UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

BRIAN McAUTHOR McGEE, Petitioner, v. RICHARD KIRKLAND, Warden, Respondent.	Case No. CV 05-5077-PSG (OP) SUPPLEMENTAL REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This Supplemental Report and Recommendation is submitted to the Honorable Philip S. Gutierrez, United States District Judge, pursuant to the provisions of 28 U.S.C. § 636 and General Order 194 of the United States District Court for the Central District of California.

I.

PROCEEDINGS

On July 12, 2005, Brian McGee ("Petitioner") filed a Petition for Writ of Habeas Corpus by a Person in State Custody pursuant to 28 U.S.C. § 2254 ("Petition"). (ECF No. 1.) On October 27, 2005, Respondent filed an Answer to the Petition. (ECF No. 6.) On February 13, 2006, Plaintiff filed a Reply to the Answer. (ECF No. 12.)

On August 10, 2009, this Court issued a Report and Recommendation recommending that habeas relief be granted on the basis that the prosecutor at Petitioner's state court trial impermissibly used peremptory challenges to remove African-Americans from the jury in violation of Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986). (ECF No. 14.) At that time, the Court declined to reach the merits of Petitioner's two other grounds for relief. (Id. at 29 n.17.) On June 18, 2010, the Court entered Judgment, after adopting the Magistrate Judge's Recommendation that the Petition be granted. (ECF No. 25.)

Respondent appealed to the Ninth Circuit Court of Appeal. (ECF No. 26.) On February 26, 2013, the Ninth Circuit reversed the Judgment of the Court and denied habeas relief on Petitioner's Batson challenge. (ECF No. 47.) Thus, the Court now considers Petitioner's remaining two claims for relief.

II.

PROCEDURAL BACKGROUND

On July 16, 2001, Petitioner was convicted after a jury trial in the Los Angeles County Superior Court of one count of first degree murder (Cal. Penal Code § 187(a)), and one count of attempted murder (Cal. Penal Code §§ 664/187). (Clerk's Transcript ("CT") at 510-15.) On August 15, 2001, Petitioner was sentenced to a term of imprisonment of life without the possibility of parole. (Id. at 516-19.)

Petitioner appealed his conviction to the California Court of Appeal, "arguing the trial court erred in considering his several" motions pursuant to People v. Wheeler, 22 Cal. 3d 258, 148 Cal. Rptr. 890 (1978) and Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), and challenging the trial court's evidentiary rulings. (Answer Ex. D.) On December 18, 2002, the court of appeal reversed Petitioner's conviction because the trial court failed to inquire into the reasons for the prosecutor's first five peremptory challenges of prospective African-American jurors. (Id. at D207.) The court of appeal

remanded the matter to allow the trial court to determine whether it could address the Batson/Wheeler issue and, if so, to elicit and assess the prosecutor's reasons for excluding the prospective African-American jurors. (Id.)[1] On December 18, 2002, Petitioner filed a petition for rehearing. (Official State Court Records.)[2] On January 7, 2003, the court of appeal modified the opinion and denied rehearing. (Id. Ex. E at E258-60.)

On remand, the trial court acknowledged that it "ha[d] not made an attempt to look for" its notes from voir dire and was "really not going to bother to because" it had recourse to the transcript, which was more complete and which refreshed its memory. (Second Reporter's Transcript ("2RT")[3] at 5-6, 12, 17.) The trial court found it could address the Batson/Wheeler issues, solicited the prosecutor's reasons for excluding the jurors, again denied Petitioner's Batson/Wheeler motions, and ordered the judgment reinstated. (Id. at 119-21.)

Petitioner appealed. (Answer Ex. G.) On November 15, 2004, the California Court of Appeal affirmed Petitioner's conviction and sentence, rejecting Petitioner's contention that the trial court should have engaged in a comparative juror analysis. (Id. Ex. J.)

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[1] Petitioner also filed a petition for review in the California Supreme Court. On March 26, 2003, the supreme court denied the petition. (Answer Ex. F.)

[2] The Court takes judicial notice of the state appellate court records for Petitioner's cases which are available on the Internet at http://appellatecases.courtinfo.ca.gov. See Smith v. Duncan, 297 F.3d 809, 815 (9th Cir. 2002) (federal courts may take judicial notice of relevant state court records in federal habeas proceedings).

[3] "1RT" and "2RT" refer respectively to the Reporter's Transcripts from Petitioner's trial (Los Angeles Superior Court case number TA100412; Court of Appeal case number B15420), and from the evidentiary hearing ordered by the California Court of Appeal (Los Angeles Superior Court case number TA100412; Court of Appeal case number B170336).

Petitioner then filed a petition for review in the California Supreme Court. (Id. Ex. K.) On January 19, 2005, the supreme court denied the petition. (Id. Ex. L.)

III.

SUMMARY OF THE EVIDENCE PRESENTED AT TRIAL

Because Petitioner is not challenging the sufficiency of the evidence, the Court adopts the factual discussion of the California Court of Appeal opinion, as a fair and accurate summary of the evidence presented at trial:[4]

> 1. *The December 3, 1998 Shootings*
>
> McGee (sometimes known as Geeter) lived in an apartment in the Nickerson Gardens housing project in Los Angeles with Linda Williams and Jonathan Bowen. Williams was dating Lee Anthony Lewis, who lived nearby with his mother.
>
> On the evening of December 3, 1998, Lewis went to the apartment to see Williams. McGee answered the door, told Lewis to go away and closed the door. Lewis did not leave and instead tried to get Williams's attention by shouting at her window. McGee and two friends, Charlie Mack and Larry Hamilton, then came out of the apartment and attacked Lewis for "disrespecting" them. During the assault, Mack hit Lewis in the mouth with a handgun. McGee threatened Lewis not go to the police "or he would kill him."

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[4] "Factual determinations by state courts are presumed correct absent clear and convincing evidence to the contrary . . . ." Miller-El v. Cockrell, 537 U.S. 322, 340, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003) (citing 28 U.S.C. § 2254(e)(1)). Recent Ninth Circuit cases have accorded the factual summary set forth in an opinion of the California Court of Appeal a presumption of correctness pursuant to 28 U.S.C. § 2254(e)(1). See, e.g., Moses v. Payne, 555 F.3d 742, 746 n.1 (9th Cir. 2009) (citations omitted); Slovik v. Yates, 556 F.3d 747, 749 n.1 (9th Cir. 2009).

Williams heard the commotion and went outside to see Lewis. McGee and Mack forced her back into the apartment. Mack pointed the gun at her and said "'If you or your boyfriend go and tell the police, or call the police, we're going to kill you.'" McGee repeated the threat to Williams, who ran out of the apartment in search of Lewis.

Williams found Lewis down the street talking to the police. After Lewis reported the incident, the police escorted Lewis and Williams back to the apartment, where Lewis identified Mack and Hamilton as two of the attackers. Mack and Hamilton were placed under arrest.

The police then accompanied Williams and Lewis to Lewis's house. Williams noticed McGee's uncle, George Adams, watching from a nearby corner. After the police departed, Adams knocked on the door. When Lewis answered, Adams said, "'Lee Anthony, man, you should have just left it alone'" and "'should have taken it like a man.'"

Seconds after Adams left, McGee burst into the Lewis residence and began shooting. After the shooting stopped, Williams told Lewis's mother, "'Geeter shot us, Geeter shot us.'" When the police arrived, both Williams and Lewis told the officers they had been shot by McGee.

Lewis died of multiple gunshot wounds to the chest and buttocks. Although she had been shot seven times, Williams survived and testified at trial.

(Id. Ex. D at D192-93.)

IV.

PETITIONER'S CLAIMS

Petitioner presents the following claims for habeas corpus relief:

(1) The prosecution's exclusion of African-Americans from Petitioner's jury constituted Batson/Wheeler error;

(2) The trial court erroneously admitted certain out-of-court

statements without a limiting instruction; and

(3) The trial court wrongfully excluded testimony bearing on an officer's credibility as a witness.

(Pet. at 5, 6.) Given the Ninth Circuit's reversal of this Court's ruling on the Batson/Wheeler claim, only Claims Two and Three remain.

V.

STANDARD OF REVIEW

The standard of review applicable to Petitioner's claims is set forth in 28 U.S.C. § 2254, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"):

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--
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> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). If these standards are difficult to meet, it is because they were meant to be. Harrington v. Richter, 131 S. Ct. 770, 786, 178 L. Ed. 2d 624 (2011). AEDPA "stops short of imposing a complete bar on federal court relitigation of claims already rejected in state proceedings[,]" and a writ may issue only "where there is no possibility fairminded jurists could disagree that the state

court's decision conflicts" with United States Supreme Court precedent. Id. Further, a state court factual determination shall be presumed correct unless rebutted by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

Under the AEDPA, the "clearly established Federal law" that controls federal habeas review of state court decisions consists of holdings (as opposed to dicta) of Supreme Court decisions "as of the time of the relevant state-court decision." Williams v. Taylor, 529 U.S. 362, 412, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000). To determine what, if any, "clearly established" United States Supreme Court law exists, the court may examine decisions other than those of the United States Supreme Court. LaJoie v. Thompson, 217 F.3d 663, 669 n.6 (9th Cir. 2000). Ninth Circuit cases "may be persuasive." Duhaime v. Ducharme, 200 F.3d 597, 600 (9th Cir. 1999). On the other hand, a state court's decision cannot be contrary to, or an unreasonable application of, clearly established federal law, if no Supreme Court precedent creates clearly established federal law relating to the legal issue the habeas petitioner raised in state court. Brewer v. Hall, 378 F.3d 952, 955 (9th Cir. 2004); see also Carey v. Musladin, 549 U.S. 70, 77, 127 S. Ct. 649, 166 L. Ed. 2d 482 (2006) (in the absence of a Supreme Court holding regarding the prejudicial effect of spectators' courtroom conduct, the state court's decision could not have been contrary to or an unreasonable application of clearly established federal law).

Although a particular state court decision may be both "contrary to" and an "unreasonable application of" controlling Supreme Court law, the two phrases have distinct meanings. Williams, 529 U.S. at 405. A state court decision is "contrary to" clearly established federal law if the decision either applies a rule that contradicts the governing Supreme Court law, or reaches a result that differs from the result the Supreme Court reached on "materially indistinguishable" facts. Early v. Packer, 537 U.S. 3, 8, 123 S. Ct. 362, 154 L. Ed. 2d 263 (2002) (per curiam) (citing Williams, 529 U.S. at 405-06). When a state court decision

adjudicating a claim is "contrary to" controlling Supreme Court precedent, the reviewing federal habeas court is "unconstrained by § 2254(d)(1)." Williams, 529 U.S. at 406. However, the state court need not cite or even be aware of the controlling Supreme Court cases, "so long as neither the reasoning nor the result of the state-court decision contradicts them." Packer, 537 U.S. at 8.

State court decisions that are not "contrary to" Supreme Court law may only be set aside on federal habeas review "if they are not merely erroneous, but 'an unreasonable application' of clearly established federal law, or based on 'an unreasonable determination of the facts.'" Id. at 11 (citing 28 U.S.C. § 2254(d)). Consequently, a state court decision that correctly identified the governing legal rule may be rejected if it unreasonably applied the rule to the facts of a particular case. See Williams, 529 U.S. at 406-10, 413 (e.g., the rejected decision may state Strickland rule correctly but apply it unreasonably); Woodford v. Visciotti, 537 U.S. 19, 24-25, 123 S. Ct. 357, 154 L. Ed. 2d 279 (2002) (per curiam). However, to obtain federal habeas relief for such an "unreasonable application," a petitioner must show that the state court's application of Supreme Court law was "objectively unreasonable." Visciotti, 537 U.S. at 27. An "unreasonable application" is different from an erroneous or incorrect one. Williams, 529 U.S. at 409-10; see also Visciotti, 537 U.S. at 25.

Where, as here, the California Supreme Court denies a petitioner's claims without comment, the state high court's "silent" denial is considered to be "on the merits" and to rest on the last reasoned decision on these claims, in this case, the grounds articulated by the California Court of Appeal in its decision. See Ylst v. Nunnemaker, 501 U.S. 797, 803-06, 111 S. Ct. 2590, 115 L. Ed. 2d 706 (1991); Hunter v. Aispuro, 982 F.2d 344, 347-48 (9th Cir. 1992); see also Kennedy v. Lockyer, 379 F.3d 1041, 1052 (9th Cir. 2004); Gill v. Ayers, 342 F.3d 911, 917 n.5 (9th Cir. 2003).

VI.

DISCUSSION

A. Habeas Relief Is Not Warranted on Petitioner's Claim That the Trial Court Erroneously Admitted Certain Out-of Court Statements Without a Limiting Instruction.

1. Background.

Petitioner contends the trial court erroneously admitted certain out-of-court statements without a limiting instruction. (Pet. at 5.) Specifically, he contends that his rights to confrontation and due process were violated when the trial court allowed Linda Williams to testify about an out-of-court statement made by George Adams. (Id.)

The court of appeal in its opinion as modified on rehearing, provided the following additional facts:

> Williams testified that, after she and Lewis had returned to Lewis's home following the attack on Lewis, Adams came to the house and said, "'Lee Anthony, man, you should have just left it alone'"; "'[you] should have taken it like a man.'" Seconds later, McGee arrived and shot both Lewis and Williams. The trial court overruled McGee's hearsay and relevance objections to the Adams statement and denied a request for an instruction limiting use of the statement to show a relationship between Adams and McGee, which the prosecutor had explained as the reason the statement was relevant.

(Answer Ex. E at E259.)

2. California Court Opinions.

The California Court of Appeal found that any error in admitting Adams' statements was harmless:

> Any error in admitting Adams's out-of-court statements was harmless. It is not reasonably probable that McGee would have

> obtained a more favorable verdict if the statements had been excluded or a limiting instruction given. The evidence that McGee was the shooter was overwhelming and included multiple positive identifications by both victims. Evidence in support of the witness-killing allegation was also overwhelming and included the assault on Lewis and his report of the assault to the police, expert testimony that gang members tend to seek retribution against "snitches" and witness accounts that McGee warned Lewis and Williams that he would kill them if they went to the police. In light of this evidence, Adams's statements that Lewis should have "left it alone [and] taken it like a man" were not reasonably likely to have affected the verdict.

(Id. at 259-60 (citations omitted).)

3. Legal Standard.

Preliminarily, federal habeas relief is not available for errors of state law only. See 28 U.S.C. § 2254(a); see also Estelle v. McGuire, 502 U.S. 62, 67-68, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991) ("In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States."); Smith v. Phillips, 455 U.S. 209, 221, 102 S. Ct. 940, 71 L. Ed. 2d 78 (1982) ("A federally issued writ of habeas corpus, of course, reaches only convictions obtained in violation of some provision of the United States Constitution."). Specifically, state evidentiary rulings are not cognizable in a federal habeas proceeding unless federal constitutional rights are affected. See McGuire, 502 U.S. at 68; Gordon v. Duran, 895 F.2d 610, 613 (9th Cir. 1990). To the extent Petitioner argues that evidence was admitted in violation of California's evidentiary rules, his claim does not present a federal question.

A state court's evidentiary ruling is subject to federal habeas review only if it violates federal law, either by infringing upon a specific federal constitutional or statutory provision or by depriving the defendant of the fundamentally fair trial

guaranteed by due process. See Pulley v. Harris, 465 U.S. 37, 41, 104 S. Ct. 871, 79 L. Ed. 2d 29 (1984). The due process inquiry in federal habeas review is whether the admission of evidence was arbitrary or so prejudicial that it rendered the trial fundamentally unfair. See Walters v. Maass, 45 F.3d 1355, 1357 (9th Cir. 1995). "[T]he category of infractions that violate fundamental fairness" is a very narrow one. McGuire, 502 U.S. at 73 (citation and internal quotation marks omitted). As a result, few evidentiary errors will implicate fundamental fairness. Id. at 70; see also DePetris v. Kuykendall, 239 F.3d 1057, 1062 (9th Cir. 2001) (citing Chambers v. Mississippi, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973) and Washington v. Texas, 388 U.S. 14, 19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967)). The Ninth Circuit has opined that "[o]nly if there are no permissible inferences the jury may draw from the evidence can its admission violate due process." Jammal v. Van de Kamp, 926 F.2d 918, 920 (9th Cir. 1991); see also McKinney v. Rees, 993 F.2d 1378 (9th Cir. 1993) (explaining that admitting propensity evidence will violate the constitutional right to a fair trial only if no permissible inferences can be drawn from the evidence and its potential for prejudice far outweighs the relevance).

4. Analysis.

In Crawford v. Washington, the United States Supreme Court examined the relationship between the Confrontation Clause and the hearsay rule. Among other things, the Supreme Court held that the Confrontation Clause "does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." Crawford, 541 U.S. 36, 59 n.9, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004) (citation omitted). The challenged statements here were not admitted for the purpose of establishing that Lewis should have "just left it alone" and "taken it like a man." Thus, they were not admitted to establish the truth of the matter asserted, and their admission did not violate the Confrontation Clause.

Additionally, prior to the murder, the victim had been hit in the mouth with

a gun and had reported the attack to the police. (1RT at 650-53.) The jury could reasonably infer from the testimony that the killing was committed in order to silence Lewis. Thus, because there was a reasonable inference that the jury could draw from the admitted statements, it did not violate due process to admit them.

In any event, even if admission of the statements was error of constitutional magnitude, habeas relief is not warranted when viewed in the context of the entire proceeding because it is not likely the result would have been different without its admission. Brecht v. Abrahamson, 507 U.S. 619, 637-38, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1993) (to obtain habeas relief, the trial error must have had "substantial and injurious effect or influence in determining the jury's verdict."). Even without the statements, there was ample evidence of Petitioner's guilt, including eyewitness testimony that he was the shooter. (1RT at 671-72, 751, 754-58.) Additionally, the victim made a deathbed statement, identifying Petitioner as the person who shot him. (Id. at 927-29.) Moreover, as noted by the court of appeal, the victim had reported Petitioner's assault on him, and the gang expert testified that gang members tend to seek retribution against "snitches." (Answer Ex. E at E259-60.) Witnesses also testified that Petitioner had warned them he would kill them if they went to the police. Id. As a result, even without the testimony, the jury could have reasonably convicted Petitioner of the crimes. Accordingly, even if there was error in admitting the statements, Petitioner has not established there was a "substantial and injurious effect or influence in determining the jury's verdict." Brecht, 507 U.S. at 637-38.

Based on the foregoing, the Court finds that the California court's rejection of Petitioner's claim was neither contrary to, nor involved an unreasonable application of, clearly established federal law, as determined by the United States Supreme Court. Thus, habeas relief is not warranted on this claim.

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B. Habeas Relief Is Not Warranted on Petitioner's Claim That the Trial Court Wrongfully Excluded Testimony.

1. Background.

Petitioner contends the trial court erred by prohibiting the impeachment of Officer Walter McMahon with evidence of the officer's alleged misconduct in two separate drug-related arrests on other occasions. (Pet. at 6.) Specifically, Petitioner sought to introduce testimony that two persons previously arrested by Officer McMahon denied being guilty for the offenses for which they were arrested. (Id.) As noted by the court of appeal:

> The trial court found the discrepancies between McMahon's and Irby's stories were not great enough to be probative on the issue of McMahon's credibility. It also ruled the Oliva matter presented "a one-on-one situation where an officer arrests somebody for something, and the guy says I didn't do it. . . . I just don't think that it has probative value, is worth the time to take to litigate it, so I'm going to sustain the objection on that ground."

(Answer Ex. D at D205-06.)

2. California Court Opinions.

The California Court of Appeal rejected this claim:

> The trial court did not abuse its broad discretion in concluding the minimal probative value of the testimony at issue was outweighed by the danger of consuming undue time litigating collateral issues. In neither case was there a finding by the police department or a court that McMahon had in fact committed misconduct. McGee simply sought to present testimony that two persons arrested by McMah[o]n denied being guilty of the offenses for which they were arrested.

(Id. at D206 (citations omitted).)

3. Analysis.

Again, challenges to a state trial court's evidentiary rulings are not cognizable on federal habeas review unless the admission or exclusion of evidence violated a petitioner's due process right to a fair trial. McGuire, 502 U.S. at 70; see also Spivey v. Rocha, 194 F.3d 971, 977-78 (9th Cir. 1999) ("It is well settled that a state court's evidentiary ruling, even if erroneous, is grounds for federal habeas relief only if it renders the state proceedings so fundamentally unfair as to violate due process."). "[T]he category of infractions that violate fundamental fairness" is a very narrow one. McGuire, 502 U.S. at 73 (citation omitted) (internal quotation marks omitted). Thus, few evidentiary errors will implicate fundamental fairness. Id. at 70; see also DePetris, 239 F.3d at 1062 (citing Chambers, 410 U.S. at 294 and Washington, 388 U.S. at 19).

Nor does the Due Process Clause guarantee the right to introduce all evidence, even if relevant. Montana v. Egelhoff, 518 U.S. 37, 42, 116 S. Ct. 2013, 135 L. Ed. 2d 361 (1996). A defendant does not have an unfettered right to offer evidence that is incompetent, privileged or otherwise inadmissible under standard rules of evidence. Id. (citation omitted). The exclusion of evidence does not violate the Due Process Clause unless "it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." Id. at 43 (internal quotation marks omitted) (quoting Patterson v. New York, 432 U.S. 197, 201-02, 97 S. Ct. 2319, 53 L. Ed. 2d 281 (1977)).

"Even relevant and reliable evidence can be excluded when the state interest is strong." Perry v. Rushen, 713 F.2d 1447, 1450 (9th Cir. 1983); see also Holmes v. South Carolina, 547 U.S. 319, 326-27, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006) (the Constitution permits exclusion of evidence that is repetitive, only marginally relevant, or poses an undue risk of harassment, prejudice or confusion of the issues). A state law justification for exclusion of evidence does not abridge a criminal defendant's right to present a defense unless it is "arbitrary or

disproportionate" and "infringe[s] upon a weighty interest of the accused." United States v. Scheffer, 523 U.S. 303, 308, 118 S. Ct. 1261, 140 L. Ed. 2d 413 (1998) (citations omitted); see also Crane v. Kentucky, 476 U.S. 683, 689-91, 106 S. Ct. 2142, 90 L. Ed.2d 636 (1986) (discussing the tension between the discretion of state courts to exclude evidence at trial and the federal constitutional right to "present a complete defense"); Greene v. Lambert, 288 F.3d 1081, 1090 (9th Cir. 2002).

In Petitioner's case, the state court excluded the evidence on the grounds that it was not relevant and would pose an undue risk of prolonging the trial. These reasons are not so arbitrary or disproportionate that the exclusion of the evidence infringed on Petitioner's due process rights.

However, Even if the exclusion rose to a due process violation, any error was harmless. Brecht, 507 U.S. at 623. As previously noted, there was ample evidence of Petitioner's guilt, including eyewitness statements and the deathbed statement of the victim.

Based on the foregoing, the Court finds that the California court's rejection of Petitioner's claim was neither contrary to, nor involved an unreasonable application of, clearly established federal law, as determined by the United States Supreme Court. Thus, habeas relief is not warranted on this claim.

VII.

RECOMMENDATION

IT THEREFORE IS RECOMMENDED that the District Court issue an Order: (1) approving and adopting this Supplemental Report and Recommendation; and (2) directing that Judgment be entered denying the Petition and dismissing this action with prejudice.

DATED: March 29, 2013

HONORABLE OSWALD PARADA
United States Magistrate Judge