

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

CESAR MELGOZA PEREZ,
Petitioner,

v.

MARTIN BITER, Warden, et al.,
Respondents.

Case No. 1:11-cv-01766-LJO-SKO-HC

FINDINGS AND RECOMMENDATIONS TO
DIMISS IN PART AND DENY IN PART THE
SECOND AMENDED PETITION FOR WRIT OF
HABEAS CORPUS (DOC. 22) AND DENY
PETITIONER'S MOTIONS TO EXPAND THE
RECORD AND FOR AN EVIDENTIARY
HEARING (DOC. 37)

FINDINGS AND RECOMMENDATIONS TO
ENTER JUDGMENT FOR RESPONDENT AND
TO DECLINE TO ISSUE A CERTIFICATE
OF APPEALABILITY

OBJECTIONS DEADLINE:
THIRTY (30) DAYS

Petitioner is a state prisoner proceeding pro se and in forma pauperis with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. The matter has been referred to the Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1) and Local Rules 302 through 304. Pending before the Court is the second amended petition (SAP), which was filed on June 20, 2012, and associated motions concerning expansion of the record and an evidentiary hearing filed by Petitioner on December 10, 2012. Respondent filed an answer to the petition on September 20, 2012, and opposition to Petitioner's

1 motions on December 31, 2012. Petitioner filed a traverse to the
2 answer on December 14, 2012, but did not file a reply to the
3 opposition to the motions. On February 14, 2013, the Court deferred
4 consideration of the motions until the Court considered the merits
5 of the petition.

6 I. Jurisdiction

7 Because the petition was filed after April 24, 1996, the
8 effective date of the Antiterrorism and Effective Death Penalty Act
9 of 1996 (AEDPA), the AEDPA applies in this proceeding. Lindh v.
10 Murphy, 521 U.S. 320, 327 (1997); Furman v. Wood, 190 F.3d 1002,
11 1004 (9th Cir. 1999).

12 The challenged judgment was rendered by the Stanislaus County
13 Superior Court (SCSC), which is located within the territorial
14 jurisdiction of this Court. 28 U.S.C. §§ 84(b), 2254(a), 2241(a),
15 (d). Petitioner claims that in the course of the proceedings
16 resulting in his conviction, he suffered violations of his
17 constitutional rights. Accordingly, the Court has subject matter
18 jurisdiction over this action pursuant to 28 U.S.C. §§ 2254(a) and
19 2241(c)(3), which authorize a district court to entertain a petition
20 for a writ of habeas corpus by a person in custody pursuant to the
21 judgment of a state court only on the ground that the custody is in
22 violation of the Constitution, laws, or treaties of the United
23 States. Williams v. Taylor, 529 U.S. 362, 375 n.7 (2000); Wilson v.
24 Corcoran, 562 U.S. B, -, 131 S.Ct. 13, 16 (2010) (per curiam).

25 An answer was filed on behalf of Respondent Martin Biter, who,
26 pursuant to the judgment, has custody of Petitioner at his
27 institution of confinement. (Doc. 28, 12.) Petitioner has named as
28 a respondent a person who has custody of Petitioner within the

1 meaning of 28 U.S.C. § 2242 and Rule 2(a) of the Rules Governing
2 Section 2254 Cases in the District Courts (Habeas Rules). See,
3 Stanley v. California Supreme Court, 21 F.3d 359, 360 (9th Cir.
4 1994). Accordingly, the Court has jurisdiction over the person of
5 the Respondent.

6 II. Procedural Summary

7 The evidence introduced at trial showed that on July 10, 2004,
8 Petitioner fatally shot Ruben Sanchez Neuman. Petitioner was a
9 member of the South Side Treces (SST), which is a set of the Surenos
10 street gang. Neuman was a member of the Nortenos street gang.
11 Petitioner fled to Mexico, but a few years later he was apprehended
12 and returned to the United States.

13 On March 11, 2009, a jury in the SCSC found Petitioner guilty
14 of the first-degree murder of Neuman in violation of Cal. Pen. Code
15 § 187(a), and assault of Neuman by means of force likely to produce
16 great bodily injury in violation of Cal. Pen. Code § 245(a)(1). The
17 jury further found that the murder was premeditated and deliberate;
18 Petitioner committed the murder and assault for the benefit of a
19 criminal street gang within the meaning of Cal. Pen. Code
20 § 186.22(b)(1)); in the course of the murder, Petitioner personally
21 discharged a firearm and proximately caused Neuman's death within
22 the meaning of Cal. Pen. Code § 12022.53(d) and (e)(1); and
23 Petitioner was armed with a firearm during the assault within the
24 meaning of Cal. Pen. Code § 12022(a). (2 CT 548-51.)

25 On May 22, 2009, Petitioner was sentenced to fifty years to
26 life in prison for the murder, plus a determinate term of eight
27 years to be served first for the assault. (3 CT 608-13.)

28 On direct appeal, the Court of Appeal of the State of

1 California, Fifth Appellate District (CCA) affirmed the judgment but
2 modified it to stay Petitioner's sentence for the assault, thus
3 reducing his overall sentence to fifty years to life. (LD 8 at 33-
4 37, 39; LD 9 [Order Modifying Opinion [No Change in Judgment]].)

5 Petitioner filed a petition for review in the California
6 Supreme Court (CSC), and on April 13, 2011, the CSC denied review as
7 follows:

8 The petition for review is denied without prejudice
9 to any relief which defendant might be entitled after
10 this court decides *People v. Dungo*, S176886, *People*
11 *v. Gutierrez*, S176620, *People v. Lopez*, S177046, and/or
12 *People v. Rutterschmidt*, S176213.

13 (LD 11, LD 10.)

14 On October 24, 2011, Petitioner filed his original petition in
15 this case and a motion for a stay and for abeyance of the
16 proceedings. (Doc. 1, doc. 2.) On November 14, 2011, the
17 Magistrate Judge recommended that Petitioner's state law claims be
18 dismissed without leave to amend. (Doc. 10.)

19 On the same day, Petitioner filed a habeas corpus petition in
20 the CSC. (LD 12.)

21 On December 12, 2011, the District Judge adopted the Magistrate
22 Judge's findings and recommendations, dismissed the state law claims
23 without leave to amend, and referred the matter back to the
24 Magistrate Judge, who denied Petitioner's motion for stay and
25 abeyance on January 4, 2012. (Doc. 14.) Petitioner was given leave
26 to withdraw unexhausted claims and seek a Kelly stay. (Id.) On
27 January 13, 2012, Petitioner filed a first amended petition and
28 moved to withdraw his unexhausted claims and hold the petition in
abeyance pursuant to a Kelly stay. (Doc. 16, doc. 17.) On March
29, 2012, the Magistrate Judge granted the motion for a stay and

1 abeyance. (Doc. 18.)

2 On April 11, 2012, the CSC denied Petitioner's habeas petition
3 without a statement of reasoning or citation of any authority. (LD
4 13.)

5 On May 2, 2012, Petitioner lodged in this proceeding his SAP.
6 (Doc. 20.) On June 20, 2012 the court dissolved the stay and
7 ordered that the SAP be filed. (Doc. 21, doc. 22.)

8 III. Factual Summary

9 In a habeas proceeding brought by a person in custody pursuant
10 to a judgment of a state court, a determination of a factual issue
11 made by a state court shall be presumed to be correct; the
12 petitioner has the burden of producing clear and convincing evidence
13 to rebut the presumption of correctness. 28 U.S.C. § 2254(e)(1);
14 Sanders v. Lamarque, 357 F.3d 943, 947-48 (9th Cir. 2004). This
15 presumption applies to a statement of facts drawn from a state
16 appellate court's decision. Moses v. Payne, 555 F.3d 742, 746 n.1
17 (9th Cir. 2009). The following statement of facts is taken from
18 the opinion of the CCA in People v. Cesar Melgoza Perez, case number
19 F058027, filed on January 6, 2011 (LD 8):

20 FACTS

21 **I. Neuman's Murder on July 10, 2004.**

22 On the evening of July 10, 2004, a party was held in
23 Modesto. The attendees included appellant, Luis Avina
24 Meza, Sergio Felix, Raul Pena, Jose Ochoa, Alvaro
25 Arellano, Rogelio Garcia and Francisco Gomez.FN2 All of
them except Meza were active Surenos gang members; Meza
associated with Surenos gang members.

26 FN2. Meza, Felix, Pena and Ochoa entered into
27 plea bargains which obligated them to testify
28 truthfully in this case.

1 Appellant brought a gun to the party. He had short hair
2 and wore a black shirt.

3 Appellant argued with a man at the party. The owner of the
4 house asked appellant to leave.

5 Ochoa remained at the party, but the rest of the group
6 decided to go to another party in the City of Newman. They
7 left in a pickup truck and a Jeep. Gomez drove the truck,
8 with Meza as a passenger. Pena drove the Jeep; appellant,
9 Felix, Arellano, and Garcia were passengers. Pena's
10 girlfriend, Teresa Marlen Vizcarra, accompanied the group.
11 She rode in the Jeep.

12 On the way, both vehicles stopped. Pena, Gomez and
13 appellant walked into an orchard. Pena saw appellant put
14 something into the top of his pants. Pena asked appellant
15 if he had a gun. Appellant replied affirmatively. Since
16 Pena was on probation, he told appellant to ride in the
17 truck. Appellant rode in the truck the rest of the way to
18 Newman.

19 When the group reached Newman, both vehicles stopped at a
20 liquor store. Pena went inside to buy some beer. When Pena
21 exited the liquor store, Gomez told him that "a northerner
22 guy went by" and "they said verbally words to each other."

23 Around 10:00 p.m., the group left the liquor store. Meza
24 was driving the truck with Gomez and appellant as
25 passengers. The rest of the group was in the Jeep, which
26 was driven by Pena. The Jeep followed the truck.

27 About two blocks away from the liquor store, Neuman was
28 walking with his bicycle through an intersection. Neuman
wore red pants.FN3 He was carrying a paper bag containing
some beer.

FN3. Nortenos are associated with the color red
and wear red clothing. Surenos are associated
with the color blue and wear blue clothing.

Appellant told Meza to stop the truck. Meza stopped the
truck in the middle of the street.
Appellant got out of the truck, ran up to Neuman and
verbally confronted him. They argued and then exchanged
punches.

1 Meza and Gomez got out of the truck and moved towards
2 appellant and Neuman.

3 Pena stopped his Jeep in the middle of the intersection.
4 Pena backed up the Jeep, accidentally hitting appellant
5 and Neuman. The back window of the Jeep shattered.
6 Appellant and Neuman fell to the ground. They both got up.
7 Appellant angrily yelled at Pena.

8 Felix, Garcia and Arellano got out of the Jeep. Pena and
9 his girlfriend stayed in the Jeep.

10 Neuman had beer in the brown paper bag. He threw a beer at
11 Gomez, but it did not hit him.

12 Appellant asked Gomez if "he was going to get away with
13 that." Gomez said that "he needs some backup." Meza walked
14 towards Gomez.

15 Appellant punched Neuman in the chest and Neuman fell to
16 the ground. Meza, Gomez, Felix, Arellano, Garcia and
17 appellant stood in a semi-circle around Neuman, punching
18 and kicking him.

19 A woman came out of a nearby house and screamed. Meza
20 testified, "So that's when everybody started running back
21 to the cars." Meza also said, "So the only one who stayed
22 was [appellant]." Meza testified that he turned around and
23 saw appellant pull out a gun from the waistband of his
24 pants. He pointed the gun down at Neuman, who was lying on
25 the ground. Meza testified appellant fired four or five
26 shots at Neuman.

27 Felix testified that the group was still punching and
28 kicking Neuman when appellant suddenly had a gun in his
hand. Appellant started firing the gun at Neuman. Felix
thought that appellant fired more than four or five shots.
Felix testified that when appellant started shooting, he,
Arellano and Garcia ran back to the Jeep. When Felix got
into the Jeep, shots were still being fired.

Pena testified that he saw Arellano, Felix and Garcia
getting back into the Jeep. At the same time, Pena saw
five or six gun flashes. Then he saw appellant pointing a
gun at the ground.

1 Meza got into the driver's seat of the truck, and Gomez
2 got into the passenger's seat. Meza began to drive away.
3 Appellant ran after the truck. He yelled for them to stop
4 and wait for him. Meza stopped the truck. Appellant jumped
into the back of the truck's bed. The truck sped away. The
rest of the group, including Arellano, left in the Jeep.

5 A person approached Neuman and comforted him.

6 A police officer arrived about 10:40 p.m. The officer saw
7 what appeared to be bullet wounds on Neuman's torso.
8 Neuman died before he could be transported to the
hospital.

9 Numerous bystanders and neighbors heard or saw some or all
10 of the events culminating in Neuman's murder.FN4 A police
11 officer testified that someone told him that he/she
12 witnessed Neuman's murder. This person told the police
13 officer that during the fight, one person started shooting
14 down at the ground. This person heard four shots. This
15 person described the shooter as a male who was about five
16 feet 10 inches tall and weighed approximately 130 to 140
17 pounds. This person said the shooter wore a black shirt
and had short hair. This person thought the shooter got
into a Jeep. The Jeep drove away. Then this person saw two
people run behind a pickup truck. The truck slowed and the
two people got into the bed of the truck and the truck
drove away.

18 FN4. Appellant has not challenged the
19 sufficiency of the evidence and we have not
20 discerned any error requiring us to assess the
21 strength of the evidence supporting the guilty
22 verdicts. Therefore, it is not necessary to set
23 forth everyone's statements to police officers
and/or trial testimony. Since the murder and
assault were gang-related, these people will not
be named unless this information is necessary to
resolve an appellate issue.

24 A bystander testified that he/she was inside his/her
25 house. He/she heard a crash and then heard three or four
26 gunshots. He/she went out to the front porch. He/she saw a
27 man chasing after a pickup truck. The truck slowed and the
28 man climbed into the truck's bed. The man appeared to be
"fairly young" and his height and weight was characterized
as "medium." In response to a question whether the man was

1 bald, this person responded, "Yes. I didn't see any hair.
2 It was like a silhouette. I didn't see any hair."

3 Meza drove the truck to his house. During the drive,
4 appellant opened the window separating the truck's cabin
5 from the bed. Appellant said that he had killed the man.
6 Meza and Gomez were upset. They asked appellant why he
7 killed the man. Appellant said the man had a gun. Meza and
8 Gomez disagreed, telling appellant that the man did not
9 have a gun. Then appellant "said he's one man less for
10 them."

11 On the morning after the shooting, Pena told Ochoa that
12 the back window of the Jeep was broken because "they
13 jumped some guy" when they got to Newman. Pena said that
14 he and his girlfriend stayed in the Jeep, and "[p]retty
15 much everybody [else] jumped the guy." Pena told Ocha that
16 he was backing up the Jeep to get everyone back in the
17 vehicle. The rear of the Jeep accidentally hit appellant
18 "and that guy they were jumping." Then Arellano "got in it
19 and started kicking the guy. That's when [appellant]
20 pulled out a gun and shot the guy."

21 **II. Drive-by Shooting on July 12, 2004.**

22 On the night of July 11, 2004, Jose Cruz was murdered
23 during a drive-by shooting, which was possibly committed
24 by Nortenos.

25 On the evening of July 12, 2004, two Honda Accords were
26 reported stolen. It was stipulated that Pena stole one of
27 the Hondas.

28 About 10:00 p.m., two Hondas matching the description of
the stolen vehicles were used in a retaliatory drive-by
shooting targeting Nortenos. Several prosecution witnesses
were involved in this drive-by shooting.FN5

FN5. Appellant was not charged in this case with
any crime arising from the vehicular thefts or
the July 12 drive-by shooting.

After this drive-by shooting, police officers searched a
residence. Ochoa, Arellano and some other people were
hiding in the garage. Pena was arrested nearby.

1 Three guns had been secreted under the steps of the
2 residence's back porch. One of the guns was a black semi-
3 automatic .380-caliber Beretta handgun. The Beretta was
4 loaded with an empty magazine; another empty magazine was
5 found lying next to the Beretta. On the east side of the
6 house, police officers found some ammunition, including
7 some .380-caliber rounds.

8 Gunshot residue tests were performed on Pena, Gomez, Ochoa
9 and Manuel Mendez after they were arrested in connection
10 with the July 12, 2004, drive-by shooting. Gunshot residue
11 particles were detected on Arellano's, Gomez's and Ochoa's
12 hands. No particles were detected on Pena's hands.

13 **III. Police Interviews.**

14 During a police interview, Vizcarra "said that when they
15 were all around the victim, kicking him and stomping him,
16 she saw [appellant] remove a gun and point the gun down."
17 She turned her head away and heard three or more gunshots.

18 During police interviews, Pena and Felix identified
19 appellant as the shooter. They both said appellant got
20 into the pickup truck.

21 A sheriff's deputy interviewed Arellano. Arellano told him
22 that he wore a black shirt on the night Neuman was killed.
23 Arellano said that when they got to Newman, appellant and
24 Gomez argued with a man on a bicycle because the man threw
25 something towards the truck. The man was a Norteno.
26 Arellano said he and Felix got out of the Jeep. Arellano
27 admitted that he was part of the group that kicked Neuman.
28 Arellano said "he was already getting back to the Jeep and
inside the Jeep when he heard those shots." Arellano said
he looked back and saw muzzle flashes. Gomez and appellant
were standing by Neuman at that time. Arellano denied
knowing who shot Neuman. Arellano said that he was not the
shooter.

During a police interview, Ochoa related a conversation he
had with Pena after Neuman's death. Pena told Ochoa that
he and all his friends were Surenos. "They just saw a
Norteno riding a bike," so everyone except Pena and his
girlfriend "went over there and started jumping him. And
while they were jumping him, [appellant] pulled out a gun
and just shot him." Ochoa said he asked Pena why appellant

1 shot the guy and Pena replied, "because, you know, he was
2 wearing red."

3 In a police interview, Meza admitted participating in the
4 attack on Neuman. Meza said that they had kicked and
5 punched Neuman for over a minute when a woman yelled at
6 them to "knock it off." At that point, they started
7 returning to their vehicles. Meza said he was walking
8 towards the truck with Gomez when appellant pulled out a
9 handgun, pointed it in a downward motion and started
10 firing. At that point, they all started running to the
11 vehicles. Meza heard five or six shots. Meza said the
12 attack on Neuman was unprovoked and occurred solely
13 because of Neuman's Norteno gang affiliation.

14 **IV. Appellant's Flight to Mexico.**

15 On July 13, 2004, appellant went to the probation
16 department for an unscheduled visit. He saw his probation
17 officer and requested permission to accompany his mother
18 to visit an aunt in Arizona. The probation officer granted
19 appellant permission to go to Arizona until August 6,
20 2004. Appellant never contacted his probation officer
21 again.

22 On July 14, 2004, police officers unsuccessfully attempted
23 to locate appellant at his mother's house in Modesto and
24 at his father's house in Salinas.

25 A bench warrant was issued on July 15, 2004.

26 On July 20, 2004, appellant's mother told appellant's
27 probation officer that she did not know where appellant
28 was.

29 In 2006, appellant was located in Mexico. He was living
30 under a different name. He was arrested by federal agents.
31 Several months later, he was returned to California in
32 custody.

33 **V. Physical Evidence and Autopsy Results.**

34 A bicycle, a brown paper bag containing broken glass from
35 a beer bottle, vehicle window glass, pieces of a beer
36 bottle and some beer cans were found on the ground around
37 the intersection where Neuman died.
38

1 Blood stains were found on the sidewalk. Four bullet
2 impact marks were found to the left of the blood stain.
3 Some .380-caliber cartridge casings and bullet slugs were
4 found in the area of the crime scene. It was subsequently
5 determined that the locations of the casings and bullet
6 impact marks indicated the shooter stood upright and fired
7 the gun downward.

8 Neuman's shirt had seven bullet holes that "were all close
9 to each other almost like in a half circle as well." There
10 was a shoe imprint on the back of the shirt. A fragment of
11 a bullet was found in Neuman's shirt.

12 A fully jacketed medium-caliber bullet was retrieved from
13 Neuman's body. It was determined that this bullet was
14 fired by the Baretta.

15 It was stipulated that the Baretta was used in Neuman's
16 killing and used to return fire at the car committing the
17 drive-by shooting that killed Jose Cruz.

18 It was also stipulated that a usable latent fingerprint
19 was developed from the Baretta. Appellant was not the
20 source of this fingerprint.

21 An autopsy was performed. Neuman's cause of death was
22 shock and hemorrhage due to multiple gunshot wounds.
23 Neuman suffered seven gunshot wounds. Five bullets entered
24 the right side of Newman's back. These five gunshots were
25 grouped together in a diameter of 12 to 15 inches. Both
26 lungs, the liver, stomach, right adrenal gland, spinal
27 column, diaphragm and aorta were perforated. Other bullets
28 caused a grazing wound to Neuman's abdomen and entered his
upper right arm. Neuman also suffered blunt force injuries
that were consistent with a fight.

The gunshot wounds to Neuman's back and arm were similar
looking and had a similar direction on the body,
indicating the shots occurred in rapid succession. The
shooter was standing on the right side of Neuman, and
Neuman had his back or right side to the shooter when at
least six of the shots were fired. The angles of the
wounds were consistent with the shooter being above the
victim or the victim being angled towards the shooter and
the victim falling toward the shooter after being struck
by the first three bullets. All of the shots were fired
from a distance exceeding 18 inches.

1
2 **VI. Gang Testimony.**

3 Froilan Mariscal gave expert gang testimony. After
4 explaining the origins of the Surenos and [Nortenos]
5 gangs, he identified the SST as a set of the Surenos gang.
6 Mariscal opined that the Nortenos and Surenos are criminal
7 street gangs. He testified about predicate offenses.
8 Mariscal opined that appellant was an active Surenos gang
9 member on the date of Neuman's murder. Mariscal also
10 opined that the assault and murder of Neuman were
11 committed to benefit a criminal street gang.

12 **VII. Appellant's Defense Theory: Arellano Shot Neuman.**

13 The defense called Daniel Britt. Britt testified that he
14 met Felix while they were housed in the gang drop-out unit
15 at Corcoran State Prison. Britt testified that Felix told
16 him Arellano shot Neuman. Felix also said "that they had
17 busted some 15-year-old youngster. He was in Mexico. But
18 the Surenos said he was supposed to take the rap because
19 he was the youngest one and would get less time." Britt
20 admitted that defense counsel and the defense investigator
21 were the first people he told about these statements.

22 Britt also testified that in 2006, a Sureno gang member
23 fatally shot Michael Arreola, who was a Norteno gang
24 member. Britt identified a photograph of Arellano as the
25 shooter. However, Britt later shared a jail cell with
26 Arellano and was no longer certain that Arellano shot
27 Arreola.

28 Felix testified that Britt approached him in the prison
yard and harassed him with questions about Neuman's
murder. Felix said he falsely told Britt that Arellano
shot Neuman so Britt would stop bothering him.

(LD 8, 2-11.)

IV. Introduction of Accomplice Testimony

Petitioner argues he suffered a violation of his Fifth and
Fourteenth Amendment rights to due process of law and a
fundamentally fair trial by the introduction of the testimony of the

1 four accomplices because the testimony was coerced by the
2 accomplices' plea agreements, which required truthful testimony and
3 represented that the accomplices' prior statements to law
4 enforcement agents were true.

5
6 A. Standard of Decision and Scope of Review

7 Title 28 U.S.C. § 2254 provides in pertinent part:

8 (d) An application for a writ of habeas corpus on
9 behalf of a person in custody pursuant to the

10 judgment of a State court shall not be granted
11 with respect to any claim that was adjudicated
12 on the merits in State court proceedings unless
13 the adjudication of the claim-

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

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

22 Clearly established federal law refers to the holdings, as
23 opposed to the dicta, of the decisions of the Supreme Court as of
24 the time of the relevant state court decision. Cullen v.
25 Pinholster, - U.S. -, 131 S.Ct. 1388, 1399 (2011); Lockyer v.
26 Andrade, 538 U.S. 63, 71 (2003); Williams v. Taylor, 529 U.S. 362,
27 412 (2000).

28 A state court's decision contravenes clearly established
Supreme Court precedent if it reaches a legal conclusion opposite
to, or substantially different from, the Supreme Court's or

1 concludes differently on a materially indistinguishable set of
2 facts. Williams v. Taylor, 529 U.S. at 405-06. The state court
3 need not have cited Supreme Court precedent or have been aware of
4 it, "so long as neither the reasoning nor the result of the state-
5 court decision contradicts [it]." Early v. Packer, 537 U.S. 3, 8
6 (2002). A state court unreasonably applies clearly established
7 federal law if it either 1) correctly identifies the governing rule
8 but applies it to a new set of facts in an objectively unreasonable
9 manner, or 2) extends or fails to extend a clearly established legal
10 principle to a new context in an objectively unreasonable manner.
11 Hernandez v. Small, 282 F.3d 1132, 1142 (9th Cir. 2002); see,
12 Williams, 529 U.S. at 407. An application of clearly established
13 federal law is unreasonable only if it is objectively unreasonable;
14 an incorrect or inaccurate application is not necessarily
15 unreasonable. Williams, 529 U.S. at 410. A state court's
16 determination that a claim lacks merit precludes federal habeas
17 relief as long as it is possible that fairminded jurists could
18 disagree on the correctness of the state court's decision.
19 Harrington v. Richter, 562 U.S. -, 131 S.Ct. 770, 786 (2011). Even
20 a strong case for relief does not render the state court's
21 conclusions unreasonable. Id. To obtain federal habeas relief, a
22 state prisoner must show that the state court's ruling on a claim
23 was "so lacking in justification that there was an error well
24 understood and comprehended in existing law beyond any possibility
25
26
27
28

1 for fairminded disagreement." Id. at 786-87. The standards set by
2 § 2254(d) are "highly deferential standard[s] for evaluating state-
3 court rulings" which require that state court decisions be given the
4 benefit of the doubt, and the Petitioner bear the burden of proof.
5 Cullen v. Pinholster, 131 S.Ct. at 1398. Habeas relief is not
6 appropriate unless each ground supporting the state court decision
7 is examined and found to be unreasonable under the AEDPA. Wetzel v.
8 Lambert, --U.S.--, 132 S.Ct. 1195, 1199 (2012).

10 In assessing under section 2254(d)(1) whether the state court's
11 legal conclusion was contrary to or an unreasonable application of
12 federal law, "review... is limited to the record that was before the
13 state court that adjudicated the claim on the merits." Cullen v.
14 Pinholster, 131 S.Ct. at 1398. Evidence introduced in federal court
15 has no bearing on review pursuant to § 2254(d)(1). Id. at 1400.
16 Further, 28 U.S.C. § 2254(e)(1) provides that in a habeas proceeding
17 brought by a person in custody pursuant to a judgment of a state
18 court, a determination of a factual issue made by a state court
19 shall be presumed to be correct; the petitioner has the burden of
20 producing clear and convincing evidence to rebut the presumption of
21 correctness. A state court decision on the merits based on a
22 factual determination will not be overturned on factual grounds
23 unless it was objectively unreasonable in light of the evidence
24 presented in the state proceedings. Miller-El v. Cockrell, 537 U.S.
25 322, 340 (2003).

1 With respect to each claim, the last reasoned decision must be
2 identified in order to analyze the state court decision pursuant to
3 28 U.S.C. § 2254(d)(1). Barker v. Fleming, 423 F.3d 1085, 1092 n.3
4 (9th Cir. 2005); Bailey v. Rae, 339 F.3d 1107, 1112-13 (9th Cir.
5 2003).

7 B. The State Court Decision

8 The CCA's decision on the merits of the coercion claim was
9 followed by the CSC's summary denial of a petition for review.
10 Where there has been one reasoned state judgment rejecting a federal
11 claim, later unexplained orders upholding that judgment or rejecting
12 the same claim are presumed to rest upon the same ground. Ylst v.
13 Nunnemaker, 501 U.S. 797, 803 (1991). This Court will thus "look
14 through" the unexplained decision of the CSC to the CCA's last
15 reasoned decision as the relevant state court determination. Id. at
16 803-04; Taylor v. Maddox, 366 F.3d 992, 998 n.5 (9th Cir. 2004).

18 The CCA addressed the issue of coerced testimony by first
19 reviewing the pertinent facts as follows:
20

21 **A. The Court Did Not Err by Admitting the Accomplices'**
22 **Testimony.**

23 The district attorney entered into written plea agreements
24 with Pena, Felix, Meza and Ochoa and they testified as
25 prosecution witnesses. Appellant contends the plea
26 agreements were coercive and the trial court erred by
27 refusing to exclude these witnesses. As will be explained,
28 the plea agreements were not coercive. Admission of the
contested testimony was proper and did not infringe
appellant's constitutional rights to a fair trial and due
process of law.

1 **1. Facts.**

2 All four plea agreements provided, "It is my understanding
3 that you wish to testify regarding the following: your
4 personal knowledge and observations regarding the events
5 and persons responsible for these crimes, and all other
6 matters about which you know regarding these crimes."

7 Then the plea agreements of Felix and Meza stated, "You
8 have given a statement to [specified detective or
9 investigator] on [specified date], which [you] have
10 represented to be truthful." Pena's plea agreement stated,
11 "You have given a statement to [specified police
12 officers], which [you] have represented to be truthful."
13 This section of Ochoa's plea agreement was worded slightly
14 differently. It provided, "You have given a statement to
15 [specified police officers], in which you answered
16 questions and provided information about the murder and
17 the drive-by shooting, and have represented to be
18 truthful."

19 Next, all four of the plea agreements essentially provided
20 the witness agreed to testify truthfully to any and all
21 hearings, trials and retrials on these matters.

22 Then all four plea agreements provided that if all of the
23 following obligations were fulfilled, the person would
24 receive a specified benefit from the district attorney.
25 These obligations included the following: (1) testify
26 truthfully at all hearings, trial, or retrials; (2) attend
27 all necessary court appearances; and (3) stay available to
28 law enforcement.

 Next, each plea agreement set forth the benefit provided
 by the district attorney. The benefit differed for each
 individual.

 Then each plea agreement stated it would be null and void
 if the enumerated conditions were not fulfilled or if it
 was discovered that the witness testified falsely.
 Further, the witness would be subject to prosecution for
 perjury.

 At trial, defense counsel argued the plea agreements were
 coercive because they violated the *Medina* rule by
 essentially requiring Pena, Felix, Meza and Ochoa to
 testify consistently with their prior statements. (*People*

1 v. *Medina* (1974) 41 Cal.App.3d 438, 116 Cal.Rptr. 133
 2 (*Medina*).) The court overruled this objection.

3 2. The *Medina* rule.

4 A plea agreement requiring only that the witness testify
 5 fully and truthfully is valid. But a plea agreement that
 6 expressly requires the witness to conform to an
 7 established script or one that is conditioned on a
 8 particular result is unfairly coercive. Admission of
 9 testimony that is the product of a coercive plea agreement
 10 infringes the defendant's federal constitutional fair
 11 trial right. (*People v. Jenkins* (2000) 22 Cal.4th 900,
 12 1010, 95 Cal.Rptr.2d 377, 997 P.2d 1044 (*Jenkins*); *Medina*,
supra, 41 Cal.App.3d at pp. 449-456, 116 Cal.Rptr. 133;
 13 *People v. Green* (1951) 102 Cal.App.2d 831, 838-839, 228
 14 P.2d 867.) This principle is known as the *Medina* rule.
 15 (See, e.g., *People v. Fields* (1983) 35 Cal.3d 329, 360,
 16 197 Cal.Rptr. 803, 673 P.2d 680 (*Fields*).)

17 In *Medina*, three witnesses testified under a grant of
 18 immunity subject to the condition that the witness did not
 19 materially or substantially change her testimony from the
 20 tape-recorded statement she gave to law enforcement
 21 officers. The appellate court acknowledged that a grant of
 22 immunity could be conditioned on a requirement that the
 23 witness testify fully and fairly to the facts, but held
 24 that when the terms of the immunity place the witness
 25 under a strong compulsion to testify in a particular
 26 fashion, the testimony is tainted and inadmissible.
 27 (*Medina, supra*, 41 Cal.App.3d at p. 456, 116 Cal.Rptr.
 28 133.)

In several cases, our Supreme Court has assessed plea
 agreements and determined that they were not coercive. In
 the process, it has impliedly determined that the *Medina*
 rule be restrictively interpreted. (See, e.g., *People v.*
Reyes (2008) 165 Cal.App.4th 426, 434, 80 Cal.Rptr.3d 619
 (*Reyes*).)

(LD 8, 11-13.)

The state court then reviewed the state cases in which the CSC
 had held that plea agreements in various sets of circumstances were
 not coercive, including 1) where a witness agreed to testify
 according to a statement she had given at a specified time, which

1 she confirmed was truthful, where the witness understood that if she
2 told a different story the agreement would fall through; 2) where a
3 plea agreement was not offered until after a witness gave a
4 statement to police and was not told or led to believe he would
5 receive the benefit of the plea bargain only if his testimony
6 conformed with his prior statement to police; 3) where unwritten
7 portions of a plea bargain, extraneous to a written plea agreement,
8 provided that the witness had already passed a polygraph examination
9 indicating the witness was being truthful, the witness agreed to
10 testify truthfully, and the witness agreed he had already truthfully
11 told the facts to investigators. The CCA noted that in these cases
12 the CSC had acknowledged that although the witnesses may have felt
13 some compulsion to testify consistently with their earlier
14 statements, the plea agreements obligated them only to testify
15 truthfully and did not obligate them to testify consistently with
16 prior statements regardless of the truth of those statements. (LD
17 8, 13-16.) The decision of the CCA continued as follows:

18 This line of authority was cogently examined by the Second
19 District Court of Appeal in *Reyes, supra*, 165 Cal.App.4th
20 426, 80 Cal.Rptr.3d 619. *Reyes* recognized, " 'The
21 California Supreme Court has refused to extend *Medina*
22 beyond the instance in which a plea agreement expressly
23 requires consistency between accomplice testimony and a
24 prior statement.'" (*Id.* at p. 434, 80 Cal.Rptr.3d 619.)
25 Thus, "[a] coordinate principle of the Supreme Court's
26 *Medina* jurisprudence is the understanding, ... that
27 although plea agreements calling for testimony naturally
28 will exert some compulsion to testify satisfactorily, an
agreement that binds the witness only to testify
truthfully, and not in some prearranged fashion, cannot be
deemed invalid." (*Id.* at p. 435, 80 Cal.Rptr.3d 619.)

In *Reyes, supra*, 165 Cal.App.4th 426, 80 Cal.Rptr.3d 619,
the appellate court applied this line of authority and
upheld a plea agreement which contained a provision that

1 if it was discovered the witness had "'already not told us
2 the truth about a material significant matter'" in a prior
3 police interview, the witness would be in breach of the
4 plea agreement. (*Id.* at p. 433, 80 Cal.Rptr.3d 619.) It
5 reasoned that "by its terms the interview provision did
6 not qualify or restrict [the witness's] agreement to
7 testify truthfully, nor did it direct that he testify in
8 conformity with his interview. Under our Supreme Court's
9 decisions on claims of '*Medina* error,' these are critical,
10 dispositive distinctions." (*Id.* at p. 434, 80 Cal.Rptr.3d
11 619.) Reyes rejected appellant's contention that this
12 provision effectively coerced the witness to testify in
13 accordance with the interview, as follows: "This claim is
14 hypothetical and unverifiable. Practically, it is far more
15 likely that [the witness] entered into the interview
16 provision because he, like the prosecution believed his
17 interview was truthful. If that is so, the provision posed
18 no improper compulsion. [Citation.]" (*Id.* at p. 434, 80
19 Cal.Rptr.3d 619.)

20 **3. The plea agreements did not violate the *Medina***
21 **rule.**

22 Having examined the relevant line of authority, we now
23 examine appellant's contention that the plea agreements in
24 this case were unfairly coercive because they "impliedly
25 specified that in each case the witness would be deprived
26 of the benefit of his bargain if his testimony deviated
27 from the extrajudicial statements he had given to police."

28 In assessing this claim, "we review the record and reach
an independent judgment whether the agreement under which
the witnesses testified was coercive and whether defendant
was deprived of a fair trial by the introduction of the
testimony, keeping in mind that generally we resolve
factual conflicts in favor of the judgment below.
[Citation.]" (*Jenkins, supra*, 22 Cal.4th at pp. 1010-1011,
95 Cal.Rptr.2d 377, 997 P.2d 1044.)

Appellant's argument is not convincing. Each of the plea
agreements required the witness to testify truthfully in
all proceedings. Also, they stated that each person had
given a truthful statement to a specified police officer
or investigator. Yet, there is no condition in the plea
agreements requiring the testimony to be identical to the
prior statement. Also, there is nothing in the plea
agreements indicating that the plea agreement is expressly

1 contingent on the witness sticking to a particular version
2 or script. (*Garrison, supra*, 47 Cal.3d at p. 771, 254
Cal.Rptr. 257, 765 P.2d 419.)

3 The district attorney clearly expected the witnesses to
4 testify in a manner that is materially consistent with
5 their prior statements to the law enforcement officials
6 specified in the plea agreements. The witnesses had
7 represented that those prior statements were truthful. But
8 the reference to the witness's prior police interview in
9 the plea agreement did not restrict the contents of the
10 witness's testimony. This is a critical distinction.
11 Unless the plea agreement specifically requires the
12 witness to testify in conformity to a pre-arranged script,
13 it does not violate the *Medina* rule. Where, as here, a
14 plea agreement only refers to a prior statement to police
15 and contains a representation that the prior statement is
16 the truth, the plea agreement is not unfairly coercive.
17 (*Garrison, supra*, 47 Cal.3d at p. 771, 254 Cal.Rptr. 257,
18 765 P.2d 419; *Boyer, supra*, 38 Cal.4th at p. 457, 42
19 Cal.Rptr.3d 677, 133 P.3d 581; *Reyes, supra*, 165
20 Cal.App.4th at p. 436, 80 Cal.Rptr.3d 619.)

21 Further, examination of the testimony of the four
22 witnesses dispels any concern that they were following a
23 prosecution created script. They were impeached with
24 inconsistencies between their trial testimony and pretrial
25 statements. In his closing argument, defense counsel
26 insisted that these witnesses should be disregarded
27 because their stories kept changing. Also, the testimony
28 of these four witnesses about the circumstances of
Neuman's murder is generally consistent with the physical
evidence recovered from the crime scene, Vizcarra's
pretrial statement to the police and some of the
observations by bystanders and neighbors.

For all of these reasons, we hold that the plea agreements
were not coercive and appellant's constitutional rights to
a fair trial and due process of law were not infringed by
admission of the contested testimony.

(LD 8, 16-18.)

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1 C. Analysis of Application of Clearly Established
2 Federal Law pursuant to 28 U.S.C. § 2254(d)(1)

3 Petitioner relies on state cases involving a requirement in
4 plea agreements that a witness's testimony either conform to earlier
5 statements (a so-called "consistency" clause or agreement) or result
6 in a defendant's conviction; however, Petitioner also acknowledges
7 that state law permits plea agreements that merely require the
8 witness to testify fully and truthfully. (Doc. 22, 35.) Petitioner
9 nevertheless argues that the agreements in the present case in
10 effect require consistency with earlier statements and thus offend
11 due process.
12

13 The Supreme Court held in Pyle v. Kansas, 317 U.S. 213, 214-16
14 (1942) that allegations that the government knowingly coerced
15 perjured testimony from a prosecution witness stated a potential
16 claim for habeas relief under the Due Process Clause. Id. (citing
17 Mooney v. Holohan, 294 U.S. 103 (1935)). Other cases following
18 Mooney establish that due process is violated if the government
19 knowingly uses perjured testimony or deliberately deceives the
20 court. See Giglio v. United States, 405 U.S. 150, 153 (1972)
21 (prosecutor stated, and a witness testified, that there was no plea
22 deal when there was a lenient plea agreement); Miller v. Pate, 386
23 U.S. 1, 3-7 (1967) (prosecutor knowingly presented expert testimony
24 that misidentified paint on the defendant's clothing as blood);
25 Alcorta v. Texas, 355 U.S. 28, 30-32 (1957) (per curiam) (the
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1 prosecutor told a witness not to volunteer that the witness had a
2 sexual relationship with the defendant's wife, and in testimony the
3 witness denied sexual involvement with the defendant's wife).

4
5 However, there is no clearly established federal law within the
6 meaning of 28 U.S.C. § 2254(d)(1) that prohibits plea agreements
7 such as those in the present case, which imposed an obligation on
8 the witness to testify truthfully after the witness had given a
9 statement that was confirmed by the witness to be true. Indeed,
10 even if the plea agreement were interpreted also to require
11 testimony consistent with the witness's earlier statement, there is
12 no clearly established federal law providing that consistency
13 agreements violate due process.
14

15 In Cook v. Shriro, 538 F.3d 1000 (9th Cir. 2008), cert. den.
16 555 U.S. 1141 (2009), the court held that the petitioner was not
17 entitled to relief for a violation of due process where a witness
18 testified truthfully and believed a plea agreement required him to
19 testify consistently with an initial videotaped confession, and
20 where the agreement provided that the witness would provide truthful
21 responses to questions, would not knowingly make any false or
22 misleading statements, and would be responsible for violating the
23 agreement without any additional proof if the witness made two or
24 more statements which were inconsistent such that at least one of
25 them must be false. There was no indication that any testimony
26 given was false. The court in Cook reviewed the status of the
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1 pertinent law as follows:

2 We agree that there is no Supreme Court case law
3 establishing that consistency clauses violate due process
4 or any other constitutional provision. Because it is an
5 open question in the Supreme Court's jurisprudence, we
6 cannot say "that the state court 'unreasonably applied
7 clearly established Federal law'" by rejecting Cook's
claim based on the consistency agreement. Carey v.
Musladin, 549 U.S. 70, 127 S.Ct. 649, 654, 166 L.Ed.2d 482
(2006).

8 Cook, 538 F.3d at 1017.

9 Thus, in this circuit, a plea agreement may require an
10 accomplice to testify fully and truthfully without violating the Due
11 Process Clause so long as the accused has the opportunity to cross-
12 examine and impeach the witness. Gallego v. McDaniel, 124 F.3d
13 1065, 1077-78 (9th Cir. 1997). "An agreement that requires a
14 witness to testify truthfully in exchange for a plea is proper so
15 long as 'the jury is informed of the exact nature of the agreement,
16 defense counsel is permitted to cross-examine the accomplice about
17 the agreement, and the jury is instructed to weigh the accomplice's
18 testimony with care.'" Allen v. Woodford, 395 F.3d 979, 995 (9th
19 Cir. 2005) (quoting United States v. Yarbrough, 852 F.2d 1522, 1537
20 (9th Cir. 1988)); accord, Reyes v. Lewis, no. cv 10-1325-VAP (JCG),
21 2011 WL 2554519, *3-*4 (C.D.Cal. April 29, 2011), adopted 2011 WL
22 2554919 (June 28, 2011) (unpublished).

23 Although Petitioner argues that the testimony of the
24 accomplices and Ochoa should have been excluded because it was
25 unreliable, Petitioner does not provide authority for exclusion of
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1 the evidence because of a witness's bias or self-interest. With
2 respect to the admission of relevant evidence contended to be
3 unreliable, the primary federal safeguards are provided by the Sixth
4 Amendment's rights to counsel, compulsory process to obtain defense
5 witnesses, and confrontation and cross-examination of prosecution
6 witnesses; otherwise, admission of evidence in state trials is
7 ordinarily governed by state law. Perry v. New Hampshire, - U.S. -,
8 132 S.Ct. 716, 723 (2012) (Due Process Clause does not require a
9 trial judge to conduct a preliminary assessment of reliability of
10 eyewitness identification made under suggestive circumstances not
11 arranged by the police). The reliability of relevant testimony
12 typically falls within the province of the jury. Id. at 728-29.
13 Absent improper police conduct or other state action, the
14 reliability of evidence may be tested through the normal procedures,
15 including the right to counsel and cross-examination, protective
16 rules of evidence, the requirement of proof of guilt beyond a
17 reasonable doubt, and jury instructions. Id.

21 Even if, as Petitioner argues, the introduction of statements
22 made involuntarily by third party witnesses could offend due process
23 if coerced by the government, there is no evidence of any coercive
24 methods in this case that would render any statement or testimony
25 involuntary. Likewise, there is no evidence that compels a
26 conclusion that the witnesses' testimony was false. Under these
27 circumstances, Petitioner does not appear to have suffered any
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1 prejudice and would not be entitled to habeas relief. Cf. Cook v.
2 Schriro, 538 F.3d at 1018; Morris v. Woodford, 273 F.3d 826, 836-37
3 (9th Cir. 2001), cert. den. Woodford v. Morris, 537 U.S. 941 (2002)
4 (any error in admitting allegedly coerced accomplice testimony was
5 rendered harmless by evidence of the Petitioner's admissions and
6 corroborating physical evidence of guilt). Here, giving due
7 deference to the state court's factual findings, there was no
8 evidence of coercion, perjured testimony, or deliberate deception to
9 support a due process claim. Further, the record contained
10 independent evidence of Petitioner's guilt, including the eyewitness
11 testimony of Vizcarra and more distant bystanders and physical
12 evidence consistent with the accomplices' reports and testimony.
13 The Court concludes that Petitioner suffered no prejudice that would
14 warrant habeas relief.

15
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17 D. Analysis of the State Court's Determination of Facts
18 pursuant to 28 U.S.C. § 2254(d) (2)

19 Petitioner argues that the state court's findings of fact were
20 unreasonable in light of the evidence before the state court.
21 However, consideration of the findings in accordance with pertinent
22 legal standards reveals that the state court's findings were
23 reasonable despite the initial report of Pena that Arellano was the
24 shooter, Brigg's testimony, and occasional inconsistencies in the
25 statements of the numerous accomplices.
26

27 Pursuant to 28 U.S.C. § 2254(d) (2), a habeas petition may be
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1 granted only if the state court's conclusion was an unreasonable
2 determination of the facts in light of the evidence presented in the
3 state court proceeding. Section 2254(d)(2) applies where the
4 challenge is based entirely on the state court record or where the
5 process of the state court is claimed to have been defective, such
6 as challenges to the sufficiency of the evidence, or allegations
7 that the state court's processes were defective or factual findings
8 were omitted. Taylor v. Maddox, 366 F.3d 992, 999-1001 (9th Cir.
9 2004). For a determination of fact to be unreasonable, the state
10 court's determination must be not merely incorrect or erroneous, but
11 rather objectively unreasonable. Id. at 999. It is not sufficient
12 that that reasonable minds might disagree with the determination or
13 have a basis to question the finding; rather, a federal habeas court
14 must find that the trial court's factual determination was such that
15 a reasonable fact finder could not have made the finding. Rice v.
16 Collins, 546 U.S. 333, 340-42 (2006). To conclude that a state
17 court finding is unsupported by substantial evidence, a federal
18 habeas court must be convinced that an appellate panel, applying the
19 normal standards of appellate review, could not reasonably conclude
20 that the finding is supported by the record. Taylor v. Maddox, 366
21 F.3d at 1000. To determine that a state court's fact finding
22 process is defective in some material way or non-existent, a federal
23 habeas court must be satisfied that any appellate court to whom the
24 defect is pointed out would be unreasonable in holding that the
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1 state court's fact finding process was adequate. Id.

2 Here, Petitioner disagrees with the statement of facts from the
3 state court and relies instead on 1) inconsistent evidence in the
4 record, and 2) declarations, including a declaration of Alvarado
5 Arellano in which Arellano states that Petitioner was not the
6 shooter, and a declaration of Petitioner in which Petitioner
7 declares that he was not the shooter, was not a member of a criminal
8 street gang, and knew that the accomplices prevaricated in order to
9 obtain favorable plea bargains. (Trav., doc. 38 at 14, 93-95.)

10 However, the record contained not only the accomplices' testimony,
11 but also corroborative testimony from persons in the area and
12 consistent physical and expert evidence. Applying the standards of
13 appellate review, a tribunal could reasonably conclude that the
14 finding that Petitioner was the shooter was supported by the record.
15

16 The declarations, which were not before the state court, are
17 not subject to this Court's review in this proceeding. In Murray v.
18 Schriro, 745 F.3d 984, 1001 (9th Cir. 2014), the court reviewed
19 challenges to state court findings that were based entirely on the
20 record for "an unreasonable determination of the facts" pursuant to
21 28 U.S.C. § 2254(d)(2) without considering any new evidence as to
22 claims adjudicated on the merits by the state court (citing
23 Pinholster, 131 S.Ct. at 1401).
24

25 Based on the foregoing, it will be recommended that
26
27 Petitioner's due process claim concerning introduction of the
28

1 statements of the accomplices and Ochoa be denied.

2 V. Instruction on Accomplice Testimony and Related Claim
3 Regarding the Ineffective Assistance of Counsel

4 Petitioner argues that his right to due process under the Sixth
5 and Fourteenth Amendments was violated by the instructions given on
6 corroboration of accomplice testimony. Petitioner contends that the
7 instruction did not correctly convey the requirement of
8 corroboration because it permitted the jury to conclude that an
9 accomplice's prior out-of-court statements could be used to
10 corroborate the accomplice's in-court testimony. Petitioner
11 contends that the error was prejudicial because the only strong
12 evidence against Petitioner was the accomplices' testimony.
13 Petitioner raises the related claim that his counsel's failure to
14 object to or otherwise to remedy the instructional error constituted
15 ineffective assistance of counsel in violation of Petitioner's
16 rights under the Sixth and Fourteenth Amendments.

17 A. The State Court Decision

18 The last reasoned decision on this claim was the CCA's opinion,
19 in which the CCA initially found that Petitioner had forfeited the
20 claim because at trial the defense failed either to request a
21 modification of the instruction or to submit a legally correct
22 pinpoint instruction; however, the CCA concluded that there had been
23 no constitutional violation. (LD 8, 26-29.) The CCA stated the
24 following:
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1 **A. The Jury was Correctly Instructed on Accomplice**
2 **Corroboration.**

3 The court instructed the jury on accomplice testimony with
4 CALCRIM Nos. 301, 318, and 335.

5 As given, CALCRIM No. 301 provided:

6 "Except for the testimony of Raul Pena, Sergio
7 Felix, Luis Avina Meza, and the out of court
8 statements of Alvaro Arellano, which require
9 supporting evidence, the testimony of only one
10 witness can prove any fact. Before you conclude
11 that the testimony of one witness proves a fact,
12 you should carefully review all the evidence."

13 CALCRIM No. 318 informed the jurors:

14 "You have heard evidence of statements that a
15 witness made before the trial. If you decide
16 that the witness made those statements, you may
17 use those statements in two ways: [¶] 1. To
18 evaluate whether the witness's testimony in
19 court is believable; [¶] AND [¶] 2. As evidence
20 that the information in those earlier statements
21 is true."

22 CALCRIM No. 335 instructed the jurors that Pena, Felix,
23 Meza and Arellano were accomplices to the charged
24 offenses. Then it stated:

25 "You may not convict the defendant of [the
26 charged offenses], or any lesser crime, based on
27 the statement or testimony of an accomplice
28 alone. You may use the statement or testimony of
29 an accomplice to convict the defendant only if:
30 [¶] 1. The accomplice's statement or testimony
31 is supported by other evidence that you believe;
32 [¶] 2. That supporting evidence is independent
33 of the accomplice's statement or testimony [¶]
34 AND [¶] 3. That supporting evidence tends to
35 connect the defendant to the commissions of the
36 crimes."

37 Appellant argues that while CALCRIM Nos. 318 and 335 are
38 generally correct, the instructions were misleading in
39 this case because there were numerous accomplices who all

1 gave statements to the police. In appellant's view,
2 CALCRIM Nos. 318 and 335 incorrectly permitted the jury to
3 find "that the testimony of one accomplice was
4 corroborated by the statements of another accomplice or
5 that the testimony of one accomplice was corroborated by
6 the statements of that same accomplice." Based on this
7 premise, appellant asserts the court had a sua sponte
8 obligation to modify these instructions and inform the
9 jury that the required corroboration of an accomplice's
10 testimony must be both independent of any prior out-of-
11 court statements that were made by the accomplice and
12 independent of both the testimony and prior out-of-court
13 statements that were made by the other accomplices. As we
14 will explain, this claim of instructional error is both
15 procedurally defective and substantively meritless.

16 Procedurally, appellant forfeited the right to raise this
17 issue on appeal because he did not seek modification of
18 the instructions in the trial court or submit a legally
19 correct pinpoint instruction. Section 1259 provides that
20 we may review "any instruction given, refused or modified,
21 even though no objection was made thereto" in the trial
22 court. (§ 1259.) Even so, a defendant may not complain on
23 appeal that a legally correct jury instruction was too
24 general or incomplete unless he or she sought clarifying
25 or amplifying language in the trial court. (*People v.*
26 *Tuggles* (2009) 179 Cal.App.4th 339, 364-365, 100
27 Cal.Rptr.3d 820 (*Tuggles*); *People v. Cleveland* (2004) 32
28 Cal.4th 704, 750, 11 Cal.Rptr.3d 236, 86 P.3d 302; *People*
v. Hart (1999) 20 Cal.4th 546, 622, 85 Cal.Rptr.2d 132,
976 P.2d 683.)

Essentially, appellant is arguing that due to the
unusually large number of accomplices who all made
pretrial statements, the court had a sua sponte duty to
modify the otherwise correct instructions in a way that
avoided the potentially problematic interpretation he
identified in his briefing. Appellant reasons that such
an instruction fell within the ambit of general principles
of law closely and openly connected to the facts and
necessary for the jury's understanding of the case. We
disagree.

A trial court is not required to instruct sua sponte on
specific points developed at trial. (*People v. Daya* (1994)
29 Cal.App.4th 697, 714, 34 Cal.Rptr.2d 884.) If appellant
was concerned that under the unique facts of this case,

1 the jury needed additional instruction on accomplice
2 corroboration, he was required to submit a special
3 instruction addressing this point. "[D]efendant is not
4 entitled to remain mute at trial and scream foul on appeal
for the court's failure to expand, modify and refine
standardized jury instructions." (*Ibid.*)

5 *Tuggles, supra*, 179 Cal.App.4th 339, 100 Cal.Rptr.3d 820
6 is directly on point. There, CALCRIM Nos. 318 and 335 were
7 given without objection or request for modification. On
8 appeal, Tuggles argued that when these instructions were
9 read together, they "erroneously instructed the jury that
10 an accomplice's testimony at trial could be corroborated
11 by the same accomplice's prior out-of-court statements."
(*Id.* at p. 363, fn. omitted.) The appellate court
concluded the point was both forfeited and lacked merit.
With respect to forfeiture, the court reasoned:

12 "The gravamen of Tuggle's argument is a claim of
13 improper 'completion of the instruction by the
14 trial court.' To preserve the issue, Tuggles was
15 required to request the additional language
16 needed to complete the jury instructions.
[Citation.] The lack of such a request by
Tuggles forfeited the issue for review.
[Citation.]" (*Tuggles, supra*, 179 Cal.App.4th at
pp. 364-365, 100 Cal.Rptr.3d 820.)

17 The appellate court then considered the substantive point
18 in an ineffective assistance of counsel context. It
19 decided no reasonable juror would have understood CALCRIM
20 Nos. 318 and 335 as permitting the witness to corroborate
21 his own testimony. (*Tuggles, supra*, 179 Cal.App.4th at p.
22 365, 100 Cal.Rptr.3d 820.) Use of the word "independent"
23 in CALCRIM No. 335 to describe the sort of evidence that
24 could serve as corroboration negates the defendant's
25 assertion that the instruction allowed the accomplice to
26 corroborate his own testimony. Further, even if CALCRIM
27 Nos. 318 and 335 were susceptible to this interpretation,
28 "any mistaken impression was dispelled by the court's
giving of CALCRIM No. 301." (*Ibid.*) "This instruction
informed the jury that [the witness's] status as an
accomplice disallowed his testimony to suffice for
conviction without additional evidence in support." (*Id.*
at p. 366.) With the additional consideration of CALCRIM
No. 301, "no reasonable jury could have understood the
instructions to allow an accomplice to corroborate

1 himself. [Citations.]" (*Id.* at p. 366.)

2 Appellant argues *Tuggles* is distinguishable because this
3 case involves multiple accomplices and the prosecutor
4 implied in his closing arguments that an accomplice's
5 testimony could be corroborated by his pretrial statement
6 and/or the testimony of other accomplices.

7 Neither of these factual differences pertains to the issue
8 of forfeiture. We find *Tuggles* to be persuasive on that
9 point. If appellant wanted additional instruction on
10 accomplice corroboration or modification of generally
11 correct instructions, it was incumbent on him to request
12 it. Also, if appellant thought the prosecutor was
13 misstating the law during closing arguments, he was
14 affirmatively obligated to assert a timely objection and
15 request admonishment. (*People v. Hill* (1998) 17 Cal.4th
16 800, 820, 72 Cal.Rptr.2d 656, 952 P.2d 673.)

17 Since appellant did not request modification of CALCRIM
18 Nos. 318 or 335, did not offer a pinpoint instruction
19 concerning multiple accomplices, and did not object to the
20 prosecutor's closing argument on this basis, we conclude
21 the point was not preserved for direct appellate review.
22 (*Tuggles, supra*, 179 Cal.App.4th at pp. 364-365, 100
23 Cal.Rptr.3d 820.)

24 Furthermore, we agree with the reasoning in *Tuggles* that
25 inclusion of CALCRIM No. 301 in the jury charge precluded
26 the erroneous interpretation urged by appellant. The
27 correctness of jury instructions is to be determined from
28 the entire charge of the court, not from a consideration
29 of parts of an instruction or from a particular
30 instruction. (*Estelle v. McGuire* (1991) 502 U.S. 62, 72,
31 112 S.Ct. 475, 116 L.Ed.2d 385 (*Estelle*); see, e.g.,
32 *People v. Solomon* (2010) 49 Cal.4th 792, 824, 112
33 Cal.Rptr.3d 244, 234 P.3d 501; *People v. Jones* (2003) 108
34 Cal.App.4th 455, 468, 133 Cal.Rptr.2d 358.) We must review
35 jury instructions based on how a reasonable juror would
36 construe them. (*People v. Clair* (1992) 2 Cal.4th 629, 688,
37 7 Cal.Rptr.2d 564, 828 P.2d 705.) The test on appeal is
38 "whether there is a reasonable likelihood that the jury
39 has applied the challenged instruction in a way' that
40 violates the Constitution. [Citation.]" (*Estelle, supra*,
41 502 U.S. at p. 72.) Reasonable jurors would not have
42 construed the language of CALCRIM Nos. 318 and 335 in the
43 manner suggested by appellant. Since it is not reasonably

1 likely that the jury applied the instructions in a way
2 that violates the state or federal constitutions, this
3 claim of evidentiary error fails. (*Tuggles, supra*, 179
4 Cal.App.4th at pp. 365-366, 100 Cal.Rptr.3d 820.)

5 (LD 8, 25-29.)

6 B. Analysis

7 Any challenge that Petitioner might have had that was based on
8 state law, such as compliance with Cal. Pen. Code § 1111 regarding
9 corroboration of accomplice testimony, is not subject to this
10 Court's review in this proceeding. A challenge to a jury
11 instruction based solely on an error under state law does not state
12 a claim cognizable in federal habeas corpus proceedings. Estelle v.
13 McGuire, 502 U.S. 62, 72 (1991). A claim that an instruction was
14 deficient compared to a state model or that a trial judge
15 incorrectly interpreted or applied state law governing jury
16 instructions does not entitle one to relief under § 2254, which
17 requires violation of the Constitution, laws, or treaties of the
18 United States. 28 U.S.C. §§ 2254(a), 2241(c) (3).

19 Further, Respondent asserts that any error is procedurally
20 barred from this Court's review. In response to Respondent's
21 assertion that any claim of instructional error was procedurally
22 defaulted pursuant to California's rule requiring the defense to
23 challenge the instruction at trial, Petitioner argues that his
24 counsel was ineffective in failing to request modification of the
25 instructions and to submit an appropriate pinpoint instruction.
26 27
27 28

1 Respondent correctly contends that California's rule requiring
2 a defense challenge to instructions at the trial level is recognized
3 as independent and adequate such that a failure to comply with it
4 results in forfeiture of the issue in a proceeding pursuant to 28
5 U.S.C. § 2254.¹ Paulino v. Castro, 371 F.3d 1083, 1092-93 (9th Cir.
6 2004); see Huff v. Martel, no. 2:08-cv-3053-JAM-TJB, 2010 WL
7 3608111, *10-*11 (E.D.Cal. Sept. 10, 2010) (unpublished).

8 However, it is also established that in a habeas case, the
9 issue of procedural bar need not be resolved if another issue is
10 capable of being resolved against the petitioner. Lambrix v.
11 Singletary, 520 U.S. 518, 525 (1997). Likewise, the procedural
12 default issue, which may necessitate determinations concerning cause
13 and miscarriage of justice, may be more complex than the underlying
14 issues in the case. In such circumstances, it may make more sense
15 to proceed to the merits. See Franklin v. Johnson, 290 F.3d 1223,
16 1232 (9th Cir. 2002).

17 Here, because Petitioner also asserts ineffective assistance of
18 counsel based on counsel's failure to challenge or correct the
19 instructions, the Court deems it most efficient to proceed to the
20

21
22 ¹ The doctrine of procedural default is a specific application of the more general
23 doctrine of independent state grounds. It provides that when a state court
24 decision on a claim rests on a prisoner's violation of either a state procedural
25 rule that bars adjudication of the case on the merits or a state substantive rule
26 that is dispositive of the case, and the state law ground is independent of the
27 federal question and adequate to support the judgment such that direct review in
28 the United States Supreme Court would be barred, then the prisoner may not raise
the claim in federal habeas absent a showing of cause and prejudice or that a
failure to consider the claim will result in a fundamental miscarriage of justice.
Walker v. Martin, - U.S. -, 131 S.Ct. 1120, 1127 (2011); Coleman v. Thompson, 501
U.S. 722, 729-30 (1991); Bennett v. Mueller, 322 F.3d 573, 580 (9th Cir. 2003);
Wells v. Maass, 28 F.3d 1005, 1008 (9th Cir. 1994). The doctrine applies
regardless of whether the default occurred at trial, on appeal, or on state
collateral review. Edwards v. Carpenter, 529 U.S. 446, 451 (2000).

1 merits of Petitioner's claim concerning erroneous instructions
2 regarding corroboration of accomplice testimony.

3 The only basis for federal collateral relief for instructional
4 error is that the infirm instruction or the lack of instruction by
5 itself so infected the entire trial that the resulting conviction
6 violates due process. Estelle v. McGuire, 502 U.S. at 71-72; Cupp
7 v. Naughten, 414 U.S. 141, 147 (1973); see Donnelly v.
8 DeChristoforo, 416 U.S. 637, 643 (1974) (it must be established not
9 merely that the instruction is undesirable, erroneous or even
10 "universally condemned," but that it violated some right guaranteed
11 to the defendant by the Fourteenth Amendment). Further, the
12 instruction may not be judged in artificial isolation, but must be
13 considered in the context of the instructions as a whole and the
14 trial record. Estelle, 502 U.S. at 72. In reviewing an ambiguous
15 instruction, it must be determined whether there is a reasonable
16 likelihood that the jury applied the challenged instruction in a way
17 that violates the Constitution. Estelle, 502 U.S. at 72-73
18 (reaffirming the standard as stated in Boyde v. California, 494 U.S.
19 370, 380 (1990)). The Court in Estelle emphasized that the Court
20 had defined the category of infractions that violate fundamental
21 fairness very narrowly, and that beyond the specific guarantees
22 enumerated in the Bill of Rights, the Due Process Clause has limited
23 operation. Id. at 72-73.

24 Moreover, even if there is instructional error, a petitioner is
25 generally not entitled to habeas relief for the error unless it is
26 prejudicial. The harmless error analysis applies to instructional
27 errors as long as the error at issue does not categorically vitiate
28 all the jury's findings. Hedgpeth v. Pulido, 555 U.S. 57, 61 (2008)

1 (citing Neder v. United States, 527 U.S. 1, 11 (1999) (quoting
2 Sullivan v. Louisiana, 508 U.S. 275 (1993) concerning erroneous
3 reasonable doubt instructions as constituting structural error)).
4 In Hedgpeth v. Pulido, the United States Supreme Court cited its
5 previous decisions that various forms of instructional error were
6 trial errors subject to harmless error analysis, including errors of
7 omitting or misstating an element of the offense or erroneously
8 shifting the burden of proof as to an element. Hedgpeth, 555 U.S.
9 60-61. To determine whether a petitioner pursuant to § 2254
10 suffered prejudice from such an instructional error, a federal court
11 must determine whether a petitioner suffered actual prejudice by
12 assessing whether, in light of the record as a whole, the error had
13 a substantial and injurious effect or influence in determining the
14 jury's verdict. Hedgpeth, 555 U.S. at 62; Brecht v. Abrahamson, 507
15 U.S. 619, 638 (1993).

16 Petitioner contends that the instructions must be evaluated in
17 light of the prosecutor's argument that the accomplices' testimony
18 was corroborated by other evidence coming from the accomplices. The
19 prosecutor's argument will be further analyzed in connection with
20 Petitioner's claims of prosecutorial misconduct. However, in the
21 context of the entire case, the Court will consider Petitioner's
22 argument that the possibility that the jury understood the
23 instructions concerning corroboration of accomplice testimony to
24 permit corroboration by accomplice testimony itself was magnified by
25 the multiplicity of accomplices, and the instructional error
26 rendered his trial unfair because the only significant or strong
27 evidence identifying Petitioner as the shooter came from the
28 accomplices.

1 The Due Process Clause does not require corroboration of
2 accomplice testimony. United States v. Augenblick, 393 U.S. 348,
3 352 (1969). Unless accomplice testimony is incredible or so
4 insubstantial on its face that it results in a denial of fundamental
5 unfairness, corroboration is not required by the Constitution or
6 federal law. Laboa v. Calderon, 224 F.3d 972, 979 (9th Cir. 2000).

7 Here, the accomplices' testimony concerning Petitioner's
8 shooting of the victim was corroborated substantially by the
9 testimony and statements of Vizcarra, observations of neighbors and
10 persons in the vicinity, and uncontroverted physical evidence. The
11 accomplices' testimony was consistent with the independent evidence.
12 The record contained significant independent evidence that
13 corroborated accomplice testimony. It was not likely that the
14 jurors understood the instructions to require independent
15 corroboration of accomplice testimony and simultaneously to provide
16 that accomplice testimony itself could provide that corroboration.
17 The state court's conclusion that it was not likely that the jurors'
18 understood the instructions to permit corroboration by other
19 accomplice testimony was not objectively unreasonable and was not
20 contrary to, or an unreasonable application of, clearly established
21 federal law.

22 Here, as the independent evidence of Petitioner's culpability
23 was strong and came from many sources, the Court concludes that
24 Petitioner did not suffer any prejudice from the instructions on
25 accomplice testimony. Contrary to Petitioner's representations
26 concerning the record, there was strong independent evidence that
27 Petitioner was the shooter. Before trial, Petitioner was identified
28 as the shooter not only by Pena, Felix, and Meza, but also by

1 Vizcarra, who reported Petitioner took a gun and pointed it towards
2 the ground where the victim was, which was followed immediately by
3 the sound of three or more gunshots. (8 RT 1726, 1742-43, 1746-47,
4 1788.) Before trial, in addition to Felix, Pena, and Meza, various
5 persons who were not accomplices reported that the shooter pulled
6 out or pointed a gun down at the victim, who was on or close to the
7 ground, and fired multiple gunshots in rapid succession. (5 RT
8 1057, 1060, 1070 [Sabrina Lominario]; 4 RT 985, 990-91 [Marlena
9 Phipps]; 8 RT 1742-43, 1741 [Vizcarra].) Although Meza and Felix
10 identified Petitioner as the shooter at trial, independent witnesses
11 testified that the shooter pointed the gun down at the victim, who
12 was down, and fired multiple gunshots in rapid succession. (2 RT
13 208-09, 218-21, 233 [Lominario]; id. at 246, 253-54, 256 [Phipps];
14 id. at 348, 360-62, 427, 442-43 [Michael Steinberg].) The
15 independent witnesses' observations of the person with short hair
16 were consistent with the accomplice's representations regarding
17 Petitioner's conduct and appearance. The physical evidence also
18 supported the testimony concerning multiple shots from one gun fired
19 by a person into a victim who was down.

20 Accordingly, it will be recommended that Petitioner's claim of
21 instructional error regarding accomplice testimony be denied.

22 VI. Ineffective Assistance of Counsel

23 Petitioner argues that his rights under the Sixth and
24 Fourteenth Amendment were violated by counsel's failure to challenge
25 the accomplice instructions.

26 A. Legal Standards

27 The law governing claims concerning ineffective assistance of
28 counsel is clearly established for the purposes of the AEDPA

1 deference standard set forth in 28 U.S.C. § 2254(d). Premo v.
2 Moore, - U.S. -, 131 S.Ct. 733, 737-38 (2011); Canales v. Roe, 151
3 F.3d 1226, 1229 n.2 (9th Cir. 1998).

4 To demonstrate ineffective assistance of counsel in violation
5 of the Sixth and Fourteenth Amendments, a convicted defendant must
6 show that 1) counsel's representation fell below an objective
7 standard of reasonableness under prevailing professional norms in
8 light of all the circumstances of the particular case; and 2) unless
9 prejudice is presumed, it is reasonably probable that, but for
10 counsel's errors, the result of the proceeding would have been
11 different. Strickland v. Washington, 466 U.S. 668, 687-94 (1984);
12 Lowry v. Lewis, 21 F.3d 344, 346 (9th Cir. 1994).

13 With respect to this Court's review of a state court's decision
14 concerning a claim of ineffective assistance of counsel, the Supreme
15 Court has set forth the standard of decision as follows:

16 To establish ineffective assistance of counsel "a
17 defendant must show both deficient performance by counsel
18 and prejudice." Knowles v. Mirzayance, 556 U.S. --, --, 129
19 S.Ct. 1411, 1419, 173 L.Ed.2d 251 (2009). In addressing
20 this standard and its relationship to AEDPA, the Court
today in Richter, -- U.S., at -- - --, 131 S.Ct. 770,
gives the following explanation:

21 "To establish deficient performance, a person
22 challenging a conviction must show that
23 'counsel's representation fell below an
objective standard of reasonableness.'

24 [Strickland,] 466 U.S., at 688 [104 S.Ct. 2052].

25 A court considering a claim of ineffective
26 assistance must apply a 'strong presumption'
27 that counsel's representation was within the
'wide range' of reasonable professional
28 assistance. Id., at 689 [104 S.Ct. 2052]. The
challenger's burden is to show 'that counsel
made errors so serious that counsel was not
functioning as the "counsel" guaranteed the

1 defendant by the Sixth Amendment.' Id., at 687
2 [104 S.Ct. 2052].

3 "With respect to prejudice, a challenger must
4 demonstrate 'a reasonable probability that, but
5 for counsel's unprofessional errors, the result
6 of the proceeding would have been different.'
7 ...

8 " 'Surmounting Strickland's high bar is never an
9 easy task.' Padilla v. Kentucky, 559 U.S. --, --
10 [130 S.Ct. 1473, 1485, 176 L.Ed.2d 284] (2010).
11 An ineffective-assistance claim can function as
12 a way to escape rules of waiver and forfeiture
13 and raise issues not presented at trial [or in
14 pretrial proceedings], and so the Strickland
15 standard must be applied with scrupulous care,
16 lest 'intrusive post-trial inquiry' threaten the
17 integrity of the very adversary process the
18 right to counsel is meant to serve. Strickland,
19 466 U.S., at 689-690 [104 S.Ct. 2052]. Even
20 under de novo review, the standard for judging
21 counsel's representation is a most deferential
22 one. Unlike a later reviewing court, the
23 attorney observed the relevant proceedings, knew
24 of materials outside the record, and interacted
25 with the client, with opposing counsel, and with
26 the judge. It is 'all too tempting' to 'second-
27 guess counsel's assistance after conviction or
28 adverse sentence.' Id., at 689 [104 S.Ct. 2052];
see also Bell v. Cone, 535 U.S. 685, 702, 122
S.Ct. 1843, 152 L.Ed.2d 914 (2002); Lockhart v.
Fretwell, 506 U.S. 364, 372, 113 S.Ct. 838, 122
L.Ed.2d 180 (1993). The question is whether an
attorney's representation amounted to
incompetence under 'prevailing professional
norms,' not whether it deviated from best
practices or most common custom. Strickland, 466
U.S., at 690, 104 S.Ct. 2052.

24 "Establishing that a state court's application
25 of Strickland was unreasonable under § 2254(d)
26 is all the more difficult. The standards created
27 by Strickland and § 2254(d) are both 'highly
28 deferential,' id., at 689 [104 S.Ct. 2052];
Lindh v. Murphy, 521 U.S. 320, 333, n. 7, 117
S.Ct. 2059, 138 L.Ed.2d 481 (1997), and when the

1 two apply in tandem, review is 'doubly' so,
2 Knowles, 556 U.S., at ----, 129 S.Ct., at 1420.
3 The Strickland standard is a general one, so the
4 range of reasonable applications is substantial.
5 556 U.S., at ---- [129 S.Ct., at 1420]. Federal
6 habeas courts must guard against the danger of
7 equating unreasonableness under Strickland with
8 unreasonableness under § 2254(d). When § 2254(d)
9 applies, the question is not whether counsel's
10 actions were reasonable. The question is whether
11 there is any reasonable argument that counsel
12 satisfied Strickland's deferential standard."

13 Premo v. Moore, 131 S.Ct. at 739-40 (quoting Harrington v. Richter,
14 131 S.Ct. 770 (2011)).

15 B. Analysis

16 Respondent contends that Petitioner's claim of ineffective
17 assistance regarding accomplice instructions was never presented to
18 the state courts and thus was not exhausted, and that in any event,
19 Petitioner's claim fails on the merits.

20 The claim was not addressed in the CCA's decision (LD 8, 25-29)
21 or in Petitioner's petition for writ of habeas corpus filed in the
22 CSC (LD 12.). Nevertheless, as the foregoing discussion concerning
23 Petitioner's claim of instructional error shows, the California
24 courts properly concluded that it was not reasonably likely that the
25 jury had applied the instructions in a manner that violated the
26 Constitution. Considering the state court decision in this case and
27 the holding in the Tuggles case discussed by the CCA in its
28 decision, the record reflects it is not reasonably probable that the
trial court would have ruled favorably on any challenge lodged by
trial counsel to the instructions. See Styers v. Schriro, 547 F.3d
1026, 1030 n.5 (9th Cir. 2008) (a petitioner claiming ineffective
assistance based on counsel's failure to file a particular motion

1 must demonstrate "a likelihood of prevailing on the motion," and "a
2 reasonable probability that the granting of the motion would have
3 resulted in a more favorable outcome in the entire case"). Here,
4 counsel could have made a reasonable tactical decision not to
5 challenge the instructions or argument to minimize the likelihood
6 that the prosecutor would highlight the independent evidence even
7 further in responsive argument. Further, in light of the
8 independent evidence of Petitioner's guilt in the record, it does
9 not appear that any theoretical ambiguity in the instruction
10 prejudiced Petitioner.

11 The Court concludes that counsel's failure to challenge the
12 accomplice instructions did not constitute ineffective assistance of
13 counsel. Petitioner has not shown that counsel's omission resulted
14 in prejudice. Accordingly, it will be recommended that Petitioner's
15 claim of ineffective assistance of counsel relating to accomplice
16 instructions be denied.

17 VI. Admission of the Autopsy Report

18 Petitioner claims that admission of an autopsy report violated
19 his rights to confrontation and cross-examination guaranteed by the
20 Sixth and Fourteenth Amendments because the report was testimonial,
21 and it was admitted without the testimony of the pathologist who
22 performed the autopsy.

23 A. The State Court's Decision

24 The last reasoned decision on the Confrontation Clause claim
25 must be identified. Although the CCA addressed the general issue,
26 the CCA did not decide the precise issue presented by Petitioner;
27 the CCA instead reviewed the evidence but concluded that any alleged
28

1 Confrontation Clause error was harmless beyond a reasonable doubt.²
2 The CCA did not determine whether there was an actual Confrontation
3 Clause error. A state court decision cannot be classified as an
4 "adjudication on the merits" within the meaning of § 2254(d)(1) if
5 the state court failed to resolve all determinative issues of
6 federal law. In analogous circumstances, a state court's decision
7 on the prejudice prong of an ineffective assistance claim does not
8 constitute a decision on whether there was unreasonable, sub-
9 standard conduct of counsel; the portion or element of the claim
10 that was not analyzed is determined de novo by this Court. Porter
11 v. McCollum, 558 U.S. 30, 37-38 n.6, 39 (2009) (per curiam);
12 Rompilla v. Beard, 545 U.S. 374, 390 (2005).

13 Arguably, the last reasoned decision was the decision of the
14 trial court, which admitted the evidence over objection. Medley v.
15 Runnels, 506 F.3d 857, 863 (9th Cir. 2007) (concluding that where
16 the state appellate courts had not discussed an issue regarding
17 evidence concerning a flare gun, the state trial court "effectively
18 ruled on this issue when it decided that if the prosecution
19 presented evidence as to how a flare gun functions, then the issue

21 ²The CCA concluded that admission of the autopsy report and Dr. Lawrence's
22 testimony summarizing its contents did not prejudice the Petitioner. The court
23 reasoned that the error was harmless beyond a reasonable doubt in light of the
24 entire record because the cause and manner of the victim's death was undisputed at
25 trial, where the defense suggested that Arellano was the killer and thereby
26 attempted to raise a reasonable doubt as to the identity of the shooter; there was
27 independent testimony about the autopsy by percipient witnesses who were subject
28 to cross-examination by defense counsel; the contents of the doctor's testimony
and autopsy report were largely cumulative to the percipient witnesses' testimony
and physical evidence recovered at the crime scene; all the evidence corroborated
the contents of the autopsy report and the doctor's testimony concerning the
victim's injuries, the directional path of the bullets, and the cause of death;
and Petitioner did not suggest any new evidence that was available only if Dr.
Schmunk had been cross-examined. (LD 8, 22-25.)

1 of whether the flare gun was a firearm would be moot). In Medley,
2 the Court of Appeals concluded that the terse pretrial ruling
3 constituted the last reasoned decision under Ylst and would be the
4 ruling reviewed in habeas corpus. Medley v. Runnels, 506 F.3d at
5 863.

6 Even if a state court has failed to set forth its reasoning, a
7 federal habeas court must determine what arguments or theories could
8 have supported the state court's decision and then determine whether
9 fairminded jurists could disagree that those arguments or theories
10 are inconsistent with the holding in a prior decision of this Court.
11 Harrington v. Richter, 131 S.Ct. at 786. When the state court does
12 not supply reasoning for its decision, this Court does not conduct
13 de novo review but rather conducts an independent review of the
14 record to ascertain whether the state court's decision was
15 objectively unreasonable. Walker v. Martel, 709 F.3d 925, 939 (9th
16 Cir. 2013), cert. den. Walker v. Chappell, 134 S.Ct. 514 (2013).

17 B. Analysis

18 The Confrontation Clause of the Sixth Amendment, made binding
19 on the states by the Fourteenth Amendment, provides that in all
20 criminal cases, the accused shall enjoy the right to be confronted
21 with the witnesses against him. Pointer v. Texas, 380 U.S. 400
22 (1965). The main purpose of confrontation as guaranteed by the
23 Sixth Amendment is to secure the opportunity for cross-examination
24 to permit the opponent of the party presenting a witness to test the
25 believability of the witness and the truth of his or her testimony
26 by examining the witness's story, testing the witness's perceptions
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1 and memory, and impeaching the witness. Delaware v. Van Arsdall,
 2 475 U.S. 673, 678 (1986); Davis v. Alaska, 415 U.S. 308, 316 (1974).
 3 Even if there is a violation of the right to confrontation, habeas
 4 relief will not be granted unless the error had a substantial and
 5 injurious effect or influence in determining the jury's verdict.
 6 Ocampo v. Vail, 649 F.3d 1098, 1114 (9th Cir. 2011), cert. den.,
 7 Warner v. Ocampo, 131 S.Ct. 62 (2012); Jackson v. Brown, 513 F.3d
 8 1057, 1084 (9th Cir. 2008) (citing Brecht v. Abrahamson, 507 U.S. at
 9 637).

11 Petitioner relies on Crawford v. Washington, 541 U.S. 36, 59
 12 (2004), holding that testimonial statements of witnesses absent from
 13 trial may be admitted only where the declarant is unavailable and
 14 the defendant has had a prior opportunity to cross-examine the
 15 witness; and Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009),
 16 holding that notarized, sworn certificates of analysis prepared by
 17 laboratory analysts that under state law constitute prima facie
 18 evidence come within the core class of testimonial documents
 19 protected by the Sixth Amendment. Petitioner contends that in
 20 argument to the jury, the prosecutor here repeatedly referred to the
 21 nature of the injuries found in the autopsy, specifically,
 22 lacerations, abrasions, glass, the bullet removed from the victim
 23 that was linked to the gun recovered by police, and the pattern of
 24 five wounds to the victim's back as reflecting the victim's having
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 26
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1 been punched, kicked, and shot while down. The prosecutor also
2 reminded the jurors that they could observe the autopsy photographs.

3 However, Petitioner may not rely on Melendez-Diaz or other
4 Supreme Court decisions made after the date of the state court's
5 merits decision. Clearly established federal law within the meaning
6 of § 2254(d)(1) is the Supreme Court case law that existed on the
7 day the state court rendered its merits adjudication. Greene v.
8 Fisher, 132 S. Ct. 38, 44 (2011). Section 2254(d)(1) requires
9 federal courts to "focu[s] on what a state court knew and did," and
10 to measure state-court decisions "against this Court's precedents as
11 of 'the time the state court renders its decision.'" Id. (quoting
12 Cullen v. Pinholster, 131 S.Ct. at 1399). A later affirmance on
13 alternative procedural grounds or a later decision by a higher state
14 court denying review would not alter this. Id. at 45.

15 Here, the state trial court's merits adjudication occurred on
16 January 20, 2009. (2 RT 347, 381-82, 384-85; II CT 352-53). In
17 2004, five years before the adjudication, in Crawford v. Washington,
18 541 U.S. at 53-54, the Court held that the Confrontation Clause bars
19 the admission of testimonial hearsay unless the declarant is
20 unavailable and the accused had "a prior opportunity for
21 cross-examination." The Crawford holding abrogated in part the prior
22 rule that the admission of testimonial hearsay did not violate the
23 Confrontation Clause if the declarant was unavailable and the
24 statement fell within a "firmly rooted hearsay exception" or
25 otherwise bore indicia of reliability. Ohio v. Roberts, 448 U.S.
26 56, 66 (1980). Although Crawford did not define "'testimonial' or
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28

1 'nontestimonial,' it made clear that the Confrontation Clause was
2 concerned with 'testimony,' which 'is typically [a] solemn declaration
3 or affirmation made for the purpose of establishing or proving some
4 fact,' and noted that '[a]n accuser who makes a formal statement to
5 government officers bears testimony in a sense that a person who
6 makes a casual remark to an acquaintance does not.'" Delgadillo v.
7 Woodford, 527 F.3d 919, 927 (9th Cir. 2008) (quoting Crawford, 541
8 U.S. at 51 (first alteration in original) (internal quotation marks
9 omitted)).

10 However, Melendez-Diaz v. Massachusetts, relied on by
11 Petitioner, was not decided until June 25, 2009, after the state
12 court's merits decision in the present case. Melendez-Diaz, 557
13 U.S. 305. Because the clearly established federal law based on
14 Crawford did not delineate what was testimonial, a state court
15 decision at that time that admitting an autopsy report without
16 confrontation or cross-examination of the person who authored the
17 report was not contrary to, or an unreasonable application of,
18 clearly established federal law where another forensic pathologist
19 from the laboratory gave expert testimony based on the data in the
20 report. See, McNeiece v. Lattimore, no. ED CV 07-0951 RGK (FMO),
21 2009 WL 1464368, *7-*10 (C.D.Cal. May 22, 2009) (unpublished);
22 Rogovich v. Schriro, no. CV-00-1896-PHX-ROS, 2008 WL 2757362, at *6
23 (D. Ariz. July 14, 2008), aff'd., Rogovich v. Ryan, 694 F.3d 1094
24 (9th Cir. 2012), cert. den. 134 S.Ct. 93 (2013); cf. Flournoy v.
25 Small, 681 F.3d 1000, 1004 (9th Cir. 2012), cert. den. 133 S.Ct. 880
26 (2013) (an analogous state court decision that found no
27 Confrontation Clause violation in the admission of a scientist's
28 testimony based on the tests and reports of other crime laboratory

1 workers was not contrary to, or an unreasonable application of,
2 clearly established federal law, and citing Meras v. Sisto, 676 F.3d
3 1184, 1188 (9th Cir. 2012) (Crawford did not clearly establish
4 whether a forensic laboratory report was testimonial)).

5 Even considering the more recent holdings in Melendez-Diaz and
6 Bulcoming v. New Mexico, 564 U.S. -, 131 S.Ct. 2705 (2011) (holding
7 testimonial scientists' unsworn, formal certificates of analysis
8 made for the purpose of introduction in evidence to establish proof
9 of the results of the analysis), a fairminded jurist could argue
10 that it was uncertain whether the Supreme Court would classify
11 autopsy reports as testimonial, or would find fundamentally unfair
12 the admission of the testimony of another expert who relied in part
13 on an autopsy report and in part on independent evidence of the
14 substance and procedure of the autopsy. See, Flournoy v. Small, 681
15 F.3d at 1005; Vega v. Walsh, 669 F.3d 123, 127-28 n.2 (2d Cir.
16 2012); Nardi v. Pepe, 662 F.3d 107, 112, (1st Cir. 2011).

17 In any event, regardless of the date of the relevant state
18 court decision or the status of the law as clearly established,
19 Petitioner has not shown that any Confrontation Clause violation was
20 prejudicial. Although Dr. Lawrence did not perform the autopsy, he
21 was the laboratory's owner and custodian of records and was a
22 pathologist in the laboratory who had practiced for thirty-six
23 years, performed over 8,000 autopsies, and testified in court over
24 1,000 times (2 RT 379-81, 384-85); thus, he had personal knowledge
25 regarding the laboratory's forensic and record-keeping procedures.
26 Further, Lawrence had expertise regarding Petitioner's wounds based
27 not only on the autopsy report, but also by the doctor's own
28 observations and interpretations of the photographs that had been

1 taken during the course of the autopsy. (Id. at 382).³

2 It is true that Lawrence did testify regarding matters
3 reflected in the autopsy report, including the victim's clothing,
4 height and weight, and his general health before death as well as
5 the presence of blunt force injuries consistent with a fight, a
6 total of seven gunshot wounds, glass fragments in the victim's
7 forehead and elbow, and an absence of burn marks near the entrance
8 wounds. (Id. at 387-389, 414-15.) He testified that the report
9 indicated that the bullets hit the victim's lungs, liver, adrenal
10 gland, spinal column, diaphragm, and aorta, causing significant
11 internal bleeding; and the cause of death was shock and hemorrhage
12 due to multiple gunshot wounds. (Id. at 402-03, 420-23.) Further,
13 the report indicated that some of the shots were fired in a downward
14 direction. (Id. at 414-15.)

15 However, there was independent, non-hearsay evidence of the
16 autopsy procedures and the authenticity of the autopsy photographs.
17 A deputy sheriff testified he was present during the autopsy with
18 two members of the district attorney's staff and an identification
19 officer. The deputy confirmed the presence and location of the
20 bullet holes in the victim's body and other injuries; the removal by
21 Dr. Schmunk, the pathologist performing the autopsy, of a bullet,
22 which the deputy identified, from the area of the victim's chest
23 cavity; and the deputy's direction to Officer Brown to take the
24 autopsy photographs (People's exhs. nos. 9 through 26). He
25 identified the matters (injuries and clothing, personal effects, and

26
27 ³ Lawrence testified that the very purpose of documenting the investigation into
28 the cause and circumstances of the victim's death was to permit another
pathologist to interpret the phenomena recorded and testify regarding them if
something happened to the examining pathologist. (Id. at 384-85.)

1 debris removed from the body) depicted in the photographs and
2 removed from the body. (4 RT 748-49, 751-54, 756-59.) Another law
3 enforcement officer who arrived at the scene before the victim died
4 testified to observing the victim lying face down on the sidewalk
5 and gasping for air; seeing bullet wounds and blood on his right
6 side, back, and chest; and learning of the victim's death shortly
7 thereafter. (2 RT 195-98, 202.)

8 Physical evidence consistent with the autopsy report was also
9 introduced with testimony as to the location of the evidence at the
10 scene, including the bullet fragment found in the victim's shirt,
11 the shirt with seven bullet holes that were close to each other in a
12 pattern like a half-circle, six .380-caliber cartridge casings found
13 in a half-circle in the intersection on the south side of Kern
14 Street, a blood stain on the sidewalk and gutter behind the casings,
15 four bullet impact marks next to the corner to the left of the blood
16 stain, and associated bullet slugs. (4 RT 880, 883, 886, 889, 895,
17 897-88; 5 RT 1020-25, 1030-35, 1040-47, 1050-57; 7 RT 1597.) The
18 locations of the casings, bullet slugs, and bullet impact marks
19 indicated that the shooter was standing on the corner of Kern and P
20 Streets, facing north or northwest when he fired the gun, and that
21 he shot down at the ground. (5 RT 1022, 1077-78.)

22 Further, Lawrence also testified based on his observation and
23 interpretation of autopsy photographs that represented phenomena
24 that were consistent with matters reported in the report.⁴ Lawrence
25 testified that the photographs showed abrasions on the victim's arm,
26 blood or lacerations on his elbow, abrasions on his finger and

27
28 ⁴ Lawrence had reviewed the photographs in order to prepare diagrams of the wounds.
(2 RT at 389.)

1 forearm, scratches on the backs of his finger and left hand, bruises
2 and abrasions on his head and face, tempered glass embedded in his
3 forehead, gunshot wounds to his abdomen and arm, a pattern of five
4 similar-looking gunshot entrance wounds with a similar direction in
5 the upper body grouped in an area twelve or fifteen inches in size,
6 four exit wounds in the left side of his body, one bullet recovered
7 in the soft tissues of the left flank, and lividity in his body. (2
8 RT 389-403.) Based on the autopsy photos, Dr. Lawrence opined that
9 the injuries were consistent with a fight or fall, the injuries to
10 the victim's head and face were consistent with falling on a hard
11 object, and the gunshots to his abdomen were likely fired in rapid
12 succession with slight if any movement between the assailant and the
13 victim during the shooting; further, the shooter fired from
14 somewhere to the rear and right of the victim. (2 RT 395, 398, 403,
15 409, 412, 419-20, 422-23.)

16 Here, independent of the autopsy report, there was evidence of
17 the nature and severity of the victim's wounds from physical
18 evidence at the scene and from the testimony of other persons who
19 were actually present at the crime scene or at the autopsy.
20 Petitioner has not identified any material factual dispute with
21 respect to the injuries, the opinion that the victim died with five
22 gunshots, or the related physical evidence.

23 Petitioner has neither suggested what additional information
24 could have been elicited, nor shown that admission of the report had
25 any substantial or injurious influence or effect in determining the
26 jury's verdict. Accordingly, it will be recommended that
27 Petitioner's claim that his rights under the Confrontation Clause
28 were violated be denied.

VIII. Flight Instruction

Petitioner argues he suffered a violation of his right to a jury trial and to due process guaranteed by the Sixth and Fourteenth Amendments when the jury was instructed that Petitioner's flight to Mexico could be considered to demonstrate consciousness of guilt. Petitioner argues that the instruction should not have been given because there was no evidence that Petitioner knew he was suspected or accused of the murder when he left for Mexico. Petitioner argues that the instruction allowed the jury to consider flight that was wholly unrelated to the charges. In addition to the federal Constitution, Petitioner relies on state constitutional, statutory, and case law in support of this contention. (FAP, doc. 22, 56-59.)

As set forth above, Petitioner's claim of instructional error is not cognizable in this proceeding. Further, Respondent contends this claim was not exhausted in the state courts because in presenting the issue to the CSC, Petitioner did not refer to a specific constitutional guarantee, but rather only argued that it "would create an impermissible inference in violation of the Federal Constitution." (LD 10, 15; see id. at ii, 14-16.)

In the interest of economy, the Court will exercise its discretion to forego an examination of the exhaustion issue and to proceed directly to consider Respondent's briefing to the effect that even if Petitioner had exhausted state court remedies as to a cognizable federal claim, the state court's denial of the claim on the merits was not objectively unreasonable.

A. The State Court Decision

The CCA upheld the trial court's decision to instruct the jury regarding flight as follows:

B. Inclusion of a Flight Instruction in the Jury Charge was Proper.

1. Facts.

The prosecution presented evidence that on July 13, 2004, appellant spoke with his probation officer and told him he wanted to go with his mother to visit an aunt in Arizona. Based on this representation, the probation officer gave appellant permission to leave California from July 16, 2004 to August 6, 2004. Appellant agreed to contact his probation officer on August 6, 2004. Appellant did not go to Arizona with his mother and never contacted his probation officer again.

On July 14, 2004, the police attempted to locate appellant at his mother's residence in Modesto and his father's residence in Salinas. On July 15, 2004, a bench warrant was issued for appellant's arrest. On July 20, 2004, appellant's mother told the police that she did not know where appellant was.

In September 2006, police officers confirmed that appellant was living in Uruapan, Mexico. Federal agents arrested appellant, who was using a different name. Appellant was returned to the United States in custody.

Over defense objection, the court instructed on flight by giving a modified version of CALCRIM No. 372. The court omitted the portion of CALCRIM No. 372 concerning flight after the defendant has been accused of committing the charged crimes. As given, the instruction provided:

"If the defendant fled or tried to flee immediately after the crime was committed, that conduct may show that he was aware of his guilt. If you conclude that the defendant fled or tried to flee, it is up to you to decide the meaning and importance of that conduct. However, evidence that the defendant fled or tried to flee cannot prove guilt by itself."

2. The flight instruction was supported by the evidence.

Appellant argues the flight instruction should not have been given because he did not leave California immediately after the murder. Also, he contends there is no proof of

1 guilty knowledge. Appellant asserts that when he left
 2 California, he was "wholly unaware that he [was] under
 3 suspicion of the charged crime[s]." Neither of these
 contentions is persuasive.

4 " '[A] flight instruction is proper whenever evidence of
 5 the circumstances of defendant's departure from the crime
 6 scene or his usual environs,... logically permits an
 7 inference that his movement was motivated by guilty
 8 knowledge.' [Citation.]" (*People v. Lucas* (1995) 12
 9 Cal.4th 415, 470, 48 Cal.Rptr.2d 525, 907 P.2d 373.)
 10 Flight requires a purpose to avoid being observed or
 11 arrested. A flight instruction does not assume that flight
 was established. It leaves this factual determination and
 its significance to the jury. The facts of each case
 determine whether it is reasonable to infer that flight
 shows consciousness of guilt. (*People v. Mason* (1991) 52
 Cal.3d 909, 941, 277 Cal.Rptr. 166, 802 P.2d 950 (*Mason*).)

12 Our Supreme Court has rejected any "inflexible rules about
 13 the required proximity between crime and flight." (*Mason*,
 14 *supra*, 52 Cal.3d at p. 941, 277 Cal.Rptr. 166, 802 P.2d
 15 950 [four-week delay]; see also, e.g., *People v. Santo*
 16 (1954) 43 Cal.2d 319, 329-330, 273 P.2d 249 [one-month
 17 delay].) There is not a "defined temporal period within
 18 which the flight must be commenced." (*People v. Carter*
 19 (2005) 36 Cal.4th 1114, 1182, 32 Cal.Rptr.3d 759, 117 P.3d
 20 476 [delay of a few days].) Given the circumstances of
 21 this case, appellant's sudden departure from the country
 22 occurred in sufficient proximity to the murder to allow a
 flight instruction. Appellant killed Neuman on the night
 of July 10, 2004. On or about July 13, 2004, appellant
 fled the area. "Common sense ... suggests that a guilty
 person does not lose the desire to avoid apprehension for
 offenses as grave as" murder after only a few days.
 (*Mason, supra*, 52 Cal.3d at p. 941, 277 Cal.Rptr. 166, 802
 P.2d 950.)

23 Also, the jury could reasonably infer that appellant's
 24 flight to Mexico was motivated by guilty knowledge and
 25 appellant's purpose was to avoid being questioned,
 26 detained or arrested for shooting Neuman. Soon after
 27 appellant killed Neuman, he lied to his probation officer
 28 to obtain permission to leave the state for two weeks. It
 reasonably can be inferred that appellant made up the
 story about visiting an aunt so the probation officer
 would not know that he had fled the country and alert

1 authorities when he failed to report to the probation
2 officer for their regularly scheduled meetings.

3 Accordingly, we conclude inclusion of the flight
4 instruction in the jury charge was proper and did not
5 infringe appellant's constitutional rights to a fair trial
6 and due process of law.

7 (LD 8, 29-31.)

8 B. Analysis

9 Here, the modified version of CALCRIM 372 that was given
10 suggested to the jury that it was possible to conclude that
11 Petitioner fled and that his flight evinced consciousness of guilt,
12 but it did not require the conclusion. The instruction did not
13 require the jury to consider the evidence or direct the finding of
14 any particular fact, and it permitted the jury to reject the
15 evidence or to accept it as true and determine the weight to which
16 it was entitled. Thus, the instruction was a "permissive inference
17 instruction," a form of instruction that is generally acceptable
18 unless the conclusion the instruction suggests "is not one that
19 reason and common sense justify in light of proven facts before the
20 jury." Francis v. Franklin, 471 U.S. 307, 314-15 (1985).

21 Here, Petitioner's deceptive representations to his parole
22 officer concerning his travel plans and destination as well as the
23 timing and secrecy of his departure to Mexico warranted the
24 conclusion that Petitioner fled as a result of his having shot the
25 victim and was motivated by a consciousness of guilt. The fact that
26 Petitioner had not been formally accused of the crime did not
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1 attenuate the otherwise rational inferences in view of additional
2 circumstances that strongly supported inferences of flight and
3 consciousness of guilt. The evidence supported providing the
4 instruction, and the instruction respected the jury's role as fact
5 finder.
6

7 More specifically, the Court is aware of no clearly established
8 federal law that prohibits the giving of the flight instruction in
9 the circumstances of Petitioner's case. The Ninth Circuit has
10 repeatedly confirmed the constitutionality of similar flight
11 instructions. See, e.g., Karis v. Calderon, 283 F.3d 1117, 1131-32
12 (9th Cir. 2002) (instructing the jury on flight, even though the
13 trial court refused to advise the jury of possible reasons for
14 flight other than consciousness of guilt, was not fundamentally
15 unfair and did not violate due process); Houston v. Roe, 177 F.3d
16 901, 910 (9th Cir. 1999) (instructing the jury on flight was not
17 unconstitutional because there is no clearly established federal law
18 as determined by the Supreme Court that prohibits giving a flight
19 instruction when the defendant admits committing the act charged);
20 McMillan v. Gomez, 19 F.3d 465, 469 (9th Cir. 1994) (instructing on
21 flight was proper even though there was an issue as to identity of
22 the person fleeing where the prosecution made a strong showing that
23 it was the defendant who fled); cf. Flores v. Stainer, no. 1:11-cv-
24 00190-BAM-HC, 2012 WL 3143874, *31-32 (E.D.Cal. Aug. 1, 2012)
25 (unpublished) (noting there is no clearly established federal law
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27
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1 that the flight instruction lessens the burden of proof in violation
2 of the Sixth and Fourteenth Amendments); United States v. Harrison,
3 585 F.3d 1155, 1159-60 (9th Cir. 2009) cert. den., Harrison v.
4 United States, 559 U.S. 958 (2010) (instructing on flight was not
5 erroneous under the circumstances where the instruction "permitted
6 the jury to draw a reasonable inference; it did not require an
7 unreasonable one") and "did not require an unreasonable
8 [inference]"). Indeed, the Ninth Circuit has recognized that where,
9 as here (LD 3, 11 RT 2533-36), the instruction is accompanied by the
10 standard instructions concerning the burden of proof, circumstantial
11 evidence, and the drawing of inferences, the instruction may benefit
12 defendants because it reminds jurors that evidence of flight is not,
13 by itself, sufficient to support a finding of guilt, and requires an
14 inference of consciousness of guilt only if flight is proven.
15 Karis, 283 F.3d at 1132; Harrison, 585 F.3d at 1160; McMillan, 19
16 F.3d at 469.

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19
20 Considering the flight instruction in the context of the
21 evidence introduced at trial and the instructions as a whole, the
22 instruction did not render Petitioner's trial fundamentally unfair.
23 Cf. Palma v. Harrington, No. CV 11-5728-JHN (E), 2012 WL 1570805,
24 *7-*10 (C.D.Cal. May 2, 2012) (unpublished). Accordingly, it will
25 be recommended that Petitioner's claim concerning the flight
26 instruction be denied.

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IX. Ineffective Assistance of Counsel regarding Seating
of Law Enforcement Investigators and Witnesses at Trial

Petitioner argues he suffered a denial of his right to the effective assistance of counsel when his counsel failed to object to the seating of two witnesses (the prosecutor's lead investigator and gang expert) at the prosecutor's table during trial. Petitioner contends that the presence of the witnesses at the prosecutor's side throughout the trial gave an unfair advantage to the prosecution and rendered his trial fundamentally unfair.

This claim was not addressed in the CCA's decision on direct appeal. (LD 8.) Petitioner raised the issue in his petition for writ of habeas corpus filed in the CSC. (LD 12, ground 1.) The CSC summarily denied the petition without any statement of reasoning or authority. (LD 13.)

A state court adjudicates a claim on the merits when it decides the petitioner's right to relief on the basis of the substance of the constitutional claim raised, rather than denying the claim because of a procedural or other rule precluding state court review of the merits. Lambert v. Blodgett, 393 F.3d 943, 969 (9th Cir. 2004). A state court need not issue an opinion on a claim for a claim to be adjudicated on the merits within the meaning of § 2254(d); rather, a state court's denial of an original petition for writ of habeas corpus without a statement of reasons is presumed to have been adjudicated on the merits in the absence of any indication or state law procedural principles to the contrary. Harrington v. Richter, 131 S.Ct. at 784-85. The presumption may be overcome when there is

1 reason to think some other explanation for the state court's decision
2 is more likely. Id. at 785. Where a petitioner has failed to show
3 that the California Supreme Court's decision did not involve a
4 determination of the merits of his claim, a summary denial of relief
5 will thus be considered to be an adjudication on the merits. Id.

6 Here, the CSC's silent denial was an adjudication on the merits
7 within the meaning of § 2254(d)(1) which warrants deferential review
8 under § 2254(d)(1).

9 Petitioner does not dispute the pertinent facts as summarized
10 by Respondent in the answer, which are as follows:

11 On January 8, 2009, the court heard pretrial motions in
12 limine. (1 CT 270.)

13 At the beginning of the hearing, the court asked the
14 prosecutor, Marlisa Ferreira, about the identity of the
15 man sitting next to her. Ferreira introduced the man as
16 Frolian Mariscal, an investigator with the district
17 attorney's gang task force. Ferreira explained that
18 Mariscal would be the prosecution's gang expert for the
trial, and her lead investigator was Marc Nuno, a
sheriff's detective. Ferreira also explained that, at
different stages of the trial, the investigators would
change. (1 RT 101.)

19 During trial, an investigator, usually Nuno or Mariscal,
20 sat at the prosecution's table, and the defense
investigator sat at the defense's table. (1 RT 153; 2 RT
21 193; 3 RT 485, 612; 4 RT 734, 856; 5 RT 999, 1131; 6 RT
1231, 1356; 7 RT 1469, 1596; 8 RT 1726, 1845; 9 RT 1967,
22 2082; 10 RT 2236, 2361; 11 RT 2511, 2576.)

23 (Ans., doc. 28, 44:4-13.) Further, it appears to be undisputed that
24 Officer Nuno testified to his processing of the crime scene and
25 additional investigation, including taking statements from co-
26 participants that identified Petitioner as the shooter and
27 attempting to locate Petitioner after he left the jurisdiction. It
28

1 is also undisputed that Officer Mariscal provided extensive expert
2 testimony as a gang expert, including identifying Petitioner as an
3 active participant in a named criminal street gang and concluded
4 that the murder was committed for the benefit of a criminal street
5 gang.
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7 Petitioner argues that the presence of the two officers
8 deprived him of an opportunity guaranteed by the Sixth Amendment to
9 determine his guilt solely based on the evidence introduced at
10 trial, as distinct from official suspicion, accusation, continued
11 custody, or other extraneous circumstances. See, Holbrook v. Flynn,
12 475 U.S. 560, 567-72 (1986) (presence of four uniformed and armed
13 officers in the courtroom during trial was not an inherently
14 prejudicial practice, such as shackling, that should be permitted
15 only when justified by an essential state interest specific to each
16 trial because of the possibility of a wide range of inferences,
17 unrelated to the defendant, from the presence of the guards such
18 that there was no unacceptable risk of impermissible factors coming
19 into play). Petitioner relies on Turner v. State of Louisiana, 372
20 U.S. 466 (1965), in which the Court held that the defendant had been
21 denied a fair trial before an impartial tribunal where two deputy
22 sheriffs who gave key testimony leading to the defendant's
23 conviction and whose credibility was in issue, had charge of jury
24 during the trial and had fraternized with them outside courtroom
25 during performance of their duties in what was described as "a
26 continuous and intimate association throughout a three-day trial—an
27 association which gave these witnesses an opportunity... to renew
28 old friendships and make new acquaintances among the members of the

1 jury.” Id. at 473. The Court focused on the additional fact that
2 the relationship of the witnesses to the jurors was that of official
3 guardians, a position that naturally fostered the confidence of the
4 jurors in those guardians. Id. at 474.

5 Under California law, where a party to an action is an entity
6 other than a natural person, the trial court has the discretion to
7 permit an officer or employee of the party to attend trial; in fact,
8 failure to permit a prosecutor’s investigator to remain in court has
9 been held to be an abuse of discretion. See, Cal. Evid. Code §
10 777(a)-(c); People v. Gonzalez, 38 Cal.4th 932, 950-51 (2006).
11 Further, Petitioner does not dispute that a defense investigator sat
12 at the defense table during the trial.

13 Although Petitioner argues that the presence of the testifying
14 law enforcement officers was like wearing prison garb or similar to
15 the presence of supporters wearing buttons in favor of one side of
16 the case, he does not point to any improper conduct by the
17 investigators. The fact that the investigators also testified in
18 various capacities does not necessarily relate to their presence in
19 the courtroom, which is permitted for a different purpose, namely,
20 for the assistance of the prosecutor. The inferences to be drawn
21 from the presence of the officers were not so narrow and focused
22 that the presence of the officers raised any significant likelihood
23 of the intrusion of extraneous matters that would render their
24 presence inherently prejudicial.
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27 The failure to make a motion that is legally meritless and thus
28 futile does not constitute conduct falling below reasonable

professional norms and does not result in prejudice. Matylinsky v. Budge, 577 F.3d 1083, 1094 (9th Cir. 2009). Here, the presence of the investigators was permitted under state law that was promulgated pursuant to the state's interest in defining criminal procedures. The officers' presence did not result in any inherent or demonstrable prejudice to Petitioner. Petitioner's counsel was not required under clearly established federal law to object to the presence of the investigators, and the objection would not have been successful under state law. Thus, the state court's denial of Petitioner's ineffective assistance claim based on the failure to object was not contrary to, or an unreasonable application of, clearly established federal law. Accordingly, it will be recommended that Petitioner's ineffective assistance claim relating to the presence of the witnesses at counsel's table be denied.

Petitioner's related claim that the presence of the investigating officers constituted vouching by the prosecutor also fails because the record does not reflect that the presence of the officers constituted a representation by the prosecutor of the credibility of the officers.

X. Ineffective Assistance of Counsel in Failing to Object to Autopsy Photographs

Petitioner argues that his counsel was ineffective for failing to object to the admission of photographs of the victim taken during the autopsy. Petitioner does not describe the precise matter

1 depicted in the photographs or otherwise catalogue any
2 characteristics of the photographs that he considers objectionable.
3 He instead lodges a blanket challenge to counsel's failure to object
4 to any of the photographs on the ground that the photographs were
5 necessarily or inherently prejudicial as photographs of the
6 deceased. Petitioner contends that the photographs injected an
7 impermissible outside influence into the jury's determination of the
8 evidence.
9

10 Although this issue was not addressed in the CCA's opinion on
11 direct appeal (LD 8), Petitioner raised it before the CSC in his
12 habeas petition (LD 12, printed p. 4), and the CSC summarily denied
13 the petition (LD 13). The silent decision of the CSC constitutes an
14 adjudication on the merits.
15

16 A. Background

17 Petitioner does not dispute or object to Respondent's summary
18 of the pertinent proceedings set forth in the answer as follows:
19

20 In a motion in limine before the presentation of evidence,
21 the prosecution said it intended to introduce postmortem
22 photos of the victim, Neuman. (1 CT 219-220, 244-244-245.)
23 When the parties discussed this issue, the court said it
24 would admit the photos if there was nothing "unduly
25 offensive" about them. (1 RT 75.) The prosecutor said she
26 had removed any photos that seemed prejudicial, and that
27 the photos that she intended to introduce were taken after
28 Neuman's body was cleaned. (1 RT 75-76.) Defense counsel
said he would examine the photos before deciding whether
to object, and he would object to any photos that were
"overboard." (1 RT 76.) The court said it was prepared to
admit the photos even if they were "bloody" but was
inclined to sustain objections if there were too many
photos showing the same view. Id. Defense counsel said he

1 wanted to avoid any photos that had no relevance other
2 than "sensational value." The prosecutor said she was not
offering any photos like that. (1 RT 77.)

3 Later, during the prosecution's case-in-chief, the
4 prosecutor introduced the testimony of the pathologist,
5 Dr. Lawrence. (2 RT 379.) In his testimony, Dr. Lawrence
6 reviewed and discussed eighteen autopsy photos, which were
7 labeled as prosecution exhibits 9 through 26. The photos
8 depicted Neuman's arm, hands, fingers, forehead, abdomen,
head, and face. Some of them showed his gunshot wounds. (2
RT 389-99.) After Dr. Lawrence finished testifying, the
court admitted the photos without objection. (2 RT 426.)

9 (Ans., doc. 28, 46.)

10 B. Analysis

11 As previously set forth in connection with the confrontation
12 claim, the testimony of Dr. Lawrence revealed that the photographs
13 showed abrasions on the victim's arm, blood or lacerations on his
14 elbow, abrasions on his finger and forearm, scratches on the backs
15 of his finger and left hand, bruises and abrasions on his head and
16 face, tempered glass embedded in his forehead, gunshot wounds to his
17 abdomen and arm, a pattern of five similar-looking gunshot entrance
18 wounds with a similar direction in the upper body grouped in an area
19 twelve or fifteen inches in size, four exit wounds in the left side
20 of his body, one bullet recovered in the soft tissues of the left
21 flank, and lividity in his body. (2 RT 389-403.) The photographs
22 were thus relevant to factual issues concerning the course of the
23 homicide and the identity of the perpetrator.

24 The photographs do not appear to have been sensational or
25 unnecessarily duplicative. Although by their nature they were
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1 unpleasant, there is no indication they were unduly inflammatory.
2 Further, the nature of the wounds and condition of the body of the
3 deceased were not matters extraneous to the jury's consideration of
4 the evidence, but rather were part and parcel of the physical and
5 forensic evidence that the jury had to consider and evaluate.
6

7 The record supports a conclusion that defense counsel reviewed
8 the photographs and determined not to object to their admission. On
9 the record before the Court, counsel could rationally have
10 determined that an objection based on Cal. Evid. Code § 352 based on
11 undue prejudice would have been unsuccessful in light of state law
12 generally supporting the introduction of autopsy photographs. See
13 People v. Howard, 51 Cal.4th 15, 33 (2010), cert. den. Howard v.
14 California, 132 S.Ct. 213 (2011) (upholding against a due process
15 challenge the discretionary admission of autopsy photographs of
16 gunshot wounds to the head that were not particularly gruesome or
17 inflammatory and noting that autopsy photographs "are routinely
18 admitted to establish the nature and placement of the victim's
19 wounds and to clarify the testimony of prosecution witnesses
20 regarding the crime scene and the autopsy, even if other evidence
21 may serve the same purposes"); People v. Loker, 44 Cal.4th 691, 704-
22 05 (2008) (upholding the admission of autopsy photographs in a first
23 degree murder case where the photographs were relevant to various
24 aspects of the prosecution's case, including theories of
25 premeditation and felony murder as well as the mode of the homicide,
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1 the nature and placement of the fatal wounds, and illustration of
2 the testimony of the coroner and percipient witnesses; the court
3 noted that the prosecution was not obligated to "accept antiseptic
4 stipulations in lieu of photographic evidence"). Here, because of
5 the strong relevance of the evidence and the absence of specific
6 indicia of excessively inflammatory content, the state court could
7 reasonably have concluded that admitting the autopsy photographs was
8 neither arbitrary nor prejudicial.

10 Further, there is no clearly established federal law
11 prohibiting the admission of autopsy photographs or other
12 prejudicial evidence. A state court's procedural or evidentiary
13 ruling may be subject to federal habeas review if it violates
14 federal law, either by infringing upon a specific federal
15 constitutional or statutory provision or by admitting evidence so
16 arbitrary or prejudicial that its admission rendered the trial
17 fundamentally unfair and violated fundamental conceptions of
18 justice. Perry v. New Hampshire, - U.S.-, 132 S.Ct. 716, 723
19 (2012); Windham v. Merkle, 163 F.3d 1092, 1103 (9th Cir. 1998);
20 Jammal v. Van de Kamp, 926 F.2d 918, 919-20 (9th Cir. 1991).

21 The Supreme Court has not yet clearly ruled that the admission
22 of irrelevant or overtly prejudicial evidence constitutes a due
23 process violation sufficient to warrant issuance of a writ of habeas
24 corpus. Estelle v. McGuire, 502 U.S. at 75 n.5 (declining to state
25 an opinion on whether a state law would violate the Due Process
26 Clause if it permitted use of prior crimes evidence to show
27 propensity to commit a charged crime). Absent such clearly
28 established federal law, it cannot be concluded that a state court's

1 evidentiary ruling was contrary to, or an unreasonable application
2 of, Supreme Court precedent under 28 U.S.C. § 2254(d) (1). Holley
3 v. Yarborough, 568 F.3d 1091, 1101 (9th Cir. 2009) (citing Carey v.
4 Musladin, 549 U.S. 70, 77 (2006)); Larson v. Palmateer, 515 F.3d
5 1057, 1066 (9th Cir. 2008), cert. den., Larson v. Belleque, 555 U.S.
6 871 (2008) (denying a due process claim concerning the admission of
7 prior crimes evidence); Alberni v. McDaniel, 458 F.3d 860, 866-67
8 (9th Cir. 2006), cert. den., - U.S. -, 127 S.Ct. 1834 (2007)
9 (denying a due process claim concerning the admission of past
10 violent actions as propensity evidence in a second degree murder
11 case for want of a "clearly established" rule from the Supreme
12 Court); Mejia v. Garcia, 534 F.3d 1036, 1046 (9th Cir. 2008), cert.
13 den., 555 U.S. 1117 (2009) (finding no unreasonable application of
14 clearly established Supreme Court precedent regarding either
15 propensity evidence or general due process principles where in a
16 case of rape, kidnapping, and assault against the Petitioner's other
17 family members, the state court admitted evidence that the defendant
18 had committed uncharged sexual assaults of his daughter).

19 Here, Petitioner's counsel could have exercised a rational,
20 professional, tactical judgment not to lodge a futile objection to
21 the photographs. Further, in view of the strong evidence of
22 Petitioner's guilt, it does not appear that Petitioner suffered
23 prejudice from the admission of the photographs. It is, therefore,
24 concluded that the state court decision denying Petitioner's
25 ineffective assistance claim was not contrary to, or an unreasonable
26 application of, clearly established federal law.

27 Accordingly, it will be recommended that Petitioner's due
28 process claim relating to the admission of autopsy photographs be

1 denied.

2 XI. Ineffective Assistance of Counsel for Failing to Object
3 to the Prosecutor's Argument and Misconduct

4 Petitioner argues that his counsel was ineffective for failing
5 to object to what Petitioner characterizes as the prosecutor's
6 vouching for witnesses and making improper remarks regarding
7 Petitioner's guilt.

8 This claim was not addressed in the CCA's decision on direct
9 appeal (LD 8), but Petitioner raised it before the CSC in his habeas
10 petition (LD 12, supp., 25-32), and the CSC summarily denied the
11 petition (LD 13). The silent decision of the CSC constitutes an
12 adjudication on the merits.
13

14 Because Petitioner's ineffective assistance claims depend in
15 part on the separate question of whether there was any objectionable
16 prosecutorial misconduct that required counsel to object, the Court
17 will review each of the specific allegations of misconduct before
18 addressing any related ineffective assistance of counsel.
19

20 A. Prosecutorial Misconduct
21

22 It is clearly established federal law within the meaning of
23 § 2254(d)(1) that a prosecutor's improper remarks violate the
24 Constitution only if they so infect the trial with unfairness as to
25 make the resulting conviction a denial of due process. Parker v.
26 Matthews, - U.S. -, 132 S.Ct. 2148, 2153 (2012) (per curiam); see,
27 Darden v. Wainwright, 477 U.S. 168, 181 (1986); Comer v. Schriro,
28

1 480 F.3d 960, 988 (9th Cir. 2007). Prosecutorial misconduct
2 deprives the defendant of a fair trial as guaranteed by the Due
3 Process Clause if it prejudicially affects the substantial rights
4 of a defendant. United States v. Yarbrough, 852 F.2d 1522, 1539
5 (9th Cir. 1988) (citing Smith v. Phillips, 455 U.S. 209, 219
6 (1982)). However, the standard of review of claims concerning
7 prosecutorial misconduct in a § 2254 proceeding is the narrow
8 standard of due process, and not the broad exercise of supervisory
9 power; improper argument does not, per se, violate a defendant's
10 constitutional rights. Mancuso v. Olivarez, 292 F.3d 939, 957 (9th
11 Cir. 2002) (citing Thompson v. Borg, 74 F.3d 1571, 1576 (9th Cir.
12 1996)). This Court must, therefore, determine whether the alleged
13 misconduct rendered a trial fundamentally unfair. Darden v.
14 Wainwright, 477 U.S. at 183. The Court must also determine whether
15 the prosecutor's actions constituted misconduct, and whether the
16 conduct violated Petitioner's right to due process of law. Drayden
17 v. White, 232 F.3d 704, 713 (9th Cir. 2000).

21 Further, to grant habeas relief, this Court must conclude that
22 the state court's rejection of the prosecutorial misconduct claim
23 "was so lacking in justification that there was an error well
24 understood and comprehended in existing law beyond any possibility
25 for fairminded disagreement." Parker v. Matthews, 132 S.Ct. at 2155
26 (quoting Harrington v. Richter, 131 S.Ct. at 767-87). In addition,
27 the standard of Darden v. Wainwright is a very general one that
28

1 leaves courts with more leeway in reaching outcomes in case-by-case
2 determinations. Parker v. Matthews, 132 S.Ct. at 2155 (quoting
3 Yarborough v. Alvarado, 541 U.S. 652, 664 (2004)). In determining
4 whether remarks in argument rendered a trial fundamentally unfair, a
5 court must judge the remarks in the context of the entire proceeding
6 to determine whether the argument influenced the jury's decision.
7 Boyde v. California, 494 U.S. 370, 385 (1990); Darden v. Wainwright,
8 477 U.S. at 179-82. In Darden, the Court considered whether the
9 prosecutor manipulated or misstated evidence, whether specific
10 rights of the accused were implicated, the context of the remarks in
11 light of both parties' arguments, the instructions given by the
12 trial court, and the weight of the evidence. Darden, 477 U.S. at
13 179-82.

14
15
16 Prosecutors may argue reasonable inferences based on the
17 evidence, including that witnesses for one of the two sides are
18 lying. United States v. Necoechea, 986 F.2d at 1276. In contrast,
19 vouching consists of placing the prestige of the government behind a
20 witness through personal assurances of the witness's veracity, or
21 suggesting that information not presented to the jury supports the
22 witness's testimony. United States v. Necoechea, 986 F.2d 1273,
23 1276 (9th Cir. 1993). Vouching for the credibility of a witness or
24 expressing a personal opinion concerning the accused's guilt can
25 pose two dangers. First, it can convey the impression that evidence
26 known by the prosecutor but not presented to the jury supports the
27
28

1 charges, and thus it can jeopardize the defendant's right to be
2 tried solely on the basis of the evidence presented to the jury.
3 United States v. Young, 470 U.S. 1, 18 (1985). Second, the
4 prosecutor's opinion reflects the imprimatur of the government and
5 may induce the jury to trust the government's judgment rather than
6 its own assessment of the evidence. Id. at 18-19.

8 When a prosecutor engages in argument that violates the ethical
9 principle that a lawyer not express a personal belief or opinion in
10 the truth or falsity of any testimony or evidence, the violation
11 must be viewed in context to determine whether the prosecutor's
12 conduct affected the fairness of the trial. Id. at 10-11. To
13 determine whether prejudicial error occurred, a court must consider
14 the probable effect of the prosecutor's argument on the jury's
15 ability to judge the evidence fairly. Id. at 12. Vouching for a
16 witness's credibility is more likely to be damaging where the
17 credibility of the witness is crucial. United States v. Edwards,
18 154 F.3d 915, 921 (9th Cir. 1998). Further, the Court is mindful
19 that the standard of Darden v. Wainwright is a very general one.

22 B. Remark regarding Not Seeing the Victim

23 At the commencement of her argument, the prosecutor stated:

24 And a long time ago, two months ago, I introduced you
25 to a man named Ruben Sanchez Neuman. We haven't seen him
26 since, have we? Maybe in some pictures, maybe he's been
27 talked about a little bit. We haven't seen him since.
28 And the reason we haven't seen him since is because he fell
victim to the man sitting at the edge of the table, Ceasar
Perez. He was murdered. And that is why we're here today.

1 (LD 3, 11 RT 2577.)
2

3 Petitioner does not explain why this remark is allegedly
4 improper. Argument that Petitioner was the perpetrator of the
5 murder was fair argument based on the evidence in the record.

6 Petitioner may be arguing that the remark was an appeal to
7 sympathy. It is improper to appeal to the jurors' emotions and
8 fears or to inform the jury that it has any duty other than the
9 weighing of the evidence. United States v. Nobari, 574 F.3d 1065,
10 1077 (9th Cir. 2009). However, the argument here was not overly
11 dramatic or emotionally charged; it was a matter-of-fact comment on
12 the state of the evidence pertaining to Petitioner's behavior.
13

14 Accordingly, the state court could reasonably have concluded
15 that the argument was not improper or did not result in any
16 fundamental unfairness.
17

18 C. Argument concerning Lack of Provocation and
19 Characterization of Petitioner as a Thug

20 Petitioner quotes from several pages of the prosecutor's
21 argument but does not specify either the particular portion or
22 portions that are challenged as improper or the legal basis for the
23 claim of misconduct.

24 In the course of arguing that Petitioner was guilty of murder
25 with malice aforethought and not manslaughter, the prosecutor
26 contended that Petitioner could not have killed in the sudden heat
27 of passion because there was no legally adequate provocation or rash
28

1 action; to the contrary, Petitioner intended his act, as
2 demonstrated by his choices to draw his firearm and shoot
3 repeatedly. (Id. at 2582-86.) The prosecutor stated she wanted to
4 review the evidence of intent to kill. (Id. at 2586.) She stated,
5 "This was an unprovoked act." She then recounted the evidence of a
6 course of intentional and unprovoked conduct, including Petitioner's
7 starting an argument earlier in the evening, telling Meza to stop
8 the truck, starting the fight with the victim and throwing the first
9 punch, encouraging others to participate, firing the whole clip into
10 the victim, telling Meza and Francisco in the truck after shooting
11 the victim "seven times for nothing" that "There's one less of
12 them," showing no remorse or concern for the victim after the event,
13 and fleeing the country. (Id. at 2587-88.) The prosecutor reviewed
14 the elements of murder; emphasized that to an ordinary, reasonable
15 person, the victim's having worn red pants was not adequate
16 provocation for homicide; invited the jury to conclude that
17 petitioner's conduct and flight evinced intent to kill and
18 consciousness of guilt; and noted that the murder benefited the gang
19 by instilling fear in people. The prosecutor concluded, "Murders
20 intimidate people. They make them fear the type of people that
21 commit them. And by doing that, thugs like Cesar Perez earn
22 respect." (Id. at 2588.)

23 The prosecutor's argument generally constituted fair comment on
24 the evidence. The prosecutor's characterization of Petitioner as a
25

1 "thug" was denigrating and reflected a judgment of Petitioner's
 2 conduct and character. However, the Court notes that the defense
 3 likewise acknowledged the accuracy of the prosecutor's
 4 characterization of the witnesses against Petitioner and referred to
 5 them as lying gangbangers and street thugs. (Id. at 2633.)
 6 Further, the prosecutor's statement was made in the course of
 7 argument concerning whether the crime was gang-motivated and
 8 benefited a criminal street gang; Petitioner's concerted, violent
 9 behavior and associations with gang members related to core issues
 10 in the case. The assessment followed the prosecutor's review of the
 11 considerable evidence of gang intimidation and violence. The
 12 prosecutor then stated, "Out there, you earn respect by intimidation
 13 and fear and violence." (Id. at 2589.) Although somewhat harsh,
 14 the characterization was warranted by the evidence recounted by the
 15 prosecutor and does not constitute an improper attack on Petitioner.

16
 17 In any event, in light of the entire record, including
 18 considerable evidence of gang violence, it does not appear that the
 19 remarks would have influenced the jury's verdict or resulted in any
 20 fundamental unfairness.

21
 22 The Court concludes that the state court could have reasonably
 23 concluded that this portion of the argument did not violate
 24 Petitioner's right to due process of law.

25
 26
 27 D. Argument regarding Witness Vicki Bozarth

28 Petitioner next quotes a portion of the prosecutor's argument

1 concerning one of the many witnesses who provided corroborating
2 testimony concerning the arrival of Petitioner and his companions at
3 the intersection, the assault and shooting, and the departure of the
4 perpetrators. In the course of a review of the testimony of a
5 jogger and neighbors who lived at or near the intersection, the
6 prosecutor referred to Vicki Bozarth, who lived in a house on the
7 corner where the incident happened. (Id. at 2597-2603.) The
8 prosecutor summarized Bozarth's testimony that upon hearing a loud
9 crash and gunshots, she looked out and saw a wrecked bike and the
10 departing pickup truck with a male running after it and then jumping
11 into it. The prosecutor argued that Marlana Phipps' testimony
12 corroborated not only Bozarth's testimony regarding the running man
13 and the truck, but also the testimony of Pena, Meza, and Felix that
14 Petitioner ran to the truck after he shot the victim, and Arellano's
15 testimony that only Gomez and Petitioner were standing next to the
16 muzzle flashes and were the last two people at the scene. (Id. at
17 2603.) The prosecutor argued that the co-participants in the
18 assault, as members or loyal associates of a criminal street gang,
19 felt pressure to participate in the gang attack to avoid either
20 being seen as weak or being beaten themselves for not participating,
21 but they immediately ran when the shooting began. She argued that
22 it was logical that the shooter was the last person to get into the
23 vehicle and that all the independent eyewitness testimony
24 corroborated or was consistent with Petitioner's being the shooter
25
26
27
28

1 who ran to the truck as it was departing. She argued that the man
2 Bozarth saw running to the truck after she heard gunshots was
3 Petitioner. She noted that the independent eyewitness testimony of
4 the persons in the vicinity corroborated the co-participants'
5 identification of Petitioner as the shooter. She emphasized that
6 the identification was actually made by the co-participants in the
7 crime. She remarked, "You don't get to pick them ladies and
8 gentlemen. These cases come to you as they are. It is what it is."
9 (Id. at 2603-05.) She reminded the jurors expressly of their duty
10 to listen to the accomplices who had entered into plea agreements
11 and to weigh their evidence against what others told them, to see if
12 it was corroborated and made sense, and then come to a conclusion.
13 (Id. at 2605.) She stated that the four accomplices' testimony had
14 to be corroborated by evidence provided by someone else that
15 connects the defendant to the crime, and pointed out that Ochoa and
16 Vizcarra were not accomplices. (Id. at 2606.)

17
18
19
20 Petitioner has not suggested how this argument was improper.
21 The prosecutor reviewed the key facts of the body of the crime from
22 the point of view of multiple witnesses, and she argued fair
23 inferences from the evidence. The references to corroboration
24 fairly discriminated between the evidence from the accomplices on
25 the one hand, and that from the independent witnesses on the other.
26 The prosecutor did not argue that one accomplice corroborated the
27 others, but rather carefully summarized the independent testimonial
28

1 and physical evidence and reviewed how it was internally consistent
2 and further corroborated the statements and testimony of the
3 accomplices. (Id. at 2605-17.) She did not express inappropriate
4 opinions regarding the evidence, but rather summarized it and argued
5 the significance of the evidence.
6

7 The Court concludes that a state court could reasonably have
8 concluded there was no misconduct or no fundamental unfairness
9 resulting from this portion of the argument.

10 E. Argument regarding Flight as Evincing Consciousness
11 of Guilt

12 Petitioner challenges the prosecutor's argument on Petitioner's
13 flight.
14

15 The prosecutor recounted Petitioner's visit to his probation
16 officer two days before his scheduled reporting time and several
17 days after the shooting. She explained Petitioner's apparently
18 false story of going to Arizona as necessary to avoid issuance of a
19 warrant for his arrest by probation authorities for a failure to
20 report; a warrant would impede passage over the border to Mexico.
21 She noted that flight immediately after the commission of a crime is
22 not sufficient to establish guilt but could be considered, and
23 argued that Petitioner fled to Mexico which evinced his
24 consciousness of guilt of the shooting. (Id. at 2621-23.) She
25 summarized the evidence, argued that Petitioner committed the murder
26 to move up in the gang, and reminded the jury that the killing was
27 first degree murder because Petitioner stood over the victim, who
28

1 had already been beaten down on the ground, and fired seven shots,
2 causing the victim to scream in pain. (Id. at 2624.)

3 The prosecutor did not offer any improper personal opinions or
4 otherwise vouch for the witnesses, but instead commented on the
5 state of the evidence in the record. To the extent that she
6 referred to Petitioner's firing seven shots into the vulnerable
7 victim and causing the victim to scream, the prosecutor's argument
8 was supported by the evidence.

9 The state court could reasonably have determined that the
10 account of Petitioner's conduct was permissible comment on the
11 evidence and not an impermissible appeal to passion or sympathy
12 because the comment did no more than summarize the facts of the
13 brutal offense. The state court could reasonably have concluded
14 there was no fundamentally unfair conduct.

15 F. Argument regarding Witness Daniel Britt

16 Petitioner next objects to the prosecutor's rebuttal argument
17 concerning witness Daniel Britt, who testified that while in
18 custody, Sergio Felix told Britt that Arellano was the killer.

19 In argument, the defense reviewed the testimony of the
20 accomplices and the eyewitnesses and recounted the timeline of the
21 emergence of the accomplices' statements. Defense counsel argued
22 that the accomplices had strong personal interests to lie, and
23 Vizcarra's strong feelings for Pena rendered her an unreliable
24 witness. The defense argued that Arellano was the killer because
25 unlike Petitioner, who was corpulent, Arellano was thin and admitted
26 that he wore a black shirt; the jogger, Ms. Lominario, testified
27 that the shooter got into a Jeep; and Britt testified to Felix's
28

1 extra-judicial statement that it was Arellano who killed Neuman.
2 (LD 3, 11 RT 2625-66.)

3 In response, the prosecutor argued that the defense's story of
4 Petitioner being framed by gang members was untenable because
5 Petitioner alone fled the country, demonstrating consciousness of
6 guilt; Luis Meza, who was not arrested with everyone else, could not
7 have made up the details he knew; and Daniel Britt was not a
8 credible person. She argued that Lominario was not certain that the
9 shooter got back into the Jeep, and that Lominario's testimony was
10 otherwise consistent with that of the other witnesses. The
11 prosecutor stated, "Daniel Britt is the only person who testified
12 before you that the shooter was someone other than Cesar Perez, and
13 Daniel Britt wasn't there." (Id. at 2671, 2667-71.) She contrasted
14 his testimony with that of Pena, Meza, Felix, and Arellano, who were
15 present and were percipient witnesses. (Id. at 2671-72.)
16 The prosecutor argued fair inferences from the record; the question
17 of which witnesses to credit was within the jury's province.

18 Petitioner has not even suggested, let alone shown, how these
19 remarks could have resulted in unfairness in the proceedings. The
20 Court, therefore, concludes that the state court could have
21 reasonably determined no misconduct occurred or no fundamental
22 unfairness resulted from the argument.

23 G. The Prosecutor's Summation in Rebuttal

24 Again, without explanation of the precise basis on which
25 Petitioner rests his claim of misconduct, Petitioner quotes a long
26 portion of the very last part of the prosecutor's rebuttal argument.

27 The prosecutor continued with her rebuttal, emphasizing that
28 the testimony of Vicki Bozarth and Aolani Smith, who both came out

1 after the shots were fired and saw only one vehicle (the truck), was
2 consistent with Pena's testimony that the Jeep left the scene
3 earlier than the truck. She noted the accomplices' testimony that
4 Petitioner was the shooter was corroborated by Marlana Phipps, who
5 was certain that the man who started the fight came from the pickup
6 truck, and by physical evidence, such as the beer cans near where
7 the Jeep was; further, Vizcarra was credible and was not biased by
8 love for Pena because she had moved on with her life and had a baby
9 with someone else. (Id. at 2672-73.) The prosecutor reviewed
10 Meza's testimony in detail and reviewed evidence of gang activity.
11 She then embarked on a final summation of the evidence of the
12 criminal transaction, beginning with the victim's peaceful act of
13 walking with his bicycle three blocks from home, continuing with a
14 detailed recounting of the gang's aggression led by Petitioner to
15 the point at which the victim was on the ground and the others
16 stomped on him and Petitioner "unloaded five rounds into Joey's
17 back." (Id. at 2685, 2674-85.) The prosecutor referred to the
18 victim's screaming in pain and his dying at the scene; she argued
19 that the shooter's pursuit of the truck was corroborated by Vicki
20 Bozarth, Meza, and Gomez. (Id. at 2685-86.) The prosecutor
21 concluded:

22 And you know how you know that he meant to do this
23 and that he wanted to do this and that he's not sorry
24 one bit that this happened? Because what he says next,
25 well, there is now one less of them. And he's right.
26 There is one less Norteno gang member in the world, but
27 he had a name. His name was Joey. He had a family and
28 a life and he didn't deserve to die like that.

One thing that I agree with [defense counsel] about is
this is your community and I trust you're going to do the
right thing.

1 His name was Joey and he died on July 10th of 2004.
2 You decide.

3 (Id. at 2586.)

4 With respect to the vivid recounting of the homicide, the
5 prosecutor's argument was not unduly inflammatory. The victim's
6 suffering was not improperly emphasized. Emphasis on the victim's
7 individuality and behavior related to core issues of lack of
8 adequate provocation and the presence of the requisite gang
9 motivation.
10

11 The prosecutor implied urging of the jury to do "the right
12 thing" was made in the context of highlighting the viciousness of
13 the gang violence that she had just described in detail. The
14 prosecutor's appeal was made in the course of her final review of
15 the evidence, and not in a manner reasonably understood as referring
16 to extra-record matters or as inviting the jury to perform any duty
17 other than the weighing of the evidence.
18

19 In summary, a state court could reasonably have concluded that
20 it was not reasonably likely that a rational juror would
21 misunderstand this argument as an inappropriate appeal to passion,
22 prejudice, or other extra-record matters. Thus, the Court concludes
23 that this portion of the argument has not been shown to constitute
24 prejudicial misconduct or to have resulted in any unfairness.
25

26 ///

27 ///

1 H. Additional Conference concerning Argument

2 Finally, Petitioner quotes a portion of the transcript of a
3 post-argument conference, held outside the presence of the jury,
4 regarding the objections made during the argument.

5 Petitioner's counsel stated that he objected to the
6 prosecutor's comment that the plea of Mr. Meza "was not to any gang
7 enhancement," which was vouching for the witness to the effect that
8 he was not in fact a gang member where the evidence was disputed.
9 (Id. at 2690.) The prosecutor had reviewed the gang activity and
10 status of the accomplices, acknowledged that Meza was a "banger
11 too," but noted that he was different because he had simply grown up
12 in the neighborhood but was not "hardcore...." (Id. at 2612.) She
13 argued that he was different: he had a job and worked during the
14 whole period, and he had no gang tattoos, prior arrests, or prior
15 contact with law enforcement. He pled guilty to kicking the victim
16 and thereby committing assault with force likely to cause great
17 bodily injury, receiving a year in jail. The prosecutor stated,
18 "Now, if you'll notice, he did not plead to the gang enhancement."
19 (Id. at 2613.) The trial court stated that it had overruled the
20 objection to this argument because the court did not consider it to
21 have been harkening the jury to consider that Meza "didn't have to
22 plead to anything that was gang." (Id.)

23 The prosecutor's reference was to the terms of the plea
24 bargain, a subject central to the credibility of the pleading
25
26
27
28

1 accomplices. The prosecutor did not imply that there was extra-
2 record evidence that was determinative or even considered in the
3 plea bargaining process. Likewise, she did not express her personal
4 opinion with respect to any part of the plea bargaining process or
5 the credibility of the witness. Instead, she referred to the terms
6 of the plea bargain. The substance and form of her argument did not
7 constitute impermissible vouching for a witness, but rather
8 permissible marshaling of the facts. The state court could
9 reasonably have concluded that no misconduct had occurred, or that
10 it was not likely that a jury would have understood her comments as
11 vouching.
12

13
14 The next matter raised in the post-argument conference was the
15 defense's concern with comparison of the demeanor of the Petitioner
16 with that of Meza. Defense counsel argued that it improperly sought
17 the jury's consideration of Petitioner's demeanor during the trial,
18 which was a matter that was not evidence.
19

20 The prosecutor had read or summarized in detail Meza's
21 testimony about Petitioner's post-shooting statement that "there's
22 one less of them" and then had asked Meza about Petitioner's
23 demeanor earlier in the evening. (Id. at 2681.) The trial court
24 overruled the objection on the ground that the comparison had been
25 between Petitioner's demeanor first before, and then at the time of,
26 the attack on the victim. (Id. at 2690-92.)
27
28

1 No comparison with Petitioner's in-court behavior is brought to
2 this Court's attention. The trial court could reasonably have
3 concluded that no rational juror would have understood the argument
4 as an inappropriate comparison with matters outside the body of the
5 evidence before the jury. In any event, the jury was properly
6 instructed that the lawyers' comments and argument were not evidence
7 (11 RT 2534), and thus to the extent that any isolated instances of
8 misconduct occurred, any harmful effect was cured. Sassounian v.
9 Roe, 230 F.3d 1097, 1107 (9th Cir. 2000). Arguments of counsel
10 carry less weight with a jury than do instructions from the court.
11 Boyde v. California, 494 U.S. at 384-85.
12
13

14 In sum, the evidence against the Petitioner was strong and was
15 from multiple sources. The state court could reasonably have
16 concluded that any remark concerning the defendant's demeanor was
17 not understood in a way that violated the Constitution and did not
18 render the proceedings fundamentally unfair.
19

20 I. Ineffective Assistance of Counsel

21 As the foregoing analysis of Petitioner's contentions
22 concerning alleged prosecutorial misconduct in argument reflects,
23 the state court could reasonably have concluded that the prosecutor
24 did not engage in prejudicial misconduct in argument that rendered
25 Petitioner's trial fundamentally unfair. Thus, a fairminded jurist
26 could conclude that Petitioner's counsel exercised a reasonable
27 tactical judgment not to object further to the prosecutor's
28

1 arguments and thus did not engage in conduct below professional
2 standards of competence.

3 Accordingly, it will be recommended that Petitioner's claim or
4 claims of ineffective assistance of counsel for failing to object to
5 misconduct in argument should be denied.
6

7 XII. Insufficient Evidence of Firearm Enhancements

8 Petitioner alleges he suffered a violation of his right to due
9 process of law because the evidence was insufficient to support the
10 findings that he 1) discharged a firearm and caused death within the
11 meaning of Cal. Pen. Code § 12022.53(d), and 2) was armed with a
12 firearm during the commission of the offense within the meaning of
13 Cal. Pen. Code § 12022(a).
14

15 This claim was not addressed by the CCA, but Petitioner raised
16 it before the CSC in his petition for writ of habeas corpus. (LD
17 12, ground 4.) It has not been shown that the CSC's silent denial
18 was not an adjudication on the merits.
19

20 To determine whether a conviction violates the constitutional
21 guarantees of due process of law because of insufficient evidence, a
22 federal court ruling on a petition for writ of habeas corpus must
23 determine whether any rational trier of fact could have found the
24 essential elements of the crime beyond a reasonable doubt. Jackson
25 v. Virginia, 443 U.S. 307, 319, 20-21 (1979); Windham v. Merkle, 163
26 F.3d 1092, 1101 (9th Cir. 1998); Jones v. Wood, 114 F.3d 1002, 1008
27 (9th Cir. 1997).
28

1 All evidence must be considered in the light that is the most
2 favorable to the prosecution. Jackson, 443 U.S. at 319; Jones, 114
3 F.3d at 1008. It is the trier of fact's responsibility to resolve
4 conflicting testimony, weigh evidence, and draw reasonable
5 inferences from the facts; thus, it must be assumed that the trier
6 resolved all conflicts in a manner that supports the verdict.
7 Jackson v. Virginia, 443 U.S. at 319; Jones, 114 F.3d at 1008. The
8 relevant inquiry is not whether the evidence excludes every
9 hypothesis except guilt, but rather whether the jury could
10 reasonably arrive at its verdict. United States v. Mares, 940 F.2d
11 455, 458 (9th Cir. 1991). Circumstantial evidence and the
12 inferences reasonably drawn therefrom can be sufficient to prove any
13 fact and to sustain a conviction, although mere suspicion or
14 speculation does not rise to the level of sufficient evidence.
15 United States v. Lennick, 18 F.3d 814, 820 (9th Cir. 1994); United
16 States v. Stauffer, 922 F.2d 508, 514 (9th Cir. 1990); see, Jones v.
17 Wood, 207 F.3d at 563. The court must base its determination of the
18 sufficiency of the evidence on a review of the record. Jackson at
19 324.

20
21 The Jackson standard must be applied with reference to the
22 substantive elements of the criminal offense as defined by state
23 law. Jackson, 443 U.S. at 324 n.16; Windham, 163 F.3d at 1101.
24 However, the minimum amount of evidence that the Due Process Clause
25 requires to prove an offense is purely a matter of federal law.
26
27
28

1 Coleman v. Johnson, - U.S. -, 132 S.Ct. 2060, 2064 (2012) (per
2 curiam). For example, under Jackson, juries have broad discretion
3 to decide what inferences to draw and are required only to draw
4 reasonable inferences from basic facts to ultimate facts. Id.

5
6 Further, under the AEDPA, federal courts must apply the
7 standards of Jackson with an additional layer of deference. Coleman
8 v. Johnson, 132 S.Ct.at 2062; Juan H. v. Allen, 408 F.3d 1262, 1274
9 (9th Cir. 2005). This Court thus asks whether the state court
10 decision being reviewed reflected an objectively unreasonable
11 application of the Jackson standards to the facts of the case.
12 Coleman v. Johnson, 132 S.Ct. at 2062; Juan H. v. Allen, 408 F.3d at
13 1275. The determination of the state court of last review on a
14 question of the sufficiency of the evidence is entitled to
15 considerable deference under 28 U.S.C. § 2254(d). Coleman v.
16 Johnson, 132 S.Ct. at 2065.

17
18 Petitioner argues that the evidence is insufficient because
19 Pena initially reported that Arellano was the shooter, Arellano
20 admitted having worn black clothing, and Daniel Britt testified that
21 he was told that Arellano was the shooter. Petitioner further
22 contends that the remaining evidence that supports a conclusion that
23 Petitioner was the shooter was unreliable.

24
25 The trier of fact was presented with conflicting evidence
26 concerning the identity of the shooter. It was within the jury's
27 province to consider the testimony and evidence, including the
28

1 circumstances that bore on the credibility of the witnesses, and to
2 resolve any conflicts in the evidence. The judgment is supported by
3 evidence from the accomplices as well as from disinterested,
4 independent witnesses and physical evidence; the record does not
5 reflect that the evidence against Petitioner was inherently
6 unreliable. In its review of the petition, this Court must conclude
7 that the trier of fact resolved all conflicts in favor of the
8 judgment. A rational trier of fact could have found beyond a
9 reasonable doubt that Petitioner was armed with a firearm during the
10 commission of the offense, discharged a firearm, and thereby caused
11 the death of the victim.
12
13

14 Therefore, the state court decision rejecting Petitioner's
15 challenge to the sufficiency of the evidence was an objectively
16 reasonable application of the Jackson standard. The state court's
17 decision was not contrary to, or an unreasonable application of,
18 clearly established federal law within the meaning of § 2254(d)(1).
19 Accordingly, it will be recommended that Petitioner's claim or
20 claims concerning the sufficiency of the evidence to support the
21 firearms findings be denied.
22

23 In sum, it will be recommended that insofar as Petitioner
24 raises state law claims, the petition be dismissed; the remainder of
25 the petition be denied; and judgment be entered for Respondent.
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1 XIII. Motion for Expansion of the Record and for an
2 Evidentiary Hearing

3 On December 12, 2012, Petitioner filed a motion to expand the
4 record to include declarations from Alvarado Arellano and
5 Petitioner, and for an evidentiary hearing on all the claims raised
6 in this proceeding and on the major issues of disputed fact
7 pertinent to Petitioner's guilt that have already been determined by
8 the jury. Respondent filed opposition to the motion on December 31,
9 2012. Petitioner did not file a reply.
10

11 In his declaration, Petitioner denies he shot or killed the
12 victim, that he participated in a criminal street gang, or that he
13 ever made statements indicating that he had done so. Further,
14 Petitioner declares he knows the accomplices made up false evidence
15 against him to obtain plea bargains. (Doc. 37, 8-9.) In his
16 declaration, Arellano, who identifies himself as an inmate of the
17 Kern Valley State Prison, states Petitioner did not shoot the victim
18 and that someone else, who is not identified, did. (Id. at 10.)
19

20 The decision to grant an evidentiary hearing is generally a
21 matter left to the sound discretion of the district courts. 28
22 U.S.C. § 2254; Habeas Rule 8(a); Schriro v. Landrigan, 550 U.S. 465,
23 473 (2007). To obtain an evidentiary hearing in federal court under
24 the AEDPA, a petitioner must allege a colorable claim by alleging
25 disputed facts which, if proved, would entitle him to relief.
26
27 Schriro v. Landrigan, 550 U.S. at 474.
28

1 The determination of entitlement to relief is, in turn, is
2 limited by 28 U.S.C. § 2254(d)(1), which requires that to obtain
3 relief with respect to a claim adjudicated on the merits in state
4 court, the adjudication must result in a decision that was either
5 contrary to, or an unreasonable application of, clearly established
6 federal law. Schriro v. Landrigan, 550 U.S. at 474. Further, in
7 analyzing a claim pursuant to § 2254(d)(1), a federal court is
8 limited to the record that was before the state court that
9 adjudicated the claim on the merits. Cullen v. Pinholster, 131
10 S.Ct. at 1398.

11
12 Thus, when a state court record precludes habeas relief under
13 the limitations set forth in § 2254(d), a district court is not
14 required to hold an evidentiary hearing. Cullen v. Pinholster, 131
15 S.Ct. at 1399 (citing Schriro v. Landrigan, 550 U.S. at 474). An
16 evidentiary hearing may be granted with respect to a claim
17 adjudicated on the merits in state court where the petitioner
18 satisfies § 2254(d)(1), or where § 2254(d)(1) does not apply, such
19 as where the claim was not adjudicated on the merits in state court.
20 Cullen v. Pinholster, 131 S.Ct. at 1398, 1400-01.

21
22 Here, Petitioner has not shown that the state court decisions
23 on his claims were contrary to or unreasonably applied clearly
24 established federal law within the meaning of 28 U.S.C.
25 § 2254(d)(1). Likewise, he has not demonstrated that the state
26 court decisions were based on any unreasonable determination of the
27
28

1 facts in light of the evidence presented in the state court
2 proceedings within the meaning of 28 U.S.C. § 2254(d)(2). Further,
3 reference to the petition for writ of habeas corpus filed in the
4 California Supreme Court (LD 12) shows that the declarations of
5 Petitioner and Arellano were not presented to the CSC for review.
6

7 Accordingly, it will be recommended that this Court deny the
8 motion to expand the record and grant an evidentiary hearing.

9 XIV. Certificate of Appealability

10 Unless a circuit justice or judge issues a certificate of
11 appealability, an appeal may not be taken to the Court of Appeals
12 from the final order in a habeas proceeding in which the detention
13 complained of arises out of process issued by a state court. 28
14 U.S.C. § 2253(c)(1)(A); Miller-El v. Cockrell, 537 U.S. 322, 336
15 (2003). A district court must issue or deny a certificate of
16 appealability when it enters a final order adverse to the applicant.
17 Rule 11(a) of the Rules Governing Section 2254 Cases.

18 A certificate of appealability may issue only if the applicant
19 makes a substantial showing of the denial of a constitutional right.
20 § 2253(c)(2). Under this standard, a petitioner must show that
21 reasonable jurists could debate whether the petition should have
22 been resolved in a different manner or that the issues presented
23 were adequate to deserve encouragement to proceed further. Miller-
24 El v. Cockrell, 537 U.S. at 336 (quoting Slack v. McDaniel, 529 U.S.
25 473, 484 (2000)). A certificate should issue if the Petitioner
26 shows that jurists of reason would find it debatable whether: (1)
27 the petition states a valid claim of the denial of a constitutional
28

1 right, and (2) the district court was correct in any procedural
2 ruling. Slack v. McDaniel, 529 U.S. 473, 483-84 (2000).

3 In determining this issue, a court conducts an overview of the
4 claims in the habeas petition, generally assesses their merits, and
5 determines whether the resolution was debatable among jurists of
6 reason or wrong. Id. An applicant must show more than an absence
7 of frivolity or the existence of mere good faith; however, the
8 applicant need not show that the appeal will succeed. Miller-El v.
9 Cockrell, 537 U.S. at 338.

10 Here, it does not appear that reasonable jurists could debate
11 whether the petition should have been resolved in a different
12 manner. Petitioner has not made a substantial showing of the denial
13 of a constitutional right.

14 Accordingly, it will be recommended that the Court decline to
15 issue a certificate of appealability.

16 XV. Recommendations

17 In accordance with the foregoing analysis, it is RECOMMENDED
18 that:
19

20 1) Insofar as Petitioner raises claims based on state law, the
21 second amended petition for writ of habeas corpus be DISMISSED; and

22 2) The remainder of the second amended petition for writ of
23 habeas corpus be DENIED; and

24 3) The motion for expansion of the record and for an
25 evidentiary hearing be DENIED; and

26 4) Judgment be ENTERED for Respondent; and

27 5) The Court DECLINE to issue a certificate of appealability.
28

1 These findings and recommendations are submitted to the United
2 States District Court Judge assigned to the case, pursuant to the
3 provisions of 28 U.S.C. § 636 (b) (1) (B) and Rule 304 of the Local
4 Rules of Practice for the United States District Court, Eastern
5 District of California. Within thirty (30) days after being served
6 with a copy, any party may file written objections with the Court
7 and serve a copy on all parties. Such a document should be
8 captioned "Objections to Magistrate Judge's Findings and
9 Recommendations." Replies to the objections shall be served and
10 filed within fourteen (14) days (plus three (3) days if served by
11 mail) after service of the objections. The Court will then review
12 the Magistrate Judge's ruling pursuant to 28 U.S.C. § 636 (b) (1) (C).
13 The parties are advised that failure to file objections within the
14 specified time may waive the right to appeal the District Court's
15 order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

16
17
18 IT IS SO ORDERED.

19 Dated: May 22, 2014

/s/ Sheila K. Oberto
UNITED STATES MAGISTRATE JUDGE