UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ANDRE BUTLER, Petitioner, v. R. GROUNDS, Warden, Respondent.	Case No. CV 13-1120 JC MEMORANDUM OPINION AND ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS AND DISMISSING ACTION WITH PREJUDICE

I. SUMMARY

On February 15, 2013, Andre Butler ("petitioner"), a state prisoner who was then proceeding *pro se*, filed an unverified Petition for Writ of Habeas Corpus by a Person in State Custody ("Petition") pursuant to 28 U.S.C. § 2254, with an attached memorandum ("Petition Memo")[1] and exhibits ("Petition Ex.").

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[1]As the pages of the Petition Memo are not consecutively numbered after page 22, this Court, for ease of reference, has consecutively numbered the remaining pages thereof commencing with page 23.

On July 19, 2013, respondent filed an Answer and a supporting memorandum ("Answer").[2] On August 21, 2013, the Court appointed counsel for petitioner. On June 30, 2014, petitioner's counsel filed a Traverse and petitioner's verification of the Petition.

The parties have consented to proceed before the undersigned United States Magistrate Judge.

For the reasons stated below, the Petition is denied, and this action is dismissed with prejudice.

II. PROCEDURAL HISTORY

On June 3, 2010, the Los Angeles County District Attorney filed an Amended Information charging petitioner with two violations of California Penal Code section 451(d) – arson of the property of CalTrans (count 2) and arson of the property of Neuman Habana (count 3). (CT 262-65). On June 18, 2010, a Los Angeles County Superior Court jury found petitioner guilty of both counts (which were renumbered as counts 1 and 2 on the verdict forms to avoid jury confusion). (CT 292-93). On the same date, the trial court sentenced petitioner to a total of nine years in state prison. (CT 308-09; RT 2170-71).

On December 7, 2011, the California Court of Appeal affirmed the judgment in a reasoned decision. (Lodged Doc. 6). On March 14, 2012, the California Supreme Court denied review without comment. (Lodged Doc. 8).

Meanwhile, on May 6, 2011, petitioner petitioned the Los Angeles County Superior Court for habeas relief. (Petition Ex. A). On May 27, 2011, the Superior Court denied the petition for lack of jurisdiction in light of the then pendency of the direct appeal in the Court of Appeal. (Petition Ex. A). On June 24, 2011, petitioner petitioned for habeas relief with the California Court of Appeal.

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[2]Respondent concurrently lodged multiple documents ("Lodged Doc."), including the Clerk's Transcript ("CT") and the Reporter's Transcript ("RT").

(Lodged Doc. 9). On June 28, 2011, the Court of Appeal summarily denied such petition without comment. (Lodged Doc. 10). On August 18, 2011, petitioner petitioned for habeas relief with the California Supreme Court. (Lodged Doc. 11). On January 4, 2012, the California Supreme Court summarily denied such petition without comment. (Lodged Doc. 12).

III. FACTS[3]

A. Prosecution Case

1. The Fire

On January 11, 2009, Neuman Habana returned from county jail after serving time for violating his drug program. Habana lived in a homeless camp next to a freeway off-ramp. The homeless camp included makeshift shelters with other homeless people living in the area, including petitioner. When Habana returned to the camp, he noticed petitioner was staying at his shelter. Reluctantly, Habana gave petitioner a few days to gather his belongings and move out of the shelter.

On January 17, at around 3 p.m., Habana began to move petitioner's belongings out of the shelter. Petitioner became enraged and threatened to hit Habana. Petitioner threatened to set Habana's shelter on fire. Habana testified that he warned petitioner that he would report petitioner to the police if petitioner set Habana's shelter on fire. About 10 minutes later, petitioner returned with a container, pouring an unidentifiable liquid over a tree next to Habana's shelter.

Habana went to call the police and noticed that petitioner was following him close behind. At this time, Habana ran into Miguel Huerta, and they exchanged a few words before petitioner arrived. Habana returned to his shelter, and Miguel and petitioner discussed the situation. Miguel testified that petitioner appeared

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[3]The facts set forth are drawn from the California Court of Appeal's decision on direct appeal. (Lodged Doc. 6). Such factual findings are presumed correct. 28 U.S.C. § 2254(e)(1).

very angry and threatened to burn down the shelter. Miguel warned petitioner not to do anything foolish. Petitioner insisted he was going to burn down every off-ramp and on-ramp in the area.

Shortly thereafter, petitioner returned to the shelter and exchanged a few heated words with Habana before pulling out a lighter and setting some pine needles on fire near the shelter. Sue Huerta, who was standing next to them, attempted to put out the fire a couple of times. The third time, petitioner succeeded in setting a fire, and Sue ran to get more water, but by now, the fire was spreading too fast to put out. The fire burned an area approximately 50 by 25 feet including Habana's shelter and belongings along with several trees belonging to CalTrans.

2. Arson Investigation

During the trial, Michael Camello, a fire arson investigator with the Los Angeles Fire Department testified that he investigated the fire shortly after firefighters extinguished the fire. Camello determined that the origin of the fire was in the area of a tree attached to the shelter and caused by an open flame, such as that from a lighter. A lighter was subsequently recovered from petitioner's pocket after his arrest.

B. Defense

Petitioner testified on his own behalf and disputed the facts surrounding the fire. Petitioner asserted that he took ownership of the shelter after Habana went to jail, and after Habana returned from jail, the ownership of the shelter was never an issue. Further, petitioner claimed that moments before the start of the fire, he saw people gathered by his shelter smoking cocaine, including Sue, who was using a pan and a candle to heat heroin. Moments later, as Habana was getting up from a futon near the shelter, petitioner pulled it from under him. Petitioner suggested the

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futon must have hit the pan and started the fire.[4] Petitioner attempted to put out the fire, but it had quickly spread. Petitioner went to a nearby fast food restaurant and asked the manager to call 911. Petitioner denied ever arguing with or threatening Habana and denied that any of the burned property belonged to Habana.

IV. STANDARD OF REVIEW

This Court may entertain a petition for writ of habeas corpus on "behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). A federal court may not grant an application for writ of habeas corpus on behalf of a person in state custody with respect to any claim that was adjudicated on the merits in state court proceedings unless the adjudication of the claim: (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).[5]

In applying the foregoing standards, federal courts look to the last reasoned state court decision. See Smith v. Hedgpeth, 706 F.3d 1099, 1102 (9th Cir.), cert. denied, 133 S. Ct. 1831 (2013). "Where there has been one reasoned state judgment rejecting a federal claim, later unexplained orders upholding that

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[4]On rebuttal, investigator Camello testified that the wax from the candle would not have caused the fire.

[5]When a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary. Harrington v. Richter, 562 U.S. 86, 131 S. Ct. 770, 784-85 (2011); see also Johnson v. Williams, 133 S. Ct. 1088, 1094-96 (2013) (extending Richter presumption to situations in which state court opinion addresses some, but not all of defendant's claims).

judgment or rejecting the same claim rest upon the same ground." Ylst v. Nunnemaker, 501 U.S. 797, 803 (1991) (cited with approval in Johnson v. Williams, 133 S. Ct. 1088, 1094 n.1 (2013)); Cannedy v. Adams, 706 F.3d 1148, 1158 (9th Cir. 2013) (it remains Ninth Circuit practice to "look through" summary denials of discretionary review to the last reasoned state-court decision – whether those denials are on the merits or denials of discretionary review), as amended on denial of rehearing, 733 F.3d 794 (9th Cir. 2013), cert. denied, 134 S. Ct. 1001 (2014).

However, to the extent no such reasoned opinion exists, courts must conduct an independent review of the record to determine whether the state court clearly erred in its application of controlling federal law, and consequently, whether the state court's decision was objectively unreasonable. Delgado v. Lewis, 223 F.3d 976, 982 (9th Cir. 2000), abrogated on other grounds, Lockyer v. Andrade, 538 U.S. 63, 75-76 (2003); see also Harrington v. Richter, 562 U.S. 86, 131 S. Ct. 770, 784 (2011) ("Where a state court's decision is unaccompanied by an explanation, the habeas petitioner's burden still must be met by showing there was no reasonable basis for the state court to deny relief."); Cullen v. Pinholster, 131 S. Ct. 1388, 1402 (2011) ("Section 2254(d) applies even where there has been a summary denial.") (citation omitted).

V. DISCUSSION[6]

Petitioner claims he is entitled to federal habeas relief because: (1) as a matter of California law petitioner could only be convicted of a single count of arson (Ground I); (2) the trial court's evidentiary rulings violated petitioner's rights under the Confrontation Clause (Ground II); (3) petitioner's trial counsel rendered ineffective assistance (Ground III); (4) the prosecution engaged in

[6]The Court has read, considered and rejected on the merits all of petitioner's contentions. The Court discusses petitioner's principal contentions herein.

misconduct (portion of Ground IV); (5) the trial judge was biased (portion of Ground IV); and (5) cumulative error (Ground V). Petitioner is not entitled to habeas relief on any of his claims.

A. Petitioner's Challenge to the Propriety of His Two Arson Convictions Does Not Merit Federal Habeas Relief

In Ground I, petitioner contends, as a matter of state law and statutory interpretation, that he was improperly convicted of two arson counts under California Penal Code section 451(d) based on a single alleged act of setting a fire, and that the fact that each arson count in this case pertained to property owned by a different entity/person (CalTrans/Habana) does not support two separate convictions. (Petition Memo at 12-14).

The California Court of Appeal – the last state court to issue a reasoned decision addressing this claim – rejected the claim on its merits, finding, as a matter of statutory construction and state law, that petitioner could properly be charged with and convicted of two arson counts. (Lodged Doc. 6 at 4-6). The Court of Appeal noted that, as a general matter under California law (subject to an exception not applicable here), a single act or course of conduct by a defendant can lead to convictions of any number of offenses charged, so long as the defendant is not punished for more than one crime arising out of the same act or course of conduct.[7] (Lodged Doc. 6 at 4-5) (citations omitted). It further pointed out that Section 451(d) prohibits an individual from burning property *other than his own*, and accordingly, that it was appropriate for the prosecution to charge petitioner with two separate counts of arson arising from a single incident where, as here, petitioner claimed ownership of some of the burned property (the shelter) and its ownership might be disputed. (Lodged Doc. 6 at 6).

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[7]The trial court imposed concurrent terms on the two arson counts. (CT 308-09; RT 2170-71). Petitioner does not here complain that he was improperly *punished for*, as opposed to improperly *convicted of* the two arson counts.

Petitioner is not entitled to federal habeas relief on his instant claim as it is predicated on state law and is not cognizable on federal habeas review. See 28 U.S.C. § 2254(a) (federal habeas corpus relief may be granted "only on the ground that [petitioner] is in custody in violation of the Constitution or laws or treaties of the United States."); Estelle v. McGuire, 502 U.S. 62, 67-68 (1991) (not province of federal habeas court to reexamine state-court determinations on state-law questions; in conducting habeas review, federal court limited to deciding whether conviction violated Constitution, laws, or treaties of United States). This Court is bound by the state court's reasonable determination under state law that no error occurred. See Waddington v. Sarausad, 555 U.S. 179, 192 n.5 (2009) ("we have repeatedly held that it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions") (citation and internal quotations omitted); Bradshaw v. Richey, 546 U.S. 74, 76 (2005) (per curiam) ("a state court's interpretation of state law, including one announced on direct appeal of the challenged conviction, binds a federal court sitting in habeas corpus") (citations omitted); Hicks on behalf of Feiock v. Feiock, 485 U.S. 624, 629-30 (1988) ("We are not at liberty to depart from the state appellate court's resolution of these issues of state law. Although petitioner marshals a number of sources in support of the contention that the state appellate court misapplied state law on these two points, the California Supreme Court denied review of this case, and we are not free in this situation to overturn the state court's conclusions of state law.") (footnote omitted).

Accordingly, Ground I does not merit federal habeas relief.

B. Petitioner's Confrontation Clause Claim Does Not Merit Federal Habeas Relief

In Ground II, petitioner asserts that the trial court's rulings in response to prosecution witness Neuman Habana's refusal to answer certain questions on cross-examination violated the Confrontation Clause. (Petition Memo at 14-22).

Specifically, petitioner argues that he should have been allowed to recall and cross-examine Habana regarding the alleged drug activity of others at the homeless camp, and that the trial court erred in denying his repeated motions to strike Habana's testimony or declare a mistrial. The California Court of Appeal – the last state court to issue a reasoned decision addressing this claim – rejected the claim on its merits, finding that the trial court's limits on petitioner's right to recall Habana did not violate the Constitution. (Lodged Doc. 6 at 6-10). Petitioner is not entitled to federal habeas relief on this claim.

1. Additional Pertinent Facts

Neuman Habana testified that on January 17, 2009, he lived in a shelter he built near an off-ramp in an area that had trees, shrubs, and bushes. (RT 917). When Habana tried to remove petitioner from Habana's shelter, petitioner threatened to set Habana's place on fire. (RT 947-48). After two tries, petitioner lit a third fire that spread to burn the shelter and the tree it was built against. (RT 959-69). The fire burned the shelter, most of Habana's blankets and clothing, his two chairs, bike parts, and canes, and a plastic trash can, leaving Habana with no belongings. (RT 969-71; see also RT 1007-08 (Habana admitting the fire burned petitioner's property as well)).[8]

On cross-examination, Habana admitted that he had been arrested for failing to go to a drug program. (RT 973-74). Habana admitted to using narcotics (crack cocaine) prior to his arrest, and on a daily basis after he returned to the homeless encampment, and to using a lighter to light the crack that he had in his pocket on the day of the fire. (RT 974-78, 990; see also RT 1805-06 (defense narcotics expert testifying about how rock cocaine is smoked)). Habana initially denied that he had used drugs on the day of the fire. (RT 977; but see RT 991-98, 1010-11,

[8]Petitioner testified in his defense that he had thrown all of Habana's personal belongings away while Habana was in jail, that he tore apart and completely rebuilt the shelter, and that the personal items burned were his. (RT 1823-24, 1848-52).

1015-17, 1025, 1027-30 (Habana admitting that he smoked rock cocaine in his shelter on the day of the fire after he had moved petitioner's things from the shelter and about 10 (or 30 to 45 minutes or more) before the fire and, that in so doing, he used his lighter to light the crack pipe, and that he also smoked after the fire before he spoke to fire investigators); cf. RT 1032-33 (Habana testifying that he smoked after the fire only after he spoke with fire investigators)).[9] Habana admitted he was high when the fire started and still high when he talked to the police and fire investigator. (RT 1035). Habana did not tell the arson investigators that he had smoked rock cocaine shortly before the fire, but did take out his lighter to light a cigarette while the investigators were there. (RT 1011-13). Habana was afraid the police would blame him for the fire. (RT 1031-32). When asked whether he saw others at the camp using drugs, Habana replied:

> I won't tell you what I saw [sic] what they do. What I saw is my own, but if it doesn't affect other people, I don't bother them. If it affects everybody else, especially the houses behind my place or endangers anybody, that is something to say something about.

(RT 978). Counsel again asked if Habana had seen other people using narcotics and Habana replied: "That I can't tell you what I saw because it doesn't affect anybody else." (RT 979). The court ordered Habana to respond, and Habana replied, "That, I can't give out." (RT 979). Out of the jury's presence, petitioner's counsel objected to Habana's refusal to answer questions as impinging on petitioner's right to a fair trial and to confrontation because admitted drug use related to eyewitness credibility and their ability to perceive. (RT 979-80). The trial court asked and the prosecution confirmed that the prosecution had other

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[9]Habana testified that he believed that no matter how much a person used narcotics, a person would not be able to catch his shelter on fire unless the person was "careless enough," and Habana was "not that careless." (RT 1022). Habana said no flame Habana lit set the shelter on fire. (RT 1023).

witnesses who could be asked about their drug use. (RT 979-80). After some discussion, the court advised that it would order Habana again to answer counsel's questions, and that if Habana refused and that if the defense continued to feel hampered after an opportunity to question the other witnesses whose drug use was in issue, the defense could raise the issue at such later time. If the other witnesses refused to cooperate, the court would allow the defense to bring Habana back for a hearing. (RT 982-83). The court denied petitioner's motion for a mistrial at that time, indicating that if the other witnesses refuse to answer, counsel would have a viable motion at that time. (RT 983-84).

In the presence of the jury, the trial court again ordered Habana to answer the questions asked. (RT 984). When asked whether he had seen Sue Huerta consume narcotics in January of 2009, Habana refused to answer. (RT 984-85). Habana did not know whether Miguel Huerta ever consumed narcotics in January of 2009. (RT 985). Habana said he had not consumed rock cocaine with Sue Huerta in January of 2009. (RT 985). Habana would not say whether he consumed rock cocaine by himself or with others. (RT 985-86). The trial court again ordered Habana to answer the questions posed but to no avail. (RT 986). After Habana's testimony, the trial court told counsel outside the presence of the jury that the defense would be allowed to ask the defense witnesses about their drug use and ability to perceive. (RT 1039-40, 1207). Petitioner's counsel again moved to strike Habana's testimony or alternatively for a mistrial – motions which the trial court denied. (RT 1207-08).

Sue Huerta testified that petitioner lit Habana's hut on fire. (RT 1226-30). On cross-examination Sue admitted that Habana used his "hut" (or shelter) to smoke rock cocaine. (RT 1241-42). She denied ever smoking rock cocaine at all or with Habana before. (RT 1242, 1264). She stated that she had stopped using heroin about two weeks before the fire, and was purchasing methadone on the street which she drank daily (including the day of the fire) to help her stay off

heroin. (RT 1243-44, 1264). Sue Huerta said methadone did not give her a high or affect her ability to perceive. (RT 1244, 1258). She shared the methadone she took on the day of the fire with her husband Miguel Huerta, who also consumed methadone daily because he had been a heroin user. (RT 1244-45, 1253). She had seen a person under the influence of rock cocaine and the intoxicated effect. (RT 1246). She did not notice that Habana was under the influence just before the fire. She said Habana would get really quiet under the influence and at that time Habana was boisterous and jumping around. (RT 1246-47). She did not think Habana was using right before the fire. (RT 1246).

Miguel Huerta testified that on the day of the fire petitioner was upset with Habana and told him (Miguel Huerta) that he (petitioner) was going to burn Habana's dwelling. (RT 1272). Miguel Huerta went to a store and when he returned he saw a tree on fire. (RT 1273). He admitted that he was using heroin in January of 2009 on a daily basis and that he, along with Sue Huerta, had used heroin on the morning of the fire. (RT 1274-75).[10] He explained how he prepared heroin for injection by heating it with a lighter which he had with him on the day of the fire. (RT 1274-75; see also RT 1806 (defense narcotics expert explaining how heroin is heated and injected)). He did not tell the fire investigator that he had used heroin that morning or that he had a lighter. (RT 1279). He thought that Habana used crack cocaine but did not see Habana use it on the day of the fire. (RT 1277). He admitted that he and Sue Huerta had used heroin the day before they testified at trial. (RT 1280).

The fire investigator testified that when he investigated the scene he saw that three or four trees and some items had been burned in the area, including what appeared to be a shelter. (RT 1290-95, 1502-06, 1513; see also RT 1560

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[10]Petitioner testified that he used drugs with Miguel and Sue Huerta and others at the camp on the day of the fire. (RT 1828-35). Petitioner did drug runs to get cocaine for Miguel and Sue Huerta and others, and Miguel and Sue Huerta would get their own heroin. (RT 1863).

(CalTrans employee testifying that the trees belonged to CalTrans)). From the burn patterns, and to some degree from the eyewitness statements, the investigator concluded that the fire was intentional and began at the tree to which the shelter was attached. (RT 1509, 1517-19). The investigator found no evidence of an accelerant and admitted that a person using narcotics could accidentally start a fire. (RT 1521). The investigator found a pan with candle wax in it which could have been a potential source of the fire if it was in the area of origin. (RT 1524). The pan however was found 20 to 25 feet from the origin of the fire. (RT 1524, 1530, 1556). He opined that a fire from inside the shelter would not be consistent with the burn patterns because, in his opinion, the fire started outside the shelter on the right side of the tree. (RT 1527-28). The fact that someone had been using an open flame to heat heroin did not alter the investigator's conclusion that the fire was intentionally set. (RT 1529-30). The investigator could not distinguish whether the fire was started with a candle or a match or a lighter, only that it was with an open flame. (RT 1551).[11]

At the close of the prosecution's case, the trial court found that the Huertas were not evasive about their own drug use, and had answered the questions Habana refused to answer. (RT 1572). Petitioner's counsel wanted to bring Habana back to further impeach Sue Huerta's testimony that she and Miguel Huerta were doing methadone, not heroin. (RT 1573). The trial court took under consideration the matter of whether the defense could recall Habana for the limited purpose of asking what Habana may know about the Huertas' drug use, but

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[11]Paul Cohen, the defense narcotics expert who was a former police officer, testified to the following: It was not unusual for small fires to be caused by homeless people who are not careful and drug addicts who are not careful when they cook their food or when they consume drugs using open flames. (RT 1807, 1810). In his experience, people who are using rock cocaine do not understand or see what is going on around them because users are totally focused on obtaining rock cocaine, whereas heroin users should be able to follow a conversation if they are not falling asleep. (RT 1813-14). The high from heroin lasts for a period of hours – much longer than the high from rock cocaine. (RT 1814-15).

indicated there already was sufficient evidence for the impeachment of the Huertas to cast doubt on their credibility. (RT 1573-75).

Petitioner's defense was that it was Sue Huerta's careless heating of heroin that caused the shelter to catch fire. (RT 1802, 1837-39, 1842-44, 1868-70, 2129-30). Petitioner denied having words with Habana that day and said he would not have been angry had Habana asked him to leave the shelter. (RT 1850, 1853-59). Petitioner suggested that Habana and the Huertas were lying so that someone else would take the blame for the fire. (RT 1875).

Petitioner's counsel sought to recall Habana to testify and the trial court denied the final request, finding that the Huertas freely admitted having used drugs, that they had already been adequately impeached, and that recalling Habana to elicit further impeachment evidence would result in an undue consumption of time. (RT 1880-81). The court also denied a renewed motion for mistrial noting that the record was "replete with information that impeaches those witnesses." (RT 1881).

2. Applicable Law

The Confrontation Clause of the Sixth Amendment, made applicable to the States through the Fourteenth Amendment, provides that "[i]n all criminal prosecutions, the accused shall enjoy the right. . . to be confronted with the witness against him." U.S. Const. amend. VI; Crawford v. Washington, 541 U.S. 36, 42 (2004); Maryland v. Craig, 497 U.S. 836, 844 (1990). "The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact." Id. at 845. In other words, the main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination. See Delaware v. Van Arsdall, 475 U.S. 673, 678 (1986) (citations and quotation marks omitted). However, the Confrontation Clause guarantees only "an *opportunity* for effective cross-examination, not cross-

examination that is effective in whatever way, and to whatever extent, the defense might wish." Delaware v. Van Arsdall, 475 U.S. at 679 (quoting Delaware v. Fensterer, 474 U.S. 15, 20 (1985) (per curiam) (emphasis in original)).

When a witness gives "testimony that is marred by forgetfulness, confusion, or evasion . . . the Confrontation Clause is generally satisfied when the defense is given a full and fair opportunity to probe and expose these infirmities through cross-examination, thereby calling to the attention of the factfinder the reasons for giving scant weight to the witness' testimony." United States v. Owens, 484 U.S. 554, 558 (1988) (quoting Delaware v. Fensterer, 474 U.S. at 21-22); Walters v. McCormick, 122 F.3d 1172, 1175 (9th Cir. 1997) (same), cert. denied, 523 U.S. 1060 (1998).[12] The extent of the cross-examination must be sufficient to allow the jury to evaluate the witness' general credibility and, in particular, the biases and motivations of the witness. Evans v. Lewis, 855 F.2d 631, 633-34 (9th Cir. 1988) (citations omitted). A trial court may exclude cross-examination "that is repetitive or only marginally relevant." Id. (quoting Delaware v. Van Arsdall, 475 U.S. at 679). Additionally, as the Court of Appeal noted, a trial court's limitation on cross-examination pertaining to the credibility of a witness does not violate the Confrontation Clause unless a reasonable jury might have received a significantly different impression of the witness' credibility had the excluded cross-examination been permitted. (Lodged Doc. 6 at 8) (citing, *inter alia*, Delaware v. Van Arsdall, 475 U.S. at 680).

A Confrontation Clause claim is subject to harmless error analysis. See Winzer v. Hall, 494 F.3d 1192, 1201 (9th Cir. 2007) (citing Brecht v. Abrahamson, 507 U.S. 619 (1993)); see also Ocampo v. Vail, 649 F.3d 1098, 1114

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[12]In Delaware v. Fensterer, the Supreme Court found no Confrontation Clause violation where the prosecution's expert witness could not recall the theory on which his opinion was based, but the defense expert was able to suggest to the jury that the prosecution's expert relied on a theory which the defense expert considered baseless. See Delaware v. Fensterer, 474 U.S. at 20 (concluding, "The Confrontation Clause certainly requires no more than this.")

(9th Cir. 2011) (same), cert. denied, 133 S. Ct. 62 (2012). "Under this standard, habeas petitioners . . . are not entitled to habeas relief based on trial error unless they can establish that it resulted in 'actual prejudice.'" Brecht, 507 U.S. at 637. Actual prejudice, in turn, is demonstrated by the petitioner "if the error in question had a 'substantial and injurious effect or influence in determining the jury's verdict.'" Winzer, 494 F.3d at 1201 (quoting Brecht). Factors to consider in determining under Brecht whether violation of right to cross-examine was harmless include the importance of the witness' testimony to the prosecution's case, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and the overall strength of the prosecution's case. See Delaware v. Van Arsdall, 475 U.S. at 684.

3. Analysis

The Court of Appeal reasonably rejected this claim as the trial court's refusal to allow petitioner to recall Habana to the stand for further examination did not violate the Confrontation Clause. First, there is no suggestion that Habana's further testimony about Miguel and Sue Huerta's drug use would have given the jury a significantly different impression of the credibility of the Huertas or Habana. Delaware v. Van Arsdall, 475 U.S. at 680. Upon cross-examination, Habana freely admitted his own drug use both leading up to and on the day of the fire. Habana only refused to testify about the drug use of others. And, as the trial court noted, the prosecution's two other percipient witnesses, Sue and Miguel Huerta, both testified voluntarily about their drug use, and provided petitioner with ample opportunity to impeach their testimony based on inconsistencies between Miguel Huerta's and Sue Huerta's testimony about the drugs they were using, the fact that all percipient witnesses were on drugs during the time the fire took place, and that Miguel and Sue Huerta admittedly used heroin up to the day

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before their testimony at trial. The Confrontation Clause required no more. Delaware v. Fensterer, 474 U.S. at 20.

Assuming, *arguendo*, that petitioner's right to confrontation was violated by the trial court's finding that recalling Habana would be repetitive and unduly time consuming, petitioner can show no prejudice from the trial court's rulings. The prosecution's case against petitioner was strong. All three witnesses testified that petitioner had threatened to light the shelter on fire, and the two witnesses who saw the fire lit reported the same story to initial responders and at trial: petitioner tried three times to light the shelter on fire, Sue Huerta put out the first two fires, and the third fire burned down the shelter and its surroundings, including the trees. The fire investigator testified that he believed the fire was intentionally set in the area where the witnesses said petitioner lit the shelter.

The trial court ordered Habana to answer the defense questions and gave the defense wide latitude in cross-examining both Habana and the Huertas so that petitioner could explore his theory of the defense. The jury heard petitioner's defense that the fire was accidentally started by Sue Huerta's careless drug use at the homeless camp, and heard Habana and Miguel Huerta admit that all three witnesses (Habana, Miguel Huerta, and Sue Huerta) were using drugs involving open flames on the day of the fire. The jury also heard Habana and Miguel Huerta testify that they did not tell investigators about their drug use on the day of the fire. Even through trial, Sue Huerta denied her use of heroin on the day of the fire. From this evidence, petitioner had ample support for his contention that the percipient witnesses were motivated to cover up Sue Huerta's alleged drug use just prior to the fire as the cause of the fire. By their verdict, the jury simply did not believe petitioner's version of the events.

On this record, the Court does not find that the trial court's denial of petitioner's request to recall Habana to further impeach the Huertas, and the accompanying defense motion for mistrial, materially violated petitioner's

constitutional rights. The Court of Appeal's denial of this claim was not an unreasonable application of clearly established federal law. See Nevada v. Jackson, 133 S. Ct. 1990, 1994 (2013) (per curiam) ("this Court has never held that the Confrontation Clause entitles a criminal defendant to introduce *extrinsic evidence* for impeachment purposes") (emphasis original) (citing, *inter alia*, Jordan v. Warden, Lebanon Correctional Institution, 675 F.3d 586, 596 (6th Cir. 2012) ("the Supreme Court has not recognized the sweep of the Confrontation Clause to encompass the right to impeach an adverse witness by putting on a third-party witness") (internal quotations and citation omitted)). For these reasons, Ground II does not merit federal habeas relief.

C. Petitioner's Ineffective Assistance of Counsel Claim Does Not Merit Federal Habeas Relief

In Ground III, petitioner asserts a number of reasons his trial counsel assertedly rendered ineffective assistance. (Petition Memo at 23-26). Petitioner contends that his trial counsel was ineffective for failing to investigate and subpoena witnesses for the defense, namely Bert Hicks and arson investigator Hernandez. Petitioner faults counsel for relying on the prosecution to produce witnesses, and for failing to obtain an expert witness to rebut the state's arson expert to support his "not arson" defense. (Petition Memo at 23, 25-26). Petitioner also faults counsel for failing to research and offer case law to the trial court after the court overruled counsel's objection to the filing of an additional arson count on the day of trial. Petitioner suggests, without any authority, that counsel should have argued that the additional count put petitioner "twice in jeopardy for the same offense." (Petition Memo at 24). Finally, petitioner faults counsel for failing to establish the value of the damaged property in question, since the threshold for felony arson assertedly was $950, and it was estimated that the value of property damaged was $1,000. (Petition Memo at 24). As the California Supreme Court rejected such claims without comment on habeas review

– a determination which is deemed to be on the merits – and as there is no reasoned decision addressing the merits of such claims, this Court has conducted an independent review of the record to assess whether petitioner is entitled federal habeas relief thereon. Based upon such independent review, this Court concludes that none of these alleged shortcomings establish counsel's ineffectiveness or petitioner's entitlement to federal habeas relief.

1. Applicable Law

The Sixth Amendment of the United States Constitution as applied to the states through the Fourteenth Amendment guarantees a state criminal defendant the right to effective assistance of counsel at trial. Evitts v. Lucey, 469 U.S. 387 (1985). To warrant habeas relief due to ineffective assistance of counsel, a petitioner must demonstrate that: (1) counsel's performance was deficient; and (2) the deficient performance prejudiced his defense. Strickland v. Washington, 466 U.S. 668, 687-93 (1984). As both prongs of the Strickland test must be satisfied in order to establish a constitutional violation, failure to satisfy either prong requires that a petitioner's ineffective assistance of counsel claim be denied. Strickland, 466 U.S. at 687, 697 (no need to address deficiency of performance if lack of prejudice is obvious); Hein v. Sullivan, 601 F.3d 897, 918 (9th Cir. 2010) (a court can deny a Strickland claim if either part of the test is not satisfied), cert. denied, 131 S. Ct. 2093 (2011).

2. Pertinent Pretrial Proceedings

After the preliminary hearing, petitioner requested and was granted the right to represent himself. (RT E1-E5). From May 26, 2009, though May 3, 2010, petitioner represented himself at numerous pretrial hearings while he developed his defense. (RT D1-N5). This Court has read and considered the entirety of these hearings and notes that the trial court was accommodating to petitioner's various requests.

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For instance, petitioner was granted an investigator and, upon further request, was granted a different investigator who worked near the crime scene. (RT E5-F1, G4-G5, G8).[13] Petitioner requested further discovery which was provided to the extent it existed. See, e.g., RT F3-F7, G2-G3, I5, L10-L11, 1263. Petitioner also requested and was granted appointment of an arson expert. (RT G5-G6, H1 (court noting concern that the expert might be limited in what could be done since the crime scene may have changed and whatever may have burned may not be preserved), H5).

Petitioner wanted to subpoena various witnesses and was instructed to write down the names of the proposed witnesses and to tell the court why petitioner wanted the witnesses to testify. (RT H7). After a pause, petitioner asked the court to "hold off" on contacting petitioner's arson expert based on what petitioner's investigator had gathered from the crime scene. (RT H8-H9). The court gave petitioner and the prosecution time to discuss the investigator's findings. (RT H9). The court approved additional defense investigator hours and petitioner replied, "If we can eliminate the expert witness, I think [the investigator has] been expert enough to help me." (RT H10). The court granted petitioner's request. (RT H10).

At the next pretrial proceeding, petitioner indicated he had photographs to contest the testimony that the property at issue had an estimated value of $1,000. (RT I3-I4). The trial court found that the value would be an issue for the trier of fact. (RT I4).

At a later hearing, petitioner advised that he would be calling "at least 15" witnesses he had yet to disclose to the prosecution. (RT L13). Petitioner indicated that he would not be ready for trial until he could provide a witness list and advised that he would file a motion to recuse the judge. (RT L14). When the

[13]Petitioner reported that his second investigator had "done an excellent job." (RT H2).

matter returned for the next court date, the judge denied the motion to recuse the judge as untimely since petitioner had been assigned for all purposes to the court for over a year. (RT M1). Petitioner then requested that the trial court appoint his standby attorney to represent him during trial because petitioner thought the stress might be too much, but petitioner wanted to complete his investigation before the appointment of standby counsel. (RT M6-M7). The trial court permitted petitioner to proceed as requested. (RT N5).

3. Counsel Was Not Ineffective for Failing to Investigate and Present Witnesses

Petitioner fails to demonstrate that his trial counsel was ineffective in failing to investigate and subpoena Bert Hicks and arson investigator Hernandez, who took the photographs of the fire scene,[14] and other unidentified witnesses. Petitioner does not allege how these witnesses may have aided his defense. Petitioner's vague and conclusory allegations do not merit relief. See James v. Borg, 24 F.3d 20, 26 (9th Cir.) (Strickland claim insufficient where petitioner failed to identify what evidence counsel should have presented which would have aided petitioner), cert. denied, 513 U.S. 935 (1994); see also Jones v. Gomez, 66 F.3d 199, 204 (9th Cir. 1995) ("[c]onclusory allegations which are not supported by a statement of specific facts do not warrant habeas relief") (citation omitted), cert. denied, 517 U.S. 1143 (1996); Blackledge v. Allison, 431 U.S. 63, 75 n.7 (1977) (summary disposition of habeas petition appropriate where allegations are vague or conclusory; "the petition is expected to state facts that point to a real possibility of constitutional error") (citation and internal quotations omitted). Moreover, as detailed above, petitioner chose to represent himself

[14]As to investigator Hernandez, petitioner's counsel inquired whether Hernandez would need to be present to provide a foundation for the photographs and statements taken. (RT 311-12). The issue was left to the prosecution to lay the proper foundation. (RT 312). Hernandez did not testify.

through pretrial investigation until the day the case was called for trial. Petitioner cannot fault counsel for the investigation that petitioner himself chose to undertake or to forego.

There is no indication in the record that petitioner's counsel relied on the prosecution to produce witnesses. Counsel expressed an intent to call a drug expert and noted that he had two other witnesses to call if he could locate them – for one he had only a first name and the other was a common name. (RT 314-15). Later, after voir dire had begun, petitioner provided counsel with a list of 18 named witnesses, some counsel noted were not applicable to the case, and none of those witnesses (who were not included in counsel's list) had been properly subpoenaed. (RT 602-03). Petitioner's counsel called his own witnesses in petitioner's defense. As noted above, petitioner was given many pretrial opportunities to produce a witness list for the court, and had his own investigator while he was representing himself who could have served subpoenas on any witnesses petitioner saw fit to subpoena for trial. Petitioner also chose to forego obtaining his own arson expert based on what the defense investigator had gathered from the scene. Once again, petitioner cannot fault counsel for the choices petitioner made in preparing his own case for trial.

In short, the record refutes petitioner's allegations that counsel was ineffective in the foregoing respects.

4. Counsel Was Not Ineffective for Failing to Research and Offer Case Law to Support an Objection to Filing the CalTrans Charge on the Day of Trial

Petitioner faults counsel for failing to research and offer case law to the trial court, after the court overruled counsel's objection on the day of trial to the filing of an additional arson count. (Petition Memo at 23).

The original Information charged petitioner with one count of arson of a structure in violation of California Penal Code section 451(c). (CT 95-97). At the

preliminary hearing, Habana testified that petitioner intentionally lit a tree on fire near Habana's shelter which burned Habana's shelter and all of his belongings inside. (CT 18-23). The prosecution thereafter filed an Amended Information adding an additional count of arson of the property of another (Habana) in violation of California Penal Code section 451(d). (CT 137-40; RT D5). When the matter was called for a hearing on the petitioner's motion to set aside the Information, petitioner's counsel objected to the Amended Information because it named a new victim (Habana) based on information that purportedly was not gathered at the preliminary hearing. (RT D4). Counsel also argued that the evidence was insufficient to support the charges because the shelter was not adequate to be a "structure," and there was a lack of case law to suggest that the shelter was a "structure" (which the court and the prosecution acknowledged). (RT D6-D12). The trial court granted the motion as to the arson of a "structure" count, finding that what was burned did not constitute a "structure," but denied the motion as to arson of the property of Habana since Habana testified that his personal property had been burned. (RT D15).[15]

On the first day of trial, the trial court noted another Amended Information had been filed adding the arson of property of another (CalTrans) count. (RT 301-02). Counsel objected to such Amended Information as untimely, and questioned why there would be multiple counts for the same fire. (RT 302, 305-08). Counsel argued that the issue was whether the charge for arson of property of Habana survived a motion to set aside the Information based on what was burned. (RT 305). The court noted that there was sufficient evidence that a jury could find that petitioner burned the trees which belonged to CalTrans (and could not be

[15]The prosecution later amended the Information to delete the section 451(c) count per the trial court's ruling, but to add a second 451(d) count based on the alleged burning of property belonging to CalTrans. (CT 262-65). Petitioner renewed his motion to set aside the Amended Information in later pretrial proceedings – a motion which the court denied. (RT J2-J6).

petitioner's property), and any dispute over whether the shelter and items burned belonged to petitioner or to Habana would be a matter for the jury to decide. (RT 307). As to whether there could be two counts from the same fire, the court inquired whether counsel had any authority for his argument and counsel then had none given the timing of the amendment. (RT 308). The trial court overruled counsel's objection without prejudice to counsel presenting authority to support his position that two counts could not arise from the single fire. (RT 308-09).

As noted in the discussion regarding Ground I herein, the Court of Appeal found that the additional count for the same fire was proper under California law. (Lodged Doc. 6 at 4-6) (noting specifically that "multiple charges and multiple convictions can be based on a single criminal act, if the charges allege separate offenses") (quotations and citation omitted). Counsel cannot be faulted for failing to further pursue a baseless claim. See Rupe v. Wood, 93 F.3d 1434, 1444-45 (9th Cir. 1996) ("[T]he failure to take a futile action can never be deficient performance."), cert. denied, 519 U.S. 1142 (1997).

5. Counsel Was Not Ineffective for Failing to Establish the Value of the Property Damaged

Petitioner faults counsel for failing to establish the amount of the damage to the property in question. (Petition Memo at 24). At petitioner's behest, counsel took issue with the value of the property that was destroyed, asking for an estimate of the loss amount, and the trial court noted that value was not an element of the charge or any lesser included offenses. (RT 312; see also Cal. Penal Code § 451(d) (containing no threshold amount)). The court found the request irrelevant. (RT 312-13). Once again, counsel cannot be faulted for further pursuing petitioner's baseless claim. See Rupe v. Wood, 93 F.3d at 1444-45.

6. Conclusion

For all the foregoing reasons, and based on the Court's independent review of the record, Ground III does not merit federal habeas relief.

D. Petitioner's Prosecutorial Misconduct Claim Does Not Merit Federal Habeas Relief

Petitioner also raises a number of prosecutorial misconduct allegations. Petitioner contends that the prosecution amended the Information adding the prior strike conviction allegation and the second arson count for destruction of CalTrans property to punish petitioner for rejecting a plea offer and exercising his right to a jury trial. (Petition Memo at 27-28, 30, 32). Petitioner also contends that the prosecution improperly vouched for the State's witnesses (Petition Memo at 28, 30-31) and knowingly presented false testimony. (Petition Memo at 31). As the California Supreme Court rejected such claims without comment on habeas review – a determination which is deemed to be on the merits – and as there is no reasoned decision addressing the merits of such claims, this Court has conducted an independent review of the record to assess whether petitioner is entitled federal habeas relief thereon. Based upon such independent review, this Court concludes that none of the foregoing allegations amount to misconduct or otherwise merit federal habeas relief.

1. Petitioner Has Not Shown That His Prosecution Was Vindictive

By amending the Information to add the additional count shortly before trial, petitioner asserts the prosecution vindictively prosecuted petitioner for rejecting a plea offer. (Petition Memo at 27-28, 30, 32 (citing, *inter alia*, United States v. Jenkins, 504 F.3d 694 (9th Cir. 2007); United States v. Lopez, 474 F.3d 1208, 1211 (9th Cir. 2007) (a vindictive prosecution claim arises when a prosecutor seeks additional charges solely to punish a defendant for exercising a constitutional right), cert. denied, 550 U.S. 928 (2007), overruled on other grounds, United States v. King, 687 F.3d 1189 (9th Cir. 2012), cert. denied, 134 S. Ct. 1492 (2014)).

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Just before trial, the court noted that petitioner's maximum sentence exposure was 12 years, and that the court previously had offered petitioner time served, with probation and accommodations for transportation to the V.A. office for any medical needs. (RT 4; see also Petition Memo at 35 (noting that offer came on March 26, 2010 and was declined on April 9, 2010)). After petitioner declined the offer, the prosecution filed an Amended Information alleging that petitioner had a prior strike conviction and another adding the CalTrans arson count. (RT 5-6; see also CT 257-59, 262-65 (Amended Informations filed on May 21 and June 3, 2010)). Petitioner noted on the record that he had talked with his attorney at the time of the offer, and that the prosecution had threatened petitioner with two counts and another five years. (RT 4-5). The court concluded that it did not have authority to strike a five year prior conviction, and the case was not resolved through plea negotiations. (RT 5-6).

"For an agent of the State to pursue a course of action whose objective is to penalize a person's reliance on his [or her] protected statutory or constitutional rights is 'patently unconstitutional.'" United States v. Goodwin, 457 U.S. 368, 372 n.4 (1982) (quoting Bordenkircher v. Hayes, 434 U.S. 357, 363 (1978)). Where the action is adding additional charges, the defendant "must show vindictiveness on the part of those who made the charging decision." United States v. Edmonds, 103 F.3d 822, 826 (9th Cir. 1996) (citations and internal quotations omitted).

> To establish a prima facie case of prosecutorial vindictiveness, a defendant must show either direct evidence of actual vindictiveness or facts that warrant an appearance of such. Evidence indicating a realistic or reasonable likelihood of vindictiveness may give rise to a presumption of vindictiveness on the government's part.

United States v. Montoya, 45 F.3d 1286, 1299 (9th Cir.) (internal citations and quotations omitted), cert. denied, 516 U.S. 814 (1995). In the absence of proof of

actual vindictiveness, petitioner must prove an improper prosecutorial motive through objective evidence before any presumption of vindictiveness attaches. Id. at 1299 (citation omitted). "[T]he appearance of vindictiveness results only where, as a practical matter, there is a realistic or reasonable likelihood of prosecutorial conduct that would not have occurred but for hostility or a punitive animus towards the defendant because he has exercised his specific legal rights." United States v. Gallegos-Curiel, 681 F.2d 1164, 1169 (9th Cir. 1982) (citing Goodwin, 457 U.S. at 372-73). Here, the record does not contain evidence of actual vindictiveness. Rather, petitioner contends the filing of the additional allegation following petitioner's rejection of the plea bargain creates a presumption of vindictiveness.[16] A presumption of vindictiveness has not been shown.

"The mere adding of the new charge at that [pretrial] stage of the proceedings did not give rise to an appearance of vindictiveness." United States v. McCoy, 495 Fed. Appx. 774, 775 (9th Cir. 2012), cert. denied, 133 S. Ct. 898 (2013); see also United States v. Kent, 649 F.3d 906, 913-14 (9th Cir.) (prosecutor may file enhanced charges when a defendant refuses to cooperate, even when the

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[16]The United States Supreme Court has held that a presumption of vindictiveness arises when, *following a conviction*, a defendant's exercise of a procedural right causes or threatens a second trial, and the defendant then is exposed to even greater punishment. See Blackledge v. Perry, 417 U.S. 21 (1974); North Carolina v. Pearce, 395 U.S. 711 (1969). However, "[t]he Supreme Court has 'generally rejected the presumption of prosecutorial vindictiveness in the pretrial context.'" United States v. Vallo, 238 F.3d 1242, 1249 (10th Cir.) (citations omitted), cert. denied, 532 U.S. 1057 (2001); see also Nunes v. Ramirez-Palmer, 485 F.3d 432, 442 (9th Cir. 2007) (argument that presumption of prosecutorial vindictiveness in pretrial charging decision is not clearly established federal law under 28 U.S.C. section 2254(d)), cert. denied, 552 U.S. 962 (2007). To the contrary, in Goodwin, the Supreme Court held that no presumption of vindictiveness attends a prosecutor's decision to charge a felony arising out of the same incident that was the subject of a previously charged misdemeanor to which the defendant had refused to plead guilty. Goodwin, 457 U.S. at 381-83; see also United States v. Gallegos-Curiel, 681 F.2d at 1167 ("When there is no evidence of actual vindictiveness and the only question is whether it must be presumed, cases involving increased charges or punishments after trial are to be sharply distinguished from cases in which the prosecution increases charges in the course of pretrial proceedings.").

defendant wants to plead guilty to the original charges; "As a general matter, prosecutors may charge and negotiate as they wish. . . . As a matter of law, the filing of additional charges to make good on a plea bargaining threat. . . will not establish the requisite punitive motive [].", cert. denied, 132 S. Ct. 355 (2011); United States v. Gamez-Orduño, 235 F.3d 453, 462 (9th Cir. 2000) ("[I]n the context of pretrial plea negotiations vindictiveness will not be presumed simply from the fact that a more severe charge followed on, or even resulted from, the defendant's exercise of a right."); United States v. Noushfar, 78 F.3d 1442, 1446 (9th Cir. 1996) (even during plea negotiations, "prosecutors may threaten additional charges and carry through on this threat. This action alone does not violate a defendant's due process rights, nor does it create a presumption of vindictiveness.") (citations omitted). Here, while the additional prior strike conviction allegation and the CalTrans arson count were added just before trial, after petitioner rejected a plea offer, there is no suggestion the addition was improper or vindictive.

Based on this Court's independent review of this claim, the California Supreme Court's rejection of this claim was not contrary to, or an unreasonable application of, any clearly established federal law as determined by the United States Supreme Court. See 28 U.S.C. § 2254(d). Accordingly, petitioner is not entitled to habeas relief on this portion of Ground IV of the Petition.

2. The Prosecution Did Not Improperly Vouch for the State's Witnesses

Petitioner also contends that the prosecution improperly vouched for the "condition and state of mind" of the prosecution witnesses, all the while knowing that the witnesses were under the influence of drugs when they came to court, prejudicing petitioner since the case hinged on witness credibility. (Petition Memo at 28, 30-31). Petitioner does not indicate any place in the record where the prosecution vouched for these witnesses other than a general reference the

prosecutor purportedly offering her personal opinion during closing argument. (Petition Memo at 28, 30-31).

There is no suggestion that the prosecution vouched in any way for the state of mind of the State's witnesses. The jury was presented with evidence that the Huertas had taken heroin close in time to their testimony.[17] In closing, the prosecutor explained (without objection) the physical evidence and why it supported a finding that the prosecution witnesses were telling the truth and petitioner was not. See RT 2119, 2125-28, 2145 (closing).

"Vouching consists of placing the prestige of the government behind a witness through personal assurances of the witness's veracity, or suggesting that information not presented to the jury supports the witness's testimony." United States v. Weatherspoon, 410 F.3d 1142, 1146 (9th Cir. 2005) (internal citation omitted). The prosecution's comments, based on the evidence adduced at trial, do not rise to the level of vouching. The prosecutor did not offer her personal assurances that her witnesses were telling the truth or suggest any evidence outside the record supported their testimony. A prosecutor has "reasonable latitude" in fashioning closing arguments and can argue "reasonable inferences" from the evidence, as here, "including that one of two sides is lying." Id. (quotations and citation omitted). On this record, the prosecutor did not improperly vouch for her witnesses.[18]

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[17]As summarized above, Miguel Huerta admitted on cross-examination that he and Sue Huerta had taken heroin the day before they testified at trial. The jury had this information and could evaluate witness credibility.

[18]Additionally, the Court finds no prejudice from the prosecution's argument given the trial court's instructions to the jury that: "[Y]ou must decide what the facts are in this case. You must use only the evidence that was presented in this courtroom. . . . Nothing the attorneys say is evidence. In their opening statements and closing arguments, the attorneys discuss the case, but their remarks are not evidence." (RT 2108). Compare Duckett v. Godinez, 67 F.3d 734, 743 (9th Cir. 1995) (assuming prosecutor's comment was improper, no constitutional violation based (continued...)

3. There Is No Evidence the Prosecution Knowingly Presented False Testimony

Petitioner contends that the prosecution knowingly presented false testimony. (Petition Memo at 31) (citing Napue v. Illinois, 360 U.S. 264, 269 (1959) (a prosecutor's knowing use of perjured testimony to obtain a conviction violates due process)). To succeed on a Napue claim, a defendant "must show that (1) the testimony (or evidence) [presented by the prosecution] was actually false, (2) the prosecution knew or should have known that the testimony was actually false, and (3) the false testimony was material." Hayes v. Ayers, 632 F.3d 500, 520 (9th Cir. 2011) (citation omitted); Jackson v. Brown, 513 F.3d 1057, 1071-72 (9th Cir. 2008) (same). Here, petitioner has made nothing more than general allegations. There is no indication in the record that the prosecution knowingly presented false testimony. The prosecution simply presented the State's theory of the case contrary to petitioner's defense. This is not misconduct. See United States v. Aichele, 941 F.2d 761, 766 (9th Cir. 1991) (rejecting prosecutorial misconduct claim where contention that testimony was perjured was "mere speculation.").[19]

4. Conclusion

For these reasons, and based on the Court's independent review of the record, petitioner's prosecutorial misconduct claim does not merit federal habeas relief.

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[18](...continued)
on isolated moment in lengthy trial were jury was instructed that the statements of attorneys are not evidence), cert. denied, 517 U.S. 1158 (1996). The jury is presumed to have followed the trial court's instructions. See Weeks v. Angelone, 528 U.S. 225, 234 (2000).

[19]Petitioner also contends that the prosecution only provided black and white photographs in discovery (Petition Memo at 32), but admits later that he was provided with color photographs as indicated on record. See Petition Memo at 32; RT I-5 (prosecutor indicating that petitioner was given copies of photographs).

E. Petitioner's Judicial Bias Claim Does Not Merit Federal Habeas Relief

Petitioner contends that his trial judge was biased for (1) allowing the prosecution to present witnesses who were under the influence of drugs; (2) "swaying" Habana to answer defense questions with "I don't know," to avoid having to order Habana to answer, and otherwise for not holding Habana in contempt for his refusal to answer the defense questions about the drug use of others; and (3) failing to address petitioner's bias claims in detail when petitioner filed his motion to recuse the judge. (Petition Memo at 35-37; see also CT 247-52 (petitioner's motion raising issue with many pretrial rulings)). Petitioner also generally alleges that the trial court's "blind view" to the prosecution's alleged misconduct assisted the prosecution's efforts in prejudicing petitioner. (Petition Memo at 28). As the California Supreme Court rejected such claims without comment on habeas review – a determination which is deemed to be on the merits – and as there is no reasoned decision addressing the merits of such claims, this Court has conducted an independent review of the record to assess whether petitioner is entitled federal habeas relief thereon. Based upon such independent review, this Court concludes that none of the foregoing allegations demonstrate judicial bias or otherwise merit federal habeas relief.

"[T]he Due Process Clause clearly requires a 'fair trial in a fair tribunal,' before a judge with no actual bias against the defendant or interest in the outcome of his particular case." Bracy v. Gramley, 520 U.S. 899, 904-05 (1997) (citation omitted); In re Murchison, 349 U.S. 133, 136 (1955); see also Ungar v. Sarafite, 376 U.S. 575, 584 (1964) (petitioner has a "right to be tried by an unbiased and impartial judge without a direct personal interest in the outcome of the hearing."). "There is a strong presumption that a judge is not biased or prejudiced[.]" Rhoades v. Henry, 598 F.3d 511, 519 (9th Cir. 2010); see also Larson v. Palmateer, 515 F.3d 1057, 1067 (9th Cir.) ("petitioner must overcome a

presumption of honesty and integrity in those serving as adjudicators") (citation omitted), cert. denied, 555 U.S. 871 (2008). Petitioner has failed to rebut that presumption here.

As explained above, petitioner has not shown any prosecutorial misconduct. Petitioner's bias claim predicated on the trial court's "blind view" to the prosecution's presentation of its case does not show bias. Nor does petitioner's claim predicated on the trial court allowing the prosecution to present witnesses who allegedly were under the influence show bias. To the extent any of the prosecution witnesses may have been using drugs, the jury was informed of such and could use the same in determining the weight to be given to the witness testimony. From the record it appears that the witnesses were able to coherently and directly answer the questions posed to them – and did so with no objection or question as to their competence.

To the extent petitioner claims that the trial court was required under California law to make a more detailed ruling on his motion to recuse the trial judge, petitioner fails to state a federal claim. See Waddington v. Sarausad, 555 U.S. at 192 n.5; see also Swarthout v. Cooke, 131 S. Ct. 859, 863 (2011) (noting that the Supreme Court "long recognized that a mere error of state law is not a denial of due process") (citations omitted). Additionally, judicial rulings alone – which were the basis of the recusal motion – "almost never constitute a valid basis for a bias or partiality motion." Liteky v. United States, 510 U.S. 540, 555 (1994). "A judge's ordinary efforts at courtroom administration – even a stern or short-tempered judge's ordinary efforts at courtroom administration – remain immune [from a bias challenge]." Id. at 556.

Based upon its independent review of the entire trial proceedings, this Court discerns no indication that the trial judge was biased against petitioner in any way. The trial judge patiently allowed petitioner time to develop his case as petitioner represented himself and, when petitioner chose to have counsel during trial,

presided over the trial with no indication of bias. This claim is without merit and accordingly fails to establish petitioner's entitlement to federal habeas relief.[20]

F. Petitioner's Cumulative Error Claim Does Not Merit Federal Habeas Relief

Petitioner contends that the cumulative effect of the foregoing alleged errors denied him due process. (Petition Memo at 37-40). As the California Supreme Court rejected such claim without comment on habeas review – a determination which is deemed to be on the merits – and as there is no reasoned decision addressing the merits of such claims, this Court has conducted an independent review of the record to assess whether petitioner is entitled federal habeas relief thereon. Based upon such independent review, this Court concludes that petitioner is not entitled to habeas relief on this claim.

As discussed above, this Court has considered and rejected all of the foregoing claims on the merits. "While the combined effect of multiple errors may violate due process even when no single error amounts to a constitutional violation or requires reversal, habeas relief is warranted only where the errors infect a trial with unfairness." Payton v. Cullen, 658 F.3d 890, 896-97 (9th Cir. 2011), cert. denied, 133 S. Ct. 426 (2012). Habeas relief on a theory of cumulative error is appropriate when there is a "'unique symmetry' of otherwise harmless errors, such that they amplify each other in relation to a key contested issue in the case." Ybarra v. McDaniel, 656 F.3d 984, 1001 (9th Cir. 2011), cert. denied, 133 S. Ct. 424 (2012) (citation omitted). Here, no such symmetry of otherwise harmless errors exists. The claimed errors either were not errors or were not prejudicial, or both. Petitioner's claim of cumulative error is meritless and accordingly, does not entitle petitioner to federal habeas relief.

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[20]Petitioner alleges that the trial judge improperly determined petitioner was not suitable for a wheel chair, but admits the issue was later resolved. (Petition Memo at 34-35).

VI. CONCLUSION

IT IS THEREFORE ORDERED that: (1) the Petition is denied and this action is dismissed with prejudice; and (2) the Clerk shall enter judgment accordingly.

IT IS SO ORDERED.

DATED: December 29, 2014

/s/

Honorable Jacqueline Chooljian
UNITED STATES MAGISTRATE JUDGE