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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

JESUS BUSTAMANTE,	)	Civil No. 03-CV-276-L(CAB)
	)	
Petitioner,	)	<b>ORDER DENYING CERTIFICATE</b>
	)	<b>OF APPEALABILITY</b>
v.	)	
	)	
S. GARCIA,	)	
	)	
Respondent.	)	
_____	)	

Petitioner Jesus Bustamante filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 asserting nine claims. After full briefing, the magistrate judge entered a Report and Recommendation ("Report") under 28 U.S.C. § 636(b)(1)(B) and Civil Local Rule 72.3 that recommended the petition be denied. Petitioner timely objected to the Report with respect to his Claim 2 concerning three particular jury instructions; Claim 6 – prosecutorial misconduct; Claim 7 – ineffective assistance of trial counsel; and Claim 8 – ineffective assistance of appellate counsel. But petitioner did not object to other portions of the Report.<sup>1</sup>

<sup>1</sup> Claims to which petitioner had no objection include: Claim 1: the trial court improperly denied his motion to dismiss (*see* Objection at 1, n.1); Claim 2: the trial court improperly instructed the jury with respect to felony murder (*see* Obj. at 1 n.1, at 3, n.4) and the failure to give a pinpoint instruction on aiding and abetting (*see* Obj. at 3 n.4) but petitioner objects to the lack of a lesser included offense, accomplice and assault/aggravated assault instructions; Claim 3: the trial court failed to rule on an objection during closing argument (*see* Obj. at 3, n.4); Claim 4: the trial court improperly denied his severance motion (*see* Obj. at 3, n.4); Claim 5: the trial court was biased against him (*see* Obj. at 3, n.4); Claim 7: ineffective

1 The Court made a *de novo* determination of those portions of the report to which  
2 petitioner objected. 28 U.S.C. § 636(b)(1). After a thorough review of the entire record in this  
3 case and the parties' arguments, the Court adopted the Report in its entirety. Petitioner filed a  
4 notice of appeal on September 29, 2009. (*See* docket no. 77.) In a footnote to the notice of  
5 appeal, petitioner states that his "legal assistant is now preparing the certificate of appealability  
6 and it will be mailed forthwith as soon as completed." On October 15, 2009, petitioner  
7 requested and was granted an extension of time in which to file his application for a certificate of  
8 appealability ("COA"). [doc. #] On the date his application was due, petitioner instead filed a  
9 motion for appointment of counsel and declaration of indigency. [doc. #80]

10 Because petitioner has not filed an application for a COA within the extended time  
11 provided, the court construes petitioner's notice of appeal as a request for a certificate of  
12 appealability. *See United States v. Asrar*, 116 F.3d 1268, 1270 (9th Cir. 1997)("If no express  
13 request is made for a certificate of appealability, the notice of appeal shall be deemed to  
14 constitute a request for a certificate.").

15 **1. Standard for a COA**

16 A Certificate of Appealability ("COA") is required under 28 U.S.C. § 2253 before a  
17 petitioner can pursue an appeal. A COA will issue when the petitioner makes a "substantial  
18 showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529  
19 U.S. 473, 478 (2000) (after April 24, 1996, the right to appeal is governed by COA requirements  
20 of 28 U.S.C. § 2253(c)). When a district court has rejected constitutional claims on the merits,  
21 petitioner must show that: (1) the issues are debatable among jurists of reason; or (2) that a court  
22 could resolve the issues in a different manner; or (3) that the questions are adequate to deserve  
23 encouragement to proceed further. *Lambright v. Steward*, 220 F.3d 1022, 1024-25 (9<sup>th</sup> Cir.  
24 2000).

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27  
28 assistance of trial counsel but only to the issue of the failure to pursue the writ of mandamus (*see*  
Obj. at 11); and Claim 9: insufficiency of the evidence (*see* Obj. at 7). As to these claims, the  
Court adopted the Report and Recommendation without further review.

1 **2. Discussion**

2 **a. Jury Instructions**

3 Bustamante contends that the trial court failed to properly instruct on the elements of  
4 assault and assault with a deadly weapon (aggravated assault); to *sua sponte* instruct the jury that  
5 they could consider manslaughter as a lesser included offense; and to instruct on accomplice  
6 testimony.

7 **1. Assault/Assault with a Deadly Weapon**

8 Petitioner argued that an element of the crimes of assault and aggravated assault require  
9 the specific intent to commit a battery and because the instructions did not require the jury to  
10 find the intent to commit battery, the instructions given was a violation of his due process rights.

11 Under the Fourteenth Amendment, due process requires that “every fact necessary to  
12 constitute the crime with which [the defendant] is charged” be proved beyond a reasonable  
13 doubt. *In re Winship*, 397 U.S. 358, 364 (1970). If a trial court fails to properly instruct the jury  
14 regarding an element of the charged crime, the court commits a constitutional error that deprives  
15 the defendant of due process. *See, e.g., Conde v. Henry*, 198 F.3d 734, 740 (9th Cir. 1999).

16 Under California law, battery and assault are general intent crimes and the intent to  
17 commit battery is not an element of the crimes of assault or aggravated assault. The trial court  
18 instructed the jury on all the elements of assault and aggravated assault; therefore, the  
19 instructions did not violate petitioner’s due process rights and petitioner has not demonstrated  
20 entitlement to a COA on this claim.

21 **2. Lesser Included Offense Instruction**

22 Petitioner contended that the trial court failed to instruct, *sua sponte*, on the lesser  
23 included offense of manslaughter. There is no clearly established federal law that requires a  
24 state trial court to give a lesser included offense instruction. *See* 28 U.S.C. § 2254(d)(1); *Solis v.*  
25 *Garcia*, 219 F.3d 922, 929 (9th Cir. 2000) (*per curiam*) (in non-capital case, failure of state court  
26 to instruct on lesser included offense does not alone present a federal constitutional question  
27 cognizable in a federal habeas corpus proceeding), *cert. denied*, 534 U.S. 839 (2001); *Windham*  
28 *v. Merkle*, 163 F.3d 1092, 1106 (9th Cir. 1998) (failure of state trial court to instruct on lesser

1 included offenses in non-capital case does not present federal constitutional question), *cert.*  
2 *denied*, 541 U.S. 950 (2004)).

3 But a state court's jury instructions violate due process if they deny the criminal defendant  
4 “a meaningful opportunity to present a complete defense.” *Clark v. Brown*, 450 F.3d 898, 904  
5 (9th Cir. 2006), *cert. denied* by *Ayers v. Clark*, 549 U.S. 1027 (2006) (quoting *California v.*  
6 *Trombetta*, 467 U.S. 479, 485 (1984)).

7 Here petitioner was not denied a meaningful opportunity to present a complete defense.  
8 This issue cannot be resolved in a different manner and is not debatable among jurist of reason.  
9 Accordingly, a COA will not issue.

### 10 **3. Accomplice Instruction**

11 Petitioner complained that two witnesses were actually accomplices to the killing which  
12 required the trial court to instruct the jury to view their testimony with caution or to require  
13 corroboration to support his conviction. However, petitioner made no showing that the jury's  
14 determination would have been different had the jury been instructed that it could not rely on  
15 Truehitt's and Jacobo's testimony in the absence of corroboration. Accordingly, the lack of an  
16 accomplice instruction did not so infect petitioner's trial as to result in a violation of due process.  
17 This conclusion is not debatable among jurists of reason. Nor could a court resolve this issue in  
18 a different manner and it is not an issue that deserves encouragement to proceed further.  
19 *Lambright*, 220 F.3d at 1024-25.

#### 20 **b. Prosecutorial Misconduct**

21 Petitioner contended that his trial was fundamentally unfair based upon prosecutorial  
22 misconduct. *Darden v. Wainwright*, 477 U.S. 168, 181 (1986). Under *Darden*, the court first  
23 determines whether the prosecutor's remarks or acts were improper; if so, the next consideration  
24 is whether the conduct infected the trial with unfairness. *Tan v. Runnels*, 413 F.3d 1101, 1112  
25 (9th Cir. 2005). A prosecutorial misconduct claim is decided “on the merits, examining the  
26 entire proceedings to determine whether the prosecutor's remarks so infected the trial with  
27 unfairness as to make the resulting conviction a denial of due process.” *Johnson v. Sublett*, 63  
28 F.3d 926, 929 (9th Cir. 1995) (citation omitted).

1 As the Supreme Court has noted: “Past decisions of this Court demonstrate that the  
2 touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of  
3 the trial, not the culpability of the prosecutor.” *Smith v. Phillips*, 455 U.S. 209, 219 (1982).  
4 Prosecutorial misconduct alone does not require a new trial. *Id.* at 220. Instead, the effect on  
5 the trial is of paramount importance.

### 6 **1. Threat to defense counsel**

7 Petitioner contends that he suffered severe prejudice based upon a verbal exchange  
8 between his counsel and the prosecutor. The record does not support petitioner’s contention in  
9 any manner. The exchange cannot be properly characterized as threatening. This conclusion is  
10 not debatable and a court could not resolve this issue differently. Accordingly, petitioner has not  
11 demonstrated entitlement to a COA on this issue.

### 12 **2. Questioning of Witness Jacobo**

13 The trial court found that during the questioning of a prosecution witness the prosecutor  
14 had placed some inadmissible and potentially prejudicial information before the jury by assuming  
15 facts not in evidence, improperly characterizing prior testimony, improperly eliciting testimony  
16 about co-defendants’ statements and improperly posing a question that the prosecutor knew  
17 would elicit prejudicial hearsay. In order to find a remedy other than striking the witness’s  
18 testimony or declaring a mistrial for the prosecutor’s errors, the jury was admonished to  
19 disregard certain testimony.

20 Within the context of the entire trial, the prosecutor’s actions in questioning the state’s  
21 witness, Jacobo, did not impair the jury’s ability to render a fair and impartial verdict. The  
22 prosecutorial misconduct did not violated petitioner’s due process rights and petitioner has failed  
23 to make a showing that a COA should be granted.

### 24 **3. Failure to Provide Information Prior to Trial**

25 Petitioner contended the prosecution withheld material, exculpatory evidence by failing to  
26 disclose that a prosecution witness was a confidential informant. However delay in disclosure  
27 does not deprive an accused of due process where disclosure is made at pretrial conference, *see*  
28 *Reiger v. Christensen*, 789 F.2d 1425, 1432 (9th Cir. 1986), or during trial where the disclosure,

1 though tardy, is still of value to the accused, *see U.S. v. Vgeri*, 51 F.3d 876, 880 (9th Cir. 1995).

2 Here, the information concerning Truehitt's confidential informant status was disclosed to  
3 the defense, at the latest, during the beginning of petitioner's first trial. The Court concluded  
4 that petitioner had not shown that the delayed disclosure violated his due process rights. This  
5 conclusion is not debatable, it could not be resolved in a different manner and is not an issue  
6 deserving further attention. Accordingly, petitioner has not demonstrated an entitlement to a  
7 COA.

#### 8 **4. Vindictive prosecution**

9 Initially petitioner was arrested on a murder charge. He was released but later rearrested  
10 and charged with conspiracy to commit assault. Petitioner was prepared to enter a guilty plea to  
11 that offense at the preliminary hearing; however, the prosecutor sought permission from the  
12 court to amend the charges by adding a count of murder. The court granted the motion and  
13 consequently, petitioner was not permitted to enter a plea to the conspiracy to commit assault  
14 charge. Petitioner contended in his habeas petition that the prosecutor demonstrated vindictive  
15 prosecution by amending the charge.

16 The State court found petitioner had neither alleged or made a showing that the amended  
17 charges were based upon any impermissible ground, *e.g.*, race, religion or other arbitrary  
18 classification. In the habeas proceeding, the Court determined that the State Court conclusion  
19 was based on a reasonable determination of the facts in light of the evidence presented and was  
20 neither contrary to or involved an unreasonable application of clearly established federal law.  
21 Petitioner has not demonstrated that he is entitled to a COA on this claim.

#### 22 **5. Testimony of Sergio Jacobo & Sergio Bustamante**

23 At trial, Sergio Jacobo ("Jacobo") and petitioner's brother, Sergio Bustamante ("Sergio")  
24 testified under grants of immunity. Petitioner argued that Jacobo's testimony was coerced, and  
25 the trial court violated his due process rights by permitting the testimony. Because the threat of  
26 potential liability for the killing is not an improper inducement and raised voices do not suggest  
27 coercion, petitioner had not made a factual showing to demonstrate that Jacobo's testimony was  
28 involuntary and that its admission rendered the trial so fundamentally unfair as to violate due

1 process. This conclusion is not debatable among jurists of reason. Nor could a court resolve  
2 this issue in a different manner and it is not an issue that deserves encouragement to proceed  
3 further.

4 With respect to Sergio, defense counsel sought to exclude Sergio's testimony as  
5 involuntarily made. The trial court conducted an evidentiary hearing on the issue of  
6 voluntariness and determined that Sergio's statements were not coerced. This Court accorded  
7 this factual finding presumptively correct. Further the record is devoid of any suggestion that  
8 the detectives resorted to physical or psychological pressure to elicit Sergio's statements. As a  
9 result, the Court determined that petitioner was not entitled to habeas relief on the ground that  
10 Sergio's statements were coerced. Again, petitioner has not shown entitlement to a COA.

#### 11 **6. False Evidence**

12 Petitioner contends that the prosecutor knowingly permitted Detective Ronald Thill to lie  
13 when he testified at trial that he did not threaten Sergio Bustamante during his interview with  
14 him but petitioner did not establish that Thill's statement was false. Accordingly, the State court  
15 concluded petitioner was not denied due process based on alleged false testimony presented by  
16 the prosecutor. In the habeas proceeding, the Court found that the State Court conclusion was  
17 based on a reasonable determination of the facts in light of the evidence presented and was  
18 neither contrary to or involved an unreasonable application of clearly established federal law. A  
19 COA on this claim is not warranted in that the issue is not debatable, could not be resolved in a  
20 different manner and is not an issue that deserves encouragement to proceed further.

#### 21 **7. Improper Closing Argument**

22 Petitioner complains that the prosecutor made a variety of improper remarks in closing  
23 argument including telling the jury to credit some statements made to police but not trial  
24 testimony, mischaracterizing certain testimony, and pointing out petitioner's prior statements.

25 As discussed above, federal habeas review of prosecutorial misconduct claims is limited  
26 to the narrow issue of whether the alleged misconduct violated due process. *See Donnelly v.*  
27 *DeChristoforo*, 416 U.S. 637, 642-43 (1974). "Misconduct is reviewed in light of the entire trial  
28 record, and relief will be granted only if the misconduct infected the trial with unfairness. *See*

1 *Donnelly*, 416 U.S. at 639-43; *see also Darden*, 477 U.S. at 181; *Greer v. Miller*, 483 U.S. 756,  
2 765-66 (1987).

3 In determining whether due process was violated, the Court considers: (1) whether the  
4 prosecutor's comments manipulated or misstated the evidence; (2) whether the trial court gave a  
5 curative instruction; and (3) the weight of the evidence against the accused. *See Darden*, 477  
6 U.S. at 181-82. Here, even assuming that the prosecutor committed misconduct during his  
7 closing argument, a review of the record establishes that this misconduct did not violate due  
8 process. *See Drayden*, 232 F.3d at 713 (prosecutor engaged in misconduct by delivering closing  
9 argument in voice of the victim, but it did not so infect trial with unfairness as to violate due  
10 process).

11 The court of appeal's finding that the prosecutor's argument did not violate due process is  
12 objectively reasonable and supported by the record. In each of petitioner's contentions of  
13 misconduct, the prosecutor did not manipulate or misstate the evidence, the prosecutor's  
14 statements were supported by the evidence and reasonable inferences that could be drawn from  
15 the evidence, and the court provided proper and appropriate jury instructions concerning prior  
16 consistent or inconsistent statements, discrepancies in testimony, credibility of witness, and  
17 weighing conflicting testimony. Therefore, the state Court of Appeal's finding that the  
18 prosecutor's closing argument did not violate due process is objectively reasonable and  
19 supported by the record. This Court found that habeas relief is unavailable because there was no  
20 showing that the closing argument infected the trial with unfairness. A COA should not issue  
21 because the conclusion is not debatable, could not be resolved in a different manner and is not an  
22 issue deserving an opportunity to go forward.

23 **c. Ineffective Assistance of Trial Counsel**

24 To warrant habeas relief based upon ineffective assistance of trial counsel, petitioner must  
25 show both that counsel's representation fell below an objective standard of reasonableness and  
26 that counsel's deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S.  
27 668, 687-88 (1984). A court may reject an ineffective assistance claim upon finding either that  
28 counsel's performance was reasonable or that the alleged error was not prejudicial. *Strickland*,



1 466 U.S. at 687, 697; *United States v. Thomas*, 417 F.3d 1053, 1056 (9th Cir. 2005), *cert.*  
2 *denied*, 546 U.S. 1121 (2006). Failure to satisfy either prong of the *Strickland* test obviates the  
3 need to consider the other. *Rios v. Rocha*, 299 F.3d 796, 805 (9th Cir. 2002).

4 In his objections to the Report, petitioner stated that he “object[ed] to all aspects of  
5 Magistrate’s rejection of ineffective assistance, however, [would] only expand on the one crucial  
6 aspect which is so erroneous it needs to be fully explained.” (Obj. at 6.)

### 7 **1. Voluntary Intoxication as a Defense**

8 Petitioner contended that trial counsel was ineffective because he failed to investigate  
9 voluntary intoxication as a defense. Petitioner acknowledged that he and counsel discussed the  
10 defense of involuntary intoxication but nevertheless argues that the tactical decision was based  
11 upon counsel’s inadequate investigation of such a defense. Petitioner also states there was no  
12 rational, reasonable tactical decision not to have pursued the involuntary intoxication defense.  
13 But as discussed above in reference to a jury instruction on intoxication, such a defense would  
14 have created conflicting and irreconcilable defenses. A voluntary intoxication defense would  
15 vitiate the defense that petitioner was not involved in the killing at all. Additionally, although  
16 the record indicated that petitioner had been drinking for several days prior to and on the day of  
17 the killing, there was no evidence that petitioner was intoxicated to the point where voluntary  
18 intoxication could provide a defense.

19 A COA is not warranted in this circumstance. The state court’s decision is based on a  
20 reasonable determination of the facts in light of the evidence and petitioner did not demonstrate  
21 prejudice. The Court’s denial of habeas relief for petitioner’s claim of ineffective assistance of  
22 trial counsel is neither debatable or open for resolution in a different manner.

### 23 **2. Other Claims of Ineffective Assistance of Trial Counsel**

24 Petitioner did not provide specific objections to the magistrate judge’s Report concerning  
25 other instances of ineffective assistance of trial counsel. Instead, petitioner generally objected to  
26 the Report’s finding that counsel was not ineffective for failing to object to Jacobo and Sergio’s  
27 testimony as coerced, to object to Thill’s testimony as false, to effectively present closing  
28 argument, to request favorable jury instructions, and to competently argue motion for new trial.

1           Because petitioner failed to show that any of the acts of his counsel were objectively  
2 unreasonable and there were no trial counsel errors that had some conceivable effect on the  
3 outcome of petitioner’s case, petitioner is not entitled to a COA on any of his ineffective  
4 assistance of trial counsel claims.

5                   **d.     Ineffective assistance of appellate counsel (CLAIM 8)**

6           The *Strickland* test also applies to claims of ineffective assistance by appellate counsel.  
7 *See Smith v. Murray*, 477 U.S. 527, 536 (1986); *see also Smith*, 528 U.S. at 285-86 (“the proper  
8 standard for evaluating [a petitioner's] claim that appellate counsel was ineffective . . . is that  
9 enunciated in *Strickland*”). Petitioner focused his argument on appellate counsel’s failure to  
10 challenge the restitution order but also generally objected to the Report concerning other aspects  
11 of appellate counsel’s performance.

12                   **1.     Fine/restitution**

13           Petitioner contends that his appellate counsel's failure to object to the trial court's  
14 imposition of a restitution fine of \$10,000 constituted ineffective assistance of appellate counsel  
15 because petitioner could have demonstrated that he was unable to pay any such fine.

16           The restitution fine was imposed pursuant to California Penal Code § 1202.4(b). Under  
17 Penal Code § 1202.4(c), “[t]he court shall impose the restitution fine unless it finds compelling  
18 and extraordinary reasons for not doing so . . . A defendant's inability to pay shall not be  
19 considered a compelling and extraordinary reason not to impose a restitution fine.” The  
20 Excessive Fines Clause of the Eighth Amendment is implicated only where a forfeiture is  
21 “grossly disproportional to the gravity of a defendant's offense.” *Id.* (quoting *United States v.*  
22 *Bajakajian*, 524 U.S. 321, 334 (1998)).

23           On habeas review, this court denied petitioner’s claim of ineffective assistance of  
24 appellate counsel because the state court of appeals’ findings that petitioner was convicted of  
25 second degree murder with the jury finding as true an allegation of armed with a firearm under  
26 Penal Code § 12022(b), and he had a prior felony conviction, were objectively reasonable and  
27 supported by the record, and therefore, the restitution fine was not “grossly disproportional”  
28 under the Constitution. Further, petitioner had not demonstrated that a different outcome would

1 have resulted if counsel had objected to the amount of the restitution fine and, therefore, had not  
2 shown prejudice under *Strickland*. This conclusion is not debatable among jurists of reason.  
3 Accordingly a COA will not issue

4 **2. Other Claims of Ineffective Assistance of Appellate Counsel**

5 Petitioner contends that appellate counsel was ineffective for failing to argue instructional  
6 error, to challenge denial of a severance motion, to challenge the introduction of false testimony,  
7 and to argue trial counsel was ineffective.

8 Appellate counsel's decision to press only issues on appeal that she believed, in her  
9 professional judgment, had more merit than the claims suggested by petitioner is "within the  
10 range of competence demanded of attorneys in criminal cases." *McMann v. Richardson*, 397  
11 U.S. 759, 771. Petitioner's appellate counsel had no obligation to raise meritless issues on  
12 appeal. *Strickland*, 466 U.S. at 687-88.


13 The claims petitioner raised were without factual or legal merit, in that they failed to  
14 demonstrate any constitutional violations with respect to appellate counsel's failure to present  
15 them on appeal and therefore cannot constitute deficient performance under *Strickland*. As a  
16 result, this Court denied habeas relief on petitioner's claims of ineffective assistance by appellate  
17 counsel. Because this issue is not debatable among jurist of reason and this issue could not  
18 decided differently, a COA will not issue.

19 **C. Conclusion**

20 Based on the foregoing, the request for a Certificate of Appealability is denied in full.

21 **IT IS SO ORDERED.**

22 DATED: May 24, 2010

23   
24 M. James Lorenz  
United States District Court Judge

25 COPY TO:

26 HON. CATHY ANN BENCIVENGO  
27 UNITED STATES MAGISTRATE JUDGE

28 ALL PARTIES/COUNSEL