

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

JAN 30 2018

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

DALE RAY HURD,

Petitioner-Appellant,

v.

JOE A. LIZARRAGA, Warden,

Respondent-Appellee.

No. 17-55686

D.C. No. 2:16-cv-03427-CJC-JCG
Central District of California,
Los Angeles

ORDER

Before: NGUYEN and OWENS, Circuit Judges.

Appellant has filed a combined motion for reconsideration and motion for reconsideration en banc (Docket Entry No. 3).

The motion for reconsideration is denied and the motion for reconsideration en banc is denied on behalf of the court. *See* 9th Cir. R. 27-10; 9th Cir. Gen. Ord.

6.11.

No further filings will be entertained in this closed case.

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Central District of California,
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ORDER

Before: BYBEE and MURGUIA, Circuit Judges.

The request for a certificate of appealability 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.

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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA
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11 DALE R. HURD,

12 Petitioner,

13 v.

14 JOE A. LIZARRAGA,

15 Respondent.
16

Case No. LA CV 16-3427 CJC (JCG)

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

17 Pursuant to 28 U.S.C. § 636, the Court has reviewed: (1) the Petition; (2) the
18 Magistrate Judge's Report and Recommendation ("R&R"); (3) Petitioner's Objections
19 to the R&R ("Objections"); and (4) the remaining record, and has made a *de novo*
20 determination.
21

22 Petitioner's Objections generally reiterate arguments made in the Petition, and
23 lack merit for the reasons set forth in the R&R. There is one issue, however, that
24 warrants brief discussion.

25 In his objections, Petitioner challenges the R&R's conclusion that he had failed
26 to show prejudicial error under *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993).
27 [Dkt. No. 33 at 22-23.] Specifically, Petitioner contends that the R&R improperly
28

1 referenced his “son’s testimony” because his son, Charlie, did not testify about any of
2 the matters mentioned in that portion of the R&R. [*Id.*]

3 At Petitioner’s third trial, Charlie testified primarily about his memory of his
4 mother crying, screaming, falling down the stairs, and collapsing on the ground.
5 (Lodg. No. 3, Reporter’s Transcript (“RT”) at 986-1002.) But Charlie could not
6 remember many of the details of his testimony from the previous trials — even after
7 attempts to refresh his collection with his prior testimony — because he was young
8 when he testified, and so much time had elapsed by Petitioner’s third trial. (*See, e.g.,*
9 *id.* at 987-89, 998-1001.) The R&R explained that “testimony was presented” that
10 Petitioner had asked his wife to review and sign divorce papers, and that Charlie had
11 made statements to the effect that his mother would not sign them, he heard a gunshot,
12 and heard her scream. (R&R at 6.) As explained in the R&R, Charlie made these
13 statements to: (1) a neighbor, (RT at 1011-14, 1019-21, 2557-58); (2) his uncle, (*id.* at
14 976-77, 1031-32, 1035-36, 2539-41); and (3) the police, (*id.* at 2541). (*See* R&R at 6.)

15 Petitioner is correct that Charlie did not directly testify about his statements at
16 Petitioner’s third trial due to his lack of memory about them or for other reasons, but
17 the cited testimony from the three witnesses remains a valid consideration in assessing
18 prejudice, as the R&R so found. Accordingly, any confusion resulting from the
19 reference to Petitioner’s “son’s testimony” does not detract in any way from the
20 R&R’s conclusion that Petitioner had not shown the requisite prejudice in light of the
21 testimony about Charlie’s statements of what he heard and saw on the day of the
22 crime. *See Brecht*, 507 U.S. at 639.

23 Finally, Charlie’s statements were just one of many aspects of the prejudice
24 analysis in the R&R. (*See* R&R at 4-7.) Petitioner has not shown in his Objections
25 that the other aspects of the R&R’s prejudice analysis warrant discussion, and they are
26 valid for the reasons stated in the R&R.

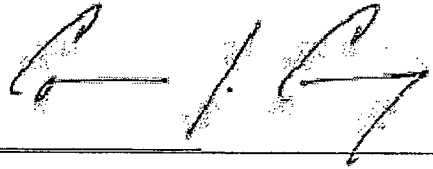
1 Accordingly, IT IS ORDERED THAT:

- 2 1. The Report and Recommendation is approved and accepted;
3 2. Judgment be entered denying the Petition and dismissing this action with
4 prejudice;
5 3. All pending motions are denied; and
6 4. The Clerk serve copies of this Order on the parties.

7 Additionally, for the reasons stated in the Report and Recommendation, the
8 Court finds that Petitioner has not made a substantial showing of the denial of a
9 constitutional right. *See* 28 U.S.C. § 2253; Fed. R. App. P. 22(b); *Miller-El v.*
10 *Cockrell*, 537 U.S. 322, 336 (2003). Thus, the Court declines to issue a certificate of
11 appealability.

12 Nor is Petitioner entitled to an evidentiary hearing. *See Cullen v. Pinholster*,
13 131 S.Ct. 1388, 1398 (2011) (AEDPA “requires an examination of the state court-
14 decision at the time it was made. It follows that the record under review is limited to
15 the record in existence at that same time—*i.e.*, the record before the state court.”).

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18 DATED: April 11, 2017



HON. CORMAC J. CARNEY
UNITED STATES DISTRICT JUDGE

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8 **UNITED STATES DISTRICT COURT**
9 **CENTRAL DISTRICT OF CALIFORNIA**
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11 DALE R. HURD,

12 Petitioner,

13 v.

14 JOE A. LIZARRAGA,¹

15 Respondent.
16
17

Case No. LA CV 16-3427 CJC (JCG)

**REPORT AND RECOMMENDATION
TO DENY PETITION FOR WRIT OF
HABEAS CORPUS**

18 **I.**

19 **BACKGROUND**

20 On November 29, 2012, a jury convicted Dale R. Hurd ("Petitioner") of first
21 degree murder for killing his wife in 1993. (Lodg. No. 2, Clerk's Transcript ("CT") at
22 389; Lodg. No. 3, Reporter's Transcript ("RT") at 4203-04.) The jury also found true
23 a special circumstance allegation that Petitioner committed the crime for financial gain
24 and that he personally used a firearm. (CT at 389; RT at 4204.) On July 31, 2013,
25
26

27 ¹ The Court **DIRECTS** the Clerk of Court to update the case caption to reflect Joe A. Lizarraga
28 as the proper Respondent. *See* Fed. R. Civ. P. 25(d); R. 2, Rs. Governing § 2254 Cases in U.S. Dist.
Cts.; [see also Dkt. No. 17 at 14.]

1 Petitioner was sentenced to prison for an indeterminate term of life without the
2 possibility of parole plus two years.² (CT at 447-48; RT at 5731-35.)

3 On appeal, the California Court of Appeal (“Court of Appeal”) affirmed the
4 judgment, and denied a related habeas petition. (*See* Lodg. Nos. 8, 13, 14); *see also*
5 *People v. Hurd*, 2015 WL 1954450 (Cal. Ct. App. Apr. 30, 2015). The California
6 Supreme Court subsequently denied review and denied a related habeas petition. (*See*
7 Lodg. Nos. 11, 15, 12); [Dkt. 3-3 at 156].³ The United States Supreme Court denied
8 certiorari. (Lodg. No. 17); *see also Hurd v. California*, 136 S. Ct. 904 (2016).

9 The Court has reviewed the record, and the evidence is accurately summarized
10 in the Court of Appeal’s decision on direct review. *See Hurd*, 2015 WL 1954450 at
11 *1-10; *see also* 28 U.S.C. § 2254(e)(1) (“[A] determination of a factual issue made by
12 a State court shall be presumed to be correct.”). The Court discusses the facts below as
13 are pertinent to habeas relief.

14 II.

15 DISCUSSION

16 Petitioner asserts eleven grounds for relief, all of which fail on this record. *See*
17 28 U.S.C. § 2254(d) (Antiterrorism and Effective Death Penalty Act) (“AEDPA”);
18 *Harrington v. Richter*, 562 U.S. 86, 101-02 (2011).

19 A. Grounds One & Eight: Right to Present a Defense

20 In Ground One, Petitioner contends that his right to present a defense was

21
22 ² This was the third time Petitioner was tried for his wife’s murder. (*See* Lodg. No. 8 at 2 n.2.)
23 The first trial ended in a mistrial after the jury deadlocked. (*See id.*) Following a second trial,
24 Petitioner was convicted. (*See id.*) However, he prevailed in a later federal habeas corpus
25 proceeding. *See Hurd v. Terhune*, 619 F.3d 1080 (9th Cir. 2010). The Ninth Circuit found that the
26 trial court improperly allowed the prosecution to present evidence of Petitioner’s refusal, during
27 police interrogation, to reenact what he claimed was the accidental shooting of his wife. *Id.* at 1082.
28 It issued a writ of habeas corpus, requiring Petitioner’s release from custody unless the prosecution
chose to retry him. *Id.* at 1091. The People elected to retry Petitioner, resulting in the conviction he
now challenges. *Id.*; [Dkt. Nos. 1, 2].

³ The document lodged by Respondent as a purported California Supreme Court denial order is
in fact an order extending time to grant or deny relief. [*See* Dkt. No. 22 at 2]; (*see also* Lodg. No.
16). Petitioner included the actual order denying relief with his Petition. [*See* Dkt. No. 3-3 at 156.]

1 violated when he was prevented from testifying that, because his wife was “nervous”
2 about the Rodney King civil trial verdicts, he was going to suggest she have a gun.
3 [Dkt. No. 1 at 7; Dkt. No. 2 at 18-22; Dkt. No. 28 at 16-18, 23-28.] In Ground Eight,
4 Petitioner contends that exclusion of the evidence was prejudicial. [Dkt. No. 1 at 9;
5 Dkt. No. 2 at 49-52; Dkt. No. 28 at 71-74.]

6 By way of background, Petitioner testified in his own defense that he shot his
7 estranged wife by accident. (*See* RT at 2807.) Specifically, Petitioner testified that
8 while she dropped their kids off at Petitioner’s home, they talked about their
9 daughter’s swim meet and the upcoming verdict in the King case. (RT at 2832-33.)
10 They also talked about how she was going to pick up the kids in the morning, and then
11 possibly go to the swim meet “depending upon how the verdict played out.” (RT at
12 2833.)

13 Petitioner said *he* was “anxious” about the King verdict. (RT at 2833.) To
14 prepare for any civil disturbance, he got his handgun out, got it ready, and moved it to
15 a more accessible location. (RT at 2833-34.) Petitioner’s wife came back that next
16 morning, and Petitioner asked her to go to his bedroom. There, he picked up his gun to
17 “impress her” and show her he could “protect her and care for her.” (RT at 2481,
18 2485.) He further “tried to impress [his wife] by showing her how to chamber a
19 round.” (RT at 2845.) The gun seemed to jam, but Petitioner unjammed it and felt a
20 bullet move into the chamber. (RT at 2845, 2892-93.) He then became distracted by
21 the television, pulled the trigger, and shot his wife in the chest. (RT at 2883-85, 2892-
22 93, 3020.) Petitioner said his memory was “blank” as to the exact moment he shot her.
23 (RT at 2845, 2889.) In addition to this testimony, defense counsel sought permission
24 to allow Petitioner to testify that, although he knew his wife was afraid of guns, he was
25 going to suggest she have a gun because *she* was “nervous” about the verdicts in the
26 King case. (RT at 2834-41.) The trial court precluded the testimony. (RT at 2839-
27 41.)
28

1 As a rule, the exclusion of evidence does not violate the Due Process Clause
2 unless “it offends some principle of justice so rooted in the traditions and conscience
3 of our people as to be ranked as fundamental.” *Montana v. Egelhoff*, 518 U.S. 37, 43
4 (1996) (quoting *Patterson v. New York*, 432 U.S. 197, 201-02 (1977)). One of the
5 fundamental rules that may be violated by the erroneous exclusion of defense evidence
6 is the Sixth Amendment right to present a defense. *DePetrìs v. Kuykendall*, 239 F.3d
7 1057, 1062 (9th Cir. 2001) (citing *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973)
8 and *Washington v. Texas*, 388 U.S. 14, 18-19 (1967)).

9 The Court of Appeal found that the trial court’s ruling was error but, “under the
10 facts of this case, it was not prejudicial under any standard of review.” *Hurd*, 2015
11 WL 1954450 at *15. Because the state court resolved Petitioner’s claim on prejudice
12 grounds, and because it is simpler to resolve this claim on that ground, the Court limits
13 its review here to whether there was prejudice. *See Shaw v. Terhune*, 380 F.3d 473,
14 478 (9th Cir. 2004) (courts should avoid considering constitutionality if issue may be
15 resolved on narrower grounds, such as lack of prejudice). Thus, even if the Court
16 assumes that the trial court committed a constitutional error by excluding the evidence,
17 relief requires a showing that such error “had substantial and injurious effect or
18 influence in determining the jury’s verdict.” *Brecht v. Abrahamson*, 507 U.S. 619, 637
19 (1993) (citation omitted). That is, the petitioner must establish “actual prejudice,” not
20 just a “reasonable possibility” that the alleged trial error contributed to the verdict. *Id.*

21 Here, the Court agrees with the Court of Appeal’s conclusion that Petitioner was
22 not prejudiced by exclusion of the evidence, *see Hurd*, 2015 WL 1954450 at *16,⁴ for
23 four reasons:

24
25 ⁴ The state appellate court addressed both the federal harmless error standard of *Chapman v.*
26 *California*, 386 U.S. 18, 24 (1967) and the state-law standard of *People v. Watson*, 46 Cal. 2d 818,
27 836 (1956) in determining that the error was harmless under any standard of review. *See Hurd*, 2015
28 WL 1954450 at *16-17. The Court recognizes that the Supreme Court recently clarified that *Brecht*
incorporates the requirements of AEDPA. *See Davis v. Ayala*, 135 S. Ct. 2187, 2196-99 (2015).
Thus, if a state court has determined that a trial error was harmless, then “a federal court may not
award habeas relief under § 2254 unless *the harmlessness determination itself* was unreasonable.” *Id.*

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- Evidence Minor and Subsidiary to Defense: First, the excluded evidence addressed only why Petitioner came to show his wife the gun before it discharged, which was a minor and subsidiary point to his overall defense that it was an accident. *See Brecht*, 507 U.S. at 637; *Lunbery v. Hornbeak*, 605 F.3d 754, 762 (9th Cir. 2010) (finding that a defendant “does not have an unfettered right to present any evidence he or she wishes.” (internal quotation marks omitted)). Indeed, the core of Petitioner’s defense was presented to the jury: (1) Petitioner was able to testify at length to explain how the “accident” occurred (RT at 2481, 2485, 2832-33, 2845, 2883-85, 2889, 2892-93, 3020); (2) counsel cross-examined the People’s firearms expert about the possibility of the gun jamming, as Petitioner claimed (RT at 1943, 1947); (3) the court instructed the jury that an accident is not a crime (CT at 380-81; RT at 3321-22); and (4) defense counsel argued during closing that Petitioner was not guilty because the shooting was an accident (RT at 3401-04, 3413-15).
 - No Prejudice in Light of Petitioner’s Statements: Second, Petitioner fails to show the requisite prejudice in light of his own statements to others. *See Brecht*, 507 U.S. at 639 (concluding error harmless in part because “the State’s evidence of guilt was, if not overwhelming, certainly weighty”). For example, Petitioner: (1) asked Joseph Loggia – a colleague and former police officer – for his assistance in finding someone to “take out” his wife (RT at 1067, 1526-29, 1532-37); (2) told Loggia that he would have to pay his wife two thirds of his income in spousal and child support⁵ and, because that would leave him with no discretionary income, it would be “easier to just get rid of her” (RT at 1535-36; *see also* RT at 2201-03; 2402-04, 2411-17);

21 at 2199 (emphasis in original) (quoting *Fry v. Pliler*, 551 U.S. 112, 119 (2007)). However, because
22 federal courts need not “formally” apply both *Brecht* and AEDPA, the Court simply applies *Brecht*
23 here, especially considering Petitioner’s ability to meet that standard would necessarily mean he met
24 the other. *See Ayala*, 135 S. Ct. at 2198; *Fry*, 551 U.S. at 119-20; *Sifuentes v. Brazelton*, 825 F.3d
25 506, 535 (9th Cir.) (“[I]f a petitioner does satisfy the *Brecht* requirement of showing that an error
resulted in ‘actual prejudice,’ then the petitioner necessarily must have shown that the state court’s
determination that the error was harmless was objectively unreasonable.”), *cert. denied*, 137 S. Ct.
486 (2016).

26 ⁵ Petitioner’s wife had hired an attorney and initiated divorce proceedings. (RT at 2124-29,
27 2141-44.) Notably, two important dates were on the horizon before Petitioner murdered his wife:
28 (1) a mediation regarding child custody was scheduled for a date three days after the murder
occurred; and (2) a hearing on temporary spousal and child support was scheduled for a date almost
two weeks after the murder occurred. (RT at 1002-07, 2135.)

1 and (3) asked Loggia and Alan Funk⁶ – a colleague and former FBI agent –
2 questions relevant to murdering his wife, *i.e.*, the effect of hollow point
3 bullets (the type of bullet he used to shoot his wife with the next day) and the
4 loudness of a gunshot (Petitioner's home was adjacent to a police station)
(RT at 979, 1054, 1062-63, 1067-68, 1538-39, 1878, 2500-01; Lodg. No. 3,
5 Augmented Reporter's Transcript ("ART") at 957).

- 6 • No Prejudice in Light of Son's Testimony: Third, Petitioner also fails to
7 show the requisite prejudice in light of his son's testimony. *See Brecht*, 507
8 U.S. at 639. By way of background, testimony was presented that Petitioner
9 had asked his wife to come upstairs to review and sign divorce papers that he
10 had prepared. (*See, e.g.*, ART at 960-61; RT at 2504-06.) Their son,
11 Charlie: (1) told a neighbor, who had taken the children in when emergency
12 personnel arrived, that "Daddy tried to get Mommy to write" and "[M]ommy
13 wouldn't write the papers" (RT at 1011-14, 1019-21); (2) told his uncle
14 several weeks later that "Daddy called Mommy upstairs to write some
15 papers, " and that he saw "Mommy go upstairs [and] then heard her say she
16 wouldn't sign the papers" (RT at 976-77, 1031-32, 1035-36, 2539, 2541);
17 and (3) later told the police that "Daddy called Mommy upstairs to write the
18 papers. [I] heard a gunshot from upstairs [and] heard Mommy scream" (RT
19 at 2254, 2541).
- 20 • No Prejudice in Light of Conduct After Shooting: Fourth, Petitioner's
21 conduct after the shooting provides further evidence of his guilt. *See Brecht*,
22 507 U.S. at 639; *see also Flores v. McDonald*, 2014 WL 102343, at *7 (C.D.
23 Cal. Jan. 7, 2014) (petitioner's conduct after shooting supported inference
24 that he knew he had committed murder and did not believe that he had only
25 accidentally shot victim); *Cottrell v. Trimble*, 2012 WL 3042437, at *81
26 (E.D. Cal. July 25, 2012) (petitioner's conduct after shooting, including delay
27 in calling authorities, supported inference of consciousness of guilt). Here,
28 Petitioner: (1) took no steps to assist his wife immediately after shooting her;
(2) did not call 911 from the master bedroom; (3) did nothing as she
screamed and fell down the stairs; (4) waited until she had stopped screaming
before he went downstairs; (5) calmly took his son outside to the car instead
of stopping to assist his wife or contact 911 from the downstairs phone; and
(6) did not appear to be upset and returned to his home, using a normal walk.
(ART at 965-66; RT at 990-94, 999, 2573.)

⁶ Petitioner had previously told Loggia and Funk that that he was getting divorced, and said his wife had been sleeping with his best friend. (RT at 1213, 1530-31.)

1 Accordingly, Petitioner's first and eighth claims do not warrant federal habeas
2 relief.

3 **B. Grounds Two, Six, & Eleven: Instructional Error**

4 In Grounds Two and Six, Petitioner contends that the trial court's instruction on
5 accident was erroneous. Specifically, Petitioner contends that (1) the instruction given
6 – California Jury Instruction, Criminal (“CALJIC”) No. 4.45⁷ – was incomplete
7 because it did not state that the prosecution was required to prove beyond a reasonable
8 doubt that the killing was not an accident and it did not explain that an accidental
9 killing was “excusable”; and (2) the trial court should have given CALJIC Nos. 5.00⁸
10 and 5.15⁹ to cover those points. [Dkt. No. 1 at 7; Dkt. No. 2 at 22-28, 44-46; Dkt. No.
11 28 at 18-19, 29-35.] In Ground Eleven, Petitioner contends that the trial court erred by
12 instructing the jury with a modified version of CALJIC No. 8.51¹⁰ that mentioned the
13 concept of felony murder.¹¹ [Dkt. No. 1 at 10; Dkt. No. 28 at 70.]

14
15 ⁷ This instruction provided that “[w]hen a person commits an act or makes an omission through
16 misfortune or by accident under circumstances that show neither criminal intent nor purpose, nor
17 criminal negligence, he does not thereby commit a crime.” (CT at 381; RT at 3322.)

18 ⁸ CALJIC No. 5.00 provides: “The unintentional killing of a human being is excusable and not
19 unlawful when (1) committed by accident and misfortune in the performance of a lawful act by
20 lawful means and (2) where the person causing the death acted with that care and caution which
21 would be exercised by an ordinarily careful and prudent individual under like circumstances.” *See*
22 *Hurd*, 2015 WL 1954450 at *20.

23 ⁹ CALJIC No. 5.15 provides: “Upon a trial of a charge of murder, a killing is lawful if it was
24 [justifiable] [excusable]. The burden is on the prosecution to prove beyond a reasonable doubt that
25 the homicide was unlawful, that is, not [justifiable] [excusable]. If you have a reasonable doubt that
26 the homicide was unlawful, you must find the defendant not guilty.” *See Hurd*, 2015 WL 1954450 at
27 *20.

28 ¹⁰ The relevant portion of the modified version of CALJIC No. 8.51 provided: “*If a person*
causes another's death, while committing a felony which is dangerous to human life, the crime is
murder. If a person causes another's death, while committing a lawful act which is dangerous to
human life under the circumstances of its commission, the crime is involuntary manslaughter.” (CT at
383 (emphasis added).)

¹¹ In the Return, Respondent contends that a Ground Eleven is procedurally barred because the
Court of Appeal determined that Petitioner forfeited the claim by failing to object at trial. [Dkt. No.
21 at 86-88]; *see Hurd*, 2015 WL 1954450 at *22. However, where a claim “fails on the merits, the
interests of comity and judicial efficiency are better served by addressing the claim on the merits”

1 Generally, a claim that a jury instruction was “allegedly incorrect under state
2 law is not a basis for habeas relief.” *Estelle v. McGuire*, 502 U.S. 62, 71-72 (1991).
3 Furthermore, it is not enough that the jury instruction in question is “erroneous” or
4 “even universally condemned,” but rather, it “must be established” to have violated a
5 constitutional right. *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974). In
6 challenging a court’s failure to give an instruction, a habeas petitioner faces an
7 “especially heavy” burden. *Henderson v. Kibbe*, 431 U.S. 145, 155 (1977). Notably,
8 if the Court determines that an error has occurred, such error warrants federal habeas
9 relief only if it meets the “substantial and injurious effect” standard of *Brecht*. See 507
10 U.S. at 623.

11 Here, Petitioner’s claims fail for five reasons:

- 12 • Not Cognizable (Grounds 2, 6, 11): First, to the extent Petitioner bases his
13 claims on alleged errors in state law, such errors cannot form the basis of
14 federal habeas relief. See 28 U.S.C. § 2254(a); *McGuire*, 502 U.S. at 71-72;
15 *Chavez v. Woodford*, 2011 WL 782311, at *21 (C.D. Cal. Jan. 20, 2011)
16 (claim that trial court failed to properly instruct on accident and misfortune
17 not cognizable on federal review to extent it was based solely on state law);
18 *Collier v. Diaz*, 2012 WL 1835255, at *15 (C.D. Cal. Apr. 24, 2012)
19 (“Petitioner’s argument that it was improper for the trial court to instruct the
20 jury on felony murder is based exclusively on state law, and, therefore, is not
21 cognizable on federal habeas review.”).
- 22 • Federal Court Bound By State Court Determination That Accident
23 Instruction Was Proper (Grounds 2 & 6): Second, this Court is bound by the
24 Court of Appeal’s determination that, under the CALJIC Use Note, CALJIC
25 No. 4.45 was the proper instruction because it prevented the jury from
26 convicting Petitioner of involuntary manslaughter based upon a finding of
27 ordinary negligence. See *Hurd*, 2015 WL 1954450 at *21; *Bradshaw v.*
28 *Richey*, 546 U.S. 74, 76 (2006) (“We have repeatedly held 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.”).

than by invoking procedural default. *Walters v. Maass*, 45 F.3d 1355, 1360 n.6 (9th Cir. 1995).
Accordingly, the Court denies Ground Eleven on its merits.

- 1 • Adequate Instructions Given (Grounds 2 & 6): Third, the court's instructions
2 *as a whole* adequately explained that it was the prosecution's burden of proof
3 beyond a reasonable doubt. *See McGuire*, 502 U.S. at 72 ("It is well
4 established that the instruction may not be judged in artificial isolation, but
5 must be considered in the instructions as a whole and the trial record."
6 (internal quotation marks omitted)); *Key v. Walker*, 2009 WL 3878070, at
7 *23-24 (N.D. Cal. Nov. 18, 2009) (finding any error in failing to instruct with
8 CALJIC No. 5.15 harmless because instructions as a whole adequately
9 informed that prosecution had burden of proving beyond a reasonable doubt
10 that attempted murder was unlawful). Significantly, Petitioner's jury was
11 instructed: (1) repeatedly on reasonable doubt; (2) repeatedly that the
12 prosecution was required to prove the killing was unlawful; and (3) that an
13 unlawful killing is one that is "not excusable." (CT at 374, 379-382.)
14 Accordingly, as the Court of Appeal concluded, it is not reasonably likely
15 that the jury misunderstood the concept that an accidental killing was not
16 criminal. *See Hurd*, 2015 WL 1954450 at *21.
- 17 • No Prejudice Because Felony-Murder Theory Never Advanced (Ground 11):
18 Fourth, the Court agrees with the Court of Appeal's conclusion that
19 Petitioner was not prejudiced by the single mention of felony-murder in the
20 instructions because that theory was never advanced in his case. *See Hurd*,
21 2015 WL 1954450 at *22; *Brecht*, 507 U.S. at 623; *cf. Nunez v. Bitter*, 2015
22 WL 3452604, at *19 (C.D. Cal. Feb. 26, 2015) (any error in instructions on
23 theory of natural and probable consequences harmless because prosecutor did
24 not argue under that theory). Indeed: (1) the prosecutor never mentioned
25 felony-murder or presented the case based on that theory; (2) defense counsel
26 did not mention or counter a theory of felony-murder, or otherwise indicate
27 that any such theory had been presented; and (3) the prosecutor argued solely
28 that the evidence proved Petitioner committed first degree murder based
29 upon premeditation and deliberation for financial gain. (RT at 3336-37,
30 3362-63, 3368.)
- 31 • No Prejudice (Grounds 2, 6, 11): Fifth, even if there was instructional error,
32 Petitioner was not prejudiced due to the evidence showing he committed first
33 degree premeditated murder of his wife. *See Brecht*, 507 U.S. at 639; *Nunez*,
34 2015 WL 3452604, at *19. Specifically, in light of the weighty evidence
35 detailed above, including Petitioner's statements to others, his son's
36 testimony, and Petitioner's conduct after the shooting, there is no reasonable
37 possibility any instructional error had a substantial and injurious effect on the
38 jury's verdict. (*See Section II.A, supra.*)

1 Accordingly, Petitioner's second, sixth, and eleventh claims do not merit federal
2 habeas relief.

3 **C. Grounds Three & Ten: Ineffective Assistance**

4 In Ground Three, Petitioner contends that trial counsel was ineffective by:
5 (1) failing to object to comments made by the prosecutor in opening and closing
6 argument because they misled the jury as to the relevance of prior evidence of abuse;¹²
7 (2) failing to request that the modified version of CALJIC No. 8.51 omit mention of
8 felony murder; and (3) failing to establish that the prosecutor (who served as a stand-in
9 during a demonstration of the shooting) was taller and had a different body type than
10 Petitioner's wife.¹³ [Dkt. No. 1 at 7; Dkt. No. 2 at 28-37; Dkt. No. 28 at 19-21, 37-52,
11 70.] In Ground Ten, Petitioner contends that counsel was ineffective by failing to ask
12 the trial court to modify CALJIC No. 2.50.02¹⁴ – the propensity instruction about
13 domestic violence – to make it clear that it applied only to domestic violence incidents
14 witnessed by their daughter, Diana (as opposed to the other abuse Petitioner's wife
15 mentioned to friends and associates). [Dkt. No. 1 at 7; Dkt. No. 28 at 69.]; (*see also*
16 Lodg. No. 4 at 142-43).

17 As a rule, to establish ineffective assistance of trial counsel, Petitioner must
18 demonstrate that: (1) counsel's representation "fell below an objective standard of
19

20 ¹² Specifically, Petitioner complains that the prosecutor conflated direct evidence of domestic
21 violence against his wife with hearsay evidence of abuse admitted only to show the victim's state of
22 mind. [Dkt. 2 at 29.] Petitioner suggests that this, in effect, urged the jury to use state of mind
23 evidence as substantive proof of physical abuse by him. [*Id.*]

24 ¹³ By way of background, during cross-examination, the prosecutor asked Petitioner to
25 demonstrate how the shooting occurred, using herself as a stand-in for the victim and a microphone to
26 serve as the gun. (RT at 3018.) Petitioner did so, directing the prosecutor's positioning. (*See* RT at
27 3018-20.) After the demonstration was completed, the prosecutor and defense counsel summarized it
28 for the record. (RT at 3021.)

¹⁴ The trial court gave the standard version of CALJIC No. 2.50.02, which instructed that if the
jury found Petitioner committed a prior domestic violence, the jurors "may, but are not required to,
infer that the defendant had a disposition to commit another offense involving domestic violence."
(CT at 378.) The instruction further stated that if the jury found the defendant had that disposition,
they "may, but are not required to, infer that he was likely to commit and did commit the crime of
which he is accused." (*Id.*)

1 reasonably”; and (2) counsel’s deficient performance prejudiced Petitioner such
2 that “there is a reasonable probability that, but for counsel’s unprofessional errors, the
3 result of the proceedings would have been different.” *Strickland v. Washington*, 466
4 U.S. 668, 687-88 (1984). Petitioner bears the high burden of establishing both prongs.
5 *Id.* at 687. Importantly, a state court’s decision in rejecting an ineffective assistance of
6 counsel claim “must be granted a deference and latitude that are not in operation when
7 the case involves review under the *Strickland* standard itself.” *Richter*, 562 U.S. at
8 101.

9 Preliminarily, all of Petitioner’s ineffective assistance claims fail for two general
10 reasons:

- 11 • Wide Latitude Given to Counsel’s Tactical Decisions: First, as cogently
12 explained by the Court of Appeal, counsel’s actions in Petitioner’s case are
13 presumed strategic, especially because: (1) counsel represented Petitioner in
14 the two previous trials and thus was very familiar with how the jury could
15 view the evidence and respond to instructions; and (2) counsel’s strategy
16 was, in large part, based upon a decision to avoid drawing undue attention to
17 the circumstantial evidence of Petitioner’s wife’s state of mind.¹⁵ *See*
18 *Strickland*, 466 U.S. at 689-90 (counsel’s actions presumed strategic and thus
19 given “wide latitude”); *Bashor v. Risley*, 730 F.2d 1228, 1241 (9th Cir. 1984)
20 (tactical decisions not ineffective assistance simply because, in retrospect,
21 better tactics were available).
- 22 • No Prejudice: Second, Petitioner has not shown how he was prejudiced by
23 counsel’s actions in light of the weighty evidence against him, as
24 summarized above, (*see* Section II.A., *supra*). *See Strickland*, 466 U.S. at
25 697 (“If it is easier to dispose of an ineffectiveness claim on the ground of
26 lack of sufficient prejudice . . . that course should be followed.”).

27 Additionally, Petitioner’s individual claims fail for four reasons:

28 ¹⁵ The Court of Appeal reasonably determined that two instances during trial revealed counsel’s
strategy: (1) counsel’s decision to decline an instruction proposed by the trial court (CALJIC No.
2.09) because it unduly emphasized evidence of his wife’s state of mind; and (2) counsel’s opening
statement which sought to minimize the significance of the prosecution’s “state of mind” witnesses
by correctly noting that none of them had actually witnessed any act of the abuse. *See Hurd*, 2015
WL 1954450 at *24-25; (RT at 3058-61).

- 1 • Objection To Opening/Closing Statements & Request to Modify Propensity
2 Instruction Could Have Hurt the Defense (Grounds 3(1) & 10): First,
3 counsel could have reasonably determined that objecting to the prosecutor's
4 mention of prior instances of domestic violence, or requesting modification
5 of the propensity instruction, could harm Petitioner. *See Strickland*, 466 U.S.
6 at 689-90; *Butcher v. Marquez*, 758 F.2d 373, 376 (1985) (counsel not
7 ineffective for making tactical decision not to pursue particular strategy,
8 where it could be inferred that such strategy would have been fruitless or
9 harmful). Specifically, an objection would have: (1) drawn the jury's
10 attention to the matter; and (2) as detailed by the Court of Appeal, would
11 have resulted in the trial court giving the jury a detailed explanation of the
12 evidence's limited purpose (further drawing the jury's attention to the abuse),
13 *see Hurd*, 2015 WL 1954450 at *26. Similarly, the Court agrees with the
14 Court of Appeal that counsel could have reasonably decided not to request
15 modification of CALJIC No. 2.50.02 because it would have emphasized
16 Diana's testimony about the domestic violence she witnessed. *See id.* at *28.
17
18 • Curative Jury Instruction On Attorney Statements/Argument (Ground 3(1)):
19 Second, the trial court neutralized any prejudice from the prosecutor's
20 statements with instructions to the jury that: (1) opening statements are not
21 evidence; (2) attorney statements are not evidence; (3) the jury must follow
22 the law as instructed by the court; and (4) if there is a conflict between the
23 instructions and the attorneys' argument, the jury must follow the court's
24 instruction. (CT at 373-74); *see Weeks v. Angelone*, 528 U.S. 225, 226
25 (2000) (finding that the jury is presumed to follow its instructions); *see also*
26 *Boyde v. California*, 494 U.S. 370, 384-85 (1990) ("[P]rosecutorial
27 misrepresentations . . . are not to be judged as having the same force as an
28 instruction from the court."); *Linebaugh v. Belleque*, 385 F. App'x 751, 753
(9th Cir. 2010) (petitioner not prejudiced by counsel's failure to object to
prosecutor's statements during closing argument in part due to instructions
that attorney arguments are not evidence).
- No Prejudice By Failing To Object To Felony-Murder Instruction (Ground
3(2)): Third, Petitioner's cannot show he was prejudiced by counsel's failure
to object to the single sentence about felony-murder in the instructions for the
reasons discussed above. (*See* Section II.B., *supra*); *see also Strickland*, 466
U.S. at 687-88. Namely: (1) the theory was never advanced or even
mentioned at trial; and (2) it would not have made a difference in light of the
evidence against Petitioner that he committed first degree murder for

1 financial gain, and not murder under the theory of felony-murder. (See
2 Section II.B., *supra*.)

- 3 • Prosecutor's Height & Body-Type Irrelevant to Defense (Ground 3(3)):
4 Fourth, Petitioner cannot show deficient performance, or prejudice, by
5 counsel's failure to establish any difference in height and body-type between
6 the prosecutor and Petitioner's wife. This information was
7 irrelevant inasmuch as Petitioner admitted he shot his wife and the only
8 pertinent question for the defense was whether the juror's believed his claim
9 that it was an accident.¹⁶ (RT at 2893); *see also Strickland*, 466 U.S. at 687-
10 88; *Rupe v. Wood*, 93 F.3d 1434, 1445 (9th Cir. 1996) (holding that "the
11 failure to take a futile action can never be deficient performance"); *cf.*
12 *Bustamante v. Hill*, 2011 WL 4083894, at *11 (E.D. Cal. Sept. 13, 2011)
13 (counsel not ineffective by failing to present reenactment defense evidence
14 because proposed reenactment would not have provided exculpatory
15 evidence that someone besides petitioner committed crime).

16 Accordingly, Petitioner's third and tenth claims do not merit federal habeas
17 relief.

18 **D. Ground Four: Expert Testimony on Intimate Partner Battering**

19 In Ground Four, Petitioner contends that the trial court erred by admitting expert
20 opinion testimony in intimate partner battering. [Dkt. No. 1 at 8; Dkt. No. 2 at 37-38;
21 Dkt. No. 28 at 21, 53-59.]

22 As an initial matter, federal habeas relief is not available for errors of state law
23 only. *See* 28 U.S.C. § 2254(a); *McGuire*, 502 U.S. at 67-68. In particular, state
24 evidentiary rulings are not cognizable in a federal habeas proceeding unless federal
25 constitutional rights are affected. *McGuire*, 502 U.S. at 68.

26 Moreover, a claim challenging the admission of evidence does not allege a
27 violation of clearly established federal law as is required for habeas relief under
28 AEDPA. *See Holley v. Yarborough*, 568 F.3d 1091, 1101 (9th Cir. 2009) (finding that
the Supreme Court has not yet clearly ruled that the admission of irrelevant or overtly

¹⁶ As the Court of Appeal explained in another portion of its opinion: "[T]here was no dispute
that [Petitioner's wife] was fatally shot with defendant's gun. The key issue was whether it was an
intentional or accidental act." *Hurd*, 2015 WL 1954450 at *13.

1 prejudicial evidence constitutes a due process violation); *Moses v. Payne*, 555 F.3d
2 742, 761-62 (9th Cir. 2009); *Mejia v. Garcia*, 534 F.3d 1036, 1046 (9th Cir. 2008).
3 Absent “clearly established [f]ederal law,” a federal court evaluating a habeas claim
4 cannot conclude that a state court’s admission of evidence was contrary to, or
5 unreasonably applied, Supreme Court precedent. *Wright v. Van Patten*, 552 U.S. 120,
6 126 (2008).

7 Here, Petitioner’s claim fails for two reasons:

- 8 • State Law Claim: First, to the extent Petitioner alleges a violation of state
9 law, his claim does not state a cognizable claim on federal habeas review. 28
10 U.S.C. § 2254(a); *McGuire*, 502 U.S. at 67-68; *Briceno v. Scribner*, 555 F.3d
11 1069, 1077 (9th Cir. 2009); *Hurd*, 2015 WL 1954450 at *19 (rejecting
12 Petitioner’s claim because state evidentiary law specifically “authorizes the
13 admission of expert testimony about ‘intimate partner battering and its
14 effects . . . if the proponent of the evidence establishes its relevancy.’”
15 (Citing Cal. Evid. Code § 1107(a)-(b)).)
- 16 • No Clearly Established Federal Law: Second, the admission of expert
17 opinion evidence does not violate clearly established federal law so as to
18 warrant relief. *See Wright*, 552 U.S. at 126; *Briceno*, 555 F.3d at 1077
19 (rejecting habeas claim challenging expert’s testimony because “there is no
20 clearly established constitutional right to be free of an expert opinion on an
21 ultimate issue”), *overruled on other grounds as recognized in Emery v.*
22 *Clark*, 643 F.3d 1210, 1215 (9th Cir. 2011); *Moses*, 555 F.3d at 761.

23 Accordingly, Petitioner’s fourth claim does not merit federal habeas relief.

24 **E. Ground Five: Jury Readback**

25 In Ground Five, Petitioner contends that his constitutional right to a
26 jury trial was violated by the manner in which the trial court responded to the jury’s
27 request for readback. [Dkt. No. 1 at 8; Dkt. 2 at 38-44; Dkt. No. 28 at 22, 60-62.]

28 As mentioned, federal habeas relief is not available for errors of state law only.
See 28 U.S.C. § 2254(a); *McGuire*, 502 U.S. at 67-68. As further mentioned, to
prevail on a federal habeas claim alleging constitutional violations, a petitioner must
show that the state court’s decision “was contrary to, or involved an unreasonable

1 application of, clearly established Federal law, as determined by the Supreme Court of
2 the United States.” 28 U.S.C. § 2254(d)(1); *Van Patten*, 552 U.S. at 126.

3 Here, Petitioner’s claim fails for two reasons:

- 4
- 5 • State Law Claim: First, Petitioner’s claim alleges a non-cognizable violation
6 of state law. *See* 28 U.S.C. § 2254(a); *McGuire*, 502 U.S. at 67-68; *Hilson v.*
7 *Junious*, 2013 WL 5574989, *19 (C.D. Cal. Oct. 8, 2013) (“to the extent
8 [p]etitioner’s claim [regarding readback] is based solely on the trial court’s
9 alleged misapplication of California law (Cal. Penal Code § 1138), such a
10 claim is not cognizable on federal habeas review”); *see also* *People v. Ayala*,
11 23 Cal. 4th 225, 288 (2000) (“The rereading of testimony is not a critical
12 stage of the proceedings.”)
 - 13 • No Clearly Established Federal Law: Second, Petitioner has not directed the
14 Court to any clearly established federal law on a constitutional right to jury
15 readback, and the Court is not aware of any. *Van Patten*, 552 U.S. at 126;
16 *see* *Hilson*, 2013 WL 5574989, *20 (“[T]he Court has not found any U.S.
17 Supreme Court precedent, nor do the parties cite any, that squarely addresses
18 whether a criminal defendant has a constitutional right to have testimony
19 read back to the jury.”).

20 Accordingly, Petitioner’s fifth claim does not merit federal habeas relief.

21 **F. Ground Seven: Evidence of Abuse**

22 In Ground Seven, Petitioner contends that his rights were violated when the trial
23 court admitted evidence that in the months leading up to her death, Petitioner’s wife
24 told friends and others that Petitioner had abused her and that she was afraid of him.
25 [Dkt. No. 1 at 9; Dkt. No. 2 at 46-49; Dkt. No. 28 at 63-65.]

26 Again, as mentioned, federal habeas relief is not available for errors of state law
27 only. *See* 28 U.S.C. § 2254(a); *McGuire*, 502 U.S. at 67-68.

28 Moreover, as also mentioned, a claim challenging the admission of evidence –
even irrelevant or overtly prejudicial evidence – does not allege a violation of clearly
established federal law as is required for habeas relief under AEDPA. *See* *Holley*, 568
F.3d at 1101; *Moses*, 555 F.3d at 761-62; *Mejia*, 534 F.3d at 1046.

1 Finally, to the extent that the admission implicates due process, the federal
2 inquiry asks whether the admission was arbitrary or so prejudicial that it rendered the
3 trial fundamentally unfair. *See Walters v. Maas*, 45 F.3d 1355, 1357 (9th Cir. 1995).
4 “Only if there are *no* permissible inferences the jury may draw from the evidence can
5 its admission violate due process.” *Jammal v. Van de Kamp*, 926 F.2d 918, 920 (9th
6 Cir. 1991) (emphasis in original).

7 Here, Petitioner’s claim fails for four reasons:

- 8 • State Law Claim: First, to the extent Petitioner alleges a violation of state
9 law, his claim is not cognizable. *See* 28 U.S.C. § 2254(a); *McGuire*, 502
10 U.S. at 67-68; *Harville v. Hedgepeth*, 2012 WL 3778343, at *8 (C.D. Cal.
11 July 25, 2012) (petitioner fails to state a cognizable federal habeas corpus
12 claim to extent he claims trial court violated California state law in admitting
evidence of prior acts of misconduct).
- 13 • Federal Court Bound By State Court Determinations: Second, this Court is
14 bound by the Court of Appeal’s determinations that, under state evidentiary
15 law, and state case law: (1) Petitioner’s wife’s statements that Petitioner had
16 physically abused her were “precisely the class of evidence” the California
17 Supreme Court had found admissible as circumstantial state of mind; and
18 (2) the statements were trustworthy under the state evidentiary code.¹⁷ *See*
Hurd, 2015 WL 1954450 at *13-14; *Bradshaw*, 546 U.S. at 76.
- 19 • No Clearly Established Federal Law: Third, the admission of evidence does
20 not violate clearly established federal law so as to warrant relief. *See*
McGuire, 502 U.S. at 75 n.5; *Alberni v. McDaniel*, 458 F.3d 860, 866-67 (9th
21 Cir. 2006) (holding that *McGuire* left the constitutionality of propensity
22 evidence an open question; thus admission of such evidence could not violate
23 clearly established federal law under AEDPA); *Vinci v. Paramo*, 2015 WL
24 5155594, at *1 (S.D. Cal. Sept. 1, 2015) (no “clearly established federal law”
on the issue of admission of propensity evidence in the form of testimony
regarding acts of domestic violence).

25
26
27 ¹⁷ Specifically, the Court of Appeal found the statements trustworthy under California law
28 because they were made: (1) by eleven separate witnesses; (2) over a period of years; (3) right up to
just a week before Petitioner’s wife was killed, and (4) in varying circumstances to a wide variety of
individuals, including friends, co-workers, and professionals. *See Hurd*, 2015 WL 1954450 at *14.

- 1 • Permissible Inferences: Fourth, the jury could permissibly infer from the
2 evidence that Petitioner's defense theory – that he believed up until the
3 moment of his wife's death that they would reconcile and accidentally shot
4 her – lacked credibility. (*See* RT at 2481, 2485, 3003-04); *see also Jammal*,
5 926 F.2d at 920; *Harville*, 2012 WL 3778343, at *8 (jury could permissibly
6 infer from evidence of prior domestic violence that petitioner's actions
7 toward victim were not accidental, as he claimed). Specifically, testimony
8 that Petitioner's wife had told other people that Petitioner physically abused
9 her in the past refuted: (1) any suggestion that she had an interest in
10 reconciling; and (2) the notion that she would have stood next to Petitioner
11 while he demonstrated how to chamber a round. *See Hurd*, 2015 WL
12 1954450 at *13-14.

13 Accordingly, Petitioner's seventh claim does not merit federal habeas relief.

14 **G. Ground Nine: Cumulative Error**

15 Finally, in Ground Nine, Petitioner contends that even if the alleged trial court
16 errors do not require reversal alone, the cumulative effect of the errors violated his
17 Constitutional rights. [Dkt. No. 1 at 9; Dkt. No. 2 at 52-54; Dkt. No. 28 at 66-68.]

18 As a general matter, cumulative error applies where, "although no single trial
19 error examined in isolation is sufficiently prejudicial to warrant reversal, the
20 cumulative effect of multiple errors may still prejudice a defendant." *Mancuso v.*
21 *Olivarez*, 292 F.3d 939, 957 (9th Cir. 2002, *as amended* June 11, 2002) (citation and
22 internal quotation marks omitted). However, where *no* error lies in each alleged claim
23 taken separately, there also rests no cumulative error. *See Mancuso*, 292 F.3d at 957
24 ("Because there is no single constitutional error in this case, there is nothing to
25 accumulate to a level of a constitutional violation.").

26 Here, because none of Petitioner's separate arguments is meritorious, his
27 cumulative error claim fails as well.

28 Accordingly, Petitioner's Ninth claim does not merit federal habeas relief.

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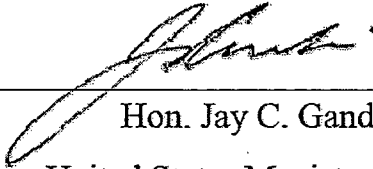
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III.

RECOMMENDATION

In accordance with the foregoing, IT IS RECOMMENDED that the Court issue an Order: (1) approving and accepting this Report and Recommendation; (2) directing that Judgment be entered dismissing this action with prejudice; (3) denying the motion for expansion of record [Dkt. No. 25]; (4) denying the requests for an evidentiary hearing [Dkt. No. 26; Dkt. No. 28 at 36, 74]; and (5) denying a certificate of appealability. *See* 28 U.S.C. § 2253; Fed. R. App. P. 22(b); *Cullen v. Pinholster*, 563 U.S. 170, 180-81 (2011); *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003).

DATED: January 25, 2017


Hon. Jay C. Gandhi

United States Magistrate Judge

This Report and Recommendation is not intended for publication. Nor is it intended to be included or submitted to any online service such as Westlaw or Lexis.

**Additional material
from this filing is
available in the
Clerk's Office.**