

1 Walker, an off-duty police officer² who was driving his truck down Park Avenue in Merced,
2 California. After seeing the two men emerging from an alley, Walker slowed, preparing to stop if
3 they decided to cross the street in front of him. Petitioner stepped in front of Walker's truck,
4 requiring him to stop completely, and the confederate approached the driver's side window and
5 asked for a cigarette. Petitioner appeared to signal the confederate, using his head and eyebrows.
6 Walker was alarmed, thinking that he had been set up for a robbery or assault. Walker did not see
7 a weapon.
8

9 As Walker accelerated away, swerving to avoid hitting Petitioner, he heard multiple
10 gunshots. Although three shots struck and damaged the truck, Walker was not injured. Later
11 inspection showed that all three shots entered the truck cab near Walker. After calling 911 from a
12 safe location, Walker returned to the area but could not locate Petitioner or his confederate.
13

14 Merced police responded to the scene and began searching for the individuals that Walker
15 described. Officer DeJong and Sergeant Dash saw Petitioner near an apartment complex in the
16 3000 block of Park Avenue. Petitioner fled on foot. As Officer Padgett chased Petitioner, he
17 encountered Petitioner's co-defendant, Martin Olvera, near the same location. Olvera's clothes
18 did not match Walker's description, and he did not have a firearm. After securing Olvera, Padgett
19 rejoined the chase and assisted DeJong and Dash in stopping and arresting Petitioner. Walker
20 identified Petitioner by his face and voice, but stated that Olvera looked like the other suspect but
21 had different clothing. Officers then discovered that Olvera was wearing clothing matching
22 Walker's description under an outer layer of baggy clothing.
23

24 Earlier that night, Petitioner and Olvera attended a party given by Cameo Vargas, who
25 lived in the apartment complex with her boyfriend, Oscar Damian,³ and their young daughter.
26 Vargas, who admitted at trial that she socialized with members of the Norteño gang, recalled that
27

28 ² Walker had a firearm in the truck but did not use it during the incident.

³ Damian was not home the night of the party.

1 everyone was drinking to excess. Although her memory of the timing was uncertain because of
2 her intoxication, Vargas recalled that Petitioner, Olvera, and a third man arrived at 1:00 or 2:00
3 a.m. and stayed for several hours. At one point, the three men closed themselves in her
4 daughter's bedroom. Vargas ordered them to get out. In Vargas' living room, Petitioner ordered
5 Olvera to give him something, causing an argument. After Petitioner "disrespected" Vargas, she
6 ordered all three men to leave and locked the door behind them. Petitioner, accompanied by
7 Olvera, kicked in the door. Vargas insisted that she had not seen a firearm that night and did not
8 know why one would be found above her daughter's bedroom.

10 Witness Kathryn Vonsivers, who lived next door to Vargas on the second floor, testified
11 that the party, which had begun on the evening before, became large and noisy, spilling over onto
12 the walkway in front of the apartments. At one point, a fight erupted among Vargas' intoxicated
13 guests. Vonsivers, who could see and hear the guests through her front window, repeatedly asked
14 Vargas to quiet things down.

16 At about 4:00 a.m., Vonsivers saw three men dressed in white tank tops and jeans leave
17 the party. One man, whom Vonsivers identified as Petitioner, was so drunk that he staggered and
18 had to be helped down the stairs. Vonsivers testified that she had previously seen Petitioner
19 visiting Vargas' apartment.

21 Shortly thereafter, Vonsivers heard five gunshots. A herd of people ran up the stairs to
22 Vargas' apartment, the door slammed, the music was turned off, and the party became completely
23 quiet. Vonsivers heard something being dragged across the floor of Vargas' apartment.

24 Shortly thereafter, the SWAT team surrounded the building. Later that morning, police
25 officers searched Vargas' apartment where they discovered a ladder in the child's bedroom
26 closet, leading to the crawl space above. A .38 caliber revolver was found hidden in the crawl
27 space.

1 Officer Joseph Perez, a member of the Merced Police Department's gang violence
2 suppression unit, testified as a gang expert, providing general information about the Norteños. He
3 described Vargas as a Norteño associate, but he was not familiar with her live-in boyfriend
4 Damian. Perez opined that the party was likely a Norteño gang party. Defendant and Perez were
5 known to be active participants in the Norteño gang in Merced County, although Perez did not
6 know them to have previously collaborated in any crime.
7

8 Merced Police Lieutenant Trinidad also testified as a gang expert, providing background
9 on the Norteño gang and its typical criminal activities. He opined that the gang frequently used
10 firearms as well as using the ruse of asking for a cigarette to distract the target of a robbery or
11 assault. In response to the prosecutor's hypothetical question,⁴ Trinidad opined that the
12 hypothetical offense would have benefited the gang financially and enhanced the perpetrators'
13 standing in the gang.
14

15 **II. Procedural Background**

16 Petitioner and Olvera were charged with (1) attempted premeditated murder (Cal. Penal
17 Code §§ 664 and 187), (2) discharge of a firearm at an occupied vehicle (Cal. Penal Code § 246),
18 and (3) participation in a street gang (Cal. Penal Code § 186.22(a)). In addition, counts 1 and 2
19 were alleged to have been committed to benefit a street gang (Cal. Penal Code § 186.22(b)), and
20 Petitioner was alleged to have a prior strike conviction (Cal. Penal Code § 667 (b)(i)). With
21 regard to count 1, Olvera was alleged to have personally discharged a firearm (Cal. Penal Code
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24 ⁴ "Two Norteño gang members are walking down an alley at the intersection of Park Avenue, a pickup truck is
25 approaching, the truck is driven by an off-duty Merced police officer. The truck slows because gangsters approach
26 the intersection. One gangster continues across the street. That gangster slows his gait in such a way to cause the
27 truck to come to a complete stop. The gangster also stops directly in front of the truck. The other gangster who
28 stayed on the corner of the intersection, called out to the driver of the truck asking for a cigarette. The driver
responds he does not smoke. The driver notices the gangster standing in front of his vehicle gesture his head toward
the second gangster on the corner. The driver becomes very concerned for his safety and starts to drive away.
Immediately his truck is struck with multiple bullets as he hears corresponding gunshots. The driver drives to safety
and calls the police." Doc. 22-1 at 13.

1 § 12022.53(c)), and Petitioner was charged with having committed an offense in which a
2 participant discharged a firearm (Cal. Penal Code § 12022.53(c) and(e)(1)).

3 In January, February, and March, 2010, Petitioner and Olvera were tried jointly before a
4 jury in the Merced County Superior Court. On March 9, 2010, the jury found Petitioner guilty of
5 all three counts and found the special allegations and prior strike conviction to be true. On March
6 10, 2010, the Court heard the bifurcated charges of enhancement 4 to count 1 and enhancement 3
7 to count 2, and found both enhancements to be true. On May 13, 2010, the court sentenced
8 Petitioner to a prison term of 30 years to life for attempted murder. (Sentences for the remaining
9 convictions were stayed.)
10

11 On April 15, 2011, Petitioner filed a direct appeal to the California Court of Appeals, Fifth
12 Appellate District. The Court of Appeal affirmed the judgment on December 19, 2011. The
13 California Supreme Court denied review on March 21, 2012.
14

15 On January 25, 2013, Petitioner filed a federal petition for writ of habeas corpus.

16 **III. Standard of Review**

17 A person in custody as a result of the judgment of a state court may secure relief through a
18 petition for habeas corpus if the custody violates the Constitution or laws or treaties of the United
19 States. 28 U.S.C. § 2254(a); *Williams v. Taylor*, 529 U.S. 362, 375 (2000). On April 24, 1996,
20 Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), which
21 applies to all petitions for writ of habeas corpus filed thereafter. *Lindh v. Murphy*, 521 U.S. 320,
22 322-23 (1997). Under the statutory terms, the petition in this case is governed by AEDPA's
23 provisions because Petitioner filed it after April 24, 1996.
24

25 Habeas corpus is neither a substitute for a direct appeal nor a device for federal review of
26 the merits of a guilty verdict rendered in state court. *Jackson v. Virginia*, 443 U.S. 307, 332 n. 5
27 (1979) (Stevens, J., concurring). Habeas corpus relief is intended to address only "extreme
28

1 malfunctions" in state criminal justice proceedings. *Id.* Under AEDPA, a petitioner can prevail
2 only if he can show that the state court's adjudication of his claim:

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

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

8 28 U.S.C. § 2254(d); *Lockyer v. Andrade*, 538 U.S. 63, 70-71 (2003); *Williams*, 529
9 U.S. at 413.

10 "By its terms, § 2254(d) bars relitigation of any claim 'adjudicated on the merits' in state
11 court, subject only to the exceptions set forth in §§ 2254(d)(1) and (d)(2)." *Harrington v.*
12 *Richter*, 562 U.S. 86, 98 (2011).

13 As a threshold matter, a federal court must first determine what constitutes "clearly
14 established Federal law, as determined by the Supreme Court of the United States." *Lockyer*,
15 538 U.S. at 71. To do so, the Court must look to the holdings, as opposed to the dicta, of the
16 Supreme Court's decisions at the time of the relevant state-court decision. *Id.* The court must
17 then consider whether the state court's decision was "contrary to, or involved an unreasonable
18 application of, clearly established Federal law." *Id.* at 72. The state court need not have cited
19 clearly established Supreme Court precedent; it is sufficient that neither the reasoning nor the
20 result of the state court contradicts it. *Early v. Packer*, 537 U.S. 3, 8 (2002). The federal court
21 must apply the presumption that state courts know and follow the law. *Woodford v. Visciotti*,
22 537 U.S. 19, 24 (2002). The petitioner has the burden of establishing that the decision of the
23 state court is contrary to, or involved an unreasonable application of, United States Supreme
24 Court precedent. *Baylor v. Estelle*, 94 F.3d 1321, 1325 (9th Cir. 1996).

25 "A federal habeas court may not issue the writ simply because the court concludes in its
26 independent judgment that the relevant state-court decision applied clearly established federal
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28

1 law erroneously or incorrectly." *Lockyer*, 538 U.S. at 75-76. "A state court's determination that
2 a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree'
3 on the correctness of the state court's decision." *Harrington*, 562 U.S. at 101 (quoting
4 *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)). Thus, the AEDPA standard is difficult to
5 satisfy since even a strong case for relief does not demonstrate that the state court's
6 determination was unreasonable. *Harrington*, 562 U.S. at 102.

8 **IV. Errors in Jury Instructions**

9 In grounds 1 and 2, Petitioner contends that in providing CALCRIM 400, the trial court
10 improperly (1) referred to the natural and probable consequences doctrine, and (2) used the term
11 "equally guilty." Respondent counters that the trial court's reference to the natural and
12 probable consequences doctrine was not prejudicial and that because of Petitioner's failure to
13 object at trial, he is procedurally barred from raising the "equally guilty" claim.

15 **A. The Jury Instructions**

16 After denying Olvera's motion to dismiss the case, the trial court conducted an off-the-
17 record conference with the prosecutor and defense attorneys to discuss final proposed changes
18 to the jury instructions. Upon return to the record, the parties' attorneys declined the trial
19 court's invitation to memorialize any objections. The trial court then presented jury instructions
20 including the following instructions drawn from CALCRIM 400 and 401:

22 A person may be guilty of a crime in two ways. One, he or she may
23 have directly committed the crime. I will call that person the
24 perpetrator. Two, he or she may have aided and abetted a
25 perpetrator who directly committed the crime. *A person is equally
guilty of the crime whether he or she committed it personally or
aided and abetted the perpetrator who committed it.*

26 *Unless under some specific circumstances[,] if the evidence
27 establishes aiding and abetting of one crime, a person may be
28 found guilty of other crimes that occurred during the commission of
the first crime. To prove that a defendant is guilty of a crime based
on aiding and abetting that crime, the People must prove that,*

1 number one, the perpetrator committed the crime. Number two, the
2 defendant knew that the perpetrator intended to commit the crime.
3 Number three, before or during the commission of the crime, the
4 defendant intended to aid and abet the perpetrator in committing the
5 crime, and number four, the defendant's words or conduct did, in
6 fact, aid and abet the perpetrator's commission of the crime.

7 Someone aids and abets a crime if he or she knows of the
8 perpetrator's unlawful purpose, and he or she specifically intends to
9 and does, in fact, aid, facilitate, promote, encourage or instigate the
10 perpetrator's commission of that crime. If all of these requirements
11 are proved, the defendant does not need to actually have been
12 present when the crime was committed to be guilty as an aider and
13 abetter.

14 If you conclude that the defendant was present at the scene of the
15 crime or failed to prevent a crime, you may consider that fact in
16 determining whether the defendant was an aider and abetter.
17 However, the fact that a person is present at the scene of a crime or
18 fails to prevent the crime, does not by itself make him or her an
19 aider and abetter.

20 RT1030-RT1031 (added emphasis denotes challenged language).

21 The instructions did not include CALCRIM 403, which addresses the natural and probable
22 consequences doctrine in detail and includes an explanation of target and nontarget offenses.

23 **B. Natural and Probable Consequences**

24 Petitioner first contends that the trial court violated his constitutional rights when it
25 referred to the natural and probable consequences doctrine in the statement: "Unless under
26 some specific circumstances[,] if the evidence establishes aiding and abetting of one crime, a
27 person may be found guilty of other crimes that occurred during the commission of the first
28 crime."

29 **1. Trial Court's Application of State Law Provisions**

30 Under California Law, a person who aids and abets a
31 confederate in the commission of a criminal act is liable not only
32 for that crime (the target crime), but also for any other offense
33 (nontarget crime) committed by the confederate as a "natural and
34 probable consequence" of the crime originally aided and abetted.
35 To convict a defendant of a nontarget crime as an accomplice under
36 the "natural and probable consequences" doctrine, the jury must
37 find that, with knowledge of the perpetrator's unlawful purpose,
38 and with the intent of committing, encouraging, or facilitating the
39 commission of the target crime, the defendant aided, promoted,

1 encouraged, or instigated the commission of the target crime. The
2 jury must also find that the defendant's confederate committed an
3 offense other than the target crime, and that the nontarget offense
4 perpetrated by the confederate was a "natural and probable
5 consequence" of the target crime that the defendant assisted or
6 encouraged.

7 *People v. Prettyman*, 14 Cal.4th 248, 254 (1996).

8 In this case, the prosecution's proposed jury instructions included CALCRIM 403, which
9 addresses the natural and probable consequences doctrine. The defense argued that the facts did
10 not clearly establish what crime Petitioner and Olvera intended to commit when Petitioner
11 stepped into the roadway to stop Walker's truck. The trial court shared the defense's concern.

12 California law provides:

13 [W]hen the prosecutor relies on the "natural and probable
14 consequences" doctrine, the trial court must identify and describe
15 the target crimes that the defendant might have assisted or
16 encouraged. An instruction *identifying* target crimes will assist the
17 jury in determining whether the crime charged was a natural and
18 probable consequence of some other criminal act. And an
19 instruction *describing* the target crimes will eliminate the risk that
20 the jury will indulge in uninformed speculation with regard to what
21 types of conduct are criminal.

22 *Prettyman*, 14 Cal.4th at 254.

23 The natural and probable consequences doctrine requires the jury to decide "whether the
24 defendant (1) with knowledge of the confederate's unlawful purpose; and (2) the intent of
25 committing, encouraging, or facilitating the commission of any target crime(s); (3) aided,
26 promoted, encouraged, or instigated the commission of the target crimes. *Id.* at 271. "The jury
27 must also determine whether (4) the defendant's confederate committed an offense other than the
28 target crime(s); and whether (5) the offense committed by the confederate was a natural and
probable consequence of the target crime(s) that the defendant encouraged or facilitated." *Id.*

Before instructing the jury, counsel and the trial court went off the record to discuss the
trial court's proposed final changes to the jury instructions. When they returned to the record, the
trial judge stated that he believed he was prepared to provide "an agreed-upon set of instruction"
and asked counsel if there were "[a]ny objections, requests for deletions, additions, or other
modifications." RT1011. Petitioner's attorney had a question regarding the pre-deliberation

1 instructions (CALCRIM 3550), but neither he nor any other counsel raised an issues relating to
2 the aiding and abetting instructions.

3 The trial court then instructed the jury without including the specific instructions on the
4 natural and probable consequences doctrine (CALCRIM 403). The court did not exclude the
5 provision in CALCRIM 400 that referred to the natural and probable consequences doctrine,
6 however.

7 **2. Court of Appeals Decision**⁵

8 The California Court of Appeal agreed that the objected-to provision in CALCRIM 400
9 implicated the natural and probable consequences doctrine and concluded that the trial court
10 erroneously included it, even though the instructions, as actually given to the jury, did not include
11 CALCRIM 403. As a result, the objected-to provision in CALCRIM 400 became an “abstract
12 instruction,” that is, an instruction which is correct in law but irrelevant to the case. Under
13 California law, a trial court’s giving an abstract instruction is error. Applying California cases,
14 the appellate court wrote:

15 Nonetheless, giving an irrelevant or inapplicable instruction is
16 generally only a technical error which does not constitute ground
17 for reversal. A defendant challenging an instruction as being
18 subject to erroneous interpretation by the jury must demonstrate a
19 reasonable likelihood that the jury understood the instruction in the
20 way asserted by the defendant. In evaluating such a challenge, we
21 must consider whether it is reasonably likely that the trial court’s
22 instructions caused the jury to misapply the law or to interpret the
23 instructions in a way that violated the defendant’s rights. In doing
24 so, we must consider the entire charge to the jury, not just one
25 particular instruction or part of an instruction.

26 *People v. Uriostegui*, Doc. 22-1 at 25 (Cal.Ct.App. Dec. 19, 2011)
(No. FG060232) (internal quotation marks and citations omitted).

27 The court concluded that the challenged language in CALCRIM 400 was not prejudicial
28 under the case’s facts and that there was “no reasonable likelihood that the jury misapplied the
29 language.” *Id.* The trial court accurately provided instructions on culpability as a direct
30 perpetrator and as an aider and abetter, accurately explaining the differences between the two

⁵ Because the California Supreme Court summarily denied review, the Court must "look through" the summary denial to the last reasoned decision, which is, in this case, the opinion of the California Court of Appeal, Fifth Appellate District. *Ylst v. Nunnemaker*, 501 U.S. 797, 803-06 (1991).

1 types of culpability. *Id.* at 26. The trial court did not include CALCRIM 403, which addressed
2 the natural and probable consequences doctrine. *Id.*

3 Closing arguments did not include any comments or statements that implicated the natural
4 and probable consequences doctrine. *Id.* The prosecutor argued that Petitioner and Olvera had
5 planned to ambush the truck but never referred to target and nontarget offenses. *Id.* Notably, he
6 never argued that Petitioner and Olvera had planned a carjacking, robbery, or other specific
7 offense nor suggested that Petitioner did not share Olvera’s specific intent to kill. *Id.* Neither
8 defense attorney raised the natural and probable consequences doctrine in their closing
9 arguments; instead, they challenged Walker’s description of the shooting and his identification of
10 the suspects. *Id.*

11 In his appeal, Petitioner argued that the erroneously included paragraph could have led the
12 jury to improperly consider the natural and probable consequences doctrine, based on Walker’s
13 description of the actions of Petitioner and Olvera, and his testimony that he feared that he was
14 going to be attacked or robbed of his truck or both. *Id.* The court rejected Petitioner’s argument,
15 noting that Walker testified that he did not know whether Petitioner and Olvera sought to “kill me
16 to get my truck or just kill me because they recognized me as an officer.” *Id.* The court
17 emphasized that (1) no evidence supported a conclusion that Petitioner and Olvera knew that
18 Walker was an off-duty police officer and (2) Walker’s testimony as a whole supported the
19 prosecution’s theory that Petitioner and Olvera intended to kill Walker. *Id.* at 26-27.

20 The court also rejected Petitioner’s argument that Lieutenant Trinidad’s testimony
21 regarding the “cigarette ruse” could have led the jury to apply the objectional paragraph
22 improperly. *Id.* at 27. The court described Trinidad’s testimony as a whole as being more detailed
23 than simply describing the cigarette ruse as a robbery method and intended to illustrate a means by
24 which gang members could approach a victim and lull him into a sense of false security before
25 committing an assault or a robbery. *Id.* In any case, Trinidad’s testimony focused on whether the
26 offenses were gang-related. *Id.*

27 The appellate court concluded:

28 The [trial] court’s erroneous inclusion of the final paragraph of

1 CALCRIM No. 400 was not prejudicial under the circumstances of
2 this case. “Because the parties made no reference to the ‘natural
3 and probable consequences’ doctrine in their arguments to the jury,
4 it is highly unlikely that the jury relied on that rule when it
5 convicted defendant,” and it appears that the jury was persuaded by
6 the prosecutor’s argument that defendant encouraged or assisted the
7 gunman to murder the truck’s driver, and he was thus guilty of
8 attempted murder as an accomplice to that crime, “not as an
9 accomplice to some other unlawful act of which murder was a
10 natural and probable consequence.” (*People v. Prettyman, supra*,
11 14 Cal.4th at p. 273.)

12 Doc. 22-1 at 27.

13 **3. Review of Jury Instruction Errors**

14 Neither the state appellate court nor the parties disagree that the trial court erred by
15 including the natural and probable consequences language of CALCRIM 400. This Court is
16 bound by the state court’s determination of state law. *Bradshaw v. Richey*, 546 U.S. 74, 76
17 (2005). Petitioner contends that a constitutional violation arises from the state court’s conclusion
18 that the error was harmless.

19 Generally, claims of instructional error are questions of state law and are not cognizable
20 on federal habeas review. “It is not the province of a federal court to reexamine state court
21 determinations of state law questions.” *Estelle v. McGuire*, 502 U.S. 62, 71-72 (1991). “The fact
22 that a jury instruction violates state law is not, by itself, a basis for federal habeas corpus relief.”
23 *Clark v. Brown*, 450 F.3d 898, 904 (9th Cir. 2006). “[A] petitioner may not “transform a state-law
24 issue into a federal one merely by asserting a violation of due process.” *Langford v. Day*, 110
25 F.3d 1380, 1389 (9th Cir. 1997).

26 To prevail in a collateral attack on state court jury instructions, a petitioner must do more
27 that prove that the instruction was erroneous. *Henderson v. Kibbe*, 431 U.S. 145, 154 (1977).
28 Instead, the petitioner must prove that the improper instruction “by itself so infected the entire
trial that the resulting conviction violated due process.” *Estelle*, 502 U.S. at 72. Even if there
were constitutional error, habeas relief cannot be granted absent a “substantial and injurious
effect” on the verdict. *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993).

1 A federal court’s review of a claim of instructional error is highly deferential. *Masoner v.*
2 *Thurman*, 996 F.2d 1003, 1006 (9th Cir. 1993). A reviewing court may not judge the instruction
3 in isolation but must consider the context of the entire record and of the instructions as a whole.
4 *Id.* The mere possibility of a different verdict is too speculative to justify a finding of
5 constitutional error. *Henderson*, 431 U.S. at 157. “Where the jury verdict is complete, but based
6 upon ambiguous instructions, the federal court, in a habeas petition, will not disturb the verdict
7 unless ‘there is a reasonable likelihood that the jury has applied the challenged instruction in a
8 way’ that violates the Constitution.” *Solis v. Garcia*, 219 F.3d 922, 927 (9th Cir. 2000) (quoting
9 *Estelle*, 502 U.S. at 72).

10 Even when the trial court has made an error in the instruction, a habeas petitioner is only
11 entitled to relief if the error “had a substantial and injurious effect or influence in determining the
12 jury’s verdict.” *Brecht*, 507 U.S. at 637 (quoting *Kotteakos v. United States*, 328 U.S. 750, 776
13 (1946)). A state prisoner is not entitled to federal habeas relief unless the instructional error
14 resulted in “actual prejudice.” *Brecht*, 507 U.S. at 637. A violation of due process occurs only
15 when the instructional error results in the trial being fundamentally unfair. *Estelle*, 502 U.S. at
16 72-73; *Duckett v. Godinez*, 67 F.3d 734, 746 (9th Cir. 1995). If the court is convinced that the
17 error did not influence the jury, or had little effect, the judgment should stand. *O’Neal v.*
18 *McAninch*, 513 U.S. 432, 437 (1995).

19 Having carefully considered the record as a whole, the Court concurs with the state court’s
20 fact finding. The determination to omit instructing the jury of the natural and probable
21 consequences doctrine reflected the concern of both the trial court and defense attorneys that the
22 record did not establish any target offense of which the shooting at Walker was a natural and
23 probable consequence.

24 In closing arguments, the prosecutor argued that Petitioner and his confederate planned to
25 ambush Walker’s truck, but he never referred to target and nontarget offenses nor argued that the
26 defendants had planned to commit another crime. The defense challenged the sufficiency of the
27 evidence against the defendants, particularly the credibility of various witnesses, and Walker’s

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1 testimony about the circumstances of the shooting and his identification of the suspects. It never
2 raised the natural and probable consequences doctrine.

3 Petitioner repeats his argument, rejected by the state court, that the evidence supported a
4 conclusion that Petitioner had no intent to shoot and that Trinidad’s testimony regarding the
5 “cigarette ruse” indicates no more than an intent to rob. The argument is inconsistent with
6 Petitioner’s defense at trial. In his closing argument, Petitioner’s trial counsel, Sean Howard,
7 never suggested that Petitioner simply intended to rob Walker. Instead, pointing to evidence and
8 testimony, Howard argued that Petitioner was not involved in the shooting and simply happened
9 to be crossing the street near Walker’s truck when the shooting took place. He denied that
10 Petitioner was acting in concert with the shooter, and contended that Petitioner paused in the
11 street in front of Walker’s truck because he was intoxicated.

12 Petitioner contends that under the *Chapman*⁶ standard, a court evaluating the prejudice
13 resulting from the erroneous inclusion of the last paragraph of CALCRIM 400 would conclude
14 that the provision “create[d] a substantial risk of misleading the jury to the defendant’s
15 prejudice.” Doc. 1 at 18 (quoting *People v. Rollo*, 20 Cal.3d 109, 123 (1977)). In an AEDPA
16 case, however, the district court must assess the prejudicial impact of constitutional error by
17 applying the more forgiving “substantial and injurious effect” standard set forth in *Brecht* whether
18 or not the state court acknowledged the constitutional error and evaluated it under *Chapman*’s
19 “harmless beyond a reasonable doubt” standard. *Fry v. Pliler*, 551 U.S. 112, 120-21 (2007) (“[I]t
20 certainly makes no sense to require formal application of *both* tests (AEDPA/*Chapman* and
21 *Brecht*) when the latter obviously subsumes the former”).

22 That the evidence could have supported a conclusion other than that reached by the jury
23 does not mean that the instructional error caused the jury to find Petitioner guilty. Even if the
24 Court accepts Petitioner’s argument without question, the evidence could have supported either
25 construction of the evidence. The state court reasonably concluded that the instructional error
26 was harmless.

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28 ⁶ *Chapman v. California*, 386 U.S. 18 (1967).

1 **C. Equally Guilty**

2 In his second claim, Petitioner contends that his rights were violated by inclusion of the
3 phrase: “A person is equally guilty of the crime whether he or she committed it personally or
4 aided and abetted the perpetrator who committed it.” The state court found this claim to be
5 procedurally defaulted.

6 A district court cannot hear a federal petition for writ of habeas corpus unless the highest
7 state court had a full and fair opportunity to hear the claim. 28 U.S.C. § 2254(a). When a state
8 prisoner has defaulted on his federal claim in state court pursuant to an independent and adequate
9 state procedural rule, federal habeas review of the claim is barred unless the prisoner can
10 demonstrate cause for the default and actual prejudice as a result of the alleged violation of
11 federal law, or demonstrate that failure to consider the claims will result in a fundamental
12 miscarriage of justice. *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). An adequate rule is one
13 that is "firmly established and regularly followed." *Id.* (quoting *Ford v. Georgia*, 498 U.S. 411,
14 423-24 (1991)); *Bennett v. Mueller*, 322 F.3d 573, 583 (9th Cir. 2003). An independent rule is
15 one that is not "interwoven with federal law." *Park v. California*, 202 F.3d 1146, 1152 (9th Cir.
16 2000) (quoting *Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983)). Not having addressed this
17 issue in his traverse, Petitioner did not establish grounds for this Court to hear the petition despite
18 the state court’s determination.

19 The court of appeal added that even if this claim were not procedurally defaulted,
20 Petitioner could not prevail under applicable California law. As previously stated, this Court is
21 bound by the state court’s determination of state law. *Bradshaw*, 546 U.S. at 76; *Estelle*, 502
22 U.S. at 71-72. “The fact that a jury instruction violates state law is not, by itself, a basis for
23 federal habeas corpus relief.” *Clark*, 450 F.3d at 904.

24 **V. Walker’s Opinion Testimony**⁷

25 As his third ground for habeas relief, Petitioner contends that the trial court erred in
26 admitting the testimony of Walker, a lay witness, that Petitioner’s physical movements signaled

27 ⁷ Petitioner’s heading of this claim, “Exclusion of Eva Miron’s Extrajudicial Statement,” appears to be an error since
28 the context of the claim solely concerns Walker’s testimony. No one named “Eva Miron” testified at Petitioner’s
trial.

1 his confederate to attack. Petitioner contends that since Walker was not an expert witness, the
2 trial court should not have admitted his testimony of what he thought Petitioner and his
3 confederate were doing.

4 After Walker testified that he had stopped his truck to avoid striking Petitioner, who was
5 standing in the street, direct examination continued:

6 Q. Now what was the—what was [Petitioner] doing at that
7 point?

8 A. He was still standing near the right headlight of my vehicle
9 and started to turn over his right shoulder and made kind of a heads
up, kind of a nodding affirmation to the person on the sidewalk.

10 Q. Did that cause you concern?

11 A. It did. It caused me great concern.

12 Q. Why?

13 A. As a police officer I train in the use of force and firearms
14 training and defense tactics. I believed I was being set up for an
attack.

15 RT295-RT296.

16 Both defense counsel objected (without articulating the grounds of the objection on the
17 record). The trial court overruled the objection. The court of appeal found that Walker testified
18 as a percipient witness whose “lay opinion testimony, based on his personal knowledge and
19 experience of the situation, was admissible to describe his interpretation of defendant’s subtle
20 physical movements.” Doc. 22-1 at 31. *See* Evid.R. §§ 702 and 800.

21 Issues regarding the admission of evidence are matters of state law, generally outside the
22 purview of a federal habeas court. *Holley v. Yarborough*, 568 F.3d 1091, 1101 (9th Cir. 2009).
23 “The admission of evidence does not provide a basis for habeas relief unless it rendered the trial
24 fundamentally unfair in violation of due process.” *Johnson v. Sublett*, 63 F.3d 926, 930 (9th Cir.
25 1995). “[T]he Due Process Clause does not permit the federal courts to engage in a finely tuned
26 review of the wisdom of state evidentiary rules.” *Marshall v. Lonberger*, 459 U.S. 422, 438 n. 6
27 (1983). “Although the [U.S. Supreme] Court has been clear that a writ should be issued when
28 constitutional errors have rendered the trial fundamentally unfair, see *Williams*, 529 U.S. at

1 375 . . . , it has not yet made a clear ruling that admission of irrelevant or overtly prejudicial
2 evidence constitutes a due process violation sufficient to warrant issuance of the writ." *Holley*,
3 568 F.3d at 1101. Since the state appellate court's disposition of Petitioner's appeal was not
4 contrary to or an unreasonable application of Supreme Court precedent, a federal district court
5 may not grant the writ based on the trial court's admission of Walker's testimony.

6 **VI. Due Process: Insufficient Evidence**

7 In his fourth and fifth grounds for habeas relief, Petitioner contends that his convictions
8 for (A) attempted murder and (B) shooting into an occupied vehicle should be reversed for
9 insufficiency of the evidence. Respondent disagrees.

10 **A. Standard for Reviewing Insufficient Evidence**

11 To determine whether the evidence supporting a conviction is so insufficient that it
12 violates the constitutional guarantee of due process of law, a court evaluating a habeas petition
13 must carefully review the record to determine whether a rational trier of fact could have found the
14 essential elements of the offense beyond a reasonable doubt. *Jackson*, 443 U.S. at 319; *Windham*
15 *v. Merkle*, 163 F.3d 1092, 1101 (9th Cir. 1998). It must consider the evidence in the light most
16 favorable to the prosecution, assuming that the trier of fact weighed the evidence, resolved
17 conflicting evidence, and drew reasonable inferences from the facts in the manner that most
18 supports the verdict. *Jackson*, 443 U.S. at 319; *Jones v. Wood*, 114 F.3d 1002, 1008 (9th Cir.
19 1997). The relevant inquiry is not whether the evidence excludes every hypothesis except guilt,
20 but whether the trier of fact could reasonably have reached its verdict. *United States v. Mares*,
21 940 F.2d 455, 458 (9th Cir. 1991).

22 **B. Sufficiency of Evidence of Attempted Murder**

23 "Murder is the unlawful killing of a human being, . . . with malice aforethought." Cal.
24 Penal Code § 187(a). An attempt occurs when a person attempts to commit a crime, but fails, or
25 is prevented or intercepted in its perpetration. Cal. Penal Code § 664. Petitioner contends that no
26 substantial evidence supported a finding that he had the requisite intent to kill Walker.

27 ///

28 ///

1 **1. State Court Decision**

2 The California Court of Appeals rejected Petitioner’s contention that no evidence was
3 presented that Petitioner “actually knew the gunman intended to kill Walker—or that [Petitioner]
4 shared that intent.” Doc. 22-1 at 17.

5 To the contrary, there was very strong circumstantial evidence to
6 support his conviction as an aider and abettor of attempted murder,
7 and that he had knowledge of the gunman’s criminal purpose and
8 intended to facilitate the gunman’s intent to kill. [Petitioner] and
9 Olvera were together at Vargas’s apartment in the hours before the
10 shooting. When Walker saw [Petitioner] and Olvera, they were
11 walking together out of the alley. The alley was in the general
12 vicinity of Vargas’s apartment. As they approached Park Avenue,
13 Olvera stopped on the sidewalk while [Petitioner] slowed his gait,
14 walked at an angle into the street, and stopped in front of Walker’s
15 truck in order to impede his travel. As [Petitioner] remained in
16 front of Walker’s truck, Olvera asked if Walker had a cigarette.
17 Within seconds, [Petitioner] used his head and body, and he moved
18 or gestured toward Olvera’s position on the sidewalk. [Petitioner]
19 remained in front of Walker’s truck as gunshots rang out from
20 Walker’s left side. The first gunshot, which was fired as Walker
21 was trying to drive around [Petitioner], hit the driver’s side door,
22 just above the door handle and below the open driver’s window.
23 The other gunshots hit the left side of the truck, shattered the
24 driver’s side mirror, and narrowly missed Walker as he finally
25 maneuvered around [Petitioner] and drove away.

26 There is strong circumstantial evidence that [Petitioner’s] conduct
27 was part of an orchestrated scheme to intentionally stop the vehicle,
28 take the driver by surprise, divert his attention, impede his ability to
drive away, and keep him within easy range of the gunman, who
was clearly standing on the left side of Walker’s truck. The nature
and location of the first shot, fired directly at the driver’s door and
which narrowly missed Walker, provides further circumstantial
evidence that the gunman intended to kill the driver and the
[Petitioner] was part of the plan to keep the driver in harm’s way
until their specific intent to kill was accomplished.

[Petitioner] concedes that his conduct of stopping in front of
Walker’s truck and impeding its path could be interpreted as
encouraging “some criminal action” by a waiting gunman.
However, [Petitioner] argues it would have been illogical for him to
stay in the “line of fire” in front of Walker’s truck while the
gunman fired at the vehicle from the left side. To the contrary,
[Petitioner’s] purposeful conduct of stopping in front of the right
headlight of Walker’s truck, and his continued presence in that
position as shots were fired, raises the strong inference that
[Petitioner] knew exactly how and where the gunman was going to
open fire from the left side—that the gunshots were being aimed
directly at the driver of the truck and not wildly in the general
vicinity of the vehicle. There is no evidence that [Petitioner] ran or
got out of the line of fire when the shooting started. Walker

1 believed that [Petitioner] was still standing in front of his truck, and
2 he had to maneuver his vehicle to the left side to avoid [Petitioner]
3 and escape as the shots continued to be fired at his truck.
[Petitioner's] conduct undermined any inference that he was
surprised or confused by the gunman's actions.

4 [Petitioner] further argues there was no evidence of [Petitioner's]
5 motive to kill Officer Walker, given the absence of evidence that
6 [Petitioner] and/or Olvera recognized Walker as an officer. While
7 there was no evidence on that particular point, there was substantial
8 evidence that [Petitioner] and Olvera acted in concert and according
9 to a plan to stop a vehicle in the early morning hours, when there
10 were few people or vehicles on the street, and kill the vehicle's
11 driver. It was presumably happenstance that the driver was a law
12 enforcement officer and reacted so quickly to the dangerous
13 situation.

14 Doc. 22-1 at 16-18.

15 **2. Evidence of Petitioner's Knowledge or Intent**

16 Petitioner contends only that "[t]here was no substantial evidence to support a reasonable
17 conclusion that Petitioner intended to kill Walker; knew that codefendant intended to shoot and
18 kill him; or even knew that codefendant had a gun." Doc. 1 at 23. The federal petition includes
19 no specific contentions, such as those presented to the state court (i.e., positioning in front of
20 Walker's truck or gesturing to the gunman).

21 Considering the evidence in the light most favorable to the prosecution, as *Jackson*
22 requires, the Court agrees with the state court's conclusion that sufficient circumstantial evidence
23 could support the conclusion that Petitioner and his confederate planned to distract and murder a
24 random motorist. Because the jury could reasonably have concluded that Petitioner aided and
25 abetted his confederate by blocking Walker's path of travel, Petitioner's due process rights were
26 not violated by the attempted murder conviction.

27 **C. Sufficiency of Evidence of Shooting into Occupied Vehicle**

28 "Any person who shall maliciously and willfully discharge a firearm at an . . . occupied
motor vehicle . . . is guilty of a felony." Cal. Penal Code § 246. Petitioner contends that "[t]here
was insufficient evidence that Petitioner knew that codefendant Olvera possessed a gun and
intended to shoot it." Doc. 1 at 23.

///

1 **1. State Court Decision**

2 Referring to its analysis of the sufficiency of the evidence to support an attempted murder
3 conviction, the Court of Appeals wrote:

4 Section 246 states that “[a]ny person who shall maliciously and
5 willfully discharge a firearm at an . . . occupied motor vehicle . . .
6 is guilty of a felony . . .” “Section 246 is a general intent crime.
7 [Citation.] As such, the term ‘maliciously’ in section 246 is defined
8 by section 7, item 4, as ‘a wish to vex, annoy, or injure another
9 person, or an intent to do a wrongful act, established either by proof
10 or presumption of law.’” (*People v. Watie* (2002) 100 Cal.App.4th
11 866, 879.)

12 The offense of shooting at any occupied vehicle can be committed
13 without personally using a firearm, i.e., when the defendant has
14 aided and abetted the gunman. (*People v. Blackburn* (1999) 72
15 Cal.App.4th 1520, 1531.) “[A] person aids and abets the
16 commission of a crime when he or she, acting with (1) knowledge
17 of the unlawful purpose of the perpetrator; and (2) the intent or
18 purpose of committing, encouraging, or facilitating the commission
19 of the offense, (3) by act or advice aids, promotes, encourages, or
20 instigates, the commission of the crime.” (*People v. Beeman* (1984)
21 35 Cal.3d 547, 561.)

22 As explained in section 1, *post*, there is strong circumstantial
23 evidence that [Petitioner] acted as part of a concerted plan to stop a
24 vehicle and impede its path, so that the gunman could open fire on
25 the driver. There is no evidence that [Petitioner] was surprised by
26 the gunfire. Instead, [Petitioner] signaled to someone on the left
27 side of Walker’s truck, and [Petitioner] remained in front of
28 Walker’s vehicle as the shots were fired directly at the driver’s
door.

Doc. 22-1 at 18-19.

2. Evidence of Petitioner’s Intent

In a single paragraph, the petition refers to ground four (sufficiency of the evidence of attempted murder) and asserts that insufficient evidence supported Petitioner’s conviction for aiding and abetting the gunman’s shooting into the driver’s side of Walker’s truck.

Again evaluating the evidence in the light most favorable to the prosecution, the Court agrees with the state court’s conclusion that sufficient circumstantial evidence could support the conclusion that Petitioner and his confederate planned to distract and murder a random motorist, including shooting into his or her occupied vehicle. Because the jury could reasonably have concluded that Petitioner aided and abetted his confederate by blocking Walker’s path of travel,

1 Petitioner's due process rights were not violated by the conviction for shooting into an occupied
2 vehicle.

3 **VII. Hypothetical Question to Gang Expert**

4 As his sixth ground for relief, Petitioner contends the hypothetical question presented to
5 the expert witness on street gangs violated the holding of *People v. Vang*, 52 Cal.4th 1038 (2011).
6 As a result, Petitioner claims violations off his rights to trial by jury, fair trial, and due process as
7 set forth in the Fifth, Sixth, and Fourteenth Amendments to the Constitution. Respondent
8 counters that because the U.S. Supreme Court has never addressed this issue, no clearly
9 established federal law governs this issue, and AEDPA precludes federal review. *See* 28 U.S.C. §
10 2254(d)(1).

11 As previously stated, federal habeas courts presume that state courts know and follow the
12 law. *Woodford*, 537 U.S. at 24. The petitioner has the burden of establishing that the decision of
13 the state court is contrary to, or involved an unreasonable application of, United States Supreme
14 Court precedent. *Baylor*, 94 F.3d at 1325. In this claim, Petitioner does no more than allege that
15 the state court erroneously applied state law.

16 The Antiterrorism and Effective Death Penalty Act ("AEDPA") imposes "a highly
17 deferential standard for evaluating state-court rulings," requiring "that state-court decisions be
18 given the benefit of the doubt." *Woodford*, 537 U.S. at 24 (quoting *Lindh*, 521 U.S. at 333 n. 7.
19 "[F]ederal habeas corpus relief does not lie for errors of state law." *Estelle*, 502 U.S. at 67
20 (*citations omitted*). This claim implicates only the provisions of California state law. As such, it
21 is not properly addressed as a federal habeas claim.

22 **VIII. Sentencing Error**

23 Finally, in ground seven, Petitioner contends that the state court erred in sentencing
24 Petitioner to a two-year concurrent sentence for active gang participation (count 3). Respondent's
25 answer does not address this claim.

26 After reviewing the provisions of Cal. Penal Code § 654 and California cases applying
27 that statute, the state court rejected Petitioner's contention that all three counts relied on the same
28 objective and intent. Under California law, participation in a criminal street gang is a separate

1 offense that requires only that the defendant have the intent and objective to participate in the
2 gang, even if he or she did not have the personal intent to commit the other specific felony
3 offenses charged.

4 Ground seven implicates only the provisions of California state law. As such, it is not
5 properly addressed as a federal habeas claim.

6 **IX. Certificate of Appealability**

7 A petitioner seeking a writ of habeas corpus has no absolute entitlement to appeal a district
8 court's denial of his petition, but may only appeal in certain circumstances. *Miller-El v. Cockrell*,
9 537 U.S. 322, 335-36 (2003). The controlling statute in determining whether to issue a certificate
10 of appealability is 28 U.S.C. § 2253, which provides:

11 (a) In a habeas corpus proceeding or a proceeding under section 2255
12 before a district judge, the final order shall be subject to review, on appeal, by
13 the court of appeals for the circuit in which the proceeding is held.

14 (b) There shall be no right of appeal from a final order in a proceeding
15 to test the validity of a warrant to remove to another district or place for
16 commitment or trial a person charged with a criminal offense against the
17 United States, or to test the validity of such person's detention pending
18 removal proceedings.

19 (c) (1) Unless a circuit justice or judge issues a certificate of
20 appealability, an appeal may not be taken to the court of appeals from—

21 (A) the final order in a habeas corpus proceeding in which the
22 detention complained of arises out of process issued by a State court; or

23 (B) the final order in a proceeding under section 2255.

24 (2) A certificate of appealability may issue under paragraph (1)
25 only if the applicant has made a substantial showing of the denial of a
26 constitutional right.

27 (3) The certificate of appealability under paragraph (1) shall
28 indicate which specific issues or issues satisfy the showing required by
paragraph (2).

If a court denies a habeas petition, the court may only issue a certificate of appealability
"if jurists of reason could disagree with the district court's resolution of his constitutional claims

1 or that jurists could conclude the issues presented are adequate to deserve encouragement to
2 proceed further." *Miller-El*, 537 U.S. at 327; *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

3 Although the petitioner is not required to prove the merits of his case, he must demonstrate
4 "something more than the absence of frivolity or the existence of mere good faith on his . . .
5 part." *Miller-El*, 537 U.S. at 338.

6
7 Reasonable jurists would not find the Court's determination that Petitioner is not entitled
8 to federal habeas corpus relief debatable, wrong, or deserving of encouragement to proceed
9 further. Accordingly, the undersigned recommends that the Court decline to issue a certificate of
10 appealability.

11 **X. Conclusion and Recommendations**

12 The undersigned recommends that the Court deny the Petition for writ of habeas corpus
13 with prejudice and decline to issue a certificate of appealability.

14
15 These Findings and Recommendations will be submitted to the United States District
16 Judge assigned to the case, pursuant to the provisions of 28 U.S.C § 636(b)(1). Within **thirty**
17 **(30) days** after being served with these Findings and Recommendations, either party may file
18 written objections with the Court. The document should be captioned "Objections to Magistrate
19 Judge's Findings and Recommendations." Replies to the objections, if any, shall be served and
20 filed within **fourteen (14) days** after service of the objections. The parties are advised that failure
21 to file objections within the specified time may constitute waiver of the right to appeal the District
22 Court's order. *Wilkerson v. Wheeler*, 772 F.3d 834, 839 ((9th Cir. 2014) (citing *Baxter v.*
23 *Sullivan*, 923 F.2d 1391, 1394 (9th Cir. 1991)).

24
25
26 IT IS SO ORDERED.

27 Dated: March 18, 2016

/s/ Sheila K. Oberto
UNITED STATES MAGISTRATE JUDGE