

APPENDIX

"A"

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

FEB 22 2018

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

JOHN LEE YUN,

Petitioner-Appellant,

v.

JEFFREY A. BEARD, Secretary of
California Department of Corrections and
Rehabilitation (CDCR),

Respondent-Appellee.

No. 17-56234

D.C. No. 2:15-cv-04013-AG-AFM
Central District of California,
Los Angeles

ORDER

Before: TROTT and FISHER, 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.

APPENDIX

"B"

"B"

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

JOHN LEE YUN,

Petitioner,

v.

JEFFREY A. BEARD,

Respondent.

Case No. CV 15-4013 AG (AFM)

**FINAL REPORT AND
RECOMMENDATION OF UNITED
STATES MAGISTRATE JUDGE**

This Final Report and Recommendation is submitted to the Honorable Andrew J. Guilford, United States District Judge, pursuant to the provisions of 28 U.S.C. § 636 and General Order 05-07 of the United States District Court for the Central District of California.

INTRODUCTION

Petitioner, an inmate at Salinas Valley State Prison, has filed a Petition for Writ of Habeas Corpus by a Person in State Custody (28 U.S.C. § 2254). The Petition raises ten grounds for federal habeas relief, including seven grounds of ineffective assistance of counsel, directed to petitioner's convictions of assault with a deadly weapon. Petitioner's convictions arose from his participation in a gang-

1 related beating, during which he used a box cutter against the two victims.

2 As discussed below, the Court recommends that the Petition be denied and
3 that this action be dismissed with prejudice.

4 5 **PROCEDURAL HISTORY**

6 On July 7, 2011, a Los Angeles Superior Court jury found petitioner guilty of
7 two counts of assault with a deadly weapon and two counts of assault by means
8 likely to produce great bodily injury. The jury also found true allegations of gang
9 affiliation and great bodily injury. Petitioner's co-defendant, Bobby Matters, was
10 convicted by a separate jury of multiple offenses. After admitting that he had a
11 prior strike conviction and a prior prison term, petitioner was sentenced to state
12 prison for twenty-nine years and four months. (6 Reporter's Transcript ["RT"]
13 3003-06; 7 RT 3903, 3911; 3 Clerk's Transcript ["CT"] 640-44, 679-83, 735.)

14 Petitioner appealed. (Respondent's notice of lodging, Lodgment No. 3.) On
15 April 25, 2013, the California Court of Appeal affirmed the judgment. (Lodgment
16 6.) Petitioner filed a Petition for Review in the California Supreme Court.
17 (Lodgment 7.) It was summarily denied on July 17, 2013. (Lodgment 8.)

18 Petitioner then filed several habeas petitions in the California courts. On
19 May 9, 2014, petitioner filed a habeas petition in the Los Angeles County Superior
20 Court. (Respondent was unable to obtain a copy of this petition. [ECF No. 8 at 1
21 and n.4.]) The petition was denied in a brief decision on June 12, 2014. (Lodgment
22 9.)

23 On August 4, 2014, petitioner filed a habeas petition in the California Court
24 of Appeal. (Lodgment 10.) It was denied without comment or citation of authority
25 on August 20, 2014. (Lodgment 11.)

26 On November 6, 2014, petitioner filed a habeas petition in the California
27 Supreme Court, and on January 22, 2015, filed a supplement. (Lodgments 12 and
28 13.) The petition was denied without comment or citation of authority on

1 February 11, 2015. (Lodgment 14.)

2 On May 4, 2015, petitioner filed a habeas petition in the Los Angeles County
3 Superior Court. (Lodgment 15.) It was denied in a brief decision on July 21, 2015.
4 (Lodgment 18.)

5 On May 15, 2015, petitioner filed a habeas petition in the California Supreme
6 Court. (Lodgment 16.) It was denied on August 12, 2015, with a citation to *In re*
7 *Clark*, 5 Cal. 4th 750, 767-69 (1993). (Lodgment 19.) The citation to *Clark* meant
8 that the California Supreme Court rejected the petition as successive.

9 Petitioner filed this Petition on May 28, 2015, raising ten claims.
10 Respondent filed a Motion to Dismiss the Petition as a “mixed petition” containing
11 three unexhausted claims. Respondent’s motion became moot when the California
12 Supreme Court denied the three claims on August 12, 2015. (Lodgment 19.)

13 Near this time, petitioner requested leave to amend his Petition with a
14 proposed eleventh claim of sentencing error, in which he challenged the imposition
15 of two sentence enhancements for great bodily injury to the same victim. (ECF No.
16 12 at 5-6.) Because the proposed eleventh claim involved only a matter of state law
17 rather than a federal question, petitioner’s request was denied in a Report and
18 Recommendation adopted on December 31, 2015. (ECF Nos. 20, 22.) However, it
19 appears that petitioner did eventually obtain relief in the state court: According to
20 the California Court of Appeal’s website, on February 18, 2016, the government
21 had conceded that one of the three-year sentence enhancements for great bodily
22 injury should be stayed, and the case was remanded to the trial court for amendment
23 of the judgment.

24 On February 10, 2016, respondent filed an Answer addressing the merits of
25 petitioner’s ten remaining claims. On June 27, 2016, petitioner filed a Traverse.

26 ///

27 ///

28 ///

SUMMARY OF THE EVIDENCE

Based on its independent review of the record, the Court adopts the following factual summary from the California Court of Appeal's opinion as a fair and accurate summary of the evidence presented at petitioner and Matters's trial. (Lodgment 6 at 4-12.)

Prosecution evidence

1. The crimes

a. Will Brown [victim]

On December 29, 2009, at 6:00 p.m., Will Brown, Cono D'Amato, and Micaela Brito went to Smith Park in San Gabriel hoping to join a "pick-up" game of basketball. Two half-court games were ongoing when they arrived. Matters was playing in one game. Brown, who had known Matters since middle school, asked if they could play with his basketball. Matters responded, "Here you go," gave Brown the ball. Matters walked off the court and made a cell phone call, as Brown and his friends began to play.

Soon thereafter, a group of 10–20 men arrived at the park. Most of the men were Hispanic, but the group also included some Asian and Caucasian men. Brown recognized [petitioner], Christopher Zuniga and Michael Cardenas. Matters joined the group which surrounded Brown and D'Amato. [Petitioner] told Brown and D'Amato, "This is our park." [Petitioner] announced his gang affiliation, "Sangra gang," and displayed the gang's hand sign. [Petitioner], Matters and the rest of the group advanced toward Brown, who ran towards the handball courts. Five or six men, including [petitioner], Zuniga, and Cardenas, chased after and surrounded Brown. Zuniga punched Brown in the back of the head. Brown fought back, hitting Cardenas in the face. Cardenas punched Brown in the face, and [petitioner] punched Brown

1 in the ribcage. Other unnamed men hit and kicked Brown “anywhere
2 they could,” beating him for about 10 minutes until he blacked out.

3 Brown regained consciousness and tried to run away, he heard
4 someone yell, “Get that bitch.” Eight or nine men, including
5 [petitioner], Zuniga, and Cardenas, chased Brown and beat him again.
6 During this attack, [petitioner] repeatedly threatened to “cut” Brown.
7 [Petitioner] swung a box cutter at Brown’s neck and slashed his arm.
8 The men continued beating Brown until he lost consciousness.
9 Matters was involved in the attacks on Brown. When he regained
10 consciousness, Brown saw that the men had surrounded D’Amato.
11 [Petitioner], Matters, Zuniga, and Cardenas were kicking D’Amato.
12 Brown ran to a nearby store and called for help.

13 Brown suffered a cut on one bicep that required 13 staples,
14 bruises to his stomach, back and legs, and lingering headaches and
15 memory loss. He identified [petitioner], Matters, Cardenas and Zuniga
16 from a photographic lineup.

17 Two days after the attack, Brown received three calls on his cell
18 phone during the early afternoon. He did not answer the first call.
19 Brown answered the second call, but the caller said nothing. The third
20 call was from Matters. Referring to [petitioner] by his gang moniker,
21 “Chino,” Matters told Brown that “if you don’t change your story
22 about Chino, your family, your sister’s boyfriend’s family, and your
23 house is [sic] all at risk,” and “they were going to kill [him.]” In fear
24 for his own and his family’s safety, Brown called the police. San
25 Gabriel Police Officer Ricky Nakamura met with Brown that day and
26 later confirmed that the call was made from Matters’s cell phone.

27 ///

28 ///

1 *b. Evidence admitted only against Matters*

2 After he met with Brown, Nakamura went to Matters's house.
 3 He asked if Matters had called Brown, which Matters denied.
 4 Nakamura "proceeded to ask [Matters] further questions in regards to
 5 contacting . . . Brown"; Matters persisted in denying that he had called
 6 Brown. Nakamura ultimately arrested Matters.

7 Nakamura interviewed Matters at the police station after
 8 advising him of his *Miranda* rights. [footnote omitted.] Matters
 9 waived his rights and agreed to speak to Nakamura. He explained that
 10 [petitioner] had called him earlier that day and instructed him to call
 11 Brown and tell him to "switch up his story and to not get [petitioner]
 12 busted." Matters called Brown and relayed [petitioner's] message.
 13 He denied having threatened Brown or his family, saying he "just
 14 basically was a mediator between [petitioner and Brown] in order to
 15 help his friend [petitioner] out." Matters never said he feared
 16 [petitioner] or that he was afraid of what might happen to him if he
 17 didn't call Brown.

18
 19 *c. Cono D'Amato [victim]^[fn]*

20 ^[fn] D'Amato refused to testify at trial. His
 21 testimony from preliminary hearings in the
 22 Zuniga/Cardenas and [petitioner]/Matters actions
 23 was read at trial.

24 D'Amato testified that when the group first approached him and
 25 Brown, Matters asked D'Amato "where [he] was from," meaning
 26 whether D'Amato was in a gang. D'Amato told him, "I don't bang."
 27 Matters asked D'Amato if he had written on the ground, poles or tree
 28 near the basketball courts. D'Amato said he had not. Matters told

1 D'Amato to, "Back up your shit. Back up your shit." Matters then
2 walked behind D'Amato who was hit in the head by someone he did
3 not see. D'Amato fell down and several men kicked and stomped on
4 his head until he lost consciousness. When D'Amato awoke the men
5 "rushed" him again. Someone asked D'Amato if he was from the
6 "Lomas" gang, a rival gang of Sangra's, which D'Amato denied.
7 Brito helped D'Amato get up, but two men rushed him again.
8 [Petitioner] approached D'Amato, identified himself as "Chino,"
9 flashed a gang sign for "Avenues" and yelled, "Sickos." He demanded
10 D'Amato's wallet, but D'Amato said he left it in the car. [Petitioner]
11 swung a box cutter at D'Amato. D'Amato jumped back to avoid being
12 stabbed and ran across the street to get help.

13 D'Amato suffered cuts to his head and swelling to his ear and
14 head as a result of the attacks. He identified [petitioner] as "Chino,"
15 the man with the box cutter, from a photographic lineup. He also
16 identified Zuniga as having been present when he was attacked, but
17 said Zuniga had not hit or kicked him. Zuniga backed away when
18 [petitioner] swung the box cutter at D'Amato. D'Amato testified that
19 Matters was present during the attack. He said Matters had not gone
20 after Brown, but had stayed with D'Amato, although Matters "didn't
21 say or do anything."

22
23 *d. Micaela Brito [eyewitness]*

24 Brito's testimony was largely consistent with the testimony
25 given by Brown and D'Amato. While Brito and Brown played ball,
26 D'Amato squatted down by a basketball pole and appeared to draw or
27 write something on the ground with his finger. Brito saw Matters take
28 out his cell phone. Shortly thereafter, a group of eight to 15 men

1 arrived at the park, some of whom “jumped” D’Amato and some of
2 whom chased Brown. Brito did not see anyone with a weapon.

3
4 *2. Jail cell graffiti*

5 On January 2, 2010, [petitioner] was in custody in a cell at the
6 San Gabriel Police Department. At about 5:30 p.m., Nakamura
7 discovered gang graffiti inside the jail cell. The graffiti was not there
8 prior to [petitioner’s] custody.

9
10 *3. Gang Evidence*

11 San Gabriel Police Detective Fabian Valdez testified as the
12 prosecution’s gang expert. Valdez testified about the Sangra gang’s
13 history, make-up and culture. The gang’s primary activities range
14 from vandalism to multiple homicides. Valdez explained that Smith
15 Park was territory claimed by the Sangra gang. One clique of the
16 Sangra gang was the “Sickos” clique. The gang allowed some
17 affiliated tagging crews to draw graffiti in its territory, specifically, the
18 “F.T.S.,” “K.F.T.,” “D.F.W.,” and “4U2C” crews. But if an
19 unaffiliated tagging crew came into the gang’s territory without
20 permission, the gang would retaliate with violence.

21 According to Valdez, [petitioner] was an admitted and senior
22 member of the Sangra gang. Cardenas was also an admitted member
23 of that gang. Zuniga was, “at minimum,” an associate of Sangra, and
24 he was headed “down the path of becoming a gang member.” Matters
25 was not a member of the Sangra gang. Brown, who said he was or had
26 been the head of the K.O.A. tagging crew, told Valdez that Matters
27 was a member of the D.F.W. tagging crew, affiliated with the Sangra
28 gang. Matters had previously been arrested for vandalizing wet

1 cement with the name of a rival tagging crew, with the name crossed
2 out. In gang culture that meant disrespect and a threat to kill. Matters
3 had also been arrested in possession of tagging tools, after marking up
4 a trash can (with a nongang related word).

5 Based on a hypothetical posed to him patterned on the
6 circumstances of the attacks on Brown and D'Amato at the park, and
7 the phone call to Brown, Valdez opined that the offenses were "done
8 for the benefit, at the association [sic] and direction of the gang," and
9 committed "with the specific intent to promote, further, or assist in any
10 criminal conduct by gang members." Gangs survive by being
11 respected by other gangs and by being feared in the community.
12 Gangs do not tolerate disrespect. The attacks at issue here promoted
13 the Sangra gang in that they "reinforce[d] the intimidation . . . the gang
14 needs to survive," instilling fear in the community. Valdez opined that
15 someone present at the scene when gang members committed a crime
16 who tried to leave, would be at risk of physical harm. Matters could
17 have faced retaliation from the Sangra gang had he left the scene
18 during the attacks on Brown and D'Amato, and similarly would face
19 retaliation for not participating in the assaults.

20 Valdez testified that graffiti reflecting D'Amato's moniker,
21 "Decoy" and the tagging crew initials, "T.F.O.C." were drawn in the
22 park before the attacks. He opined that this graffiti likely motivated
23 the attacks on Brown and D'Amato because "T.F.O." was not
24 associated with the Sangra gang and the "tag" would be "the
25 equivalent of a declaration of war" between rival gangs. He also
26 testified that threatening a witness "to change his story" would be done
27 for the benefit of, in association with or direction of the criminal street
28 gang" and "done with the specific intent to promote, further, or assist

1 any criminal conduct by gang members.” Such threats help gang
2 members and “sends a message that they are able to get away with
3 certain crimes and sway people to not testify against them.”
4

5 *Defense Evidence*

6 1. *Taylor Ruddell and Kohana Tom* [eyewitnesses]

7 Taylor Ruddell and Kohana Tom are [petitioner’s] friends.
8 Ruddell and Tom were walking by the park on December 29, 2009 and
9 saw [petitioner] standing alone. They saw Brown and another man
10 approach [petitioner] and speak to him. The next thing they knew, the
11 men had “jumped” [petitioner] who curled into a ball and did not fight
12 back. Zuniga and Matters were also at the park. Tom did not tell
13 anyone what he saw at the park until he was subpoenaed by
14 [petitioner’s] attorney.
15

16 2. *Zuniga and Cardenas* [co-perpetrators]

17 Zuniga and Cardenas testified that they were at the park playing
18 basketball with Matters. Zuniga borrowed Matters’s phone to call
19 [petitioner] to tell him to bring a handball to the park. Zuniga,
20 Cardenas and Matters resumed their game, and [petitioner] arrived
21 shortly thereafter.

22 While he was playing, Zuniga heard a commotion. He saw that
23 someone was being “beat up” by the handball courts. He saw Brown,
24 D’Amato and a woman. He heard Brown or D’Amato make a racial
25 slur to or about [petitioner]. One of them said, this is “T.F.O.” and the
26 two men began fighting [petitioner], who fell and “balled up.” Zuniga,
27 Cardenas and Matters ran over to help [petitioner]. Zuniga hit Brown
28 in the back of his head. Zuniga and Cardenas kicked D’Amato while

1 [petitioner] ran away. When Brown tried to escape, Zuniga, Cardenas
2 and [petitioner] chased him. Zuniga never saw anyone with a blade or
3 knife.^[fn]

4 ^[fn] Zuniga's trial ended in a hung jury, after which
5 Zuniga pleaded no contest to assault. Zuniga later
6 explained that he did not want to go through another
7 trial, but decided to enter a plea because he wanted
8 to "get this thing over."

9 Cardenas testified that he pulled out a knife during the fight and
10 swung it at Brown to scare him off. Cardenas did not intend to cut
11 Brown, but Brown got cut by the knife when he charged at and
12 punched Cardenas. After the fight Cardenas turned himself into the
13 police. He had told the police he knew nothing about the incident
14 because he was afraid, and because his girlfriend was several months
15 pregnant.^[fn]

16 ^[fn] Cardenas was tried with Zuniga. At trial,
17 Cardenas had two witnesses testify that he had been
18 with them, not at the park. He asked the witnesses to
19 lie because he wanted to be at home for his
20 girlfriend. After the mistrial, Cardenas pleaded no
21 contest.

22 23 3. *Matters*

24 Matters testified that he had been a member of the D.F.W.
25 tagging crew, but ended his association with that crew four months
26 before the assaults. On December 29, 2009 Matters was playing
27 basketball at the park when Brown, D'Amato and Brito drove up. As
28 the car pulled up beside him, Brown asked Matters, "What's up?" in a

1 friendly manner, and Matters and the three individuals engaged in a
2 conversation about tattoos. Brown, D'Amato and Brito asked Matters
3 if they could play basketball with him. Matters played with Brown
4 and Brito. D'Amato did not play; he had a rock in his hand and was
5 "tagging on the floor" of the basketball court.

6 Matters stopped playing when his girlfriend called, and went to
7 get a drink of water. As he returned to the basketball court, Matters
8 saw [petitioner] drive past the park and park behind D'Amato's car.
9 [Petitioner] got out of the car and walked toward the basketball court
10 followed by a group of 10 people, including Zuniga and Cardenas. As
11 he walked, [petitioner] said, "Sangra" and threw up gang signs.
12 [Petitioner] and the others approached Brown and D'Amato on the
13 basketball court. Zuniga asked Brown if he was from "T.F.O." Brown
14 said, "No." Cardenas responded, "I know that you're from T.F.O. I
15 seen it all over your MySpace and Facebook." Zuniga then struck
16 D'Amato in the face, and Brown "took off running." Some members
17 of the group, including Cardenas, Zuniga, and [petitioner] followed
18 Brown. The others continued to assault D'Amato for about five
19 minutes. Matters denied participating in any assault or acting as a
20 lookout. He did not see anyone with a weapon. He did not see
21 [petitioner] pull out a box cutter and cut anyone. Matters denied
22 having told anyone to, "back up your shit," or accusing anyone of
23 "writing on poles." He claimed he left the park while the attack on
24 D'Amato was ongoing. Matters did not see the attack on Brown and
25 did not know he had been stabbed. In Matters's view, the leaders of
26 the attacks were Cardenas and Zuniga.

27 Shortly after the incident, Matters received an unexpected call
28 from [petitioner], who had never called Matters before. [Petitioner],

1 who was upset, instructed Matters to “switch up [his] story and
2 [petitioner] better not be in it.” Matters understood [petitioner] to
3 mean he should not mention [petitioner’s] name if asked about the
4 events in the park. Matters felt threatened by [petitioner]. [Petitioner]
5 also told Matters to call Brown and give him the same message.
6 [Petitioner] learned that Matters did not have Brown’s phone number,
7 and told him he would call him back and said Matters “better pick up.”
8 [Petitioner] called back a few minutes later with Brown’s number. He
9 told Matters to call Brown and said he knew Brown was home because
10 he had just called the number.

11 Matters called Brown, but said nothing when Brown answered
12 the phone. Matters called [petitioner] and told him, “nobody picked
13 up.” [Petitioner] told Matters he was lying; Brown had answered the
14 phone when [petitioner] called. He told Matters to call again and “not
15 to lie to him.” [Petitioner] threatened to put Matters “in the same spot
16 that [Brown was] in” if he lied and did not call Brown. Matters then
17 called Brown as instructed. He told Brown, “Chino said you better
18 switch up your story and he better not get busted.” Brown hung up.
19 Matters claimed he did what [petitioner] told him to do because he was
20 afraid for his own and his family’s safety. Matters was afraid of
21 [petitioner], a member of the Sangra gang, and believed [petitioner]
22 was threatening him.

23 Matters testified that two months before trial he was attacked by
24 Joey Leal, another member of the Sangra gang, and another man. The
25 incident ended only when someone drove up honking and threatening
26 to summon the police. Leal accused Matters of “snitching on Chino”
27 and told him, “This will not be the end of it.” Matters reported the
28 Leal incident to the police.

In 2005, Matters had problems with a Sangra gang member who had broken the windows of his girlfriend's car. Matters got angry and broke the gang member's mother's car window. At the time he was so angry he had not thought about the gang implications of what he had done, and was "just acting on [his] anger." When his anger ebbed, he had time to think and was now afraid of retaliation. At trial, Matters remained afraid of the Sangra gang.

Matters testified about some conflicting statements he made to the police. He said when he had been sitting on the curb outside his house and Nakamura drove up (throwing dust in his face), Matters at first denied calling Brown because he was intimidated by Nakamura. Later at the police station, however, Matters told Nakamura the truth because Matters no longer felt threatened by Nakamura. Matters explained that [petitioner] ordered him to call Brown, and asked if he could file a police report against [petitioner], whom he admitted being afraid of. Matters then repeated his statements to another officer.

PETITIONER'S CLAIMS

1. Trial counsel was ineffective for failing to object to evidence of petitioner's prior bad acts, and the error was compounded by the admission of a photograph depicting a group of people that included petitioner and another person with a short-barreled shotgun. (Petition at 5; Traverse at 7-9.)

2. Trial counsel was ineffective for failing to object to the closing argument of Matters's counsel regarding petitioner's prior bad acts. (Petition at 5; Traverse at 9-10.)

3. Trial counsel was ineffective for failing to object to the gang expert's qualifications. (Petition at 5, 6; Traverse at 10.)

1 was based on an unreasonable determination of the facts in light of the
2 evidence presented in the State court proceeding.”

3 Under the AEDPA, the “clearly established Federal law” that controls federal
4 habeas review of state court decisions consists of holdings (as opposed to dicta) of
5 Supreme Court decisions “as of the time of the relevant state-court decision.”
6 *Williams v. Taylor*, 529 U.S. 362, 412 (2000); *see also Carey v. Musladin*, 549 U.S.
7 70, 74 (2006).

8 Although a particular state court decision may be both “contrary to” and “an
9 unreasonable application of” controlling Supreme Court law, the two phrases have
10 distinct meanings. *See Williams*, 529 U.S. at 391, 413. A state court decision is
11 “contrary to” clearly established federal law if the decision either applies a rule that
12 contradicts the governing Supreme Court law, or reaches a result that differs from
13 the result the Supreme Court reached on “materially indistinguishable” facts. *See*
14 *Early v. Packer*, 537 U.S. 3, 8 (2002) (per curiam); *Williams*, 529 U.S. at 405-06.
15 When a state court decision adjudicating a claim is contrary to controlling Supreme
16 Court law, the reviewing federal habeas court is “unconstrained by § 2254(d)(1).”
17 *See Williams*, 529 U.S. at 406. However, the state court need not cite or even be
18 aware of the controlling Supreme Court cases, “so long as neither the reasoning nor
19 the result of the state-court decision contradicts them.” *See Early*, 537 U.S. at 8.

20 State court decisions that are not “contrary to” Supreme Court law may be set
21 aside on federal habeas review only “if they are not merely erroneous, but ‘an
22 unreasonable application’ of clearly established federal law, or based on ‘an
23 unreasonable determination of the facts.’” *See Early*, 537 U.S. at 11 (citing 28
24 U.S.C. § 2254(d)) (emphasis added). A state-court decision that correctly identified
25 the governing legal rule may be rejected if it unreasonably applied the rule to the
26 facts of a particular case. *See Williams*, 529 U.S. at 406-10, 413 (e.g., the rejected
27 decision may state the *Strickland* standard correctly but apply it unreasonably);
28 *Woodford v. Visciotti*, 537 U.S. 19, 24-27 (2002) (per curiam). However, to obtain

1 federal habeas relief for such an “unreasonable application,” a petitioner must show
2 that the state court’s application of Supreme Court law was “objectively
3 unreasonable.” *Visciotti*, 537 U.S. at 24-27; *Williams*, 529 U.S. at 413. An
4 “unreasonable application” is different from an erroneous or incorrect one. *See*
5 *Williams*, 529 U.S. at 409-10; *Visciotti*, 537 U.S. at 25; *Bell v. Cone*, 535 U.S. 685,
6 699 (2002). Moreover, review of state court decisions under § 2254(d)(1) “is
7 limited to the record that was before the state court that adjudicated the claim on the
8 merits.” *See Cullen v. Pinholster*, 563 U.S. 170, 180 (2011).

9 As the Supreme Court explained in *Harrington v. Richter*, 562 U.S. 86, 102
10 (2011):

11 “Under § 2254(d), a habeas court must determine what arguments or
12 theories supported or, as here [i.e., where there was no reasoned state-
13 court decision], could have supported, the state court’s decision; and
14 then it must ask whether it is possible fairminded jurists could disagree
15 that those arguments or theories are inconsistent with the holding in a
16 prior decision of this Court.”

17 Furthermore, “[a]s a condition for obtaining habeas corpus from a federal court, a
18 state prisoner must show that the state court’s ruling on the claim being presented in
19 federal court was so lacking in justification that there was an error well understood
20 and comprehended in existing law beyond any possibility for fairminded
21 disagreement.” *Richter*, 562 U.S. at 103.

22 Petitioner’s claims in Grounds One to Three appeared to have been denied in
23 a briefly-reasoned decision by the Los Angeles County Superior Court. (Lodgment
24 9.) It is unclear, however, whether the Superior Court’s decision constitutes the
25 relevant state court decision for Grounds One to Three because respondent was
26 unable to obtain a copy of the Superior Court habeas petition. (ECF No. 8 at 1 and
27 n.4.) This makes no difference. Assuming that the relevant state court adjudication
28 for Grounds One to Three is the Superior Court’s decision — which rejected

1 petitioner's ineffective-assistance claims solely for lack of prejudice under the
2 *Strickland* standard — then the Court reviews petitioner's claims in Ground One to
3 Three under the AEDPA standard only as to the prejudice prong, while applying
4 de novo review to the deficient-performance prong. *See Rompilla v. Beard*, 545
5 U.S. 374, 390 (2005) (federal court applies de novo standard to element of
6 *Strickland* claim that was never reached by the state court). If the deficient-
7 performance prong is meritless under a de novo standard, then it necessarily would
8 have been reasonable for the state court to reject that prong, if it did, under the
9 AEDPA standard of review. *See Berghuis v. Thompkins*, 560 U.S. 370, 389-90
10 (2010) (where it is unclear whether the AEDPA standard applies, a state court's
11 adjudication that is correct under a de novo standard would necessarily be
12 reasonable under the more deferential AEDPA standard of review).

13 Similarly, petitioner asserts that his claims in Grounds Eight and Nine were
14 also denied by the Superior Court, and denied solely on a procedural ground.
15 (Traverse at 4; Lodgment 9.) Assuming this is true, Grounds Eight and Nine are
16 reviewed under a de novo standard. *See Tanner v. McDaniel*, 493 F.3d 1135, 1139
17 (9th Cir. 2007); *Chaker v. Crogan*, 428 F.3d 1215, 1220-21 (9th Cir. 2005); *Pirtle*
18 *v. Morgan*, 313 F.3d 1160, 1167 (9th Cir. 2002). If the claims in Grounds Eight
19 and Nine are meritless under a de novo standard, then it necessarily would have
20 been reasonable for a state court to reject them, if it did, under the AEDPA standard
21 of review. *See Berghuis*, 560 U.S. at 389-90.

22 Petitioner's claims in Grounds Four to Six were denied by the California
23 Supreme Court only a procedural ground. (Lodgment 19.) Since these claims were
24 not adjudicated on the merits by a state court, the Court reviews Grounds Four to
25 Six under a de novo standard. *See Tanner*, 493 F.3d at 1139; *Chaker*, 428 F.3d at
26 1220-21; *Pirtle*, 313 F.3d at 1167.

27 Petitioner's claim in Ground Seven was denied by the California Court of
28 Appeal in a reasoned decision on direct appeal. (Lodgment 6.) The claim than was

presented in the Petition for Review, which the California Supreme Court summarily denied. Thus, the California Court of Appeal's decision on direct appeal constitutes the relevant state court adjudication on the merits for purposes of the AEDPA standard of review for Ground Seven. *See Berghuis*, 560 U.S. at 380 (where state supreme court denied discretionary review of decision on direct appeal, the decision on direct appeal is the relevant state-court decision for purposes of the AEDPA standard of review).

Petitioner's claim in Ground Ten was denied on the merits without comment or citation of authority by the California Supreme Court when it denied petitioner's habeas petition. (Lodgments 13 and 14.) Thus, the California Supreme Court's decision on collateral review constitutes the relevant state court adjudication on the merits for purposes of the AEDPA standard of review for Ground Ten.

DISCUSSION

As an initial matter, respondent argues that petitioner's claims in Grounds Four to Six are procedurally defaulted. (Answer Mem. at 6-9.) Because it is more efficient to dispose of these claims on the merits, however, the Court elects to resolve them solely on that basis. *See Lambrix v. Singletary*, 520 U.S. 518, 525 (1997); *Franklin v. Johnson*, 290 F.3d 1223, 1232 (9th Cir. 2002).

A. Habeas relief is not warranted with respect to petitioner's claims of ineffective assistance of trial counsel (Grounds One to Six).

In Grounds One to Six, petitioner claims that his trial counsel was ineffective in various respects. (Petition at 5, 6-6a; Traverse at 7-14.)

In *Strickland v. Washington*, 466 U.S. 668, 694 (1984), the Supreme Court held that there are two components to an ineffective assistance of counsel claim: "deficient performance" and "prejudice." "Deficient performance" in this context means unreasonable representation falling below professional norms prevailing at

1 the time of trial. See *Strickland*, 466 U.S. at 688-89. To show “deficient
2 performance,” petitioner must overcome a “strong presumption” that his lawyer
3 “rendered adequate assistance and made all significant decisions in the exercise of
4 reasonable professional judgment.” *Id.* at 690. Further, petitioner “must identify
5 the acts or omissions of counsel that are alleged not to have been the result of
6 reasonable professional judgment.” *Id.* The Court must then “determine whether,
7 in light of all the circumstances, the identified acts or omissions were outside the
8 range of professionally competent assistance.” *Id.* The Supreme Court in
9 *Strickland* recognized that “it is all too easy for a court, examining counsel’s
10 defense after it has proved unsuccessful, to conclude that a particular act or
11 omission of counsel was unreasonable.” *Id.* at 689. Accordingly, to overturn the
12 strong presumption of adequate assistance, petitioner must demonstrate that “the
13 challenged action cannot reasonably be considered sound trial strategy under the
14 circumstances of the case.” See *Lord v. Wood*, 184 F.3d 1083, 1085 (9th Cir.
15 1999).

16 To meet his burden of showing the distinctive kind of “prejudice” required
17 by *Strickland*, petitioner must affirmatively “show that there is a reasonable
18 probability that, but for counsel’s unprofessional errors, the result of the proceeding
19 would have been different. A reasonable probability is a probability sufficient to
20 undermine confidence in the outcome.” See *Strickland*, 466 U.S. at 694; see also
21 *Richter*, 562 U.S. at 111 (“In assessing prejudice under *Strickland*, the question is
22 not whether a court can be certain counsel’s performance had no effect on the
23 outcome or whether it is possible a reasonable doubt might have been established if
24 counsel acted differently.”); *Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993) (noting
25 that the “prejudice” component “focuses on the question whether counsel’s
26 deficient performance renders the result of the trial unreliable or the proceeding
27 fundamentally unfair”).
28

Moreover, it is unnecessary to address both *Strickland* requirements if the petitioner makes an insufficient showing on one. *See Strickland*, 466 U.S. at 697 (“If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . that course should be followed.”); *Rios v. Rocha*, 299 F.3d 796, 805 (9th Cir. 2002) (“Failure to satisfy either prong of the *Strickland* test obviates the need to consider the other.”); *Williams v. Calderon*, 52 F.3d 1465, 1470 and n.3 (9th Cir. 1995) (disposing of an ineffective assistance of counsel claim without reaching the issue of deficient performance because petitioner failed to make the requisite showing of prejudice).

In *Richter*, the Supreme Court reiterated that the AEDPA requires an additional level of deference if state court has rejected an ineffective assistance of counsel claim. “The pivotal question is whether the state court’s application of the *Strickland* standard was unreasonable. This is different from asking whether defense counsel’s performance fell below *Strickland*’s standard.” *See Richter*, 562 U.S. at 101. As the Supreme Court further observed (*id.* at 105):

“‘Surmounting *Strickland*’s high bar is never an easy task.’ *Padilla v. Kentucky*, 559 U.S. 356, 371, 130 S. Ct. 1473, 1485, 176 L. Ed. 2d 284 (2010). An ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the *Strickland* standard must be applied with scrupulous care, lest ‘intrusive post-trial inquiry’ threaten the integrity of the very adversary process the right to counsel is meant to serve. *Strickland*, 466 U.S., at 689-690, 104 S. Ct. 2052. Even under de novo review, the standard for judging counsel’s representation is a most deferential one. Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge. It is ‘all too tempting’ to ‘second-guess counsel’s assistance after

1 conviction or adverse sentence.’ *Id.*, at 689, 104 S. Ct. 2052; *see also*
2 *Bell v. Cone*, 535 U.S. 685, 702, 122 S. Ct. 1843, 152 L. Ed. 2d 914
3 (2002); *Lockhart v. Fretwell*, 506 U.S. 364, 372, 113 S. Ct. 838, 122 L.
4 Ed. 2d 180 (1993). The question is whether an attorney’s
5 representation amounted to incompetence under ‘prevailing
6 professional norms,’ not whether it deviated from best practices or
7 most common custom. *Strickland*, 466 U.S., at 690, 104 S. Ct. 2052.

8 “Establishing that a state court’s application of *Strickland* was
9 unreasonable under § 2254(d) is all the more difficult. The standards
10 created by *Strickland* and § 2254(d) are both ‘highly deferential,’ *id.*,
11 at 689, 104 S. Ct. 2052; *Lindh v. Murphy*, 521 U.S. 320, 333, n. 7, 117
12 S. Ct. 2059, 138 L. Ed. 2d 481 (1997), and when the two apply in
13 tandem, review is ‘doubly’ so, *Knowles*, 556 U.S., at -, 129 S. Ct. at
14 1420. The *Strickland* standard is a general one, so the range of
15 reasonable applications is substantial. 556 U.S., at 123, 129 S. Ct. at
16 1420. Federal habeas courts must guard against the danger of equating
17 unreasonableness under *Strickland* with unreasonableness under
18 § 2254(d). When § 2254(d) applies, the question is not whether
19 counsel’s actions were reasonable. The question is whether there is
20 any reasonable argument that counsel satisfied *Strickland*’s deferential
21 standard.”

22
23 **1. Failure to object to evidence of petitioner’s prior bad acts (Ground**
24 **One).**

25 In Ground One, petitioner claims that his trial counsel was ineffective for
26 failing to object to Bobby Matters’s testimony about petitioner’s prior bad acts, and
27 that this error was compounded by the prosecutor’s evidence. (Petition at 5;
28 Traverse at 7-9.)

1 Matters testified that, before the beatings, he had seen petitioner threatening
2 and scaring people at Smith Park. (5 RT 2468.) On one prior occasion, Matters
3 saw people leave the park after petitioner confronted them about where they were
4 from. (5 RT 2468-69.) On another prior occasion, Matters saw people leave the
5 park after petitioner had changed into all-black clothing and pulled out an object
6 that Matters could not clearly identify but had the same length as a short-barreled
7 shotgun; after the incident, petitioner changed back into his normal clothes. (5 RT
8 2469-70.) Matters was afraid of petitioner. (5 RT 2471.) Trial counsel did not
9 object to these portions of Matters's testimony. The prosecutor's evidence included
10 a photograph depicting a large group of people that included petitioner and another
11 person with a gun. (3 RT 1513.)

12 Counsel could not be ineffective for failing to object to Matters's testimony
13 about petitioner's prior conduct if it was admissible evidence. *See Wilson v. Henry*,
14 185 F.3d 986, 990 (9th Cir. 1999). Under California law, a trial court has discretion
15 to admit evidence of a defendant's uncharged bad acts "if such evidence is relevant
16 to prove some fact at issue, and if the probative value of the evidence outweighs its
17 prejudicial effect." *See People v. Hawkins*, 10 Cal. 4th 920, 951 (1995), *abrogated*
18 *on other ground by People v. Lasko*, 23 Cal. 4th 101, 107 (2000); Cal. Evid. Code
19 § 352.

20 Matters's testimony about petitioner's threatening behavior in the park was
21 relevant under California law to prove Matters's defense to the charge of witness
22 intimidation: Because Matters was afraid of petitioner, he had a motive to obey
23 petitioner's command to dissuade one of the victims, Will Brown, from implicating
24 petitioner as one of the attackers. Matters's stated fear of petitioner could not be
25 accepted simply at face value. The California courts have held that the probative
26 value of such testimony, offered to show a witness's fear or motive, outweighs its
27 prejudicial effect. *See People v. Alvarez*, 14 Cal. 4th 155, 214-15 (1996) (co-
28 defendant's testimony that she had seen defendant violently argue with his

1 girlfriend was admissible because it was the “nut” of the co-defendant’s defense
2 that she had helped defendant commit the crimes because she was afraid of him);
3 *People v. Gallego*, 52 Cal. 3d 115, 174 (1990) (evidence that a defendant had
4 beaten his wife was admissible to corroborate the wife’s claim that she acted as
5 defendant’s accomplice because she was afraid of him); *People v. Escobar*, 48 Cal.
6 App. 4th 999, 1023-24 (1996) (evidence that a defendant carried a firearm was
7 admissible to show that his co-defendant participated in the crime because he was
8 afraid of the defendant), *abrogated on other ground by People v. Mendoza*, 23 Cal.
9 4th 896, 911 (2000); *see also People v. Mackey*, 233 Cal. App. 4th 32, 100-01
10 (2015) (evidence of a defendant’s prior “unsavory conduct” of vandalism and
11 kidnapping was admissible to show his “tremendous sway” over others and his co-
12 defendant’s motive to commit the crime). Any objection by trial counsel to these
13 portions of Matters’s testimony therefore would have been meritless as a matter of
14 California law. *See Wilson*, 185 F.3d at 990 (holding that trial counsel was not
15 ineffective for failing to object to evidence of petitioner’s uncharged bad conduct of
16 dealing heroin when the evidence was admissible under California law).

17 Even assuming for the sake of argument that Matters’s testimony on this
18 point was inadmissible, it was not especially inflammatory, even when considered
19 together with the prosecutor’s photograph depicting a group of people that included
20 a person with a gun. Matters’s testimony about petitioner’s prior threatening
21 behavior described conduct that was far less egregious than petitioner’s charged
22 offenses — severely beating the victims, including one of them into
23 unconsciousness, and attacking them with a box cutter. And the photograph did not
24 depict petitioner engaging in any bad conduct. (3 RT 1513.) Matters’s testimony
25 was not so prejudicial that it would have incited the jury to convict petitioner of the
26 charged crimes because of his character. It therefore would not have been
27 objectively unreasonable for the California courts to conclude that there was no
28 reasonable probability that, even had trial counsel’s objection to the testimony been

1 sustained, the result of the trial would have been different. *Compare Morris v.*
 2 *State of Cal.*, 966 F.2d 448, 456 (9th Cir. 1991) (finding no error from counsel's
 3 failure to object to allegedly inadmissible evidence that petitioner had admitted to a
 4 single instance of cocaine use six years earlier); *with Crotts v. Smith*, 73 F.3d 861,
 5 867 (9th Cir. 1996) (finding prejudice from counsel's failure to object to
 6 inadmissible evidence that petitioner, whom jurors knew was on parole for an
 7 undisclosed felony, was wanted for "killing a cop"), *superseded by statute on other*
 8 *grounds as stated in Van Tran v. Lindsey*, 212 F.3d 1143 (9th Cir. 2000).

9 In sum, petitioner has not met his burden of showing deficient performance,
 10 nor would it have been objectively unreasonable for the California courts to reject
 11 this claim for lack of prejudice.

12
 13 **2. Failure to object to the co-defendant's closing argument about**
 14 **petitioner's bad acts (Ground Two).**

15 In Ground Two, petitioner claims that his trial counsel was ineffective for
 16 failing to object when Matters's counsel discussed petitioner's prior bad acts in his
 17 closing argument. (Petition at 5; Traverse at 9-10.) Matters's counsel said the
 18 following (6 RT 2798-99):

19 Do you think that Bobby Matters isn't in reasonable fear about what is
 20 going to happen to him either through [petitioner] individually or the
 21 gang? Let's talk about that.

22 [Petitioner] is an Asian big fish in a small Mexican gang. Do
 23 you think he doesn't have to be specially fearsome in order to
 24 overcome those racial barriers? He is probably badder than anybody
 25 else has ever seen for a long time in that area and you would be afraid
 26 of him. So Bobby Matters is reasonable in his fear and he doesn't
 27 even have to have a direct threat because he has seen this guy chase
 28 people out of that park. He has seen things that probably qualify as

1 short barrel shotguns being pulled by a guy who is bold enough to go
2 down to his place, change his clothes, come back dressed to kill
3 somebody, pull out a weapon and then five minutes later go home and
4 come back to the park dressed like a normal human being. That would
5 scare anybody.

6 Petitioner has not shown deficient performance from his trial counsel's
7 failure to object to this argument by Matters's counsel. "Because many lawyers
8 refrain from objecting during opening statement and closing argument, absent
9 egregious misstatements, the failure to object during closing argument and opening
10 statement is within the 'wide range' of permissible professional legal conduct."
11 *United States v. Necoechea*, 986 F.2d 1273, 1281 (9th Cir. 1993) (*quoting*
12 *Strickland*, 466 U.S. at 689). Matters's counsel did not make an egregious
13 misstatement or commit misconduct during her closing argument. Rather, her
14 comments to the effect that petitioner made other people afraid of him were
15 permissible inferences from the evidence, including properly admitted evidence of
16 petitioner's prior acts at the park. Trial counsel's failure to object to the comments
17 therefore was within the wide range of reasonable conduct. *See Ayala v. Chappell*,
18 829 F.3d 1081, 1115 (9th Cir. 2016) (closing argument that petitioner caused others
19 to fear him did not undermine the fairness of his trial); *see also Demirdjian v.*
20 *Gipson*, 832 F.3d 1060, 1074 (9th Cir. 2016) (a federal habeas court will not
21 second-guess a defense counsel's failure to object to a closing argument that "did
22 not unquestionably cross the line").

23 Nor would it have been objectively unreasonable for the California courts to
24 reject this claim for lack of prejudice. The comments by Matters's counsel
25 amounted to little more than one paragraph in a lengthy closing argument. And the
26 jury was instructed that closing arguments were not evidence. (3 CT 655; 6 RT
27 2731.) In these circumstances, there was no reasonable probability that, but for trial
28 counsel's failure to object to the closing argument, the result of the trial would have

1 been different. *See Cunningham v. Wong*, 704 F.3d 1143, 1159 (9th Cir. 2013)
2 (finding no prejudice from counsel's failure to object to closing comments that
3 amounted to a single paragraph and where the trial judge instructed the jury that
4 closing arguments are not evidence).

5 In sum, petitioner has not met his burden of showing deficient performance,
6 nor would it have been objectively unreasonable for the California courts to reject
7 this claim for lack of prejudice.

8
9 **3. Failure to object to the gang expert's qualifications (Ground**
10 **Three).**

11 In Ground Three, petitioner claims that his trial counsel was ineffective for
12 failing to argue that the prosecutor's gang expert was not qualified to give an
13 opinion about the Sangra gang. (Petition at 5, 6; Traverse at 10.)

14 The gang expert, Detective Fabian Valdez, had the following qualifications.
15 He had been a peace officer for 13 years. (5 RT 2114.) He was assigned to a unit
16 that investigated tagging and other gang-related cases, and supplemented a gang
17 team. (5 RT 2116.) Spanish was his primary language, and he grew up exposed to
18 Hispanic gang culture. (5 RT 2117.) He received formal training in gangs at the
19 police academy and other organizations, including 40 hours of training from the
20 Sheriff's Department and 16 hours of training from an association of Hispanic gang
21 investigators. (5 RT 2117, 2118.) He used to be a high school teacher who worked
22 with students who belonged to gangs. (5 RT 2118.) He co-organized a multi-
23 agency gang task force that conducted gang-suppression operations and parole-
24 compliance checks. (5 RT 2118-19.) He was contacted by the History Channel to
25 give background information about the Sangra gang for a documentary. (5 RT
26 2119.) He had had more than a thousand informal contacts and 500 formal contacts
27 with gang members. (5 RT 2120-21.) He had testified as a gang expert on three
28

1 prior occasions. (5 RT 2121.) He had been very familiar with the Sangra gang for
 2 the entire 13 years he was on the police force. (5 RT 2121-22.)

3 In light of his experience, Detective Valdez was amply qualified to testify as
 4 an expert about the Sangra gang. The California courts repeatedly have found gang
 5 experts to be qualified with similar or less experience. *See People v. Montes*, 58
 6 Cal. 4th 809, 861 (2014) (police sergeant was amply qualified to testify as a gang
 7 expert, even though he had never before qualified as an expert, where he was an
 8 officer for six years, during which he gained familiarity with the gangs in the area,
 9 and where he was specifically familiar with the street gang in the case and had
 10 undergone 20 to 30 hours of training); *People v. Williams*, 16 Cal. 4th 153, 195
 11 (1997) (officer was qualified as a gang expert where he was a member of a special
 12 gang unit and “had been involved with gangs for seven years”); *People v. Valadez*,
 13 220 Cal. App. 4th 16, 29 (2013) (gang expert was qualified where he was a police
 14 officer for six and a half years “and spent almost two years in a gang-enforcement
 15 division”). Accordingly, any objection by trial counsel to Detective Valdez’s
 16 qualifications would have been meritless. Indeed, petitioner now concedes in his
 17 Traverse that Detective Valdez was qualified. (Traverse at 10.)

18 In sum, petitioner has not met his burden of showing deficient performance,
 19 nor would it have been objectively unreasonable for the California courts to reject
 20 this claim for lack of prejudice.

21
 22 **4. Failure to request an instruction on third party culpability**
 23 **(Ground Four).**

24 In Ground Four, petitioner claims that his trial counsel was ineffective for
 25 failing to request an instruction on third party culpability.

26 Petitioner’s theory is that it was Michael Cardenas, not petitioner, who
 27 committed assault with a deadly weapon by cutting one of the victims, Will Brown,
 28 with a knife. (Petition at 6; Traverse at 10-12.) Cardenas testified for the defense

1 that he had a knife during the fight and that he accidentally sliced Will Brown with
2 it. (6 RT 2565-66, 2581.) In his closing argument, trial counsel raised the
3 possibility that Cardenas, not petitioner, was the person who cut Will Brown. (6
4 RT 2821.) However, trial counsel did not request an instruction on third-party
5 culpability. According to petitioner, the instruction should have said in relevant
6 part, "Evidence that another person committed the charge offense may by itself
7 raise a reasonable doubt as to the defendant's guilt." (Traverse at 11.)

8 Petitioner has failed to show that trial counsel's failure to request a pinpoint
9 instruction on third party culpability was deficient performance. Under California
10 law, criminal defendants are not entitled to pinpoint instructions, even if they are
11 legally correct, when they are duplicative of other instructions. *See People v.*
12 *Bolden*, 29 Cal. 4th 515, 558 (2002) (citing *People v. Catlin*, 26 Cal. 4th 81, 152
13 (2001)). By the time of petitioner's trial, the California Supreme Court had
14 repeatedly observed that an instruction on third party culpability essentially
15 duplicates or adds little to the general instruction on reasonable doubt. *See People*
16 *v. Hartsch*, 49 Cal. 4th 472, 504 (2010) (instruction on third party liability "simply
17 restated" the reasonable doubt instruction); *People v. Wright*, 45 Cal.3d 1126, 1134
18 (1988) (instructions on identity of the perpetrator "duplicate" the reasonable doubt
19 instruction); *People v. Gutierrez*, 45 Cal. 4th 789, 825 (2009) (finding no necessity
20 for instruction on third party liability when the jury was properly instructed on
21 reasonable doubt); *People v. Earp*, 20 Cal. 4th 826, 887 (1999) (same). Trial
22 counsel's performance was not deficient simply because he failed to request an
23 instruction that was widely considered duplicative and unnecessary.

24 Nor was there a reasonable probability that, but for counsel's failure to
25 request the instruction, the result of the trial would have been different. The jury
26 heard Cardenas testify that he cut Brown with a knife, and heard trial counsel's
27 closing argument in this regard. (6 RT 2565-66, 2581, 2821.) Had the jury
28 believed Cardenas's testimony, it would have had reasonable doubt that petitioner

1 had assaulted Brown with a box cutter and would have acquitted petitioner of that
2 crime even without the instruction. *See Hartsch*, 49 Cal. 4th at 504 (“It is hardly a
3 difficult concept for the jury to grasp that acquittal is required if there is reasonable
4 doubt as to whether someone else committed the charged crimes.”). Yet the jury
5 had several reasons to disbelieve Cardenas’s testimony. The prosecutor highlighted
6 Cardenas’s motives: Cardenas was petitioner’s friend, belonged to the same gang,
7 and had nothing to lose by implicating himself because he had already pled guilty
8 to crimes arising from the beatings and could no longer be prosecuted for assaulting
9 Brown. (6 RT 2767-68, 2822-23.) Brown’s wound was a clean cut (6 RT 2770),
10 consistent with infliction by a box cutter rather than a knife. Cardenas’s testimony
11 was inconsistent with the testimony of his confederate, Christopher Zuniga, who
12 fought alongside Cardenas but denied that Cardenas had a knife and did not know
13 how Brown sustained his wound. (5 RT 2416, 2429-30.) Cardenas’s testimony
14 was contradicted by the two victims, who identified petitioner as the person who
15 attacked each of them with a box cutter. (3 RT 1354, 1531-32, 1549-50; 4 RT
16 1824-25, 1846.) Given these weakness in Cardenas’s testimony, petitioner has
17 failed to show prejudice from trial counsel’s failure to request an instruction on
18 third party culpability.

19 In sum, petitioner has failed to show either deficient performance or
20 prejudice under the *Strickland* standard.

21
22 **5. Failure to request an instruction on accomplice liability (Ground**
23 **Five).**

24 In Ground Five, petitioner claims that his trial counsel was ineffective for
25 failing to request an instruction, CALCRIM No. 334, about the victims’ status as
26 accomplices. (Petition at 6; Traverse at 12-14.)

27 CALCRIM No. 334 states that the testimony of an accomplice must be
28 corroborated and should be viewed with caution. The victims and alleged

1 accomplices in this case, Will Brown and Cono D'Amato, testified that petitioner
2 was part of the group that attacked them. (3 RT 1346-47, 1354, 1530-31; 4 RT
3 1824-25, 1846.) Petitioner argues that his trial counsel should have requested
4 CALCRIM No. 334 because Brown and D'Amato were accomplices under a theory
5 of "natural and probable consequences." According to that theory, Brown and
6 D'Amato in fact attacked petitioner first, so it was a natural and probable
7 consequence that they would be assaulted in response. (Petition at 6.)

8 Petitioner's theory is misplaced. In order for the theory of natural and
9 probable consequences to apply, there must have been a target crime to which
10 Brown and D'Amato were accomplices of petitioner, the natural and probable
11 consequence of which was the assault of Brown and D'Amato. *See People v.*
12 *Prettyman*, 14 Cal. 4th 428, 261 (1996) (accomplice liability under a theory of
13 natural and probable consequences requires, in part, aiding and abetting a target
14 crime). This case had no target crime in which Brown and D'Amato acted as
15 petitioner's accomplices. Indeed, this case had no crime for which Brown,
16 D'Amato, and petitioner were all chargeable. *See People v. Sully*, 53 Cal. 3d 1195,
17 1227 (1991) (in order to be an accomplice, the person must be chargeable with the
18 identical crime as a principal). Brown and D'Amato's alleged initial attack on
19 petitioner could not have been a target crime because petitioner could not have been
20 criminally liable for his own attack. *See People v. Antick*, 15 Cal. 3d 79, 91 (1975)
21 (accomplice to burglary who was killed could not be criminally liable for his own
22 death), *disapproved on other ground by People v. McCoy*, 25 Cal. 4th 1111, 1123
23 (2001); *People v. Slaughter*, 27 Cal. 4th 1187, 1202 (2002) (accomplice to drug
24 sale who was attacked could not be criminally liable for his own attack), *abrogated*
25 *on other ground by People v. Diaz*, 60 Cal. 4th 1176, 1190-91 (2015); *People v.*
26 *Tobias*, 25 Cal. 4th 327, 337 (2001) (victim of incest could not be criminally liable
27 as an accomplice to her own incest despite her consent); *In re Meagan R.*, 42 Cal.

1 App. 4th 17, 26 (1996) (victim of statutory rape could not be criminally liable as an
2 accomplice to her own statutory rape).

3 Likewise, Brown and D'Amato could not have been criminally liable for
4 their own attack that was the alleged response to their initial attack on petitioner.
5 Therefore, any request by trial counsel for a jury instruction classifying Brown and
6 D'Amato as accomplices would have been meritless and futile.

7 In sum, petitioner has failed to show either deficient performance or
8 prejudice under the *Strickland* standard.

9
10 **6. Failure to object to the omission of an instruction on great bodily**
11 **injury (Ground Six).**

12 In Ground Six, petitioner claims that his trial counsel was ineffective for
13 failing to object to the omission of an exception for the great-bodily-injury
14 enhancement where the victims were accomplices. (Petition at 6a; Traverse at 14.)

15 Petitioner claims that trial counsel should have raised an argument under Cal.
16 Penal Code § 12022.7(a), which states that any person who personally inflicts great
17 bodily injury "on a person other than an accomplice" in the commission of a felony
18 or attempted felony shall be punished by a consecutive term of three years.
19 Petitioner's theory for claim is the same as for his prior claim: The victims, Will
20 Brown and Cono D'Amato, were accomplices under a theory of natural and
21 probable consequences. As discussed above, petitioner is incorrect because this
22 case had no crime in which Brown and D'Amato were petitioner's accomplices.

23 In sum, petitioner has failed to show either deficient performance or
24 prejudice under the *Strickland* standard.

25 ///

26 ///

27 ///

28 ///

B. Habeas relief is not warranted with respect to petitioner's claim of instructional error (Ground Seven).

In Ground Seven, petitioner claims that the trial court erred in failing to *sua sponte* instruct the jury with CALCRIM No. 334 because his co-defendant, Bobby Matters, was an accomplice to the beatings. (Petition at 6a-6b; Traverse at 14-15.)

CALCRIM No. 334 states that the testimony of an accomplice must be corroborated and should be viewed with caution. The California Court of Appeal concluded that this instruction would have been unwarranted as to Matters under California law for the following reasons: (1) petitioner did not request the instruction; (2) Matters's testimony to a large extent exculpated petitioner; and (3) given the fact that Matters denied any involvement in the beatings, an instruction labeling him as an accomplice may have prejudiced his defense. (Lodgment 6 at 27-31.)

The Court is bound by the California Court of Appeal's determination that the instruction was unwarranted as a matter of state law. *See Bradshaw v. Richey*, 546 U.S. 74, 76 (2005) (state court's interpretation of state law binds a federal court on habeas review); *Waddington v. Sarausad*, 555 U.S. 179, 193 n.5 (2009) (state court's interpretation of instructional error claim as a matter of state law was beyond the province of a federal habeas court to reexamine); *Gonzalez v. Gonzalez*, 394 F. App'x 415, 415-16 (9th Cir. 2010) ("The California Court of Appeal's conclusion that there was no instructional error is a binding interpretation of state law."). "Quite simply, that should be the final word on the subject." *Menendez v. Terhune*, 422 F.3d 1012, 1029 (9th Cir. 2005) (rejecting instructional error claim on federal habeas review where the state court applied state law principles to determine that the proposed instruction was unwarranted).

But even if an instruction on accomplice testimony was warranted as to Matters under California law, this still does not mean petitioner has a federal

1 constitutional claim. *See Miller v. Stagner*, 757 F.2d 988, 993 (9th Cir. 1985)
 2 (“Failure to give an instruction which might be proper as a matter of state law does
 3 not amount to a federal constitutional violation.”). Although an instruction on
 4 accomplice testimony may sometimes be proper under state law, it “is not required
 5 by the Constitution or federal law.” *See Laboa v. Calderon*, 224 F.3d 972, 979 (9th
 6 Cir. 2000); *see also Kappos v. Hanks*, 54 F.3d 365, 367 (7th Cir. 1995) (failure to
 7 give cautionary instruction on accomplice testimony does not rise to the level of a
 8 constitutional violation); *Harrington v. Nix*, 983 F.2d 872, 874 (8th Cir. 1993)
 9 (“[S]tate laws requiring corroboration do not implicate constitutional concerns that
 10 can be addressed on habeas review.”). Petitioner’s claim of instructional error
 11 therefore is not cognizable on federal habeas review. *See Estelle v. McGuire*, 502
 12 U.S. 62, 71-72 (1991) (reiterating that “it is not the province of a federal habeas
 13 court to reexamine state court determinations on state law questions”). Petitioner
 14 has even conceded this point in his Traverse. (Traverse at 15.)

15 In sum, the California Court of Appeal’s rejection of this claim did not result
 16 in a decision that was contrary to, or involve an unreasonable application of, clearly
 17 established federal law.

18
 19 **C. Habeas relief is not warranted with respect to petitioner’s claim of**
 20 **prosecutorial misconduct (Ground Eight).**

21 In Ground Eight, petitioner claims that the prosecutor violated his
 22 constitutional rights by commenting on petitioner’s failure to testify on his own
 23 behalf. (Petition at 6b; Traverse at 15-16.)

24 During his closing argument, the prosecutor did not say that petitioner failed
 25 to testify on his own behalf. Rather, the prosecutor mentioned that petitioner’s co-
 26 defendant, Bobby Matters, did exercise his right to testify: “The defense counsel’s
 27 role is to . . . protect their clients’ rights and in certain instances exercise those
 28 rights, whether that would be through cross-examination, calling witnesses which

1 he have seen and in Mr. Matters's case Mr. Matters testifying, exercising his right
2 to testify." (6 RT 2761.) According to petitioner, this comment carried the "clear
3 import" that Matters, unlike petitioner, exercised his right to testify because Matters
4 had nothing to hide. (Petition at 6b.)

5 The Due Process Clause prohibits a prosecutor from commenting on a
6 defendant's failure to testify. *Griffin v. California*, 380 U.S. 609, 615 (1965).
7 "While a direct comment about a defendant's failure to testify always violates
8 *Griffin*, a prosecutor's indirect comment violates *Griffin* only 'if it is manifestly
9 intended to call attention to the defendant's failure to testify, or is of such a
10 character that the jury would naturally and necessarily take it to be a comment on
11 the failure to testify.'" *Hovey v. Ayers*, 458 F.3d 892, 912 (9th Cir. 2006) (quoting
12 *Lincoln v. Sunn*, 807 F.2d 805, 809 (9th Cir. 1987)).

13 The prosecutor's comment that petitioner's co-defendant, Matters, had
14 testified did not amount to *Griffin* error for the following reasons. At most, the
15 prosecutor's comment implicated petitioner's refusal to testify only indirectly. The
16 Ninth Circuit has repeatedly declined to find *Griffin* error from comments that were
17 much more aggressive in drawing attention to the fact that a co-defendant had
18 testified. See *United States v. Olano*, 62 F.3d 1180, 1196-97 (9th Cir. 1995)
19 (finding no violation of appellant's right to testify from comment that his co-
20 defendant had "sat up in that chair for almost 20 hours and let everybody take a
21 shot at him," because it implicated appellant's failure to testify "only indirectly");
22 *United States v. Patterson*, 819 F.2d 1495, 1506 (9th Cir. 1987) (finding no
23 reversible *Griffin* error from comment that a co-defendant was "different than the
24 other defendants" because "he has taken the stand and faced his accusers"); *United*
25 *States v. Moreno-Nunez*, 595 F.2d 1186, 1187 (9th Cir. 1979) (same from comment
26 that a co-defendant "had the guts to take the stand and withstand cross-
27 examination").
28

1 The comment was not manifestly intended to call attention to petitioner's
2 failure to testify, nor was it of such a character that the jury would naturally and
3 necessarily take it to be a comment on the failure to testify. Rather, the comment
4 was a generic statement about the role of Matters's counsel that made no mention
5 of petitioner, and it did not necessarily invite the jury to draw a negative
6 comparison between petitioner and his testifying co-defendant. *See Patterson*, 819
7 F.2d at 1506 (finding no *Griffin* error where the fact that a co-defendant had
8 testified was highlighted for the jury because the comments did not benefit the co-
9 defendant at the expense of the other defendants, and they did not stress any
10 inference that the other defendants were guilty because they chose to remain silent).
11 Instead, the comment was single and isolated, and was not used to support an
12 inference of petitioner's guilt. *See Jeffries v. Blodgett*, 5 F.3d 1180, 1192 (9th Cir.
13 1993) (finding no *Griffin* error where prosecutor's comment that "I can't cross-
14 examine" the petitioner was a "single, isolated incident rather than an extensive
15 tactic by the prosecution"); *see also Lincoln*, 807 F.2d at 809 ("Improper comment
16 warrants reversal only if it appears that the comment may possibly have affected the
17 verdict.").

18 Finally, petitioner's jury was instructed that petitioner had an absolute
19 constitutional right not to testify and that his decision not to do so must not be
20 considered for any reason. (6 RT 2740-41; 3 CT 623.) It is presumed that the jury
21 followed this instruction, given the absence of evidence that it did not. *See Weeks*
22 *v. Angelone*, 528 U.S. 225, 234 (2000) (a jury is presumed to have followed the
23 instructions given to them); *see also Olano*, 62 F.3d at 1196 (appellant's right to
24 remain silent was not violated in part because the jury was given a cautionary
25 instruction not to draw a negative inference from a defendant's decision not to
26 testify); *United States v. Soulard*, 730 F.2d 1292, 1307 (9th Cir. 1984) (finding that
27 such a cautionary instruction was sufficient to cure any prejudice from an allegedly
28 impermissible comment about appellant's decision not to testify).

1 In sum, petitioner has failed to show that the prosecutor's comment
2 amounted to *Griffin* error.

3
4 **D. Habeas relief is not warranted with respect to petitioner's claim of**
5 **cumulative error (Ground Nine).**

6 In Ground Nine, petitioner claims that the cumulative effect of the alleged
7 errors discussed above was prejudicial. (Petition at 6b; Traverse at 16-17.)

8 For the reasons discussed above, however, no constitutional error occurred in
9 this case. Therefore, no accumulation of errors could take place. *See Fairbank v.*
10 *Ayers*, 650 F.3d 1243, 1257 (9th Cir. 2011) ("[B]ecause we hold that none of
11 [petitioner]'s claims rise to the level of constitutional error, 'there is nothing to
12 accumulate to a level of a constitutional violation.'") (*quoting Mancuso v. Olivarez*,
13 292 F.3d 939, 957 (9th Cir. 2002)); *Jones v. Stotts*, 59 F.3d 143, 147 (10th Cir.
14 1995) (noting that cumulative-error analysis evaluates only effect of matters
15 determined to be error, not cumulative effect of non-errors).

16
17 **E. Habeas relief is not warranted with respect to petitioner's claim of**
18 **ineffective assistance of appellate counsel (Ground Ten).**

19 In Ground Ten, petitioner claims that his appellate counsel was ineffective
20 for failing to raise the claims discussed above on appeal, particularly Grounds Eight
21 and Nine. (Petition at 6b; Traverse at 17-18.)

22 Claims of ineffective assistance of appellate counsel are reviewed under the
23 *Strickland* standard. Petitioner must show that the performance of appellate
24 counsel fell below an objective standard of reasonableness and that, for appellate
25 counsel's professional errors, there is a reasonable probability that petitioner would
26 have prevailed on appeal. *See Smith v. Robbins*, 528 U.S. 259, 285 (2000).

27 Each of the proposed claims has been shown to be invalid for the reasons
28 discussed above. Petitioner therefore has failed to meet his burden of showing a

1 reasonable probability that he would have prevailed on appeal if his appellate
2 counsel had raised these issues. *See Butcher v. Marquez*, 758 F.2d 373, 378 (9th
3 Cir. 1985) (“[Petitioner] claims as well that appellate counsel’s failure to argue the
4 issues presented above constituted ineffective assistance of counsel. In view of the
5 fact that those claims have been shown to be invalid [petitioner] would not have
6 gained anything by raising them.”).

7 Accordingly, it would not have been objectively unreasonable for the
8 California Supreme Court to reject this claim on the ground that neither *Strickland*
9 prong was satisfied.

10
11 **F. Petitioner’s request for an evidentiary hearing should be denied.**

12 Finally, petitioner requests an evidentiary hearing to resolve his claims.
13 (Traverse at 2.)

14 However, as noted above, the Supreme Court held in *Pinholster*, 563 U.S. at
15 180, that review of state court decisions under § 2254(d)(1) “is limited to the record
16 that was before the state court that adjudicated the claim on the merits.” By its
17 express terms, § 2254(d)(2) restricts federal habeas review to the record that was
18 before the state court. *See also Pinholster*, 563 U.S. at 185 n.7 (noting that an
19 unreasonable determination of fact under § 2254(d)(2) must be unreasonable “in
20 light of the evidence presented in the State court proceeding,” and stating that “[t]he
21 additional clarity of § 2254(d)(2) on this point . . . does not detract from our view
22 that § 2254(d)(1) also is plainly limited to the state-court record.”). Thus, federal
23 courts may not consider new evidence on claims adjudicated on the merits in state
24 court unless the petitioner first satisfies his burden under § 2254(d) and then
25 satisfies his burden under § 2254(e)(2). *See Pinholster*, 563 U.S. at 181-85;
26 *Holland v. Jackson*, 542 U.S. 649, 652-53 (2004). The Court’s findings above that
27 petitioner is not entitled to federal habeas relief under the AEDPA standard of
28 review are dispositive of petitioner’s request for an evidentiary hearing as to those

1 claims. As to any other claims, "an evidentiary hearing is not required on issues
2 that can be resolved by reference to the state court record." *See Totten v. Merkle*,
3 137 F.3d 1172, 1176 (9th Cir. 1998) (emphasis in original). The Court has been
4 able to resolve petitioner's claims by reference to the state court record.

5 Accordingly, the Court recommends that petitioner's request for an
6 evidentiary hearing be denied.

7
8 **RECOMMENDATION**

9 IT THEREFORE IS RECOMMENDED that the District Court issue an
10 Order: (1) accepting and adopting this Final Report and Recommendation;
11 (2) denying petitioner's request for an evidentiary hearing; and (3) directing that
12 Judgment be entered denying the Petition and dismissing this action with prejudice.

13
14 DATED: April 20, 2017

15 

16 ALEXANDER F. MacKINNON
17 UNITED STATES MAGISTRATE JUDGE
18
19
20
21
22
23
24
25
26
27
28

1
2
3
4
5
6
7 **UNITED STATES DISTRICT COURT**
8 **CENTRAL DISTRICT OF CALIFORNIA**
9

10 JOHN LEE YUN,

11 Petitioner,

12 v.

13 JEFFREY A. BEARD,

14 Respondent.
15

Case No. CV 15-04013 AG (AFM)

**ORDER ACCEPTING FINDINGS AND
RECOMMENDATIONS OF UNITED
STATES MAGISTRATE JUDGE**

16 Pursuant to 28 U.S.C. § 636, the Court has reviewed the Petition, the records
17 on file, and the Final Report and Recommendation of the United States Magistrate
18 Judge. Further, the Court has engaged in a *de novo* review of those portions of the
19 Report to which objections have been made. Petitioner's objections are overruled.

20 The Court accepts the findings and recommendations of the Magistrate
21 Judge. IT THEREFORE IS ORDERED that (1) the Final Report and
22 Recommendation is accepted and adopted; (2) petitioner's request for an
23 evidentiary hearing is denied; and (2) Judgment shall be entered denying the
24 Petition and dismissing this action with prejudice.

25 DATED: July 30, 2017
26
27
28



ANDREW J. GUILFORD
UNITED STATES DISTRICT JUDGE

1
2
3
4
5
6
7
8 **UNITED STATES DISTRICT COURT**
9 **CENTRAL DISTRICT OF CALIFORNIA**
10

11 JOHN LEE YUN,

12 Petitioner,

13 v.

14 JEFFREY A. BEARD,

15 Respondent.
16

Case No. CV 15-04013 AG (AFM)

JUDGMENT

17 Pursuant to the Order Accepting Findings and Recommendations of the
18 United States Magistrate Judge,

19 IT IS ORDERED AND ADJUDGED that the Petition is denied and the
20 action is dismissed with prejudice.
21

22 DATED: July 30, 2017
23
24



25 **ANDREW J. GUILFORD**
26 **UNITED STATES DISTRICT JUDGE**
27
28

1
2
3
4
5
6
7
8 **UNITED STATES DISTRICT COURT**
9 **CENTRAL DISTRICT OF CALIFORNIA**
10

11 JOHN LEE YUN,

12 Petitioner,

13 v.

14 JEFFREY A. BEARD,

15 Respondent.
16

Case No. CV 15-04013 AG (AFM)

**ORDER RE CERTIFICATE OF
APPEALABILITY**

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

19 (a) **Certificate of Appealability.** The district court must
20 issue or deny a certificate of appealability when it enters a final order
21 adverse to the applicant. Before entering the final order, the court may
22 direct the parties to submit arguments on whether a certificate should
23 issue. If the court issues a certificate, the court must state the specific
24 issue or issues that satisfy the showing required by 28 U.S.C.
25 § 2253(c)(2). If the court denies a certificate, the parties may not
26 appeal the denial but may seek a certificate from the court of appeals
27 under Federal Rule of Appellate Procedure 22. A motion to reconsider
28 a denial does not extend the time to appeal.

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

5 Under 28 U.S.C. § 2253(c)(2), a Certificate of Appealability may issue “only
6 if the applicant has made a substantial showing of the denial of a constitutional
7 right.” The Supreme Court has held that this standard means a showing that
8 “reasonable jurists could debate whether (or, for that matter, agree that) the petition
9 should have been resolved in a different manner or that the issues presented were
10 adequate to deserve encouragement to proceed further.” *See Slack v. McDaniel*,
11 529 U.S. 473, 483-84 (2000) (internal quotation marks omitted).

12 Here, after duly considering petitioner’s contentions in support of the claims
13 alleged in the Petition, including in his objections to the Final Report and
14 Recommendation, the Court finds that petitioner has not satisfied the requirements
15 for a Certificate of Appealability. Accordingly, the Certificate is DENIED.

16
17 DATED: July 30, 2017



18
19
20 ANDREW J. GUILFORD
UNITED STATES DISTRICT JUDGE
21
22
23
24
25
26
27
28

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