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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

JING HUA WU,

No. C 17-2036 WHA (PR)

Petitioner,

**ORDER DENYING PETITION FOR
WRIT OF HABEAS CORPUS;
DENYING CERTIFICATE OF
APPEALABILITY**

v.

JAMES ROBERTSON,

Respondent.

INTRODUCTION

Petitioner, a California prisoner proceeding pro se, filed this action for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 challenging his conviction in state court. The judge previously assigned to this case stayed it to allow petitioner time to exhaust additional claims. After he did, and filed an amended petition, she recused herself, and the case was reassigned. Respondent filed an answer following an order show cause, and after receiving an extension of time, petitioner filed a traverse. For the reasons discussed below, the petition is **DENIED**.

STATEMENT

I. PROCEDURAL BACKGROUND

In November 2008, prosecutors charged petitioner in Santa Clara County Superior Court with three counts of murder and related sentence enhancements. Petitioner pled not guilty and not guilty by reason of insanity. A jury found him guilty of three counts of first-degree murder and found sentence enhancements true for the use of a firearms and for the special circumstance of multiple murders. At a separate phase, the same jury found petitioner sane on all counts. On August 2, 2013, the trial court sentenced him to a term of life without the possibility of parole,

1 consecutive to a term of 75-years-to-life, in state prison.

2 The California Court of Appeal rejected his appeal in a reasoned opinion, and the
3 California Supreme Court summarily denied his petition for direct review. Petitioner then filed
4 the instant federal petition. While this petition was pending, petitioner filed a habeas petition in
5 the superior court raising new claims that he had not brought on direct appeal. The superior
6 court denied the petition in an explained opinion. Later, the California Court of Appeal and
7 then the California Supreme Court summarily denied similar petitions. Thereafter, petitioner
8 filed an amended federal petition, which is the operative petition, with the following claims: (1)
9 the trial court violated his right to due process by failing to instruct the jury on the element of
10 heat of passion in second-degree murder and by misleading the jury on heat of passion
11 voluntary manslaughter; (2) the trial court violated state and federal law by allowing a
12 prosecution expert to administer a personality test upon him without ruling that the test bore a
13 reasonable relation to his mental state; (3) the prosecutor made improper comments during
14 closing argument at the sanity phase of his trial; (4) the state court made an unreasonable
15 determination of two “factual issues;” (5) the trial court violated his constitutional rights by
16 denying his claim of jury misconduct and making errors in its hearing on the issue; (6)
17 prosecutor committed misconduct by presenting false evidence; (7) he received ineffective
18 assistance of trial counsel; (8) he received ineffective assistance of appellate counsel; (9) the
19 cumulative effect of the foregoing errors violated his right to due process.

20 II. FACTUAL BACKGROUND

21 From 2006 to 2008, petitioner worked as an engineer at SiPort, Inc., a designer of
22 computer chips in Santa Clara, California. On the morning of November 14, 2008, Vice
23 President Brian Pugh and Office Manager Marilyn Lewis met with petitioner and fired him.
24 According to an email from Pugh, after Lewis left the room, petitioner told him, “You will pay
25 for this. You will see. I wish you go to hell. You will not escape from earth.” Petitioner denied
26 saying this.

27 Petitioner asked to meet with the Chief Executive Officer Sid Agrewal and an
28 engineering supervisor. When they met, Agrewal agreed to allow petitioner to work as a

1 consultant for three months, but petitioner did not believe him. Petitioner returned to his desk,
2 and after lunch, he left to buy fifty rounds of ammunition for a gun he had recently bought. He
3 returned to the office that afternoon, and a short while later he went to Agrewal's office.
4 Agrewal and Pugh were meeting, and Lewis followed petitioner into the office. After a short
5 verbal exchange, petitioner fired six shots and killed Agrewal, Pugh and Lewis.

6 After hearing the shots, the other SiPort employees left the offices. Petitioner then left,
7 called his wife to tell her she would have to take care of their children, and went to the bank
8 where he deposited a check and withdrew \$2000 in cash. He drove away, parked, and spent the
9 night in his car. The next day, he called his wife the next day, and the police found and arrested
10 him.

11 Petitioner testified that he intended to kill himself in the SiPort offices when he returned
12 after lunch with the gun and ammunition. He further testified that while in Agrewal's office, he
13 fired the first shot accidentally and did not remember firing the other shots. He testified that he
14 was in a trance and suffering flashbacks to trauma suffered as a child being raised in China
15 during the Great Famine and Cultural Revolution.

16 A number of mental health experts testified at trial. The defense experts examined
17 plaintiff and found that he suffered major depression, and that the stress of financial worries
18 from real estate losses, raising small children, and losing his job caused a psychotic break such
19 that he was not sane at the time of the shooting. The experts for the prosecution found that
20 petitioner suffered normal depression, was malingering, and was legally sane when he killed the
21 victims. The trial court appointed two additional experts who split on this issue: one concluded
22 that petitioner suffered a disassociative disorder that caused plaintiff not to understand what was
23 happening and made him legally insane at the time of the shooting, rendering him legally
24 insane, but the second expert found that he was sane and did not have a psychotic break or
25 disassociative disorder at the time of the shooting.

26 ANALYSIS

27 I. STANDARD OF REVIEW

28 Pursuant to the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), a

1 federal court may entertain a petition for writ of habeas corpus "in behalf of a person in custody
2 pursuant to the judgment of a State court only on the ground that he is in custody in violation of
3 the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). The petition
4 may not be granted with respect to any claim adjudicated on the merits in state court unless the
5 state court's adjudication of the claim: "(1) resulted in a decision that was contrary to, or
6 involved an unreasonable application of, clearly established Federal law, as determined by the
7 Supreme Court of the United States; or (2) resulted in a decision that was based on an
8 unreasonable determination of the facts in light of the evidence presented in the State court
9 proceeding." 28 U.S.C. § 2254(d).

10 "Under the 'contrary to' clause, a federal habeas court may grant the writ if the state
11 court arrives at a conclusion opposite to that reached by [the United States Supreme] Court on a
12 question of law or if the state court decides a case differently than [the] Court has on a set of
13 materially indistinguishable facts." *Williams (Terry) v. Taylor*, 529 U.S. 362, 412-13 (2000).

14 "Under the 'unreasonable application' clause, a federal habeas court may grant the writ if the
15 state court identifies the correct governing legal principle from [the] Court's decisions but
16 unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 413. "[A] federal
17 habeas court may not issue the writ simply because that court concludes in its independent
18 judgment that the relevant state-court decision applied clearly established federal law
19 erroneously or incorrectly. Rather, that application must also be unreasonable." *Id.* at 411. A
20 federal habeas court making the "unreasonable application" inquiry should ask whether the state
21 court's application of clearly established federal law was "objectively unreasonable." *Id.* at 409.

22 When there is no reasoned opinion from the highest state court to consider the
23 petitioner's claims, the federal habeas court looks to the last reasoned opinion from the state
24 courts. *See Wilson v. Sellers*, 138 S. Ct. 1188, 1192 (2018). When the state court has rejected a
25 claim on the merits without explanation, this court "must determine what arguments or theories
26 supported or . . . could have supported, the state court's decision; and then it must ask whether it
27 is possible fairminded jurists could disagree that those arguments or theories are inconsistent
28 with the holding in a prior decision of [the U.S. Supreme] Court." *Harrington v. Richter*, 562

1 U.S. 86, 102 (2011).

2 II. CLAIMS FOR RELIEF

3 1. Jury Instructions

4 Petitioner claims that the trial court violated his due process rights by failing to instruct
5 the jury on the element of heat of passion for second-degree murder and by misleading the jury
6 regarding heat of passion voluntary manslaughter (ECF No. 26-2 at 5).

7 To obtain federal collateral relief for errors in the jury charge, a petitioner must show
8 that the ailing instruction so infected the entire trial that the resulting conviction violates due
9 process. *Estelle v. McGuire*, 502 U.S. 62, 71-72 (1991). The instruction may not be judged in
10 artificial isolation, but must be considered in the context of the instructions as a whole and the
11 trial record. *Ibid*. In other words, the court must evaluate jury instructions in the context of the
12 overall charge to the jury as a component of the entire trial process. *United States v. Frady*, 456
13 U.S. 152, 169 (1982).

14 In addition to the standard instructions on murder, first-degree murder, and
15 manslaughter, the trial court issued the standard instruction on provocation, which informed the
16 jury that a provocation could reduce first-degree murder to second-degree murder, or it could
17 reduce murder to manslaughter. A later instruction on voluntary manslaughter explained that
18 provocation could result in voluntary manslaughter done in the heat of passion, but such a
19 provocation had to be objectively reasonable. Petitioner argues that these instructions did not
20 convey that murder in the heat of passion would be second-degree murder, and that they misled
21 the jury that provocation had to be objectively reasonable to reduce first-degree murder to
22 second-degree murder, like the objectively reasonable provocation necessary to find heat of
23 passion voluntary manslaughter.

24 The California Court of Appeal denied this claim based upon the following reasoning:

25 Defendant contends the trial court failed to instruct the jury on “the
26 elements of heat of passion second degree murder.” We disagree. First, the trial
27 court properly instructed the jury using CALCRIM No. 520 on express malice
28 murder in the first or second degree. Second, the trial court properly instructed the
jury using CALCRIM No. 521 that first degree murder (apart from lying in wait)
requires premeditation and deliberation, which the instruction defined in detail.
Third, the trial court properly instructed the jury using CALCRIM No. 522 that
provocation could reduce first degree murder to second degree murder. These

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instructions set forth the law that would have allowed the jury to find second degree murder on the ground that provocation had negated the existence of premeditation or deliberation. (*People v. Jones* (2014) 223 Cal.App.4th 995, 1001 (*Jones*) [no error in giving CALCRIM Nos. 521 and 522].)

Defendant contends the trial court failed to distinguish “heat of passion second degree murder” from voluntary manslaughter under heat of passion. We disagree. The trial court properly instructed the jury using CALCRIM No. 570 on the elements of heat of passion required to reduce murder to voluntary manslaughter. The court gave this instruction separately from the instruction on the possibility of provocation reducing first degree murder to second degree murder. Nothing in either of these instructions told the jury that the provocation necessary to reduce first degree murder to second degree murder required a finding that such provocation would have caused an ordinary person to react in a certain way.

The crux of defendant’s argument is that the jury could have been misled into thinking that only an objectively reasonable type of provocation would have sufficed to reduce first degree murder to second degree murder. While CALCRIM No. 522—to distinguish it from the provocation necessary for voluntary manslaughter under heat of passion—could have explicitly instructed the jury that provocation sufficient to negate premeditation or deliberation need not be objectively reasonable, any ambiguity in this regard was harmless, as it was not reasonably likely the jury was confused on this point. The voluntary manslaughter under heat of passion instruction made clear that the “objectively reasonable” requirement for provocation was an element of voluntary manslaughter under heat of passion. And the trial court never used the phrase “heat of passion” in connection with the second degree murder instructions. Furthermore, the prosecution, in closing argument, distinguished the level of provocation required for voluntary manslaughter under heat of passion from that necessary to reduce first degree murder to second degree murder. Therefore, there was no danger the jury would have confused these distinct requirements.

Defendant acknowledges that his arguments were rejected by the Second District Court of Appeal in *Jones, supra*, 223 Cal.App.4th 995. (See also *People v. Hernandez, supra*, 183 Cal.App.4th at p. 1335 [approving of CALCRIM No. 522].) He contends *Jones* was wrongly decided. We disagree. We find *Jones* persuasive and we adopt its holding as to this claim.

The California Court of Appeal reasonably applied of federal law in concluding that the instructions as a whole adequately conveyed the element of second-degree murder. The trial court instructed the jury on the elements of murder, and on the elements of the two theories of first-degree murder at issue: premeditated murder and lying-in-wait. The instructions were also clear that if the jury found that petitioner had committed murder (i.e. because he acted with malice), but not first-degree murder, it had to find second-degree murder. There is no dispute that these were correct statements of California law. Under these instructions, the jury would know that a murder committed in the heat of passion would be murder in the second-degree, provided that there was malice but the heat of passion negated of premeditation and lying in

1 wait. The provocation instruction further informed the jury that a provocation could be what
2 negated premeditation or lying in wait because such provocation could reduce murder from first
3 to second degree. The state court reasonably concluded that the instructions properly informed
4 the jury of California law regarding how heat of passion could lead to a verdict of second-
5 degree murder.

6 The state court also reasonably concluded that the instructions did not mislead the jury
7 regarding the type of type of provocation necessary to reduce murder to second-degree or to
8 reduce murder to manslaughter. The trial court instructed the jury that provocation must be
9 objectively reasonable to reduce murder to manslaughter; no instruction stated that provocation
10 must similarly objectively reasonable to reduce murder from first to second degree. There is no
11 dispute that was a correct statement of California law. Petitioner’s concern that the jury may
12 have thought that provocation also had to be objectively reasonable in order to reduce first-
13 degree murder to second-degree murder is unfounded. The instructions never made or implied
14 such a requirement in the context of murder, and the instruction on the objective standard for
15 provocation explicitly stated that it applied to voluntary heat of passion manslaughter. There
16 are no grounds to assume that the jury also read into such instructions an additional requirement
17 that the objective standard for provocation also applied to second-degree murder.

18 The state court’s decision reasonably applied federal law in denying petitioner’s claim
19 that the jury instructions misstated state law or were misleading so as to violate petitioner’s
20 right to due process. Therefore, petitioner may not obtain federal habeas relief on this claim.

21 2. Administration of Personality Test

22 Petitioner claims that the trial court violated California Penal Code § 1054.3(b)(1)(B) by
23 allowing a prosecution expert, Dr. Mohandie, to administer the Minnesota Multiphasic
24 Personality Inventory - II (“MMPI - 2”) without finding that the test bore a reasonable relation
25 to petitioner’s mental state (ECF 26-2 at 11). He also claims that this error was of
26 “constitutional magnitude.” He further claims that the state court’s ruling allowing the expert to
27 perform the test and to testify about its results was an unreasonable determination of the facts
28 under 28 U.S.C. § 2254(d)(2).

1 Petitioner’s state law argument fails both because failure to comply with state law is
2 neither a necessary nor a sufficient basis for granting federal habeas relief, *see Henry v. Kernan*,
3 197 F.3d 1021, 1031 (9th Cir. 1999), and because the state appellate court’s ruling that the trial
4 court did not violate state law is binding in on federal habeas review, *see Mendez v. Small*, 298
5 F.3d 1154, 1158 (9th Cir. 2002). The claimed violation of California Penal Code §
6 1054.3(b)(1)(B) does not afford petitioner grounds for federal habeas relief.

7 Petitioner’s argument that the trial court’s asserted violation of state law is of
8 “constitutional dimension” also does not present grounds for relief because allowing the expert
9 to administer the test and admitting its results was neither “contrary to nor an unreasonable
10 application of clearly established Supreme Court precedent” under 28 U.S.C. § 2254(d)(1).
11 Petitioner cites no Supreme Court precedent, nor is any apparent, that an expert’s administration
12 of a mental health test on its own implicates a defendant’s right to due process or other
13 constitutional right. As to admitting the test results into evidence, the defense had the
14 opportunity to cross-examine the expert on such results, the test was not a major part of his
15 testimony that petitioner was sane, and petitioner presented his own experts that he was insane.
16 In any event, the Supreme Court “has not yet made a clear ruling that admission of irrelevant or
17 overtly prejudicial evidence constitutes a due process violation sufficient to warrant issuance of
18 the writ.” *Holley v. Yarborough*, 568 F.3d 1091, 1101 (9th Cir. 2009). Because there is no such
19 Supreme Court case, the admission of the test results was not contrary to or an unreasonable
20 application of Supreme Court precedent and cannot be grounds for federal habeas relief under
21 section 2254(d)(1). *See Zapien v. Martel*, 849 F.3d 787, 794 (9th Cir. 2016) (because there is
22 no Supreme Court case establishing the fundamental unfairness of admitting inadmissible and
23 prejudicial testimony, *Holley* bars any such claim on federal habeas review). Accordingly, the
24 trial court’s allowing the expert to administer the test and admitting its results does not entitle
25 petitioner to habeas relief.

26 Petitioner is wrong that the trial court’s ruling allowing the test and admission of its
27 results was an unreasonable factual finding warranting relief under 28 U.S.C. § 2254(d)(2).
28 California Penal Code § 1054.3(b)(1)(B) required the trial court to make a threshold

1 determination that the proposed test bear “some reasonable relation to the mental state placed in
2 issue” before allowing the test to be administered or admitting its results. The reasonableness
3 of the relationship was not a matter of historical or then-existing fact, but rather a judgment or
4 conclusion applying a reasonableness standard to a set of facts. As such, it was not a factual
5 finding subject to review under 28 U.S.C. § 2254(d)(2).

6 The state courts’ rejection of this claim did not unreasonably apply federal law or rest on
7 unreasonable factual findings, and petitioner may not receive habeas relief on this claim.

8 3. Prosecutor Comments

9 Petitioner claims that the trial violated his right to due process because the prosecutor
10 made improper comments during closing argument of the sanity phase of his trial (ECF 26-2 at
11 12). Specifically, petitioner cites the prosecutor’s comments that state hospitals are “cushy,”
12 that petitioner had a “motive for being mentally ill,” and that a finding of insanity would be “a
13 slap in the face to justice.”

14 The California Court of Appeal rejected this claim on procedural grounds, not on its
15 merits. As a result, the state court’s decision does not receive deference under 28 U.S.C. §
16 2254(d), but rather review of this claim is de novo. *Pirtle v. Morgan*, 313 F.3d 1160, 1167-68
17 (9th Cir. 2002).

18 A prosecutor’s misconduct violates a defendant's due process rights when such
19 misconduct renders the trial "fundamentally unfair." *Darden v. Wainwright*, 477 U.S. 168, 181
20 (1986). The weight of the evidence against the defendant compared to the importance and
21 extent of the comments are critical factors to this determination. *See United States v. Young*,
22 470 U.S. 1, 19 (1985) (weight of evidence of guilt); *Giglio v. United States*, 405 U.S. 150, 154
23 (1972) (whether comments relate to critical part of case); *Lincoln v. Sunn*, 807 F.2d 805, 809
24 (9th Cir. 1987) (whether comments isolated or part of ongoing pattern).

25 Here, the evidence of petitioner’s sanity was strong, as measured by the evidence that he
26 premeditated, deliberated and was conscious of his wrongdoing. The sequence of his actions
27 progressed steadily from learning that he would be fired towards killing the victims: he left the
28 office, retrieved his gun, bought a large amount of ammunition, loaded his gun, put on a jacket

1 and concealed the gun before returning to his office, waited until he was inside Agrewal's
2 office, spoke to the victims, shot them at close range in the head, and checked on two of them
3 before leaving to be sure they were dead. Moreover, he showed awareness of his wrongdoing
4 when he concealed the weapon before the shooting, and then after the shooting told his wife that
5 she would have to care for their children by herself, turned off his cellphone to avoid detection,
6 spent the night in his car, and withdrew a large amount of money, which was consistent with a
7 plan to flee. This objective evidence of his deliberate actions and understanding of wrong
8 strongly outweighed the contrary evidence of his insanity, which consisted of petitioner's
9 subjective and self-serving statements and the opinions of experts largely based upon such
10 statements.

11 By contrast, the prosecutor's comments were an extremely insignificant part of her
12 closing argument. They were short and isolated phrases in a lengthy (60 transcript pages)
13 argument addressing Petitioner's burden to prove insanity, the elements of the defense, and the
14 evidence against petitioner. The comments were not part of a larger theme or theory of the
15 prosecution of the defense. In addition, the comment that petitioner believed the mental
16 hospital would be "cushy" pertained to the relevant topic of his motive to lie and possible
17 malingering, not to the impermissible topic of the conditions he would face if found insane.
18 The prosecutor's relatively insignificant comments had little impact on a trial in which there
19 was such strong evidence of petitioner's legal sanity.

20 In addition, the trial court instructed the jury specifically that it could not consider what
21 would happen to petitioner as a consequence of being found not guilty by reason of insanity,
22 including his placement in a hospital, and that the comments of attorneys are not evidence.
23 Such instructions further ensured that the prosecutor's comments did render the trial
24 fundamentally unfair. *See Greer v. Miller*, 483 U.S. 756, 766 n.8 (1987) (curative instructions);
25 *Boyde v. California*, 494 U.S. at 384; (comments of the attorneys do not carry the same weight
26 as instructions by the court).

27 Viewing the trial as a whole, the prosecutor's few, isolated comments did not so infect
28 the trial so as to violated petitioner's right to due process. For the same reasons discussed

1 above, the comments did not have a substantial and injurious effect or influence in determining
2 the jury's verdict; therefore, they did not cause the prejudice necessary to warrant habeas relief.
3 *See Brecht v. Abrahamson*, 507 U.S. 619, 637-38 (1993).

4 4. Determination of “Factual Issues” Regarding Expert Testimony

5 Petitioner claims that the state court made “unreasonable factual determinations” in two
6 instances: the false testimony by one of the prosecutor’s witnesses, Dr. Hughey; and the
7 determination that Dr. Mohandie could administer the MMPI-2 test to assess petitioner’s
8 personality.

9 *First*, the claim regarding the allegedly false statements by the Dr. Hughey is not
10 exhausted because petitioner did not fairly present it to the California Supreme Court or in any
11 state appellate court. State prisoners who wish to file a federal habeas petition must first
12 exhaust state judicial remedies, either on direct appeal or through collateral proceedings, by
13 presenting the highest state court available with a fair opportunity to rule on the merits of each
14 and every claim they seek to raise in federal court. 28 U.S.C. § 2254(b),(c). As petitioner did
15 not raise this claim in the state courts, it is not exhausted and will be stricken from the amended
16 petition. *See Rhines v. Weber*, 544 U.S. 269, 277 (2005) (when faced with a mixed petition,
17 unexhausted claims may be stricken without prejudice). If petitioner exhausts the claim, he
18 may seek to bring it in a new petition in federal court. *Second*, the purportedly false statements
19 by Dr. Hughey — discussed below regarding plaintiff’s claim of that the prosecutor presented
20 false evidence — were not factual determinations by the state courts, and thus are not reviewed
21 for unreasonableness under 28 U.S.C. § 2254(d)(2).

22 Petitioner’s claim that the trial court made unreasonable factual determinations in
23 allowing and admitting the Dr. Mohandie s administration of the MMPI-2 test is addressed and
24 denied, above.

25 5. Jury Misconduct

26 Petitioner claims that Jurors 4 and 5 prejudged the evidence and his innocence, and that
27 their statements to that effect influenced the other jurors; he also argues that the trial court
28 committed errors in its hearing on such misconduct (ECF No. 26-3 at 6-10, 26-1 at 2-17). The

1 superior court largely denied this claim for procedural reasons in an explained opinion, and the
2 California Court of Appeal and the California Supreme Court denied the claim on its merits,
3 albeit summarily.

4 The Sixth Amendment guarantees to the criminally accused a fair trial by a panel of
5 impartial jurors. U.S. Const. amend. VI. Premature deliberations can undermine such a right,
6 but they are not as serious as private communication, contact or tampering. *Davis v. Woodford*,
7 384 F.3d 628, 653 (9th Cir. 2004). “What is crucial is not that jurors keep silent with each other
8 about the case but that each juror keep an open mind until the case has been submitted to the
9 jury.” *Id.* at 653 (internal quotation and citation omitted).

10 During the sanity phase of the trial, Juror 3 alleged that Juror 5 had stated on “many
11 many” occasions that petitioner was guilty prior to submission of the case in the guilt phase,
12 and that Juror 4 had also prematurely stated that the prosecution’s expert was the only credible
13 expert. The trial court held a hearing and questioned each juror to determine whether they had
14 heard such statements from Jurors 4 and 5, questioned Jurors 4 and 5 about whether they had
15 made such statements, and questioned Juror 3 on his recollection of the specific circumstances
16 of each instance in which Jurors 4 and 5 had allegedly made such statements. Based on the
17 testimony that no other jurors had heard such statements outside of deliberations, indications
18 favoring the other jurors’ reliability over that of Juror 3 on this issue, and the lack of evidence
19 that the other jurors were in an agreement to lie about what Jurors 4 and 5 said, the trial court
20 found that Juror 3 mistakenly recollected that Jurors 4 and 5 made the alleged statements, or
21 that if they did so, they made the statements during deliberations. The trial court found that
22 Jurors 4 and 5 did not commit misconduct by improperly prematurely deliberating and did not
23 influence other jurors into doing so. In that basis, the trial court concluded that there was no
24 misconduct and the jury was not biased.

25 The record does not support overcoming the presumption of correctness afforded to the
26 trial court’s the factual findings that Jurors 4 and 5 did not make the statements about their view
27 of the case outside of deliberations, and that they did not prematurely decide the case or
28 influence other jurors to do so. *See* 28 U.S.C. § 2254(e)(1). Upon questioning, it was clear that

1 Juror 3 could only recall four instances of alleged improper statements by Juror 5. No other
2 juror recalled Jurors 4 or 5 making such statements, and some of them were “emphatic” in
3 denying such statements. By contrast, Juror 3 was late to court four times, was often fatigued,
4 once fell asleep during trial, had issues with his eyes, and had some conflict with Juror 5.
5 Petitioner has not rebutted the presumption that the trial court’s findings that the Jurors 4 and 5
6 did not prematurely decide the case or influence the other jurors into doing so. Given these
7 presumptively correct factual findings, the state courts reasonably found that the jury did not
8 commit misconduct so as to violate petitioner’s Sixth Amendment right to an unbiased jury.

9 Petitioner argues that the trial court’s hearing was deficient. Such an argument is not,
10 on its own, a basis for federal habeas relief because clearly established federal law, as
11 determined by the Supreme Court, does not require state or federal courts to hold a hearing
12 when a claim of juror bias is raised by the parties. *Tracey v. Palmateer*, 341 F.3d 1037, 1045
13 (9th Cir. 2003). A court confronted with a colorable claim of juror bias will generally conduct a
14 hearing, however, to explore the issue of juror bias and provide the defendant an opportunity to
15 prove actual bias. *See Hedlund*, 854 F.3d at 574. And so long as the fact-finding process is
16 objective and reasonably explores the issues presented, the state trial judge’s findings based on
17 that investigation are entitled to a presumption of correctness. *Id.*

18 Petitioner’s complaints about the hearing do not undermine the presumption of
19 correctness should not apply. *First*, he complains that the trial court violated California
20 Evidence Code 1150(a), (b) and Federal Rules of Evidence 606(b)(2). Federal Rule of
21 Evidence 606(b) and California Evidence Code section 1150(a) prohibit the use of juror
22 testimony to impeach a verdict when that testimony relates to intrinsic matters, i.e., the internal,
23 mental processes by which the verdict was rendered. “[L]ong-recognized and very substantial
24 concerns support the protection of jury deliberations from intrusive inquiry.” *Tanner v. United*
25 *States*, 483 U.S. 107, 127 (1987). The transcript shows that the trial court initially asked jurors
26 whether they heard statements from Jurors 4 or 5 prematurely judging petitioner’s guilt or
27 innocence, and if so whether that impacted their decision. The trial court also asked Jurors 4
28 and 5 whether they had made such statements and whether they had prematurely decided the

1 case. The transcript is clear, however, that the trial court subsequently recognized that it was
2 inappropriate to ask about the jurors' decision-making, and that the court did not rely on the
3 answers to such questions in finding no misconduct.

4 *Second*, petitioner complains that the trial court pressured jurors to report that any
5 misconduct had occurred in the deliberation room. The transcript of the hearing does not bear
6 this out, but rather shows that the trial court conducted a thorough hearing into all of the
7 allegations by Juror 3 about statements by Jurors 4 and 5. The court questioned each and every
8 juror and alternate, questioned Jurors 4 and 5 under oath, and questioned Juror 3 twice. The
9 court methodically required Juror 3 to identify each and every instance in which any other
10 jurors may have made improper statements and then asked about the surrounding
11 circumstances, the context, and which other jurors who were present. And when Juror 3 began
12 to discuss matters that occurred inside the deliberation room, the trial court admonished him not
13 to divulge such matters, in accordance with applicable law. The transcript shows no sign that
14 the trial court foreclosed any inquiry into matters outside the deliberation room in the manner
15 petitioner suggests.

16 *Third*, petitioner complains that the trial court rejected counsel's request to investigate
17 misconduct during the deliberations process and banned inquiry into what happened in the
18 deliberation room. As indicated above, such limitations were a proper application of federal
19 law prohibiting intrusive inquiry into jury deliberations. *See Tanner*, 483 U.S. at 127.

20 The state court correctly, and reasonably, denied this claim.

21 6. Prosecutorial Misconduct - False Evidence

22 Petitioner claims that the prosecutor committed misconduct in several respects:
23 presented false testimony by an expert that petitioner had threatened one of the victims prior to
24 the shooting, presented photographs of an altered crime scene, altered a transcript of petitioner's
25 prior statements and MMPI-2 answer sheet, and presented false testimony about petitioner's
26 phone calls to his wife on the day of the murders (ECF Nos. 26-3 at 10-11, 26-1 at 17-22). The
27 California Court of Appeal and California Supreme Court summarily denied this claim on the
28 merits.

1 "[A] conviction obtained by the knowing use of perjured testimony is fundamentally
2 unfair, and must be set aside if there is any reasonable likelihood that the false testimony could
3 have affected the judgment of the jury." *United States v. Agurs*, 427 U.S. 97, 103 (1976). So
4 must a conviction obtained by the presentation of false evidence. *United States v. Bagley*, 473
5 U.S. 667, 678-80 nn.8-9 (1985). Such a claim succeeds when (1) the testimony or evidence was
6 actually false, (2) the prosecution knew or should have known that the testimony or evidence
7 was actually false, and (3) the false testimony or evidence was material. *Henry v. Ryan*, 720
8 F.3d 1073, 1084 (9th Cir. 2013). Conclusory assertions will not do. *Ibid*. The materiality
9 standard requires only that "the error *could* have affected the judgment of the jury, whereas
10 ordinary harmless error review requires us to determine whether the error *would* have done so."
11 *Dow v. Virga*, 729 F.3d 1041, 1048 (9th Cir. 2013).

12 Petitioner's first claim is that the prosecutor presented "false" testimony by the witness
13 Dr. Hughey that petitioner had threatened one of the victims, Brian Pugh, on the day of the
14 murders as well as months earlier. The trial records show, however, that during his testimony,
15 Hughey admitted that he was mistaken and that petitioner had not in fact made such threats.
16 There is no evidence that the prosecutor knew that Hughey's initial testimony was inaccurate,
17 *see Reis-Campos v. Biter*, 832 F.3d 968, 977 (9th Cir. 2016) (claim that only the witness knew
18 testimony was false, and not the prosecutor, is not a valid basis for federal habeas relief), and
19 Hughey's correction of the inaccuracies ensured that it did not have any adverse effect.

20 Petitioner asserts that the police altered the crime scene, but this assertion is based on
21 inconsistencies between photographs of the scene and witness testimony as to the location of
22 bodies and furniture. Such inconsistencies do not establish that the photographs were false, as
23 opposed to the testimony, let alone that the prosecutor knew them to be false. Furthermore, the
24 jury knew about the inconsistencies because the witnesses testified as much, which allowed the
25 jury to weigh the accuracy of the photographs.

26 Petitioner claims that the prosecutor altered a portion of the transcript of his statement to
27 the police that Pugh threw a chair at him prior to the shooting to state that Pugh simply picked
28 up the chair. Pugh's throwing the chair would advance the defense argument that petitioner

1 shot the victims during a disassociative state. The record does not support petitioner's claim
2 that the prosecutor made inaccurate changes to the transcript. Petitioner represented himself for
3 a period of time before trial, and he and the prosecutor agreed to make changes to the transcript
4 to align with the video recordings. There is no evidence that the prosecutor changed the
5 transcript, as petitioner alleges, much less that she knew such a change would be false; indeed,
6 in two other places in the transcript petitioner stated that Pugh "picked up" the chair, not that he
7 threw it.

8 Petitioner claims that the prosecution expert, Dr. Mohandie, doctored the test results for
9 the MMPI-2 test by filling in some of the answers that petitioner had left blank. He does not
10 offer any evidence to support this assertion. Petitioner also claims that testimony by the police
11 officer who interviewed petitioner's wife falsely represented the timing of his three phone calls
12 to her on the day he killed the victims. This officer testified to what petitioner's wife told him,
13 however, not to his knowledge of when petitioner actually made the calls. Even if the times
14 were in fact inaccurate, there is no evidence that was due to the officer falsifying evidence
15 rather than petitioner's wife's inaccurate memory of the precise times of the calls. Most
16 importantly, petitioner offers no evidence that the prosecutor knew either that Dr. Mohandie
17 had answered the test questions falsely or that the officer falsely represented what petitioner's
18 wife told him. Moreover, all of this evidence was subject to cross-examination and the jury
19 received petitioner's account of his answers to the personality test and the times of his phone
20 calls to his wife.

21 The trial record establishes that the prosecutor did not violate petitioner's due process
22 rights by knowingly presenting false testimony or false evidence. The state courts therefore
23 correctly rejected this claim.

24 7. Ineffective Assistance of Trial Counsel

25 Petitioner contends that trial counsel provided ineffective assistance as follows: (1)
26 counsel failed to provide him a copy of the answer sheet to the MMPI-2 test prior to trial, failed
27 to inform him of Dr. Mohandie's (the prosecution expert) prior experience with the Los Angeles
28 Police Department, and was not present when petitioner took the MMPI-2 test; (2) he did not

1 elicit testimony by Hien Tram that he overheard Lewis state that she was escorting petitioner to
2 Agrewal's office just prior to the shooting; and (3) he did not rebut or seek to strike purportedly
3 altered photographs of the crime scene (ECF No. Dkt. 26-1 at 24-25).

4 In order to succeed on a claim that he has received ineffective assistance of counsel, a
5 petitioner must satisfy the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668,
6 687 (1984), which requires him to show deficient performance and prejudice. Under the
7 deficient-performance prong, a petitioner "must show that counsel's representation fell below
8 an objective standard of reasonableness." *Id.* at 688. Judicial review of the performance of
9 defense counsel must be "highly deferential," taking into account that there is a "wide range of
10 reasonable professional conduct" and a "strong presumption" that counsel's conduct fell within
11 that range. *Id.* at 689. Under the prejudice prong of the *Strickland* test, a petitioner must show
12 that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of
13 the proceeding would have been different. A reasonable probability is a probability sufficient
14 to undermine confidence in the outcome." *Id.* at 694.

15 *First*, petitioner has not established prejudice from counsel's handling of the prosecution
16 expert Dr. Mohandie. The MMPI-2 personality that Mohandie administered on petitioner was
17 not a significant basis for Mohandie's testimony that petitioner was legally sane, the defense
18 had and took the opportunity to present multiple experts to testify to petitioner's insanity, and
19 the defense took cross-examined and argue against Dr. Mohandie's conclusions. Defense
20 counsel knew about Dr. Mohandie's prior work for the police, and the jury learned of this fact at
21 trial; petitioner does not explain how his personal knowledge of this information would have
22 made any difference at trial. He also does not explain how defense counsel's presence when he
23 took the MMPI-2 test would have changed his answers or what useful evidence he would have
24 found if he had a copy of his answers before trial. Petitioner has not shown that these steps by
25 counsel would have had a reasonable likelihood of changing the verdict.

26 *Second*, there is no support in the record that defense counsel could have elicited
27 testimony from Hien Tram that Lewis escorted petitioner into Agrewal's office before the
28 shooting. The relevant police report shows no such statement by Tram. According to the

1 report, Tram simply saw Lewis walk behind petitioner into Agrewal's office, and that Tram
2 offered testified to this effect. As there is no evidence that Tram saw Lewis escort petitioner to
3 the office, defense counsel did not perform deficiently or prejudicially by failing to elicit such
4 testimony from Tram.

5 *Third*, petitioner's complaint that trial counsel did not rebut or seek to strike
6 photographs of a crime scene altered by the police fails because there is no evidence that the
7 police in fact altered the scene. As discussed above, the mere fact that witness testimony was
8 inconsistent with the photographs does not mean that the photographs were wrong or that the
9 police altered the crime scene. Moreover, the jury heard about these inconsistencies and was
10 able to decide what to believe. Petitioner has not shown that counsel acted unreasonably or
11 prejudicially with regard to the crime scene photographs.

12 Petitioner's claim for federal habeas relief on the basis of ineffective assistance of trial
13 counsel fails because the state courts reasonably applied federal law in denying this claim.

14 8. Ineffective Assistance of Appellate Counsel

15 Petitioner claims that appellate counsel was ineffective in failing to bring the above-
16 discussed claims of jury misconduct, false evidence, and ineffective assistance of trial counsel
17 (ECF No. 26-3 at 13-15; 26-1 at 27-28). For the reasons discussed, these claims are meritless.
18 Appellate counsel will frequently remain above an objective standard of competence and have
19 caused his client no prejudice for the same reason: because he declined to raise a meritless
20 issue. *Miller v. Keeney*, 882 F.2d 1428, 1434 n.10 (9th Cir. 1989). That was the case here. The
21 state courts' rejection of this claim was a reasonable application of federal law, and petitioner
22 shall not receive habeas relief on this claim.

23 9. Cumulative Error

24 Petitioner claims that the foregoing claimed errors accumulated to render the trial
25 fundamentally unfair in violation of his right to due process (ECF No. 26-3 at 13-15; 26-1 at 27-
26 28; No. 26-2 at 16). For the reasons discussed above, petitioner's claims do not establish
27 constitutional error, and there are no errors to cumulate. Accordingly, petitioner's claims of
28 cumulative error fail.

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CONCLUSION

For the foregoing reasons, the petition is **DENIED**.

A certificate of appealability will not issue because reasonable jurists would not “find the district court’s assessment of the constitutional claims debatable or wrong.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Petitioner may seek a certificate of appealability from the United States Court of Appeals.

The clerk shall enter judgment in favor of respondent, and close the file.

IT IS SO ORDERED.

Dated: September 30, 2020.



WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE