it did not make the adversarial testing process work in the case at hand. Strickland, supra, 466 U.S. at 690.

Moreover, contrary to the California Superior Court's decision, the evidence that Diaz made the statement was not strong at all. Dorral's testimony was suspect, first because in his initial narrative to Detective Poroli he did not mention at all that Diaz said to "get a gun." Rather, he said that as the car pulled up his brother told him somebody was going to get a gun. Second, it was only after Detective Poroli suggested that Dorral had heard someone make such a statement, and that it was Diaz who made it, that Dorral agreed that Diaz had said it.

Detective Poroli had interviewed Dorral at the hospital five days after the shooting, and surreptitiously recorded their conversation. ER 614. Dorral was still under medication. ER 629.

Dorral told Poroli they were driving on 36th Street when they saw a group of young men. "And we pulled over. . . We was gong to pull over, but then my brother [it is unclear which brother] said one of them was going to go get a gun. . ." ER 859.

Poroli then asked what happened when Dorral got out of the car, and Dorral told him that he recognized someone he had seen at "[t]he Gold Teeth

Store.” ER 861. Poroli then asked about the shooter, and Dorral described him. ER 861-862.

In Dorral’s first narrative in the interview he had not mentioned someone telling someone else to go get a gun, but rather said he heard his brother say “one of them” was going to get a gun. ER 859. However, Poroli asked a series of leading questions that suggested that Dorral heard someone say to get a gun, and it was Diaz who said it:

UNK. DET.: Okay. So you guys actually are back -- getting back into the car? Did you hear someone say to tell someone to go get a gun?

MR. HICKS: (No audible response).

UNK. DET.: Who said that? The guy you were talking to or someone else?

MR. HICKS: Uh-huh.

UNK. DET.: So the guy you were talking to when you got out of the car told this other guy to go get a gun?

MR. HICKS: Uh-huh.

UNK. DET.: And. -- and where did he go?

MR. HICKS: To the side of a house.

ER 862.

Aside from Dorral’s prior inconsistent statement, a juror might also question whether Dorral had actually heard Diaz say anything at all while Dorral was still in the car, since he did not see or recognize Diaz until *after* he got out of the car, and for that reason it is unlikely he would have known whether or not it was Diaz who made the statement. ER 524. A juror might also wonder if in fact “[h]e yelled it out,” ER 468. why *all* the witnesses did not

hear it. Finally, Dorral's testimony contained many answers saying, "I don't remember." ER 450, 462, 466.

But defense counsel did not exploit these weaknesses in the State's case. See Strickland, 466 U.S. at 696 ["a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support"].

2.

Absent Defense Counsel's Gaffe, It is Reasonably Probable That the Outcome Would Have Been More Favorable to Petitioner.

The prejudice component is a mixed question of law and fact. Strickland, *supra*, 466 U.S. at 698 ["both the performance and prejudice components of the ineffectiveness inquiry are mixed questions of law and fact"]. Because the state court found no ineffective assistance, it did not address the issue of prejudice, and a federal court examines the element of prejudice de novo. Rompilla v. Beard, 545 U.S. 374, 390 (2005).

A "reasonable probability" of a different outcome of does not mean a different outcome would be "probable." The Strickland opinion cautioned that "a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case." *Id.*, 466 U.S. at 693; see also Williams v. Taylor, 529 U.S. 362, 405-406 (2000) [a "preponderance" standard is diametrically opposed to Strickland's precedent]. A reasonable probability is one "sufficient to undermine confidence in the outcome." 496 U.S. at 694. One California court characterized this standard as "a significant but something-less-than-50 percent likelihood of a more favorable verdict." People v. Howard, 190 Cal.App.3d 41, 48 (1987). Even if it is possible that in the absence is counsel's deficient performance a jury could have still decided against Petitioner, "that is not the test." Rompilla v. Beard, *supra* 545 U.S. at 393.

The questions asked by the jury during deliberations and their request to replay Dorral's interview with Detective Poroli suggest the State's case was not open-and-shut. Importantly, the weaknesses in the State's case went to the credibility of its witnesses, particularly Dorral, and questions of credibility are for the jury, not a reviewing court, to decide. "The Anglo-Saxon tradition of criminal justice, embodied in the United States Constitution and in federal statutes, makes jurors the judges of the credibility of testimony offered by witnesses. It is for them, generally, and not for appellate courts, to say that a particular witness spoke the truth or fabricated a cock-and-bull story." United States v. Bailey, 444 U.S. 394, 414-415 (1980); see also Holmes v. South Carolina, 547 U.S. 319, 330 (2006) [factual findings have traditionally been reserved for the trier of fact]; Cavazos v. Smith, 565 U.S. 1, ___, 132 S.Ct. 2, 4, 181 L.Ed.2d 311 (2011) [the jury must decide what conclusions to draw from the evidence]. Another reason is because "a cold record cannot recreate testimony. A witness may be credible on paper but not on the stand." Harvard v. Florida, 459 U.S. 1128, 1134 (1983) (Marshall, J., dissenting from denial of certiorari). This means that a reviewing court cannot say whether, had counsel not conceded that appellant said "get a gun," the jury would have believed Dorral's testimony that he heard Diaz said it. But it does mean that there is a reasonable probability of a different outcome.

It is reasonable to conclude that it did not go unnoticed by all 12 jurors that when the prosecutor first asked Dorral if he heard the person on the street talking to anyone else Dorral said, "I don't remember," ER 450, and that at least some of the jurors might have questioned whether the detective's leading questions were the source of Dorral's testimony that Petitioner said to get a gun. Dorral initially told the police it was his brother who said somebody went to get

a gun, and it was the interviewing detective, not Dorral, who first suggested that it was actually Petitioner who made the statement.

It is true that at one point Dorrate said the person in the middle of the street looked back and “said something to two of his friends,” ER 319, but on cross-examination he said he “didn’t hear words,” ER 400, and on redirect examination he said that guy in the street never appeared to be saying anything else to the guys who started to walk away. ER 428-429. Even if Dorrate clearly testified that Diaz “said something,” that is not proof that what he said was “get a gun.” See Juan H. v. Allen 408 F.3d 1262, 1279 (9th Cir. 2005), cert. denied 546 U.S. 1137 (2007) [“Speculation and conjecture cannot take the place of reasonable inferences and evidence”]; Langston v. Smith, 630 F.3d 310, 319 (2d Cir.), cert. denied, 565 U.S. ___, 132 S.Ct. 366 (2011) [State’s argument that defendants “must have concluded” that potential robbery victims would try to disarm them was “pure conjecture untethered from the evidence presented at trial”]. “The jury may not use its imagination to fill in the blanks.” Rivera v. Cuomo, 649 F.3d 132, 142 (2d Cir. 2011).

And at the end of the day, the question is still one of witness credibility, which must be decided by the jury.

3.

Reasons for Granting the Petition—The Prosecutor, Defense Counsel, One State Court Judge and Five Federal Judges Processed Petitioner’s Case on the Basis of Crucial Facts That Never Took Place. Such a Severe Breakdown of the Criminal Justice System Calls Out for Reversal of the Court of Appeals Decision, and a Remand to Consider Petitioner’s Case in Light of the True Facts.

Unquestionably, it is proper for a federal habeas court to deny relief when the state court’s evaluation of the record is “supported by the record.” See Yarborough v. Gentry, supra 540 U.S. 1, 6. But here the California Superior Court decision was based on the judge’s determination that “strong testimony”

existed that appellant had made the statement, when such “strong testimony” did not exist. Nor did the testimony upon which the superior court evaluated counsel’s performance ever take place. The superior court’s decision that counsel’s decision to concede that Diaz had made the statement was a tactical one, “and a reasonable one at that,” did not consider the gap between counsel’s argument and the actual evidence, and can only be characterized as “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 state court’s finding that counsel was effective “is not a finding of fact binding on the federal court.”⁴ Strickland v. Washington, *supra* 466 U.S. 668, 694. A reviewing court should evaluate the reasonableness of counsel’s conduct based on the actual facts shown by the record, rather than through *post hoc* rationalization. Kimmelman v. Morrison, 477 U.S. 365, 381 (1986); Wiggins v. Smith, 539 U.S. 510, 526 (2003) [finding that State courts’ conclusion that counsel made a “strategic decision” to forgo pursuit of more extensive mitigating evidence “resembles more a *post hoc* rationalization of counsel’s conduct” than an actual description of counsel’s efforts and pre-sentence reasoning].

This is not a case where a reviewing court has no way of knowing whether a seemingly misguided action by counsel actually had a sound strategic motive; the testimony upon which counsel based her actions disputes it, and counsel herself disputed it in her notice of appeal and her letter to appellate counsel.

⁴ The Supreme Court has consistently interpreted the “determination . . . of a factual issue” language in 28 U.S.C. § 2254(d) as it existed before AEDPA to mean “basic, primary, or historical facts,” not mixed questions of fact and law, “which require the application of a legal standard to the historical-fact determinations.” See, e.g., Thompson v. Keohane, 516 U.S. 99, 110 (1995). The relevant language in new sections 2254(d)(2) and 2254(e) is similar, and should be interpreted in a similar manner.

Counsel's justification argument to the jury—the only defense she argued—was not the result of a reasonable judgment and could not have made the adversarial testing process work. Strickland at 690. It cannot be considered sound trial strategy, and it could not have persuaded a jury if they remembered the actual testimony. Moreover, the case against Petitioner was far from overwhelming; the contradictions in Dorral's statements alone could have raised doubt in a juror's mind about his credibility. Counsel could have made a viable and potentially persuasive argument by pointing out those inconsistencies and the suggestive interview techniques used by the interviewing detective. These circumstances strongly suggest a reasonable probability that counsel's miscalculation affected the verdict.

Yet at every step of the way when Diaz sought to correct the error, the courts got the facts wrong, and denied Diaz's claim based on those wrong facts.

The underlying purpose of the Sixth and Fourteenth Amendments was undoubtedly to ensure that a defendant in a criminal case would receive a fair trial. Similar considerations underlie the establishment of the appellate process in both state and federal courts.

But Petitioner did not get a fair trial. Nor did he get fair consideration when his state habeas petition was decided. He did not get fair consideration when the magistrate judge recommended that his federal petition be denied. He did not get fair consideration when the district judge dismissed his petition. And he did not get fair consideration when the Court of Appeals denied relief.

The decisions of all these courts are at odds with the standard of reasonableness of Strickland v. Washington and are outside the usual course of judicial proceedings, where decisions are made based on the evidence. The errors are clear, they are serious, and they undermine the fundamental constitutional purpose of ensuring that cases are decided fairly.

This court has in the past, when errors were obvious and serious, granted certiorari and entered summary reversals pursuant to Rule 16.1. See Dye v. Hofbauer, 546 U.S. 1 (2005) [Court of Appeals incorrectly concluded the record did not reflect a federal claim had been filed, when district court record contained a brief setting out the claim]; Sao Paulo v. American Tobacco Co., 535 U.S. 229 (2002) [Court of Appeals disqualified district judge whose name erroneously appeared, prior to his appointment to the bench, on a motion to file an *amicus* brief for the Louisiana Trial Lawyers Association in a similar suit against same defendants; decision was inconsistent with Supreme Court precedent]; Flippo v. West Virginia, 528 U.S. 11 (1999) [erroneous denial of motion to suppress on the basis of a non-existent “homicide crime scene” exception to the Fourth Amendment; decision was squarely in conflict with Supreme Court precedent]; Pennsylvania v. Labron, 518 U.S. 938 (1996) [vehicle search; lower court decision erroneously applied “exigent circumstances” standard instead of “ready mobility” standard established by Supreme Court precedent]; Ohio v. Reiner, 532 U.S. 17 (2001) [lower court’s determination that witness did not have Fifth Amendment privilege because her proposed testimony exculpated her clearly conflicted with Supreme Court precedent].

CONCLUSION

Sometimes timing is everything. In a recent rerun of an episode of the television series “Columbo,” a sister shoots her brother one night in her bedroom, and later takes over control of his lucrative company. Her excuse to the police and coroner’s jury is one of justification—the burglar alarm went off, she saw movement in the dark room, and shot at what she thought was a burglar. Lieutenant Columbo finds inconsistencies that the sister explains away, but the case is solved when Columbo announces that he has uncovered

evidence that the shots were fired *before* the burglar alarm went off, which means the sister staged the shooting to make it look like an accident. Relevant to the case at bar, when the actual chronology is established, the audience immediately knows that the sister's excuse—one at odds with that chronology—should be totally disregarded. One would not expect the jury in our case to come to any different conclusion.

In the case at bar, one state court and two federal courts—six judges in all—overlooked the actual chronology, and for that reason failed to consider that a jury hearing defense counsel's excuse—one at odds with that chronology—would likely say it should be totally disregarded.

It would not have taken Perry Mason to point out to the jury that the initial chronology Dorral gave to Detective Poroli did not mention Diaz, but instead established that Dorral's brother told him that "one of them was gong to go get a gun." Or to point out how the investigating detective suggested that what Dorral actually heard was "someone say to tell someone to go get a gun." Or that then he suggested that it was Diaz who "told this other guy to go get a gun." Or to point out that on direct examination Dorral said he didn't remember Diaz make conversation with anyone, and that it was only after several leading questions that the prosecutor asked if he had told the detective that the guy in the street said to go get a gun, he responded, "Yes," ER 466, "I think, yes." ER 467. Or to point out that the testimony Diaz had "yelled it out," ER 468, was inconsistent with the fact that no one else heard him say it. Or to point out that if, as Dorral testified, ER 524, he heard the "get a gun" statement *before* he got out of the car and saw and recognized Diaz, it was unlikely he could tell who outside the car had made the statement.

In a case involving a different context, but which provides insight to the case at bar, this court said, "A prosecutor is seeking a conviction. Jurors

understand this and may reasonably be expected to evaluate the government's evidence and arguments in light of its motivations. When a defendant's own lawyer puts in the offending evidence, it is in the nature of an admission against interest, more likely to be taken at face value.” Buck v. Davis, 137 S.Ct. 759, 777, 580 US ___, 197 L. Ed. 2d 1 (2017).

There can be no serious doubt that something went badly wrong here, beginning with the trial in Sacramento County and continuing through the state and federal reviewing courts, culminating in the Court of Appeals’ failure, because of error or oversight, to properly apply the standard of reasonableness in Strickland v. Washington

In such a case, briefing and oral argument are not even needed. The court should summarily reverse the decision of the Court of Appeals, and remand the case for further proceedings consistent with the true facts.

Respectfully submitted,

/s/ Walter K. Pyle

Walter K. Pyle
2039 Shattuck Avenue, Suite 202
Berkeley, CA 94704-1116
(510) 849-4424
Attorney for Petitioner

APPENDIX
TABLE OF CONTENTS

Memorandum Decision of the Court of Appeals.....	App. 1
Order of District Court Denying Habeas Corpus Petition.....	App. 5
Magistrate Judge’s Findings and Recommendations, Recommending that Habeas Petition Be Denied	App. 7
Order of Sacramento County (California) Superior Court Denying State Habeas Corpus Petition.....	App. 27

App. 1

FILED

NOT FOR PUBLICATION

OCT 23 2017

UNITED STATES COURT OF APPEALS

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

FOR THE NINTH CIRCUIT

HUMBERTO DIAZ,

Petitioner - Appellant,

v.

G.D. LEWIS, Warden, and XAVIER
BECERRA, Attorney General,

Respondents - Appellees.

No. 15-15245

D.C. No. 2:12-cv-01095-WBS-AC

MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of California
William B. Shubb, District Judge, Presiding

Argued and Submitted October 16, 2017
San Francisco, California

Before: IKUTA and HURWITZ, Circuit Judges, and MOLLOY,** District Judge.

California state prisoner Humberto Diaz appeals from the district court's judgment denying his 28 U.S.C. § 2254 petition. We have jurisdiction pursuant to 28 U.S.C. § 2253, and we affirm.

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

** The Honorable Donald W. Molloy, District Judge for the U.S. District Court for the District of Montana, sitting by designation.

App . 2

In January 2006, Diaz was involved in a gang shooting in Sacramento, California. Following a jury trial, he was convicted of three counts of attempted murder on aiding-and-abetting theories. The sole question before us is whether the state court's determination that Diaz's counsel was not ineffective when she conceded during closing argument that Diaz said "get a gun" prior to the shooting was an objectively unreasonable application of *Strickland v. Washington*, 466 U.S. 668 (1984).¹

"[W]e review *de novo* the district court's decision to grant or deny a petition for a writ of habeas corpus." *Lambert v. Blodgett*, 393 F.3d 943, 964 (9th Cir. 2004). Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), habeas relief "shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings" unless the state decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," 28 U.S.C. § 2254(d)(1), or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," *id.* at § 2254(d)(2).

¹ Although the district court denied a certificate of appealability as to all of Diaz's claims, this Court appointed counsel and granted Diaz's request for a certificate of appealability as to this single claim.

App. 3

Because the California Supreme Court and the Court of Appeal summarily denied Diaz's postconviction claims, we "look through" to the last reasoned state-court decision, that of the Sacramento County Superior Court, as the basis for the state court judgment. *Ylst v. Nunnemaker*, 501 U.S. 797, 804 (1991); *Cannedy v. Adams*, 706 F.3d 1148, 1159 (9th Cir. 2013).

To succeed on a claim for ineffective assistance of counsel, Diaz "must show that counsel's performance was deficient" and "that the deficient performance prejudiced the defense." *Strickland*, 466 U.S. at 687. However, "[e]stablishing that a state court's application of *Strickland* was unreasonable under § 2254(d) is all the more difficult. The standards created by *Strickland* and § 2254(d) are both highly deferential, and when the two apply in tandem, review is doubly so." *Harrington v. Richter*, 562 U.S. 86, 105 (2011) (internal quotation marks and citations omitted). "When § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard." *Id.*

Under this "doubly" deferential standard, Diaz is not entitled to relief. The state court correctly cited *Strickland* and concluded that counsel's performance was not deficient, finding the record could support counsel's theory in closing that Diaz said "get a gun" only to scare off potential assailants. That "factual determination

App. 4

is not unreasonable merely because” we might “have reached a different conclusion in the first instance.” *Wood v. Allen*, 558 U.S. 290, 301 (2010). Moreover, the state court “was not obligated to accept a self-proclaimed assertion by trial counsel of inadequate performance” after the fact. *Edwards v. Lamarque*, 475 F.3d 1121, 1126 (9th Cir. 2007) (en banc) (internal quotation marks omitted); *see also Strickland*, 466 U.S. at 689, 690 (assessing reasonableness “as of the time of counsel’s conduct”); *Hendricks v. Calderon*, 70 F.3d 1032, 1039 (9th Cir. 1995) (finding the “latter-day emergence of [counsels]’ belief in their own incompetence runs afoul of the rule of contemporary assessment”). Nor was trial counsel required to obtain Diaz’s consent in making her argument. *Florida v. Nixon*, 543 U.S. 175, 187 (2004); *see also Taylor v. Illinois*, 484 U.S. 400, 418 (1988) (“The adversary process could not function effectively if every tactical decision required client approval.”).

AFFIRMED.

App. 5

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

HUMBERTO DIAZ,

Petitioner,

v.

G. D. LEWIS,

Respondent.

No. 2:12-cv-1095 WBS AC P

ORDER

Petitioner, a state prisoner proceeding pro se, has filed this application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The matter was referred to a United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 302.

On December 12, 2014, the magistrate judge filed findings and recommendations herein which were served on all parties and which contained notice to all parties that any objections to the findings and recommendations were to be filed within twenty-one days. Petitioner has filed objections to the findings and recommendations, and moved for a certificate of appealability.

In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C) and Local Rule 304, this court has conducted a de novo review of this case. Having carefully reviewed the entire file, the court finds the findings and recommendations to be supported by the record and by proper analysis.

////

1 Accordingly, IT IS HEREBY ORDERED that:

2 1. The findings and recommendations filed December 12, 2014 (ECF No. 44), are
3 adopted in full;

4 2. Petitioner's application for federal habeas corpus is denied;

5 3. Petitioner's motion for issuance of a certificate of appealability referenced in 28 U.S.C.
6 § 2253 (ECF No. 49), is DENIED, and the court declines to issue the certificate.

7 Dated: January 27, 2015

8 

9 WILLIAM B. SHUBB

10 UNITED STATES DISTRICT JUDGE

11
12
13
14 /diaz1095.805hc(2)
15
16
17
18
19
20
21
22
23
24
25
26
27
28

App. 7

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

HUMBERTO DIAZ,

Petitioner,

v.

G. D. LEWIS,

Respondent.

No. 2:12-cv-1095 WBS AC

FINDINGS AND RECOMMENDATIONS

Petitioner is a California state prisoner proceeding pro se with an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The action proceeds on the amended petition filed July 19, 2013, ECF No. 31, which challenges petitioner's 2007 conviction for three counts of attempted murder with firearm and gang enhancements. Respondent has answered, ECF No. 38, and petitioner has filed a traverse, ECF No. 41.

BACKGROUND

Trial Court Proceedings

Petitioner and his co-defendant, Jamual Broadbent, were charged in Sacramento County with three counts of attempted murder arising from a 2006 gang-related shooting. Broadbent was alleged to be the shooter, and petitioner was tried on an aiding and abetting theory. The evidence at trial established the following facts:

On January 13, 2006, teenager Dorrante Hicks and his friend Michael Jordan were walking

1 down the street in the Oak Park neighborhood of Sacramento, and passed a group of men that
2 included petitioner and Broadbent. Jordan recognized petitioner and shook his hand. As Jordan
3 and Hicks walked away, another man asked where Hicks and Jordan were from. Jordan replied
4 that he was from Los Angeles, but did not “gang-bang.” Someone in petitioner’s group said “Oak
5 Park is mine,” which Hicks understood as a territorial claim. Someone said “fuck L.A.,” and
6 someone else told Hicks and Jordan to get out of the area. Jordan replied that they were not
7 looking for trouble, and he and Hicks walked off.

8 Hicks and Jordan walked to nearby Christian Brothers High School, where Hicks called
9 his brother, Tykemo Harrison, and asked to be picked up. Hicks told Harrison that some guys
10 had tried to “punk him.” Harrison drove to Christian Brothers with Dorral Hicks (another
11 brother), Anthony Watkins, and Javan Gant. When the men arrived, Harrison asked the location
12 of the men who had been “messing with” his little brother. Dorrante Hicks got into the car and
13 directed the men to the intersection where petitioner and his companions remained. (Jordan had
14 left the scene by the time Harrison arrived.) There were as many as eight men standing around
15 the intersection. Harrison parked in the middle of the street and got out of the car, leaving the
16 engine running. The four occupants also got out of the car.

17 According to Dorrante Hicks, Harrison said something like, “my brother just told me one
18 [of you] all from down here was messing with him.” A man later identified as petitioner replied,
19 “Your little brother don’t supposed to be over here,” and “This is Oak Park Bloods. We don’t
20 know who your brother is.” Dorral Hicks recognized petitioner as someone he had seen before.
21 The two shook hands and petitioner said, “[E]verything cool.” At some point during these
22 exchanges, petitioner turned and said something to two of his associates. Id. In response, the two
23 men walked from one corner to another and around the back of a house.

24 Dorral Hicks and Harrison both testified that when petitioner spoke to the two men who
25 walked away from the group, he said something like “go get a gun” or “go get the gun.” When
26 the two men returned to the intersection shortly thereafter, Gant said “they was on point and let’s
27 get out of here.” Harrison, Gant and the Hicks brothers got back in Harrison’s car as the two men
28 from petitioner’s group, one of whom was later identified as Broadbent, approached the vehicle.

1 Dorral Hicks told Broadbent that everything was cool and they were just leaving. As Watson was
2 getting into the car to join the others, Broadbent started shooting. The windows on the passenger
3 side shattered. Watson was shot in the head. Dorral Hicks was shot in the wrist and in the arm.
4 The bullet that entered Hicks' arm traveled through his chest and lodged in his neck. Harrison
5 was shot in the shoulder. Although none of the wounds were fatal, Watson was left in a
6 vegetative state.

7 Sacramento Police Detective Wendy Brown was working in the gang suppression unit at
8 the time of the shooting. She arrested Broadbent and was present at petitioner's arrest two days
9 later. When he was arrested, petitioner had rock cocaine in a plastic baggie on his person. Det.
10 Brown testified as the prosecution's gang expert. She told the jury that petitioner and Broadbent
11 were both validated members of "Ridezilla," a subset of the Oak Park Bloods. Petitioner had
12 been validated in 2005, in part on the basis of his admissions of gang membership. Petitioner had
13 Ridezilla tattoos on both forearms. Det. Brown testified that Ridezilla is a "very, very violent
14 gang" and its primary activities are "[h]omicides, attempt[ed] homicides, narcotics dealings, [and]
15 assaults with deadly weapons." She stated that, "The rivals of Ridezilla are anyone who
16 challenges Ridezilla." She described Ridezilla members as "very, very often armed, and. . . not
17 afraid to use them." Det. Brown expressed her opinion that the shooting was committed for the
18 benefit of Ridezilla because "the gang . . . benefits by a show of force in answering disrespect."

19 On September 17, 2007, the jury found petitioner and Broadbent guilty on all charges and
20 found true all the enhancement allegations. CT 548-50; RT 1338-45.¹ On December 14, 2007,
21 the trial court sentenced petitioner to an aggregate term of 18 years four months plus 50 years to
22 life in prison. CT 17; RT 1410.

23 Post-conviction Proceedings

24 Petitioner appealed, and the California Court of Appeal affirmed the judgment on October

25 ///

26 ///

27 ¹ "CT" refers to the Clerk's Transcript on Appeal. "RT" refers to the Reporters Transcript on
28 Appeal.

1 29, 2009. Lodged Doc. 7.² The California Supreme Court summarily denied review on February
2 10, 2010. Lodged Doc. 10.

3 On November 3, 2010, petitioner filed a pro se petition for writ of habeas corpus in the
4 Sacramento County Superior Court. Lodged Doc. 1. The petition was denied on January 10,
5 2011. Lodged Doc. 12. On April 11, 2011, petitioner filed a petition for writ of habeas corpus in
6 the Court of Appeal. Lodged Doc. 13. That petition was denied on April 21, 2011. Lodged Doc.
7 14. On June 6, 2011, petitioner filed a petition for writ of habeas corpus in the California
8 Supreme Court. Lodged Doc. 15. That petition was denied on March 14, 2012. Lodged Doc. 16.

9 On March 30, 2012, petitioner filed a habeas petition in this court. ECF No. 1.
10 Respondent moved to dismiss the petition as “mixed” -- that is, containing both exhausted and
11 unexhausted claims. ECF No. 12. Petitioner moved for stay and abeyance of the mixed petition.
12 ECF No. 17. In Findings and Recommendations filed on May 15, 2013, the undersigned found
13 that Claims One, Three, Four, and part of Claim Two were exhausted, and that Claims Six
14 through Eight and the remainder of Claim Two were unexhausted. ECF No. 25 at 9-10. The
15 undersigned recommended that the motion for stay and abeyance be denied because petitioner
16 had not demonstrated good cause under Rhines v. Weber, 544 U.S. 269 (2005). Id. at 13, 15. It
17 was further recommended that the motion to dismiss be granted in part, and that petitioner be
18 offered the choice between (1) amending the petition to delete unexhausted claims, and
19 proceeding on the exhausted claims only, (2) accepting dismissal without prejudice of the mixed
20 petition pending further exhaustion, or (3) amending the petition to delete unexhausted claims,
21 and seeking a stay under Kelly v. Small, 315 F.3d 1063 (9th Cir. 2002). Id. at 14-16. The district
22 judge adopted the Findings and Recommendations on June 19, 2013. ECF No. 27.

23 On June 27, 2013, petitioner filed an interlocutory appeal. ECF No. 28. On July 19,
24 2013, he filed an amended petition. ECF No. 31. On October 28, 2013, petitioner’s appeal was
25 dismissed for lack of jurisdiction. ECF No. 42.

26 Respondent’s answer was filed on September 17, 2013, and petitioner’s traverse on

27 _____
28 ² All citations to the state court record refer to respondent’s second lodging, dated September 17,
2013. See ECF No. 37.

October 18, 2013.

STANDARDS GOVERNING HABEAS RELIEF UNDER THE AEDPA

28 U.S.C. § 2254, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), provides in relevant part as follows:

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a state court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –

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

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

The statute applies whenever the state court has denied a federal claim on its merits, whether or not the state court explained its reasons. Harrington v. Richter, 131 S. Ct. 770, 785 (2011). State court rejection of a federal claim will be presumed to have been on the merits absent any indication or state-law procedural principles to the contrary. Id. at 784-785 (citing Harris v. Reed, 489 U.S. 255, 265 (1989) (presumption of a merits determination when it is unclear whether a decision appearing to rest on federal grounds was decided on another basis)). “The presumption may be overcome when there is reason to think some other explanation for the state court’s decision is more likely.” Id. at 785.

The phrase “clearly established Federal law” in § 2254(d)(1) refers to the “governing legal principle or principles” previously articulated by the Supreme Court. Lockyer v. Andrade, 538 U.S. 63, 71-72 (2003). Clearly established federal law also includes “the legal principles and standards flowing from precedent.” Bradley v. Duncan, 315 F.3d 1091, 1101 (9th Cir. 2002) (quoting Taylor v. Withrow, 288 F.3d 846, 852 (6th Cir. 2002)). Only Supreme Court precedent may constitute “clearly established Federal law,” but circuit law has persuasive value regarding what law is “clearly established” and what constitutes “unreasonable application” of that law. Duchaime v. Ducharme, 200 F.3d 597, 600 (9th Cir. 2000); Robinson v. Ignacio, 360 F.3d 1044, 1057 (9th Cir. 2004).

1 A state court decision is “contrary to” clearly established federal law if the decision
2 “contradicts the governing law set forth in [the Supreme Court’s] cases.” Williams v. Taylor, 529
3 U.S. 362, 405 (2000). A state court decision “unreasonably applies” federal law “if the state
4 court identifies the correct rule from [the Supreme Court’s] cases but unreasonably applies it to
5 the facts of the particular state prisoner’s case.” Id. at 407-08. It is not enough that the state court
6 was incorrect in the view of the federal habeas court; the state court decision must be objectively
7 unreasonable. Wiggins v. Smith, 539 U.S. 510, 520-21 (2003).

8 Review under § 2254(d) is limited to the record that was before the state court. Cullen v.
9 Pinholster, 131 S. Ct. 1388, 1398 (2011). The question at this stage is whether the state court
10 reasonably applied clearly established federal law to the facts before it. Id. In other words, the
11 focus of the § 2254(d) inquiry is “on what a state court knew and did.” Id. at 1399. Where the
12 state court’s adjudication is set forth in a reasoned opinion, §2254(d)(1) review is confined to “the
13 state court’s actual reasoning” and “actual analysis.” Frantz v. Hazey, 533 F.3d 724, 738 (9th
14 Cir. 2008) (en banc). A different rule applies where the state court rejects claims summarily,
15 without a reasoned opinion. In Richter, supra, the Supreme Court held that when a state court
16 denies a claim on the merits but without a reasoned opinion, the federal habeas court must
17 determine what arguments or theories may have supported the state court’s decision, and subject
18 those arguments or theories to § 2254(d) scrutiny. Richter, 131 S. Ct. at 786.

19 Relief is also available under AEDPA where the state court predicated its adjudication of
20 a claim on an unreasonable factual determination. Miller-El v. Dretke, 545 U.S. 231, 240 (2005);
21 Taylor v. Maddox, 366 F.3d 992, 999-1001 (9th Cir.), cert. denied, 543 U.S. 1038 (2004). The
22 statute explicitly limits this inquiry to the evidence that was before the state court. 28 U.S.C. §
23 2254(d)(2).

24 To prevail in federal habeas proceedings, a petitioner must establish the applicability of
25 one of the § 2254(d) exceptions and also must also affirmatively establish the constitutional
26 invalidity of his custody under pre-AEDPA standards. Frantz v. Hazey, 533 F.3d 724. There is
27 no single prescribed order in which these two inquiries must be conducted. Id. at 736-37. The
28 AEDPA does not require the federal habeas court to adopt any one methodology. Lockyer v.

1 Andrade, 538 U.S. at 71.

2 DISCUSSION

3 I. Claim One: Ineffective Assistance of Trial Counsel

4 A. Petitioner's Allegations

5 Petitioner contends that he was denied his right to the effective assistance of counsel when
6 his attorney "went against petitioner's theory of the case" and effectively conceded his guilt by
7 stating during closing argument that petitioner had said "Get a gun."³

8 Petitioner's liability was based on aiding and abetting. Prosecution witnesses testified that
9 petitioner told one of his confederates to "go get a gun" during the confrontation that immediately
10 preceded the shooting. Petitioner and his counsel had agreed pretrial on the importance of
11 disputing that evidence. Petitioner specifically told counsel that he had *not* said "Get a gun."
12 During closing argument, however, counsel told the jury that "the only reason why Mr. Diaz said
13 get a gun" was to make Tykemo Harrison back off. Counsel argued that petitioner was unarmed
14 and in fear for his life, so he said "the only thing he [could] think of that might keep him from
15 getting shot." ECF No. 31 at 40 (Pet. Ex. A) (RT 1238).

16 She elaborated as follows:

17 Mr. Diaz' attempts at cooling everything down and his friendliness
18 out there proves that he had [no] criminal intent.

19 He didn't pull out a gun. He didn't shoot people. He didn't tell
20 anybody to shoot people. That's not what he wanted to happen.
21 That's not what he intended to happen that night at all.

22 And if this was some secret plan that Mr. Diaz cooked up in a
23 fraction of a second in order to set these people up so they could be
24 assaulted or shot, why say get a gun out loud? Why say get a gun
25 out loud?

24 ³ Petitioner's original federal petition, like the petition he filed in Sacramento County Superior
25 Court, further alleged that several other aspects of counsel's performance constituted ineffective
26 assistance. The court previously found those other allegations unexhausted as grounds for relief.
27 ECF Nos. 25, 27. Respondent's answer addresses the additional ineffective assistance subclaims,
28 presumably because unexhausted claims may be denied on the merits. ECF No. 38 at 23-25
(discussing allegations and citing 28 U.S.C. § 2254(b)(2)). These instances of alleged IAC are
not asserted as grounds for relief in the operative amended petition, however. Compare ECF No.
1 at 10 with ECF No. 31 at 12. Accordingly, they will not be addressed.

1 The reason is because he was talking to Tykemo, and he wanted
2 Tykemo to know he meant business, and he was trying to protect
3 himself against maybe getting shot out there in the middle of the
street.

4 Id. at 43 (RT 1241).

5 Following petitioner's conviction, trial counsel filed a notice of appeal that specified
6 "points [to] be raised on appeal" including:

7 IAC for defense counsel's argument to jury conceding defendant
8 made the alleged statement "Go get the gun" in contravention of
defendant's express objection and denial to counsel that he made
9 the statement. . .

10 ECF No. 31 at 49 (Pet. Ex. C).⁴

11 In a post-trial letter to appellate counsel, trial counsel stated as follows:

12 Mr. Diaz. . . specifically asked me not to argue that he in fact *said*
13 "get the gun." I did anyway, and realized later that it was a very
bad decision on my part. I can't explain why I did that. Except to
14 say that I decided to argue instead that he only trying to scare the
'vicitms' away, and that he wasn't telling Broadbent or anyone else
15 to shoot people, and that he wasn't responsible for the shootings. . .
I have re-argued this case in my mind a million times, and will
16 always regret the way I made my argument. . . . This was a
complete mistake on my part, having nothing to do with any tactical
17 decision I made.

18 ECF No. 31 at 53 (Pet. Ex. D).

19 B. The Clearly Established Federal Law

20 To establish a constitutional violation based on ineffective assistance of counsel, a
21 petitioner must show (1) that counsel's representation fell below an objective standard of
22 reasonableness, and (2) that counsel's deficient performance prejudiced the defense. Strickland v.
23 Washington, 466 U.S. 668, 692, 694 (1984). Prejudice means that the error actually had an
24 adverse effect on the defense. There must be a reasonable probability that, but for counsel's
25 errors, the result of the proceeding would have been different. Id. at 693-94. The court need not
26 address both prongs of the Strickland test if the petitioner's showing is insufficient as to one

27 _____
28 ⁴ Citations to court documents refer to the page numbers assigned by the court's electronic
docketing system.

1 prong. Id. at 697.

2 C. The State Court's Ruling

3 Petitioner's ineffective assistance of counsel ("IAC") claim was exhausted in state habeas.
4 The California Supreme Court denied the petition without comment or citation. Lodged Doc. 12.
5 Accordingly, this court "looks through" the silent denial to the last reasoned state court decision.
6 See Ylst v. Nunnemaker, 501 U.S. 797 (1991). Because the superior court issued the only
7 reasoned decision adjudicating the claim, that is the decision reviewed for reasonableness under §
8 2254(d). See Bonner v. Carey, 425 F.3d 1145, 1148 n.13 (9th Cir. 2005).

9 The superior court ruled in relevant part as follows:

10 Petitioner next claims that trial counsel was ineffective in failing to
11 proceed with the agreed-upon defense that petitioner never said "go
12 get the gun" and instead admitting in argument that he made the
13 statement, and that appellate counsel was ineffective in failing to
14 raise the issue on appeal. In support, he attaches a letter trial
15 counsel wrote to appellate counsel, stating that petitioner had
16 specifically asked trial counsel not to argue that petitioner in fact
17 said "get the gun," but counsel did anyway and argued instead that
18 petitioner was only trying to scare the victims away and was not
19 telling codefendant to shoot people, and that this was a complete
20 mistake on counsel's part and had nothing to do with any tactical
21 decision counsel had made.

22 The letter also, however, admits that eyewitnesses had heard
23 petitioner to have said "get the gun." As such, even though after the
24 fact trial counsel stated it was not a tactical decision, it actually was
25 a tactical decision on counsel's one [sic], and a reasonable one at
26 that, in deciding not to challenge strong testimony that petitioner
27 had in fact made the statement and instead deciding to attempt to
28 explain away the statement in hopes that the jury would believe that
reasoning. That did not constitute ineffective assistance of counsel,
under the circumstances, and was a reasonable gamble that was
rejected by the jury. As such, the claim fails and is denied.
(Strickland v. Washington (1984) 466 U.S. 668; [In re] Bower,
supra[, 38 Cal.3d 865 (1985)]).

23 Lodged Doc. 12 at 3-4.

24 D. Objective Reasonableness Under § 2254(d)

25 The superior court's adjudication of petitioner's IAC claim did not unreasonably apply
26 Strickland. Strickland and progeny require deference to counsel's decisions unless those
27 decisions are outside the wide range of reasonable performance. See Strickland, 466 U.S. at 689;
28 see also Harrington v. Richter, 131 S. Ct. at 788. The conduct complained of here – making an

1 argument that was inconsistent with petitioner's preferred strategy, but that gave the jury an
2 exculpatory interpretation of the evidence that had been presented – does not fall outside that
3 wide range. Contrary to petitioner's argument, counsel did not concede his liability for attempted
4 murder. The jury had heard two witnesses testify that petitioner had said "Get a gun."⁵
5 Challenging the interpretation of that testimony, rather than its truth, was not an unreasonable
6 response to the state of the evidence. Because it was not unreasonable of the superior court to
7 apply the deference that Strickland requires under these circumstances, § 2254(d)(1) does not
8 permit relief.

9 To the extent that the superior court's decision rested on a factual finding that trial counsel
10 made a tactical decision, that determination was not unreasonable.⁶ Trial counsel's own post-hoc
11 disavowal of tactical considerations is not dispositive. It is not unreasonable to characterize as
12 tactical the decision to argue that the "get a gun" statement had an innocent explanation, rather
13 than arguing it had not been made. This is especially so in light of the fact that two witnesses
14 testified that petitioner had made the statement. Accordingly, § 2254(d)(2) does not permit relief.

15 II. Claim Two: Denial of Post-Trial Access to Jurors

16 A. Petitioner's Allegations

17 Petitioner claims that the trial court abused its discretion, in violation of his rights to due
18 process and an impartial jury, by denying his post-trial motion for juror contact information.
19 After the trial, defense counsel was contacted by a juror who regretted the verdict. Counsel's
20 declaration in support of the motion stated as follows:

21 1. On or about September 19, 2007, I returned a phone call from
22 juror Joseph Rona and spoke with him at length about his
23 perceptions and understanding of the law as it applies to this case.
24 He said he had called me because he wanted to talk about the case
25 and the jury's verdicts. He stated that he wished he had not voted in
26 favor of Mr. Diaz's guilt. We spoke quite a while, and some of his
comments lead me to believe that the jurors may have
inappropriately considered and discussed Mr. Diaz's failure to
testify. Mr. Rona said to me that during the trial, the jury had
questions and felt there was a "missing link." He said he did not

27 ⁵ RT 464 (testimony of Dorral Hicks); RT 565 (testimony of Tykemo Harrison).

28 ⁶ In any case, the dispositive question on a Strickland claim is not whether the decision was
strategic, but whether it was reasonable. Roe v. Flores-Ortega, 528 U.S. 470, 481 (2000).

1 know if the shooting was intentional (on Mr. Diaz's part) but that
2 "he didn't defend himself."

3 2. Additionally, Mr. Rona and other jurors may have misunderstood
4 some of the instructions on the law. He said that "the procedure for
5 someone to get away from being an aider and abettor, is they have
6 to do all within their power to stop what's going on. The law says
7 that if you started it, you must stop it." Mr. Rona said that he
8 thought Mr. Diaz was guilty for "being there," but that he does not
9 believe he intended for the shooting to happen.

10 3. Mr. Rona stated that everybody wanted to find Mr. Diaz guilty of
11 a lesser crime but that attempted voluntary manslaughter "didn't
12 fit," and so he felt he had no choice but to vote for guilt on the
13 attempted murder charge.

14 4. I believe that information provided by Mr. Rona raises a
15 possibility of juror misconduct and misapplication of the law as
16 well as an improper placement of the burden of proof on the
17 defense in this case.

18 ECF No. 31 at 60-161 (Pet. Ex. F); CT 57-58.

19 Petitioner sought juror identifying information pursuant to Cal. Code Civ. P. §§ 206(f) and
20 237(b), in order to investigate possible jury misconduct and misapplication of the law. Id. at 58-
21 59. The trial court denied the motion on grounds that (1) counsels' declaration was inadmissible
22 hearsay, (2) even considering the declaration, there was no prima facie showing of good cause to
23 support disclosure, (3) juror safety was a genuine issue in this case, and constituted a compelling
24 interest against disclosure, and (4) the verdict could not be impeached in any case with jurors'
25 testimony about their thought processes. RT 1367-68.

26 B. The Clearly Established Federal Law

27 Due process requires that criminal trials "comport with prevailing notions of fundamental
28 fairness." California v. Trombetta, 467 U.S. 479, 485 (1984). The constitutional guarantee of a
fair trial encompasses the right to an impartial jury. See Morgan v. Illinois, 504 U.S. 719, 727
(1992); Groppi v. Wisconsin, 400 U.S. 505, 508 (1971). Because a criminal defendant enjoys a
constitutional privilege against self-incrimination, a jury may not consider or draw any adverse
inferences from a defendant's choice not to testify. Carter v. Kentucky, 450 U.S. 288, 300 (1981)
(constitution requires no-adverse-inference instruction upon request). When a trial court is
presented with credible evidence of jury bias, a new trial is not necessarily required; the trial court

1 may conduct a limited hearing consistent with minimum due process requirements. Smith v.
2 Phillips, 455 U.S. 209 (1982).

3 C. The State Court's Ruling

4 This claim was exhausted in state habeas. The superior court denied relief in a reasoned
5 decision, which was presumptively adopted by the California Supreme Court's "postcard denial."
6 See Bonner v. Carey, 425 F.3d at 1148 n.13. The superior court ruled in relevant part as follows:

7 Petitioner first claims that the trial court abused its discretion in
8 improperly denying access to jury information needed to prepare a
9 motion for a new trial, and never determined whether an affidavit
10 supporting the motion was admissible, regarding juror discussion of
petitioner's failure to testify and uncertainty regarding petitioner's
overall guilt as conveyed to petitioner's trial counsel in a phone
conversation.

11 . . . In support, petitioner attaches a copy of the motion filed by
12 trial counsel, postverdict, requesting juror identifying information,
13 as well as trial counsel's affidavit detailing a telephone
14 conversation that trial counsel had with the juror. Trial counsel, in
the affidavit, attests that the juror told counsel that he wished he had
15 not voted guilty, that during the trial the jury had questions and felt
there was a missing link, that the juror did not know if the shooting
was intentional and that petitioner did not defend himself, that to
16 get out of aider and abettor liability one must do all within one's
power to stop what's going on, that the juror did not believe that
petitioner intended for the shooting to happen, and that everybody
17 wanted to find petitioner guilty of a lesser crime but that attempted
voluntary manslaughter did not fit so the juror had no choice but to
18 vote for guilt on attempted murder.

19 Petitioner fails to attach a copy of the reporter's transcript of the
October 31, 2007 hearing during which petitioner's motion for
20 disclosure of juror identifying information [sic]. As such, the court
cannot now review the court's reasoning, if any was stated, to
21 determine whether that was error. Nor does petitioner state how the
ruling was erroneous, nor does he support his position with citation
to proper authority. In any event, it appears that the motion was
22 properly denied, as trial counsel did not attach an affidavit from the
juror. Only a sworn affidavit or oral testimony from the juror could
23 have established good cause for granting the request for the
disclosure (see People v. Hayes (1999) 21 Cal.4th 1211). Nor does
24 petitioner submit a sworn affidavit from the juror to support his
claim. Nor does petitioner show that any of the matter attested to in
25 counsel's affidavit presented to the trial court would have been
admissible for purposes of a motion for a new trial, pursuant to
26 Evid. Code § 1150(a). For all these reasons, the claim is denied (In
27 re Bower (1985) 38 Cal.3d 865).

28 Lodged Doc. 12 at 1-2.

1 D. Objective Reasonableness Under § 2254(d)

2 The superior court did not mention the federal constitutional dimension of petitioner's
3 claim, but this court must presume that it was considered and apply § 2254(d) standards to the
4 implicit rejection of the claim. Johnson v. Williams, 133 S.Ct. 1088, 1096 (2013).

5 In Sims v. Rowland, 414 F.3d 1148 (9th Cir.), cert. denied, 546 U.S. 1066 (2005), the
6 Ninth Circuit held that § 2254(d) barred relief where a California trial court failed to conduct a
7 hearing regarding possible jury bias. The Court concluded that the state court could not have
8 unreasonably applied clearly established federal law, because "the Supreme Court has not yet
9 decided whether due process requires a trial court to hold a hearing *sua sponte* whenever evidence
10 of juror bias comes to light." Sims, 414 F.3d at 1153. The Supreme Court has also never decided
11 the related question whether, or under what circumstances, due process requires that a criminal
12 defendant be permitted post-trial access to jurors in order to investigate possible bias or
13 misconduct. Where no Supreme Court precedent directly governs an issue, there can be no
14 unreasonable application of clearly established federal law. Carey v. Musladin, 549 U.S. 70, 77
15 (2006). Accordingly, § 2254(d) precludes relief here.

16 Even if the undersigned were to conclude that the constitutional claim had not been
17 adjudicated by the superior court, and therefore were to conduct de novo review, petitioner would
18 not be entitled to relief. The Supreme Court has held that a hearing is required where there is
19 evidence of jury tampering, Remmer v. United States, 347 U.S. 227 (1954), but the Ninth Circuit
20 has explained that this rule is limited to the tampering context and does not apply to other forms
21 of potential jury misconduct. Tracey v. Palmateer, 341 F.3d 1037, 1044 (9th Cir.), cert. denied,
22 543 U.S. 864 (2003). Where there is no constitutional right to a hearing regarding jury issues,
23 there can be no constitutional right to investigate such issues. Without a constitutional right to
24 investigate juror misconduct, the denial of juror identifying information cannot support federal
25 habeas relief.

26 In deciding whether to hold a hearing or otherwise inquire into possible jury misconduct,
27 due process principles require a court to consider the content and source of the allegations,
28 assesses the seriousness of the issue, and determine whether further inquiry is warranted. Sims,

1 414 F.3d at 1155. All that the Fourteenth Amendment categorically forbids is “a trial judge
2 remaining idle in the face of evidence indicating probable juror bias.” Id. at 1156.

3 In petitioner’s case, the trial judge was not presented with evidence indicating probable
4 juror bias. It was presented with a hearsay account of possible juror second-guessing, which is
5 not the same thing. The declaration of counsel that was presented to the superior court did not
6 recount or allege any specific facts that would constitute jury misconduct, or that demonstrated
7 jurors had impermissibly drawn adverse inferences from petitioner’s failure to testify. Counsel
8 merely reported her suspicion that this might be so. Accordingly, even if due process requires
9 disclosure of juror contact information in the face of evidence that jurors were biased or failed to
10 follow their instructions, the evidence before the trial judge in this case was insufficient to require
11 investigation.

12 Finally, even if the trial judge misapplied the California statute, petitioner would not be
13 entitled to habeas relief. See Estele v. McGuire, 502 U.S. 62, 67 (1991) (errors of state law do
14 not support habeas relief absent a due process violation). This court may not disturb the decision
15 of the California court finding no violation of the statute. Bradshaw v. Richie, 546 U.S. 74, 76
16 (2005).

17 For all these reasons, relief is not available on this claim.

18 III. Claim Three: Instructional Error

19 A. Petitioner’s Allegations

20 Petitioner claims that his rights to due process and a fair trial were violated when the jury
21 was instructed pursuant to CALCRIM 403, as follows:

22 Before you may decide whether the defendant is guilty of attempted
23 murder based on the theory that he aided and abetted someone else
24 who committed the crime, you must decide whether he is guilty of
25 brandishing a firearm or assault with a firearm. The crimes of
brandishing a firearm and assault with a firearm are defined
elsewhere in these instructions.

26 To prove that a defendant is guilty of attempted murder, the People
must prove that:

27 1. The defendant is guilty of brandishing a firearm or assault with a
28 firearm;

2. During the commission of the brandishing a firearm or assault with a firearm the crime of attempted murder was committed; and

3. Under all of the circumstances a reasonable person in the defendant's position would have known that the commission of the attempted murder was a natural and probable consequence of the commission of the brandishing of a firearm or assault with a firearm.

A natural and probable consequence is one that a reasonable person knows is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all of the circumstances established by the evidence. If the attempted murder was committed for a reason independent of the common plan to commit the brandishing a firearm or assault with a firearm, then the commission of attempted murder was not a natural and probable consequence of brandishing a firearm or assault with a firearm.

To decide whether a crime of attempted murder was committed, please refer to the separate instructions that I will give you on that crime.

The People are alleging that the defendant originally intended to aid and abet either brandishing a firearm or assault with a firearm.

The defendant is guilty of attempted murder if you decide that the defendant aided and abetted one of those crimes and that attempted murder was the natural and probable result of one of these crimes. However, you do not need to agree about which of these crimes the defendant aided and abetted.

RT [].

Petitioner contends that this instruction was inconsistent with California law regarding the "natural and probable consequences" doctrine, and that it prejudiced him in violation of his federal constitutional rights.

B. The Clearly Established Federal Law

Erroneous jury instructions do not support federal habeas relief unless the infirm instruction so infected the entire trial that the resulting conviction violates due process. Estelle v. McGuire, 502 U.S. 62, 72 (1991) (citing Cupp v. Naughten, 414 U.S. 141, 147 (1973)). See also Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974) ("[I]t must be established not merely that the instruction is undesirable, erroneous, or even 'universally condemned,' but that it violated some [constitutional right]"). The challenged instruction may not be judged in artificial isolation, but must be considered in the context of the instructions as a whole and the trial record overall. Estelle, 502 U.S. at 72. Moreover, relief is only available if there is a reasonable

1 likelihood that the jury has applied the challenged instruction in a way that violates the
2 Constitution. Id. at 72–73.

3 C. The State Court’s Ruling

4 This claim was raised on direct appeal. Because the California Supreme Court denied
5 discretionary review, the opinion of the California Court of Appeal constitutes the last reasoned
6 decision on the merits and is the subject of habeas review in this court. See Ylst v. Nunnemaker,
7 501 U.S. 797; Ortiz v. Yates, 704 F.3d 1026, 1034 (9th Cir. 2012). The Court of Appeal ruled in
8 relevant part as follows:

9 Under the natural and probable consequences doctrine, “‘A person
10 who knowingly aids and abets criminal conduct is guilty of not only
11 the intended crime [target offense] but also of any other crime the
12 perpetrator actually commits [nontarget offense] that is a natural
and probable consequence of the intended crime.’” (People v.
Medina (2009) 46 Cal.4th 913, 920.)

13 . . . Diaz complains that, contrary to the natural and probable
14 consequences doctrine, CALCRIM No. 403 “does not require that
the [aider and abettor] aided and abetted the actual perpetrator in
15 the target crimes.... [¶] All CALCRIM [No.] 403 requires is that the
[aider and abettor] aided or abetted someone in the target crime.”

16 In making this argument, Diaz ignores CALCRIM Nos. 400 and
401, which the jury also received. CALCRIM No. 400 told the jury
17 that “[a] person may be guilty of a crime” if he “aided and abetted a
perpetrator who directly committed the crime.” CALCRIM No. 401
18 told the jury that “[t]o prove that a defendant is guilty of a crime
based on aiding and abetting that crime, the People must prove that:
19 [¶] 1. The perpetrator committed the crime; [¶] 2. The defendant
knew that the perpetrator intended to commit the crime; [¶] 3.
20 Before or during the commission of the crime the defendant
intended to aid the perpetrator in committing the crime; and [¶] 4.
21 The defendant’s words or conduct did, in fact, aid and abet the
perpetrator’s commission of the crime. [¶] Someone aids and abets
22 a crime if he knows of the perpetrator’s unlawful purpose and he
specifically intends to and does, in fact, aid, facilitate, promote,
23 encourage or instigate the perpetrator’s commission of that crime.”
(Italics added.)

24 “In assessing [a] defendant’s claim of [instructional] error, we
25 consider the entire charge to the jury and not simply the asserted
deficiencies in the challenged instruction.” (People v. Lewis (2001)
26 25 Cal.4th 610, 649.) Taken together, CALCRIM Nos. 400, 401,
and 403 informed the jurors that to find Diaz guilty of attempted
27 murder under the natural and probable consequences doctrine, they
had to first find he intended to and did, in fact, aid and abet the
28 perpetrator’s commission of either brandishing a firearm or assault
with a firearm. Thus, Diaz’s claim of error in CALCRIM No. 403 is

1 without merit.

2 Lodged Doc. 7 at 21-22.

3 D. Objective Reasonableness Under § 2254(d)

4 This court may not revisit the question whether the challenged jury instruction was proper
5 under California's natural and probable consequences doctrine. That is a state law issue on which
6 the state courts have the final word. See Waddington v. Sarausad, 555 U.S. 179, 192 n.5 (2009)
7 ("we have repeatedly held that 'it is not the province of a federal habeas court to reexamine state-
8 court determinations on state-law questions'") (quoting Estelle, 502 U.S. at 67-68). Where jury
9 instructions are correct under state law, there can be no due process violation. Spivey v. Rocha,
10 194 F.3d 971, 976 (1999), cert. denied, 531 U.S. 995 (2000).

11 In rejecting petitioner's claim, the California Court of Appeal did not unreasonably
12 resolve the due process issue. Indeed, the claim would fail even without reference to AEDPA's
13 exacting standards for relief. Taken in their entirety, the jury instructions were adequate. The
14 jury was instructed that it could find petitioner guilty only if it was proved beyond a reasonable
15 doubt that he had aided and abetted a target offense (brandishing a firearm or assault with a
16 firearm), and that the attempted murder was a reasonably foreseeable consequence of the target
17 offense. This theory of liability does not offend due process. Moreover, in light of the record as
18 a whole, petitioner has not demonstrated that the instruction rendered the conviction
19 fundamentally unfair. See Estelle, 502 U.S. at 67, 71-73; see also Solis v. Garcia, 219 F.3d 922,
20 927-28 (9th Cir. 2000) (rejecting argument that jury instructions, including natural and probable
21 consequences instruction, allowed conviction without requisite proof of criminal intent where
22 instructions on the whole reflected that jury was correctly instructed on criminal intent for
23 purposes of aider and abettor liability), cert. denied, 534 U.S. 839 (2001); Spivey, 194 F.3d at 977
24 (rejecting argument that instruction about natural and probable consequences relieved prosecution
25 of its burden of proving requisite mental state).

26 IV. Claim Four: Failure to Give Unanimity Instruction

27 A. Petitioner's Allegations

28 Petitioner claims that his rights to due process and a fair trial were violated by the trial

1 court's failure to instruct the jury that their verdict must be unanimous as to the theory of liability.
2 More specifically, he contends that his conviction is invalid because the jury was not required to
3 agree on which predicate act subjected him to aider and abettor liability.

4 B. The Clearly Established Federal Law

5 "[T]here is no general requirement that the jury reach agreement on the preliminary
6 factual issues which underlie the verdict." Schad v. Arizona, 501 U.S. 624, 632 (1991) (plurality
7 opinion). Indeed, the Supreme Court has held that the requirement of a unanimous verdict is not
8 itself constitutionally compelled in state criminal trials. Apodaca v. Oregon, 406 U.S. 404 (1972)
9 (affirming state convictions upon less than unanimous jury verdicts).

10 C. The State Court's Ruling

11 Because this claim was raised on appeal and the California Supreme Court denied review,
12 the decision of the California Court of Appeals is the decision subject to review here. Ortiz v.
13 Yates, 704 F.3d at 1034. The Court of Appeals ruled in relevant part as follows:

14 Diaz contends the trial court erred in failing to give a unanimity
15 instruction because "[t]he prosecution proceeded on a theory that
16 [he] was an aider and abettor" and "[t]he aiding and abetting of the
17 offenses could have been premised on any one of two acts under the
18 evidence the prosecution presented." More specifically, Diaz
19 contends the jury could have found he aided and abetted Broadbent
either by telling him to "go get the gun" or by "lull[ing] the victims
into a false sense of security, or divert[ing] their attention from
[Broadbent] while [he] was preparing his deadly assault." We find
no error.

20 In People v. Jenkins (2000) 22 Cal.4th 900, the defendant insisted
21 he was entitled to a unanimity instruction because the jury could
22 have found him guilty of murder either as the direct perpetrator or
23 as an aider and abettor. (Id. at p. 1024.) The Supreme Court
disagreed, noting it was "'settled that as long as each juror is
convinced beyond a reasonable doubt that [the] defendant is guilty
of murder as that offense is defined by statute, it need not decide ...
unanimously whether [the] defendant was guilty as the aider and
24 abettor or as the direct perpetrator." (Id. at pp. 1024-1025.)
"[R]el[ying] upon authority indicating that the unanimity
instruction is required if there are multiple acts shown that could
25 have been charged as separate offenses," the defendant in Jenkins
argued that "the circumstances in support of his potential
26 accomplice liability—that he was far from the scene when the
murder occurred but had aided and abetted in it—were so distinct
27 from the circumstances in support of his potential direct liability—
that he had been at the scene and had pulled the trigger—as to
28 constitute two 'discrete criminal events' requiring the unanimity

instruction.” (*Id.* at p. 1025.) Still disagreeing, the Supreme Court stated, “In the present case, defendant’s conduct as an aider and abettor or as a direct perpetrator could result only in one criminal act and one charge. Under these circumstances, ‘[j]urors need not unanimously agree on whether the defendant is an aider and abettor or a principal even when different evidence and facts support each conclusion.’” (*Id.* at pp. 1025- 1026.)

Jenkins compels a similar result here. If there is no need for jury unanimity on whether a particular defendant was the perpetrator or an aider and abettor of a murder, then why should there be a need for jury unanimity on whether Diaz aided and abetted the attempted murders of Harrison, Watson, and Dorral by telling Broadbent to “go get a gun” or by lulling the victims into a false sense of security while Broadbent did so?

“[C]riminal law is ultimately concerned with ascribing criminal responsibility for discrete events. This is done by defining crimes, for example, first degree murder, and by determining who will be responsible for those crimes, for example, aider and abettors and direct perpetrators. Once the discrete event is identified, for example, the killing of a particular human being, the theory each individual juror uses to conclude the defendant is criminally responsible need not be the same and, indeed, may be contradictory.” (*People v. Davis* (1992) 8 Cal.App.4th 28, 45.)

Here, the discrete criminal event was the attempted murders of Harrison, Watson, and Dorral when Broadbent fired his gun into their car. The jury did not have to agree whether Diaz told Broadbent to “go get a gun,” lulled the victims into a false sense of security while Broadbent did so, or both, to find him criminally responsible, as long as each individual juror reached that conclusion of criminal responsibility one way or another. No unanimity instruction was required.

Lodged Doc. 7 at 19-21.

D. Objective Reasonableness Under § 2254(d)

Nothing in the state court’s analysis unreasonably applies clearly established federal law. Because the U.S. Supreme Court has declined to hold that the Constitution requires unanimous verdicts in state criminal trials, Apodaca, *supra*, and has specifically approved instructions which permit jurors to reach ultimate agreement as to the verdict based on different factual predicates, Shad, *supra*, this claim is a non-starter under any standard of review.

Petitioner relies on Andres v. United States, 333 U.S. 740 (1948), for the principle that “unanimity in jury verdicts is required where the Sixth and Seventh Amendments apply.” *See* ECF No. 41 at 26. Petitioner correctly quotes Andres, *id.* at 748, but fails to appreciate that its

1 holding is limited to federal prosecutions. See Johnson v. Louisiana, 406 U.S. 356, 369-70 & n.5
2 (1972) (Powell, J., concurring) (discussing differences in application of unanimity principle to
3 federal and state trials). Apodaca indisputably governs state criminal prosecutions such as
4 petitioner's.

5 Because the unanimous verdict requirement at petitioner's trial was a creature of
6 California law, and was not required by the U.S. Constitution, the state court's adjudication of the
7 unanimity issue may not be disturbed here. Bradshaw v. Richie, 546 U.S. at 76.

8 CONCLUSION

9 For all the reasons set forth above, IT IS RECOMMENDED that petitioner's application
10 for federal habeas corpus be denied.

11 These findings and recommendations are submitted to the United States District Judge
12 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty-one days
13 after being served with these findings and recommendations, any party may file written
14 objections with the court and serve a copy on all parties. Such a document should be captioned
15 "Objections to Magistrate Judge's Findings and Recommendations." If petitioner files objections,
16 he shall also address whether a certificate of appealability should issue and, if so, why and as to
17 which issues. A certificate of appealability may issue under 28 U.S.C. § 2253 "only if the
18 applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. §
19 2253(c)(3). Any response to the objections shall be filed and served within fourteen days after
20 service of the objections. The parties are advised that failure to file objections within the
21 specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951
22 F.2d 1153 (9th Cir. 1991).

23 DATED: December 11, 2014

24 
25 ALLISON CLAIRE
26 UNITED STATES MAGISTRATE JUDGE
27
28

App. 27

1 KAMALA D. HARRIS, State Bar No. 146672
Attorney General of California
2 CHARLES A. FRENCH, State Bar No. 158361
Supervising Deputy Attorney General
3 TIA M. CORONADO, State Bar No. 252064
Deputy Attorney General
4 1300 I Street, Suite 125
P.O. Box 944255
5 Sacramento, CA 94244-2550
Telephone: (916) 324-5232
6 Fax: (916) 324-2960
E-mail: Tia.Coronado@doj.ca.gov
7 *Attorneys for Respondent*

RECEIVED

JUL 20 2012

CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
BY DEPUTY CLERK

8
9 IN THE UNITED STATES DISTRICT COURT
10 FOR THE EASTERN DISTRICT OF CALIFORNIA
11

12
13 **HUMBERTO DIAZ,**

2:12-cv-1095 WBS DAD

14 Petitioner,

DOCUMENT TO BE LODGED

15 v.

16 **G. D. LEWIS,**

17 Respondent.
18
19

20 Lod. Doc. 5 – Order denying Petition for Writ of Habeas Corpus, filed in
21 Sacramento County Superior Court, January 10, 2011
22
23
24
25
26
27
28

App. 28

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SACRAMENTO

DATE/TIME : JANUARY 10, 2011
JUDGE : T. NUNLEY
REPORTER : NONE

DEPT. NO : 17
CLERK : D. MORRISON
BAILIFF : S. HILL
PRESENT:

IN RE THE MATTER OF

HUMBERTO DIAZ,

Case No.: 10F07193

Nature of Proceedings: PETITION FOR WRIT OF HABEAS CORPUS ORDER

The petition for writ of habeas corpus has been filed and considered.

IT IS ORDERED that the petition for writ of habeas corpus is DENIED.

Petitioner challenges the judgment in Sacramento County Superior Court Case No. 06F00542.

Petitioner first claims that the trial court abused its discretion in improperly denying access to jury information needed to prepare a motion for a new trial, and never determined whether an affidavit supporting the motion was admissible, regarding juror discussion of petitioner's failure to testify and uncertainty regarding petitioner's overall guilt as conveyed to petitioner's trial counsel in a phone conversation. Petitioner also claims that appellate counsel was ineffective in failing to raise the issue on appeal. In support, petitioner attaches a copy of the motion filed by trial counsel, postverdict, requesting juror identifying information, as well as trial counsel's affidavit detailing a telephone conversation that trial counsel had with the juror. Trial counsel, in the affidavit, attests that the juror told counsel that he wished he had not voted guilty, that during the trial the jury had questions and felt there was a missing link, that the juror did not know if the shooting was intentional and that petitioner did not defend himself, that to get out of aider and abettor liability one must do all within one's power to stop what's going on, that the juror did not believe that petitioner intended for the shooting to happen, and that everybody wanted to find petitioner guilty of a lesser

BOOK : 17
PAGE :
DATE : JANUARY 10, 2011
CASE NO. : 10F07193
CASE TITLE : IN RE: HUMBERTO DIAZ

Superior Court of California,
County of Sacramento

BY: D. MORRISON, *D. Morrison*
Deputy Clerk

App. 29

CASE NO: 10F07193

PROCEEDINGS: PETITION FOR WRIT OF HABEAS CORPUS

crime but that attempted voluntary manslaughter did not fit so the juror had no choice but to vote for guilt on attempted murder.

Petitioner fails to attach a copy of reporter's transcript of the October 31, 2007 hearing during which petitioner's motion for disclosure of juror identifying information. As such, the court cannot now review the court's reasoning, if any was stated, to determine whether that was error. Nor does petitioner state how the ruling was erroneous, nor does he support his position with citation to proper authority. In any event, it appears that the motion was properly denied, as trial counsel did not attach an affidavit from the juror. Only a sworn affidavit or oral testimony from the juror could have established good cause for granting the request for the disclosure (see People v. Hayes (1999) 21 Cal.4th 1211). Nor does petitioner now submit a sworn affidavit from the juror to support his claim. Nor does petitioner show that any of the matter attested to in counsel's affidavit presented to the trial court would have been admissible for purposes of a motion for a new trial, pursuant to Evid. Code § 1150(a). For all of these reasons, the claim is denied (In re Bower (1985) 38 Cal.3d 865).

Petitioner next claims that the trial court erred in refusing to give instructions on specific mental state, and that appellate counsel was ineffective in failing to raise the issue on appeal. Petitioner gives no further detail and attaches no documentation in support.

A habeas corpus petition must state with particularity the facts upon which the petitioner is relying to justify relief (In re Swain (1949) 34 Cal.2d 300), and be supported by reasonably available documentary evidence or affidavits (In re Harris (1993) 5 Cal.4th 813, 827 fn. 5). As petitioner has failed to do so, and additionally has failed to support his claim with appropriate citation to authority, the claim should be denied. Regardless, the trial court gave CALCRIM No. 252 on general and specific mental states as required for the various possible crimes in the case, including that attempted murder requires a specific mental state, and also gave CALCRIM No. 600, instructing that attempted murder requires intent to kill. Again, petitioner fails to show how these or any other instructions given on mental state were erroneous, requiring denial of the claim (Bower, supra).

Petitioner next claims that the trial court erred in giving misleading and incriminating instructions on aiding and abetting and on the natural and probable consequences doctrine, that trial counsel was ineffective in failing to object on this ground, and had not given the standard instructions on these matters. He also claims that appellate counsel was

BOOK : 17
 PAGE :
 DATE : JANUARY 10, 2011
 CASE NO. : 10F07193
 CASE TITLE : IN RE:HUMBERTO DIAZ

Superior Court of California,
 County of Sacramento

BY: D. MORRISON, 
 Deputy Clerk

App. 30

CASE NO: 10F07193

PROCEEDINGS: PETITION FOR WRIT OF HABEAS CORPUS

ineffective in failing to raise the issue on appeal. He gives no further detail.

Appellate counsel did raise the issue of whether CALCRIM No. 403 was contrary to the natural and probable consequences doctrine because it does not require aiding and abetting the actual perpetrator in the target crimes. Thus, to the extent that petitioner again raises this same issue, which was rejected on appeal by the Third District Court of Appeal, the claim is barred on habeas review under In re Waltreus (1965) 62 Cal.2d 218, reaffirmed in In re Harris (1993) 5 Cal.4th 813, 829. The only exceptions to this procedural bar are: (1) if the claim is based on constitutional error that is both clear and fundamental, and that strikes at the heart of the trial process; (2) if the claim is now couched in ineffective assistance of counsel terms; (3) if the court lacked fundamental jurisdiction over the petitioner or the subject matter; (4) if the court acted in excess of its jurisdiction and the issue is strictly a legal one not requiring a redetermination of the facts underlying the claim; (5) there has been a change in the law affecting the petitioner (Harris, supra, 5 Cal.4th 813, 834, 834 fn. 8, 836, 840-841, 841); or (6) if the claim is that the sentence is unauthorized, as an unauthorized sentence may be corrected at any time (People v. Welch (1993) 5 Cal.4th 228; Harris, supra, 5 Cal.4th 813, 842; People v. Serrato (1973) 9 Cal.3d 753, 763, overruled on other grounds in People v. Fosselman (1983) 33 Cal.3d 572, 583 fn. 1). Petitioner does not show that this claim qualifies for any of these exceptions, including that of ineffective assistance of counsel, which does not apply to a claim of ineffective assistance in failure to raise a claim that was, in fact, raised and rejected on appeal. Nor does petitioner give this court any reason why it should conclude any differently than did the Third District, even if the claim were not barred under Waltreus.

To the extent that petitioner is attempting to raise a different claim, the claim fails under Swain, supra, and Harris, supra.

Petitioner next claims that trial counsel was ineffective in failing to proceed with the agreed-upon defense that petitioner never said "go get the gun" and instead admitting in argument that he made the statement, and that appellate counsel was ineffective in failing to raise the issue on appeal. In support, he attaches a letter trial counsel wrote to appellate counsel, stating that petitioner had specifically asked trial counsel not to argue that petitioner in fact said "get the gun," but counsel did anyway and argued instead that petitioner was only trying to scare the victims away and was not telling codefendant to shoot people, and that this was a complete mistake on counsel's part and had nothing to do with any tactical decision counsel had made.

BOOK : 17
 PAGE :
 DATE : JANUARY 10, 2011
 CASE NO. : 10F07193
 CASE TITLE : IN RE: HUMBERTO DIAZ

Superior Court of California,
 County of Sacramento

BY: D. MORRISON, 
 Deputy Clerk

App. 31

~~CASE NAME, IN RE: DIAZ~~

CASE NO: 10F07193

PROCEEDINGS: PETITION FOR WRIT OF HABEAS CORPUS

The letter also, however, admits that eyewitnesses had heard petitioner to have said "get the gun." As such, even though after the fact trial counsel stated it was not a tactical decision, it actually was a tactical decision on counsel's one, and a reasonable one at that, in deciding not to challenge strong testimony that petitioner had in fact made the statement and instead deciding to attempt to explain away the statement in hopes that the jury would believe that reasoning. That did not constitute ineffective assistance of counsel, under the circumstances, and was a reasonable gamble that was rejected by the jury. As such, the claim fails and is denied (Strickland v. Washington (1984) 466 U.S. 668; Bower, supra).

Petitioner next claims that trial counsel was ineffective in failing to investigate by following up with a potential witness, and that appellate counsel was ineffective in failing to raise the issue on appeal. Petitioner gives no further detail.

The claim fails under Swain, supra, and Harris, supra.

Petitioner next claims that trial counsel was ineffective in failing to request lesser included offenses to all three counts of attempted murder, and that appellate counsel was ineffective in failing to raise the issue on appeal.

Petitioner, however, overlooks the fact that the jury was, in fact, instructed on attempted voluntary manslaughter as a lesser included offense of attempted murder. As such, the claim fails and is denied (Bower, supra).

Petitioner next claims that trial counsel was ineffective in inadequately advising petitioner not to testify, as a jury had stated that this had been the subject of juror discussion. He also claims that appellate counsel was ineffective in failing to raise the issue on appeal.

Petitioner, however, fails to attach an affidavit from himself setting forth the testimony that he would have given, had he taken the stand, that would have been reasonably likely to have made a difference in the outcome of the trial. Not having done so, the claim fails under Swain, supra, and Harris, supra.

Petitioner next claims that trial counsel was ineffective in failing to call the codefendant as a witness, and that appellate counsel was ineffective in failing to raise the issue on appeal.

BOOK : 17
 PAGE :
 DATE : JANUARY 10, 2011
 CASE NO. : 10F07193
 CASE TITLE : IN RE: HUMBERTO DIAZ

Superior Court of California,
 County of Sacramento

BY: D. MORRISON 
 Deputy Clerk

App. 32

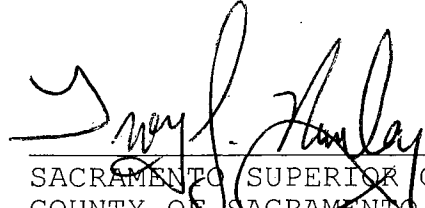
~~CASE NAME: IN RE: DIAZ~~

CASE NO: 10F07193

PROCEEDINGS: PETITION FOR WRIT OF HABEAS CORPUS

Petitioner, however, overlooks the fact that codefendant was jointly tried with him, and most likely would have asserted his Fifth Amendment privilege against self-incrimination if called by petitioner to testify. Nor does petitioner attach an affidavit from codefendant stating that codefendant would have taken the stand and waived his Fifth Amendment privilege, and would have testified to specified matters that would have been reasonably likely to have made a difference in the outcome of the trial. Not having done so, the claim fails under Swain, supra, and Harris, supra.

DATED: January 10, 2011


SACRAMENTO SUPERIOR COURT
COUNTY OF SACRAMENTO
HONORABLE JUDGE TROY L. NUNLEY

BOOK : 17
PAGE :
DATE : JANUARY 10, 2011
CASE NO. : 10F07193
CASE TITLE : IN RE:HUMBERTO DIAZ

Superior Court of California,
County of Sacramento

BY: D. MORRISON 
Deputy Clerk

App. 33

Case Number: ~~1070-155~~ Department: 17
Case Title: In re HUMBERTO DIAZ

CERTIFICATE OF SERVICE BY MAILING
(C.C.P. Sec. 1013a(4))

I, the Clerk of the Superior Court of California, County of Sacramento, certify that I am not a party to this cause, and on the date shown below I served the foregoing HABEAS CORPUS ORDER by depositing true copies thereof, enclosed in separate, sealed envelopes with the postage fully prepaid, in the United States Mail at Sacramento, California, each of which envelopes was addressed respectively to the persons and addresses shown below:

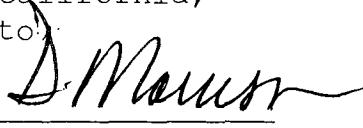
HUMBERTO DIAZ, F-97270
PELICAN BAY STATE PRISON
5905 LAKE EARL DRIVE
P.O. BOX 7500
CRESCENT CITY, CA 95531

SACRAMENTO COUNTY DISTRICT
ATTY.
ATTN: WRITS AND APPEALS
901 G STREET
SACRAMENTO, CA 95814

I, the undersigned deputy clerk, declare under penalty of perjury that the foregoing is true and correct.

Dated: 01/12th/2011

Superior Court of California,
County of Sacramento

By: D. MORRISON, 
Deputy Clerk