APPENDICES

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

JAN 23 2025

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

MARLON EDGARDO SIGUENZA,

Petitioner - Appellant,

v.

DOMINGO URIBE, Jr.,

Respondent - Appellee.

No. 24-1616

D.C. No. 2:11-cv-08020-SSS-AGR
Central District of California,
Los Angeles

ORDER

Before: SILVERMAN and SUNG, Circuit Judges.

The request for a certificate of appealability (Docket Entry No. 11) 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.

JS-6

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

MARLON EDGARDO SIGUENZA,

Petitioner,

v.

DOMINGO URIBE, JR.,

Respondent.

Case No. 2:11-cv-08020-SSS-AGR

JUDGMENT

Pursuant to the Order Accepting Findings and Recommendation of Magistrate Judge, **IT IS ADJUDGED** that the Petition in this matter is **DENIED** and **DISMISSED WITH PREJUDICE**.

IT IS SO ORDERED.

DATED: February 14, 2024

SUNSHINE S. SYKES
United States District Judge

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

MARLON EDGARDO SIGUENZA,

Petitioner,

v.

DOMINGO URIBE, JR.,

Respondent.

Case No. 2:11-cv-08020-SSS-AGR

ORDER ACCEPTING FINDINGS AND RECOMMENDATION OF MAGISTRATE JUDGE

Pursuant to 28 U.S.C. § 636, the Court has reviewed the Petition for Writ of Habeas Corpus, the other records on file herein, the Report and Recommendation of the United States Magistrate Judge ("Report"), and the Objections. Further, the Court has engaged in a *de novo* review of those portions of the Report to which objections have been made.

The Report recommends denial of the First Amended Petition and dismissal of this action with prejudice. [Dkt. 118]. Petitioner's Objections focus on the Report's analysis of Grounds Six to Eight, in which Petitioner claims ineffective assistance of counsel. [Dkt. 124]. The primary basis of Petitioner's objections is that his counsel failed "to present a mental-state

defense" at trial based on Petitioner's alleged post-traumatic stress disorder ("PTSD"). [*Id.* at 6]. For the reasons discussed below, however, Petitioner's Objections to the Report do not warrant a change to the Magistrate Judge's findings or recommendation.

Petitioner objects that the record does not adequately explain counsel's failures with regard to the PTSD defense. [Dkt. 124 at 7]. But this misstates the standard, which does not require such an explanation to appear affirmatively in the record. The "absence of evidence" cannot satisfy Petitioner's burden of proving ineffective assistance of counsel. *Dunn v. Reeves*, 141 S. Ct. 2405, 2410 (2021). Indeed, even if the record suggests that counsel's conduct was "far from exemplary," the Court cannot grant relief unless the record affirmatively shows "that counsel took an approach that no competent lawyer would have chosen." *Id.* Petitioner has not made the required showing from the existing record.

Petitioner objects that he was unable to develop the record to prove his claims. He allegedly was unable to provide a declaration from counsel because counsel was unresponsive to Petitioner's letters. [Dkt. 124 at 7]. But Petitioner's vague allegation about sending letters to counsel does not include a specific allegation that he ever asked counsel to explain the failure to present a PTSD defense. Petitioner therefore has not provided enough detailed allegations to support a reasonable inference that he could not obtain a declaration from counsel about a PTSD defense. *See Porcaro v. United States*, 832 F.2d 208, 211 (1st Cir. 1987) (per curiam) (holding that where a witness allegedly will not take the time to prepare an affidavit, the petitioner must submit an affidavit with the details of the refusal and the information that could have been furnished); *see also Garuti v. Roden*, 733 F.3d 18, 25-26 (1st Cir. 2013) (holding that a petitioner's non-specific and conclusory allegations about

his counsel, who had refused to furnish an affidavit, were insufficient to raise a substantial issue).

Petitioner objects that counsel's ability to secure an acquittal on first-degree murder was not relevant evidence of his effectiveness. [Dkt. 124 at 8]. But the Report did not state that the acquittal was the determinative factor of whether counsel's performance was ineffective. It was only one circumstance among others. *See Eckert v. Tansy*, 936 F.2d 444, 447 (9th Cir. 1991) (an evaluation of counsel's performance for objective reasonableness considers "the totality of the circumstances"). Other circumstances in assessing counsel's performance included the critical fact that Petitioner never told his counsel about suffering from PTSD at the time of the shooting or at any other time. [Dkt. 118 at 32].

Petitioner objects that the Report afforded too much weight to the testimony of Justin Turman. [Dkt. 124 at 9-10]. Turman, an eyewitness, testified that Petitioner methodically loaded the gun, pointed it at the victim, twice stated his intention to "do this," and then shot the victim. [*Id.* at 9]. Petitioner argues that Turman's testimony had no value because the jury acquitted Petitioner of first-degree premeditated murder. [*Id.*]. To the contrary, as the Report found, "Petitioner's belief that the jury's failure to convict him of first-degree murder necessarily means it rejected Turman's testimony is speculative. Turman's testimony supported malice aforethought, which the jury believed beyond a reasonable doubt that Petitioner had when he murdered [the victim]." [Dkt. 118 at 39]. The Report did not err in finding that, even if the jury may have rejected Turman's testimony about premeditation, his testimony still had evidentiary value about malice. *See United States v. Messina*, 806 F.3d 55, 64 (2d Cir. 2015) ("[A] factfinder who determines that a witness has been inaccurate, contradictory and even untruthful in some respects may nevertheless

find the witness entirely credible in the essentials of his testimony.") (citation and internal quotation marks omitted).

Petitioner objects that he should have been granted an opportunity for factual development of his PTSD claim. [Dkt. 124 at 11]. As the Report noted, no medical expert has diagnosed Petitioner with PTSD. [Dkt. 118 at 35]. Petitioner argues that he should have been granted an evidentiary hearing to develop that evidence. [Dkt. 124 at 11]. To the contrary, Petitioner's allegations about having PTSD were too speculative to warrant further evidentiary development. Allegations based only on speculation are insufficient to entitle a habeas petitioner to an evidentiary hearing, in either state or federal court. *See Woods v. Sinclair*, 764 F.3d 1109, 1128 (9th Cir. 2014) (petitioner was not entitled to an evidentiary hearing in state court "when all he could offer was speculation that an evidentiary hearing might produce [helpful] testimony or other evidence"); *Morris v. State of Cal.*, 966 F.2d 448, 455-56 (9th Cir. 1991) (petitioner was not entitled to an evidentiary hearing in federal court based on a "bare allegation" and "speculation as to the contents" of testimony; "wishful suggestions cannot substitute for declaratory or other evidence.").

Petitioner objects that a reasonable attorney would have been on notice of the potential PTSD issue. [Dkt. 124 at 13-14]. Petitioner argues that his counsel was on notice because of Petitioner's testimony about the shooting, which included descriptions such as "just one long blur," "slow motion," and "everything frozen," as well as Petitioner's testimony of having no memory of it. [*Id.*]. Yet, as the Report found, Petitioner never told his counsel about suffering from PTSD, and Petitioner has never been diagnosed with PTSD. [Dkt. 118 at 32, 35]. Given this context, Petitioner's description of how he perceived the shooting, by itself, was insufficient to put counsel on notice of a possible PTSD defense. *See Wilson v. Henry*, 185 F.3d 986, 990 (9th Cir. 1999)

(holding that evidence that petitioner had been beaten the day before he fatally shot someone was insufficient to put counsel on notice of a possible mental state defense); *Williams v. Calderon*, 52 F.3d 1465 1471 (9th Cir. 1995) ("[E]ven today, no psychiatrist has said [petitioner] was not sane."); *see also Michaels v. Davis*, 51 F.4th 904, 960-61 (9th Cir. 2022) (holding that counsel was not on notice of mitigating evidence of mental illness in petitioner's family where there was no diagnosis at the time of trial and where the available evidence of mental health treatment was insufficient to put counsel on notice to investigate the issue).

Petitioner objects that the Report inadequately conveys the significance of Dr. Rudnick's letter. [Dkt. 124 at 15-16]. In the letter, written four years after Petitioner was convicted, Dr. Rudnick told Petitioner, "I believe that you may well qualify for a diagnosis of chronic PTSD," but it "is less clear as to how that may have influenced your behavior in the subject incident, over and above the effects of drug intoxication." [Dkt. 14-3 at 13]. Contrary to Petitioner's objection, the Report reasonably found that Petitioner's reliance on this letter was "misplaced" because Dr. Rudnick "did not offer any medical or legal opinion concerning Petitioner." [Dkt. 118 at 35].

Petitioner objects that the Report erroneously considered individual instances of counsel's conduct, rather than considering counsel's "conduct as a whole." [Dkt. 124 at 17-18]. To the contrary, the Report did properly consider counsel's conduct as a whole, by carefully analyzing and discussing each of the "specific instances of [counsel's] conduct that [allegedly] demonstrate incompetent performance." *Browning v. Baker*, 875 F.3d 444, 471 (9th Cir. 2017). Moreover, Petitioner does not persuasively argue how the Report would have reached a different result by organizing its analysis in the way he insists is required. For example, Petitioner argues that counsel's selected defense of an

"imperfect defense of others was a dead-bang loser" under California law. [Dkt. 124 at 18]. To the contrary, as the Report correctly found, the trial court permitted the defense in light of evidence of Petitioner's extensive drug use, and explicitly instructed the jury on it. [Dkt. 118 at 43-44].

The Court accepts the findings and recommendation of the Magistrate Judge. Judgment will be entered denying the First Amended Petition for Writ of Habeas Corpus and dismissing this action with prejudice.

IT IS SO ORDERED.

DATED: February 14, 2024

SUNSHINE S. SYKES
United States District Judge

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

MARLON EDGARDO SIGUENZA, Petitioner, v. DOMINGO URIBE, JR., Respondent.	NO. CV 11-08020-SSS (AGR) REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

The Court submits this Report and Recommendation ("Report") to the Honorable Sunshine Suzanne Sykes, United States District Judge, pursuant to 28 U.S.C. § 636 and General Order No. 05-07. For the reasons set forth below, the court recommends that the First Amended Petition for Writ of Habeas Corpus be denied.

I.

SUMMARY OF PROCEEDINGS

A. Conviction, Sentence, and Appeal

On December 21, 2006, a Los Angeles County jury convicted Petitioner of second degree murder and found that he personally discharged a handgun causing the death of Richard Wright. (Lodged Document (LD) 1.) On January 26, 2007, the court sentenced Petitioner to 40 years to life. (LD 2.) On June 25, 2008, the California Court of Appeal affirmed the judgment. (LD 3 (Case No. B197757).) On September 10, 2008, the California Supreme Court summarily denied review. (LD 4 (Case No. S165420).)

B. State-Court Post-Conviction Proceedings

On September 8, 2009, Petitioner constructively filed a petition for writ of habeas corpus in Superior Court (LD 5), which denied it in a reasoned decision on June 30, 2010 (LD 6 (Case No. BA289665)). On September 9, 2010, Petitioner constructively filed a habeas petition in the California Court of Appeal (LD 7), which summarily denied it on November 10, 2010 (LD 8 (Case No. B227320)). On January 20, 2012, he filed a habeas petition in the California Supreme Court (LD 9), which summarily denied it on August 17, 2012 (LD 10 (Case No. 191248)). On May 3, 2016, he constructively filed a second habeas petition in the California Supreme Court (LD 18), which summarily denied it on June 22, 2016 (LD 19 (Case No. S234342)).

C. Federal Habeas Corpus Proceedings

1. Initial Proceedings in the District Court

On September 22, 2011, Petitioner constructively filed a Petition for Writ of Habeas Corpus by a Person in State Custody. (Dkt. No. 1.) On November 23, 2011, he filed a First Amended Petition. (Dkt. No. 14-1 through 14-3 ("FAP").) Respondent moved to dismiss the FAP as untimely and partially unexhausted. (Dkt. No. 28.) Petitioner filed an opposition and Respondent filed a reply. (Dkt.

Nos. 31, 34.) Petitioner also moved for leave to amend the FAP and lodged a proposed Second Amended Petition. (Dkt. No. 35.) Respondent filed an opposition. (Dkt. No. 37.) Petitioner filed a reply. (Dkt. No. 41.)

On February 8, 2013, the court issued a Report and Recommendation, and recommended that Respondent's motion to dismiss be granted and Petitioner's motion for leave to amend the FAP be denied. (Dkt. No. 43.) Petitioner objected. Upon de novo review, the District Court entered an order accepting the Report and Recommendation and finding the FAP time barred. (Dkt. Nos. 48, 49.) On April 28, 2013, the Court entered judgment denying and dismissing the FAP with prejudice and denying Petitioner's request for a certificate of appealability. (Dkt. Nos. 50, 51.)

2. Appeal and Remand

Petitioner filed a notice of appeal. On April 22, 2014, the Ninth Circuit issued a certificate of appealability on whether the FAP had been properly dismissed as untimely. (Dkt. Nos. 52, 55.) On August 4, 2017, the appeal was stayed pending a decision in *Robinson v. Lewis*, No. 14-15125. (Dkt. No. 62.)[1] On September 16, 2020, the Ninth Circuit lifted the stay and granted Petitioner's motion for summary reversal, vacated this Court's judgment, and remanded for further proceedings. (Dkt. No. 63.)

3. Subsequent Proceedings in this Court

On remand, Petitioner moved for appointment of counsel. On October 21, 2020, the court appointed the Federal Public Defender's Office to represent him. (Dkt. No. 70.) Petitioner filed a renewed Motion for Leave to Amend the FAP. (Dkt. No. 77.) Respondent filed an opposition. (Dkt. No. 82.) Petitioner filed a

[1] On July 20, 2020, the California Supreme Court answered the question certified by the Ninth Circuit, adopting "a time period of 120 days as the safe harbor for gap delay." *Robinson v. Lewis*, 9 Cal. 5th 883, 901 (2020) ("A new [state habeas] petition filed in a higher court within 120 days of the lower court's denial will never be considered untimely due to gap delay.")

reply. (Dkt. No. 83.) On February 14, 2022, the court filed a Report and Recommendation that recommended the second motion to amend be denied. (Dkt. No. 84.) On March 10, 2022, the District Court entered an order accepting the Report and Recommendation. (Dkt. No. 86.) The court ordered Respondent to file an Answer to the FAP. Respondent filed an Answer. (Dkt. No. 102.) Petitioner filed a reply. (Dkt. No. 116.) The matter was taken under submission.

II.

STATEMENT OF FACTS

The California Court of Appeal set forth the following facts in its decision on direct appeal. To the extent an evaluation of Petitioner's claims for relief depends on an examination of the record, the Court has made an independent evaluation of the record specific to Petitioner's claims for relief.

> While [Petitioner] (a drug dealer) and two friends, Justin Turman and Richard Wright (the murder victim), were watching the television coverage of Hurricane Katrina at Wright's girlfriend's house, [Petitioner] and Turman engaged in a lengthy conversation about race. One of [Petitioner's] customers (Erika Breitkoph) called him on his cell phone several times but [Petitioner] did not answer and told Wright and Turman he did not want to be bothered. Breitkoph then called Wright on his cell phone and said she wanted some cocaine. Wright told her to come to the house and gave her directions.
>
> Wright and Turman went outside to smoke, leaving an angry [Petitioner] inside clenching his jaw. When Wright and Turman went back inside, [Petitioner] was "chopping" cocaine. A few minutes later, Breitkoph called Wright to tell him she was out front, and Wright relayed this information to [Petitioner] and Turman.
>
> In response, [Petitioner] stood up, reached into his waistband, pulled out a gun, and with shaking hands took a bullet from his pocket and loaded the gun. Turman asked, "Marlon, what are you doing, this is your friend."

[Petitioner] responded, "Shh. Be quiet. I have to do this real quick and I'll leave." Turman repeated his question, and [Petitioner] repeated his answer, then shot Wright five times, killing him. [Petitioner] fled.

[Petitioner], accompanied by counsel, surrendered to the police several weeks later, at which point counsel (out of [Petitioner's] presence) told Detective Lloyd Parry that [Petitioner] had dropped the gun in some bushes as he ran from the house. Counsel told [Petitioner] not to talk to the officers, told the officers not to talk to [Petitioner], then left the station. After counsel left, Detective Parry asked [Petitioner] what he had done with the gun. [Petitioner] responded that he didn't know anything about a gun and that his lawyer would answer any questions.

[Petitioner] was arrested and charged, and at trial the People presented evidence of the facts summarized above. In defense, [Petitioner] testified that he was "high as hell," that his conversation with Turman was "heated," that Turman and Wright had used cocaine when they returned to the house after smoking outside, and that Wright had then made derogatory remarks about the African-American victims of the hurricane ("fuck the struggle, it doesn't matter"). [Petitioner] "couldn't clearly think then at that moment," got up, pulled out his gun, and shot Wright. Later, he believed he was saving the lives of others "[t]housands of miles away in New Orleans." [Petitioner] fled, tossing the gun as he ran, but stopped two blocks away by some bushes and went to sleep. He wandered around homeless until he surrendered. A defense psychiatrist (Ronald Markman, M.D.) testified that [Petitioner] abused drugs and alcohol and suffered from adult anti-social behavior. In rebuttal, Detective Parry testified about [Petitioner's] post-arrest statement that he "didn't know anything about a gun."

(LD 3 at 2-4.)[2]

III.

PETITIONER'S CLAIMS[3]

I. The trial court violated Petitioner's rights under the Fifth, Sixth, and Fourteenth Amendments, as well as the California Constitution, by admitting his involuntary, un-*Mirandized* custodial statement to police, and the prosecutor impermissibly commented on Petitioner's right to silence. (Dkt. No. 14-1 at 40-47.)

II. Trial counsel was ineffective by failing to object to admission of Petitioner's involuntary, un-*Mirandized* custodial statement on Sixth Amendment grounds. (*Id.* at 48-51.)

III. Appellate counsel was ineffective by failing to challenge admission of Petitioner's involuntary, un-*Mirandized* custodial statement on Fifth Amendment grounds and by failing to argue that trial counsel erred in neglecting to challenge its admission on Sixth Amendment grounds. (*Id.* at 52-55.)

IV. The trial court erred in denying Petitioner's mistrial motion based on the prosecutor's argument that the defense expert never testified Petitioner lacked malice aforethought when he killed Wright or, alternatively, in failing to instruct the jury on relevant California law prohibiting an expert from testifying about that issue. (*Id.* at 56-58.)

V. The prosecutor committed misconduct by arguing that Petitioner's expert did not testify on the ultimate issue of whether Petitioner intended to kill

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[2] Unless otherwise indicated, the Court uses the pagination generated by its Case Management/Electronic Case Filing system.

[3] This Report re-orders and renumbers the grounds for relief. Although the FAP asserts 38 grounds for relief, Petitioner has "withdraw[n]" Ground 26. (Dkt. No. 14-2 at 45.) Moreover, because the cumulative error claim alleged in Ground One encompasses most if not all of Petitioner's grounds for relief (*see* Dkt. No. 14-1 at 36-39), the court has re-ordered and renumbered that claim to be the FAP's last ground for relief.

Wright and then using the absence of such testimony to impeach his credibility and convince the jury to convict him of second degree murder. (*Id.* at 59-61.)

VI. Trial counsel was ineffective by failing to investigate and present evidence showing that Petitioner experienced a posttraumatic-stress-disorder-induced "flashback" that rendered him unconscious when he shot the victim. (*Id.* at 62-70.)

VII. Trial counsel was ineffective by pursuing an imperfect defense-of-others theory at trial rather than a posttraumatic-stress-disorder-induced-unconsciousness defense. (*Id.* at 71-72.)

VIII. Trial counsel was ineffective by failing to request jury instructions on voluntary manslaughter due to unconsciousness brought on by posttraumatic stress disorder. (*Id.* at 73-78.)

IX. The trial court erred in failing to sua sponte instruct the jury on involuntary manslaughter as a lesser included offense of second degree murder, and the prosecutor erred in failing to ensure that the instruction was given. (*Id.* at 79-80; Dkt. No. 14-2 at 1-4.)

X. The trial court erred in failing to instruct the jury on unconsciousness caused by intoxication as both a lesser included offense and defense to second degree murder. (*Id.* at 5-7.)

XI. Appellate counsel was ineffective in failing to assert that the trial court erred in not instructing the jury on "unconsciousness caused by intoxication" as a lesser included offense to second degree murder. (*Id.* at 5-7, 11-13.)

XII. Appellate counsel was ineffective because he did not assert an ineffective-assistance-of-trial-counsel claim based on trial counsel's failure to investigate and request jury instructions on involuntary manslaughter due to unconsciousness. (*Id.* at 11-13.)

XIII. Trial counsel was ineffective in failing to move to suppress evidence that was seized from Petitioner's home. (*Id.* at 14-15.)

XIV. Trial counsel was ineffective in failing to inform Petitioner of the potential immigration consequences to pleading not guilty and proceeding to trial. (*Id.* at 16-17.)

XV. Trial counsel was ineffective in misrepresenting the potential sentence Petitioner faced if the jury convicted him of murder and mischaracterizing the chances that the jury would find him guilty of that crime. (*Id.* at 18-20.)

XVI. The prosecutor failed to disclose exculpatory statements the investigating detective made about Petitioner's mental health. (*Id.* at 21-22.)

XVII. The prosecutor failed to disclose exculpatory information that would have undermined Turman's testimony. (*Id.* at 23-25.)

XVIII. The prosecutor knowingly presented false testimony from Turman. (*Id.* at 26-28.)

XIX. The prosecutor failed to disclose exculpatory evidence concerning threats the investigating detective made to Breitkoph to force her to testify against Petitioner. (*Id.* at 29-31.)

XX. The prosecutor committed misconduct by knowingly introducing coerced testimony from Breitkoph and tampering with the shirt Petitioner wore when he murdered Wright. (*Id.* at 32-33.)

XXI. The prosecutor failed to disclose exculpatory information concerning tampering with the shirt Petitioner wore when he murdered Wright. (*Id.* at 34-35.)

XXII. The prosecutor committed misconduct in her closing argument by ridiculing Petitioner's imperfect defense-of-others theory. (*Id.* at 36-37.)

XXIII. The prosecutor committed misconduct in her closing argument by arguing motives for Wright's murder that had no basis in the evidence at trial. (*Id.* at 38-40.)

XXIV. The prosecutor committed misconduct in her closing argument by referring to facts and evidence that had been ruled inadmissible. (*Id.* at 41-44.)

XXV. The prosecutor committed misconduct in her closing argument by commenting on the reasons why Wright's mother was not present at trial and displaying to the jury a photograph of Wright that had not been admitted at trial. (*Id.* at 46-47.)

XXVI. The prosecutor committed misconduct in her closing argument by misstating her burden to prove that Petitioner did not commit voluntary manslaughter. (*Id.* at 48-49.)

XXVII. Trial counsel was ineffective in failing to request and use undisclosed exculpatory information and to order laboratory testing on the shirt that Petitioner wore when he shot Wright. (*Id.* at 50-52.)

XXVIII. Appellate counsel was ineffective in failing to assert grounds 16 through 26 on appeal. (*Id.* at 53-54.)

XXIX. The trial court violated Petitioner's right to confrontation by allowing the court reporter to read back testimony to the jury without obtaining a waiver of his right to be present during the readback. (*Id.* at 55-56.)

XXX. The trial court violated the Double Jeopardy Clause by imposing an unauthorized 25-years-to-life sentence based on Petitioner's discharging a firearm in murdering Wright. (*Id.* at 57-58.)

XXXI. The trial court erroneously imposed a restitution fine without first determining Petitioner's ability to pay it. (*Id.* at 59-61.)

XXXII. The trial court erred in increasing Petitioner's sentence based on facts and aggravating factors that were not found true by the jury. (*Id.* at 62-64.)

XXXIII. Trial counsel was ineffective at sentencing by failing to raise several meritorious challenges to Petitioner's 40-years-to-life sentence and object to the imposition of various fines. (*Id.* at 65-69.)

XXXIV. Appellate counsel was ineffective in failing to assert an ineffective-assistance-of-trial-counsel claim based on trial counsel's performance during sentencing. (*Id.* at 70-74.)

XXXV. Petitioner's fifteen-years-to-life sentence for second degree murder violates the Eighth Amendment's ban on cruel and unusual punishment. (*Id.* at 75.)

XXXVI. The prosecutor failed to prove that Petitioner committed second degree murder, and appellate counsel was ineffective by failing to challenge the sufficiency of the evidence on appeal. (*Id.* at 76-77.)

XXXVII. The cumulative impact of the trial errors alleged above violated Petitioner's rights to due process and a fair trial. (Dkt. No. 14-1 at 36-40.)

IV.

STANDARD OF REVIEW

The petition was filed after enactment of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). Therefore, the court applies the AEDPA in reviewing the Petition. *See Lindh v. Murphy*, 521 U.S. 320, 336 (1997).

A federal court may not grant a petition for writ of habeas corpus by a person in state custody with respect to any claim that was adjudicated on the merits in state court unless it (1) "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States"; or (2) "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d); *Harrington v. Richter*, 562 U.S. 86, 98 (2011).

"'[C]learly established Federal law' . . . is the governing legal principle or principles set forth by the Supreme Court at the time the state court rendered its decision." *Lockyer v. Andrade*, 538 U.S. 63, 71-72 (2003); *see Greene v. Fisher*, 565 U.S. 34, 40 (2011) (examining Supreme Court precedent as of the date of the last state court decision on the merits of the claim). Clearly established federal law includes only the holdings, as opposed to the dicta, of Supreme Court decisions. *White v. Woodall*, 134 S. Ct. 1697, 1702 (2014).

A state court's decision is "contrary to" clearly established Federal law if (1) it applies a rule that contradicts governing Supreme Court law; or (2) it "'confronts a set of facts . . . materially indistinguishable'" from a decision of the Supreme Court but reaches a different result. *Early v. Packer*, 537 U.S. 3, 8 (2002) (per curiam) (citation omitted). A state court's decision cannot be contrary to clearly established Federal law if there is a lack of holdings from the Supreme Court on a particular issue. *See Carey v. Musladin*, 549 U.S. 70, 77 (2006).

Under the "unreasonable application prong" of section 2254(d)(1), a federal court may grant habeas relief "based on the application of a governing legal principle to a set of facts different from those of the case in which the principle was announced." *Lockyer*, 538 U.S. at 76; *see also Rompilla v. Beard*, 545 U.S. 374, 380 (2005) ("An 'unreasonable application' occurs when a state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of petitioner's case.") (citation and some quotation marks omitted).

"[F]or a federal court to find a state court's application of [Supreme Court] precedent 'unreasonable,' the state court's decision must have been more than incorrect or erroneous." *Wiggins v. Smith*, 539 U.S. 510, 520 (2003). "The state court's application must have been 'objectively unreasonable.'" *Id.* at 520-21 (citation omitted).

"Under § 2254(d), a habeas court must determine what arguments or theories supported or, [in the case of an unexplained denial on the merits], could have supported, the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this [Supreme] Court." *Harrington*, 562 U.S. at 102. "[A] state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law

beyond any possibility for fairminded disagreement." *Id.* at 103.

"Factual determinations by state courts are presumed correct absent clear and convincing evidence to the contrary, § 2254(e)(1), and a decision adjudicated on the merits in a state court and based on a factual determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state-court proceeding, § 2254(d)(2)." *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003).

In applying these standards, this court looks to the last reasoned state court decision. *See Ylst v. Nunnemaker*, 501 U.S. 797, 803 (1991); *see also Wilson v. Sellers*, 138 S. Ct. 1188, 1192 (2018).

V.

DISCUSSION

The California Court of Appeal's decision on direct appeal is the last reasoned decision on Grounds 1, 5 and 25. The Superior Court's decision on habeas review is the last reasoned decision on Grounds 6, 8 through 11, and 12. To the extent the state courts adjudicated those grounds on their merits, this court's review is limited by AEDPA deference. *See Richter*, 562 U.S. at 100.

The California Supreme Court summarily denied Grounds 2, 3, 7, 13 through15, 27, 28, 33, 34, and part of Ground 36. (LD 10.) As to those grounds, the court conducts an independent review to determine whether the decision was contrary to, or involved an unreasonable application of, "clearly established" Supreme Court precedent. *Walker v. Martel*, 709 F.3d 925, 939 (9th Cir. 2013); *Haney v. Adams*, 641 F.3d 1168, 1171 (9th Cir. 2011).

Other than the claims raised on direct appeal, Petitioner claims of error based exclusively on the trial record – that is, claims of error not alleging ineffective assistance of counsel, which concern matters outside the trial record, *see People v. Mendoza Tello*, 15 Cal. 4th 264, 266-67 (2010)) – in the habeas petition he filed in Superior Court. (LD 5.) The Superior Court found that each of

those claims, other than those alleged in Grounds 9 and 10, was procedurally barred because they could have been raised on appeal but were not. (LD 6 at 8-9.) The California Supreme Court's silent denial of Petitioner's subsequent habeas petition raising those same claims presumably adopted the Superior Court's reasoning. *See Wilson*, 138 S. Ct. at 1192. Respondent therefore argues that all of Petitioner's trial-record based claims that were not raised on appeal are procedurally barred in this action. Petitioner argues that the Superior Court's stated reason for denying those claims is not sufficiently adequate to procedurally bar any of his claims here and, alternatively, any procedural bar should be excused because appellate counsel performed deficiently in failing to raise them on appeal. The parties also dispute whether Grounds 16, 19, 23, and 27 are exhausted. The Court need not resolve these issues because all of Petitioner's claims clearly fail on their respective merits. *See Lambrix v. Singletary*, 520 U.S. 518, 524-25 (1997); *see also Stevens v. Davis*, 25 F.4th 1141, 1165 (9th Cir. 2022) (declining to address argument that *Batson* claims were exhausted and rejecting them on the merits under *de novo* review).

When state courts decline to decide a federal constitutional claim on the merits, this court considers that claim under the *de novo* standard of review. *Cone v. Bell*, 556 U.S. 449, 472 (2009); *see also Lewis v. Mayle*, 391 F.3d 989, 996 (9th Cir. 2004).

A. GROUND ONE: Admission of Petitioner's Postarrest Statement to Police

Petitioner contends that the trial court violated his rights under the Fifth, Sixth, and Fourteenth Amendments by admitting his involuntary, un-*Mirandized* custodial statement to police that he "didn't know anything about a gun."[4] (Dkt.

[4] In part (b) of his first ground for relief, Petitioner contends that the prosecutor impermissibly commented on his postarrest silence by questioning him about what he told police about the gun's whereabouts. (Dkt. No. 14-1 at 44-47.) The Court addresses that claim below, when it addresses Petitioner's

No. 14-1 at 40-47; *see also* LD 3 at 3.) As set forth in more detail above, Petitioner made the statement in response to a question from the investigating officer. According to Petitioner, the detective had no right to ask anything because he had not been advised of *Miranda* rights and trial counsel explicitly advised the detective not to talk to Petitioner, which he maintains was a clear invocation of his right to counsel. (Dkt. No. 14-1 at 40-41.) Petitioner argues the statement was not admissible at trial for any purpose.

1. The California Court of Appeal's Decision

The California Court of Appeal rejected Petitioner's challenge to the admission of his postarrest statement to police, finding that the statement was properly admitted as rebuttal to Petitioner's testimony:

> Leaving to one side any issue about waiver, the issue fails on the merits because [Petitioner's] statement was properly admitted during rebuttal for impeachment purposes. (*People v. Brown* (1996) 42 Cal. App. 4th 461, 472-474 [a defendant who testifies inconsistently with a voluntary statement obtained in violation of *Miranda* may be impeached with the prior statement].) Because [Petitioner] testified that he "might have" thrown the gun into the bushes, and conceded that this fact would seem to be something important that he should have told the police, he was properly impeached with his prior inconsistent statement that he didn't know anything about the gun. (*Michigan v. Harvey* (1990) 494 U.S. 344, 351.)

(LD 3 at 4.)

2. Analysis

Before questioning a suspect in custody, law enforcement officials must inform him "that he has the right to remain silent, that anything he says can be

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numerous other prosecutorial-misconduct grounds for relief.

used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires." *Miranda v. Arizona*, 384 U.S. 436, 478-79 (1966). In *Edwards v. Arizona*, 451 U.S. 477,478-79 (1981), the Court held that "an accused . . . having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities . . . unless the accused himself initiates further communication, exchanges, or conversations with the police." Statements obtained in violation of *Miranda* must be excluded from the prosecutor's case-in-chief at a criminal trial. *Miranda*, 384 U.S. at 444.

Although inadmissible in the prosecution's case-in-chief, statements obtained in violation of *Miranda* may be used to impeach a defendant who testifies inconsistently with his pretrial statements, as long as those statements were voluntary. *See Harris v. New York*, 401 U.S. 222, 224-26 (1971); *Pollard v. Galaza*, 290 F.3d 1030, 1033 (9th Cir. 2002) ("Although a statement, taken in violation of *Miranda*, may not be used substantively in the prosecution's case-in-chief, such a statement, if voluntary, may be used for impeachment should the [d]efendant testify inconsistently."). "If a defendant exercises his right to testify on his own behalf, he assumes a reciprocal 'obligation to speak truthfully and accurately.'" *Michigan v. Harvey*, 494 U.S. 344, 351 (1990) (quoting *Harris*, 401 U.S. at 225). If, on the other hand, the defendant's statement was obtained in a manner that renders it involuntary, it must be excluded for all purposes. *Id.*; *Pollard*, 290 F.3d at 1034.

To determine whether a statement is involuntary, a court asks "'whether [the] defendant's will was overborne by the circumstances surrounding the giving of a confession,' considering 'the totality of all the surrounding circumstances – both the characteristics of the accused and the details of the interrogation.'" *Balbuena v. Sullivan*, 980 F.3d 619, 629 (9th Cir. 2020) (quoting *Dickerson v.*

United States, 530 U.S. 428, 434 (2000)). "An *Edwards* violation, however, does not on its own render subsequent confessions involuntary." *Bradford v. Davis*, 923 F.3d 599, 616 (9th Cir. 2019) (citing *Oregon v. Elstad*, 470 U.S. 298, 308-10 (1985)). As the Ninth Circuit observed, the Supreme Court "has held that statements taken in violation of *Edwards* may still be used for impeachment, which means that such statements are not presumed to be involuntary by virtue of the *Edwards* violation alone." *Id.* (citing *Oregon v. Hass*, 420 U.S. 714, 722-23 (1975); *see Harvey*, 494 U.S. at 350-51; *Mincey v. Arizona*, 437 U.S. 385, 398 (1978)).

The Court of Appeal reasonably rejected Petitioner's challenge to the admission of his un-*Mirandized*, postarrest statement. Petitioner testified that after the shooting, he ran and "might have tossed" the gun he used to shoot Wright into some bushes. (4 RT at 1628.) That testimony contradicted his un-*Mirandized* postarrest statement to police that he "didn't know anything about a gun and that his attorney would answer any questions." (5 RT at 1884.) Consequently, the prosecutor was free to use Petitioner's un-*Mirandized* postarrest statement to impeach his contradictory testimony at trial.[5]

Petitioner has not shown that his postarrest statement was involuntary. Although he contends the investigating detective's failure to respect his invocation of his right to counsel renders his subsequent statement involuntary, the Ninth Circuit has rejected that argument. See *Bradford*, 923 F.3d at 616 (citing *Elstad*, 470 U.S. at 308-10). Because Petitioner points to no other evidence suggesting his postarrest statement was involuntary, his argument fails.

Petitioner's attempt to equate the investigating detective's singular question

[5] It is of no moment that, as Petitioner claims, his un-*Mirandized* statement reflected his belief that counsel had already relayed to the detective the relevant information about the gun. As discussed above, trial counsel told the investigating detective that Petitioner had dropped the gun in some bushes as he ran from Wright's home.

about the gun's whereabouts to the two-step interrogation technique that the Supreme Court condemned in *Missouri v. Seibert*, 542 U.S. 600 (2004), is unpersuasive. In *Seibert*, the Supreme Court held that "where officers deliberately use a two-step interrogation technique in which they elicit an unwarned confession, administer the *Miranda* warnings and obtain a waiver of *Miranda* rights, then elicit a repeated confession," a court generally must suppress the post-warning statements. *See United States v. Reyes-Bosque*, 596 F.3d 1017, 1031 (9th Cir. 2010) (citations and quotations omitted). This technique, according to the Supreme Court, renders *Miranda* warnings ineffective and "thwarts *Miranda*'s purpose of reducing the risk that a coerced confession w[ill] be admitted." *Seibert*, 542 U.S. at 611, 617.

Here, the investigating detective did not employ the two-step interrogation procedure prohibited by *Seibert*. To the contrary, the detective never advised Petitioner of his *Miranda* rights (*see* 5 RT at 1873), much less obtained a waiver of those rights and incriminating statement after initially eliciting his un-*Mirandized* statement concerning the gun. Nothing in the record suggests that the detective deliberately withheld *Miranda* warnings to gain a tactical advantage in questioning Petitioner. The detective explained that he questioned Petitioner about the gun's whereabouts because it posed a risk to public safety. (*Id.*) Petitioner's reliance on *Seibert* is misplaced.

Accordingly, the state court's decision rejecting Petitioner's claims was not an unreasonable application of, nor contrary to, clearly established United States Supreme Court precedent, and was not an unreasonable determination of facts. Petitioner is not entitled to relief on this claim.

B. GROUND FOUR: Denial of Petitioner's Mistrial Motion

Petitioner contends that the trial court erred in denying his motion for mistrial based on the prosecutor's improper argument concerning the testimony of Petitioner's expert, Dr. Markman. Petitioner contends that the prosecutor

argued Dr. Markman never testified that Petitioner did not have malice aforethought when he killed Wright. That argument, according to Petitioner, was improper because Cal. Penal Code § 29 prohibits experts from testifying about whether a criminal defendant had the requisite mental state to commit any charged crime.[6] Petitioner contends the trial court should have granted his motion for a mistrial or, alternatively, instructed the jury that Cal. Penal Code § 29 prohibited Dr. Markman from testifying about whether Petitioner had the requisite mental state to commit murder.

No state court has addressed the merits of this claim. As explained below, the claim is not cognizable on federal habeas review and fails under de novo review in any event.

(1) Relevant Facts

Dr. Markman testified as an expert for the defense. (*See* 4 RT at 1220). Among other things, he testified about how a person's use of illegal narcotics – such as the ones Petitioner admitted to having regularly used and having used on the night he shot Wright (*see* 4 RT at 1593, 1611-17, 1659) – could cause the person to experience a "break with reality," dramatically misinterpret a situation, and suffer memory loss (*id.* at 1252, 1502-1504). He also testified that using such narcotics "c[ould] produce a clinical condition in an individual that is indistinguishable from a psychotic condition called schizophrenia and generally lasts for the time under which the person is under the influence" and "sometimes beyond." (*Id.* at 1503.) Under cross-examination, Dr. Markman conceded that his testimony was not "specific to [Petitioner]" and that he had no independent

[6] Cal. Penal Code § 29 provides: "In the guilt phase of a criminal action, any expert testifying about a defendant's mental illness, mental disorder, or mental defect shall not testify as to whether the defendant had or did not have the required mental states, which include, but are not limited to, purpose, intent, knowledge, or malice aforethought, for the crimes charged. The question as to whether the defendant had or did not have the required mental states shall be decided by the trier of fact."

knowledge of what occurred when Petitioner shot Wright because he was not there. (4 RT at 1546.)

During closing argument, defense counsel cited Dr. Markman's testimony and Petitioner's admissions about using substantial amounts of illegal narcotics to argue that Petitioner was in a "delusion[al]" and "paranoid" state when he shot Wright. (5 RT at 2109.) In pertinent part, counsel argued:

> You know, this case is about Richard Wright and [Petitioner] and what happened and why it happened. And I'll tell you why it happened. It happened because my client, like many other people, got himself involved with drugs.
>
> . . .
>
> The evidence that you got from a medical doctor, from a psychiatrist about the effects of drug use, of cocaine and methamphetamine and even mixing in some marijuana and alcohol, is that you can lose it. That it does create delusions. That you can become ultra paranoid. That's not good.
>
> . . .
>
> Do you realize that it is just as reasonable for [Petitioner] to have reacted the way he did due to those drugs? [¶] Because when you're delusional, it doesn't matter whether or not the reality of the situation is you heard or saw – and I mean real life now. I'm not talking about some deluded state of mind – whether or not he heard – actually heard – in other words, whether Mr. Wright actually said anything. Because if you believe it, you're deluded, if you're freaking out and you snapped, you hear things. You imagine things that aren't there. That didn't happen. That weren't said. But just because you're off, just because you're not really with us all doesn't mean that in your deluded, crazed drug-induced mind you do not honestly

> believe what you perceive to be going on. Whether or not it's actually going on.
>
> . . .
>
> There's no motive here and there's no way possible for [the prosecutor] to rebut, to overcome her burden that [Petitioner] was not acting in a delusional state when he believed that he was acting in the defense of those people in New Orleans, or Katrina . . . The issue is if he believed it. Why would he believe something so ludicrous? So ridiculous. Why? Because when people take those kind of drugs, they snap. They can snap. They can, you know, suffer delusions and hallucinations and all different kind of things. That – unfortunately that's the case.

(5 RT at 2108-19.)

In rebuttal, the prosecutor made the following statement just before finishing her argument:

> What he told Dr. Markman. And what he didn't tell Dr. Markman. And Dr. Markman, how he never told you that [Petitioner] had a delusional break, a snap, a hallucination. [¶] We talk in generalities. Drugs? Maybe. Possibly. To the level of voluntary manslaughter? Absolutely not. Not in this case. Not this time.

(*Id.* at 2136.)

When the prosecutor finished her rebuttal, defense counsel argued that the prosecutor had effectively stated that Dr. Markman had not testified to the ultimate issue of Petitioner's ability to form the intent to commit murder, which Cal. Penal Code § 29 prohibited Dr. Markman from doing. (*Id.* at 2138.) Defense counsel moved for a mistrial or, alternatively, to instruct the jury on Cal. Penal Code § 29. (*Id.* at 2143.) After reviewing the transcript, the trial court concluded that the prosecutor's comments were not improper. (*Id.*) In pertinent

part, the court stated:

> It [was] a very brief insignificant comment. It is a fair statement of the evidence. Dr. Markman did not testify about a specific delusional break, snap or hallucination. [The prosecutor] was contrasting [trial counsel's] argument to the evidence that was before the jury. She's entitled to do that. This was not a situation – and Dr. Markman, even if he had been asked that question, would not have been able to say, yes, I can tell you that on this occasion under these circumstances [Petitioner] was undergoing a hallucination, a snap or delusional break. No one's going to be able to make that kind of testimony. Penal Code section 29 prohibits Dr. Markman from testifying as to whether [Petitioner] did or did not have the required mental states in this case – intent, malice aforethought or whether he deliberated and premeditated. Those are prohibited by Penal Code section 29.
>
> This would be a different situation if the prosecutor had said – had made an argument along the lines of if [Petitioner] truly had the mental state that counsel hypothesized or counsel argued to you, Dr. Markman would have come in here and told us that [Petitioner] lacked the ability to premeditate or that he, in fact, did not harbor malice aforethought. That would be an improper argument. Simply pointing out to the jury the evidence before them did not include a specific statement by Dr. Markman that [Petitioner] had delusional break, a snap, a hallucination, I think is not only not misconduct, but I think it's a proper comment on the state of the evidence.

(*Id.* at 2146-47.) Accordingly, the court denied the request for a mistrial. (*Id.* at 2147.) The court also denied the request that the jury be instructed "about the intricacies of California Penal Code section 29," because "it would be more

confusing than anything else." (*Id.*)

2. Applicable Federal Law and Analysis

Petitioner is not entitled to relief on his claim that the trial court erred in denying his motion for mistrial. As an initial matter, the claim is not cognizable on federal habeas review. Federal courts may grant a writ of habeas corpus only if the petitioner's conviction or sentence violates "the Constitution or laws or treaties of the United States." § 2254(a); *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991) (noting "it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions"). Whether a criminal defendant is entitled to a mistrial exclusively concerns state law, and thus denial of a mistrial motion cannot be the basis for federal habeas relief. *See*, *e.g.*, *Mitchell v. Fox*, No. 2:18-cv-0985 WBS AC, 2023 WL 2774697, at *8 (C.D. Cal. Apr. 4, 2023) (denying claim that court erred in denying motion for mistrial because it "turn[ed] on a purely state law question – whether the motion for a mistrial was correctly decided – and state law questions are not cognizable in federal habeas" (citation omitted)), *accepted by* 2023 WL 3467141 (C.D. Cal. May 15, 2023); *Chima v. Pfeiffer*, No. CV 21-7035 VAP (AS), 2022 WL 527851, at *7 (C.D. Cal. Jan. 21, 2022) (same; collecting cases), *accepted by* 2022 WL 523992 (C.D. Cal. Feb. 22, 2022); *McLaurin v. Sherman*, No. CV 17-2831 JVS (AS), 2018 WL 2759392, at *10 (C.D. Cal. May 11, 2018) (same), *accepted by* 2018 WL 2759386 (C.D. Cal. June 5, 2018); *Trejo v. Montgomery*, No. CV 13-1657 JVS (AJW), 2014 WL 1089071, at *9 (same). That Petitioner alludes to his right to due process is not sufficient to transform his state-law claim into a federal one. *See Gray v. Netherland*, 518 U.S. 152, 163 (1996) (explaining petitioner may not convert state-law claim into federal one by making general appeal to constitutional guarantee); *see also Cacoperdo v. Demosthenes*, 37 F.3d 504, 507 (9th Cir. 1994) (habeas petitioner's reference to Due Process Clause was insufficient to render his claims viable under 14th Amendment).

Moreover, even if Petitioner had alleged a cognizable due process challenge to the denial of his mistrial motion, it would fail. At bottom, he asserts that a mistrial was warranted because the prosecutor skirted Cal. Penal Code § 29 by arguing that Dr. Markman never testified Petitioner had a delusional break, snap, or hallucination on the night he shot Wright. The trial court found that the prosecutor's argument did not run afoul of or implicate § 29, and this court is bound by that interpretation of California law on federal habeas review. *See Waddington v. Sarausad*, 555 U.S. 179, 192 n.5 (2009) ("[W]e have repeatedly held that 'it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions.'") (quoting *McGuire*, 502 U.S. at 67-68); *Bradshaw v. Richey*, 546 U.S. 74, 76 (2006) (per curiam) ("[A] state court's interpretation of state law . . . binds a federal court sitting in habeas corpus."). Any due process challenge to the denial of Petitioner's mistrial motion fails.

Petitioner's claim that the trial court erred in refusing to instruct the jury on § 29 fares no better. It is likewise not cognizable on federal habeas review because it exclusively concerns state law. Indeed, it assumes that the instruction was necessary because the prosecutor's rebuttal argument amounted to a violation of § 29. Even if the Court were not bound by the trial court's decision, Petitioner cites no authority for the proposition that due process requires a jury be instructed on state law concerning the limitations of expert testimony. As the trial court observed, instructing the jury on "the intricacies of California Penal Code section 29 . . . would [have] be[en] more confusing than anything else." (5 RT at 2147.)

Accordingly, Petitioner is not entitled to habeas relief on this claim.

C. GROUNDS TWO, THREE, SIX through EIGHT, 12 through 15, and 30 through 34: Trial and Appellate Counsels' Performance

Petitioner asserts numerous challenges to the performance of his trial

counsel and appellate counsel.[7] (*See* Dkt. No. 14-1 at 48-55, 62-78; Dkt. No. 14-2 at 11-20, 57-74.)

1. Applicable Federal Law

The standards for assessing the performance of trial and appellate counsel are the same. *See Evitts v. Lucey*, 469 U.S. 387, 395-99 (1985); *Cockett v. Ray*, 333 F.3d 938, 944 (9th Cir. 2003). To succeed on a claim of ineffective assistance of counsel, Petitioner must demonstrate that his attorney's performance was deficient and that the deficiency prejudiced the defense. *Wiggins*, 539 U.S. at 521; *Strickland* , 466 U.S. at 687. Petitioner bears the burden of establishing both components. *Williams v. Taylor*, 529 U.S. 362, 390-91 (2000); *Smith v. Robbins*, 528 U.S. 259, 285-86 (2000).

"'Judicial scrutiny of counsel's performance must be highly deferential,' and 'a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.'" *Knowles v. Mirzayance*, 556 U.S. 111, 124 (2009) (citation omitted). A petitioner "must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Strickland*, 466 U.S. at 689. (citation omitted). "'The proper measure of attorney performance remains simply reasonableness under prevailing professional norms.'" *Knowles*, 566 U.S. at 124 (citation omitted). *Strickland* "calls for an inquiry into the objective reasonableness of counsel's performance, not counsel's subjective state of mind." *Richter*, 562 U.S. at 110. In assessing whether appellate counsel performed reasonably, reviewing courts must be mindful that counsel has no constitutional duty to raise an issue when in the attorney's judgment it has little or no likelihood of success. *See*

[7] Some of Petitioner's ineffective-assistance claims correspond to other independent claims for relief. When appropriate, the Court addresses those ineffective-assistance claims when it addresses the independent corresponding claim rather than in this section. Conversely, when appropriate, the Court addresses some of Petitioner's independent claims that correspond to his ineffective-assistance claims in this section.

McCoy v. Wisconsin, 486 U.S. 429, 436 (1988).

To establish prejudice, a petitioner must establish a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* "In assessing prejudice under *Strickland*, the question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently. Instead, *Strickland* asks whether it is 'reasonably likely' the result would have been different. This does not require a showing that counsel's actions 'more likely than not altered the outcome,' but the difference between *Strickland*'s prejudice standard and a more-probable-than not standard is slight and matters 'only in the rarest case.' The likelihood of a different result must be substantial, not just conceivable." *Richter*, 562 U.S. at 111-12.

A court need not address both deficiency and prejudice if a petitioner makes an insufficient showing on one. *Strickland*, 466 U.S. at 697. "The question is whether there is any reasonable argument that counsel satisfied Strickland's deferential standard." *Richter*, 562 U.S. at 105.

2. Application

As an initial matter, all of Petitioner's ineffective-assistance claims fail for lack of evidence because they are not supported by a declaration from trial or appellate counsel concerning their actions (or any evidence that Petitioner unsuccessfully sought one) and, as related below, reasons apparent from the record could explain counsels' decisions not to raise the challenges or defenses Petitioner has identified.[8] *See Dunn v. Reeves*, 141 S. Ct. 2405, 2413 (2021)

[8] There is a posttrial communication with trial counsel concerning Petitioner's request for his legal file (*see* DKt. No. 14-3 at 48-49), which trial counsel provided in October 2011 (*Id.* at 50).

(per curiam) (failure to submit declaration or elicit testimony from trial counsel about his actions defeated ineffective-assistance claim when record suggested strategic reasons for challenged actions because "silent record cannot discharge a petitioner's burden"); *Gentry v. Sinclair*, 705 F.3d 884, 900 (9th Cir. 2013) (state court was not unreasonable in concluding trial counsel's performance was not deficient as to particular ineffective-assistance claim when petitioner presented counsel's affidavit only to "support . . . other ineffective assistance claims" and "had no evidence" to support first claim).

Moreover, Petitioner cannot show that trial or appellate counsel performed deficiently as to any of his allegations of error or that, assuming error, he suffered prejudice as result. His allegations of attorney error are addressed in turn below.

a. Failing to Challenge Admission of Petitioner's Postarrest Custodial Statement on Sixth Amendment Grounds

In his second ground for relief, Petitioner contends that trial counsel was ineffective by failing to argue that his postarrest, un-*Mirandized* custodial statement to the investigating detective was obtained in violation of his Sixth Amendment right to counsel. (*See* Dkt. No. 14-1 at 48-51.) Although he concedes counsel unsuccessfully objected to the statement on Fifth Amendment grounds, Petitioner maintains that the trial court would have excluded the statement if counsel had objected on Sixth Amendment grounds. In his third ground for relief, Petitioner faults appellate counsel for failing argue on appeal that the admission of his postarrest statement violated his Fifth Amendment rights and that trial counsel erred in neglecting to challenge its admission on Sixth Amendment grounds. (*Id.* at 52-55.)

The California Supreme Court rejected both claims on the merits. (LD 10.)

It was not objectively unreasonable in rejecting either claim.[9] First, trial counsel could not have performed deficiently in failing to object to Petitioner's postarrest statement on Sixth Amendment grounds because his Sixth Amendment right to counsel had not yet attached when he made the statement. The Sixth Amendment right to counsel "does not attach until a prosecution is commenced." *United States v. Charley*, 396 F.3d 1074, 9th Cir. 2005). That occurs "at or after the initiation of adversary judicial criminal proceedings – whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." *Id*. No such adversarial proceedings had been commenced against Petitioner when he made the statement to the investigating detective. It would make no difference for purposes of the Sixth Amendment that Petitioner was represented by counsel when he was questioned about the gun. *See Moran v. Burbine*, 475 U.S. 412, 429-30 (1986) (Sixth Amendment right to counsel did not attach for murder suspect who had not yet been formally charged even though his sister had retained counsel for him and suspect had been placed in custodial interrogation). Thus, any Sixth Amendment objection to the admission of his postarrest statement was doomed to fail, and trial counsel did not perform deficiently in failing to make it. *See Kimmelman v. Morrison*, 477 U.S. 365, 375 (1986); *Boag v. Raines*, 769 F.2d 1341, 1344 (9th Cir. 1985) (counsel's failure to raise meritless argument does not constitute ineffective assistance).

Petitioner's related ineffective-assistance-of-appellate-counsel claim

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[9] Although the Superior Court did not address Petitioner's allegations of attorney error (other than those concerning counsel's failure to pursue a posttraumatic-stress-disorder-induced-unconsciousness defense (Dkt. No. 14-1 at 62-70, 73-78; Dkt. No. 14-2 at 11-13; LD 6 at 3-8), the California Supreme Court's silent denial of those claims represented an independent denial on their respective merits. *See Johnson v. Williams*, 568 U.S. 289, 293 (2013) (rebuttable presumption that silent rejection is on merits). The California Supreme Court's decision is the relevant decision for purposes of AEDPA review as to the bulk of Petitioner's ineffective-assistance claims. Regardless, for the reasons stated herein, each of Petitioner's ineffective-assistance claims fails even under de novo review. Accordingly, the Court alternatively rejects each of those claims for the reasons stated herein under that standard as well.

likewise fails. Although he faults appellate counsel for failing to argue that trial counsel erred by neglecting to object to his postarrest statement on Sixth Amendment grounds, such a claim would not have been proper on appeal. In California, claims of ineffective assistance of trial counsel should generally be raised on habeas review, not on appeal. *See People v. Salcido*, 44 Cal. 4th 93, 172 (2008) (collecting cases); *People v. Mendoza Tello*, 15 Cal. 4th 264, 266-67 (1997) (collecting cases). Appellate counsel did not perform deficiently in failing to raise a claim that trial counsel was constitutionally ineffective. *See, e.g., Rollins v. Sutton*, No. 5:17-cv-00321-VAP-JC, 2019 WL 6040416, at *7 (C.D. Cal. Oct. 10, 2019) (appellate counsel was not unreasonable in failing to raise ineffective-assistance-of-trial-counsel claims on direct appeal because California law provides that such claims must ordinarily be raised on collateral review), *accepted by* 2019 WL 6039942 (C.D. Cal. Nov. 13, 2019); *Brown v. Asuncion*, No. CV 18-8892-MWF (FFM), 2019 WL 4509207, at *20 (C.D. Cal. Apr. 12, 2019) (same "even if some of those allegations had merit"), *accepted by* 2019 WL 7037768 (C.D. Cal. Dec. 19, 2019).

In any event, appellate counsel argued that admission of Petitioner's postarrest statement violated his Sixth Amendment right to counsel (LD 14 at 29-36), and the Court of Appeal rejected it (LD 3 at 4). There is no reason to believe the Court of Appeal would have ruled any differently if appellate counsel had couched the Sixth Amendment challenge as an ineffective-assistance-of-trial-counsel claim. Finally, although appellate counsel did not assert a Fifth Amendment challenge to the postarrest statement on appeal, Petitioner suffered no prejudice because, as related above, the statement was admissible for impeachment purposes, as the Court of Appeal noted in rejecting Petitioner's Sixth Amendment challenge. (*Id.*) Consequently, any Fifth Amendment claim on appeal would have failed.

Petitioner is therefore not entitled to habeas relief on these claims.

b. Failing to Pursue a Posttraumatic-Stress-Disorder-Induced-Unconsciousness Defense

Several of Petitioner's grounds for relief concern his trial counsel's failure to pursue defenses based on unconsciousness. In Ground Six, he contends trial counsel was ineffective by failing to investigate and present evidence showing Petitioner experienced a posttraumatic-stress-disorder-induced "flashback" that rendered him unconscious when he shot the victim. (Dkt. No. 14-1 at 62-70.) According to Petitioner, counsel should have "connected" his posttraumatic-stress disorder with his "early drug and alcohol use" to show he suffered from impaired judgment and, as a result, was unconscious when he shot Wright. (*Id.*) Similarly, in Ground Eight, he faults trial counsel for failing to investigate and request jury instructions on voluntary manslaughter due to unconsciousness. (*Id.* at 73-78.) In Ground 12, he asserts that appellate counsel was ineffective for failure to assert an ineffective-assistance-of-trial-counsel claim based on trial counsel's failure to investigate and request jury instructions on voluntary manslaughter due to unconsciousness. (Dkt. No. 14-2 at 11-13.)

The Superior Court rejected these claims on the merits. (LD 6 at 3-8.) As explained below, the Superior Court's rejection of these claims was neither an unreasonable application of, nor contrary to, clearly established United States Supreme Court precedent, and was not an unreasonable determination of facts.

(1) Petitioner's Showing of Posttraumatic-Stress Disorder

Petitioner cites several pieces of evidence that he believes show he suffered from posttraumatic-stress disorder that caused him to operate in a state of unconsciousness when he killed Wright. First, he maintains he developed posttraumatic-stress disorder as a four- or five-year-old child in El Salvador when he fell and fractured his skull while running away from an "angry dog." (Dkt. No. 14-1 at 69.) He asserts that the fall left him unconscious but does not remember

for how long. (*Id.*) The resulting damage, according to Petitioner, "could've" caused damage to his frontal lobes. (*Id.*). Although he does not contend – and nothing in the record suggests – that he informed counsel about the accident or any resulting posttraumatic-stress disorder, he asserts that his skull fracture is "visible on [his] forehead." (*Id.* at 70.)

Second, he contends that being a child in war-torn El Salvador in the 1980s exacerbated his posttraumatic-stress disorder. He claims that he witnessed gunfire and grenade blasts as a child and longed for the "screams to stop" and for "people to stop being killed." (Dkt. No. 14-3 at 17.) That, coupled with his parents being separated, caused him to become "withdrawn, anxious, [and] irritable," and have an "irrational fear of death." (*Id.*) He self-medicated with alcohol and drugs as a teenager and continued to do so until he killed Wright. (*Id.*) He claims that on the night he killed Wright, the images on television of the victims of Hurricane Katrina brought his childhood experiences to the fore, which, along with his drug use, contributed to a posttraumatic-stress-induced state of unconsciousness. (Dkt. No. 14-1 at 63.)

Third, Petitioner cites a one-page letter from Dr. Rudnick in which he declares that Petitioner's case "has merit" and posits that Petitioner "might qualify for a diagnosis of chronic PTSD" based his childhood experiences. (*Id.* at 77; *see* Dkt. No. 14-3 at 13.) Although Dr. Rudnick did not describe the "childhood experiences" to which he referred, he presumably referred to Petitioner's description of the images he saw and events he experienced as a child.

(2) The Superior Court's Opinion

The Superior Court rejected these claims on the merits as follows:

> Because there was no evidence at trial that [Petitioner] was unconscious when he shot Wright, his attorney was not ineffective in not

asking for CALCRIM 626.[10] Nor did the trial court err in not giving the instruction sua sponte. All of the evidence at trial – including the testimony of defense expert Dr. Markman and of [Petitioner] himself – was that [Petitioner] was conscious at the time of the shooting. [Petitioner] admitted he intentionally shot Wright, but he claimed he did it to save people in New Orleans. The jury properly could have rejected this implausible theory and concluded that [Petitioner] shot Wright over his annoyance that Wright had invited the unwanted cocaine customer to come over, for some other reason, or for no reason at all.

Moreover, even if the court had had a duty to give CALCRIM 626 – and, for the reasons discussed, it did not – the failure to do so is harmless error where, as here, the jury implicitly rejected any such "unconsciousness" theory by finding that [Petitioner] had intentionally discharged the handgun.

. . .

Because – as discussed above – there was no evidence to support an "unconsciousness" instruction, [Petitioner's] trial lawyer was not ineffective in failing to ask for it, nor was his appellate lawyer ineffective

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[10] CALCRIM 626 provides in pertinent part:

> Voluntary intoxication may cause a person to be unconscious of his or her actions. A very intoxicated person may still be capable of physical movement but may not be aware of his or her actions or the nature of those actions.
>
> A person is voluntarily intoxicated if he or she becomes intoxicated by willingly using any intoxicating drug, drink, or other substance knowing that it could produce an intoxicating effect, or willingly assuming the risk of that effect.
>
> When a person voluntarily causes his or her own intoxication to the point of unconsciousness, the person assumes the risk that while unconscious he or she will commit acts inherently dangerous to human life. If someone dies as a result of the actions of a person who was unconscious due to voluntary intoxication, then the killing is involuntary manslaughter.

> in not raising the issue on appeal. To be entitled to relief on an ineffective assistance of counsel claim, [Petitioner] must show both deficient performance and prejudice . . . Here, [Petitioner's] trial attorney asked for all jury instructions even arguably supported by the evidence. He managed to achieve an acquittal for first degree murder (the jury convicted [Petitioner] on the lesser charge of second degree murder), even though [Petitioner] methodically loaded his gun, pointed it at Wright, twice stated his intention to "do this" despite entreaties from Turman and from the victim, and then shot Wright five times. Moreover, trial counsel obtained a court appointment of Dr. Markman and presented his testimony at trial . . . [T]here is nothing in Dr. Markman's reports or testimony, in [Petitioner's] own trial testimony, or anywhere else in the record to support [Petitioner's] belated claim of post-traumatic stress disorder. In short, [Petitioner] has not carried his burden of proving that trial or appellate counsel's performance fell below an objective standard of reasonableness and that, but for counsel's unprofessional errors, there is a reasonable probability that the result would have been more favorable to him.

(LD 6 at 6-8 (citations omitted).)

(3) Analysis

The Superior Court reasonably rejected allegations of attorney error concerning the proposed defense of posttraumatic-stress-disorder-induced-unconsciousness. Although Petitioner faults counsel for failing to investigate his alleged childhood skull fracture or experiences in El Salvador in the 1980s, the record is clear that he never informed counsel of either. As such, counsel had no reason to investigate those issues. To be sure, attorneys have a duty to conduct a reasonable investigation. *See Strickland*, 466 U.S. at 691. "A lawyer who fails adequately to investigate, and to introduce into evidence, [information] that

demonstrates his client's factual innocence, or that raises sufficient doubts as to that question to undermine confidence in the verdict, renders deficient performance." *Reynoso v. Giurbino*, 462 F.3d 1099, 1112 (9th Cir. 2006). The scope of the duty to investigate is determined by the facts known to the attorney, and "[c]ounsel must be put on notice to investigate a particular matter." *Strickland*, 466 U.S. at 691; *see also Dyer v. Calderon*, 113 F.3d 927, 941 (9th Cir. 1997) (no need to investigate petitioner's possible ingestion of PCP on night of murders when petitioner never told attorneys or doctors he had smoked PCP), *vacated on other grounds*, 151 F.3d 970 (9th Cir. 1998); *Langford v. Day*, 110 F.3d 1380, 1387 (9th Cir. 1996) (counsel was not ineffective for failure to investigate petitioner's failure to waive *Miranda* rights when client failed to tell attorney about relevant facts that would trigger investigation and waiver form was not in materials produced to counsel).

Petitioner's assertion that his alleged skull-fracture injury is "visible" and thus triggered a counsel's duty to investigate whether he suffered from posttraumatic-stress disorder fails for lack of evidence. The record contains no evidence to support his assertion that his injury is visible. Even assuming visibility, there is no reason to believe it would have triggered a duty to investigate posttraumatic-stress disorder. What is more, counsel investigated whether Petitioner's diminished capacity precluded him from forming the intent to kill, harboring malice aforethought, or acting with premeditation and deliberation. (Dkt. No. 14-3 at 30 (Dr. Markman's evaluation report stating Petitioner's "issues of diminished capacity" may have impaired ability to deliberate but not to premeditate, harbor malice, or form intent to kill).)[11]

[11] Of course, whether counsel did in fact consult with Dr. Markman or another expert about Petitioner's purported posttraumatic-stress disorder is unknown. Petitioner has not submitted a declaration from counsel. To the extent counsel did and thereafter decided not to pursue a posttraumatic-stress-disorder-related defense, Petitioner's claim would be without merit. *See Strickland*, 466 U.S. at 690 (counsel's informed, strategic decisions are "virtually

Petitioner's reliance on the Diagnostic and Statistical Manual IV's ("DSM IV") discussion of posttraumatic-stress disorder among emigrants from areas of considerable social unrest and civil conflict is also unavailing. (Dkt. No. 116 at 22-23.) The DSM IV does not state that all emigrants from such areas have elevated rates of posttraumatic-stress disorder; rather, it states only that they may. (*Id.* at 22 (citing and quoting DSM IV at 119). Trial counsel cannot be faulted for not assuming, as evidently Petitioner's counsel now does, that all El Salvadoran immigrants are likely to have posttraumatic-stress disorder. It would mean that every person who emigrates from El Salvador (not to mention every person who lives in El Salvador) presumptively suffers from posttraumatic-stress disorder. Dr. Markman – a mental health expert who was familiar with the DSM IV (*see* 4 RT at 1523) – did not deem this portion of the DSM IV relevant or worthy of additional investigation despite his awareness that Petitioner emigrated from El Salvador (Dkt. No. 14-3 at 30). Counsel – who in all likelihood had no comparable medical training – would have had no reason to resort to the cited portion of the DSM IV.[12]

In any event, Petitioner provides no evidence showing that he suffered from posttraumatic-stress disorder as a result of spending the first seven years of his life in El Salvador. Although he described in a state-court habeas petition witnessing gunfire and grenade blasts as a child, he points to no medical evidence showing he suffers from posttraumatic-stress disorder as a result. On the contrary, he declares that he was never examined, counseled, or treated for posttraumatic-stress disorder. (Dkt. No. 14-3 at 17.) Although he claimed in a

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unchallengeable" on federal habeas review); *see Silva v. Woodford*, 279 F.3d 825, 844 (9th Cir. 2002) (counsel commits no error when making informed strategic decision (citing *Burger v. Kemp*, 483 U.S. 776, 790-91, 794 (1987))).

[12] Petitioner argues that the American Jurisprudence legal encyclopedia states that familiarity with the DSM IV is "indispensable" to the representation of the mentally ill. (Dkt. No. 14-3 at 23 (quoting 27 Am. Jur. Trials 1 (May 2023 Update))). The American Jurisprudence legal encyclopedia is not dispositive here. Again, Petitioner never told trial counsel that he suffered from posttraumatic-stress disorder or that he fractured his skull as a five-year-old child.

2011 declaration that he realized he suffered from posttraumatic-stress disorder after his trial (*see id.*), he evidently has still not sought any medical intervention or treatment for any posttraumatic-stress-disorder-related conditions. Regardless, nothing prevented him from telling trial counsel about his experiences in El Salvador or his alleged childhood skull injury.

Petitioner does not allege to have experienced any sort of posttraumatic-stress-disorder-induced-unconsciousness either before or in the 17 years after he murdered Wright. At most, he states that before the murder, he avoided "stimuli" associated with trauma, such as conversations and thoughts about war and death, and experienced hypervigilence, outbursts of anger, and irritable moods over the years. (Dkt. No. 14-3 at 16.) None of those symptoms are exclusive to posttraumatic-stress disorder, and his more-than-hour-long conversation with Turman about the people in New Orleans experiencing the devastating effects of Hurricane Katrina (*see* 2 RT at 333-35; 4 RT at 1617) betrays his claim that he avoided conversations about death. To the extent Petitioner purports to diagnose himself with posttraumatic-stress disorder, he is not qualified to do so.

Petitioner's reliance on Dr. Rudnick's letter as evidence of his alleged posttraumatic-stress disorder is misplaced. Dr. Rudnick did not offer any medical or legal opinion concerning Petitioner. (Dkt. No 14-3 at 13.) Although he suggested that Petitioner might suffer from posttraumatic-stress disorder from his "childhood experiences," he did not find as much. To the contrary, he stated that he needed more information before doing so and would not make any finding unless he personally examined Petitioner, which he did not. (*See id.*) Dr. Rudnick noted that even if Petitioner had posttraumatic-stress disorder, "it [was] less clear as to how that may have influenced [Petitioner's] behavior [when he killed Wright], over and above the effects of drug intoxication." (*Id.*) Additionally, Dr. Rudnick was "unclear" about Petitioner's reference to "unconsciousness." (*Id.*) In short, Petitioner has identified no expert who would have been willing to

testify that he suffered from posttraumatic-stress disorder or that it induced a state of unconsciousness when he killed Wright. His ineffective-assistance claim fails for lack of evidence. *See Dows v. Wood*, 211 F.3d 480, 486 (9th Cir. 2000) (rejecting ineffective-assistance claim based on failure to call witness when petitioner presented no affidavit from witness showing willingness to provide testimony helpful to defense).

Petitioner's reliance on *People v. Cortes*, 192 Cal. App. 4th 873 (2011) is therefore misplaced. (Dkt. No. 116 at 26-27.) In *Cortes*, the California Court of Appeal held that when the defendant was charged with first-degree murder, the trial court erred in prohibiting the defendant's expert from testifying that defendant was suffering from diminished capacity and how his upbringing and traumatic events affected his mental condition at the time of the crime. 192 Cal. App. 4th at 894-99. Unlike Petitioner's case, the expert in *Cortes* was willing to testify to those facts and was prohibited from doing so after the trial court conducted an extensive hearing under Cal. Evid. Code § 402 at which the expert shared his proposed testimony and the basis for it. *Id.* Here, no such expert exists.

Similarly, Petitioner provides no medical evidence to substantiate his claim that his alleged childhood skull fracture caused or contributed to a posttraumatic-stress-disorder-induced state of unconsciousness when he shot Wright. There is no medical evidence in the record that he suffered a skull fracture. Although he has submitted general medical information concerning the effects of skull fractures and posttraumatic-stress disorder (Dkt. No. 14-3 at 4-6, 9-11), none of that general information sheds any light on the existence, extent or severity of an alleged skull fracture or how it caused him to suffer posttraumatic-stress disorder.

Moreover, that Petitioner claimed not to remember shooting Wright does not show counsel was ineffective in failing to pursue an unconsciousness defense or prejudice from counsel's decision not to do so. To the extent a proposed unconsciousness defense was based on Petitioner's posttraumatic-stress

disorder, any such defense would have failed because, as discussed above, there was no evidence he in fact suffered from posttraumatic-stress disorder. His actions before and after the shooting indicated he was conscious when he shot Wright. According to his own testimony, he drew his gun and raised it toward Wright in response to Wright's alleged statement about the victims of Hurricane Katrina. (4 RT at 1618, 1623-25.) Although he claimed to not remember pulling the trigger, he testified that he recalled pulling the gun from his waistband, raising his arm with the gun in hand, hearing the gun shots, and immediately fleeing after shooting Wright multiple times. (4 RT at 1623-25, 1627-28).

Petitioner testified that he shot Wright because he believed Wright was a threat to the people of New Orleans. (*Id*. at 1619-37; 5 RT at 1847-52.) His claim that the testimony should not be entitled to significant weight because, at times, he suggested that he came to that conclusion only after reflecting on the shooting is not persuasive. While Petitioner indeed suggested at times that he realized only upon reflection why he killed Wright (*see, e.g.*, 4 RT at 1617-18; 5 RT at 1830-31), that testimony does not diminish the fact that he expressly and repeatedly testified that he shot Wright because he believed in the moment that Wright was going to kill people in New Orleans "right there and then." (5 RT at 1848 ("Q: When exactly was [Wright] going to kill these other people in New Orleans? A: My mind interpreted it as right there and then.").) He testified that "that's what came across [his] mind" when he shot Wright. (*Id*. at 1848, 1851 ("Q: Okay. So you think you were gonna save other people that you were defending – A: Right there – Q: – That you were – right then and there you didn't think I'm defending the lives of others? A: Right then and there, probably – when he was saying that it probably stuck a needle in my heart. And the pain, I just jumped on impulse."). When the prosecutor pressed him on that point, he reiterated that in the moment, he believed he was protecting people from Wright:

Prosecutor: I need to ask you, and I want you to be clear

with us, did you think you were saving the lives of others right then and there?

Petitioner: Right then and there, yeah, I did. But I did not clearly – that's what I'm telling you. Months after thinking about it, what makes sense, what would make me react so irrational [sic].

Prosecutor: Now you've answered my question about right then and there you thought you were saving the lives of others.

Petitioner: Yes.

Prosecutor: So when you took your gun out and you shot [Wright], you did that to save the lives of others?

Petitioner: Yes.

Prosecutor: You intended to do that?

Petitioner: Yes, I did intend to do that. That's the only thing I can –

(*Id.* at 1851-52.) This testimony is inconsistent with an unconsciousness defense.

Turman's account of the murder likewise undermines an unconsciousness defense. Turman testified that Wright was not involved in the discussion about victims of Hurricane Katrina and that Wright said nothing about its victims. (*See* 2 RT at 408-10.) Instead, according to Turman, Petitioner "hopped up" and drew his gun on Wright the moment he learned that Breitkoph was outside Wright's apartment. (*Id.* at 348-50.) When Turman implored him not to shoot Wright, Petitioner told him to be quiet and said he had to "do this real quick, and I'll leave." (2 RT at 350-51.) He gave the same response when Turman implored him a second time not to shoot Wright. (*Id.* at 352.)

Petitioner's claim that the jury "outright rejected" Turman's testimony is meritless. (Dkt. No. 29 at 29, 32). Petitioner's belief that the jury's failure to convict him of first degree murder necessarily means it rejected Turman's testimony is speculative. Turman's testimony supported malice aforethought, which the jury believed beyond a reasonable doubt that Petitioner had when he murdered Wright. (*See* 1 CT at 81.) That the jury did not convict Petitioner of first degree murder shows only that the jury did not believe the prosecutor had proven beyond a reasonable doubt that Petitioner acted with the requisite premeditation and deliberation to commit first degree murder. (*Id.* at 91 (CALCRIM 521).) The fact that the jury twice requested a readback of Petitioner's testimony to determine what "[he] thought at the time of the killing of Richard Wright" (5 RT at 2401), if anything, shows that the jury considered whether he acted with premeditation and deliberation. There is no basis to conclude that the jury's acquittal on the first degree murder count shows that it rejected Turman's testimony.

The evidence in the record does not support an inference that Hurricane Katrina triggered posttraumatic stress disorder. Turman testified that he and Petitioner spoke for over an hour and half about Hurricane Katrina and that Petitioner was "calm, cool, and collected" the entire time. (2 RT at 333, 411.) According to Turman, the conversation was not intense, and Petitioner never raised his voice. (*Id.* at 335, 337.) Whereas Wright seemed affected by the television coverage of Hurricane Katrina, Petitioner was not. (*Id.* at 409-10.) Petitioner's testimony was equally unhelpful. Petitioner testified that he was not even watching the coverage and, at best, was only aware that it was on because he could hear it and saw it for "a second or two" as he passed through Wright's living room. (5 RT at 1826.) During his prolonged conversation with Turman about Hurricane Katrina, he was seated in a way that made it impossible for him to see the television. (*Id.* at 1825 ("Q: And you actually couldn't see the T.V. from where you were sitting; correct? A: Kind of an angle – kind of like an angle like

this. I'm way over here so the screen is facing that way. You would be able to see it from your way, but I wouldn't be able to. Q: You couldn't see it? A: No.").)

Given this evidence, counsel had no reason to pursue a posttraumatic-stress-disorder-induced-unconsciousness defense. Similarly, Petitioner's purposeful actions and his own testimony undermined an unconsciousness-due-to-voluntary-intoxication defense. Accordingly, trial counsel did not perform deficiently in failing to pursue either defense (or combination of the two), and Petitioner suffered no prejudice as a result.

Petitioner's claims that appellate counsel erred in failing to allege an ineffective-assistance-of-trial-counsel claim based on trial counsel's failure to pursue a posttraumatic-stress-disorder-induced-unconsciousness or unconsciousness-due-to-voluntary-intoxication defense likewise fail. As related above, such claims are generally not proper on appeal, *see Salcido*, 44 Cal. 4th at 172; *Rollins*, 2019 WL 6040416 at *7 (*supra*), and Petitioner's proposed claim was no exception because it necessarily involved evidence that was not presented at trial, *see Mendoza Tello*, 15 Cal. 4th at 266-67 (ineffective-assistance-of-counsel claims are improper on appeal unless record illuminates all facts necessary to resolve claim, including basis for counsel's challenged decision or shortcoming). In any event, as explained above, any ineffective-assistance-of trial-counsel claim based on the failure to advance an unconsciousness defense was meritless. Appellate counsel could not have performed deficiently in opting not to raise one, and Petitioner suffered no prejudice as a result.

The court notes that trial counsel's ability to convince the jury not to convict Petitioner of first degree murder underscores counsel's effectiveness. Petitioner drew his gun and loaded it before shooting Wright. (2 RT at 349-50.) More importantly, he disregarded Turman's pleas and twice stated he had "do this real quick" before shooting Wright. (*Id.* at 350-54.) These facts show he had ample time to premeditate and deliberate before shooting Wright. *See People v. Koontz*,

27 Cal. 4th 1041, 1080 (2002) ("The process of premeditation and deliberation does not require any extended period of time. The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly."). The manner of the killing to which he himself admitted – namely, firing five shots at Wright from close range, two of which went through his chest (4 RT at 1577; 5 RT at 1847-52) – alone constituted strong evidence of premeditation and deliberation. *See Jackson v. Virginia*, 443 U.S. 307, 325 (1979) (evidence of shooting multiple times at close range indicates manner of attempted killing consistent with premeditation and deliberation); *Koontz*, 27 Cal. 4th at 1082 (manner of killing supported deliberate intent to kill where defendant fired close range shot "at a vital area of the [victim's] body"); *see also Drayden v. White*, 232 F.3d 704, 709 (9th Cir. 2000) ("[I]n California, when manner-of-killing evidence strongly suggests premeditation and deliberation, that evidence is enough, by itself, to sustain a conviction for first-degree murder.").

c. Choosing an Imperfect-Defense-of-Others Theory

In Ground Seven, Petitioner contends that counsel performed deficiently in pursuing an imperfect-defense-of-others theory. (Dkt. No. 14-1 at 71-72.) According to Petitioner, trial counsel premised his imperfect-defense-of-others theory on "hallucinations" Petitioner experienced when he shot Wright. (*Id.* at 71.) That theory of defense, according to Petitioner, was unreasonable because, under California law, an imperfect-defense-of-others claim cannot based on hallucinations. (*Id.* (citing *People v. Mejia-Lenares*, 135 Cal. App. 4th 1437 (2006).) Counsel therefore erred in pursuing that defense. (*See id.* at 71-72.)

The California Supreme Court rejected this claim on the merits. (LD 10.) It was not objectively unreasonable in doing so. To the extent Petitioner believes that a posttraumatic-stress-disorder-induced-unconsciousness or unconsciousness-due-to-voluntary-manslaughter theory (or a combination of both)

was a viable defense, he is mistaken for the reasons stated above. Consequently, trial counsel's decision to forego those theories of defense in favor of an imperfect-defense-of-others theory of defense could not have been unreasonable.

Counsel made a strategic decision to pursue a imperfect-defense-of-others theory of defense. Such strategic decisions are "virtually unchallengeable" on federal habeas review. *See Strickland*, 466 U.S. at 690; *see Silva v. Woodford*, 279 F.3d 825, 844 (9th Cir. 2002) (counsel commits no error when making informed strategic decision (*citing Burger v. Kemp*, 483 U.S. 776, 790-91, 794 (1987))). Counsel's decision was sound under the circumstances. Unlike the proposed unconsciousness theories, the chosen theory of imperfect defense of others had a basis in the evidence. Under California law, the imperfect-defense-of-others doctrine involves "'[a]n honest but unreasonable belief that it is necessary to defend" another from imminent peril to life or great bodily injury. *People v. Rogers*, 39 Cal. 4th 826, 883 (2006) (quoting *People v. Flannel*, 25 Cal. 3d 668, 674 (1979)). As stated in the instructions to the jury, Petitioner acted in imperfect defense of others if he "actually believed that someone else was in imminent danger of being killed or suffering great bodily injury" and "actually believed that the immediate use of deadly force was necessary to defend against the danger." (1 CT at 92 (CALCRIM 571).) There was some evidence to support that theory. It was utterly unreasonable for Petitioner to believe he needed to kill Wright to protect people in New Orleans against imminent harm or death. But the imperfect-defense-of-others theory allowed for such an unreasonable belief, provided Petitioner actually harbored that belief. Petitioner himself testified that he believed in the moment that he had to kill Wright to protect the victims of Hurricane Katrina. (*See* 4 RT at 1619-1623, 1637; 5RT at 1829-1832, 1850-1852.)

Furthermore, Dr. Markman's testimony supported the imperfect-defense-of-others theory. He testified that people, like Petitioner, under the effects of illegal narcotics could experience a "break with reality," dramatically misinterpret a

situation, and suffer memory loss. (4 RT at 1252, 1502-1504.) He testified that that such drug use causes someone to "actually believ[e] what he is perceiving or interpreting to be true, even though to the rest of us – to the rest of the real world it's not." (*Id.* at 1253.) He also testified that using cocaine and methamphetamine – which Petitioner admitted to using daily or every other day (*Id.* at 1593, 1659) – "can produce a clinical condition in an individual that is indistinguishable from a psychotic condition called schizophrenia and generally lasts for the time under which for the person is under the influence." (*Id.* at 1503.) Although Petitioner testified that he did not use methamphetamine on the night he murdered Wright, he nevertheless used it daily or every other day (4 RT at 1593, 1659, 1616), and Dr. Markman testified that methamphetamine's effects on a user's perception of reality sometimes extended "beyond" the time the user was under its direct influence. (*Id.* at 1503.) Further, Petitioner conceded that he used a "good amount" of cocaine and "lots" of marijuana, in addition to drinking Tequila, on the night murdered Wright. (4 RT at 1612-17.) Had the jury credited Dr. Markman's and Petitioner's testimony, it could have concluded that Petitioner acted in a drug-induced imperfect defense of others.

Petitioner's reliance on *Mejia-Lenares* to show that counsel's chosen defense was unreasonable is misplaced. (Dkt. No. 14-1 at 71.) In *Mejia-Lenares*, the California Court of Appeal held that because "imperfect self-defense cannot be based on delusion alone," the defendant "was not entitled to have jurors instructed to consider evidence of hallucination on the issue of whether [he] killed in the actual but unreasonable belief in the need to defend against imminent peril." 135 Cal. App. 4th at 1461. By contrast, trial counsel here advanced an imperfect defense of others theory based on the effects of Petitioner's extensive drug use (*see, e.g.*, 5 RT at 2108-19), which included not only marijuana but cocaine and methamphetamine (*see* 4 RT at 1593, 1611-17, 1659; 5 RT at 1953). Whereas the trial court in *Mejia-Lenares* refused to instruct the jury in a manner that

supported the defendant's "hallucinations" defense, the trial court here explicitly instructed the jury that it could consider the effects of Petitioner's drug use and evidence that he might have suffered from a "mental disease" in determining whether he acted in the actual but unreasonable belief in the need to defend others. (1 CT at 92 (CALCRIM 625, 3428).) Petitioner's and Dr. Markman's testimony supported trial counsel's theory of defense. *Mejia-Lenares* is inapplicable and does not support a conclusion that counsel performed deficiently in pursuing an imperfect-defense-of-others theory of defense in this case.

Finally, even assuming error, Petitioner cannot show that but for counsel's decision to pursue an imperfect-defense-of-others defense theory, the jury would have returned a more favorable verdict. To be sure, counsel's chosen defense theory had challenges particularly in light of the fact that Petitioner killed Wright in California and not New Orleans. Petitioner identifies no alternative theory of defense that had any basis in evidence. Instead, he maintains that counsel should have pursued a posttraumatic-stress-disorder-induced-unconsciousness or an unconsciousness-due-to-voluntary-intoxication defense theory. (Dkt. No. 14-1 at 71-72.) Again, he provides no evidence that he suffered from posttraumatic-stress disorder, and he never put counsel on notice that he might have suffered from it. As related above, his actions and statements before and after murdering Wright – as well as his trial testimony – were incompatible with an unconsciousness defense. (*See* 2 RT at 351-53; 3 RT at 925-26; 4 RT at 1637, 1623-26; 5 RT at 1847-52.) Petitioner has not shown prejudice.

Accordingly, Petitioner is not entitled to habeas relief on this claim.

d. Failing to Move to Suppress Evidence Seized from Petitioner's Home

In his 13th ground for relief, Petitioner faults trial counsel for failing to move to suppress evidence seized from his home pursuant to a search warrant. (Dkt. No. 14-2 at 14-15.) According to Petitioner, trial counsel should have challenged

the evidence on two grounds. First, he contends that the warrant police showed to his mother before conducting the search did not describe with particularity which items the officers were permitted to seize because the copy of the warrant "cover[ed]" that section. (Dkt. No. 14-1 at 14.) Second, he contends that the officers did not provide his mother a copy of the affidavit supporting the warrant. (*Id.*) According to Petitioner, because counsel failed to raise these challenges, the prosecutor was able to introduce damning evidence – such as Petitioner's rifle, holster, and drugs and drug paraphernalia – all of which the police seized under the search warrant. (*Id.* at 14-15.)

The California Supreme Court rejected this claim on the merits. (LD 10.) It was not objectively unreasonable in doing so. Defense counsel objected to introduction of a rifle found during execution of the search warrant, as discussed below in connection with Ground 24. (2 RT at 302-04; *see* § H.2(d).) Even taking Petitioner's allegations as true, trial counsel would have made an informed, strategic decision not to move to suppress the evidence seized pursuant to the warrant on the bases identified by Petitioner. (Dkt. No. 14-2 at 14 (alleging that in response to Petitioner's questions about the warrant, counsel replied, "Don't worry about that").) The record does not contain any basis to second-guess that decision on federal habeas review. *See Strickland*, 466 U.S. at 690; *Silva* 279 F.3d at 844; *Burger*, 483 U.S. at 790-91, 794.

Trial counsel's decision not to advance the challenges Petitioner has identified to admission of the seized evidence was sound. Although Petitioner claims that the copy of the warrant presented to his mother obscured its description of the items they were permitted to seize and was unsupported by an affidavit, the officers had no obligation under California law to present a copy of the warrant or its supporting affidavit before conducting their search. *See United States v. Silva*, 247 F,3d 1051, 1058 (9th Cir. 2001) ("In California, 'there is no statutory or constitutional requirement that a search warrant be exhibited as a

prerequisite to execute it." (quoting *People v. Rodrigues-Fernandez*, 235 Cal. App. 3d 543, 553 (1991))); *People v. Calabrese*, 101 Cal. App. 4th 79, 84 (2002) (California law does not require officer executing search warrant to display warrant or provide copy to person subject to search); *see also Rodrigues-Fernandez*, 235 Cal. App. 3d at 553 (noting California does not require that search warrant be present at location to be searched). Nor is there any controlling Supreme Court precedent suggesting that officers had a constitutional obligation to do so. *See Groh v. Ramirez*, 540 U.S. 551, 562 n.5 (2004) (stating Fourth Amendment does not require executing officer to serve warrant on owner before commencing search and declining to reach issue of whether it would be unreasonable to refuse to furnish warrant upon request); *Bagley v. City of Sunnyvale*, 2017 WL 344998, at *7 (N.D. Cal. Jan. 24, 2017) (noting lack of "*any* decision finding a constitutional violation based on an officer's failure to present a physical copy of a warrant during an arrest") (emphasis added). Moreover, Petitioner does not allege that the actual warrant that was issued failed to allege with particularity the items that the officers were permitted to seize, prohibited the officers from seizing any of the evidence they did, or lacked a supporting affidavit.

In short, neither of the purported deficiencies Petitioner identified provided a basis for trial counsel to move to suppress any of the items police seized. Counsel could not have performed deficiently in failing to raise those challenges at trial, and Petitioner has not shown prejudice.

Petitioner is therefore not entitled to habeas relief on this claim.

e. Failing to Explain the Immigration Consequences of Pleading Not Guilty

In his 14th ground for relief, Petitioner contends that trial counsel was ineffective by failing to explain the potential immigration consequences of pleading not guilty and proceeding to trial. (Dkt. No. 14-1. at 16-17.) According to Petitioner, he asked counsel about any potential immigration consequences, and

counsel responded, "We have bigger things to worry about, don't worry about that." (*Id.* at 16.) Petitioner maintains that had counsel conducted an adequate investigation of this issue, he would have advised Petitioner to "seek a result that [would have] avoid[ed] a ground of inadmissibility or deportability such as involuntary manslaughter." (*Id.*) According to Petitioner, because counsel never investigated any potential immigration consequences, he was unprepared to defend against them at sentencing. (*Id.*)

The California Supreme Court rejected this claim on the merits. (LD 10.) It was not objectively unreasonable in doing so. In *Padilla v. Kentucky*, 559 U.S. 356, 366 (2010), the Supreme Court held that a defense counsel performs deficiently when he fails to advise a defendant that his guilty plea makes him subject to automatic deportation. The Supreme Court has not extended *Padilla*'s holding to situations when the defendant pleads not guilty and proceeds to trial. *See Missouri v. Frye*, 566 U.S. 134, 142 (2012) (noting that in *Padilla*, the Court "discussed the duties of counsel in advising a client with respect to a plea offer that leads to a guilty plea"). The California Supreme Court reasonably could have concluded that counsel did not perform deficiently in failing to advise Petitioner of the immigration consequences of electing to go to trial rather than pleading guilty. *See Carey*, 549 U.S. at 77.[13]

Nothing in the record suggests that the prosecutor was willing to engage in

[13] Despite the lack of any controlling holding by the Supreme Court, the Fifth Circuit has stated that when "a defendant persists in a plea of not guilty, counsel's failure to properly inform him about potential sentencing exposure may constitute ineffective assistance." *United States v. Rivas-Lopez*, 678 F.3d 353, 356-57 (5th Cir. 2012). *Rivas-Lopez* was decided on direct review, not under the deferential lens of AEDPA, and is not controlling in this Circuit. Moreover, the Fifth Circuit's statement was dictum, as *Rivas-Lopez* involved a challenge to trial counsel's advice that the defendant reject a plea deal. *Id.* In any event, no plea offer was forthcoming from the prosecutor. Thus, even under the Fifth Circuit's view, Petitioner could show no prejudice. *See United States v. Ridgeway*, 321 F.3d 512, 515 (5th Cir. 2003) (holding defendant's claim that counsel incorrectly advised him of sentencing exposure if he pleaded not guilty failed for lack of prejudice when only plea deal prosecutor offered would have resulted in essentially same sentence defendant received after being convicted by jury).

any plea deal, let alone one under which Petitioner pleaded guilty to only involuntary manslaughter. Petitioner's actions were inconsistent with involuntary manslaughter which, under California law, is "the unlawful killing of a human being without malice aforethought and without an intent to kill." *People v. Rogers*, 39 Cal. 4th 826, 884 (2006). Petitioner shot Wright five times at close range. (*See* 2 RT at 351-53; 3 RT at 925-26; 4 RT at 1623-28, 1637; 5 RT at 1847-52.) He first loaded the gun and then disregarded Turman's repeated pleas that he not shoot Wright. In response to those pleas, Petitioner twice stated, "Be quiet. I have to do this real quick and I'll leave" and then shot Wright five times. (2 RT at 350-53.) Even under Petitioner's account of the shooting, he acted purposefully and intentionally to defend the people of New Orleans from Wright. (*See* 4 RT at 1617-20, 1637; 5 RT at 1847-53.) Thus, Petitioner cannot show prejudice. Moreover, Petitioner never alleges that he would have accepted any such plea deal even in the highly unlikely event that such a deal would have been forthcoming.

Petitioner's claim that he overheard the prosecutor tell trial counsel that "the 'offer' was 2 years" (Dkt. No. 14-1 at 18) is not sufficient to show that such an offer actually existed. First, the purported statement is hearsay and thus not competent to show the existence of any offer. Second, even if such an offer was discussed, there is no indication that it concerned Petitioner. Petitioner's suggestion that the prosecutor was willing to offer a two-year sentence in exchange for Petitioner's guilty plea strains credulity. Petitioner was charged with first degree murder, and it was undisputed that he shot Wright at close range five times. *See* Cal. Penal Code § 190(a) (first-degree murder is punishable only by either 25 years to life in prison or death), (b) ("[E]very person guilty of murder in the second degree shall be punished by imprisonment in the state prison for a term of 15 years to life."); *id.* § 193 (stating minimum sentence for voluntary manslaughter is three years).

Accordingly, Petitioner is not entitled to habeas relief on this claim.

f. Misadvising Petitioner on Potential Sentence He Faced If Convicted of Murder and Likelihood of Being Convicted

In his 15th ground for relief, Petitioner contends that trial counsel was ineffective by misrepresenting the potential sentence he faced if convicted of murder and the chances that the jury would find him guilty of that crime. (Dkt. No. 14-1 at 18-20.)

The California Supreme Court rejected this claim on the merits. (LD 10.) It was not objectively unreasonable in doing so. As discussed above, the ground fails for lack of evidence because Petitioner has not submitted a declaration from counsel either setting forth his pretrial representations to Petitioner or explaining the basis for those representations. *See Dunn*, 141 S. Ct. at 2413; *Gentry*, 705 F.3d at 900. Thus, he has not shown counsel's performance was deficient. *See Patrick v. McEwen*, No. ED CV 11–813–JAK (PLA), 2013 WL 5775136, at *29 (C.D. Cal. Oct. 25, 2013) (rejecting ineffective-assistance claim based on alleged gross mischaracterization of potential sentence when petitioner presented no evidence other than his own "self-serving statement" such as "an affidavit from counsel" to show "counsel failed to advise petitioner of his maximum exposure"); *Amirant v. Figueroa*, No. CV 13-7677-DMG (SH), 2014 WL 2472249, at *11 (C.D. Cal. May 30, 2014) (same).[14]

Moreover, Petitioner does not show prejudice. Even assuming counsel

[14] In connection with this claim, Petitioner asserts that counsel did not adequately investigate the "full facts of [the] case or Petitioner's life." (Dkt. No. 14-2 at 18.) Petitioner does not allege any facts of the case or his life that counsel failed to investigate. Conclusory allegations do not warrant habeas relief. *See James v. Borg*, 24 F.3d 20, 26 (9th Cir. 1994) ("Conclusory allegations which are not supported by a statement of specific facts do not warrant habeas relief."); *Jones v. Gomez*, 66 F.3d 199, 205 (9th Cir. 1995) (habeas relief not warranted when claims for relief are unsupported by facts). To the extent he faults counsel for being unaware of his alleged childhood injury or purported posttraumatic-stress disorder, that claim fails because Petitioner did not inform counsel of either. As discussed above, there is no evidence to support Petitioner's claim that he suffers from posttraumatic-stress disorder or that his alleged childhood injury affected his actions on the night he killed Wright.

mischaracterized Petitioner's potential sentence or likelihood of acquittal, Petitioner does not allege that he would have pleaded guilty had he been properly advised. *See Hill v. Lockhart*, 474 U.S. 52, 59 (1985) (explaining gross mischaracterization of potential sentence does not warrant habeas relief unless petitioner shows reasonable probability that but for counsel's errors, he would have made different decision about whether to proceed to trial or plead guilty). The record contains no indication the prosecutor offered Petitioner a plea deal. Petitioner was charged with first degree murder and, in the absence of a plea agreement, would have pleaded guilty to first degree murder. In that case, his sentence would have been greater than the 15-years-to life sentence he received for his second-degree murder conviction. *See* Cal. Penal Code § § 190(a) (first-degree murder is punishable only by either 25 years to life in prison or death). Given that prospect, there is no reason to believe Petitioner would have pleaded guilty had he been properly advised of the potential sentence he faced or the likelihood that the jury would convict him of second-degree murder.

Accordingly, Petitioner is not entitled to habeas relief on this claim.

g. Counsel's Performance at Sentencing

In his 33rd ground for relief, Petitioner contends that trial counsel committed several errors at sentencing that deprived him of his right to effective assistance. First, he argues that counsel should have objected to the trial court's impermissible reliance on aggravating factors not found by the jury. (Dkt. No. 14-2 at 65.) Second, he contends that counsel erred in failing to object to the imposition of multiple restitution and parole-revocation fines. (*Id.* at 66-67.) According to Petitioner, counsel should have "established" that he was unable to pay those fines. (*Id.* at 67.) Relatedly, he faults counsel for advising him to waive his right to a restitution hearing to contest the amount of those fines. (*Id.* at 66.) Third, he contends that counsel erred in failing to challenge the court's imposition of a 25-years-to life sentence for using a firearm in murdering Wright. (*Id.* at 67.)

According to Petitioner, his use of a firearm was an essential element of his second degree murder conviction and, thus, imposing a separate sentence for it violated the Double Jeopardy Clause. Fourth, he faults counsel for failing to move to reduce his second degree murder conviction to involuntary manslaughter because he was in a posttraumatic-stress-disorder-induced state of unconsciousness when he murdered Wright. (*Id.* at 67-68.) Fifth, he contends that counsel erred in failing to present evidence of his alleged posttraumatic-stress disorder, childhood skull fracture, and experiences as a child in El Salvador as mitigating factors warranting a reduced sentence. (*Id.* at 68-69.) As a result of these errors, according to Petitioner, he received a sentence that amounted to a miscarriage of justice. (*Id.* at 69.) In his 34th ground for relief, he faults appellate counsel for failing to assert on appeal that trial counsel was ineffective at sentencing for the reasons stated above. (*Id.* at 70-74.)

The California Supreme Court rejected all of these claims on the merits. (LD 10.) It was not objectively unreasonable in doing so. First, trial counsel could not have performed deficiently either in objecting to the trial court's use of aggravating factors not found by the jury or failing to present evidence in mitigation. Petitioner was convicted of second degree murder and found to have discharged a firearm in the murder. (1 CT 81.) The 40-years-to-life sentence he received was mandatory under California law. Cal. Penal Code § 190(b) (a) ("[E]very person guilty of murder in the second degree *shall be punished* by imprisonment in the state prison for a term of 15 years to life.") (emphasis added); *Id.* § 12022.53 ("[A] person who . . . personally and intentionally discharges a firearm and proximately causes great bodily injury . . . or death, to a person other than an accomplice, *shall be punished* by an additional and consecutive term of imprisonment in the state prison for 25 years to life.") (emphasis added). Any effort on counsel's part to seek reduction of Petitioner's sentence would have been futile, and thus counsel did not perform

unreasonably in failing to do so.[15] *See Kimmelman*, 477 U.S. at 375; *Boag*, 769 F.2d at 1344 (*supra*).

Second, Petitioner's challenges to counsel's failure to object to the imposition of fines and his advice to waive a hearing on them is not cognizable on federal habeas review. A federal court may entertain a habeas petition "in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." § 2254(a). Physical custody alone, however, is insufficient to confer habeas jurisdiction. *Bailey v. Hill*, 599 F.3d 976, 980 (9th Cir. 2010). Rather, jurisdiction is established only when there is a nexus between the petitioner's claim and the allegedly unlawful nature of the custody. *Id.* The Ninth Circuit has made clear that no such nexus exists when, as here, the claim involves a challenge to the imposition of fines. In *Bailey*, the Ninth Circuit held that "§ 2254(a) does not confer jurisdiction over a state prisoner's in-custody challenge to a restitution order imposed as part of a criminal sentence." 599 F.3d at 981-82; *see also Williamson v. Gregoire*, 151 F.3d 1180, 1183 (9th Cir. 1998) (stating imposition of fine is "merely a collateral consequence of conviction" and is not sufficient to establish federal habeas jurisdiction).

Although Petitioner has styled his claim in Ground 33 as an attack on his counsel's performance, as opposed to a direct attack on the imposition of the restitution fine, the result is the same. If Petitioner prevailed on his ineffective-assistance claim, he would not obtain early release from custody; rather, he would be entitled to only "the elimination or alteration of a money judgment" – and possibly reimbursement for funds already paid. *See Bailey*, 599 F.3d at 981. Thus, the "nexus" between his ineffective-assistance claim and illegal custody is

[15] In his 32nd ground for relief, Petitioner contends the trial court erred in increasing his sentence based on aggravating factors that were not found true by the jury. (Dkt. No. 14-2 at 62-64.) That claim fails for the same reasons.

lacking. *Id.*; *see United States v. Thiele*, 314 F.3d 399, 400 (9th Cir. 2002) (ineffective assistance claim based on counsel's failure to challenge restitution fine is not cognizable basis for habeas relief because such claims do not challenge validity or duration of confinement); *see also Washington v. Smith*, 564 F.3d 1350, 1351 (7th Cir. 2009) (habeas claim attacking counsel's failure to challenge calculation of restitution amount is not cognizable under § 2254).[16]

Third, trial counsel did not err in failing to raise a double jeopardy challenge to the imposition of a 25-years-to life sentence for using a firearm in murdering Wright. The Double Jeopardy Clause prohibits imposition of multiple punishments for the same offense. *See Ball v. United States*, 470 U.S. 856, 864-65 (1985). This protection, however, does not necessarily preclude cumulative punishments in a single prosecution. *Missouri v. Hunter*, 459 U.S. 359, 366 (1983). When, for example, a state legislature intends to impose multiple punishments for an enhancement, the Double Jeopardy Clause is not offended. *Plascencia v. Alameida*, 467 F.3d 1190, 1204 (9th Cir. 2006). The rule stems from the recognition that sentence enhancements do not "punish" a defendant within the meaning of double jeopardy. *See United States v. Watts*, 519 U.S. 148, 154(1997). Rather, such enhancements increase the given sentence because of the manner in which the crime was committed. *Id.* at 155 ("[T]he defendant is punished only for the fact that the present offense was carried out in a manner that warrants increased punishment."). This precedent forecloses a double jeopardy challenge to Petitioner's sentence. The California legislature clearly indicated its intent to authorize cumulative punishments when a defendant uses a firearm in the commission of a violent felony such as the one at issue here. *See, e.g., People v. Palmer*, 133 Cal. App. 4th 1141, 1152 (2005) ("The legislative purpose behind the

[16] In his 31st ground for relief, Petitioner asserts a direct challenge to the trial court's imposition of fines. (Dkt. No. 14-2 at 62-64.) That claim is likewise not cognizable on federal habeas review for the reasons stated above.

statute is unambiguous: to impose substantially longer prison sentences . . . on felons who use firearms in the commission of their crimes, in order to protect our citizens and to deter violent crime."); *see also Plascencia*, 467 F.3d at 1204 (rejecting double jeopardy claim for imposition of gun enhancement pursuant to § 12022.53 and finding California legislature intended that "a criminal offender may receive additional punishment for any single crime committed with a firearm"). Petitioner's sentence did not violate the Double Jeopardy Clause, and any objection on that basis would have failed.

There is moreover no merit to Petitioner's assertion that his use of a firearm to murder Wright was an essential element of his second degree murder conviction. Murder can be committed in ways that do not involve the use of a firearm, such as strangulation, stabbing, or suffocation, to name but a few. Any double jeopardy claim on that basis likewise would have failed.[17]

Finally, counsel did not perform deficiently or cause prejudice to Petitioner by failing to move to reduce Petitioner's second degree murder conviction to involuntary manslaughter due to his alleged posttraumatic-stress-disorder-induced state of unconsciousness when he murdered Wright. As discussed above, there is no evidence to show Petitioner suffered from posttraumatic-stress disorder, and his actions and statements before and after the murder belied unconsciousness when he murdered Wright. Petitioner shot Wright at close range five times and brushed off Turman's repeated pleas that he not shoot Wright. Petitioner's acts were intentional and purposeful even under his own account of the shooting. Petitioner has not shown any basis for a motion to reduce his second degree murder conviction to involuntary manslaughter.

Because each of Petitioner's challenges to trial counsel's performance at

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[17] In his 30th ground for relief, Petitioner contends the trial court violated the Double Jeopardy Clause by imposing an unauthorized 25-years-to-life sentence based on his discharging a firearm in murdering Wright. (Dkt. No. 14-2 at 57-58.) That ground for relief fails for the same reasons set forth above.

sentencing is meritless, appellate counsel could not have performed unreasonably in failing to assert on appeal an ineffective-assistance-of-trial-counsel claim based on those challenges.

Petitioner is not entitled to habeas relief on his ineffective assistance claims based on sentencing.

D. GROUNDS 9, 10, AND 11: Trial Court's Failure to Instruct Jury on Involuntary Manslaughter Based on Unconsciousness Caused by Voluntary Intoxication

In his 9th and 10th grounds for relief, Petitioner faults the trial court for failing to instruct the jury on involuntary manslaughter based on unconsciousness caused by voluntary intoxication. (Dkt. No. 14-1 at 79-80; Dkt No. 14-2 at 1-7.) According to Petitioner, his testimony that he did not remember pointing his gun at Wright or pulling the trigger shows he was unconscious when he shot Wright. He also claims that the prosecutor failed to comply with her duty to ensure that the jury was instructed on involuntary manslaughter. (Dkt. No. 14-2 at 2-3.) In his 11th ground for relief, he contends that his appellate counsel was ineffective in not asserting on appeal that the trial court erred in failing to instruct the jury on involuntary manslaughter. (*Id.* at 8-10.)

The Superior Court rejected Grounds 9 and 10 on the merits, reasoning that the trial court was not obliged to instruct the jury on unconsciousness because "there was no evidence at trial that [Petitioner] was unconscious when he shot Wright." (LD 6 at 6.) The California Supreme Court summarily rejected petitioner's related ineffective-assistance-of-appellate-counsel claim on its merits. (LD 10.) As explained below, the Superior Court's rejection of Grounds 9 and 10 was neither an unreasonable application of, nor contrary to, clearly established United States Supreme Court law, and the California Supreme Court was not objectively unreasonable in rejecting Ground 11.

To the extent Petitioner claims that the trial court erred under California law

in refusing to instruct the jury on involuntary manslaughter, that claim is not cognizable on federal habeas review. "In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws or treaties of the United States." *Estelle*, 502 U.S. at 68. Habeas relief is not available for an alleged error in the interpretation or application of state law. *Id*.

Moreover, even under California law, Petitioner was not entitled to have the jury instructed on involuntary manslaughter based on unconsciousness caused by voluntary intoxication. "[A] trial court errs if it fails to instruct, sua sponte, on all theories of a lesser included offense which find substantial support in the evidence." *People v. Smith*, 57 Cal. 4th 232, 239 (2013). By contrast, a court "is not obliged to instruct on theories that have no such evidentiary support." *Id.* There is no substantial evidence to show that Petitioner committed involuntary manslaughter based on unconsciousness due to voluntary intoxication. To the contrary, as related above, Petitioner's actions before shooting Wright – including repeatedly ignoring Turman's pleas, stating that he needed to shoot Wright "real quick," drawing his gun, and loading it (2 RT at 350-53) – showed that he was conscious when he murdered Wright and that his acts were purposeful. (4 RT at 1617-20, 1637; 5 RT at 1847-52). He testified that he remembered drawing his gun and raising it (4 RT at 1624-25), and he thereafter shot Wright at close range. (*Id*. at 1626.) Although he testified that he did not remember specifically pointing the gun at Wright or firing it (4 RT at 1623; 5 RT 1833, 1854), that testimony, even if true, would not have supported a finding that he was unconscious. *See People v. Rogers*, 39 Cal. 4th 826, 887-88 (2007) (defendant's claimed inability to remember murdering victim "was insufficient to warrant an unconsciousness instruction" (citation omitted)); *see also People v. Halvorsen*, 42 Cal. 4th 379, 417-18 (2007) (trial court properly refused to instruct jury on unconsciousness when defendant took purposeful acts before murder even though he claimed he did not remember actually pulling trigger). Petitioner repeatedly stated that he killed

Wright because he believed in the moment that Wright posed an imminent threat to the people of New Orleans. (4 RT at 1617-20, 1637; 5 RT at 1848-52.)

Petitioner's challenges to the trial court's failure to instruct the jury on any lesser included offense to murder are also not cognizable. "[T]he failure of a state trial court to instruct on lesser included offenses in a non-capital case does not present a federal constitutional question."[18] *Windham v. Merkle*, 163 F.3d 1092, 1106 (9th Cir. 1998); *Solis v. Garcia*, 219 F.3d 922, 929 (9th Cir. 2000).

The United States Supreme Court has not held that a trial court's failure to instruct on a lesser included offense in a non-capital case violates due process of law. The Supreme Court has held that a defendant has a constitutional right to have the jury instructed on lesser included offenses only in capital cases. *Beck v. Alabama*, 447 U.S. 625, 638 (1980). In so holding, the Supreme Court expressly declined to state whether that right extended to non-capital cases. *Id.* at 638 n.14; *see also Gilmore v. Taylor*, 508 U.S. 333, 361-62 (1993) (Blackmun, J., dissenting) (observing *Beck* left open question of whether due process entitles criminal defendants in non-capital cases to have jury instructed on lesser included offenses). Thus, the Superior Court's rejection of Petitioner's claim concerning the trial court's failure to instruct the jury on involuntary manslaughter based on unconsciousness caused by voluntary intoxication could not have been contrary to, or an unreasonable application of, clearly established Supreme Court law. *See Carey*, 549 U.S. at 77.

To the extent Petitioner believes he was entitled to an instruction on involuntary manslaughter based on unconsciousness caused by voluntary intoxication as part of his right to present a complete defense, he is mistaken. To

[18] Petitioner's related claim that the prosecutor failed to ensure that the jury was instructed on involuntary manslaughter is likewise not cognizable. Petitioner cites no authority – and the Court is aware of none – suggesting that the Constitution compels a prosecutor to ensure that a jury in a criminal trial is instructed on lesser included offenses.

be sure, the Supreme Court has held that, as a matter of federal criminal procedure, "a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor." *Mathews v. United States*, 485 U.S. 58, 63 (1988). The Supreme Court has not held that such a right is guaranteed under the Constitution. *See Marquez v. Gentry*, 708 Fed. Appx. 924, 925 & n.2 (9th Cir. 2018) (holding "right to present a 'complete defense' under federal law" extends only to "the 'exclusion of evidence' and the 'testimony of defense witnesses'"; explaining that *Mathews* involved direct appeal of federal district court case, not habeas review); *Larsen v. Paramo*, 700 Fed. Appx. 594, 596 (9th Cir. 2017) (*Mathews* "did not recognize a constitutional right to a jury instruction" but rather decided only "'general proposition' of federal criminal procedure" (quoting *Mathews*, 485 U.S. at 63)). The Supreme Court has specifically recognized that, although the constitutional guarantee of a "meaningful opportunity to present a complete defense" encompasses the exclusion of evidence and the testimony of defense witnesses, it does not speak to "restrictions imposed on a defendant's ability to present an affirmative defense." *Gilmore*, 508 U.S. at 343 (even when jury instructions "created a risk that the jury would fail to consider evidence that related to an affirmative defense," state defendant's claim of instructional error would create new rule that could not provide basis for federal habeas relief). Because no clearly established precedent exists to support the proposition that Petitioner's right to a complete defense included the right to a jury instruction, AEDPA precludes relief. *See Wright*, 552 U.S. at 126; *Carey*, 549 U.S. at 76; *Crater*, 491 F.3d at 1123.

In any event, Petitioner was permitted to present evidence showing that voluntary intoxication negated any intent to kill. His expert witness, Dr. Markman, testified that people, like Petitioner, under the effects of illegal narcotics could experience a "break with reality," dramatically misinterpret a situation, and suffer memory loss. (4 RT at 1252, 1502-1504.) He testified that using cocaine and

methamphetamine – which Petitioner used regularly (4 RT at 1593, 1659) – "can produce a clinical condition in an individual that is indistinguishable from a psychotic condition called schizophrenia and generally lasts for the time under which for the person is under the influence" and "sometimes beyond." (*Id.* at 1503.) Petitioner himself testified that his constant use of cocaine and methamphetamine, which he used either everyday or every other day, caused him to have paranoid feelings for the six months leading up to the shooting. (*Id.* at 1593, 1659; 5 RT at 1808-09.) The trial court instructed the jury that it could consider Petitioner's voluntary drug use and evidence that he may have suffered from a mental disease in determining whether he had the intent to kill or acted in imperfect defense of others. (1 CT at 91-92 ("You may consider evidence, if any, of [Petitioner's] voluntary intoxication . . . in deciding," among other things, "whether [he] acted with an intent to kill" or "in imperfect defense of another."), 92 (permitting jury to consider "evidence that [Petitioner] may have suffered from a mental disease" in deciding whether he "acted with the intent or mental state required" for charged crime and "whether [he] acted in imperfect defense of others").) Accordingly, the trial court's failure to instruct the jury on involuntary manslaughter based on unconsciousness due to voluntary intoxication did not deprive Petitioner of his right to a complete defense.

Petitioner cannot show prejudice from the absence of a jury instruction on involuntary manslaughter based on unconsciousness due to voluntary intoxication. In habeas proceedings, courts "apply the actual-prejudice standard set forth in *Brecht v. Abrahamson*, 507 U.S. 619 (1993)." *Garcia v. Long*, 808 F.3d 771, 781 (9th Cir. 2015). Under *Brecht*, "habeas relief is only available if the constitutional error had a 'substantial and injurious effect or influence' on the jury's verdict or trial-court decision." *Id.* at 781 (quoting *Brecht*, 507 U.S. at 623). This standard is satisfied only if the record raises grave doubts about whether the error influenced the jury's verdict or the court's decision. *See Davis v. Ayala*, 576 U.S. 257, 267

(2015). The trial court's purported instructional error could not have had a substantial and injurious impact on its verdict. Involuntary manslaughter is "the unlawful killing of a human being without malice aforethought and without an intent to kill." *Rogers*, 39 Cal. 4th at 884. Petitioner's actions were inconsistent with involuntary manslaughter because he shot Wright five times at close range (2 RT at 351-53; 3 RT at 925-26) and, before doing so, disregarded Turman's repeated pleas that he not shoot Wright and twice stated in response, "Be quiet. I have to do this real quick and I'll leave" (2 RT at 350-52). To the extent Petitioner argues that the jury would have convicted him only of involuntary manslaughter because of his alleged posttraumatic-stress disorder (Dkt. No. 14-1 at 79), no such evidence was presented at trial as discussed above. Petitioner presented no evidence that he suffers from or sought treatment for posttraumatic-stress disorder, let alone evidence showing that it caused him to operate in a state of unconsciousness when he shot Wright five times at close range.

In any event, the jury was instructed on voluntary manslaughter under the imperfect-defense-of-others theory and instructed that it could consider his voluntary drug use and mental disease in determining whether he had the intent to kill or acted in imperfect defense of others. (1 CT at 91-92.) Nevertheless, the jury found him guilty of second degree murder, which necessarily required the jury to find beyond a reasonable doubt that he acted with malice aforethought when he killed Wright. (*Id.* at 81, 91-92). The jury likewise found he "intentionally" discharged a firearm in murdering Wright. Accordingly, any error on the trial court's part in failing to instruct the jury on involuntary manslaughter could not have had a substantial and injurious impact on the jury's verdict.

For these reasons, Petitioner cannot show that appellate counsel's decision not to challenge the trial court's failure to instruct the jury on involuntary manslaughter based on unconsciousness was unreasonable or resulted in any prejudice. As explained above, Petitioner was not entitled to such an instruction

under California law because there was no substantial evidence to support it. Thus, counsel could not have performed deficiently in failing to argue that the trial court erred in this regard. Petitioner cannot show a reasonable probability that but for appellate counsel's failure to raise the proposed instructional-error claim on appeal, the result of the appeal would have been different. The jury's verdict shows that it believed he acted with malice aforethought and that his actions were intentional.

Accordingly, Petitioner is not entitled to habeas relief on any of these claims.

E. GROUNDS 16, 17, 19 through 21, and 27: Prosecutor's Discovery Obligations

Four of Petitioner's grounds for relief concern the prosecutor's discovery obligations. In his 16th ground for relief, he faults the prosecutor for failing to disclose exculpatory statements the investigating detective made in a published newspaper article. (Dkt. No. 14-2 at 21-22.) In his 17th ground for relief, Petitioner contends that the prosecutor failed to disclose exculpatory evidence that would have undermined Turman's credibility. (*Id.* at 23-25.) In his 19th ground for relief, Petitioner maintains that the prosecutor withheld that the investigating detective threatened Breitkoph (the woman who wanted to buy drugs from Petitioner on the night he murdered Wright) into testifying for the prosecution.[19] (*Id.* at 29-31.) In his 21st ground for relief, Petitioner contends that the prosecutor failed to disclose that law enforcement tampered with the shirt he was wearing when he murdered Wright.[20] (*Id.* at 34-35.)

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[19] In his 20th ground for relief, Petitioner contends that the prosecutor committed misconduct by knowingly introducing Breitkoph's coerced testimony. (Dkt. No. 14-2 at 32-33.)

[20] Petitioner asserts two other challenges concerning law enforcement's alleged tampering with his shirt. In his 20th ground for relief, he accuses the prosecutor of knowingly introducing testimony about the shirt without revealing the alleged tampering. (Dkt. No. 14-2 at 32-33.) In his 27th ground for relief, he contends that trial counsel was ineffective by failing to expose the alleged tampering and have the shirt subjected to independent laboratory testing. (Dkt.

No state court has addressed the merits of these claims. As explained below, however, each of them fails under *de novo* review.

1. Applicable Federal Law

In *Brady v. Maryland*, 373 U.S. 83, 87 (1963), the Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Three elements must be proved to establish a *Brady* violation: (1) the evidence at issue was favorable to the defendant, either as exculpatory evidence or impeachment material; (2) the evidence was suppressed by the state, either willfully or inadvertently; and (3) prejudice resulted. *United States v. Wilkes*, 662 F.3d 524, 535 (9th Cir. 2011). The prosecution's *Brady* obligations encompass the duty to learn of and disclose favorable evidence known to others acting on the government's behalf in the case, including the police. *Strickler v. Greene*, 527 U.S. 263, 281 (1999); *Kyles v. Whitley*, 514 U.S. 419, 437 (1995).

"[E]vidence is 'material' within the meaning of *Brady* when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different." *Cone v. Bell*, 556 U.S. 449, 469-70 (2009) (citing *United States v. Bagley*, 473 U.S. 667, 682 (1985)). "In other words, favorable evidence is subject to constitutionally mandated disclosure when it 'could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.'" *Id.* at 470 (citations omitted). Whether the suppressed evidence was material must be considered collectively, not item by item. *Kyles*, 514 U.S. at 436.

2. Analysis

Petitioner has not shown that the prosecutor withheld any material evidence.

No. 14-2 at 50-52.)

First, the investigating detective's pretrial statements were publicly available. *See Stinchfield v. Ndoh*, No. CV 16-4253-PJW, 2017 WL 3484853, at *4 (C.D. Cal. Aug. 14, 2017) (no *Brady* violation occurred when alleged impeachment evidence was either known by defense counsel or publicly available for counsel to obtain); *Pickens v. Gonzalez*, EDCV 08-1362-CAS (DTB), 2010 WL 128341, at *5 (C.D. Cal. Jan. 8, 2010) (no *Brady* violation occurred when evidence was publicly available); *see also United States v. Ruiz*, No. SACR 11-209-JST, 2013 WL 12219379, at *1 (C.D. Cal. Jan. 8, 2013) ("weight of authority holds that information is not 'suppressed'" for purposes of *Brady* "if it is publically available" (citing *United States v. Payne*, 63 F.3d 1200, 1208 (2d Cir. 1995))). The detective's statements appeared in a published newspaper article and, thus, Petitioner's trial counsel and the prosecutor had equal access to them. Counsel was undoubtedly aware of the name of the investigating detective and thus had sufficient information to discover his publicly available statements concerning Petitioner's case. *See United States v. Aichele*, 941 F.2d 761, 764 (9th Cir.1991) (no *Brady* violation occurs when "defendant has enough information to be able to ascertain *Brady* material on his own").

In any event, Petitioner cannot show that any statement the detective made in the newspaper article was material. The investigating detective expressed his belief that the murderer was "mentally unstable" (Dkt. No. 14-3 at 42) at the preliminary stages of investigation. The statement was made less than 12 days after the murder – that is, before Petitioner had surrendered himself to police. Thus, when he made the statement, the detective had not spoken to Petitioner or had any interaction with him. The investigative detective merely stated police were "leaning toward" the belief that the murderer was mentally unstable because they had not discerned a motive for the murder. (*Id.*) Putting that aside, there is no reason to believe that the detective was qualified to opine on the murderer's mental health and no reason to believe that the jury would have credited his

preliminary, untrained opinion of the murderer's mental health.

To the extent Petitioner argues that the detective's statement that he did not know the motive for the killing would have led the jury to conclude that Petitioner was guilty of manslaughter rather than second degree murder (Dkt. 14-2 at 21), he is mistaken. Motive is not an element of second-degree murder. (1 CT at 90 (CALCRIM 370 ("The People are not required to prove that the defendant had a motive to commit the crime charged.")).) The jury found beyond a reasonable doubt that Petitioner acted with malice aforethought when he shot Wright five times at close range. Accordingly, there is no reason to believe that the detective's statements would have had any impact on the jury's verdict.

Second, Petitioner has not shown that the prosecutor withheld any evidence concerning Turman's credibility. At best, he contends that the defense "needed to know" if Turman had a criminal history, testified in exchange for leniency, previously committed perjury, or suppressed information about the murder. (Dkt. No. 14-2 at 24.) Nothing in the record suggests that any such information existed. In other words, this claim consists of nothing more speculation. Such unfounded allegations do not warrant habeas relief. *Borg*, 24 F.3d at 26 ("Conclusory allegations which are not supported by a statement of specific facts do not warrant habeas relief."); *Jones*, 66 F.3d at 205 (habeas relief not warranted when claims for relief are unsupported by facts).

Third, Petitioner has not shown that the prosecutor withheld any evidence concerning alleged threats that the investigating detective made to Breitkoph. Although he points to the detective's supposedly coercive statements in the transcript of his tape-recorded interviews with Breitkoph (Dkt. No. 14-3 at 91-97), Petitioner does not allege that defense counsel did not have a copy of those transcripts. Nor has he provided a declaration from counsel stating as much. Petitioner has attached a copy of the transcripts to his FAP. (Dkt. No. 14-3 at 91-N97.) In cross-examining Breitkoph, defense counsel asked about the police

interviews and paraphrased statements from them. (*See* 3 RT at 716 ("And that [the] detective pretty much, you know, told you he didn't believe you half the time?"), 717 ("He told you at one point, you know, you're a witness now, and I want to keep you a witness, right?").) Defense counsel specifically asked about the detective's supposedly threatening tone during the interviews. (*Id.* at 717 ("And it got to the point where [the detective] was almost threatening you, right?"), *id.* ("They kept pushing you because they believed – the detective believed you knew where [Petitioner] was at this particular point.").) Petitioner has not shown that the prosecutor withheld the pretrial police interviews of Breitkoph.

Moreover, Petitioner has not shown materiality. Breitkoph did not witness the shooting and never identified him as the person she saw running from the apartment after Wright was murdered. Petitioner admitted that he shot Wright and fled the apartment afterwards. Accordingly, any evidence concerning the detective's purported threats to Breitkoph was not material.

Finally, Petitioner has not shown that the prosecutor withheld any evidence of tampering with the shirt he was wearing when he murdered Wright or that any such evidence was material. Petitioner bases his claim on the fact that the shirt had no holes or cuttings when it was seized by police but had holes when it was introduced at trial. (Dkt. No. 14-2 at 32.) The holes to which Petitioner refers were the result of forensic testing of blood found on the shirt. (Dkt. No. 14-3 at 103 (police criminologist's report stating, "Photographs of the shirt and stains . . . were taken prior to the excision and booking of these stains").) Petitioner does not allege that defense counsel did not have access to the results of the forensic testing as well as the pre-excision photographs. The investigating detective readily conceded at trial that the holes that were visible on the shirt at trial were not

present when police seized it.[21] (3 RT at 984-85.) Petitioner not shown that any evidence concerning the shirt was withheld. Moreover, the shirt was relevant to show that Petitioner shot Wright at close range. But Petitioner did not contest that he shot Wright multiple times from close range (4 RT at 1577, 1623-26, 1528-29), and Turman's testimony corroborated Petitioner's (2 RT at 350-54, 381-82). Thus, testimony concerning any alterations to or "tampering" with the shirt could not have been material.

Petitioner's related grounds for relief concerning law enforcement's alleged tampering with the shirt likewise fail. As discussed above, Petitioner has not shown, as he alleges in his 20th ground for relief, that the prosecutor withheld from trial counsel that the State's criminologist had excised portions of the shirt to test it for blood. The investigating detective conceded at trial that the shirt had no holes when it was seized from Petitioner's home. (3 RT at 984-85.) Petitioner's claim in his 27th ground for relief that trial counsel was ineffective for failing to expose the State's tampering and have the shirt subjected to independent forensic testing fails for lack of prejudice. Any evidence concerning alterations to the shirt or forensic testing of the shirt would only have been relevant if Petitioner denied shooting Wright at close range. But Petitioner conceded that fact. (4 RT at 1577, 1623-29.) Thus, he cannot show a reasonable likelihood that but for counsel's alleged errors concerning the shirt, the jury would have reached a more favorable verdict to him.

F. GROUND 18: Presenting False Testimony

In his 18th ground for relief, Petitioner contends that the prosecutor knowingly presented false testimony from Turman. According to Petitioner, the prosecutor "coached" Turman to testify in a manner that supported witness

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[21] At sentencing, Petitioner argued that the shirt had been tampered with and that the investigating detective testified that when she found the shirt, it was "clean, unstained by any type of liquid, including bloods, and was not tore." (5 RT at 3020-21.) In truth, the detective testified only that the shirt had no cuttings on it when she found it. (*See* 3 RT at 984-85.) She did not testify that it was clean or unstained by any liquid.

accounts that Petitioner drove off after the murder, and Turman offered "varying" accounts of what he saw and heard when the murder occurred. (Dkt. No. 14-2 at 26-28.) Petitioner also asserts that Turman's inability at times to remember details about the murder at the preliminary hearing – such as which hand Petitioner used to shoot Wright – proves that he lied at trial when, for example, he testified that Petitioner used his right hand. (*Id.* at 27.) Finally, Turman's offer to help police "get" Petitioner shows that he fabricated his testimony.

No state court addressed the merits of this claim. As explained below, however, it fails under *de novo* review.

1. Applicable Federal Law and Analysis

In *Napue v. Illinois*, 360 U.S. 264, 269 (1959), the Supreme Court held that "a conviction obtained through use of false evidence, known to be such by representatives of the State," violates a defendant's right to due process under the 14th Amendment. *See also Jackson v. Brown*, 513 F.3d 1057, 1071 (9th Cir. 2008). To establish a due process violation under *Napue*, a petitioner must prove that (1) the testimony was actually false, (2) the prosecution knew or should have known the testimony was false, and (3) the false testimony was material. *Id.* at 1071–72. Mere inconsistencies in testimony by government witnesses are insufficient to show actual falsity under *Napue*. *See United States v. Bingham*, 653 F.3d 983, 995 (9th Cir. 2011); *cf. Hamilton v. Ayers*, 583 F.3d 1100, 1111 n.4 (9th Cir. 2009) (finding "minor and unsurprising discrepancies" in witness testimony were not "actual conflict" under *Napue*). False evidence is material if there is "any reasonable likelihood that the false testimony could have affected the judgment of the jury." *United States v. Agurs*, 427 U.S. 97, 103 (1976); *see Dow v. Virga*, 729 F.3d 1041, 1048 (9th Cir. 2013).

Petitioner's false-evidence claim is meritless because he has failed to prove that any portion of Turman's testimony was false. He argues, for the most part, that aspects of Turman's pretrial statements to police and preliminary hearing

testimony were inconsistent with his trial testimony. (Dkt. No. 14-2 at 26-28.) These inconsistencies are insufficient alone to show that his trial testimony was false. *See Bingham*, 653 F.3d at 995; *Tapia v. Tansy*, 926 F.2d 1554, 1563 (10th Cir. 1991) ("Contradictions and changes in a witness's testimony alone do not constitute perjury and do not create an inference, let alone prove, that the prosecutor knowingly presented perjured testimony."). That Turman was at times unable to remember details about the shootings is likewise insufficient to show his testimony was false. *See United States v. Zuno-Arce*, 44 F.3d 1420, 1423 (9th Cir. 1995) (noting discrepancies between witness's testimony "could as easily flow from errors in recollection as from lies").

Petitioner's claim that the prosecutor "coached" Turman to testify falsely that he saw Petitioner's car parked in front of the apartment building is also meritless. (Dkt. No. 14-2 at 26.) Petitioner provides no evidence that Turman's testimony was coached or false. Moreover, there is no reason to believe Turman's testimony on this point was helpful to the prosecution's case. (*Id.* (alleging police coached Turman's testimony about seeing Petitioner's car to corroborate "false news release" indicating he fled murder scene by car).) Petitioner admitted that he fled after shooting Wright. (4 RT at 1627-28; 5 RT at 1833-34.) Whether he did so on foot or in a car was of no consequence. Petitioner has failed to allege any facts showing how the manner in which he fled had any bearing on the jury's verdict.

Finally, assuming Turman was eager to help police apprehend Petitioner, that would not suggest – let alone prove – that his trial testimony was false. (Dkt. No. 14-2 at 27.) Turman had known Wright since the two were kids. In the year before the murder, they had become friends while attending community college together. (2 RT at 326-27, 389-90.) Petitioner killed Wright in front of Turman for no apparent reason, and Turman testified that he feared Petitioner was going to kill him after he shot Wright. (*Id.* at 350-54.) In the days after the murder, Turman reasonably could have believed that Petitioner wanted to kill him because he was

the only eyewitness to Wright's murder. That Turman would want Petitioner apprehended is not proof that his trial testimony was false.

Accordingly, Petitioner's claim does not warrant habeas relief.

G. GROUND ONE(b): Questioning Petitioner on Postarrest Silence

In part (b) of his first ground for relief, Petitioner contends that the prosecutor impermissibly questioned him about his postarrest silence. (Dkt. No. 14-1 at 44-47.) No state court has addressed the merits of this claim. As explained below, it fails under *de novo* review.

1. Relevant Facts

As set forth in the California Court of Appeal's decision, Petitioner, accompanied by trial counsel, surrendered himself to police weeks after the shooting. (LD 3 at 3.) Trial counsel told the investigating detective not to talk to Petitioner but, once counsel left, the detective nevertheless asked Petitioner what he had done with the gun he had used to kill Wright. Petitioner responded that he did not know anything about a gun and that trial counsel would answer any further questions. (*Id.*)

At trial, Petitioner testified. (4 RT at 1576.) On direct examination, he testified that after the shooting, he ran and "might have tossed" the gun he used to shoot Wright into some bushes. (*Id.* at 1628.) During cross-examination, the prosecutor asked Petitioner, "And since you ditched the gun in the bushes, that would be something very important you would need to tell police; correct?" (5 RT at 1855.) Petitioner responded, "Yes." (*Id.*) The prosecutor did not ask any follow-up questions on that topic.

2. Analysis

Admission at trial of a criminal defendant's post-arrest, post-*Miranda* silence violates due process. *See Doyle v. Ohio*, 426 U.S. 610, 619 (1976). "This rule rests on the fundamental unfairness of implicitly assuring a suspect that his silence will not be used against him and then using his silence to impeach an explanation

subsequently offered at trial." *Brecht*, 507 U.S. at 628 (internal quotations and citations omitted).

By contrast, a prosecutor is permitted to cross-examine a defendant as to his post-arrest silence provided the questioning concerns the period before the defendant was advised of his *Miranda* rights. *See Fletcher v. Weir*, 455 U.S. 603, 606-07 (1982). "Such silence is probative and does not rest on any implied assurance by law enforcement authorities that it will carry no penalty." *Brecht*, 507 U.S. at 628. Thus, in *Brecht*, the Supreme Court held that "[i]t was entirely proper – and probative" for the prosecutor to impeach a defendant charged with murder "by pointing out that [he] had failed to tell anyone before the time he received his *Miranda* warnings at his arraignment" that he killed the victim by accident. *Id*.

The prosecutor here, likewise, committed no misconduct by asking Petitioner whether he believed it would have been important to tell police that he ditched the gun in the bushes. Although her questioning concerned Petitioner's postarrest silence, it was nevertheless proper because it exclusively involved a period before he was advised of his *Miranda* rights.[22] *See Fletcher*, 455 U.S. at 603-06 (when defendant charged with murder testified that he accidentally killed victim, prosecutor committed no misconduct in questioning defendant about his failure to tell police after his arrest that killing was accidental when "the record d[id] not indicate that [he] received any *Miranda* warnings during the period in which he remained silent immediately after his arrest").

Regardless, even assuming error, Petitioner cannot show that the error had a substantial and injurious impact on the jury's verdict. *See Brecht*, 507 U.S. at 629-30 (explaining *Doyle* error "is amenable to harmless-error analysis"). The prosecutor's question concerning Petitioner's postarrest silence was isolated. The

[22] As related above, Petitioner was never advised of his *Miranda* rights, and the investigating detective asked him only one question about what he had done with the gun he used to kill Wright. (*See* § II.)

prosecutor asked no follow-up question once Petitioner agreed that ditching the gun was something important he would have needed to tell police. (5 RT at 1855.) He readily admitted at trial that he ditched the gun, and his pretrial statement that he did not know anything about the gun was properly admitted. The isolated question necessarily took only moments during a trial that lasted seven days and took up four volumes of Reporter's Transcript. (2 RT at 301, 306 (reflecting trial began on Dec. 11, 2006); 5 RT at 2137-42 (reflecting prosecutor made purportedly offending statement at end of rebuttal on Dec. 19, 2006).)

Finally, as discussed above, the evidence of Petitioner's guilt was overwhelming. Indeed, he fired five shots from close range at Wright and evidenced his intent to kill beforehand. (2 RT at 350-53; 3 RT at 925-26; 4 RT at 1623-28, 1637; 5 RT at 1847-52.) He fled immediately afterward. (4 RT at 1627-28; 5 RT at 1833-34.) He testified as to why he shot Wright – namely, to prevent him from killing people in New Orleans experiencing the effects of Hurricane Katrina. (4 RT at 16-1920, 1637; 5 RT at 1847-52.) Petitioner cannot show that he suffered prejudice from the prosecutor's allegedly improper question.

Habeas relief is therefore not warranted on this claim.

H. GROUNDS 5 and 22 through 26: Prosecutor's Closing Argument

Petitioner asserts seven grounds for relief based on the prosecutor's alleged misconduct in closing argument. (Dkt. No. 14-1 at 44-47, 59-61; 14-2 at 36-49.) As explained below, the California Court of Appeal's reasoned decision rejecting two of the prosecutorial misconduct claims was neither an unreasonable application of, nor contrary to, clearly established Supreme Court law, and the remaining five claims fail under *de novo* review. (LD 3.)

1. Applicable Federal Law

Prosecutorial misconduct warrants habeas relief only if it "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Darden*, 477 U.S. at 181; *Tan v. Runnels*, 413 F.3d 1101, 1112 (9th Cir. 2005);

see also Wood v. Ryan, 693 F.3d 1104, 1116 (9th Cir. 2012) (petitioner must show prosecutor's misconduct "rendered the trial fundamentally unfair"). "[T]he touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor." *Smith v. Phillips*, 455 U.S. 209, 219 (1982).

To determine whether a prosecutor's comments amount to a due process violation, the reviewing court must examine the entire proceedings so that the comments may be placed in their proper context. *Boyde v. California*, 494 U.S. 370, 384-85 (1990) Assuming, however, that a petitioner can establish the prosecutor engaged in misconduct, habeas relief is unwarranted unless the petitioner can show that the misconduct had a substantial and injurious impact on the jury's verdict. *Karis v. Calderon*, 283 F.3d 1117, 1128 (9th Cir. 2002) (citing *Brecht*, 507 U.S. at 638).

2. Analysis

None of Petitioner's prosecutorial-misconduct claims warrant habeas relief.

(a) Commenting on Lack of Expert Testimony that Petitioner Had Delusional Break, Snap, or Hallucination

In his fifth ground for relief, Petitioner contends that the prosecutor committed misconduct in arguing Petitioner's expert did not testify on the ultimate issue of whether Petitioner intended to kill Wright and then using the absence of testimony on that point to impeach Petitioner's credibility and convince the jury to convict him of second-degree murder.[23] (Dkt. No. 14-1 at 59-61.) According to Petitioner, the prosecutor's argument amounted to a knowing violation of California law concerning the facts to which an expert is permitted to testify. (*Id.* at 60.) The

[23] The relevant facts underlying this claim are set forth above in connection with Petitioner's claim that the trial court erred in refusing to declare a mistrial. (*See* § V(B)(1).)

California Court of Appeal rejected this claim on direct appeal, finding that he suffered no prejudice even assuming misconduct. (Dkt. No. 19-3 at 5-6.)

The state court reasonably rejected this claim. Like his corresponding claim that the trial court erred in denying his mistrial motion, his prosecutorial misconduct claim centers on the contention that the prosecutor skirted Cal. Penal Code § 29 by arguing that Dr. Markman never testified Petitioner had a delusional break, snap, or hallucination on the night he murdered Wright. As discussed above, the trial court found that under California law the prosecutor's statement was proper. (5 RT at 2146-47.) That finding necessarily involved the interpretation and application of California law. *See Waddington*, 555 U.S. at 192 n.5; *Bradshaw*, 546 U.S. at 76.

In any event, even assuming error, the Court of Appeal reasonably found that any error was not prejudicial. (Dkt. No. 19-3 at 6.) On direct appeal, reversal is required if the prosecution fails to show that the error "was harmless beyond a reasonable doubt." *Chapman v. California*, 386 U.S. 18, 24 (1967). The *Chapman* standard, however, is less forgiving to trial errors than the harmless error standard applicable on federal habeas review. *Larson v. Palmateer*, 515 F.3d 1057, 1064 (9th Cir. 2008) ("Review for harmless error under [the harmless error standard applicable on federal habeas review] is 'more forgiving' to state court errors than the harmless error standard that the Supreme Court applies on its direct review of state court convictions."). On federal habeas review, a constitutional trial error justifies habeas relief only if the error had a substantial and injurious impact in determining the jury's verdict. *Brecht*, 507 U.S. at 623; *Merolillo v. Yates*, 663 F.3d 444, 455 (9th Cir. 2011) (holding *Brecht* test should be applied regardless of whether state court found error harmless under state's harmless error test).

Under AEDPA, reviewing courts "accord deference to a state court's harmlessness determination." *Garcia v. Long*, 808 F.3d 771, 781 (9th Cir. 2015). "Because it is more stringent, the *Brecht* test 'subsumes' the AEDPA/*Chapman*

standard for review of a state court determination of the harmlessness of a constitutional violation." *Mays v. Clark*, 807 F.3d 968, 980 (9th Cir. 2015) (citing *Fry v. Pliler*, 551 U.S. 112, 120 (2007)). "A determination that the error resulted in 'actual prejudice' [under *Brecht*] necessarily means that the state court's harmlessness determination was not merely incorrect, but objectively unreasonable." *Id.* (citations omitted). As such, "[a] separate AEDPA/*Chapman* determination is not required." *Id.* Reviewing courts apply *Brecht* "with due consideration of the state court's reasons for concluding that the error was harmless beyond a reasonable doubt." *Garcia*, 808 F.3d at 771.

The Court of Appeal's decision was reasonable. The prosecutor's brief statement came at the end of a lengthy closing argument (5 RT at 1935-72, 2123-2136), which itself followed a seven-day trial (2 RT at 301, 306; 5 RT at 2137-42). As discussed above, and contrary to Petitioner's view, the evidence supporting the jury's second degree murder conviction was overwhelming. Petitioner has failed to show that the prosecutor's brief, isolated statement about Dr. Markman's testimony had any impact on the jury's verdict, let alone a substantial and injurious one. *See Dvorak v. Figueroa*, No. CV 12–5305 JFW (FFM), 2014 WL 4627382, at *19 (C.D. Cal. Apr. 2, 2014) (prosecutor's isolated comment about petitioner's decision to represent himself resulted in no prejudice when evidence against petitioner was "significant and compelling"), *accepted by* 2014 WL 4639389 (C.D. Cal. Sept. 15, 2014).

Accordingly, habeas relief is not warranted on this claim.

(b) Commenting on Petitioner's Defense

In his 22nd ground for relief, Petitioner contends that the prosecutor violated due process by belittling his imperfect-defense of-others theory. Specifically, he faults the prosecutor for labeling the defense "ridiculous," ludicrous," "crazy," "implausible," and "contrived," and mocking Petitioner's testimony supporting it. (Dkt. No. 14-2 at 36-37.)

During closing argument, "[p]rosecutors have considerable leeway to strike 'hard blows' based on the evidence and all reasonable inferences from the evidence." *United States v. Henderson*, 241 F.3d 638, 652 (9th Cir. 2000). "Criticism of defense theories and tactics is a proper subject of closing argument." *United States v. Sayetsitty*, 107 F.3d 1405, 1409 (9th Cir. 1997). Indeed, "[a] lawyer is entitled to characterize an argument with an epithet as well as a rebuttal." *Williams v. Borg*, 139 F.3d 737, 745 (9th Cir. 1998); *see Turner v. Marshall*, 63 F.3d 807, 818 (9th Cir. 1995) (stating prosecutor is permitted to go so far as to "label a witness's testimony as lies or fabrication"), *overruled on other grounds by Tolbert v. Page*, 182 F.3d 677 (9th Cir. 1999) (en banc).

The prosecutor did not exceed the considerable leeway afforded to her. She directed her purportedly offending comments at Petitioner's defense theory that he actually believed he had to kill Wright to prevent him from immediately killing people in New Orleans. To be sure, the prosecutor argued that Petitioner's defense was "ludicrous," "crazy," and "implausible," and labeled his "story" "ridiculous." (5 RT at 1945, 1954, 1958, 1967-68, 2133.) Those comments constituted just the type of "hard blows" prosecutors are permitted to make during closing arguments, and the prosecutor thus committed no misconduct in making them. *See, e.g.*, *Shorty v. Clark*, No. CV 20-126-JAK (PLA), 2020 WL 6219832, at *18-19 (C.D. Cal. Sept. 4, 2020) (prosecutor committed no misconduct by equating petitioner's theories of defense with throwing spaghetti "against the wall" hoping something would stick), *accepted by* 2020 WL 6203554 (C.D. Cal. Oct. 22, 2020); *Dvorak*, 2014 WL 4627382, at *14 (same when prosecutor argued petitioner's arguments insulted jury's intelligence or cautioned jury against being manipulated by defense theory); *Bey v. Kernan*, CV 05-2324-ODW (CW), 2011 WL 3714631, at *28 (C.D. Cal. Apr. 7, 2011) (same when prosecutor labeled petitioner's theory that officers conspired to plant loaded gun on him "desperate"), *accepted by* 2011 WL 3706708 (C.D. Cal. Aug. 24, 2011).

In any event, defense counsel used the prosecutor's remarks to Petitioner's advantage by arguing that Petitioner's drug use led him to believe that he needed to kill Wright to protect others. (5 RT at 2119 ("The issue is if he believed it. Why would he believe something *so ludicrous*? *So ridiculous*. Why? Because when people take those kind of drugs, they snap. They can snap. They can, you know, suffer delusions and hallucinations and all different kind of things.") (emphasis added).)

Accordingly, Petitioner is not entitled to habeas relief on this claim.

(c) Arguing Petitioner's Motives for Shooting Wright

In his 23rd ground for relief, Petitioner contends that the prosecutor committed misconduct by concocting motives for Wright's murder that were unsupported by evidence at trial. According to Petitioner, the prosecutor speculated that Petitioner shot Wright either because Petitioner did not want sell drugs to, or share his own drugs with, Breitkoph or because of some other unknown issue between Petitioner and Breitkoph. Petitioner maintains that no evidence adduced at trial supported the prosecutor's speculation. Additionally, he faults the prosecutor for attempting to introduce evidence purportedly showing that he was fixated on Wright to establish a motive for the shooting.[24]

Prosecutors are afforded "reasonable latitude to fashion closing arguments, and thus can argue reasonable inferences based on the evidence." *United States v. Necoechea*, 986 F.2d 1273, 1276 (9th Cir. 1993). Prosecutors may not manipulate or misstate the evidence or make statements designed to arouse the passions or prejudices of the jury. *See Darden*, 477 U.S. at 181-82; *Viereck v. United States*, 318 U.S. 236, 247-48 (1943); *United States v. Leon-Reyes*, 177

[24] In connection with the claim, Petitioner contends that the prosecutor failed to "prov[e] all element[s] of murder" by failing to prove motive. (Dkt. No. 14-2 at 38.) This argument fails because motive is not an element of murder. (1 CT at 90 (CALCRIM 370 ("The People are not required to prove that the defendant had a motive to commit the crime charged.")).)

F.3d 816, 822 (9th Cir. 1999).

The prosecutor's arguments concerning Petitioner's possible motives for shooting Wright were proper because they were based on the trial evidence. Petitioner admitted that he brought cocaine and marijuana, among other drugs, to Wright's house and that he used a substantial amount of both. (4 RT at 1612-17.) He conceded that he was a drug dealer (4 RT at 1593-95), and Breitkoph testified that she regularly purchased cocaine from him (3 RT at 680-81). She further testified that on the night Petitioner killed Wright, she went to Wright's home to purchase cocaine from Petitioner. (*Id.* at 682.) Turman testified that on the night Wright was murdered, Petitioner refused to take Breitkoph's repeated phone calls and made clear he did not want her to come to Wright's apartment. (2 RT at 244-46.) Up until the point when he learned Wright had invited Breitkoph over, Petitioner was "calm, cool and collected." (*Id.* at 411.) Once he learned she had been invited over and was waiting outside, he immediately "jumped up," drew his gun, and repeatedly shot Wright. (*Id.* at 348-53.) Based on that evidence, the prosecutor was free to argue that Wright's decision to defy Petitioner and invite Breitkoph to his house – whether to buy drugs or use Petitioner's personal drugs – made Petitioner want to kill Wright.

To the extent the prosecutor's suggestion that there may have been "something else going on between [Petitioner] and [Breitkoph] that we don't know about" (5 RT at 1969) was not grounded in evidence, it was harmless. Immediately after making that suggestion, the prosecutor conceded she was merely speculating. (*Id.*) The jury was instructed that "[n]othing that the attorneys say is evidence" and not to assume anything they had said was true just because they had said it. (1 CT at 87 (CALCRIM 222).) The jury was also instructed on what constitutes evidence and to base its decision only on the evidence presented at trial, which did not include arguments from counsel. (*Id.*) The jury was instructed on the definition of proof beyond a reasonable doubt and to acquit

Petitioner of second degree murder if the prosecutor failed to present evidence to prove each element of that crime beyond a reasonable doubt. (*Id.* at 86-87 (CALCRIM 220), 90-91 (CALCRIM 520, 521).) The jury is presumed to have followed those instructions, *see Weeks v. Angelone*, 528 U.S. 225, 234 (2000), and Petitioner offers no reason to conclude that it did not.

Finally, the prosecutor did not commit misconduct by seeking to introduce portions of Petitioner's school sketchbook in an attempt to establish that his fixation with Wright provided motive for the murder. (Dkt. No. 14-2 at 38.) Petitioner suffered no prejudice because the trial court excluded it. (4 RT at 1202-11.) Petitioner's references to newspaper articles suggesting he killed Wright because he was obsessed with him (*Id.*; Dkt. No. 14-3 at 42) are inapposite because they too were not admitted at trial.

Accordingly, Petitioner is not entitled to habeas relief on this claim.

(d) Referring to Inadmissible Evidence

In his 24th ground for relief, Petitioner contends the prosecutor committed misconduct in closing argument by referring to evidence that had been ruled inadmissible. (Dkt. No. 14-2 at 41-44.) He asserts that the prosecutor's argument that Wright's hands were up in a defensive manner when Petitioner fired the second shot through his forearm necessarily concerned inadmissible evidence because the trial court sustained objections during the prosecutor's cross-examination of Petitioner on that topic. (*Id.* at 41-42 (citing 5 RT at 1832-33).) Petitioner argues there was no testimony about this "false scenario." (*Id.* at 42.) He also faults the prosecutor for eliciting testimony that he owned a rifle because the trial court ruled any evidence concerning the rifle was inadmissible. (*Id.* at 41.)

(i) Relevant Facts

a) Argument Concerning Wright's Defensive Posture When He Was Shot

At trial, Turman testified for the defense. (2 RT at 325.) Among other things,

he testified as to what Wright did when Petitioner drew his gun. According to Turman, Wright extended both of arms with his palms facing forward "like he wanted to graze the bullet," all the while repeatedly asking Petitioner what he was doing and urging him to "chill out." (*Id.* at 351-52.) Turman testified that Petitioner then pointed his gun at Wright and fired "at least" three shots in rapid succession. (*Id.* at 353.) Turman did not see where the bullets struck but instead ran for safety. (*Id.* at 353-54.)

The prosecutor called Ajay Panchal, a deputy medical examiner at the Los Angeles County Coroner's Office who examined Wright's body. (3 RT at 922, 924.) Panchal testified that Wright had been shot five times, but he could not identify the sequence of the shots. (*Id.* at 925.) One of the shots, however, "fractured" Wright's humerus in his right arm. Panchal recovered the bullet "within the right arm." (*Id.*) Panchal testified that Wright had been shot several times in the arm. (*Id.* at 925-26.) Two of the shots went through Wright's arm and into his chest. Both of those shots were fatal. (*Id.*)

Petitioner testified in his own defense. (4 RT at 1576.) On cross examination, the prosecutor asked if the first shot he fired hit Wright's leg. Petitioner responded that he did not know. (5 RT at 1832.) The following exchange then occurred:

Prosecutor: Then you got closer to him and his hands are up and blocking, and that's when you fired again. And the bullet went in through his right forearm and lodged itself there, right? The second firing?

Trial counsel: I'm going to object. There's no testimony of this whole scenario.

Trial court: Sustained. You can ask him whether he's aware of the sequence of shots, but you're assuming facts not in evidence.

Prosecutor: Are you aware that's the next shot?

Petitioner: I'm not aware how it happened. I don't remember pulling the trigger, Ms. Solomons.

Prosecutor: And are you aware that then you got closer yet again and now his arm is up higher?

Trial counsel: Objection. Assumes facts not in evidence.

Trial court: Sustained.

(*Id.* at 1832-33.) The prosecutor turned to another line of inquiry. (*Id.* at 1833.)

During closing argument, the prosecutor argued that Petitioner initially shot Wright in the leg and then shot him in the arm while his arms were extended in a defensive manner. (*Id.* at 1946.) Specifically, the prosecutor stated:

> So the first time most likely in the leg. Because he's farther away from the victim. And then he moves closer. And we know that [Wright's] arms are up. And this is a defensive move. How did he get shot in this forearm? Because his arm's up. He's blocking, just like [Turman] said he was. That he put his arms up, "Chill out what are you doing." And the arm is up and he gets hit in the arm. And it lodges there in the arm. In the forearm. And he gets closer again, and this time he's at point-blank range, and he fires off boom, boom, boom. The three last ones here in the upper arm. The same arm – that's got the arm up.

(*Id.* at 1946.)

b) Petitioner's Rifle

Defense counsel moved to exclude any evidence or testimony concerning a rifle that police seized from Petitioner's home, arguing that the rifle was irrelevant because it was not the murder weapon. (2 RT at 302.) The trial court agreed and ruled that "[t]he rifle is not to be shown to the jury or introduced." (*Id.* at 304.)

During the prosecutor's cross-examination of Petitioner, she asked him about a gun holster police seized from his house. Petitioner answered that

someone had given it to him but he had never used it. (5 RT at 1804.) The prosecutor asked Petitioner if the holster fit any other gun he had, and Petitioner responded, "No. I didn't own any others." (*Id.*). The following exchange then occurred:

Prosecutor: You didn't own any other guns?
Petitioner: No, I didn't own any other guns.
Prosecutor: No other weapons?
Petitioner: Excuse me?
Prosecutor: No other weapons?
Petitioner: No.
Prosecutor: Firearms?
Petitioner: No.

(*Id.*)

At that point, the prosecutor asked if counsel could approach the bench. At the bench, the court stated that the prosecutor "obviously" wanted to "put in the rifle." (*Id.* at 1805.) Defense counsel objected "for the record" while acknowledging Petitioner's testimony that he did not own any other guns. (*Id.*) The trial court permitted the prosecutor to inquire. (*Id.*)

When questioning resumed, the prosecutor questioned Petitioner about the rifle. Petitioner admitted that he owned a rifle that he kept between the mattresses in his room. (5 RT at 1806.) The prosecutor did not refer to the rifle in her closing argument.

(ii) Analysis

Petitioner is not entitled to habeas relief on either of his prosecutorial misconduct claims. Although Petitioner claimed that he could not remember what Wright was doing when he was shot, Turman testified that Wright had his arms extended in a defensive manner so as to block the bullets. Consequently, the prosecutor was free to argue Wright was shot in the arms while trying to block the

bullets. The prosecutor was likewise free to argue that Petitioner shot Wright three additional times in the arm because Panchal's testimony supported that argument.

Petitioner is correct that no evidence in the record suggested the first shot hit Wright in the leg or that the second shot (as opposed to the first) hit him in the arm. The prosecutor's argument could not have had a substantial and injurious impact on the jury's verdict because neither the sequence of gunshots nor where the first or second shots landed was of any consequence. What was material was that Petitioner repeatedly shot Wright at close range while Wright assumed a defensive posture and urged him to "chill out" (2 RT at 351-53), and that two of the five gunshots were fatal (3 RT at 925-26). Argument on those issues was proper because Turman's and Panchal's testimony supported it. Whether Wright was first shot in the leg or the arm had no bearing on Petitioner's culpability. Moreover, the court instructed the jury that "[n]othing that the attorneys say is evidence" and not to assume anything they had said was true just because they had said it. (1 CT at 87 (CALCRIM 222).) The jury was also instructed on what constituted evidence and to base its decision only on evidence presented at trial. (*Id.* at 86-87, 90-91.) The jury is presumed to have followed those unambiguous instructions. *Weeks*, 528 U.S. at 234.

The prosecutor did not commit misconduct in eliciting testimony that Petitioner owned a rifle. Although the trial court initially prohibited the evidence, the court subsequently allowed the prosecutor to question Petitioner about the rifle after he testified he did not have weapons at his house. The prosecutor did not mention the rifle in closing argument and any error was harmless.

(e) Appealing to Passions and Prejudices of Jury and Lowering Burden of Proof

In his 25th ground for relief, Petitioner contends that the prosecutor committed misconduct in her closing argument by commenting on the reasons why Wright's mother was not present at trial and displaying a photograph of Wright that

had not been admitted at trial. (Dkt. No. 14-2 at 46-47.) In his 26th ground for relief, Petitioner faults the prosecutor for misstating her burden of proof concerning whether he was guilty of voluntary manslaughter. (*Id.* at 48-49.)

No state court addressed the merits of Petitioner's claims that the prosecutor lowered her burden of proof or committed misconduct by displaying a photograph of Wright that had not been admitted at trial. The California Court of Appeal rejected his claim concerning the prosecutor's statement about Wright's mother on the merits, stating:

> Assuming misconduct, there is no possibility that it caused prejudice. The trial court (in response to a defense objection) instructed the jurors to disregard the comment about the reason for the mother's absence, and we presume the jury followed the court's instruction (*People v. Smithey* (1999) 20 Cal. 4th 936, 961). The comment had nothing to do with the substantive issues of the case.

(Dkt. No. 19-3 at 5.) The state court's rejection of that claim was not an unreasonable application of, nor contrary to, clearly established Supreme Court law. Petitioner's claims that the prosecutor lowered the burden of proof and committed misconduct by displaying a photograph that was not admitted at trial fail under *de novo* review.

(i) Relevant Facts

a) Commenting on Wright's Mother's Absence

During the prosecutor's closing argument, she made the following statement about Wright's mother:

> And this case is about Richard Wright. And this is a picture that his mother provided to me so that I could show you him alive, and not just in the deceased state that we saw in the coroner's pictures. The mother couldn't be here because it was too painful for her to sit through a trial.

(5 RT at 2134.) Trial counsel immediately objected. The trial court sustained the objection, stating, "That's not in evidence before you. Jury's admonished to disregard the comment." (*Id.*) The prosecutor did not mention Wright's mother again.

b) Commenting on Burden of Proof

During rebuttal argument, the prosecutor said the defense was "wrong when they say that I must prove beyond a reasonable doubt that it is not voluntary manslaughter," and defense counsel immediately objected. (5 RT at 2125.) At sidebar, the trial court noted that the relevant jury instruction in fact required the prosecution to prove beyond a reasonable doubt that Petitioner did not act in imperfect defense of himself or others, and therefore the prosecutor had misstated the law on this point. (*Id.* at 2126.) The prosecutor explained that trial counsel had interrupted her argument and that she was going to argue that she did not have the burden to prove beyond a reasonable doubt that the murder was not voluntary manslaughter until the defense raised the issue. The court responded that it was going to strike the prosecutor's "last statement" and allow her to "clarify." (*Id.* at 2127.) The court then addressed the jury and stated the following:

> All right. Ms. Solomons, I apologize I interrupted the argument. The last sentence that you spoke was this: "Now, the defense is wrong when they say I must prove beyond a reasonable doubt that it is not voluntary manslaughter." That last sentence is stricken. Jury's admonished to disregard that last statement. The court's instructions in that regard are [sic] the people's burden is contained in the jury instructions I have given you.
>
> I'll allow to you restate your thoughts. But I instruct the jury to disregard that last statement that the prosecutor made.

(*Id.*)

The prosecutor resumed her argument and stated that she had not

completed her initial statement when trial counsel objected. She said that "the prosecution does not have a burden to prove beyond a reasonable doubt that it was not voluntary manslaughter until it was the defense that raised that in their case." (*Id.* at 2128.) "And at that point, not until then, at that point my burden then shifts to prove to you beyond a reasonable doubt that this voluntary manslaughter is a made up concoction. That this is not something that is reasonable. And that's what this case is about." (*Id.*)

(ii) Analysis

In assessing the prejudicial impact of a prosecutor's improper comment, courts consider curative steps taken by the trial court to address the comment. *Hein v. Sullivan*, 601 F.3d 897, 912-13 (9th Cir. 2010) (identifying curative steps taken by judge as factor in determining whether prosecutor's improper comments deprived petitioner of fair trial). Absent extraordinary circumstances, a jury is presumed to follow an instruction to disregard irrelevant or improper comments to which it is exposed. *See Greer v. Miller*, 483 U.S. 756, 766 n.8 (1987). Accordingly, when a trial court timely admonishes the jury to disregard a prosecutor's improper comments, a due process claim based on the purported impropriety will typically fail. *Id.* at 765-66 (explaining sequence of single question, immediate objection, and curative instructions "clearly" indicated prosecutor's improper question did not violate due process); *Turner v. Marshall*, 63 F.3d 807, 817 (9th Cir. 1995) (noting curative actions by court when confronted by improper comments "are usually presumed to neutralize damage such that any error was harmless"), *overruled on other grounds by Tolbert v. Page*, 182 F.3d 677 (9th Cir. 1999) (en banc).

Petitioner is not entitled to habeas relief on these claims. The prosecutor's statement about why Wright's mother was not at the trial referred to facts not in evidence. Petitioner can show no prejudice because the trial court immediately took curative actions, stating that the prosecutor's statements referred to facts not

in evidence and admonishing the jury to disregard the prosecutor's statement about Wright's mother. As mentioned above, the jury was instructed that arguments of counsel were not evidence and to base its verdict on the evidence presented at trial. (1 CT at 87 (CALCRIM 222).) The same is true concerning the prosecutor's incomplete statement about her burden to prove that Petitioner did not commit voluntary manslaughter. The trial court struck that statement and admonished the jury to disregard it. The court directed the jury to the instructions concerning the prosecutor's burden of proof, which Petitioner does not challenge. The jury is presumed to have followed those clear instructions. *See Weeks*, 528 U.S. at 234. The prosecutor clarified to the jury that she was required to prove beyond a reasonable doubt that Petitioner did not commit voluntary manslaughter because the defense had raised the issue. (5 RT at 2128.)[25]

Similarly, Petitioner cannot show that the prosecutor's brief display of a photograph depicting Wright when he was alive rendered the trial so fundamentally unfair that his conviction violates due process. Assuming the prosecutor erred in showing the photograph to the jury, Petitioner suffered no prejudice because the jury saw it for only a few moments during a lengthy closing argument and had already seen Wright's autopsy photographs during the seven-day trial. (2 RT at 924-26; 5 RT at 2134); *Valdez v. Herndon*, No. CV 08-07494-DDP (SH), 2009 WL 6340019, at *18 (C.D. Cal. Nov. 4, 2009) (prosecutor's "brief display" during closing argument "of the victim's enlarged photograph" did "not infect the trial with unfairness"), *accepted by* 2010 WL 1438964 (C.D. Cal. Apr. 8, 2010); *see also Collier v. Diaz*, No. CV 11-5133-JST (PJW), 2012 WL 1835255, at *12 (C.D. Cal.

[25] The prosecutor's brief reference to why Wright's mother did not attend the trial or her burden of proof were isolated remarks that took up a total of five lines of Reporter's Transcript (5 RT at 2134) in an argument that spanned 50 pages (*Id.* at 1935-72, 2123-2136). *See Duckett v. Godinez*, 67 F.3d 734, 743 (9th Cir. 1995) (assuming prosecutor's comment was improper, no constitutional violation occurred based on isolated moment in trial where jury was instructed that statements of attorneys were not evidence).

Apr. 24, 2012) (assuming prosecutor erred in displaying photograph of young victim before murder, error did not result in due process violation when photograph was displayed only briefly and jury had already seen victim's autopsy photographs), *accepted by* 2012 WL 1850909 (C.D. Cal. May 17, 2012). As discussed above, the evidence against Petitioner was strong. *Victor v. Walker*, No. 1:07-cv-00758 ALA (HC), 2008 WL 4681166, at *9 (E.D. Cal. Oct. 22, 2008) (prosecutor's display of unadmitted photograph of murder victim when he was alive during closing argument did not so infect trial with unfairness as to violate due process when evidence against petitioner was overwhelming).

Accordingly, habeas relief is unwarranted on these claims.

I. GROUND 24: Read Back of Testimony

In his 24th ground for relief, Petitioner contends the trial court violated his confrontation rights by allowing the court reporter to read back testimony to the jury without obtaining a waiver of his right to be present. (Dkt. No. 14-2 at 55-56.)

1. Relevant Facts

During deliberations, the jury sent a note asking for a readback of "all questions and answers concerning the day of the crime having to do with what [Petitioner] thought at the time of the killing of Richard Wright." (5 RT at 2401.) The trial court interpreted the note as a request to have Petitioner's testimony read back, and both the prosecutor and trial counsel agreed. (*Id.* at 2041-02.) Trial counsel suggested that the court reporters be sent into the jury room alone and read back Petitioner's testimony to the jury. (*Id.* at 2402.)

The court informed Petitioner that he had a right to be present during any readback of trial testimony. The court explained that under trial counsel's suggestion, neither Petitioner nor counsel would be present during the readback of his testimony. The court asked Petitioner if he wanted to waive his right to be present during the readback of his testimony and agree to counsel's suggestion, and Petitioner replied, "Yes, sir." (*Id.*) Trial counsel and the prosecutor joined in

the waiver. The court then had the court reporters go into the jury room and read back the requested testimony. (*Id.*)

After the jury reached its verdict, the trial court noted that the jury had requested a second readback of Petitioner's testimony, confirmed that the attorneys had been aware of the request, and noted that the second readback had occurred in the same manner as the first. (*Id.* at 2701-02.)

2. Applicable Federal Law and Analysis

A defendant's right to be present during criminal proceedings derives from the Sixth Amendment's Confrontation Clause. *United States v. Gagnon*, 470 U.S. 522, 526 (1985). The Supreme Court has recognized that a defendant's right to be present exists "in some situations" where the defendant is not actually confronting witnesses or the evidence against him. *Id*. at 526-27. A defendant has a due process right to be present at any critical stage of his criminal proceedings if his presence would contribute to the fairness of the procedure. *Kentucky v. Stincer*, 482 U.S. 730, 745 (1987). There is, however, no right to be present "'when presence would be useless, or the benefit but a shadow.'" *Id.* at 745 (no right to be present during hearing to determine competency of prosecution's child witnesses); *Gagnon*, 470 U.S. at 526–27 (no right to be present during in camera examination of juror). "The defendant bears the burden of showing 'how [a] hearing was unfair or that his presence at the hearing would conceivably have changed the result.'" *Hovey v. Ayers*, 458 F.3d 892, 902-03 (9th Cir. 2006) (citation omitted).

The Supreme Court has not held that a readback of jury testimony is a critical stage of a criminal prosecution. *See La Crosse v. Kernan*, 244 F.3d 702, 708 (9th Cir. 2001) ("The Court . . . has never addressed whether readback of testimony to a jury is a 'critical stage of the trial' triggering a criminal defendant's fundamental right to be present")*; see also Oubichon v. Cate*, 443 Fed. Appx. 235, 237-38 (9th Cir. 2011) ("A readback of an eyewitness' testimony, without counsel's

knowledge or permission, has not been condemned by the Supreme Court."). The Ninth Circuit has held, however, that the readback of trial testimony can be a critical stage but such a determination involves "a fact-sensitive inquiry" that "varies from case to case." *Fisher v. Roe*, 263 F.3d 906, 916-17 (9th Cir. 2001).

In the Ninth Circuit, the denial of a defendant's right to be present during a readback of trial testimony does not warrant habeas relief unless the deprivation had a substantial and injurious impact on the jury's verdict. *Hegler v. Borg*, 50 F.3d 1472, 1476-78 (9th Cir. 1995). That standard is proper for such errors because, during a readback, "the ability of [the defendant] to influence the process [i]s negligible." *Id*. at 1477 (citation omitted); *see also Campbell v. Rice*, 408 F.3d 1166, 1172 (9th Cir. 2005) (explaining right-to-be-present claims are subject to harmless-error analysis "unless the deprivation, by its very nature, cannot be harmless").

Petitioner is not entitled to habeas relief on his right-to-be-present claim for at least two reasons. First, he waived his right to be present during the readback of his trial testimony. Although Petitioner suggests that his waiver applied only to the first readback, there is no reason to construe his waiver so narrowly. Indeed, in obtaining Petitioner's waiver of his right to be present at the first readback, the trial court explained which testimony the jury's request concerned and explained the procedure it would employ in having that testimony read back to the jury. (5 RT at 2402.) The first and the second readback involved the identical trial testimony and occurred under the same procedure to which Petitioner agreed in waiving his right to be present.[26]

Second, even assuming error, Petitioner has failed to show how his absence

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[26] Because Petitioner waived his right to be present at the readbacks, the Court need not decide whether the second readback was a critical stage of the criminal proceedings against him. Nevertheless, such a conclusion would be unlikely under these circumstances because the second readback was identical to the first readback, the latter of which Petitioner does not allege to have violated his right to confrontation or to be present.

from the second readback had a substantial and injurious impact on the jury's verdict. Although he speculates that his presence would have prevented the court reporters from "cho[osing] erroneous parts of testimony to read which only supported a murder conviction rather than manslaughter" (Dkt. No. 14-2 at 56), there is no evidence of any such misconduct on the court reporters' part. *See Borg*, 24 F.3d at 26 (*supra*); *see also Burr v. Chavez*, No. C 10–5935 LHK PR, 2012 WL 2935462, at *11 (N.D. Cal. July 12, 2012) (petitioner could show no prejudice from being excluded during readback of testimony when "there [was] nothing in the record showing that anything unusual occurred during the readback to indicate that the error substantially influenced the jury's decision"). Nor is there any reason to believe such misconduct occurred during the second readback because it concerned the same testimony as the first readback.[27]

Accordingly, habeas relief is unwarranted on this claim.[28]

J. GROUND 35: Petitioner's Sentence for Second Degree Murder

In his 35th ground for relief, Petitioner contends that his sentence for second degree murder violates the Eighth Amendment's ban on cruel and unusual punishment and due process because California law mandates a 15-years-to-life sentence for second-degree murder rather than providing low-, middle-, and upper-term sentences for the crime. (Dkt. No. 14-2 at 75.)

This claim is meritless. First, to the extent that this claim involves only alleged errors in the application of state sentencing law, it is not cognizable. Matters relating to state sentencing law generally are not cognizable on federal

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[27] If anything, the jury's acquittal of first degree murder and finding of guilt on second degree murder indicates the jury paid attention to the evidence.

[28] In his 28th ground for relief, Petitioner contends that appellate counsel was ineffective by failing to assert grounds 16 through 26 on appeal. (Dkt. No. 14-2 at 53-54.) Because each claim is without merit, appellate counsel did not perform unreasonably in declining to raise them on appeal and Petitioner suffered no prejudice from counsel's failure to do so.

habeas review. *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991) ("[I]t is not the province of a federal habeas court to reexamine state-court decisions on state-law grounds."). Petitioner cannot transform a state law issue into a federal claim merely by invoking due process. *See Gray*, 518 U.S. at 163; *Cacoperdo*, 37 F.3d at 507; *Miller*, 757 F.2d at 993-94.

Second, Petitioner's indeterminate 15-years-to-life sentence for second-degree murder did not violate the Eighth Amendment's ban on cruel and unusual punishment. The Eighth Amendment contains a "narrow proportionality principle" that "forbids only extreme sentences that are 'grossly disproportionate' to the crime." *Graham v. Florida*, 560 U.S. 48, 59-60 (2010) (quoting *Harmelin v. Michigan*, 501 U.S. 957, 1000-01 (1991) (Kennedy, J., *concurring*)). "The threshold determination in the eighth amendment proportionality analysis is whether [the petitioner's] sentence was one of the rare cases in which a . . . comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality." *United States v. Bland*, 961 F.2d 123, 129 (9th Cir. 1992) (citations and quotations omitted); *see also Graham*, 560 U.S. at 59-61 (discussing same); *Lockyer v. Andrade*, 538 U.S. 63, 73 (2003) (gross disproportionality principle "applicable only in the 'exceedingly rare' and 'extreme' case") (citations omitted).

When, as here, the crime is murder, even a life sentence without parole is not grossly disproportionate. *See Harris v. Wright*, 93 F.3d 581, 583-85 (9th Cir. 1996); *United States v. LaFleur*, 971 F.2d 200, 211 (9th Cir. 1991 ("Under *Harmelin*, it is clear that a mandatory life sentence for murder does not constitute cruel and unusual punishment."). Therefore, Petitioner's Eighth Amendment claim necessarily lacks merit. *See Windham v. Merkle*, 163 F.3d 1092, 1106-07 (9th Cir. 2003) (15-years-to-life sentence for second-degree murder was not cruel and unusual); *Huber v. Lizarraga*, No. CV 16-8729-BRO(E), 2017 WL 2495175, at *3 (C.D. Cal. Apr. 12, 2017) (same), *accepted by* 2017 WL 2495173 (C.D. Cal. May

10, 2017); *Deerwester v. Valenzuela*, No. CV 15-1582-CJC (PJW), 2015 WL 10793484, at *1 (C.D. Cal. Aug. 25, 2015) (citation omitted) (explaining that "it is beyond question that a life sentence for [second-degree] murder is not cruel and unusual punishment"), *accepted by* 2015 WL 10793494 (C.D. Cal. Oct. 8, 2015); *see also Harmelin*, 501 U.S. at 1009 (sentence of life imprisonment without possibility of parole for first-offense crime of possession of 672 grams of cocaine was not grossly disproportionate). The Constitution does not require California to provide low, middle and high term sentences for second-degree murder, and Petitioner cites no relevant authority suggesting otherwise.

Accordingly, he is not entitled to relief on the claim.

K. GROUND 36: Sufficiency of the Evidence

In his 36th ground for relief, Petitioner contends that there was insufficient evidence to support his conviction for second degree murder and that appellate counsel was ineffective in failing to challenge the sufficiency of the evidence supporting his conviction on appeal. (Dkt. No. 14-2 at 76-77.)

The California Supreme Court was not objectively unreasonable in rejecting either claim. "[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970). "[T]he critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be . . . to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 318 (1979). "'[A] reviewing court must consider all of the evidence admitted by the trial court,' regardless whether that evidence was admitted erroneously." *McDaniel v. Brown*, 558 U.S. 120, 131 (2010) (citation omitted).

This inquiry does not require a court to "ask itself whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt." *Jackson*, 443

U.S. at 318-19 (emphasis in original). "A reviewing court may set aside the jury's verdict on the ground of insufficient evidence only if no rational trier of fact could have agreed with the jury." *Cavazos v. Smith*, 565 U.S. 1, 2 (2011) (per curiam). A reviewing court must give "full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Jackson*, 443 U.S. at 319. "What is more, a federal court may not overturn a state court decision rejecting a sufficiency of the evidence challenge simply because the federal court disagrees with the state court. The federal court instead may do so only if the state court decision was 'objectively unreasonable.'" *Cavazos*, 565 U.S. at 2 (citation omitted). California's standard for determining the sufficiency of evidence is identical to the federal standard announced in *Jackson*. *People v. Johnson*, 26 Cal. 3d 557, 576 (1980).

In applying the *Jackson* standard, the federal court must refer to the substantive elements of the criminal offense as defined by state law at the time that a petitioner committed the crime and was convicted, and look to state law to determine whether evidence is necessary to convict on the crime charged. *See Jackson*, 443 U.S. at 324 n.16.

The Supreme Court has made clear that "it is the responsibility of the jury – not the court – decide what conclusions should be drawn from evidence admitted at trial." *Cavazos*, 565 U.S. at 2. "[E]vidence is sufficient to support a conviction so long as 'after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *Id*. at 7 (quoting *Jackson*, 443 U.S. at 319 (emphasis in original)). "[A] reviewing court 'faced with a record of historical facts that supports conflicting inferences must presume – even if it does not affirmatively appear in the record – that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution.'" *Id*. (quoting *Jackson*, 443 U.S.

at 326); *see also Jones v. Wood*, 207 F.3d 557, 563 (9th Cir. 2000) (circumstantial evidence is sufficient).

The jury convicted Petitioner of second degree murder. In California, murder is the unlawful killing of a human being "with malice aforethought." Cal. Penal Code § 187(a). The malice necessary to support a murder charge may be express or implied. *Id.* § 188. "It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature." *Id.* The requisite intent to kill is most often inferred from the defendant's acts and the circumstances of the crime because, as the California Supreme Court has recognized, "there is rarely direct evidence of a defendant's intent." *People v. Smith*, 37 Cal. 4th 733, 735-36 (2005). Malice is implied when an unprovoked killing "results from an intentional act, the natural consequences of which are dangerous to human life, and the act is deliberately performed with knowledge of the danger to, and with conscious disregard for, human life." *People v. Cook*, 39 Cal. 4th 566, 596 (2006).

The prosecutor presented ample evidence to prove that Petitioner committed second degree murder. Petitioner admitted that he shot Wright. (4 RT at 1577.) He testified that he drew his gun and raised his arm with his gun in hand. (*Id.* at 1623-25.) Turman's testimony supported a reasonable inference that Petitioner did so with express malice aforethought. Turman testified that Petitioner loaded a bullet in the gun before shooting Wright. (2 RT at 350.) Turman twice implored Petitioner not to shoot Wright, reminding Petitioner that Wright was his friend. (*Id.* at 350-53.) Petitioner's response to those entreaties – specifically, "Be quiet. I have to do this real quick and I'll leave" (*Id.*) – coupled with his firing five shots at Wright at close range (*Id.* at 351-53; 3 RT at 925-26; 4 RT at 1623-28, 1637; 5 RT at 1847-52), evidenced his intent to kill. *See People v. Smith*, 37 Cal. 4th 733, 742 (2005) (explaining "the act of purposefully firing a lethal weapon at another human being at close range, without legal excuse, generally gives rise to an inference that the shooter acted with express malice"); *see also Jackson*, 443

U.S. at 325 (evidence of shooting multiple times at close range indicates manner of attempted killing consistent with premeditation and deliberation). The evidence that Petitioner fled afterwards (4 RT at 1627-38; 5 RT at 1833-34) evidenced his consciousness of guilt. *See People v. Garrison*, 47 Cal. 3d 746, 773 (1989) ("[E]vidence of flight supports an inference of consciousness of guilt."); *see also People v. Dabb*, 32 Cal. 2d 491, 500 (1948) ("[A] consciousness of guilt may be inferred from an attempt to avoid apprehension."). There was more than sufficient evidence to support the jury's verdict of second degree murder.

Petitioner's claim that the jury's failure to convict him of first degree murder shows that it rejected Turman's testimony is meritless. Petitioner's speculation about the jury's assessment of Turman's testimony amounts to nothing more than an invitation to reweigh the evidence at trial and intrude on the jury's exclusive province to resolve conflicts in the evidence. Reviewing courts are prohibited from doing either. *See Long v. Johnson*, 736 F.3d 891, 896 (9th Cir. 2013) (explaining reviewing court must respect exclusive province of factfinder to determine credibility of witnesses, resolve evidentiary conflicts, and draw reasonable inferences from proven facts). In assessing Petitioner's challenge to the sufficiency of the evidence, the court is required to resolve any conflicts in favor of the jury's verdict. *See Cavazos*, 565 U.S. at 2.

Because ample evidence supported the jury's verdict that Petitioner committed second degree murder, appellate counsel's decision not to challenge it on appeal was reasonable and did not prejudice Petitioner.

Petitioner is therefore not entitled to habeas relief on either his sufficiency-of-the evidence claim or his corresponding ineffective-assistance claim.

L. GROUND 37: Cumulative Error

In his final ground for relief, Petitioner contends that cumulative impact of the trial errors and appellate errors alleged above violated his right to due process and a fair trial. (Dkt. No. 14-1 at 36-40.)

"[T]he combined effect of multiple trial court errors violates due process where it renders the resulting criminal trial fundamentally unfair." *Parle v. Runnels*, 505 F.3d 922, 927 (9th Cir. 2007) (citing *Chambers v. Mississippi*, 410 U.S. 284, 302-03 (1973)). But if none of the claims actually demonstrate error, no cumulative prejudice can stem from them. *See Hayes v. Ayers*, 632 F.3d 500, 524 (9th Cir. 2011) (finding that when "no error of constitutional magnitude occurred, no cumulative prejudice is possible"); *Taylor v. Beard*, 616 F. App'x 344, 345 (9th Cir. 2015) ("[Petitioner] has failed to demonstrate any error here; thus, there can be no cumulative error.").

Each of Petitioner's grounds for relief is meritless, so there can be no cumulative error. *See Taylor*, 616 Fed. Appx. at 345. Moreover, any collective prejudice from the purported errors underlying those claims likewise would not have rendered his trial or appellate review fundamentally unfair. Accordingly, he is not entitled to relief on his cumulative-error claim.

M. Petitioner's Request for Evidentiary Hearing

In his reply, Petitioner requests an evidentiary hearing "to prove his claim on ineffective assistance of trial counsel." (Dkt. No. 116 at 30.) Petitioner does not identify to which of his numerous ineffective-assistance claims the request concerns. Based on his reply, it presumably concerns his claims that trial counsel erred failing to pursue a posttraumatic-stress-disorder-induced-state-of-unconsciousness defense. (*Id.* at 20-21.)

This request is denied. Under the AEDPA, this court "is limited to the record that was before the state court that adjudicated the claim on the merits." *Pinholster*, 563 U.S. at 180. An evidentiary hearing is unnecessary here because, for the reasons stated above, "the record refutes [Petitioner's] factual allegations or otherwise precludes habeas relief[.]" *Schriro v. Landrigan*, 550 U.S. 465, 474 (2007). Accordingly, Petitioner is not entitled to an evidentiary hearing.

IV.

RECOMMENDATION

For the reasons discussed above, it is recommended that the Court issue an order: (1) accepting this Report and Recommendation; (2) and directing that judgment be entered denying the First Amended Petition for Writ of Habeas Corpus and dismissing the action with prejudice.

DATED: August 9, 2023

Alicia G. Rosenberg

ALICIA G. ROSENBERG
United States Magistrate Judge

CV 11-8020-RGK (AGR) Lodged Doc # 10

S191062 **NELSON (LASCHELL) ON H.C.**

The petition for writ of habeas corpus is denied. (See *People v. Duvall* (1995) 9 Cal.4th 464, 474.)

S191169 **WILLIAMSON (STEPHEN R.) ON H.C.**

The petition for writ of habeas corpus is denied. (See *People v. Duvall* (1995) 9 Cal.4th 464, 474; *In re Dexter* (1979) 25 Cal.3d 921, 925-926.)

S191211 **NORMAN (WELDON) ON H.C.**

The petition for writ of habeas corpus is denied. (See *In re Robbins* (1998) 18 Cal.4th 770, 780; *In re Miller* (1941) 17 Cal.2d 734, 735.)

S191212 **SMITH (LORENZO) ON H.C.**

Petition for writ of habeas corpus denied

S191215 **GALAVIZ (NICANDRO) ON H.C.**

The petition for writ of habeas corpus is denied. (See *In re Robbins* (1998) 18 Cal.4th 770, 780; *People v. Duvall* (1995) 9 Cal.4th 464, 474; *In re Swain* (1949) 34 Cal.2d 300, 304.)

S191216 **CULBERSON (KEVIN) ON H.C.**

Petition for writ of habeas corpus denied

S191217 **VANG (XAI) ON H.C.**

The petition for writ of habeas corpus is denied. (See *In re Robbins* (1998) 18 Cal.4th 770, 780; *In re Waltreus* (1965) 62 Cal.2d 218, 225; *In re Dixon* (1953) 41 Cal.2d 756, 759.)

S191248 **SIGUENZA (MARLON EDGARDO) ON H.C.**

Petition for writ of habeas corpus denied

CV11-8020-AG(AGR) Lodged Doc. #8

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

In re

MARLON E. SIGUENZA,

on

Habeas Corpus.

B227320

(L.A.S.C. No. BA289665)

ORDER

THE COURT*:

The petition for writ of habeas corpus, filed September 14, 2010, has been read and considered.

The petition is denied.

*MALLANO, P. J. CHANEY, J. JOHNSON, J.

CV 11-8020-AG (AGR) Lodged Doc. #6

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

In re MARLON EDGARDO SIGUENZA, Petitioner, On Habeas Corpus.	CASE NO. BA289665 ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS

The court has read and considered the Petition for a Writ of Habeas Corpus filed by defendant and petitioner Marlon Edgardo Siguenza. For the reasons that follow, the court denies the petition.

Procedural Background

In 2005 the People charged Siguenza with the murder of Richard Wright on September 3, 2005. The case went to trial in December 2006. The jury found Siguenza not guilty of first degree murder but guilty of second degree murder. The jury also found true an allegation that Siguenza had personally and intentionally discharged a firearm – a handgun -- in the commission of the crime, causing death to the victim. The trial court sentenced Siguenza to 40 years to life in the state prison. In June 2008 the court of appeal affirmed Siguenza's conviction. (No. B197757.) In September 2008 the California Supreme Court denied Siguenza's petition for review.

The court of appeal opinion sets forth the facts. In short, Siguenza, a drug dealer, was watching television coverage of Hurricane Katrina with the victim, Wright, and

another friend, Justin Turman. Siguenza and Turman were discussing race relations. One of Siguenza's customers called him on his cell phone several times. Siguenza did not answer, telling Turman and Wright he did not want to be bothered. The customer then called Wright and said she wanted some cocaine. Wright told her to come to the house (Wright's girlfriend's residence) and gave her directions.

Wright and Turman went outside to smoke, leaving an angry Siguenza inside clenching his jaw. When Wright and Turman came back inside, Siguenza was chopping cocaine. A few minutes later, the customer called Wright and said she was out front. Wright relayed this information to Siguenza and Turman.

Siguenza stood up, reached into his waistband, and pulled out a gun. With shaking hands, he took a bullet from his pocket and loaded the gun. Turman asked, "Marlon, what are you doing[?]; this is your friend." Siguenza responded, "Shh. Be quiet. I have to do this real quick and I'll leave." Turman repeated his question and Siguenza repeated his answer. Siguenza then shot Wright five times, killing him. Siguenza fled. He surrendered to police several weeks later, accompanied by counsel.

Siguenza's Petition

Siguenza's writ petition alleges a lengthy laundry list of grounds, including prosecutorial misconduct, the trial court's failure to give certain jury instructions *sua sponte*, and ineffective assistance of trial and appellate counsel. This court asked the District Attorney for an informal response to the petition addressing two questions: (1) Was Siguenza's retained trial attorney unconstitutionally ineffective in (a) not asking the trial court to instruct the jury on voluntary intoxication causing unconsciousness and/or (b) in not presenting evidence of Siguenza's claimed post-traumatic stress disorder; and

(2) was Siguenza's appellate attorney unconstitutionally ineffective in failing to raise a claim of error about this jury instruction issue on appeal. The People filed their informal response and Siguenza filed a reply.

Discussion

In a habeas proceeding, the burden of proof is on the petitioner to establish by a preponderance of substantial, credible evidence the contentions on which he seeks habeas relief. (*In re Alvernaz* (1992) 2 Cal.4th 924, 945; *In re Fields* (1990) 51 Cal.3d 1063, 1071.) "For purposes of collateral attack, all presumptions favor the truth, accuracy and fairness of the conviction and sentence; *defendant* thus must undertake the burden of overturning them." (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1260, emphasis in original.) "Because a petition for writ of habeas corpus seeks to collaterally attack a presumptively final criminal judgment, the petitioner bears a heavy burden initially to *plead* sufficient grounds for relief, and then later to *prove* them . . . ." (*People v. Duvall* (1995) 9 Cal.4th 464, 474, emphasis in original.)

Siguenza's Claim of Unconsciousness

Siguenza argues that his trial attorney should have requested – and/or the trial court should have given *sua sponte* – CALCRIM 626, Voluntary Intoxication Causing Unconsciousness: Effects on Homicide Crimes (Penal Code section 22). This argument is meritless.

The relevant testimony at trial was as follows: Turman testified that he and Siguenza had a conversation about the hurricane and race relations. The conversation was not heated, Wright did not participate, and Siguenza was "acting normal." Just as Turman and Wright were about to go outside to smoke, Turman noticed that Siguenza's

eyes were watering and his jaw was clenched. When Turman and Wright returned about fifteen minutes later, Siguenza was chopping up cocaine. Turman did not see Siguenza actually use any cocaine. When Siguenza learned that the unwanted customer was outside, he "hopped up," pulled a handgun out of his waistband, loaded it, and cocked it. Turman asked Siguenza what he was doing, pointing out that Wright was his friend. Siguenza answered, "Shh. Be quiet. I have to do this real quick and I'll leave." Wright put his hands in front of him and asked Siguenza what he was doing, telling him to "chill out." Turman again entreated Siguenza: "What are you doing? This is your homeboy. Why would you do this?" Siguenza repeated, "Shh. Be quiet. I'm going to do this real quick and I'm gonna leave." Siguenza then pointed the gun directly at Wright, took a few steps forward, and fired three shots in rapid succession. Turman turned and ran. He heard more shots as he was running.

The unwanted customer testified that she had used drugs with Siguenza in the past and had seen him use cocaine, methamphetamine, and marijuana. She said that Siguenza's demeanor didn't change when he was high.

The defense called Dr. Ronald Markman at trial. Dr. Markman had examined Siguenza on four separate occasions and written two reports. Dr. Markman found "no evidence of an acute psychotic process or thought disorder." Although Dr. Markman interviewed Siguenza about his early childhood in El Salvador, he made no mention or even suggestion of post-traumatic stress disorder (related to the civil war in that county) in his reports. Dr. Markman's first report noted that Siguenza had been extensively involved in substance abuse since his preteen years. Siguenza, Markman wrote, "was under the influence of cocaine at the time of the [shooting]. The reactive behavior was

undoubtedly precipitated and facilitated by his being under the influence of cocaine, which put him in a tenuous, confront[ational] state of mind." Dr. Markman opined that Siguenza "acted impulsively in a drug-induced heat of passion." Dr. Markman testified at trial that drug use can alter perception and recollection of events, but that generally a person under the influence of stimulants, while "preoccupied with [his] own concerns," is "aware of what's going on." Dr. Markman opined that Siguenza suffered from "poly-substance abuse and dependence" and exhibited "cocaine-induced paranoid disorder" on the night of the murder. Dr. Markman never testified – nor did either of his reports suggest -- that Siguenza was "unconscious" that night.

Siguenza testified at trial on his own behalf. He admitted that he killed the victim. He testified that he was born in El Salvador and moved to the United States when he was seven. Siguenza did not mention having witnessed any acts of violence in El Salvador. On the night of the murder, Siguenza drove around with Wright and Turman, then dropped them at Wright's house while he (Siguenza) went to sell some marijuana to someone in West Los Angeles. Siguenza returned to Wright's house between midnight and 1:00 a.m. He started cutting up and using cocaine. He drank some tequila and smoked some marijuana.

Siguenza and Turman discussed the devastation wrought by Hurricane Katrina. Wright was quiet and did not join in the conversation. Siguenza testified, however, that Wright at some point said "[the] struggle didn't matter." Siguenza claimed that he interpreted Wright's remarks that "[the] [s]truggle [didn't] matter" and "was bullshit" as meaning "that he [Wright] was going to kill more people" in New Orleans. Siguenza

testified that he "wanted to prevent that" and that Wright's comment "[m]ade me take away his life."

Siguenza admitted that he remembered reaching into his waistband for the gun and raising his hand with the gun in it. He remembered holding the gun out in front of him, and the sound of gunshots. He remembered moving his finger, but claimed he didn't remember pulling the trigger. Siguenza admitted he ran away after the shooting and threw the gun into some bushes as he ran.

Defense counsel asked the trial court to instruct the jury on the lesser offenses of second degree murder and voluntary manslaughter. The defense requested manslaughter instructions on two theories: imperfect defense of others, and heat of passion. The trial court agreed to give the instruction on the former theory but not the latter. The defense also asked for -- and the court agreed to give -- CALCRIM 625 about the effect of voluntary intoxication. The trial court also said it would give CALCRIM 3428 on mental disorder – again at the defense's request – because Dr. Markman's testing had revealed "a degree of paranoia" on Siguenza's part.

In closing, defense counsel argued that Siguenza was paranoid and delusional at the time of the shooting as a result of drug use and that he acted in an honest belief in the defense of others (people in New Orleans). The jury found Siguenza guilty of second degree murder. It also found the allegation of Siguenza's intentional use of a firearm true.

Because there was no evidence at trial that Siguenza was unconscious when he shot Wright, his attorney was not ineffective in not asking for CALCRIM 626. Nor did the trial court err in not giving the instruction *sua sponte*. All of the evidence at trial –

including the testimony of defense expert Dr. Markman and of Siguenza himself – was that Siguenza was conscious at the time of the shooting. Siguenza admitted he intentionally shot Wright, but he claimed he did it to save people in New Orleans. The jury properly could have rejected this implausible theory and concluded that Siguenza shot Wright over his annoyance that Wright had invited the unwanted cocaine customer to come over, for some other reason, or for no reason at all.

Moreover, even if the court had had a duty to give CALCRIM 626 – and, for the reasons discussed, it did not – the failure to do so is harmless error where, as here, the jury implicitly rejected any such "unconsciousness" theory by finding that Siguenza had intentionally discharged the handgun.

Siguenza's Ineffective Assistance of Counsel Claim

Because – as discussed above – there was no evidence to support an "unconsciousness" instruction, Siguenza's trial lawyer was not ineffective in failing to ask for it, nor was his appellate lawyer ineffective in not raising the issue on appeal. To be entitled to relief on an ineffective assistance of counsel claim, Siguenza must show both deficient performance and prejudice. The errors of his attorneys must be so serious that counsel was not functioning as the type of counsel guaranteed by the Sixth Amendment to the United States Constitution. Even if a petitioner shows deficient performance, he has not met his burden unless he shows that actual prejudice resulted. (*Strickland v. Washington* (1984) 466 U.S. 668; *People v. Marquez* (1992) 1 Cal.4th 553.) Reviewing courts "presume that counsel rendered adequate assistance and exercised reasonable professional judgment in making [strategic appellate] decisions." (*People v. Prieto* (2003) 30 Cal.4th 226, 261.) Here, Siguenza's trial attorney asked for all jury

instructions even arguably supported by the evidence. He managed to achieve an acquittal for first degree murder (the jury convicted Siguenza on the lesser charge of second degree murder), even though Siguenza methodically loaded his gun, pointed it at Wright, twice stated his intention to "do this" despite entreaties from Turman and from the victim, and then shot Wright five times. Moreover, trial counsel obtained a court appointment of Dr. Markman and presented his testimony at trial. As noted above, there is nothing in Dr. Markman's reports or testimony, in Siguenza's own trial testimony, or anywhere else in the record to support Siguenza's belated claim of post-traumatic stress disorder. In short, Siguenza has not carried his burden of proving that trial or appellate counsel's performance fell below an objective standard of reasonableness and that, but for counsel's unprofessional errors, there is a reasonable probability that the result would have been more favorable to him. (*In re Ross* (1995) 10 Cal.4th 184, 201.)

Siguenza's Remaining Contentions

Siguenza also alleges prosecutorial misconduct in the claimed failure to disclose "impeachment evidence" as to Turman, in the introduction into evidence of a t-shirt that had been "tampered" with, in the display to the jury of a photograph of the victim during closing argument, in the prosecutor's "refer[ence] to facts not in evidence," and in the district attorney's rebuttal argument about Dr. Markman's testimony. He further alleges that his rights were violated when police questioned him about where he'd thrown the gun and when the trial court admitted into evidence statements police took from Siguenza allegedly in violation of *Miranda,*; that the trial court erred in not staying or striking the sentence for the 12022.53(d) enhancement; and that his appellate counsel should have argued that the evidence supported, at most, a conviction for involuntary manslaughter.

All of these arguments either were, or could have been, raised on appeal. In general, habeas relief is not appropriate for issues raised and rejected on appeal (*In re Waltreus* (1965) 62 Cal.2d 218) or that could have been raised on appeal but were not (*In re Dixon* (1953) 41 Cal.2d 756; *In re Dean* (1970) 12 Cal.App.3d 264, 267). Claims of insufficiency of the evidence, erroneous trial court rulings, or procedural mistakes should be raised on direct appeal. (*In re Lindley* (1947) 29 Cal.2d 709, 723.)

Conclusion

Siguenza has failed to make the required showing here. Unless a petition for habeas corpus states a prima facie case for relief, it will be summarily denied. (*In re Clark* (1993) 5 Cal. 4th 750, 781; *People v. Gonzalez* (1990) 51 Cal. 3d 1179, 1260.)

For all of these reasons, Siguenza's petition is DENIED.

DATED: June 30, 2010

Anne H. Egerton
Judge of the Superior Court

Judicial Assistant to give notice

CV 11-8020-AG (AGR) Lodged Dec. #4 MARC KOHM

Court of Appeal, Second Appellate District, Div. 1 - No. B197757
S165420

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

MARLON E. SIGUENZA, Defendant and Appellant.

The petition for review is denied.

GEORGE
Chief Justice

CV 11-8020-AG (AGR) Lodged Doc. # 3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. MARLON E. SIGUENZA, Defendant and Appellant.	B197757 (Los Angeles County Super. Ct. No. BA289665)

APPEAL from a judgment of the Superior Court of Los Angeles County, David Mintz, Judge. Affirmed.

Peter Gold, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Susan Sullivan Pithey and Marc A. Kohm, Deputy Attorneys General, for Plaintiff and Respondent.

Marlon E. Siguenza was convicted of one count of second degree murder with a true finding on an allegation that he personally and intentionally discharged a firearm causing death. (Pen. Code, §§ 187, subd. (a), 12022.53, subd. (d).) He was sentenced to state prison for a term of 40 years to life. Siguenza appeals, claiming evidentiary error and prosecutorial misconduct. We affirm.

FACTS

While Siguenza (a drug dealer) and two friends, Justin Turman and Richard Wright (the murder victim), were watching the television coverage of Hurricane Katrina at Wright's girlfriend's house, Siguenza and Turman engaged in a lengthy conversation about race. One of Siguenza's customers (Erika Breitkoph) called him on his cell phone several times but Siguenza did not answer and told Wright and Turman he did not want to be bothered. Breitkoph then called Wright on his cell phone and said she wanted some cocaine. Wright told her to come to the house and gave her directions.

Wright and Turman went outside to smoke, leaving an angry Siguenza inside clenching his jaw. When Wright and Turman went back inside, Siguenza was "chopping" cocaine. A few minutes later, Breitkoph called Wright to tell him she was out front, and Wright relayed this information to Siguenza and Turman.

In response, Siguenza stood up, reached into his waistband, pulled out a gun, and with shaking hands took a bullet from his pocket and loaded the gun. Turman asked, "Marlon, what are you doing, this is your friend." Siguenza

responded, "Shh. Be quiet. I have to do this real quick and I'll leave." Turman repeated his question, and Siguenza repeated his answer, then shot Wright five times, killing him. Siguenza fled.

Siguenza, accompanied by counsel, surrendered to the police several weeks later, at which point counsel (out of Siguenza's presence) told Detective Lloyd Parry that Siguenza had dropped the gun in some bushes as he ran from the house. Counsel told Siguenza not to talk to the officers, told the officers not to talk to Siguenza, then left the station. After counsel left, Detective Parry asked Siguenza what he had done with the gun. Siguenza responded that he didn't know anything about a gun and that his lawyer would answer any questions.

Siguenza was arrested and charged, and at trial the People presented evidence of the facts summarized above. In defense, Siguenza testified that he was "high as hell," that his conversation with Turman was "heated," that Turman and Wright had used cocaine when they returned to the house after smoking outside, and that Wright had then made derogatory remarks about the African-American victims of the hurricane ("fuck the struggle, it doesn't matter"). Siguenza "couldn't clearly think then at that moment," got up, pulled out his gun, and shot Wright. Later, he believed he was saving the lives of others "[t]housands of miles away in New Orleans." Siguenza fled, tossing the gun as he ran, but stopped two blocks away by some bushes and went to sleep. He wandered around homeless until he surrendered. A defense psychiatrist (Ronald Markman, M.D.) testified that Siguenza abused drugs and alcohol and suffered from adult anti-social behavior. In rebuttal, Detective Parry testified about Siguenza's post-arrest statement that he "didn't know anything about a gun."

DISCUSSION

I.

Siguenza contends the trial court should not have admitted Detective Parry's testimony about Siguenza's statement that he didn't know anything about the gun, claiming the question should never have been asked because Siguenza's lawyer told the detective not to talk to Parry. (*Miranda v. Arizona* (1966) 384 U.S. 436.) We find no error.

Leaving to one side any issue about waiver, the issue fails on the merits because Siguenza's statement was properly admitted during rebuttal for impeachment purposes. (*People v. Brown* (1996) 42 Cal.App.4th 461, 472-474 [a defendant who testifies inconsistently with a voluntary statement obtained in violation of *Miranda* may be impeached with the prior statement].) Because Siguenza testified that he "might have" thrown the gun into the bushes, and conceded that this fact would seem to be something important that he should have told the police, he was properly impeached with his prior inconsistent statement that he didn't know anything about the gun. (*Michigan v. Harvey* (1990) 494 U.S. 344, 351.)

II.

Siguenza contends there were two incidents of prosecutorial misconduct requiring reversal. We disagree.

A.

Siguenza contends that, during her rebuttal, the prosecutor "attempted to sneak" in evidence about the victim's mother by these comments: "And this case is about Richard Wright. And this is a picture that his mother provided to

me so that I could show you him alive, and not just in the deceased state that we saw in the coroner's pictures. The mother couldn't be here because it was too painful for her to sit through a trial." (Siguenza doesn't complain about the picture, only about the statement about Wright's mother's inability to sit through the trial.)

Assuming misconduct, there is no possibility that it caused prejudice. The trial court (in response to a defense objection) instructed the jurors to disregard the comment about the reason for the mother's absence, and we presume the jury followed the court's instruction (*People v. Smithey* (1999) 20 Cal.4th 936, 961). The comment had nothing to do with the substantive issues of the case.

B.

Siguenza complains that, during rebuttal, the prosecutor urged the jury to convict him "due to the absence of evidence the prosecutor knew was inadmissible." More specifically, Siguenza points to the prosecutor's argument that Dr. Markman did not testify that Siguenza "had a delusional break or suffered from hallucinations." The prosecutor urged the jurors to consider the evidence about what Siguenza did after the shooting and to consider "[w]hat he told Dr. Markman. And what he didn't tell Dr. Markman. And Dr. Markman, how he never told you that the defendant had a delusional break, a snap, a hallucination. [¶] We talk in generalities. Drugs? Maybe. Possibly. To the level of voluntary manslaughter? Absolutely not. Not in this case. Not this time."

The trial court denied a defense request to instruct the jury that Dr. Markman was not legally permitted to testify as to the ultimate issue in the case, and found there was no prosecutorial misconduct by reason of the prosecutor's

commentary about the things Dr. Markman did *not* testify about. Assuming the trial court was mistaken, this "misconduct" could not have been prejudicial. Given Siguenza's own testimony and Turman's testimony, this was not a close case. (*People v. Sandoval* (1992) 4 Cal.4th 155, 184.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

VOGEL, J.

We concur:

MALLANO, P.J.

NEIDORF, J.*

*Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.