UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

KINZIE GENE NOORDMAN, Petitioner, v. MATTHEW CATE, Secretary, California Department of Corrections and Rehabilitation, Respondent.	Case No. ED CV 09-0409 JFW (JCG) **REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE TO DENY PETITION FOR WRIT OF HABEAS CORPUS AND DISMISS ACTION WITH PREJUDICE** [28 U.S.C. § 636; General Order 05-07]

Before the Court is a Petition for Writ of Habeas Corpus ("Petition") by Kinzie Gene Noordman ("Petitioner").[1] For the reasons detailed below, this Court recommends denial of the Petition and dismissal of this action with prejudice.

I.

PROCEDURAL AND FACTUAL BACKGROUND

A. Conviction

On March 2, 2005, a jury convicted Petitioner of first degree murder. (Clerk's Transcript ("CT") at 329.) The jury also found true that in the commission of the murder, Petitioner personally and intentionally discharged a firearm within the

[1] The Court substitutes Matthew Cate as the proper Respondent. *See* Fed. R. Civ. P. 25(d).

meaning of California Penal Code § 12022.53(c). (*Id.* at 330.)

Petitioner appealed and the California Court of Appeal affirmed the conviction in a reasoned, written decision. (Lodg. No. 1, App. A at 2); *see also People v. Noordman*, 2006 WL 2374765, at *1 (Cal. App. Aug. 17, 2006). Petitioner sought review from the California Supreme Court, and petitioned for a writ of certiorari in the United States Supreme Court. (Lodg. Nos. 1-2); *see also Noordman v. California*, 550 U.S. 908 (2007). Both petitions were summarily denied. (*Id.*)

Petitioner then filed state habeas petitions in the San Bernardino County Superior Court, California Court of Appeal, and California Supreme Court. (Lodg. Nos. 3-4, 7.) All were denied. (Lodg. No. 5, Exh. 18, Lodg. Nos. 6, 8.)

B. Evidence

The Court has reviewed the record, and the evidence is accurately summarized in the Court of Appeal's decision on direct review. (*See* Lodg. No. 1, App. A at 2-10); *see also* 28 U.S.C. § 2254(e)(1) (facts presumed correct). For ease of reference, that opinion is attached here as Exhibit A and supplies the full panoply of facts. The Court, however, repeats the facts here and throughout only as necessary.

On September 12, 2003, the night before Kelly Bullwinkle's murder, Petitioner and Damien Guerrero dug a shallow grave in a remote part of San Timoteo Canyon. The grave was 76 inches long, 13 inches deep at one end, and about two inches deep at the other end.

The next day, Petitioner invited Kelly to go with her to San Timoteo Canyon after Kelly got off work around 4:00 p.m. They drove to the canyon in Kelly's car, where Damien was going to meet them. They waited for Damien for about two hours, talking and smoking "weed."

Damien left work around 5:00 p.m. and went to see his girlfriend, Elody Romero. After about an hour and a half, he left Elody's home and drove to San Timoteo Canyon. He told Elody he was going to dinner and a movie with Petitioner, a close friend.

After meeting Petitioner and Kelly, Damien told them he wanted to see what was back in the canyon. The three drove into the canyon, parked their cars, walked around, and ended up at the grave that Petitioner and Damien had dug the night before.

1. Petitioner's and Damien's Version of the Incident

According to Petitioner and Damien, Kelly's death was the result of a joke gone wrong. The joke was that Damien would pull out a gun, point it at Kelly, and tell her that they were going to kill her and bury her in the hole. Petitioner and Damien would then tell Kelly it was a joke.

However, when Damien pulled out the gun, it accidentally fired and shot Kelly in the back of the head, dropping her to the ground. Kelly moved her legs and moaned. Petitioner panicked and told Damien to shoot Kelly a second time, but Damien said he could not do it. Petitioner then took the gun and shot Kelly in the head, so she would not suffer any more. Kelly stopped moving. Damien then put Kelly's body in the shallow grave, and covered it with dirt and an abandoned couch.

Petitioner then drove Kelly's car to the Ontario Mills mall and left it there. Damien picked her up at the mall around 8:00 p.m., and they went out to dinner and a movie. Two days after the murder, Petitioner left a message on the answering machine at Kelly's home, where she lived with her mother and a roommate, and asked Kelly if she wanted to "hang out."

2. Murder Investigation

At the time of Kelly's death, Petitioner and Damien were "soul mates and best friends." They both liked and frequently watched "Natural Born Killers," a movie from which they memorized lines. Petitioner and Damien also wore snake rings like the rings worn by the main characters from the movie, who were serial killers.

Although Petitioner was Damien's "soul mate," Elody was Damien's on-and-off-again girlfriend at the time of the murder. Kelly also had a physical relationship with Damien, but he broke up with Kelly and went back to Elody. Kelly, however, still loved Damien and continued to call him. Elody told Kelly to leave Damien alone,

and confronted Damien about Kelly. He admitted he had a relationship with Kelly. In September 2003, Damien told Kelly to leave him alone, and Kelly became upset.

On September 15th, 2003, Kelly's car was towed from the mall parking lot. Petitioner's fingerprints and DNA were found in the car. On September 17, a sheriff's deputy went to Kelly's home to investigate. Petitioner was there. Petitioner said that she was Kelly's best friend, and that she and Kelly periodically used cocaine and meth. Kelly's disappearance was publicized through the police and media, and Petitioner assisted in distributing missing-person posters. Neither Petitioner nor Damien told the police about the murder.

On October 4, 2003, two boys playing paint ball discovered Kelly's decomposed body. The boys reported their discovery to the police, who later found a shell casing eight inches from Kelly's right leg.

A forensic pathologist testified that the cause of Kelly's death was a gunshot wound to the head. Kelly had two gunshot wounds. One was a non-fatal, graze wound along the surface of Kelly's scalp. The bullet that caused this wound traveled from below, upward, was not life threatening, and would not have knocked Kelly down. The other gunshot wound was from a bullet that went through Kelly's brain and caused her death in a matter of seconds. That bullet entered the rear, right side of Kelly's skull, traveled from right to left, slightly forward and downward, and left no exit wound. This wound would have rendered Kelly incapable of any meaningful, voluntary movement. The pathologist testified, however, that he was unable to determine which of the two shots was fired first.

In 2002, Joshua Curtis sold the gun used in the murder to Damien's brother, Josh Guerrero. Josh gave the gun and ammunition to Damien sometime in 2003. The police recovered three shells in Curtis' backyard, and matched them to the shell found at the murder site. The bullet recovered from Kelly's autopsy also could have been fired from the same gun.

Curtis testified that the trigger of the gun had to be pulled each time it was fired,

and that it took a lot of pressure to pull the trigger. He never had a problem with the gun misfiring.

II.

DISCUSSION AND ANALYSIS

Under the well-known standards of the Antiterrorism and Effective Death Penalty Act of 1996, this Court may issue a writ only where a state court's decision was contrary to, or an unreasonable application of, clearly established Supreme Court authority, or was based on an unreasonable determination of the facts in light of the evidence presented. 28 U.S.C. § 2254(d). It is a highly deferential standard that is difficult to meet. *Harrington v. Richter*, 131 S.Ct. 770, 786 (2011).

A. Trial Court's *Ex Parte* Response to Jury Question

Petitioner first contends that the trial court violated her constitutional rights by responding, *ex parte*, to a jury question regarding the "law on shooting a dead body[.]" (Pet. at 33, 35.)[2] Petitioner claims that the trial court's response violated her right to be present, personally or through counsel, and constituted instructional error. (*Id*. at 5, 33.) These claims do not merit federal habeas relief.

1. Relevant Factual Background

On February 22, 2005, right before the jury began its deliberations, the prosecutor, Petitioner's counsel, and Petitioner agreed to the following:

> [I]f the jurors have any questions, ... the Court will *first* contact counsel, and if there is a relatively short, concise, *agreed-upon* answer, ... the Court can go into the jury room, ... *in the absence of counsel and parties*, and give that short, concise, *agreed-upon* answer[.] But ... if there is a question that is likely to involve an ongoing discussion, then, ... we'd have that here in court, with all parties present.

(Reporter's Transcript ("RT") at 977-978 (emphasis added).) Petitioner further agreed to "give up and waive" her right to be personally present during "any matters involving jury deliberations ...." (*Id*. at 982-983.)

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[2] The Court sequentially numbers the pages of the Petition, *i.e.*, pages 1-78.

On February 23, 2005, the jury sent out a note shortly before its evening recess. (CT at 309-311.) The note requested a readback of certain testimony, and asked the following question: "What is the law pertaining to shooting a dead body and are we responsible for determining this?" (*Id.* at 309.) The next morning, the trial judge and a court reporter entered the jury deliberation room, with "neither counsel nor parties ... present." (*Id*. at 314; RT at 984.) The trial judge responded to the jury's question as follows:

> COURT: We did receive a request and a question from the jury yesterday. *I discussed the question and the request with the attorneys yesterday, and they agreed that I can come in here today, in their absence, to give you the response ....*
>
> Your question was: "What is the law pertaining to shooting a dead body? And are we ... responsible for determining this?"
>
> The answer to that is, no, you are not responsible for determining that. And that's not an issue for you to determine in this case. So, you don't be concerned with that. Okay.

(RT at 984 (emphasis added).)

2. Right to Presence and Right to Counsel

The U.S. Supreme Court has recognized "that the right to personal presence at all critical stages of the trial and the right to counsel are fundamental rights of each criminal defendant." *Rushen v. Spain*, 464 U.S. 114, 117 (1983) (*per curiam*); *see Kentucky v. Stincer*, 482 U.S. 730, 745 (1987) ("[E]ven in situations where the defendant is not actually confronting witnesses or evidence against him, he has a due process right 'to be present in his own person whenever his presence has a relation, reasonably substantial, to the fulness of his opportunity to defend against the charge.'") (internal citation omitted); *see also Montejo v. Louisiana*, 129 S.Ct. 2079, 2085 (2009) ("[O]nce the adversary judicial process has been initiated, the Sixth Amendment guarantees a defendant the right to have counsel present at all 'critical' stages of the criminal proceedings.").

However, a criminal defendant does not have a "constitutional right to be present at every interaction between a judge and a juror ...." *United States v. Gagnon*,

470 U.S. 522, 526 (1985) (*per curiam*) (internal quotation marks and citation omitted). Thus, the "mere occurrence of an *ex parte* conversation between a trial judge and a juror does not constitute a deprivation of [a] constitutional right." *Id*. (internal quotation marks and citation omitted). Rather, the "presence of a defendant is a condition of due process [only] to the extent that a fair and just hearing would be thwarted by his absence ...." *Id.* (internal quotation marks and citations omitted).

To the extent Petitioner contends that her right to *personal* presence was violated, Petitioner is reminded that she waived that right. The record clearly indicates that Petitioner waived her right to "personal presence for any matters involving jury deliberations, except ... the verdict." (RT at 982-983.) There is no indication that such waiver was involuntary, unknowing, or unintelligent. As such, the Court fails to see how Petitioner can now claim that her right to be present was violated. *See United States v. Berger*, 473 F.3d 1080, 1095 (9th Cir. 2007) ("A defendant ... may waive his or her constitutional right to be present at all critical stages of the proceedings 'provided such waiver is voluntary, knowing, and intelligent.'"); *see also Campbell v. Wood*, 18 F.3d 662, 671-672 (9th Cir. 1994).

Nor was there a denial of Petitioner's right to counsel. Petitioner argues that her Sixth Amendment rights were violated because the Court's response to the jury question went beyond the scope of the February 22, 2005 agreement. Petitioner claims that "defense counsel [was] not ... consulted and did not agree" with the trial court's response. (Pet. at 35.)

In rejecting this claim, the San Bernardino County Superior Court found that it was "clear from the record that petitioner's counsel agreed to and ratified the court's language and conduct." (Lodg. No. 5, Exh. 18 at 5.) As such, the Superior Court held that the trial court did not "participate[] in improper communications with the jury." (*Id*.) This Court is bound by the state court's factual findings – "[f]actual determinations by state courts are presumed correct absent clear and convincing evidence to the contrary ..., and a decision adjudicated on the merits in a state court and

based on a factual determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state-court proceeding ...." *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003). Petitioner has not come forward with clear and convincing evidence. And in any event, this Court agrees with the Superior Court's findings.

Pursuant to the February 22, 2005 agreement between the parties and their counsel, the trial judge stated that if there were any jury questions, he would first contact counsel. (RT at 977-978.) If there was a "relatively short, concise, *agreed-upon* answer," the judge was permitted to "give that short, concise, *agreed-upon* answer" to the jury "in the absence of counsel and the parties ...." (*Id.* (emphasis added).) This is exactly what happened here. After receiving the jury question on February 23, 2005, the trial judge went into the jury room on February 24, and stated: "I *discussed the question ... with the attorneys yesterday* [February 23], and they *agreed* that I can come in here today ... to give you the response ...." (*Id.* at 984 (emphasis added).) The trial judge then gave the jury a "short" and "concise" response to their question. (*Id.*)

In an effort to cast doubt upon the judge's reported statements, Petitioner submits the declaration of Richard Leonard, her trial counsel.[3] (*See* Lodg. No. 5, Exh. 3.) With respect to the subject jury question and response, Leonard declares:

> I have no recollection of the judge calling about the first jury note, however, if the judge said he called me, I am sure he did.
>
> However, I would not have agreed that the court could answer the jury note as it did, since shooting a dead body was my defense theory.

(*Id*. at ¶¶ 10-11.) This evidence is neither clear, nor convincing. The Court notes that Leonard does not recall his conversation with the judge, and merely speculates that he "would not have agreed" with the judge's response. (*Id*.) As such, the Court sees no

[3] Petitioner previously submitted Leonard's declaration in support of her state court habeas petitions. (*See* Lodg. No. 3, Exh. 3; Lodg. No. 5, Exh. 3; Lodg. No. 7 at 36.)

reason to believe Leonard's declaration – signed two years and nine months after the jury question was asked and answered – over the contemporaneous and recorded statements of the trial judge. (*Id.*; RT at 984.) Petitioner has thus failed to rebut the state court's factual findings, and has not persuaded the Court that the state court's adjudication was objectively unreasonable in light of the evidence presented. *See Miller-El*, 537 U.S. at 340.

Consequently, since the Court finds that the trial court's response was authorized and agreed upon, there was no improper *ex parte* communication with the jury. Accordingly, the Court finds that neither Petitioner's right to presence, nor counsel, were violated, and federal habeas relief is unwarranted on these claims.

3. Instructional Error (Law on Shooting a Dead Body)

Petitioner also contends that the trial court committed instructional error by telling the jury it was not responsible for determining the law on shooting a dead body. (Pet. at 6.) Petitioner argues that the response was erroneous since "[s]hooting a dead body is not murder." (*Id.* at 35.) As a result, Petitioner claims that the trial court directed a verdict as to an element of murder, and allowed the jury to convict on an erroneous legal theory. (*Id.* at 6.)

Foremost, the fact that a jury instruction is "allegedly incorrect under state law is not a basis for habeas relief." *Estelle v. McGuire*, 502 U.S. 62, 71-72 (1991). "[T]he only question for [a federal habeas court] is whether the ailing instruction ... so infected the entire trial that the resulting conviction violates due process." *Id*. at 72 (internal quotation marks and citations omitted). But "not every ambiguity, inconsistency, or deficiency in a jury instruction rises to the level of a due process violation." *Middleton v. McNeil*, 541 U.S. 433, 437 (2004) (*per curiam*). Rather, due process is violated if a trial is rendered fundamentally unfair. *Estelle*, 502 U.S. at 72-73; *Duckett v. Godinez*, 67 F.3d 734, 746 (9th Cir. 1995). In making this determination, the "instruction 'may not be judged in artificial isolation,' but must be considered in the context of the instructions as a whole and the trial record." *Estelle*,

502 U.S. at 72 (internal citation omitted).

In rejecting Petitioner's claim, the San Bernardino County Superior Court drew a distinction between "the act of shooting a dead body" and "the law [on] shooting a dead body":

> Petitioner's theory is that the trial court effectively told the jury that they were not to be concerned with the act of shooting a dead body.
>
> Actually, the trial court told them they were not to be concerned with the law concerning shooting a dead body. It is clear from the record ... that petitioner argued that the victim was dead when she shot her. Petitioner's attorney swears that he provided instructions on that issue. We can logically assume that the jury rejected the idea that the victim was dead when petitioner shot her. Either that, or petitioner was convicted as an active participant in first-degree murder.
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> At any rate, the record is unpersuasive that the trial court "directed" a verdict, or that it participated in improper communications with the jury.

(*See* Lodg. No. 5, Exh. 18 at 5.) The Court agrees. The question posed to the trial judge was *not* whether the jury should consider the *act* of shooting a dead body. Rather, the jury asked whether they were responsible for determining "the *law* pertaining to shooting a dead body." (*See* RT at 984 (emphasis added).) Since it is not the jury's role to determine the law in a criminal trial, it was reasonable for the Superior Court to find that the trial judge's response did not direct a verdict. *See People v. Harrison*, 35 Cal.4th 208, 247 (2005) ("The jury at the guilt phase ... decides questions of historical fact based on the evidence and applies to those facts the law as articulated by the trial court.").

Furthermore, given the totality of the record and instructions in this case, there is no "reasonable likelihood that the jury ... applied the challenged instruction in a way that violate[d] the Constitution." *Middleton*, 541 U.S. at 437 (internal quotation marks and citation omitted); *see also Brecht v. Abrahamson*, 507 U.S. 619, 637-638 (1993) (habeas relief not warranted unless the error had a "substantial and injurious effect or influence in determining the jury's verdict."). The jury was given several instructions that made it clear that Petitioner was *not* of guilty of murder if she shot a dead body. CALJIC No. 8.00 instructed the jury that "[h]omicide is the *killing* of one human being

by another," and CALJIC No. 8.10 explicitly advised that a required element of murder was that a "human being was *killed*." (CT at 261-262 (emphasis added).) The trial court also provided the jury with the "definition of death" – "[a]n individual who has sustained either (1) irreversible cessation of circulatory and respiratory functions, or (2) irreversible cessation of all functions of the entire brain, including the brain stem ...." (*Id.* at 279.) These instructions were further supported by the argument of Petitioner's trial counsel, who told the jury that "[y]ou can't have a crime on a dead person." (RT at 937.)

As such, the Court is not persuaded that the trial judge's response caused the jury to believe that they could convict Petitioner for murder if she shot a dead body. Accordingly, the Court finds that the trial court did not commit instructional error, direct a verdict as to an element of murder, or allow the jury to convict on an erroneous legal theory.[4]

B. Instructional Error (Natural and Probable Consequences Doctrine)

In her second instructional error claim, Petitioner claims that the trial court erred by failing to *sua sponte* instruct the jury with CALJIC No. 3.02 – an instruction on aiding and abetting liability under the natural and probable consequences doctrine. (Pet. at 59); *see also* CALJIC No. 3.02. Under that doctrine, "a person encouraging or facilitating the commission of a crime [is] criminally liable not only for that crime, but for any other offense that [is] a 'natural and probable consequence' of the crime aided and abetted." *People v. Prettyman*, 14 Cal.4th 248, 260 (1996). Petitioner contends that the trial court was required to give this instruction because there was evidence that the "shooting was the natural and probable consequence of [Damien] Guerrero

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[4] In light of the Court's findings that the trial court did not err in its response to the jury question, the Court also finds that Petitioner's appellate counsel was not ineffective in failing to raise such claims on appeal. *See Strickland v. Washington*, 466 U.S. 668, 687-688 (1984).

assaulting [Kelly Bullwinkle] with a firearm." (Pet. at 60.) This claim also does not merit federal habeas relief.

The California Court of Appeal agreed with Petitioner that the evidence supported the instruction: "There was evidence [Petitioner] and Damien intended to assault Kelly with a gun. This was a dangerous act in which the fatal shooting of Kelly could be found to be a natural and probable consequence of such act." (Lodg. No. 1, App. A at 26-27.) However, the Court of Appeal also found that any error was harmless:

> Under the instructions ..., the jury had at least two means by which to find [Petitioner] guilty of first degree murder – as the actual perpetrator or as an aider and abettor in premeditated murder. The omitted instruction would have provided a third means by which the jury could have determined [Petitioner's] guilt – as an aider and abettor of assault with a firearm of which murder was a natural and probable consequence. *[Petitioner] simply could not have been prejudiced by the fact that the trial court's error deprived the jury of an additional basis upon which to find [Petitioner] guilty ....*
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> Moreover, it is not reasonably likely the jury misapplied the "natural and probable consequences" theory due to not receiving the instruction. The prosecutor did not argue the theory and there was far stronger evidence that the murder was premeditated. In order for the jury to rely on the "natural and probable consequences" theory, the jury would have had to have found that neither Damien nor [Petitioner] intentionally fired the fatal shot. However, there was extremely persuasive evidence that the fatal shot was intentional. The testimony that pulling the gun trigger required substantial force was particularly incriminating. It was not likely that Damien accidentally pulled the trigger when he fired directly into the back of Kelly's head.
>
> There also was evidence defendants dug a grave for Kelly the night before, lured Kelly to the remote gravesite, shot her in the back of the head, put her in the grave, covered the grave with a couch, abandoned Kelly's car at Ontario Mills Mall, proceeded to create an alibi by eating out and going to a movie, and acted as if defendants knew nothing about the murder, until it became apparent there was conclusive evidence linking them to the murder.

(*Id.* at 27-28 (emphasis added).) This Court unreservedly concurs. In light of the jury's verdict of first degree murder, and the *extremely* persuasive evidence of intent to kill and premeditation, it is evident that the jury rejected Petitioner's theory that the

first gunshot was an accident.[5] Thus, to the extent there was error, it did not have a substantial and injurious effect on the jury's verdict. *See Brecht*, 507 U.S. at 637-638.

Petitioner argues that "new" evidence indicates that the jury may have believed that the shooting was accidental. (Pet. at 60.) In support, Petitioner relies on the following quote from a March 10, 2005 article in a San Bernardino County newspaper:

> For some jurors, the evidence against Noordman was obvious.
>
> "The first shot, maybe. The second shot is no accident," said jury forewoman Karen Wilson ....

(Lodg. No. 5, Exh. 15.) Even assuming that the Court could consider such a statement, it does not support Petitioner's claim. In the Court's view, the statement indicates that the juror might have concluded that the shooting was an accident if only the first shot had been fired. However, since two shots were fired, the juror did not believe that either shot was accidental. This interpretation comports more logically with the writer's introductory statement that for this particular juror, the evidence against Noordman was "obvious."

Consequently, the Court finds that the trial court's failure to give CALJIC No. 3.02 did *not* render Petitioner's trial fundamentally unfair, and to the extent there was error, it was harmless. *See Estelle*, 502 U.S. at 72-73; *see also Brecht*, 507 U.S. at 637-638. Petitioner is thus not entitled to habeas relief on his second instructional error claim.

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[5] The trial court instructed the jury that Petitioner could be liable for first degree murder only if the killing was committed while lying in wait or if it was premeditated. (*See* CT at 264-271.) The jury found the lying in wait allegation to *not* be true, but found Petitioner guilty of first degree murder, indicating that they believed the murder was premeditated. (*Id.* at 329, 331.)

C. Insuffucient Evidence

Petitioner next contends that there was insufficient evidence to support the firearm enhancement under California Penal Code § 12022.53(c). (Pet. at 7.) § 12022.53(c) mandates an enhanced penalty if a defendant "personally and intentionally discharges a firearm" "in the commission of a" murder. Cal. Penal Code § 12022.53(c). Petitioner argues that since Kelly Bullwinkle was already dead when Petitioner shot her, the enhancement did not apply because she did not fire a gun "in the commission of a" murder. (Pet. at 7.) This claim does not merit habeas relief.

It is well established that sufficient evidence exists to support a conviction if, "viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). In seeking habeas relief, then, the issue is whether the state court's decision reflected an unreasonable application of *Jackson* to the facts of a particular case. *Juan H. v. Allen*, 408 F.3d 1262, 1274 (9th Cir. 2005) (under AEDPA, the Court applies "the standards of *Jackson* with an additional layer of deference" to the state court's decision).

In answering this question, a federal habeas court "must respect the province of the jury to determine the credibility of witnesses, resolve evidentiary conflicts, and draw reasonable inferences from proven facts by assuming that the jury resolved all conflicts in a manner that supports the verdict." *Walters v. Maass*, 45 F.3d 1355, 1358 (9th Cir. 1995); *see also Jackson*, 443 U.S. at 319, 324, 326. Thus, a federal habeas petitioner faces a "heavy burden" when challenging the sufficiency of the evidence used to obtain a state conviction on federal habeas grounds. *Juan H.*, 408 F.3d at 1274.

Here, while there was evidence suggesting that Damien Guerrero fired the fatal shot, there was *also* evidence supporting the theory that Petitioner fired the fatal shot. The Court of Appeal's opinion is particularly instructive on this point:

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> While there was substantial evidence Damien fired the fatal shot before [Petitioner] shot Kelly, there also was evidence that [Petitioner], rather than Damien, fired the shot that killed Kelly. Damien testified he accidentally discharged the gun and did not know if the shot grazed Kelly's head or entered her head and killed her. Damien also said he thought both shots entered Kelly's head and that he did not see any blood on the ground until after [Petitioner] fired the second shot. According to Damien, Kelly was still moving her legs and moaning after [he] shot her, but after [Petitioner] shot Kelly, she stopped moving.
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> Pathologist, Dr. Sheridan, testified he could not determine which shot was fired first, or who fired which shot. Dr. Sheridan did not agree with Dr. Hiserodt's statement ... that the non-fatal shot was fired when Kelly was on the ground. Dr. Sheridan concluded that such a determination could not be made.
>
> Elody testified that, although she had said Damien initially told her he fired at Kelly first, Elody acknowledged she may have been incorrect. She may have confused an account she read in the newspaper with Damien's initial statement.
>
> In addition, there was evidence the fatal bullet was fired downwards, from above Kelly, indicating Kelly was on the ground, and the nonfatal grazing bullet was fired upwards, indicating Kelly was standing. This supports a finding that Damien fired the first shot while Kelly was standing and it grazed Kelly's head. The second shot, which killed Kelly, was fired downwards by [Petitioner] after Kelly was on the ground.
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> The jury could have disbelieved [Petitioner's] and Damien's version of the facts and reasonably concluded from Damien's testimony and the evidence of the trajectory of the bullets that Damien fired the grazing shot while Kelly was standing; Kelly fell down and moaned while on the ground; and [Petitioner] then fatally shot Kelly. These circumstances support the finding Kelly was alive when [Petitioner] shot her and thus in turn support the firearm-discharge enhancement.

(Lodg. No. 1, App. A at 12-13.) This Court concurs with the Court of Appeal's assessment, and finds that the firearm enhancement was sufficiently supported by the evidence presented at trial. (RT at 156-157, 426-427, 435-436, 672-676, 729-730.)

In sum, the evidence showed that even after Damien shot Kelly, she continued to move her legs and moan. It was not until after Petitioner fired the second shot that Kelly stopped moving. (RT at 672-676.) Further, the pathologist's testimony indicated that the non-fatal shot was fired upwards, while the fatal shot was fired downwards. (*Id.* at 426-427, 435-436.) Viewing this evidence in the light *most favorable to the prosecution*, and drawing all reasonable inferences therefrom, the Court finds that there was sufficient evidence from which a jury could find that it was

Petitioner's gunshot that killed Kelly. *See Jackson*, 443 U.S. at 319. Thus, there was sufficient evidence to support the firearm enhancement. And regardless, the Court certainly cannot conclude that the Court of Appeal's holding reflected an unreasonable application of *Jackson* to the facts of this case. *See Juan H.*, 408 F.3d at 1274.

D. Ineffective Assistance of Counsel

Petitioner contends that her trial counsel was ineffective in failing to "investigate and elicit testimony that [P]etitioner was intoxicated with LSD at the time of the incident." (Pet. at 7.) Specifically, Petitioner points to a statement she reportedly made in a Probation Officer's Report, which indicates that Petitioner was "'high' on 'purple haze' and acid 'weed'" at the time of the murder. (*Id.* at 73; Lodg. No. 11 at 3.) Petitioner evidently claims that her drug intoxication may have affected her ability to form the requisite intent to kill. (Pet. at 73-75.) This claim is untenable.

To establish ineffective assistance, Petitioner must prove that: (1) counsel's representation "fell below an objective standard of reasonableness" under "prevailing professional norms"; and (2) the "deficient performance prejudiced the defense." *Strickland*, 466 U.S. at 687-688.

Under *Strickland's* first prong, "[j]udicial scrutiny of counsel's performance must be *highly deferential*" – "a court must indulge a *strong presumption* that counsel's conduct falls within the wide range of reasonable professional assistance[.]" *Strickland*, 466 U.S. at 689 (emphasis added) ("the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.") (internal quotation marks and citation omitted).

To establish prejudice, Petitioner must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

The San Bernardino County Superior Court found that there was "no evidence

that Petitioner was misguided by drug use, other than her own self-serving hearsay."[6] (Lodg. No. 5, Exh. 18 at 5.) The Court agrees. First, the Court notes that the subject report was created months *after* trial, and there is no indication that Petitioner's trial counsel knew that Petitioner was allegedly intoxicated on LSD at the time of the murder. (*See* Lodg. No. 11.)

Second, the fact that Petitioner told a probation officer that she was "high" on "purple haze" and "acid weed" does not establish Petitioner's inability to form the requisite intent for first degree murder. Without more, the Court is left to speculate about the effect of the alleged drug use on Petitioner's mental state, in the face of a record that contains substantial evidence of intent, planning activity, and premeditation. The Court declines to do so. *See James v. Borg*, 24 F.3d 20, 26 (9th Cir. 1994) ("Conclusory allegations which are not supported by a statement of specific facts do not warrant habeas relief."); *see also Villafuerte v. Stewart*, 111 F.3d 616, 632 (9th Cir. 1997) (rejecting petitioner's ineffective assistance claim where he presented no evidence concerning what counsel would have found had he investigated further, or what lengthier preparation would have accomplished).

Consequently, the Court finds that Petitioner has failed to establish that her counsel's representation was unreasonable, or that the outcome of her trial would have been different. *See Strickland*, 466 U.S. at 687-688, 694. As such, the Court cannot find the state court's rejection of Petitioner's claim to be unreasonable. *See Knowles v. Mirzayance*, 129 S.Ct. 1411, 1420 (2009) (A federal habeas court's review of an ineffective assistance claim under *Strickland* is "doubly deferential." "The question is not whether a federal court believes the state court's determination ... was incorrect[,] but whether that determination was unreasonable – a substantially higher threshold.") (internal quotation marks and citation omitted).

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[6] Petitioner did not testify at trial.

III.

CERTIFICATE OF APPEALABILITY

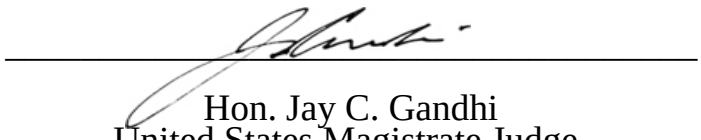
For the reasons stated above, the Court finds that Petitioner has not made a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253; Fed. R. App. P. 22(b); *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003).

IV.

RECOMMENDATION

In accordance with the foregoing, IT IS RECOMMENDED that the Court issue an Order: (1) approving and accepting this Report and Recommendation; (2) directing that Judgment be entered dismissing this action with prejudice; and (3) denying a certificate of appealability.

DATED: March 21, 2012



Hon. Jay C. Gandhi
United States Magistrate Judge

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This Report and Recommendation is not intended for publication. Nor is it intended to be included or submitted to any online service such as Westlaw or Lexis.

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