No. ___________

IN THE

Supreme Court of the United States

RANDEE D. WILLIAMS, JR.,

Petitioner,

v.

CLARK E. DUCART, WARDEN,

Respondent.

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

APPENDIX

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APPENDIX INDEX

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

JAN 30 2018

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

RANDEE D. WILLIAMS, Jr., Petitioner-Appellant, v. CLARK E. DUCART, Warden, Respondent-Appellee.	No. 17-55904 D.C. No. 2:16-cv-02190-JAK-PLA Central District of California, Los Angeles ORDER

Before: NGUYEN and OWENS, Circuit Judges.

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

Any pending motions are denied as moot.

DENIED.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

RANDEE D. WILLIAMS, JR., Petitioner, v. C.E. DuCART, Warden, Respondent.	)	No. CV 16-2190-JAK (PLA) **ORDER DENYING APPLICATION FOR CERTIFICATE OF APPEALABILITY**

Judgment has been entered dismissing the Petition for Writ of Habeas Corpus in this action. On May 1, 2017, petitioner filed an Application for Certificate of Appealability.

An appeal may not be taken from the denial by a district judge of a habeas petition in which the detention complained of arises out of process issued by a state court "unless a circuit justice or a circuit or district judge issues a certificate of appealability under 28 U.S.C. § 2253(c)." Fed. R. App. Proc. 22(b). "A certificate of appealability may issue . . . only if . . . [there is] a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). A "substantial showing . . . includes showing that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" Slack v. McDaniel, 529 U.S. 473, 484, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000) (citation omitted); see also Sassounian v. Roe, 230

F.3d 1097, 1101 (9th Cir. 2000). Thus, "[w]here a district court has rejected the constitutional claims on the merits, . . . [t]he petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." Slack, 529 U.S. at 484.

In accordance with 28 U.S.C. § 2253(c)(3), the Court finds that there is no substantial showing of a denial of a constitutional right with respect to the grounds for relief set forth in the Petition.

THEREFORE, pursuant to 28 U.S.C. § 2253, petitioner's Application for Certificate of Appealability is **DENIED.**

DATED: June 1, 2017

HONORABLE JOHN A. KRONSTADT
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

RANDEE D. WILLIAMS, JR., Petitioner, v. C.E. DuCART, Warden, Respondent.	)	No. CV 16-2190-JAK (PLA) **JUDGMENT**

Pursuant to the Order accepting the Magistrate Judge's Report and Recommendation,

IT IS ADJUDGED that the Petition in this matter is dismissed with prejudice.

DATED: June 1, 2017

HONORABLE JOHN A. KRONSTADT
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

RANDEE D. WILLIAMS, JR., Petitioner, v. C.E. DuCART, Warden, Respondent.	No. CV 16-2190-JAK (PLA) **ORDER ACCEPTING MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION**

Pursuant to 28 U.S.C. § 636, the Court has reviewed the Petition, the other records on file herein, the Magistrate Judge's Report and Recommendation, and petitioner's Objections to the Report and Recommendation. The Court has engaged in a de novo review of those portions of the Report and Recommendation to which objections have been made. The Court accepts the recommendations of the Magistrate Judge.

ACCORDINGLY, IT IS ORDERED:

1. The Report and Recommendation is accepted, with the exception of the respondent's proper name, which is reflected above.
2. Judgment shall be entered consistent with this Order.

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3. The clerk shall serve this Order and the Judgment on all counsel or parties of record.

DATED: June 1, 2017

HONORABLE JOHN A. KRONSTADT
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

RANDEE D. WILLIAMS, JR., Petitioner, v. J. SOTO, Warden, Respondent.	No. CV 16-2190-JAK (PLA) **REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE**

This Report and Recommendation is submitted to the Honorable John A. Kronstadt, United States District Judge, pursuant to 28 U.S.C. § 636 and General Order 05-07 of the United States District Court for the Central District of California. For the reasons discussed below, the Magistrate Judge recommends that the Petition for Writ of Habeas Corpus be dismissed with prejudice.

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I

PROCEDURAL HISTORY

A Los Angeles County Superior Court jury convicted petitioner of discharge of a firearm with gross negligence, in violation of California Penal Code section 246.3(a) (Count 1); possession of a firearm by a felon, in violation of California Penal Code section 29800(a)(1) (Count 2); carjacking, in violation of California Penal Code section 215(a) (Count 3); and assault with a deadly weapon, in violation of California Penal Code section 245(a)(1) (Count 5). (Clerk's Transcript ["CT"] 213-17). Petitioner was also charged with an additional count of possession of a firearm, in violation of California Penal Code section 29800 (Count 4), but the jury acquitted him of that charge. (Id. at 216). Although the jury found true the allegation that petitioner used a deadly or dangerous weapon in committing the carjacking alleged in Count 3, the jury found not true the allegation that he used a firearm in the commission of the carjacking. (Id. at 215). In a bifurcated proceeding, the trial court found that petitioner had suffered one prior serious or violent felony conviction within the meaning of California's Three Strikes Law and that he had served two prior prison terms (Cal. Penal Code §§ 667, 1170.12, 667.5). (Reporter's Transcript ["RT"] 426). The trial court sentenced petitioner to a term of twenty-nine years and four months in state prison. (CT 254-56).

Petitioner filed a direct appeal. (See Respondent's Notice of Lodging Nos. 2-4). On March 11, 2014, the California Court of Appeal affirmed the judgment against petitioner. (Lodgment No. 5). Petitioner then filed a petition for review in the California Supreme Court, which was summarily denied on November 25, 2014. (See Lodgment Nos. 6-7). Petitioner subsequently initiated a series of unsuccessful collateral attacks to his conviction, the last of which was denied by the California Supreme Court on April 27, 2016. (See Lodgment Nos. 8-21).

On March 31, 2016, petitioner initiated this action. (Docket No. 1). On April 20, 2016, the undersigned appointed the Federal Public Defender's Office as counsel for petitioner. (Docket No. 16). On October 17, 2016, respondent filed an Answer and a supporting Memorandum of Points and Authorities ("Answer"). (Docket No. 32). On February 28, 2017, petitioner filed a Reply. (Docket No. 42).

This matter is deemed submitted and is ready for a decision.

II

STATEMENT OF FACTS

The Court adopts the factual summary set forth in the California Court of Appeal's Opinion affirming petitioner's conviction.[1]

Count 4 -- Assault with a Deadly Weapon on Paris Covington

> [Petitioner] had a casual romantic relationship with Covington on July 2, 2012. Covington lives in Van Nuys with her mother, who owns a black BMW. Covington was home that morning with her friend, Latrelle, and Latrelle's baby. [Petitioner] arrived at Covington's house at around 8:00 a.m. After ongoing bickering between Covington, [petitioner], and Latrelle, Covington told [petitioner] to leave and threatened to call the police, but [petitioner] stayed and the arguing continued. Covington eventually took refuge in a bedroom, but [petitioner] broke in through the locked door and struck Covington, who jumped out of the bedroom window.
>
> Covington called 911 as she ran down the driveway, providing her address to the operator and identifying the car driven by [petitioner] as a Volkswagen (the same type of car that had been carjacked by [petitioner] from Sarai H. on June 24, 2012, as charged in count 3). Covington was struck and knocked to the ground by the Volkswagen as she ran down the street, causing injuries to her arm, hip, and pelvis area.[2]
>
> Covington ran to the home of her neighbor, Steve Macauley, who had been watching the incident through a window in his home and observed the Volkswagen chasing after Covington. Macauley saw Covington go down and believed she had been hit by the car, although he did not see actual contact. [Petitioner] turned the car around and drove off in the opposite direction. Covington was crying and screaming that [petitioner] hit her with a car when she arrived at Macauley's house. She was taken to the hospital by ambulance. Covington told the police and the 911 operator that [petitioner] hit her with the car.

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[1] The Court "presume[s] that the state court's findings of fact are correct unless [p]etitioner rebuts that presumption with clear and convincing evidence." Tilcock v. Budge, 538 F.3d 1138, 1141 (9th Cir. 2008) (citations omitted); 28 U.S.C. § 2254(e)(1). Because petitioner has not rebutted the presumption with respect to the underlying events, the Court relies on the state court's recitation of the facts. Tilcock, 538 F.3d at 1141. To the extent that an evaluation of petitioner's individual claims depends on an examination of the trial record, the Court herein has made an independent evaluation of the record specific to those claims.

[2] Covington testified at trial that she fell without being struck by the Volkswagen. The jury's verdict reflects its rejection of her recantation of her statements to the police and her call to 911.

Counts 1 and 2 -- Unlawful Discharge of a Firearm and Felon in Possession of a Firearm

[Petitioner] and Covington went to the home of Sylvester Williams, [petitioner's] grandfather, on June 2, 2012. [Petitioner] and the grandfather frequently argued, including that night. The grandfather told Officer Edgar Muro that as [petitioner] and Covington were leaving the residence, Covington asked why [petitioner] did not find another place to live.[3] [Petitioner] has a short temper and became upset, pulled out a handgun and fired approximately six shots into the air. [Petitioner] and Covington left in a black BMW, the type of car owned by Covington's mother. Officer Jose Lara responded to the call with Officer Muro and was directed by the grandfather to a location in front of the residence, where he found six spent casings on the street.[4]

[Petitioner] stipulated he had suffered prior felony convictions for purposes of the felon with a firearm counts.

Count 5 -- Carjacking of Sarai H.[5]

Sarai has a six-month-old child fathered by [petitioner]. On June 25, 2012, Sarai told Officer Timothy Hope that on the evening of June 24, she met with [petitioner], they went to a store, and then returned to her apartment. [Petitioner] asked if he could take her car, which she refused because she needed it. [Petitioner] pulled out a gun and waved it around while screaming at her. Sarai was scared for her life and that of her baby, so she said, "Take what you want. Take the car." [Petitioner] took the keys to her Volkswagen and left. She waited eight hours to call the police out of fear for herself and her baby.[6] She did not get the car back until July 3, one day after the assault with a deadly weapon on Covington.

Defense

[Petitioner] testified in his own behalf. He denied firing shots at his grandfather's house, although he did hear shots as he was leaving the area with Covington. Sarai gave him permission to take her car so he could give his cousin a ride home. He returned the car to her the next day, but after that, he borrowed it occasionally and did have it on July 2 at Covington's house. [Petitioner] agreed that he did argue with Covington, break the door, and slap her, and that she jumped out

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3 Covington admitted being with [petitioner] at his grandfather's house and witnessing their argument, but she was uncertain of the date and did not recall any shooting.

4 The grandfather recanted his statements to the officers in his trial testimony. He testified at trial that he was under the influence of alcohol that night and had merely heard shots as [petitioner] was leaving. He denied seeing [petitioner] with a gun or firing a gun, and he further denied directing the officers to the location where bullet casings were recovered.

5 As discussed more fully below, Sarai did not testify at trial, but her prior testimony from the preliminary hearing was admitted into evidence.

6 Sarai also recanted her statements to the police in her preliminary hearing testimony. She did not see a gun, according to her testimony, and the police must have misunderstood what she said due to a language problem. She allowed [petitioner] to take her car, but he did not return it as expected.

> the bedroom window. He chased her down the sidewalk and she fell. He then got into the Volkswagen and left, but he did not chase her in the car. No gun was ever recovered from him. [Petitioner] admitted suffering prior felony convictions for purposes of the felon in possession of a firearm charge.

(Lodgment No. 5 at 2-5 (original footnotes renumbered)).

III

PETITIONER'S CONTENTIONS

1. The prosecutor failed to introduce sufficient evidence to support petitioner's conviction for carjacking because the only evidence offered to support the jury's verdict was unreliable and uncorroborated testimony of an officer relaying what the victim purportedly told the officer about petitioner's actions. (See Pet., Attach. A).

2. The trial court violated petitioner's Sixth Amendment right to confrontation and cross-examination by declaring that Sarai H., the victim of the carjacking charged in Count 3, was unavailable to testify, and then admitting her preliminary hearing testimony at trial. (Id., Attach. B).

3. The trial court violated petitioner's right to due process and to a fair trial by refusing to sever Counts Three and Four (carjacking and possession of a firearm by a felon, respectively) from the remaining counts alleged against him. (Id., Attach. C).

4. Appellate counsel deprived petitioner of his right to effective assistance of counsel on appeal by failing to challenge the sufficiency of the evidence supporting petitioner's conviction for carjacking. (Id., Attach. D).

IV

STANDARD OF REVIEW

The Petition was filed after the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 ("the AEDPA"). Pub. L. No. 104-132, 110 Stat. 1214 (1996). Therefore, the Court applies the AEDPA in its review of this action. See Lindh v. Murphy, 521 U.S. 320, 336, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997).

Under the AEDPA, a federal court may not grant a writ of habeas corpus on behalf of a person in state custody "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." 28 U.S.C. § 2254(d). As explained by the Supreme Court, section 2254(d)(1) "places a new constraint on the power of a federal habeas court to grant a state prisoner's application for a writ of habeas corpus with respect to claims adjudicated on the merits in state court." Williams v. Taylor, 529 U.S. 362, 412, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). In Williams, the Court held that:

> Under the "contrary to" clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts. Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case.

Williams, 529 U.S. at 412-13; see Weighall v. Middle, 215 F.3d 1058, 1061-62 (9th Cir. 2000) (discussing Williams). A federal court making the "unreasonable application" inquiry asks "whether the state court's application of clearly established federal law was objectively unreasonable." Williams, 529 U.S. at 409; Weighall, 215 F.3d at 1062. The Williams Court explained that "a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." Williams, 529 U.S. at 411; accord: Lockyer v. Andrade, 538 U.S. 63, 75-76, 123 S.Ct. 1166, 155 L.Ed.2d 144 (2003). Section 2254(d)(1) imposes a "highly deferential standard for evaluating state-court rulings," Lindh, 521 U.S. at 333 n.7, that "demands that state court decisions be given the benefit of the doubt." Woodford v. Visciotti, 537 U.S. 19, 24, 123 S.Ct. 357, 154 L.Ed.2d 279 (2002) (per curiam). A federal court may not "substitut[e] its own judgment for that of the state court, in contravention of 28 U.S.C. § 2254(d)." Id. at 25; Early v. Packer, 537 U.S. 3, 11, 123 S.Ct. 362, 154 L.Ed.2d 263

(2002) (per curiam) (holding that habeas relief is not proper where state court decision was only "merely erroneous").

The only definitive source of clearly established federal law under the AEDPA is the holdings (as opposed to the dicta) of the Supreme Court as of the time of the state court decision. Williams, 529 U.S. at 412. While circuit law may be "persuasive authority" for purposes of determining whether a state court decision is an unreasonable application of Supreme Court law (Duhaime v. Ducharme, 200 F.3d 597, 600-01 (9th Cir. 1999)), only the Supreme Court's holdings are binding on the state courts and only those holdings need be reasonably applied. Williams, 529 U.S. at 412; Moses v. Payne, 555 F.3d 742, 759 (9th Cir. 2009). Furthermore, under 28 U.S.C. § 2254(e)(1), factual determinations by a state court "shall be presumed to be correct" unless the petitioner rebuts the presumption "by clear and convincing evidence."

A federal habeas court conducting an analysis under § 2254(d) "must determine what arguments or theories supported, or, [in the case of an unexplained denial on the merits], could have supported, the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of [the Supreme Court]." Harrington v. Richter, 562 U.S. 86, 102, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011) ("A state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision."). In other words, to obtain habeas relief from a federal court, "a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." Id. at 103.

The United States Supreme Court has held that "[w]here there has been one reasoned state judgment rejecting a federal claim, later unexplained orders upholding that judgment or rejecting the same claim rest upon the same ground." Ylst v. Nunnemaker, 501 U.S. 797, 803, 111 S.Ct. 2590, 115 L.Ed.2d 706 (1991). Here, petitioner asserted Grounds Two and Three on appeal to the California Court of Appeal, which issued a reasoned opinion rejecting both of those grounds. (See Lodgment Nos. 2-5). The California Supreme Court then summarily denied those grounds. (See Lodgment Nos. 6-7). Accordingly, this Court reviews the California Court of Appeal's reasoned opinion rejecting Grounds Two and Three under AEDPA's deferential standard. See Ylst, 501 U.S. at 803; Shackleford v. Hubbard, 234 F.3d 1072, 1079 n.2 (9th Cir. 2000) (district court "look[s] through" unexplained California Supreme Court decision to the last reasoned decision as the basis for the state court's judgment).

Petitioner first asserted Ground One -- his sufficiency of the evidence challenge -- in a habeas petition that he filed in the Los Angeles County Superior Court. (See Lodgment No. 8). The Los Angeles County Superior Court issued a reasoned opinion rejecting Ground One. (Lodgment No. 9). Petitioner then asserted Ground One in a habeas petition that he filed in the California Court of Appeal. (See Lodgment No. 12). The California Court of Appeal did not address the merits of petitioner's sufficiency of the evidence claim; instead, the court of appeal denied the claim because petitioner could have raised it on appeal, but failed to do so. (Lodgment No. 13). Thereafter, the California Supreme Court summarily denied Ground One. (See Lodgment No. 15). Citing the California Court of Appeal's reason for denying Ground One, respondent argues that Ground One is procedurally barred. (Answer at 22-24). As explained herein, however, there is no need to address respondent's procedural bar argument because petitioner's sufficiency of the evidence claim in Ground One clearly fails on its merits even under de novo review. See Lambrix v. Singletary, 520 U.S. 518, 524-25, 117 S. Ct. 1517, 137 L. Ed. 2d 771 (1997) (holding that, in interests of judicial economy, federal courts may address merits of allegedly defaulted habeas claim if issue on claim's merits is clear but the procedural default issues are not).[7]

By contrast, the California Court of Appeal rejected petitioner's ineffective assistance of counsel claim in Ground Four on its merits. (Lodgment No. 13). In doing so, the court of appeal set forth a reasoned explanation for rejecting the claim in Ground Four. (See id.). Thereafter, the

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[7] Moreover, even if the sufficiency of the evidence claim in Ground One was procedurally barred, the Court would have to address it, albeit in a slightly different form, because, in Ground Four, petitioner has raised a corresponding ineffective assistance of appellate counsel claim based on counsel's failure to assert a sufficiency of the evidence challenge on direct appeal.

California Supreme Court summarily denied Ground Four. (See Lodgment No. 15). Accordingly, this Court reviews the California Court of Appeal's reasoned opinion rejecting Ground Four under AEDPA's deferential standard. See Ylst, 501 U.S. at 803.

V

DISCUSSION

GROUND ONE: SUFFICIENCY OF THE EVIDENCE

In his first ground for relief, petitioner contends that the prosecutor failed to introduce sufficient evidence to support petitioner's conviction for carjacking. (See Pet., Attach. A). According to petitioner, no rational juror could have believed beyond a reasonable doubt that petitioner carjacked Sarai H. because the only evidence offered to prove the carjacking count was the uncorroborated testimony of Officer Timothy Hope. (Reply at 6). According to Officer Hope, Sarai H. stated that she refused to allow petitioner to use her car, but ultimately gave him the keys because he began waving a gun in the air and screaming at her. (See supra). Officer Hope further testified that Sarai H. stated that, while petitioner was engaged in these actions, she feared for her life and for the life of her baby. (Id.). Petitioner maintains that Officer Hope's testimony was not sufficient to prove petitioner's guilty because Officer Hope did not witness the purported carjacking, but, rather, merely relayed what Sarai H. told him about petitioner's actions. (Id.).

What is more, petitioner maintains that there was ample reason to question the reliability of Officer Hope's testimony about Sarai H.'s statements. (Pet., Attach. A at 4). Specifically, petitioner claims that Sarai H. was not proficient in speaking English, and, thus, her statements likely were misinterpreted by Officer Hope. (Id. at 6). In support of this claim, petitioner notes that, at the preliminary hearing in petitioner's case, Sarai H. testified that no carjacking occurred; instead, according to her preliminary hearing testimony, she willingly lent petitioner her car. (Id. at 4-6). She further attributed Officer Hope's account of her statements to the fact that he had misinterpreted her statements to him. (Id.). Citing these facts, petitioner maintains that Officer Hope's uncorroborated testimony was insufficient to lead a rational juror to conclude that petitioner carjacked Sarai H. (Id.). As explained below, there is no merit to petitioner's sufficiency of the evidence challenge.

Habeas relief is unavailable on a sufficiency of the evidence challenge unless "no rational trier of fact could have agreed with the jury." Cavazos v. Smith, 565 U.S. 1, 2, 132 S. Ct. 2, 181 L. Ed. 2d 311 (2011) (per curiam); Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). All evidence must be considered in the light most favorable to the prosecution. Jackson, 443 U.S. at 319. Accordingly, if the facts support conflicting inferences, reviewing courts "must presume -- even if it does not affirmatively appear in the record -- that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution." Id. at 326; Bruce v. Terhune, 376 F.3d 950, 957 (9th Cir. 2004) (per curiam); Turner v. Calderon, 281 F.3d 851, 882 (9th Cir. 2002). Under AEDPA, federal courts must "apply the standards of Jackson with an additional layer of deference." Juan H. v. Allen, 408 F.3d 1262, 1274 (9th Cir. 2005).

Furthermore, circumstantial evidence and inferences drawn from it may be sufficient to sustain a conviction. See Jones v. Wood, 207 F.3d 557, 563 (9th Cir. 2000) (finding sufficient evidence for murder conviction where "evidence was almost entirely circumstantial and relatively weak"). The reviewing court must respect the exclusive province of the factfinder to determine the credibility of witnesses, resolve evidentiary conflicts, and draw reasonable inferences from proven facts. See United States v. Goode, 814 F.2d 1353, 1355 (9th Cir. 1987).

Here, the prosecutor presented sufficient evidence to prove that petitioner carjacked Sarai H. Officer Hope testified that Sarai H. had told him that she had given petitioner the keys to her car because he was waving a gun and because she feared for her safety and for the safety of her child. If believed, that testimony, alone, was sufficient to prove that petitioner carjacked Sarai H. See Bruce v. Terhune, 376 F.3d 950, 957-58 (9th Cir. 2004) (explaining that testimony of single witness is sufficient to uphold conviction).

Moreover, the fact that Sarai H. recanted her pre-trial statements when she testified at petitioner's preliminary hearing is of no consequence in terms of whether there was sufficient evidence to prove the carjacking count. In California, a testifying witness's prior out-of-court inconsistent statement is admissible as substantive evidence if the witness has an opportunity to explain or deny the statement.[8] Cal. Evid. Code §§ 770, 1235; see also California v. Green, 399 U.S. 149, 153-64, 90 S. Ct. 1930, 26 L. Ed. 2d 489 (1970) (upholding validity of California Evidence Code section 1235, permitting prior inconsistent statement of witness to be used as substantive evidence if statement is otherwise admissible); Ticey v. Peters, 8 F.3d 498, 503-04 (7th Cir. 1993) (rape victim's recanted, uncorroborated out-of-court statement sufficient to support rape conviction).

Furthermore, Sarai H. had a motive to deny that she made the statements incriminating petitioner that Officer Hope attributed to her. Sarai H. had a pre-existing relationship with petitioner, and, more importantly, petitioner was the father of her infant child. See People v. Cuevas, 12 Cal. 4th 252, 270, 276-77, 48 Cal. Rptr. 2d 135, 906 P.2d 1290 (1995) (when identifying witnesses had motive to recant their earlier identifications and reasonable juror could have concluded that they were telling truth at time of initial identifications, out-of-court identifications constitute "substantial evidence" to support the conviction).

Given these facts, the jury reasonably could have concluded that Officer Hope did not misinterpret Sarai H.'s pre-trial statements and that Sarai H.'s preliminary hearing testimony to the contrary was not credible. As the finder of fact, the jury had the sole discretion to resolve the conflicts between Sarai H.'s out-of-court statements and her preliminary hearing testimony. The jury's verdict shows that it resolved those conflicts in favor of her out-of-court account of the carjacking. Consequently, petitioner's argument amounts to nothing more than an invitation to re-weigh the evidence at trial and intrude upon the jury's exclusive province to determine whether or not the witnesses were credible. Reviewing courts, however, are prohibited from doing either. See Goode, 814 F.2d at 1355.

Accordingly, habeas relief is not warranted regarding this claim.

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[8] Presumably, petitioner believes that this law is inapplicable because Sarai H. did not testify at petitioner's trial. This belief, however, is unfounded because Sarai H. testified at petitioner's preliminary hearing and was subjected to cross-examination. (See infra).

GROUND TWO: CONFRONTATION CLAUSE

In his second ground for relief, petitioner contends that the trial court violated his right to confrontation and cross-examination by declaring that Sarai H., the victim of the charged carjacking, was unavailable to testify, and then admitting her preliminary hearing testimony at trial. According to petitioner, the trial court should have excluded Sarai H.'s preliminary hearing testimony -- as well as any earlier out-of-court statements that she made that were inconsistent with her preliminary hearing testimony -- because the prosecution failed to establish that she was unavailable to testify at petitioner's trial. In particular, petitioner maintains that the prosecution failed to attempt to secure Sarai H.'s presence at trial in a timely manner. Moreover, petitioner asserts that the prosecution compounded this error by neglecting to make any effort to locate Sarai H. in the ten days between the date on which the trial commenced and the date on which her prior recorded testimony was read to the jury. Finally, petitioner faults the prosecution for failing to obtain Sarai H.'s presence at trial by enforcing the terms of a treaty between the United States and Spain, the country in which Sarai H. was believed to have been when the trial occurred.

Because, according to petitioner, the prosecution was not diligent in attempting to secure Sarai H.'s presence at trial, the admission into evidence of Sarai H.'s preliminary hearing testimony, and any inconsistent statements that she made before testifying at the preliminary hearing, violated the Confrontation Clause of the Sixth Amendment. Furthermore, petitioner maintains that the purported error in admitting Sarai H.'s preliminary hearing testimony was prejudicial because, without her preliminary testimony and her prior inconsistent statements, there was little, if any, evidence supporting the carjacking charge.

A. The California Court of Appeal Opinion

The California Court of Appeal summarized the relevant facts underlying petitioner's Confrontation Clause claim as follows:

> Sarai testified at [petitioner's] preliminary hearing on September 20, 2012. [Petitioner] announced ready for trial on December 14, and again indicated trial readiness on December 24. Trial proceedings commenced on December 28, and the first witness testified on January 4, 2013. The hearing on the prosecutor's

request to admit Sarai's preliminary hearing testimony was held midtrial on January 8, 2013.

District Attorney Investigator Rochelle Plue testified that she was assigned to locate Sarai and serve a subpoena on her. She first reviewed records in criminal and public record data bases, including national, state, and local records. She checked for arrest history, warrants, probation and parole records, weapon ownership, restraining orders, and other registrant records including the Department of Motor Vehicles. She also reviewed utility and credit records, all of which indicated an address in West Los Angeles.

On December 18, 2012, Investigator Plue went to the address for the first time to serve a subpoena for the December 24 trial date. There was no answer at the door of the apartment. She spoke to other occupants of a nearby apartment who said they recognized the witness and thought she lived there. They said there was no on-site apartment manager.

Investigator Plue returned to the apartment on December 20 and again on December 27. There was no answer at the door. She attempted to call Sarai's telephone number, but it went straight to voicemail.

On December 28, Investigator Plue went to the apartment for the last time. She spoke to a woman in the apartment who said she was an exchange student. The woman said Sarai did live in the apartment but was currently in Spain.[9] It appeared the woman and Sarai were doing a residence exchange. The woman did not know when Sarai was returning, but the woman was leaving in approximately one month and expected Sarai would return after that.

Investigator Plue contacted the Department of Homeland Security and the Division of Customs and Border Patrol. Agency records indicated Sarai traveled from O'Hare Airport to Madrid on December 8, 2012,[10] and there was no indication that she had returned. Records indicated that Sarai was born in Spain.

Defense counsel argued the prosecution was on notice from the preliminary hearing that Sarai was recalcitrant and hostile but waited until six days before trial to secure her attendance and made no effort to check within the last ten days to see if she had returned to the country. The prosecution had not carried its burden of demonstrating the necessary untiring efforts in good earnest required to establish unavailability under Evidence Code section 240.

The prosecutor argued there is no obligation to exhaust every potential avenue for due diligence. He contended the prosecution made a reasonable effort by verifying a valid address, but Sarai was not there. After the investigator spoke with the exchange student, she checked records from Homeland Security, which show Sarai left the country on December 8 and there was no return date.

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9 Based on a defense objection that the woman's statement that Sarai was in Spain was hearsay, the trial court admitted the statement, but not for the truth of the matter asserted.

10 Investigator Plue at first testified that Sarai had left for Spain in August 2012, but upon reviewing the records, corrected her testimony to reflect Sarai departed on December 8, 2012.

> The trial court noted that Sarai testified at the preliminary hearing, largely recanting her statements to the police, and she was impeached with her prior statements. The officer who heard Sarai's prior statements would testify at trial and be subject to cross-examination. Defense counsel argued the prosecution's efforts took place during the holiday season and the prosecution was aware [petitioner] would not waive the statutory time for trial. He asserted that Sarai could have been served with a subpoena had the prosecution started weeks sooner.
>
> The trial court stated that all indications are that Sarai is in another country and unavailable. Although the court felt the issue was close, it ruled the prosecution had shown a substantial effort sufficient to establish due diligence.

(Lodgment No. 5 at 7-9 (original footnotes renumbered)).

The California Court of Appeal then rejected petitioner's Confrontation Clause claim on its merits, finding that the prosecution satisfied its burden of establishing due diligence in attempting to secure Sarai H.'s presence at trial. (Id. at 9-11). First, the court of appeal noted that the prosecution attempted to contact Sarai H. before trial, but that those attempts were unsuccessful because Sarai H. had left the country before trial. (Id. at 9). The court of appeal, furthermore, noted that, at the time of trial, there was no evidence of her then-current whereabouts. (Id. at 10). Specifically, the court of appeal stated:

> The record establishes that Sarai left the country before the parties announced ready for trial, and weeks before her testimony would have been presented. The prosecution utilized all the state and federal data available and concluded she lived in an apartment which an investigator visited four times shortly before trial. The evidence unmistakably shows that Sarai was not at her apartment and most likely was out of the country. There was no evidence of her current whereabouts. These facts are sufficient to establish that Sarai was unavailable, could not be located, the prosecution used due diligence in attempting to secure her attendance, and introduction of her preliminary hearing testimony did not violate the state or federal constitutional right to confront witnesses.

(Id. at 9-10).

Second, the court of appeal rejected petitioner's suggestion that the prosecution should have been aware that Sarai H. would make herself unavailable for trial based on the fact that, at the preliminary hearing, she recanted her out-of-court statements incriminating petitioner. (Id. at 10). According to the court of appeal, the prosecution, if anything, would have believed that Sarai H. would willingly testify at trial, if only to try to exonerate petitioner, as she had attempted to do at the preliminary hearing. (Id.). Moreover, given the fact that she had spoken with authorities and that she already had testified at the preliminary hearing, the court of appeal saw no reason to believe that she would not testify at trial. (Id.).

Third, the court of appeal found that the prosecution's purported failure to timely attempt to subpoena Sarai H. as a witness resulted in no prejudice. (Id. at 10-11). Specifically, the court of appeal noted that the evidence showed that Sarai H. had left the country six days before petitioner even announced that he was ready for trial, and twenty days before trial commenced. (See id. at 10). Consequently, according to the court of appeal, "[e]ven had the prosecution started its attempt to subpoena Sarai on the first day [petitioner] announced ready for trial, she would have already been gone, and the efforts would have been futile." (Id. at 10-11).

Fourth, the court of appeal rejected petitioner's argument that the prosecution erred in failing to visit Sarai H.'s home after the date on which trial commenced. (Id. at 11). In rejecting that argument, the court of appeal cited the testimony of a prosecution investigator, who testified that, based on a search of relevant federal records, no evidence suggested that Sarai H. had reentered the country. (Id.). As such, according to the court of appeal, it was reasonable to assume that Sarai H., in fact, had not reentered the country, thus rendering further visits to her home futile. (Id.). Although the court of appeal acknowledged that the prosecution could have visited Sarai H.'s home after trial had commenced, the court of appeal concluded that the Sixth Amendment did not require the prosecution to do so in light of the prosecution's other efforts to secure her presence at trial. (Id.).

Finally, the court of appeal rejected petitioner's argument that the prosecution should have attempted to obtain Sarai H.'s presence at trial by enforcing the terms of a treaty between the United States and Spain. (Id. at 11). The court of appeal held that petitioner had waived this argument because he had failed to raise it in the trial court, thereby precluding the parties from litigating the issue at the trial court level. (Id.). Alternatively, the court of appeal concluded that the premise of petitioner's argument -- that Sarai H. was, in fact, in Spain when the trial commenced -- was speculative. (Id.). Indeed, the court of appeal noted that petitioner, himself, had argued at a hearing regarding the adequacy of the prosecution's efforts to secure Sarai H.'s presence at trial that there was no evidence that she was in Spain during the trial. (Id.).

Having concluded that the prosecution satisfied its burden of establishing due diligence in attempting to secure Sarai H.'s presence at trial and that Sarai H. was, indeed, unavailable to testify, the court of appeal held that the admission of her preliminary hearing testimony did not violate petitioner's Sixth Amendment right to confrontation. (See id. at 9-11).

B. Federal Legal Standard and Analysis

In rejecting petitioner's claim, the California Court of Appeal applied the proper legal standard for analyzing federal law challenges involving alleged violations of the Confrontation Clause. (See id. at 6, 11 (citing Hardy v. Cross, 565 U.S. 65, 71, 132 S. Ct. 490, 181 L. Ed. 2d 468 (2011); Barber v. Page, 390 U.S. 719, 724-25, 88 S. Ct. 1318, 20 L. Ed. 2d 255 (1968)). Accordingly, the court of appeal's resolution of petitioner's claim was not contrary to the Supreme Court's clearly established precedents. As such, the only avenue through which petitioner can obtain habeas relief on his Confrontation Clause claim is by showing that the court of appeal's resolution of his claim constituted an "unreasonable application of" the Supreme Court's clearly established precedent -- that is, he must show that the court of appeal unreasonably applied the governing legal standard to the facts of his case. See Penry v. Johnson, 532 U.S. 782, 792, 121 S. Ct. 1910, 150 L. Ed. 2d 9 (2001). As explained below, petitioner cannot make that showing.

The Confrontation Clause of the Sixth Amendment, made applicable to state criminal prosecutions through the Fourteenth Amendment, provides that the accused has the right to "be confronted with the witnesses against him." U.S. Const. amend. VI; Pointer v. Texas, 380 U.S. 400, 404, 85 S. Ct. 1065, 13 L. Ed. 2d 923 (1965). In Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), the Supreme Court held that the Confrontation Clause bars the "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." Id. at 53-54.

Thus, in order to admit the prior testimony of a witness at trial, the prosecution must first show that the witness is unavailable to testify at trial. Barber, 390 U.S. at 725. This showing requires the prosecution to establish that it made a good-faith effort to locate the witness and compel him or her to appear at trial. Hardy, 565 U.S. at 69 (citing Barber, 390 U.S. at 724-25).

Whether the prosecution's attempts to obtain the witness's appearance constitute a "good-faith effort" is determined under a reasonableness standard. Hardy, 565 U.S. at 70-71. In Hardy, the Supreme Court, however, made clear that "the Sixth Amendment does not require the prosecution to exhaust every avenue of inquiry, no matter how uncompromising." 565 U.S. at 71. Moreover, "the deferential standard of review set out in 28 U.S.C. § 2254(d) does not permit a federal court to overturn a state court's decision on the question of unavailability merely because the federal court identifies additional steps that might have been taken." Id.

Here, the court of appeal reasonably concluded that the prosecution made a good faith effort to locate Sarai H. and secure her appearance at trial. The prosecution's investigator visited Sarai H.'s home on four separate occasions before trial commenced. On the last occasion, she was informed by a woman residing at Sarai H.'s apartment that Sarai H. was visiting Spain. The woman, whose primary residence was in Spain, also informed the investigator that she and Sarai H. had temporarily exchanged residences. According to the woman, Sarai H. was not expected to return to her residence for approximately one month. The investigator subsequently contacted the Department of Homeland Security and confirmed that, in fact, Sarai H. had traveled to Spain on December 8, 2012. The investigator also confirmed that, according to official records, Sarai H. had not returned to the United States. These efforts constituted a "good-faith effort" to secure Sarai H.'s testimony and, moreover, supported a reasonable conclusion that Sarai H. was not in the country when petitioner's trial occurred.

Furthermore, the fact that the prosecution waited until close to the commencement of trial to attempt to contact Sarai H. does not detract from the reasonableness of the prosecution's efforts. See Hardy, 565 U.S. at 71-72. The prosecution attempted to contact Sarai H. ten days before trial commenced. Although petitioner suggests that the prosecution should have contacted Sarai H. earlier, the prosecution had no basis to believe that she would not be available. On the contrary, she had spoken with police and had testified at the preliminary hearing. Further, at the preliminary hearing, she recanted her earlier statements and attempted to exonerate petitioner. Given that track record, the prosecution reasonably could have believed that Sarai H. would be eager to testify at trial, as that would give her another opportunity to attempt to exonerate petitioner.[11] In any event, as the court of appeal noted, any earlier effort by the prosecution to contact Sarai H. would have been futile. Indeed, petitioner did not even declare that he was ready for trial until December 14, 2012. But by that time, Sarai H. had already left the country and, according to official records, did not return before her preliminary hearing testimony was read into evidence.

There is, moreover, no merit to petitioner's claim that the prosecution displayed a lack of diligence in neglecting to visit Sarai H.'s home after the trial had commenced. Putting aside the fact that the prosecution's investigator already had visited Sarai H.'s home four times before trial had commenced, the investigator had good reason to believe that any further visits would be futile. Indeed, the woman residing at Sarai H.'s home told the investigator that Sarai H. had left the country and was not expected to return for another month. Moreover, official records showed that, in fact, Sarai H. had left the country. What is more, there was no record indicating that Sarai H. had returned to the United States after traveling to Spain on December 8, 2012.

Additionally, the fact that the prosecution failed to utilize an existing treaty between Spain and the United States does not suggest that the prosecution failed to make a good faith effort to secure Sarai H.'s appearance. As an initial matter, this aspect of petitioner's claim is procedurally barred because the court of appeal held that petitioner had forfeited the argument by failing to raise it at trial. Coleman v. Thompson, 501 U.S. 722, 729, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991) (holding that state court's denial of claim based on a procedural rule bars federal review

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[11] Petitioner argues the opposite is true. Indeed, according to petitioner, the prosecution should have known that Sarai H. would make herself unavailable to testify at trial precisely because her preliminary hearing testimony conflicted with the statements that Officer Hope attributed to her. The logic underlying this argument is dubious at best. After all, Sarai H. had already testified under oath that no carjacking occurred, and she had a motive to help petitioner, considering that he was the father of her infant child. Nevertheless, even assuming that Sarai H. was unwilling to testify at petitioner's trial, there is no reason to believe that the existence of a subpoena issued in close temporal proximity to the preliminary hearing would have caused her to make herself available to testify at petitioner's trial. On the contrary, as noted in Hardy, the Supreme Court has "never held that the prosecution must have issued a subpoena if it wishes to prove that a witness who goes into hiding is unavailable for Confrontation Clause purposes, and the issuance of a subpoena may do little good if a . . . witness is so fearful . . . that []he is willing to risk his acquittal by failing to testify at trial." 132 S. Ct. at 494-95.

if state rule constitutes "adequate and independent state ground" for denying claim); see also Bennett v. Mueller, 322 F.3d 573, 583 (9th Cir. 2003) (holding that California's contemporaneous objection rule constitutes independent and adequate ground precluding federal habeas review); Vansickel v. White, 166 F.3d 953, 957-58 (9th Cir. 1999) (same).[12]

Moreover, even if this argument was not procedurally barred, it nevertheless fails because, as the court of appeal reasoned, it is purely speculative that, in fact, Sarai H. was in Spain when the trial occurred. To be sure, she traveled to Spain twenty days before trial commenced. However, petitioner has provided no competent evidence to suggest that she stayed in Spain during the entire time that she was outside of the United States. Indeed, at the trial court level, petitioner himself noted that there was no definitive evidence showing that Sarai H. was in Spain. Regardless, the Court is aware of no controlling precedent standing for the proposition that the prosecution cannot establish that it made a good-faith effort to locate a witness and compel him or her to appear at trial unless the prosecution avails itself of international treaties between the United States and a foreign country. See Hardy, 565 S. Ct. at 71-72 (explaining that prosecution need not "exhaust every avenue of inquiry" to establish good faith effort to locate witness). The controlling precedent that does exist, furthermore, suggests that such efforts are not necessary, where, as here, the prosecution takes reasonable steps to locate the witness. See id. (holding that state court reasonably found prosecution showed due diligence in attempting to locate witness by contacting, among other people, witness's family, her ex-boyfriend, and current school, even though prosecution did not contact witness's current boyfriend or her past school).

As discussed above, the Supreme Court has admonished lower courts that the deferential standard of review set out in 28 U.S.C. § 2254(d) does not permit a federal court to overturn a

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[12] Citing an opinion that the California Supreme Court issued over one year after his conviction became final, petitioner contends that the court of appeal misapplied California law in holding that petitioner forfeited this aspect of his claim. (Reply at 12) (citing People v. Sanchez, 63 Cal. 4th 411, 204 Cal. Rptr. 3d 682, 375 P.3d 812 (2016)). This Court, however, is bound by the court of appeal's application and interpretation of state law. See Bradshaw v. Richey, 546 U.S. 74, 76, 126 S. Ct. 602, 163 L. Ed. 2d 407 (2005) (per curiam) (stating that "a state court's interpretation of state law, including one announced on direct appeal of the challenged conviction, binds a federal court sitting in habeas corpus").

state court's decision on the question of unavailability merely because additional steps are identified that might have been taken to locate the witness. Here, petitioner invites the Court to disregard this admonition. For the reasons set forth above, the Court declines to do so and, instead, concludes that the court of appeal's rejection of petitioner's Confrontation Clause claim was objectively reasonable.

Petitioner does not appear to challenge the use of Sarai H.'s preliminary hearing testimony as an independent Confrontation Clause violation. If, however, he intended to do so, that claim would also fail. The Supreme Court has never held that a criminal defendant who is afforded an opportunity to cross-examine a witness at a preliminary hearing is denied his right to confrontation when that witness becomes unavailable and her preliminary hearing testimony is read to the jury. Al-Timimi v. Jackson, 379 Fed. Appx. 435, 2010 WL 2161797, *4 (6th Cir. May 28, 2010) (noting lack of Supreme Court precedent for foregoing proposition). On the contrary, the Supreme Court has suggested that "there may be some justification for holding that the opportunity for cross-examination of a witness at a preliminary hearing satisfies the demand of the confrontation clause where the witness is shown to be actually unavailable." Barber, 390 U.S. at 725-26; see also California v. Green, 399 U.S. 149, 165, 90 S. Ct. 1930, 1938, 26 L. Ed. 2d 489 (1970) (noting that testimony given in preliminary hearing setting approximated that of testimony given at trial and that defendant was given "every opportunity to cross-examine" unavailable witness). Here, petitioner does not allege that he was denied a full and fair opportunity to cross-examine Sarai H. at the preliminary hearing. Under these circumstances, courts generally have found that no Confrontation Clause violation occurs. See Delgadillo v. Woodford, 527 F.3d 919, 926 (9th Cir. 2008); Glenn v. Dallman, 635 F.2d 1183, 1186-1187 (6th Cir. 1980) (finding eyewitness's identification testimony at preliminary hearing admissible against defendant at trial even though defendant declined to thoroughly cross-examine witness); United States v. Zurosky, 614 F.2d 779, 791-93 (1st Cir. 1979) (same); compare with Magouirk v. Warden, Winn Corr. Center, 237 F.3d 549, 553 (5th Cir. 2001) (finding that admission of preliminary hearing testimony violated Confrontation Clause where "every attempt" by defense counsel to cross-examine witness was "thwarted" by prosecution's objections, which were sustained by trial court).

For all of the reasons stated above, the court of appeal's rejection of this claim was neither contrary to, nor an unreasonable application of, clearly established federal law as determined by the United States Supreme Court. As such, habeas relief is unwarranted as to this claim.

GROUND THREE: SEVERANCE OF COUNTS

In his third ground for relief, petitioner contends that the trial court abused its discretion and violated petitioner's constitutional rights by refusing to sever the counts arising from petitioner's interaction with Sarai H. -- namely, carjacking (Count 3) and unlawful possession of a firearm (Count 4) -- from the remaining counts alleged against petitioner. (Pet., Attach. C). According to petitioner, the two sets of counts should have been severed because there were no common witnesses between the counts arising from his interaction with Sarai H. and the remaining three counts. Petitioner further maintains that there was only "limited cross-admissibility" of any evidence between the two sets of counts. (Reply at 16-17).

A. The California Court of Appeal Opinion

The California Court of Appeal rejected this claim on its merits. (Lodgment No. 5 at 13-14). In doing so, the court of appeal stated:

> "When, as here, the statutory requirements for joinder are met, a defendant must make a clear showing of prejudice to establish that the trial court abused its discretion in denying the defendant's severance motion. (People v. Marshall (1997) 15 Cal. 4th 1, 27; People v. Price (1991) 1 Cal. 4th 324, 388)." (People v. Mendoza (2000) 24 Cal. 4th 130, 160-161; see also People v. Soper (2009) 45 Cal. 4th 759, 773 (Soper)). "We review a trial court's denial of a severance motion for abuse of discretion based on the facts as they appeared when the court ruled on the motion. (People v. Hardy (1992) 2 Cal. 4th 86, 167). If we conclude the trial court abused its discretion, reversal is required only if it is reasonably probable that the defendant would have obtained a more favorable result at a separate trial. (People v. Coffman and Marlow, [(2004)] 34 Cal. 4th [1,] 41; People v. Keenan (1988) 46 Cal. 3d 478, 503)." (People v. Lewis (2008) 43 Cal. 4th 415, 452). "Even if the ruling was correct when made, we must reverse if defendant shows that joinder actually resulted in 'gross unfairness,' amounting to a denial of due process. (People v. Johnson (1988) 47 Cal. 3d 576, 590)." (People v. Arias (1996) 13 Cal. 4th 92, 127).
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> [Petitioner] has not shown that the trial court abused its discretion in denying severance of counts 3 and 4 from the remainder of the charges, or that the resulting trial was unfair. There is a preference for joint trials, which avoids the expense of two or more separate trials, and that preference has "special force in the context of a motion to sever properly joined charges." (Soper, supra, 45 Cal.4th at p. 772). [Petitioner] concedes that joinder of all five counts was proper, and that none of the charged offenses are particularly inflammatory or inherently prejudicial. Although

> cross-admissibility of evidence is not required where cases are properly joined (§ 954.1 ["evidence concerning one offense or offenses need not be admissible as to the other offense or offenses before the jointly charged offenses may be tried together before the same trier of fact"]), the use of the Volkswagen carjacked from Sarai to commit the assault with a deadly weapon on Covington provides a rational ground for trying the various counts in one proceeding. We do not view the evidence supporting the counts as significantly different in strength. Each of the complaining witnesses recanted their earlier statements incriminating [petitioner], and the convictions were based on impeaching evidence.
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> Not only has [petitioner] failed to show an abuse of discretion in denial of severance, the record contains no hint of resulting gross unfairness in the trial. In response to a jury question, the trial court advised the jurors that it "must decide each count separately. A specific finding on one count does not dictate a similar finding on any of the others." The jury followed this instruction, as shown by the not guilty verdict on the felon in possession of a firearm charge in count 4 and the finding [petitioner] did not use a firearm in the commission of the carjacking in count 3. These verdicts are sufficient proof the trial was not grossly unfair.

(Id.).

B. Federal Legal Standard and Analysis

To the extent that petitioner's claim merely involves the trial court's purported misapplication of California's law regarding when severance is appropriate, the claim fails because it involves only an alleged error in state law. "In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws or treaties of the United States." Estelle v. McGuire, 502 U.S. 62, 68, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991); see also 28 U.S.C. § 2254(a). Habeas relief is not available for an alleged error in the interpretation or application of state law. Estelle, 502 U.S. at 68.

Petitioner's federal due process challenge to the trial court's refusal to sever, likewise, fails. No Supreme Court case has held that severance of multiple counts against a single defendant is constitutionally mandated. See Carey v. Musladin, 549 U.S. 70, 77, 127 S. Ct. 649, 166 L. Ed. 2d 482 (2006) (where Supreme Court precedent gives no clear answer to question presented, "it cannot be said that the state court 'unreasonab[ly] appli[ed] clearly established Federal law'"). On the contrary, the Supreme Court has unambiguously stated that "[i]mproper joinder does not, in itself, violate the Constitution." United States v. Lane, 474 U.S. 438, 446 n.8, 106 S. Ct. 725, 88 L. Ed. 2d 814 (1986). Indeed, the Supreme Court has held that severance is not required even when two defendants offering mutually antagonistic defenses are tried together. See Zafiro v. United States, 506 U.S. 534, 538-39, 113 S. Ct. 933, 122 L. Ed. 2d 317 (1993).

Notwithstanding this, the Supreme Court has stated that misjoinder of counts may rise to the level of a constitutional violation "if it results in prejudice so great as to deny a defendant his Fifth Amendment right to a fair trial." Lane, 474 U.S. at 446. The Ninth Circuit, however, has held that this statement in Lane was only dicta. Collins v. Runnels, 603 F.3d 1127, 1132 (9th Cir. 2010). Consequently, Lane did not set forth a governing legal principle, and thus does not constitute clearly established federal law regarding when, if ever, severance of counts is constitutionally mandated. Collins, 603 F.3d at 1132; see also Carey, 549 U.S. at 74 (restricting "clearly established Federal law" under § 2254(d)(1) to holdings, as opposed to dicta, of the Supreme Court).

Despite the lack of authority from the Supreme Court on the issue, the Ninth Circuit has recognized that a trial court's failure to sever multiple counts against a defendant can, in certain circumstances, result in an unfair trial. See Davis v. Woodford, 384 F.3d 628, 638 (9th Cir. 2004). According to the Ninth Circuit, any error involving the failure to sever requires reversal only if actual prejudice is shown: that is, when the error had a substantial and injurious effect or influence in determining the jury's verdict. Id. "In evaluating prejudice, the [federal habeas court] focuses particularly on cross-admissibility of evidence and the danger of 'spillover' from one charge to another, especially where one charge or set of charges is weaker than another." Id. The risk of prejudice is heightened "whenever joinder of counts allows evidence of other crimes to be introduced in a trial where the evidence would otherwise be inadmissible." Sandoval v. Calderon, 241 F.3d 765, 772 (9th Cir. 2004).

Here, even if the Ninth Circuit's standard were controlling, petitioner nevertheless would not be entitled to relief.[13] As the court of appeal observed, there was some cross-admissibility of evidence between the counts arising from petitioner's interaction with Sarai H. and at least one of the remaining counts. Indeed, petitioner used the car that he was alleged to have carjacked

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[13] The Court is aware that, for purposes of AEDPA, only the Supreme Court's holdings are binding on the state courts and only those holdings need be reasonably applied. Williams, 529 U.S. at 412.

from Sarai H. to commit the crime alleged in Count Five -- namely, running over Covington with a car.

Moreover, even assuming that there was no cross-admissibility of evidence, habeas relief would not be warranted under the Ninth Circuit's standard because none of the counts was weaker than any other in terms of the evidence offered to prove the count. On the contrary, in order to prove each count, the prosecution relied almost exclusively on recanted statements made by petitioner's family or close associates. Further, none of the crimes was particularly inflammatory, as each crime involved an act of violence or a threatened act of violence that petitioner committed against his family or those with whom he was intimately involved.

More importantly, the jury's verdict shows that petitioner suffered no prejudice from the trial court's decision not to sever the counts. Indeed, the jury did not convict petitioner of the firearm possession alleged in Count 4. What is more, the jury refused to find true the allegation that petitioner used a firearm in committing the carjacking alleged in Count 3. In other words, the jury's verdict shows that, as to Counts 3 and 4, the jury was not influenced by the fact that petitioner was charged with other crimes. Given these facts, petitioner can show no prejudice from the trial court's refusal to sever Counts 3 and 4 from the remaining counts.

For the foregoing reasons, the court of appeal's rejection of petitioner's severance claim was neither contrary to, nor an unreasonable application of, clearly established federal law as determined by the United States Supreme Court. Accordingly, habeas relief is not warranted as to this claim.

GROUND FOUR: APPELLATE COUNSEL'S PERFORMANCE

In his final ground for relief, petitioner contends that his appellate counsel deprived him of his constitutional right to effective assistance of counsel on appeal by refusing to challenge the sufficiency of the evidence supporting the jury's verdict as to the carjacking count. (Pet., Attach. D).

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A. The California Court of Appeal's Opinion

The California Court of Appeal rejected petitioner's claim in Ground Four on its merits. (Lodgment No. 13). In doing so, the court of appeal stated: "There is no merit to the contention that appointed counsel was ineffective for declining to challenge the sufficiency of the evidence in support of the carjacking conviction. (Smith v. Robbins, (2000) 528 U.S. 259, 285-286; Jones v. Barnes, (1983) 463 U.S. 745, 750; Miller v. Keeney, (9th Cir. 1989) 882 F.2d 1428, 1434, fn.10)." (Id.).

B. Federal Legal Standard and Analysis

The guarantees of due process entitle a criminal defendant to effective assistance of counsel on his first appeal as of right. See Pollard v. White, 119 F.3d 1430, 1435 (9th Cir. 1997) (citing Evitts v. Lucey, 469 U.S. 387, 391-405, 105 S. Ct. 830, 83 L. Ed. 2d 821 (1985)). A two-step analysis governs petitioner's ineffective assistance of counsel ground for relief. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); Evitts, 469 U.S. at 395-99. First, petitioner must prove that his attorney's representation fell below an objective standard of reasonableness. Strickland, 466 U.S. at 687-88, 690. To establish deficient performance, petitioner must show that his counsel's acts and omissions, examined within the context of all the surrounding circumstances, were outside the "wide range" of professionally competent assistance. Kimmelman v. Morrison, 477 U.S. 365, 386, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986); Strickland, 466 U.S. at 690. In assessing whether appellate counsel performed reasonably, reviewing courts must be mindful that appellate counsel has no constitutional duty to raise every issue, where, in the attorney's judgment, the issue has little or no likelihood of success. McCoy v. Wisconsin, 486 U.S. 429, 436, 108 S. Ct. 1895, 100 L. Ed. 2d 440 (1988).

Second, petitioner must show that he was prejudiced by demonstrating a reasonable probability that, but for his counsel's errors, the result would have been different. Strickland, 466 U.S. at 694. Petitioner must prove both deficient performance and prejudice. A court need not, however, determine whether counsel's performance was deficient before determining whether the petitioner suffered prejudice as the result of the alleged deficiencies. Id. at 697.

Here, petitioner is not entitled to relief with respect to his allegation of attorney error. First, based on the record, it appears that counsel made an informed, strategic decision against challenging the sufficiency of the evidence supporting the carjacking count. Indeed, in a declaration that petitioner has submitted to this Court, appellate counsel states that petitioner asked him to assert the sufficiency of the evidence claim, but counsel declined to do so. (Docket No. 3, Exh. D ¶ 3 ("In the course of his appeal, [petitioner] asked me to challenge his carjacking conviction on the grounds of insufficient evidence. I did not raise this issue on appeal.")). Because counsel clearly was aware of petitioner's desire to assert the proposed claim, but opted against doing so, counsel's decision cannot be second-guessed on habeas review. Strickland, 466 U.S. at 690 ("[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable."); Silva v. Woodford, 279 F.3d 825, 844 (9th Cir. 2002) (noting United States Supreme Court precedent dictates that counsel commits no error when counsel makes informed strategic decision) (citing Burger v. Kemp, 483 U.S. 776, 107 S. Ct. 3114, 97 L. Ed. 2d 638 (1987)).

Second, even if counsel's strategic decision could be reviewed, his decision was reasonable under the circumstances. As explained in connection with petitioner's first ground for relief, Officer Hope's testimony regarding Sarai H.'s out-of-court statements was sufficient to support the carjacking conviction. Accordingly, counsel could not have performed unreasonably in declining to assert a sufficiency of the evidence challenge, as any such challenge was doomed to fail. See Kimmelman v. Morrison, 477 U.S. 365, 375, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986); Boag v. Raines, 769 F.2d 1341, 1344 (9th Cir. 1985) (counsel's failure to raise meritless argument does not constitute ineffective assistance). For the same reasons, petitioner can show no prejudice arising from counsel's decision not to assert the proposed sufficiency of the evidence claim.

For the foregoing reasons, the court of appeal's rejection of petitioner's ineffective assistance of appellate counsel claim was neither contrary to, nor an unreasonable application of, clearly established federal law as determined by the United States Supreme Court. Accordingly, petitioner is not entitled to relief with respect to this claim.

VI

RECOMMENDATION

It is recommended that the District Judge issue an Order: (1) accepting this Report and Recommendation; and (2) directing that judgment be entered denying the Petition and dismissing this action with prejudice.

Paul L. Abrams

Dated: March 17, 2017

PAUL L. ABRAMS
UNITED STATES MAGISTRATE JUDGE

NOTICE

Reports and Recommendations are not appealable to the Court of Appeals, but are subject to the right of any party to file Objections as provided in the Local Rules Governing Duties of Magistrate Judges, and review by the District Judge whose initials appear in the docket number. No Notice of Appeal pursuant to the Federal Rules of Appellate Procedure should be filed until entry of the Judgment of the District Court.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES-GENERAL

Case No. CV 16-2190-JAK (PLA) **Date April 20, 2016**

Title: Randee D. Williams, Jr. v. C.E. Ducart, Warden

PRESENT: THE HONORABLE PAUL L. ABRAMS

☐ **U.S. DISTRICT JUDGE**
☒ **MAGISTRATE JUDGE**

Christianna Howard	N/A	N/A
Deputy Clerk	Court Reporter / Recorder	Tape No.

ATTORNEYS PRESENT FOR PLAINTIFFS:
NONE

ATTORNEYS PRESENT FOR DEFENDANTS:
NONE

PROCEEDINGS: (IN CHAMBERS)

On March 31, 2016, petitioner filed a Petition for Writ of Habeas Corpus by a Person in State Custody ("Petition" or "Pet."). On the same date, petitioner filed a "Motion/Request for Appointment for Counsel" ("Request" or "Req."), with attached Exhibits and the declaration of his cellmate, in which he contended that he "suffers many forms of mental illness and symptoms associated with bipolar" disorder and is "currently mentally incapacitated." (Req. at 2-3). He also stated that he is being housed at the Enhanced Outpatient ("EOP") level of care, is being denied "adequate physical access to a law library," and that his "mental health . . . coupled with [his] la[ck] of education, legal skills, and lack of ability to adequately study and research," means that he will be unable to represent himself in this action. (Req. at 3). He argued that the Petition raises viable and complex constitutional issue, that his TABE score is "0.0," and that he has no education that would allow him to represent himself. (Req. at 4). Petitioner requested appointment of counsel "for a limited purpose . . . to file a traverse or opposition to respondent[']s answer or response to the petition." (Req. at 5). On April 4, 2016, the Court denied petitioner's Motion without prejudice and issued an advisement to the warden of petitioner's institution informing the warden of petitioner's action and need for access to legal materials, copying services, writing materials, and the prison law library, as permitted by prison rules. (Dkt. No. 10).

On April 18, 2016, petitioner filed a Motion for Reconsideration ("Motion" or "Mot."), in which he contends that the April 4, 2016, Order was "manifestly unjust as even if petitioner attends the law library he will be unable to utilize the programs and services of the law library due to his incapacitated state, many forms of mental[] illness, symptoms associated with bipolar and lack of legal skills and no education." (Mot. at 5). He attaches recently acquired mental health records showing that petitioner has been admitted to a mental health crisis bed due to serious psychological issues. (Mot. at 8, Ex. A). He also attaches a declaration from his cellmate who assisted him in preparing this Motion, and who represents that he "may not be around to continue to assist [petitioner] with his legal case." (Hollis Decl. ¶ 3).

In order to be entitled to appointed counsel, a petitioner must show that the "circumstances of a particular case indicate that appointed counsel is necessary to prevent due process violations." Chaney v. Lewis, 801 F.2d 1191, 1196 (9th Cir. 1986); see 18 U.S.C. § 3006A(a)(2) (providing that a district court has discretion to appoint counsel for state habeas corpus petitioners when it determines "that the interests of justice so require"); see Anderson v. Heinze, 258 F.2d 479, 484 (9th Cir. 1958) ("Except under most unusual circumstances, an attorney ought not to be appointed by a federal court for the purpose of trying to find something wrong with a state judgment of conviction.").

The Court finds that in light of petitioner's assertion that his mental health problems constitute an extraordinary circumstance that prevent him from being able to properly prepare his traverse or opposition to a motion to dismiss, and the evidence petitioner has now submitted demonstrating his mental health issues, the "interests of justice" require appointment of counsel to represent petitioner for the purpose of filing a traverse or opposition to respondent's answer or motion to dismiss the Petition.

Accordingly, IT IS HEREBY ORDERED THAT:

1. Petitioner's Motion (Dkt. No. 15) is **granted** and counsel, through the Office of the Federal Public Defender, is appointed to represent petitioner for the purpose described herein;

2. Counsel for petitioner shall serve and file a Notice of Appearance **no later than April 27, 2016**, notifying the Court of the name of the attorney who will have principal charge of the case, together with the address where the attorney may be served, and the attorney's telephone and fax number;

3. Appointed counsel shall contact the court clerk, Christianna Howard, at (213) 894-7103, to make the necessary arrangements to have the file copied.

If the Office of the Federal Public Defender is unable to accept this appointment, the Court shall be so notified **no later than April 27, 2016**.

IT IS SO ORDERED.

cc: Randee D. Williams, Jr., pro se
Charles S. Lee, CAAG
Office of the Federal Public Defender

Initials of Deputy Clerk ch

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES-GENERAL

Case No. CV 16-2190-JAK (PLA) **Date April 4, 2016**

Title: Randee D. Williams v. C.E. McCart, Warden

PRESENT: THE HONORABLE PAUL L. ABRAMS

☐ **U.S. DISTRICT JUDGE**
☒ **MAGISTRATE JUDGE**

Christianna Howard	N/A	N/A
Deputy Clerk	Court Reporter / Recorder	Tape No.

ATTORNEYS PRESENT FOR PETITIONER:
NONE

ATTORNEYS PRESENT FOR RESPONDENTS:
NONE

PROCEEDINGS: (IN CHAMBERS)

The Court has reviewed petitioner's "Declaration in Support of Request to Proceed In Forma Pauperis," filed on March 31, 2016. Petitioner's Request is **granted**, and the Clerk of the Court is ordered to waive the filing fee in this matter.

cc: Randee D. Williams, Jr., Pro Se

Initials of Deputy Clerk ch

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Attorneys for Petitioner
RANDEE D. WILLIAMS, JR.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

RANDEE D. WILLIAMS, JR., Petitioner, v. C.E. Du Cart, Warden, Respondent.	Case No. CV 16-2190-JAK-PLA **PETITIONER'S OBJECTIONS TO MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION; APPLICATION FOR CERTIFICATE OF APPEALABILITY**

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

RANDEE D. WILLIAMS, JR., Petitioner, v. C.E. Du Cart, Warden, Respondent.	Case No. CV 16-2190-JAK-PLA **PETITIONER'S OBJECTIONS TO MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION; APPLICATION FOR CERTIFICATE OF APPEALABILITY**

Petitioner Randee Williams, by and through his counsel of record, Kelley Munoz, hereby respectfully submits the following objections to the Report and Recommendation ("Report") of United States Magistrate Judge Paul L. Abrams filed on March 17, 2017. Concurrently, Petitioner submits an Application for Certificate of Appealability.

Respectfully submitted,

HILARY POTASHNER
Federal Public Defender

DATED: May 1, 2017

By */s/ Kelley Munoz*
KELLEY MUNOZ
Deputy Federal Public Defender

MEMORANDUM OF POINTS AND AUTHORITIES

I.

INTRODUCTION

Petitioner Williams filed a pro se petition pursuant to 28 U.S.C. § 2254 alleging federal constitutional violations for the denial of due process based on insufficiency of the evidence, a confrontation clause violation based on an absent witness, denial of due process due to misjoinder of counts, and a claim of ineffective assistance of appellate counsel. After briefing by the parties, the United States Magistrate Judge issued a Report and Recommendation to deny the petition. Petitioner Williams respectfully objects the Report and Recommendation for the reasons set forth below.

II.

GENERAL OBJECTIONS

A. Objections of Factual Findings

As there was no evidentiary hearing in either the state or federal courts on his habeas claims, Petitioner Williams generally objects to the Report to the extent it contains any new factual findings.

B. Objections to Legal Conclusions

Petitioner Williams objects to all legal conclusions made in the Report. To the extent that specific objections have not been made to the Report's legal conclusions below, Petitioner Williams relies on the legal assertions made in all prior pleadings and preserves all legal objections for appeal. See Baxter v. Sullivan, 923 F.2d 1391, 1394 (9th Cir. 1991) (failure to make specific objections to legal conclusions does not constitute waiver on appeal); Miranda v. Anchondo, 684 F.3d 844, 848 (9th Cir. 2012); Robbins v. Carey, 481 F.3d 1143, 1146-47 (9th Cir. 2007) (failure to object to legal conclusion in magistrate judge's report does not constitute waiver).

III.

OBJECTIONS AND ARGUMENT

A. Petitioner Objects To The Conclusion That Habeas Relief Is Not Warranted On The Claim That The Prosecutor Presented Insufficient Evidence To Prove Carjacking

The Due Process Clause of the Fifth and Fourteenth Amendments affords a criminal defendant the right to not be convicted on legally insufficient evidence. Jackson v. Virginia, 443 U.S. 307, 313-14 (1979).

Petitioner objects to the finding in the Report that "the prosecutor presented sufficient evidence to prove that petitioner carjacked Sarai H." (Doc. 44 at 10.) No percipient witness to the alleged crime testified at the trial. The alleged victim, Sarai H., did not testify at trial. Her preliminary hearing testimony transcript was read, in which she essentially denied the crime of carjacking occurred and denied reporting a firearm to officers.

Petitioner maintains that Sarai H.'s alleged statements made out of court should not have been admitted via Officer Hope's testimony. Sarai H. was questioned at the preliminary hearing only as to what Officer Ko testified to and what was in his report, not specifically regarding Officer Hope's later trial testimony. (Reply, Doc. 42 at 6). Even if Sarai H.'s alleged statements to officers were properly admitted as substantive evidence at trial pursuant to California Evidence Code sections 770 and 1250, they alone are not sufficient and reliable evidence upon which a rational trier of fact could find Petitioner guilty of carjacking because she denied a carjacking occurred.

Officer Hope testified as to statements he claimed Sarai H. made to him made the day after the alleged crime. These alleged statements were unsworn, made outside of court. These statements were not corroborated by audio or video recording by officers. Officer Hope did not testify at the preliminary hearing. Thus, Sarai H. was not cross-examined specifically regarding what Officer Hope claimed. Sarai H., the only percipient witness, said Petitioner did not have gun in her testimony at the preliminary hearing and blamed a language barrier for misinterpretation of her statements to police.

While the Report cites to Bruce v. Terhune, 376 F3d. 950, 957-58 (9th Cir. 2004), for the proposition that Officer Hope's testimony alone was sufficient to prove carjacking, Bruce is inapposite. (Doc. 44 at 10.) In Bruce, the victim testified at trial as to the occurrence of the crime at a September sleepover. Id. at 957. While uncorroborated as to that incident, the testimony came from the person who was both the percipient witness and victim of the crime. Here, as to Petitioner Williams, there is a very different situation. The alleged victim and percipient witness, Sarai H., both did not testify at trial before the jury for them to be able to observe her and weigh her credibility, *and* she denied in what recorded evidence there was, i.e. the transcript of her preliminary hearing, ever reporting a carjacking or that a firearm was brandished.

Similarly, the out of circuit case, Ticey v. Peters, 8 F.3d 498 (7th Cir. 1993), cited in the Report should not control. (Doc. 44 at 11.) In that case, the rape victim appeared and testified at the trial. At trial, that victim, the only percipient witness to the crime, was explicitly asked about her earlier, out of court identification of her perpetrator to the detective, which differed from her trial testimony that she was not sure of the identity of her attacker. Id. at 500. Furthermore, the victim there did not deny during her trial testimony having made the prior identification of her attacker to the detective. Id. And, unlike in Petitioner Williams trial, because the victim testified at trial, the trier of fact was able to observe her demeanor. Id. at 504.

The Report attempts to attribute a motive to recant to Sarai H. due to an assumed pre-existing relationship with Petitioner Williams. (Doc. 44 at 11.) While they conceived a child together, the record evidence does not reflect any intact, on-going relationship in existence between them such that would cause Sarai H. to lie for Petitioner. As the Supreme Court recognized more than 100 years ago, deriving inferences from other inferences, and presumptions based on other presumptions, as a "mode of arriving at a conclusion of fact is generally, if not universally inadmissible." United States v. Ross, 92 U.S. 281, 283-84 (1875).

Petitioner is not making an "invitation to re-weigh the evidence at trial." (Doc. 44 at 11.) Rather, Petitioner argues that there was not evidence beyond a reasonable doubt presented where the absent alleged victim, Sarai H., testified at the preliminary hearing that there was not a carjacking and Officer Hope did not witness the crime. The denial of this claim by the Superior Court was an unreasonable application of Supreme Court law and was based on an unreasonable determination of the facts.

B. Petitioner Objects to the Conclusion That Denial of His Claim for Violation of His Right to Confrontation Was Not Contrary To Nor An Unreasonable Application Of Clearly Established Federal Law

Petitioner Williams asserted in his Petition and Reply, and continues to assert here, that the statements of Sarai H., both those allegedly made out of court to Officer Hope and those made in the preliminary hearing, were admitted at trial in violation of his Sixth Amendment right to confrontation.[1] (Doc. 44 at 20.) The decision of the Supreme Court in Crawford v. Washington is clear that "[w]here testimonial evidence

---

[1] Even if Officer Hope's trial testimony about Sarai H.'s alleged statements was properly admitted under California Evidence rules such would not vitiate Petitioner's Sixth Amendment confrontation right. Officer Hope was improperly used to introduce uncorroborated alleged prior statements of an absent witness without sufficient confrontation. As the Third Circuit warned in McCandless v. Vaughn, "[i]f the prosecution had not had [the witness's] preliminary hearing testimony and had needed [the witness's] presence at trial, we are confident that the resources and effort devoted to finding him prior to trial would have been greater than they in fact were. To countenance such a disparity would ill serve the interests protected by the Confrontation Clause." Id., 172 F.3d 255, 269 (3rd Cir. 1999).

is at issue, ... the Sixth Amendment demands what common law required: unavailability [of the declarant] and a prior opportunity for cross-examination." Id., 541 U.S. 36, 38 (2004).

The Report speculates that the "prosecution reasonably could have believed that Sarai H. would be eager to testify at trial, as that would give her another opportunity to attempt to exonerate petitioner." (Doc. 44 at 17-18.) Petitioner's constitutional rights cannot be explained away by assumption. There is no record evidence proving that Sarai H. was ever notified by the prosecutor of the pending trial date so that she could make herself available. Furthermore, such an assumption, if correct, only underscores the motivation the prosecution had not to make early and diligent efforts to secure Sarai H.'s presence so that she would not have an opportunity to persuade the jury of Petitioner's innocence by way of live testimony before the jury.

The Report also credits the statements of the woman who "had temporarily exchanged residences" with Sarai H.'s that Sarai H. gone to visit Spain, finding that the efforts which included contacting this woman constituted good faith effort by the prosecution. (Doc. 44 at 17.) Yet, later the Report contends that it is "purely speculative that, in fact, Sarai H. was in Spain when the trial occurred." (Doc. 44 at 19.) As pointed out in the Reply, the prosecution's investigator did not visit the apartment again after December 28, 2012 to see if Sarai H. had returned, or to see what updated information the woman residing in the apartment might be able to provide, despite that the hearing on Sarai H's unavailability did not occur until January 8, 2013.

The Report ignores that the trial judge stated the Court would have been more satisfied if efforts had been made at least a month before the trial date. (Lodged Item No. 23, 2RT at 37). The Report assumes there is "no reason to believe that the existence of a subpoena issued in close temporal proximity to the preliminary hearing would have caused her to make herself available to testify at petitioner's trial." (Doc. 44 at 18 n.11.) This assumption improperly removes the burden from the prosecution to make efforts to secure the presence at trial of its witnesses in order to uphold

Petitioner's right to confrontation under the 6th Amendment. Had the prosecution made timely and diligent efforts to notify Sarai H. that her presence would be required at trial, Sarai H. could have been on notice not to leave the country in the first place, notice which could have had the force of court order via subpoena. Petitioner, as argued in his Petition and Reply, objects that the treaty argument is procedurally barred, as it is necessarily part of the diligence analysis. (Doc. 44 at 18-19); see People v. Sanchez, 63 Cal. 4th 411, 204 Cal. Rptr. 3d 682 (2016).

The Report incorrectly asserts that Petitioner "does not allege that he was denied a full and fair opportunity to cross-examine Sarai H. at the preliminary hearing." (Doc. 44 at 20.) Petitioner, in fact, has and does argue that the extent of the cross-examination was not sufficient. (Reply, Doc. 42 at 19.) Because Officer Hope did not testify at the preliminary hearing, there was no effective opportunity for defense counsel to question Sarai H. about those specific statements Officer Hope later claimed at trial had been made to him. "There was no opportunity for the jury to observe [the witness] and conclude for itself, based on that observation, whether [the witness] was telling the truth." People v. Sandoval, 87 Cal. App. 4th 1425, 1445 (2001). As recognized by the Supreme Court, a "preliminary hearing is ordinarily a much less searching exploration into the merits of a case than a trial, simply because its function is the more limited one of determining whether probable cause exists to hold the accused for trial." Barber v. Page, 390 U.S. 719, 725 (1968).

Sarai H's preliminary hearing testimony, and Officer Hope's testimony reciting Sarai H's alleged statements made out of court, were admitted in violation of Petitioner William's Sixth Amendment right to confrontation. As such, denial of the claim by the California Court of Appeal was a contrary to and unreasonable application of clearly established federal law, and was based on an unreasonable determination of the facts.

C. Petitioner Objects To The Finding That Rejection Of His Claim For Violation Of Due Process For Failure To Sever Counts Was Not Contrary To Nor An Unreasonable Application Of Clearly Established Federal Law

The Report finds that "[n]o Supreme Court case has held that severance of multiple counts against a single defendant is constitutionally mandated." (Doc. 44 at 22.) Petitioner Williams disputes this narrow view of the issue. Rather, the Due Process to which Petitioner is entitled under the Fifth and Fourteenth Amendments is clearly established federal law. As recognized by the United States Supreme Court, misjoinder can "rise to the level of a constitutional violation" where it "results in prejudice so great as to deny a defendant his Fifth Amendment right to a fair trial." United States v. Lane, 474 U.S. 438, 446 n.8 (1986).

While the Report finds that Petitioner used the same car to commit the offense in Count Five as was taken in the alleged carjacking count, this is precisely what caused prejudicial "spillover." (Doc. 44 at 23); see Davis v. Woodford, 384 F.3d 628, 638 (9th Cir. 2004). The circumstances by which Petitioner came into possession of Sarai H.'s vehicle were not relevant to the elements of the remaining counts. Furthermore, the improperly joined counts made more likely Petitioner's conviction for the carjacking count by portraying him as a violent man despite the weak evidence; i.e. solely Officer Hope's testimony, that Petitioner actually took the vehicle under force or fear and without permission. Petitioner disputes the Reports finding that "none of the counts was weaker than any other in terms of the evidence offered to prove the count." (Doc. 44 at 24.) The carjacking conviction rested on the testimony of a single non-percipient witness, Officer Hope, as Sarai H. did not appear at trial and testified in the preliminary hearing that there was no firearm, nor did she report one. The remaining counts were stronger as they had evidence such as testimony from a neighbor who witnessed the incident with Paris C., photographic evidence of bullet casings, photographic evidence of Paris C.'s injuries, and contemporaneous 911 recordings.

The denial of this claim was contrary to and an unreasonable application of clearly established federal law and was based on an unreasonable determination of the facts.

D. Petitioner Objects To The Finding That Rejection Of The Claim For Ineffective Assistance Of Appellate Counsel Was Not Contrary To Nor An Unreasonable Application Of Clearly Established Federal Law

Petitioner Williams respectfully disputes the Report's conclusion that "it appears that counsel made an informed, strategic decision against challenging the sufficiency of the evidence supporting the carjacking count." (Doc. 44 at 26.) No evidentiary hearing was held and this assumption is not supported by the record.

There is no evidence in the record as to why appellate counsel failed to assert this meritorious claim as requested by Petitioner. Appellate counsel does not offer in her declaration any strategic reason for failing to pursue the claim on appeal. There is no evidence of any reasonable, strategic decision for failing to challenge the lack of evidence supporting the carjacking conviction.

Appellate counsel unreasonably failed to present a meritorious issue and Petitioner was prejudiced by this deficiency. Smith v. Robbins, 528 U.S. 259, 285 (2000). In light of Sarai H.'s testimony that there was no carjacking, there was not evidence beyond a reasonable doubt supporting the conviction. There is a "reasonable probability" Petitioner would have prevailed on appeal had the issue been raised, and thus, the Strickland standard was unreasonably applied. 28 U.S.C. §2254(d); Strickland v. Washington, 466 U.S. 668, 694 (1984).

IV.

APPLICATION OF CERTIFICATE OF APPEALABILITY

In the event the Court does not grant the petition, Petitioner Williams applies for a certificate of appealability permitting his appeal on all claims to the Ninth Circuit. Rule 11 of the Rules Governing Section 2254 Cases requires a district judge to issue or deny a Certificate of Appealability (COA) at the same time that he or she directs entry of a final order adverse to the applicant. Rules Governing section 2254 Cases, Rule 11(a).

To obtain a COA, the petitioner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The petitioner must demonstrate "that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" Slack v. McDaniel, 529 U.S. 473, 484 (2000) (citation omitted). This is a "modest standard" that does not require the petitioner to show that he will ultimately prevail on the merits. Lambright v. Stewart, 220 F.3d 1022, 1024-25 (9th Cir. 2000). Any doubt as to whether a petitioner has met the standard for a COA must be resolved in his favor. Id. at 1025.

Here, Petitioner William's claims are colorable as there is a substantial showing of the denial of Petitioner's constitutional rights. Accordingly, a COA should issue as to claims one through four.

V.

CONCLUSION

For the foregoing reasons, the petition for writ of habeas corpus should be granted, and Petitioner Williams respectfully objects to the Report and Recommendation's findings and conclusions to the contrary. Petitioner Williams respectfully requests the Court to adopt his objections and recommend his Petition be granted. If the Petition is not granted, Petitioner respectfully urges that a COA should issue on all claims.

Respectfully submitted,

HILARY POTASHNER
Federal Public Defender

DATED: May 1, 2017

By *\/s\/ Kelley Munoz*
KELLEY MUNOZ
Deputy Federal Public Defender

Report and Recommendation Events

2:16-cv-02190-JAK-PLA Randee D. Williams, Jr. v. C.E. DuCart

194

UNITED STATES DISTRICT COURT for the CENTRAL DISTRICT OF CALIFORNIA

Notice of Electronic Filing

The following transaction was entered by Munoz, Kelley on 5/1/2017 at 3:29 PM PDT and filed on 5/1/2017

Case Name: Randee D. Williams, Jr. v. C.E. DuCart
Case Number: 2:16-cv-02190-JAK-PLA
Filer: Randee D. Williams, Jr
Document Number: 47

Docket Text:
OBJECTION to Report and Recommendation (Issued) [44] ;*APPLICATION FOR CERTIFICATE OF APPEALABILITY* filed by Petitioner Randee D. Williams, Jr.(Munoz, Kelley)

2:16-cv-02190-JAK-PLA Notice has been electronically mailed to:

Charles S Lee DocketingLAAWT@doj.ca.gov, Charles.Lee@doj.ca.gov, Stephanie.Brenan@doj.ca.gov

Kelley Munoz Kelley_Munoz@fd.org, zzCAC_FPD_Document_Receiving@fd.org

2:16-cv-02190-JAK-PLA Notice has been delivered by First Class U. S. Mail or by other means BY THE FILER to :

The following document(s) are associated with this transaction:

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2b53a7b780eb126b5a310f0f4e0342831ed92b54fb6c88249e55839f1c8e]]

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Attorneys for Petitioner
RANDEE D. WILLIAMS, JR.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

RANDEE D. WILLIAMS, JR., Petitioner, v. C.E. DUCART, Warden, Respondent.	NO. CV 16-2190-JAK-PLA **NOTICE OF APPEAL**

Notice is hereby given that Petitioner Randee D. Williams, Jr., appeals to the United States Court of Appeals for the Ninth Circuit from (1) the Judgment dismissing this action with prejudice, filed on June 1, 2017, and (2) from all other rulings and orders leading up to and relating to the Judgment, including but not limited to the Order Accepting Findings and Recommendations of United States Magistrate Judge, filed on June 1, 2017, the Order Denying Petitioner's Application for Certificate of Appealability filed on June 1, 2017, and from the Report and Recommendation of United States Magistrate Judge, filed and entered on March 17, 2017.

No filing or docket fee is required because Petitioner is in forma pauperis and the Federal Public Defender's Office was appointed to represent him in this action.

The parties to the judgment are:

Petitioner:	Randee D. Williams, Jr. CDCR#G14767; Facility/Bed: A-5-120 California State Prison-Sacramento P.O. Box 290066 Represa, CA 95671
Petitioner's Counsel:	Kelley Munoz Deputy Federal Public Defender 411 W. Fourth Street, Suite 7110 Santa Ana, CA 92701-4598 Telephone (714)338-4500 Facsimile (714)338-4520 E-mail:Kelley_munoz@fd.org

Respondent: C.E. Ducart
Pelican Bay State Prison
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Crescent City, CA 95531-7000
(707) 465-1000

Respondent's Counsel: Charles S. Lee, Deputy Attorney General
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Telephone (213) 576-1346
Facsimile (213) 897-6496
E-mail: DocketingLAAWT@doj.ca.gov

Respectfully submitted,

HILARY POTASHNER
Federal Public Defender

DATED: June 26, 2017

By */s/ Kelley Munoz*
KELLEY MUNOZ
Deputy Federal Public Defender
Attorney for Petitioner
Randee D. Williams, Jr.

Appeal Documents

2:16-cv-02190-JAK-PLA Randee D. Williams, Jr. v. C.E. DuCart **CASE CLOSED on 06/01/2017**

194,CLOSED

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

Notice of Electronic Filing

The following transaction was entered by Munoz, Kelley on 6/26/2017 at 10:52 AM PDT and filed on 6/26/2017

Case Name: Randee D. Williams, Jr. v. C.E. DuCart
Case Number: 2:16-cv-02190-JAK-PLA
Filer: Randee D. Williams, Jr
WARNING: CASE CLOSED on 06/01/2017
Document Number: 51

Docket Text:
NOTICE OF APPEAL to the 9th Circuit Court of Appeals filed by Petitioner Randee D. Williams, Jr. Appeal of R&R - Accepting Report and Recommendations,, [48], Judgment, [49]. (Appeal Fee - Pending Certificate of Appealability.) (Munoz, Kelley)

2:16-cv-02190-JAK-PLA Notice has been electronically mailed to:

Charles S Lee DocketingLAAWT@doj.ca.gov, Charles.Lee@doj.ca.gov, mary.emami@doj.ca.gov, Stephanie.Brenan@doj.ca.gov

Kelley Munoz Kelley_Munoz@fd.org, zzCAC_FPD_Document_Receiving@fd.org

2:16-cv-02190-JAK-PLA Notice has been delivered by First Class U. S. Mail or by other means BY THE FILER to :

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CA NO. 17-55904

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RANDEE D. WILLIAMS, JR.,

Petitioner-Appellant,

v.

C.E. DUCART, WARDEN ,

Respondent-Appellee.

DC NO. CV 16-2190-JAK-PLA

APPELLANT'S REQUEST FOR A CERTIFICATE OF APPEALABILITY

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

HONORABLE JOHN A. KRONSTADT
United States District Judge

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I. INTRODUCTION

The District Court dismissed with prejudice the Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 filed by Randee D. Williams, Jr. finding that habeas relief was not warranted The District Court denied a certificate of appealability (COA). Williams requests a COA on each of the four claims in his Petition.

II. PROCEDURAL HISTORY

Williams was sentenced to 29 years and 4 months in state prison after a jury convicted him of discharge of a firearm with gross negligence, in violation of California Penal Code section 246.3(a) (Count 1); possession of a firearm by a felon, in violation of California Penal Code section 29800(a)(1) (Count 2); carjacking, in violation of California Penal Code section 215(a) (Count 3); and assault with a deadly weapon, in violation of California Penal Code section 245(a)(1) (Count 5), along with various sentence enhancements. Williams was acquitted of Count 4 for possession of a firearm. The victim of the alleged carjacking in count 3, Sarai H., did not testify at trial and her preliminary hearing transcript was read to the jury. Subsequently, a new trial motion was heard and denied March 25, 2013. (Lodged Item 1 at 21.) [1]In support of the new trial motion, trial counsel filed a signed Affidavit of Sarai H., in which she "declare[d] under penalty of perjury" that as to Count 3, Williams took the car without consent but did not assault, threaten, use or display a gun. (Lodged Item 10 at 28-29.)

After sentence was imposed, Williams pursued direct appeal. The California Court of Appeal affirmed the conviction on March 11, 2014, and the California Supreme Court summarily denied review on May 21, 2014.

After pursuing habeas relief in the California state courts, Williams caused to be mailed a petition for writ of habeas corpus by a person in state custody pursuant to 28 U.S.C. § 2254 on March 28, 2016, which was filed by the District Court on March 31, 2016. On June 1, 2017, the District Court issued a Judgment adopted the Magistrate Judge's Report and Recommendation, issued without evidentiary hearing, and dismissing the matter with prejudice.

III. THE STANDARD FOR GRANTING A CERTIFICATE OF APPEALABILITY

To obtain a COA, the petitioner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The petitioner must

[1] All lodged item citations refer to the documents lodged by the Respondent in the district court case no. CV 16-2190-JAK-PLA.

demonstrate "that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S.Ct. 1595 (2000) (internal quotation marks and citation omitted).

This is a "modest standard" that does not require the petitioner to show that he will ultimately prevail on the merits. *Lambright v. Stewart*, 220 F.3d 1022, 1024-25 (9th Cir. 2000). Any doubt as to whether a petitioner has met the standard for a COA must be resolved in his favor. *Id.* at 1025. A "COA ruling is not the occasion for a ruling in the merit of petitioner's claim." *Miller-El v. Cockrell,* 537 U.S. 322, 331, 123 S. Ct. 1029 (2003). "The COA inquiry asks only if the District Court's decision was debatable." *Id.* at 348. "This threshold inquiry does not require full consideration of the factual or legal bases adduced in the support of the claims. In fact, the statute forbids it." *Id.* at 336. The COA standard is "modest", '"the petitioner need not show that he should prevail on the merits."' *Lambright,* 220 F.3d at 1024-25 (*quoting Barefoot v. Estelle,* 463 U.S. 880, 893 n.4, 103 S.Ct. 3383 (1983)).

Williams need only show that the issues in the petition are not frivolous to be afforded an "opportunity to persuade [an appellate court] through full briefing and argument of the potential merit of issues that may appear, at first glance, to lack merit." *Lambright*, 220 F.3d at 1025. Here, Williams' claims are colorable and a COA should issue.

IV. WILLIAMS SHOULD BE GRANTED A COA ON ALL CLAIMS OF HIS PETITION

A. Williams' Claim That He Was Convicted On Insufficient Evidence Is Debatable Among Reasonable Jurists And Could Be Resolved Differently Warranting Appellate Review (Claim 1)

The Due Process clause "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068 (1970). A claim by a state prisoner that there was insufficient evidence for a reasonable jury to find him guilty of the crime charged beyond a reasonable doubt is cognizable on federal habeas review. *See Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781 (1979). Pursuant to AEDPA as codified at section 2254(d)(1), a state prisoner is entitled to federal habeas relief if the state courts' application of the *Jackson* standard was objectively unreasonable on the facts of the case. *Juan H. v. Allen*, 408 F.3d 1262, 1274-75 (9th Cir. 2005), *cert. denied,* 546 U.S. 1137 (2006).

The *Jackson* standard was unreasonably applied as no rational trier of fact could have found the required element of the use of force or fear to sustain a carjacking conviction proven beyond a reasonable doubt. (See CALJIC No. 9.46.) Officer Hope, who testified at trial, had no personal knowledge of what if anything occurred between Sarai H. and Petitioner Williams. Officer Hope testified about statements he claimed Sarai H. made to him the next morning. Any out of court statement made by Sarai H. to Officer Hope was not made under penalty of perjury. There was no percipient witness called at trial who observed the alleged incident at issue between Sarai H. and Petitioner Williams. Officer Hope testified that his partner, Officer Ko, responded to Sarai H.'s residence with him. In fact, it was Officer Ko who authored the police report. (Lodged Item No. 23 Vol.2 at 64.) Yet this corroborating witness, Officer Ko, was not called by the prosecution. In the preliminary hearing testimony of Sarai H., which was read to the jury at trial, Sarai H. explained that she "allowed him to go with the car." (Lodged Item No. 23, 2RT at 249.) With respect carjacking's necessary element of force or fear pursuant to California Penal Code section 215(a), Sarai H. testified "I did not say there was a gun." (Lodged Item No. 23, 2RT at 250.) Sarai H. explained that she believed the police misinterpreted her about whether Petitioner Williams had a gun. (Lodged Item No. 23, 2RT at 250-51.) Sarai H. testified that Petitioner

Williams "[n]ever" threatened her or waved a gun to make her give him the car. (Lodged Item No. 23, 2RT at 255-56.)

Williams was convicted in Count three for carjacking essentially based on what Officer Hope testified Sarai H. told him the next morning, when Sarai H's preliminary hearing transcript testimony denied there was any carjacking. Williams meets the modest *Slack* and *Lambright* standards in that a "quick look" at the petition reveals that he has "facially allege[d] the denial of a constitutional right" in Claim 1 of the Petition and reasonable jurors could debate the correctness of the District Court's denial of the claim. *Lambright,* 220 F.3d. at 1026 (citations omitted).

B. Jurists Of Reason Would Find It Debatable Whether Williams' Constitutional Right To Confrontation Was Violated (Claim 2)

Claim 2 of Williams' Petition argued that in violation of his Sixth Amendment right of confrontation, the preliminary hearing testimony of Sarai H. was read to the jury and officer Hope was permitted to testify as to the hearsay statements of Sarai H. The COA standard is met if an appellant shows that "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right." *Slack,* 529 U.S. at 478.

The Sixth Amendment guarantees a defendant "the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. "A witness's testimony against a defendant is thus inadmissible unless the witness appears at trial or, if the witness is unavailable, the defendant had a prior opportunity for cross-examination." *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 309, 129 S. Ct. 2527 (2009); *see also Crawford v. Washington*, 541 U.S. 36, 53-54, 124 S. Ct. 1354 (2004). A witness is not unavailable unless the prosecution has made good-faith efforts to obtain the witness's presence. *Barber v. Page*, 390 U.S. 719, 724-25, 88 S. Ct 1318 (1968).

1. Sarai H.'s Preliminary Hearing Transcript

The prosecution did not attempt to subpoena Sarai H. until December 18, 2012 for a trial initially set to begin on December 24, 2012. (Lodged Item No. 23, 2RT at 6.) An investigator for the district attorney testified that she went to Sarai H.'s address on December 18th, 20th, and 27th of 2012, but there was no answer at her apartment. (Lodged Item No. 23, 2RT at 4-5.) On December 28, 2012, the investigator returned to Sarai H.'s apartment and was able to speak with an exchange student. (Lodged Item No. 23, 2RT at 5.) As of the time of the January 8, 2013 hearing about Sarai H.'s availability, the prosecution's investigator had not returned to Sarai H.'s apartment since December 28, 2012 to see if the witness might have returned home after the Christmas holiday. (Lodged Item No. 23, 2RT at 7.) Defense counsel, who was not the same attorney who had conducted the preliminary hearing where Sarai H. had previously testified, objected to the prosecution's lack of diligence, especially given that they had waited until six days before trial to subpoena a witness they were on notice was "recalcitrant." (Lodged Item No. 23, 2RT at 8-9.) Defense counsel raised Petitioner's constitutional right to confrontation under the Sixth Amendment. (Lodged Item No. 23, 2RT at 10.) Despite Respondent's assertion that Sarai H. "was not in the United States at the time of the trial," the trial court agreed with defense counsel's assessment there was no evidence admitted for the truth of the matter that proved Sarai H. was actually out of the country. (Answer at 27; Lodged Item No. 23, 2RT at 5, 14.) The trial court ruled, admittedly without consulting any caselaw, that while it was a "close situation arguably," and that the court would have been more satisfied if the prosecution had made efforts to contact the witness at least a month prior, it was satisfied with the prosecution's efforts to secure Sarai H.'s testimony. (Lodged Item No. 23, 2RT at 37.)

When there is a possibility, "albeit remote, that affirmative measures might produce the declarant, the obligation of good faith may demand their effectuation." *Ohio v. Roberts*, 448 U.S. 56, 74, 100 S. Ct. 2531 (1980), *overruled by Crawford*, 541 U.S. at 63-64 . Sarai H.'s absence at trial benefitted the prosecution as Officer Hope testified about Sarai H.'s alleged reporting of a carjacking without Sarai H. present to rebut his claims in person before the jury. *See Earhart v. Konteh*, 589 F.3d 337 (6th Cir. 2009), *cert. denied*, 562 U.S. 874 (2010)(reversing denial of habeas petition for confrontation clause violation where prosecution played video-taped deposition testimony at which defense had opportunity to cross examine alleged victim witness who was later on vacation during trial).

The COA standard is also met if "jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack*, 529 U.S. at 478. Here, the District Court found any claim that the prosecution should have explored use of a the treaty with Spain was "procedurally barred because the court of appeal held that petitioner had forfeited the argument by failing to raise it at trial." (Item 44 at 18.) Williams asserts the treaty issue is not an independent claim. *Cf. People v. Sanchez*, 63 Cal.4th 411, 441-42 (2016)(California Supreme Court found appellate ground not forfeited where defendant, who did not specifically argue at trial the prosecutor should have invoked foreign treaty, had objected to admission of absent witness's preliminary hearing testimony and the prosecution's lack of diligence in securing the presence of the witness); *People v. Herrera*, 49 Cal. 4th 613, 628 (2010)("... unavailability in the constitutional sense does not invariably turn on the inability of the state court to compel the out-of-state witness's attendance through its own process, but also takes into consideration the existence of agreements or established procedures for securing a witness's presence that depend on the voluntary assistance of another government. Where such options exist, the extent to which the prosecution had the opportunity to utilize them and endeavored to do so is relevant in determining whether the obligations to act in good faith and with due diligence have been met.")

2. **Officer Hope**

Officer Hope's testimony was the only evidence presented by the prosecution at trial that Petitioner Williams had in fact brandished a firearm to threaten Sarai H. into relinquishing her vehicle. Sarai H.'s statements to Officer Hope were testimonial as the circumstances in calling the police the next morning indicated that there was no ongoing emergency, but rather the primary purpose of the interaction was interrogation regarding past events relevant to subsequent criminal prosecution. *Davis v. Washington*, 547 U.S. 813, 822, 126 S.Ct. 2266 (2006); see also *Winzer v. Hall*, 494 F.3d 1192 (9th Cir. 2007)(pre-*Crawford* decision finding Confrontation Clause violation in a §2254 action for admission at trial of police officer's hearsay testimony regarding what non-testifying witness had reported more than five hours after an alleged threat.)

Even if Officer Hope's trial testimony about Sarai H.'s alleged statements was properly admitted under California Evidence rules, such would not vitiate William's Sixth Amendment confrontation right. Officer Hope was improperly used to introduce uncorroborated alleged prior statements of an absent witness without sufficient confrontation. As the Third Circuit warned in *McCandless v. Vaughn*, "[i]f the prosecution had not had [the witness's] preliminary hearing testimony and had needed [the witness's] presence at trial, we are confident that the resources and effort devoted to finding him prior to trial would have been greater than they in fact were. To countenance such a disparity would ill serve the interests protected by the Confrontation Clause." *Id.*, 172 F.3d 255, 269 (3rd Cir. 1999).

The introduction of this evidence without Sarai H.'s presence at trial had a substantial and injurious effect on the jury's verdict to convict. *Brecht v. Abrahamson*, 507 U.S. 619, 637-38, 113 S.Ct. 1710 (1993); *Fry v. Pliler*, 551 U.S. 112, 120, 127 S. Ct. 2321 (2007). Williams meets the modest *Slack* and *Lambright* standards in that a "quick look" at the petition reveals that he has "facially allege[d] the denial of a constitutional right" in Claim 2 of the Petition and reasonable jurors could debate the correctness of the District Court's rulings on the claim. *Lambright,* 220 F.3d. at 1026 (citations omitted).

C. Jurists Of Reason Would Find It Debatable Whether Williams' Was Denied Due Process When The Trial Court Failed To Sever Counts Which Were Impermissibly Joined (Claim 3)

Williams asserted in Claim 3 of his Petition that he was denied his constitutional right to due process pursuant to the Fifth Amendment by the trial court's refusal to sever counts 3 and 4 from counts 1, 2, and 5. The trial essentially combined three separate incidents from three separate dates.

The separate trial of charges may be constitutionally required if joinder of counts would be so prejudicial as to deny a defendant his Fifth and Fourteenth Amendment rights to a fair trial. *See United States v. Lane*, 474 U.S. 438, 446 n.8, 106 S.Ct. 725 (1985)("…misjoinder would rise to the level of a constitutional violation only if it results in prejudice so great as to deny a defendant his Fifth Amendment right to a fair trial"); *Bean v. Calderon*, 163 F.3d 1073, 1084 (9th Cir. 1998)(specifically citing the Supreme Court's footnote 8 in *Lane* for the legal standard applicable to determine a constitutional violation based on a misjoinder claim in a §2254 petition); *but see Collins v. Runnels*, 603 F.3d 1127, 1132 (9th Cir. 2010).

Counts 1 and 2 charged Williams with negligent discharge and unlawful possession of a firearm related to an incident at his grandfather's residence. Counts 3 and 4 charged Williams with allegations of carjacking and unlawful possession of a firearm related to Sarai H. and her vehicle. Count 5 charged Williams with assault with a deadly weapon on Paris C. The only limited cross-admissibility of evidence was the vehicle as the prosecution attempted to establish that the car belonging to Sarai H. was the same vehicle used against Paris C. While Williams' possession of the vehicle may have been relevant to proving the assault charge in Count 5, the circumstances by which he came into possession of the vehicle, purportedly by carjacking, were not admissible or relevant to proving an assault Count 5. The evidence necessary to prove carjacking did not overlap with the evidence required to prove the counts related to the two separate incidents in counts 1, 2, and 5. *See United States v. Portac Inc.*, 869 F.2d 1288, 1294 (9th Cir. 1989) ("Joinder is proper when the same facts must be adduced to prove each of the joined offenses.") Aside from Officer Hope's testimony, there was no other evidence presented that Petitioner brandished a weapon when asking to borrow Sarai H.'s car or that he ultimately took the vehicle without permission under force or fear. Yet, jurors were invited to believe that Williams had a propensity and pattern of committing violent acts in light of the evidence presented as to the other incidents in Counts 1, 2, and 5, evidence they would not have heard but for the misjoinder. *Bean*, 163 F.3d at 1083 (consolidation at trial of the relatively weak charge as to one victim and the stronger evidence on the charge as to a separate victim violated the defendant's "right to due process by leading the jury to infer criminal propensity.")

Williams meets the modest *Slack* and *Lambright* standards in that a "quick look" at the petition reveals that he has "facially allege[d] the denial of a constitutional right" in Claim 3 of the Petition and reasonable jurors could debate the correctness of the District Court's denial of the claim. *Lambright,* 220 F.3d. at 1026 (citations omitted).

D. Jurists Of Reason Would Find It Debatable Whether Williams' Was Denied Effective Assistance Of Counsel On Appeal (Claim 4)

Williams meets the modest *Slack* and *Lambright* standards in that a "quick look" at the petition reveals that he has "facially allege[d] the denial of a constitutional right" by pleading a claim of ineffective assistance of counsel. *Lambright*, 220 F.3d. at 1026 (citations omitted). An ineffective assistance of counsel claim is a constitutional claim which has two components: that trial counsel's performance was deficient, and that the deficiency prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687-88, 104 S. Ct. 2052 (1984).

The Fourteenth Amendment guarantees a criminal appellant the right to counsel on a first appeal. *Penson v. Ohio*, 488 U.S. 75, 79, 109 S. Ct. 346 (1988); *Douglas v. California*, 372 U.S. 353, 83 S. Ct. 814 (1963). The right to appellate representation includes the right to effective assistance by that counsel. *Evitts v. Lucey*, 469 U.S. 387, 105 S. Ct. 830 (1985). Claims of ineffective assistance of appellate counsel are analyzed on the same basis as trial counsel. *Smith v. Robbins*, 528 U.S. 259, 285, 120 S. Ct. 746 (2000).

Whether Williams was convicted and sentenced on the basis of unconstitutionally insufficient evidence was a nonfrivolous issue for appeal. No percipient witness who observed the alleged carjacking testified at trial. The alleged victim, Sarai H., did not testify, and her preliminary hearing testimony denying a carjacking was read to the jury. With respect to the necessary element of force or fear in order for there to be a carjacking under California Penal Code section 215(a), Sarai H. testified that she "did not say there was a gun." (Lodged Item No. 23, 2RT at 250.) Sarai H. explained that she believed the police misunderstood her due to English not being her first language. (Lodged Item No. 23, 2RT at 250-51.) Sarai H. denied telling the police that based on fear for her life, she had agreed to give Williams the car keys. (Lodged Item No. 23, 2RT at 252.) Sarai H. testified that Williams "[n]ever" threatened her or waved a gun to make her give him the car. (Lodged Item No. 23, 2RT at 255-56.) Officer Hope testified impermissibly about what he claimed Sarai H. reported to him the next day after the alleged carjacking, but his testimony was not corroborated.

Had appellate counsel presented this arguable meritorious argument, there is a reasonable probability that Williams would have prevailed. Given that "reasonable probability" means only one "sufficient to undermine confidence in the outcome," the state court's holding was an unreasonable application of the *Strickland* standard and reasonable jurists could debate the correctness of the District Court's denial of this claim. *Id.*, 466 U.S. at 694; § 2254(d).

V. CONCLUSION

Williams has demonstrated that jurists of reason could find his petition states facially valid constitutional claims and that reasonable jurists could find it debatable whether the District Court's denial of his Petition was correct. Therefore, this Court should grant a COA on all four of the claims in his petition.

Respectfully submitted,

HILARY POTASHNER
Federal Public Defender

DATED: June 27, 2017

By *[/s/ Kelley Munoz]*
Kelley Munoz
Deputy Federal Public Defender
Attorney for Petitioner-Appellant

CERTIFICATE OF SERVICE

I hereby certify that on June, 27, 2017, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

DATED: June 27, 2017

/s/ Rebecca V. Perez
Rebecca V. Perez

United States Court of Appeals for the Ninth Circuit

Notice of Docket Activity

The following transaction was entered on 06/27/2017 at 3:53:20 PM PDT and filed on 06/27/2017

Case Name: Randee Williams, Jr. v. Clark Ducart
Case Number: 17-55904
Document(s): Document(s)

Docket Text:
Filed (ECF) Appellant Randee D. Williams, Jr. Motion for certificate of appealability. Date of service: 06/27/2017. [10490046] [17-55904] (Munoz, Kelley)

Notice will be electronically mailed to:

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Mr. Charles Shang-Rei Lee, Deputy Attorney General

The following document(s) are associated with this transaction:
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CA NO. 17-55904

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RANDEE D. WILLIAMS, JR., Petitioner-Appellant, v. C.E. DUCART, WARDEN , Respondent-Appellee.	DC NO. CV 16-2190-JAK-PLA

NOTICE OF ERRATA RE APPELLANT'S REQUEST FOR A CERTIFICATE OF APPEALABILITY

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

HONORABLE JOHN A. KRONSTADT
United States District Judge

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ERRATA

Petitioner Randee Williams, by and through his counsel of record Deputy Federal Public Defender Kelley Munoz, hereby gives notice of the following errata in Petitioner's Application for a Certificate of Appealability filed in this Court on June 27, 2017:

At page 6 of 21, on the third line, it should state "...Williams took the car *with* consent *and* did not assault, threaten, or use or display a gun." (Lodged Item 10 at 28-29.)

Respectfully submitted,

HILARY POTASHNER
Federal Public Defender

DATED: July 26, 2017

By *_/s/ Kelley Munoz_*
Kelley Munoz
Deputy Federal Public Defender
Attorney for Petitioner-Appellant

CERTIFICATE OF SERVICE

I hereby certify that on July 26, 2017, I electronically filed the foregoing

NOTICE OF ERRATA RE APPELLANT'S REQUEST FOR A CERTIFICATE OF APPEALABILITY

with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

DATED: July 26, 2017

<u>/s/ Rebecca V. Perez</u>
Rebecca V. Perez