UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

DALRAY KWAME ANDREWS, Petitioner, v. W.L. MONTGOMERY, Warden, Respondent.	NO. ED CV 16-0090-RGK(E) REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This Report and Recommendation is submitted to the Honorable R. Gary Klausner, United States District Judge, pursuant to 28 U.S.C. section 636 and General Order 05-07 of the United States District Court for the Central District of California.

PROCEEDINGS

Petitioner filed a "Petition for Writ of Habeas Corpus By a Person in State Custody" on January 15, 2016. Respondent filed an Answer on May 9, 2016. Petitioner filed a Traverse (Reply) on June 20, 2016. Petitioner filed "Petitioner's Request for Judicial

Notice, etc." on July 8, 2016,

BACKGROUND

A jury found Petitioner guilty of the first degree murder of Joshua Huizar (Count 1), attempted second degree robbery (Count 2), and assault with a semiautomatic firearm on Huizar's girlfriend, Viridiana Sanchez (Count 3) (Reporter's Transcript ["R.T."] 178-79; Clerk's Transcript ["C.T."] 52-56, 121-26, 132-33). The jury found true the allegations that Petitioner personally used a firearm in the commission of the offenses (R.T. 178-79; C.T. 121-26). The sentencing court imposed the middle term of three years on the attempted robbery count and added a ten year firearm enhancement for a total term of thirteen years on that count (R.T. 191; see C.T. 147).[1] The court sentenced Petitioner to a term of twenty-five years to life for the murder and added a ten-year firearm enhancement for a total term of thirty-five years to life on that count (R.T. 191; C.T. 147). The court indicated that Petitioner would serve the determinate term first, followed by the indeterminate term (R.T. 191; C.T. 147). The court stayed sentence on the assault count (R.T. 191; C.T. 147). Thus, Petitioner received a total sentence of forty-eight years to life (R.T. 191-92; C.T. 147).

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[1] Although the Court stated that it was imposing "the upper term of three years" on the second degree robbery count (see R.T. 191), the Clerk's Transcript and the Abstract of Judgment indicate that the Court imposed a three-year middle term (see C.T. 147, 152). Three years is the middle term for second degree robbery under California Penal Code section 213(a)(2). People v. Moody, 96 Cal. App. 4th 987, 990, 117 Cal. Rptr. 2d 527 (2002). This apparent discrepancy is immaterial to the issues presented here.

The California Court of Appeal affirmed (Respondent's Lodgment 5; see People v. Andrews, 2014 WL 505716 (Cal. App. Feb. 10, 2014)). Petitioner did not file a petition for review in the California Supreme Court (Petition, p. 3).

Petitioner filed a habeas corpus petition in the San Bernardino County Superior Court, which that court denied in a brief written order (Respondent's Lodgments 6, 7). Petitioner filed a habeas corpus petition in the California Court of Appeal, which that court denied summarily (Respondent's Lodgments 8, 9). Petitioner filed two habeas corpus petitions in the California Supreme Court (Respondent's Lodgments 10, 12). The California Supreme Court denied the first petition summarily and denied the second petition with citations to In re Clark, 5 Cal. 4th 750, 767-69, 21 Cal. Rptr. 2d 509, 855 P.2d 729 (1993) ("Clark"), People v. Duvall, 9 Cal. 4th 464, 474, 37 Cal. Rptr. 2d 259, 886 P.2d 1252 (1995) ("Duvall"), and In re Waltreus, 62 Cal. 2d 218, 42 Cal. Rptr. 9, 397 P.2d 1001, cert. denied, 382 U.S. 853 (1965) ("Waltreus") (Respondent's Lodgments 11, 13).

SUMMARY OF TRIAL EVIDENCE

The prosecution's evidence showed the following:

> The murder victim, Joshua Huizar, and his girlfriend Viridiana Sanchez, were in a car waiting in a fast-food restaurant drive-through line when Petitioner approached and tried to open the locked driver's side door of Huizar's car (R.T. 32, 43). Petitioner tapped a gun on the driver's side

window and demanded money (R.T. 26-31). Huizar said he had no money and obeyed Petitioner's demand to roll the car window down, rolling the window down halfway (R.T. 31). Petitioner put the gun through the window, pointed it at Huizar's head and again demanded money (R.T. 31-32). When Huizar said the victims had no money, Petitioner pointed the gun at Sanchez' head and said "shut up, bitch" and "[g]ive me your money" (R.T. 34). Petitioner reached into Huizar's pockets, pulled out Huizar's wallet and opened the wallet, finding no money but only a fake bill (R.T. 34-36). Pointing the gun at Huizar, Petitioner again reached into Huizar's pockets and took a cell phone (R.T. 36).

The vehicle in line in front of Huizar's car moved forward (R.T. 37). Huizar accelerated and attempted to leave (R.T. 37). The gun fired, killing Huizar (R.T. 37-39, 67-69, 119).

At trial, the prosecution called Petitioner's girlfriend, Victoria Nauls. She claimed to have little or no memory of anything material. She purported not to remember whether Petitioner was her boyfriend at the time of the incident, whether she spoke to Petitioner after the shooting or whether she spoke to a detective after the shooting (R.T. 51). Nauls also claimed she did not recall sending text messages to Petitioner in which she told Petitioner that he had "killed that boy at Del Taco," that he was "going to jail," that he would "be in jail soon for

murder," and that she, Nauls, was "calling and snitching" (R.T. 52). Nauls also claimed she did not recall that Petitioner told her "the guns were at the house" (R.T. 53).

Rialto police detective Rory Scalf testified that Scalf looked through Petitioner's cell phone and read the text messages from Nauls to Petitioner (R.T. 57-58). When Scalf interviewed Nauls at the police station, Nauls reportedly was evasive and said she did not recall the text messages (R.T. 59). Scalf told Nauls that he did not think Nauls was being honest and that if he learned she was hiding anything she could be charged with a crime (R.T. 60). Nauls then said Petitioner had told Nauls that Petitioner "had shot that boy" and that "it was an accident" (R.T. 61).

Police found a spent 9mm casing in the drive-through area (R.T. 73, 99). Petitioner's fingerprint was found on the driver's side door of Huizar's vehicle (R.T. 81-83, 130-31).

The prosecution played a tape of Petitioner's interview with police, in which Petitioner stated that "it was an accident," that he "didn't mean to do it" and that the gun "just went off" as Huizar tried to drive away (R.T. 93, 96; C.T. 158-59, 166-67). Petitioner admitted that he tapped the car window with the gun, demanded money from Huizar and took Huizar's wallet, but Petitioner said that he threw the wallet back when Huizar claimed to have no money (C.T. 160-

62, 166). Petitioner admitted that Petitioner's finger was on the trigger when the gun fired (C.T. 159). Petitioner said he ran away after the shooting and claimed he had thrown the gun in a trash can (C.T. 163-64). Petitioner thought the gun was a 9 millimeter Glock (C.T. 165).

During the interview with police, Petitioner asked if he could speak with his girlfriend (Nauls), and Petitioner was permitted a brief conversation with her (C.T. 157). This conversation was recorded (R.T. 96-97; C.T. 168-69). During the conversation, Petitioner told Nauls: "I didn't tell them about the gun" (C.T. 168). Petitioner also said: "Shh, there [sic] out there, they're out there in the hall, go get my gun out my mama house [sic]. Is in the backyard in a crate. . . ." (C.T. 168; see R.T. 97).

Police later went to the home of Petitioner's mother and discovered two guns in a crate in the backyard, one of which was a 9 millimeter Glock (R.T. 97-99). Due to some damage to the Glock, no ballistics comparisons were possible (R.T. 103).

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PETITIONER'S CONTENTIONS[1]

Petitioner contends:

1. Petitioner's trial counsel allegedly rendered ineffective assistance, by assertedly:

a. failing to challenge the admission of Petitioner's pretrial statements to police and Petitioner's pretrial statements to Nauls pursuant to Miranda v. Arizona, 384 U.S. 436 (1966) ("Miranda");

b. failing to object to alleged hearsay evidence;

c. failing to object to the gun evidence, and;

d. failing to call a fingerprint expert;

2. The cumulative effect of trial counsel's alleged errors assertedly prejudiced Petitioner;

3. The sentencing court allegedly erred by deeming the attempted robbery count to be the principal count instead of deeming the murder count to be the principal count;

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[1] The Petition references and incorporates the arguments made in Petitioner's California Supreme Court habeas petitions attached to the Petition as Exhibits J and K.

4. Petitioner's appellate counsel allegedly rendered ineffective assistance, by assertedly failing to raise on appeal:

a. the claims of alleged ineffective assistance of trial counsel summarized above; and

b. the alleged sentencing error described above;[2] and

5. The trial court allegedly violated Faretta v. California, 422 U.S. 806 (1975) ("Faretta") by denying Petitioner's eve of trial request to represent himself.

STANDARD OF REVIEW

Under the "Antiterrorism and Effective Death Penalty Act of 1996" ("AEDPA"), 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. §

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[2] Petitioner's Reply appears to concede that contentions 1-4 do not merit federal habeas relief. Petitioner has not amended the Petition, however. Out of an abundance of caution, the Court will consider the merits of all of the contentions in the Petition.

2254(d); Woodford v. Visciotti, 537 U.S. 19, 24-26 (2002); Early v. Packer, 537 U.S. 3, 8 (2002); Williams v. Taylor, 529 U.S. 362, 405-09 (2000). "Clearly established Federal law" refers to the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision on the merits. Greene v. Fisher, 132 S. Ct. 38, 44 (2011); Lockyer v. Andrade, 538 U.S. 63, 71-72 (2003). A state court's decision is "contrary to" clearly established Federal law if: (1) it applies a rule that contradicts governing Supreme Court law; or (2) it "confronts a set of facts . . . materially indistinguishable" from a decision of the Supreme Court but reaches a different result. See Early v. Packer, 537 U.S. at 8 (citation omitted); Williams v. Taylor, 529 U.S. at 405-06.

Under the "unreasonable application prong" of section 2254(d)(1), a federal court may grant habeas relief "based on the application of a governing legal principle to a set of facts different from those of the case in which the principle was announced." Lockyer v. Andrade, 538 U.S. at 76 (citation omitted); see also Woodford v. Visciotti, 537 U.S. at 24-26 (state court decision "involves an unreasonable application" of clearly established federal law if it identifies the correct governing Supreme Court law but unreasonably applies the law to the facts).

"In order for a federal court to find a state court's application of [Supreme Court] precedent 'unreasonable,' the state court's decision must have been more than incorrect or erroneous." Wiggins v. Smith, 539 U.S. 510, 520 (2003) (citation omitted). "The state court's application must have been 'objectively unreasonable.'" Id. at 520-21

(citation omitted); see also Waddington v. Sarausad, 555 U.S. 179, 190 (2009); Davis v. Woodford, 384 F.3d 628, 637-38 (9th Cir. 2004), cert. dism'd, 545 U.S. 1165 (2005). "Under § 2254(d), a habeas court must determine what arguments or theories supported, . . . or could have supported, the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court." Harrington v. Richter, 562 U.S. 86, 101 (2011). This is "the only question that matters under § 2254(d)(1)." Id. at 102 (citation and internal quotations omitted). Habeas relief may not issue unless "there is no possibility fairminded jurists could disagree that the state court's decision conflicts with [the United States Supreme Court's] precedents." Id. "As a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." Id. at 103.

In applying these standards, the Court looks to the last reasoned state court decision. See Delgadillo v. Woodford, 527 F.3d 919, 925 (9th Cir. 2008). Where no reasoned decision exists, as where the state court summarily denies a claim, "[a] habeas court must determine what arguments or theories . . . could have supported the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court." Cullen v. Pinholster, 563 U.S. 170, 188 (2011) (citation, quotations

and brackets omitted). Where a state court rejects a federal claim presented to it without expressly addressing the claim, a federal habeas court generally must presume that the state court decided the claim on the merits. Johnson v. Williams, 133 S. Ct. 1088, 1094-96 (2013).

Additionally, 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." 28 U.S.C. § 2254(a). In conducting habeas review, a court may determine the issue of whether the petition satisfies section 2254(a) prior to, or in lieu of, applying the standard of review set forth in section 2254(d). Frantz v. Hazey, 533 F.3d 724, 736-37 (9th Cir. 2008) (en banc).

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DISCUSSION[3]

I. Petitioner's Claims of Ineffective Assistance of Trial Counsel Do Not Merit Federal Habeas Relief.

A. Governing Legal Standards

To establish ineffective assistance of counsel, Petitioner must prove: (1) counsel's representation fell below an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. Strickland v. Washington, 466 U.S. 668, 688, 694, 697 (1984) ("Strickland"). A reasonable probability of a different result "is a probability sufficient to undermine confidence in the outcome." Id. at 694. The court may reject the claim upon finding either that counsel's performance was reasonable or the claimed error was not prejudicial. Id. at 697; Rios v. Rocha, 299 F.3d 796, 805 (9th Cir. 2002) ("Failure to satisfy either prong of the Strickland test obviates the need to consider the other.") (citation omitted).

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[3] Unless otherwise indicated herein, the Court assumes arguendo Petitioner has not procedurally defaulted any of his claims. See Lambrix v. Singletary, 520 U.S. 518, 523-25 (1997); Franklin v. Johnson, 290 F.3d 1223, 1229, 1232-33 (9th Cir. 2002); see also Barrett v. Acevedo, 169 F.3d 1155, 1162 (8th Cir.), cert. denied, 528 U.S. 846 (1999) ("judicial economy sometimes dictates reaching the merits if the merits are easily resolvable against a petitioner while the procedural bar issues are complicated"). Hence, Petitioner's "Request for Judicial Notice, etc.," directed to the issue of procedural default, should be denied as moot.

Review of counsel's performance is "highly deferential" and there is a "strong presumption" that counsel rendered adequate assistance and exercised reasonable professional judgment. Williams v. Woodford, 384 F.3d 567, 610 (9th Cir. 2004), cert. denied, 546 U.S. 934 (2005) (quoting Strickland, 466 U.S. at 689). The court must judge the reasonableness of counsel's conduct "on the facts of the particular case, viewed as of the time of counsel's conduct." Strickland, 466 U.S. at 690. The court may "neither second-guess counsel's decisions, nor apply the fabled twenty-twenty vision of hindsight. . . ." Matylinsky v. Budge, 577 F.3d 1083, 1091 (9th Cir. 2009), cert. denied, 558 U.S. 1154 (2010) (citation and quotations omitted); see Yarborough v. Gentry, 540 U.S. 1, 8 (2003) ("The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight.") (citations omitted). Petitioner bears the burden to show that "counsel made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment." Harrington v. Richter, 562 U.S. at 104 (citation and internal quotations omitted); see Strickland, 466 U.S. at 689 (petitioner bears burden to "overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy") (citation and quotations omitted).

A state court's decision rejecting a Strickland claim is entitled to "a deference and latitude that are not in operation when the case involves review under the Strickland standard itself." Harrington v. Richter, 562 U.S. at 101. "When § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied

Strickland's deferential standard." Id. at 105.

"In assessing prejudice under Strickland, the question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently." Id. at 111 (citations omitted). Rather, the issue is whether, in the absence of counsel's alleged error, it is "'reasonably likely'" that the result would have been different. Id. (quoting Strickland, 466 U.S. at 696). "The likelihood of a different result must be substantial, not just conceivable." Id. at 112.

Petitioner raised his claims of ineffective assistance of trial counsel in his Superior Court habeas petition, which that court denied on the ground that Petitioner had failed to support his claims with non-conclusory factual allegations or documentary evidence (see Petition, Exhibits, ECF Dkt. No. 1, pp. 28-29; ECF Dkt. No. 17-6, pp. 12-18; Respondent's Lodgment 7, ECF Dkt. No. 17-7). This decision of the Superior Court was the last reasoned state court decision regarding these claims.

B. Analysis

1. Failure to Move to Suppress Petitioner's Statements to Police and to Nauls

Miranda generally bars the use of statements elicited by custodial interrogation unless the person in custody first was

informed of his or her constitutional rights. Miranda, 384 U.S. at 444-45. "Miranda . . . only appl[ies] to interrogations, which consist of any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." Mickey v. Ayers, 606 F.3d 1223, 1235 (9th Cir. 2010), cert. denied, 132 S. Ct. 419 (2011) (citation omitted).

At the preliminary hearing, and at trial, the police detective who interviewed Petitioner testified that the detective had advised Petitioner of his Miranda rights at the commencement of the interview (C.T. 9; R.T. 90). Petitioner did not then controvert the detective's testimony. Nothing in the record suggests that Petitioner (who was present at the preliminary hearing and at trial) ever told his counsel that Petitioner supposedly believed he had not received his Miranda advisements at the interview with the detective. Counsel cannot be charged with ineffectiveness for failing to make a suppression motion where counsel had no reason to believe there was any factual basis for such a motion. See Strickland, 466 U.S. at 691 ("The reasonableness of counsel's actions may be determined . . . by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, . . . on information supplied by the defendant."); cf. Langford v. Day, 110 F.3d 1380, 1387 (9th Cir. 1996), cert. denied, 522 U.S. 881 (1997) (counsel not ineffective for failing to investigate a possible motion to suppress the petitioner's confession where the petitioner did not inform counsel of the petitioner's alleged refusal to waive his Miranda rights, but rather said he had waived those rights, and counsel otherwise was unaware of the

petitioner's alleged refusal). Furthermore, and in any event, Petitioner has not shown a reasonable probability of a different result if Petitioner's statements to police had been excluded. There was substantial other evidence of Petitioner's guilt, including: (1) Petitioner's fingerprint on the driver's side door of Huizar's car; (2) Petitioner's inculpatory statements to Nauls admitting Petitioner was the shooter and instructing Nauls to have someone retrieve the gun Petitioner used in the shooting from his mother's backyard; and (3) the discovery of a 9 millimeter Glock in the backyard of Petitioner's mother. Accordingly, Petitioner has not shown Strickland prejudice.

To the extent Petitioner contends counsel should have moved to suppress Petitioner's recorded statements to Nauls on Miranda grounds, counsel reasonably could have believed that any such motion would fail (regardless of whether Miranda warnings had been given). "Numerous courts have held that allowing a defendant to converse with his family or other third persons does not amount to interrogation." United States v. Wiggins, 2013 WL 1645180, at *7 (W.D.N.Y. Apr. 16, 2013), adopted, 2013 WL 2553971 (W.D.N.Y. June 10, 2013) (citing cases); see Arizona v. Mauro, 481 U.S. 520, 528-29 (1987) (defendant's conversation with his wife not the "functional equivalent" of police interrogation for purposes of Miranda, where defendant "was not subjected to compelling influences, psychological plots, or direct questioning" by police); Williams v. Nelson, 457 F.2d 376, 377 (9th Cir. 1972) (upholding the admissibility of a custodial conversation between the petitioner and a codefendant recorded by means of a concealed microphone in a room where the two had been placed by law

enforcement; "Trickery does not constitute coercion"); McCraw v. Harrington, 2012 WL 1570534, at *6-7 (C.D. Cal. Jan. 19, 2012), adopted, 2012 WL 1570529 (C.D. Cal. May 2, 2012) (petitioner's recorded phone calls with alleged co-perpetrator and others held admissible despite lack of Miranda advisements); Williams v. Runnels, 2008 WL 4482869, at *9-10 (E.D. Cal. Sept. 29, 2008), adopted, 2008 WL 5099733 (E.D. Cal. Dec. 1, 2008) (Miranda did not bar use of inculpatory statements made by the petitioner to his girlfriend while in a police interrogation room); People v. Tate, 49 Cal. 4th 635, 685-87, 112 Cal. Rptr. 3d 156, 234 P.3d 428 (2010), cert. denied, 562 U.S. 1274 (2011) (defendant's statements to girlfriend in police interview room admissible despite alleged lack of Miranda warnings). Counsel cannot be faulted for failing to make a futile motion to suppress. See Styers v. Schriro, 547 F.3d 1026, 1030 (9th Cir. 2008), cert. denied, 558 U.S. 932 (2009) (to show a Strickland violation, a petitioner must show a reasonable probability that, had counsel made the motion, the motion would have been granted); Rupe v. Wood, 93 F.3d 1434, 1445 (9th Cir. 1996), cert. denied, 519 U.S. 1142 (1997) ("the failure to take a futile action can never be deficient performance"); Shah v. United States, 878 F.2d 1156, 1162 (9th Cir.), cert. denied, 493 U.S. 869 (1989) ("[T]he failure to raise a meritless legal argument does not constitute ineffective assistance of counsel"; citation and internal quotations omitted).

2. Failure to Object to Alleged Hearsay Evidence

Petitioner contends counsel should have objected to the introduction of Nauls' alleged hearsay statements recounting

Petitioner's inculpatory statements to Nauls. Petitioner does not dispute that Petitioner's statements to Nauls were admissible under the party admission exception to the hearsay rule. See Cal. Evid. Code § 1220. Nor does Petitioner challenge the admissibility of Naul's statements as prior inconsistent statements. See Cal. Evid. Code § 1235; People v. Ledesma, 39 Cal.4th 641, 711-712, 47 Cal. Rptr. 3d 326, 140 P.3d 657 (2006), cert. denied, 549 U.S. 1324 (2007) ("when a witness's claim of lack of memory amounts to deliberate evasion, inconsistency is implied") (citations, internal quotations and brackets omitted). Rather, Petitioner asserts that Naul's prior statements were involuntary, and hence allegedly inadmissible, because Scalf assertedly threatened Nauls with imprisonment (see Petition, Ex. K, ECF Dkt. No. 1, pp. 81-82). Petitioner references a portion of Scalf's testimony describing the interview with Nauls stating that, after Nauls disclaimed any memory of sending the text messages, Scalf told Nauls that Scalf "didn't think she was being honest" and that if Scalf "learned that she was hiding something or trying to help [Petitioner] -- involved in this case, that she could be charged as well with a crime" (Petition, ECF Dkt. No. 1, p. 81; R.T. 60). Petitioner relies on California cases holding that the admission of the involuntary statement of a third party which renders a trial fundamentally unfair violates the Fifth Amendment, including People v. Douglas, 50 Cal. 3d 468, 268 Cal. Rptr. 126, 788 P.2d 640 (1990), abrogated on other grounds, People v. Marshall, 50 Cal. 3d 907, 933 n.4, 269 Cal. Rptr. 269, 790 P.2d 907 (1990), and People v. Underwood, 61 Cal. 2d 113, 37 Cal. Rptr. 313, 389 P.2d 937 (1964) (Petition, ECF Dkt. No. 1, p. 82).

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Even assuming arguendo Petitioner's counsel could have excluded Nauls' statements to Scalf, counsel reasonably could have decided as a matter of strategy that Naul's statements to Scalf would benefit rather than impair Petitioner's defense. In light of Petitioner's inculpatory statements to police, counsel reasonably could have believed that the best defense strategy was to argue that the shooting was an accident and that Petitioner did not harbor an intent to kill (see R.T. 154 [counsel's closing argument]). Nauls told Scalf that Petitioner told her Petitioner "shot that boy" and that "it was an accident" (R.T. 61). These statements were consistent with Petitioner's own statements to police. Nauls also said that Petitioner was crying and very upset when he made these statements to her (R.T. 61). Nauls told Scalf that Petitioner had said that he could not believe what had happened and that Petitioner "didn't shoot him but the gun went off" (R.T. 61). Thus, Naul's statements to Scalf bolstered counsel's argument regarding Petitioner's alleged lack of the requisite intent. The fact that counsel's strategy ultimately was unsuccessful does not prove counsel's ineffectiveness. See Gallegos v. Ryan, 820 F.3d 1013, 1025 (9th Cir. 2016) (court "must be careful not to conclude that a particular act or omission of counsel was unreasonable simply because the defense was ultimately unsuccessful") (citation and internal quotations omitted).

3. Failure to Object to Gun Evidence

Petitioner contends counsel should have objected to the admission of the evidence concerning the guns found at the house of Petitioner's mother (Petition, Ex. K, ECF Dkt. No. 1, p. 83). Petitioner contends

that, because the ballistics tests could not link either gun to the shooting, counsel should have objected to the introduction of the gun evidence as unduly prejudicial pursuant to California Evidence Code section 352 (Petition, Ex. K, ECF Dkt. No. 1, p. 83).[4] Petitioner also contends the gun evidence was inadmissible as the "fruit" of an interrogation allegedly conducted in violation of Miranda (Petition, Ex. K, ECF Dkt. No. 1, p. 83).

Although the ballistics evidence could not link a gun to the shooting, Petitioner's own statements provided the link. As indicated above, Petitioner told police he thought he used a 9 millimeter Glock in the shooting. Petitioner told Nauls to go to his mother's house and retrieve the gun Petitioner used in the shooting. Police later found a 9 millimeter Glock at that location. In light of the profound relevance of this gun evidence, counsel reasonably could have determined that any objection to the admission of the evidence as unduly prejudicial would have been futile.

Petitioner's argument that the guns were inadmissible as the "fruit" of an alleged Miranda violation also fails to prove counsel's ineffectiveness. As indicated above, Petitioner fails to show counsel was aware of any alleged Miranda violation. Moreover, counsel reasonably could have determined that any "fruit of the poisonous

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[4] Under California Evidence Code section 352, a trial court has the discretion to exclude evidence "if its probative value is substantially outweighed by the probability that its admission will (1) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

tree" argument would have failed as matter of law. See United States v. Patane, 542 U.S. 630, 633-34 (2004) (failure to give a suspect Miranda warnings does not require "suppression of the physical fruits of the suspect's unwarned but voluntary statements"); People v. Davis, 46 Cal. 4th 539, 598-99, 94 Cal. Rptr. 3d 322, 208 P.3d 78 (2009), cert. denied, 558 U.S. 1124 (2010) ("The fruit of the poisonous tree doctrine does not apply to physical evidence seized as a result of a noncoercive Miranda violation.") (citations omitted).

Counsel's failure to make a futile objection to the gun evidence was not constitutionally ineffective. See Rupe v. Wood, 93 F.3d 1445; Shah v. United States, 878 F.2d at 1162.

4. Failure to Call a Fingerprint Expert

Petitioner also faults counsel for failing to call a fingerprint expert "to verify the accuracy of the results" reached by the prosecution's fingerprint expert (Petition, Ex. K, ECF Dkt. No. 1, pp. 83-84). Petitioner's speculation that the testimony of some other fingerprint expert might have undercut (rather than reinforced) the testimony of the prosecution expert is insufficient to support a habeas claim. See Wildman v. Johnson, 261 F.3d 832, 839 (9th Cir. 2001). "Speculation about what an expert would have said is not enough to establish [Strickland] prejudice." Grisby v. Blodgett, 130 F.3d 365, 373 (9th Cir. 1997); see Young v. McGrath, 2007 WL 2580593 (E.D. Cal. Sept. 5, 2007), adopted, 2007 WL 4246056 (E.D. Cal. Nov. 29, 2007) (petitioner failed to show prejudice from counsel's asserted failure to have DNA tests conducted on blood on petitioner's

pants; "[b]ecause the results of DNA tests are unknown, it is impossible to say the lack of DNA testing prejudiced petitioner's defense").

5. Conclusion

For all of the foregoing reasons, the state court's rejection of Petitioner's claims of ineffective assistance of trial counsel was not contrary to, or an objectively unreasonable application of, any clearly established Federal Law as determined by the United States Supreme Court. See 28 U.S.C. section 2254(d); Harrington v. Richter, 562 U.S. 86, 100-03 (2011). Petitioner is not entitled to federal habeas relief on these claims.

II. Petitioner Is Not Entitled to Federal Habeas Relief on His Claim of Cumulative Error.

Petitioner asserts that trial counsel's alleged errors, described above, cumulatively prejudiced Petitioner (Petition, Exhibits, Ex. K, ECF Dkt. No. 2, p. 84). Petitioner presented this claim in his Superior Court habeas petition, which that court denied without addressing the claim expressly (although the court did address Petitioner's claims of ineffective assistance) (see Petition, Exhibits, ECF Dkt. No. 1, pp. 28-29; Respondent's Lodgment 6, ECF Dkt. No. 17-6, p. 18; Respondent's Lodgment 7, ECF Dkt. No. 17-7). The Court presumes the Superior Court denied the claim on the merits. See Johnson v. Williams, 133 S. Ct. 1088, 1094-96 (2013). The California Court of Appeal and the California Supreme Court subsequently denied

this claim summarily. Hence, there is no reasoned state court decision regarding this claim. Accordingly, this Court will determine what arguments or theories could have supported the state courts' rejection of the claim and then consider "whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of [the United States Supreme Court]." Harrington v. Richter, 562 U.S. at 101.

The state courts did not act unreasonably in rejecting this claim. "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). Because Petitioner's individual claims of ineffective assistance of counsel all fail, his claim of cumulative prejudice necessarily fails as well. See Sully v. Ayers, 725 F.3d 1057, 1075 (9th Cir. 2013), cert. denied, 134 S. Ct. 2697 (2014) ("Given that the California Supreme Court was not necessarily unreasonable in concluding that Sully was not prejudiced by any of the alleged errors in isolation, it was also not necessarily unreasonable in concluding that Sully was not prejudiced by the alleged errors in the aggregate."); see generally Hayes v. Ayers, 632 F.3d 500, 524 (9th Cir. 2011) ("Because we conclude that no

error of constitutional magnitude occurred, no cumulative prejudice is possible.") (citation omitted).

III. Petitioner's Claim of Sentencing Error Does Not Merit Federal Habeas Relief.

Petitioner asserts that the sentencing court erred by designating the sentence on the attempted robbery count as the principal term. According to Petitioner, the court should have designated the sentence on the murder count as the principal term and should have imposed one third the term on the attempted robbery count. Respondent contends this claim is unexhausted because Petitioner allegedly failed to present the claim to the California Supreme Court as a federal claim.

This Court need not address the issue of exhaustion. For the reasons discussed below, Petitioner's sentencing claim is not "colorable." Therefore, the Court should deny the claim on the merits. See Cassett v. Stewart, 406 F.3d 614, 623-24 (9th Cir. 2005), cert. denied, 546 U.S. 1172 (2006) (habeas court may deny on the merits an unexhausted claim that is not "colorable").

Petitioner presented his sentencing claim to the Superior Court, which rejected the claim without expressly discussing it (see Respondent's Lodgment 6, ECF Dkt. No. 17-6, p. 19; Respondent's Lodgment 8, ECF Dkt. No. 7; Petition, Exhibits, ECF Dkt. No. 1, pp. 28-29). The Superior Court described the claims presented in that petition as claims of ineffective assistance of trial and appellate counsel (Petition, Exhibits, ECF Dkt. No. 1, p. 28; Respondent's

Lodgment 7, ECF Dkt. 17-7, p. 1). Hence, it is unclear whether the Superior Court ever considered Petitioner's sentencing claim. See Johnson v. Williams, 133 S. Ct. at 1094-96. However, regardless of whether the AEDPA standard of review applies or whether a de novo standard of review applies, this claim does not merit federal habeas relief.

Matters relating to sentencing and serving of a sentence generally are governed by state law and do not raise a federal constitutional question. See Cacoperdo v. Demosthenes, 37 F.3d 504, 507 (9th Cir. 1994), cert. denied, 514 U.S. 1026 (1995) ("The decision whether to impose sentences concurrently or consecutively is a matter of state criminal procedure and is not within the purview of federal habeas corpus.") (citation omitted); see also Wilson v. Corcoran, 562 U.S. 1, 5 (2010) (per curiam) ("it is only noncompliance with *federal* law that renders a State's criminal judgment susceptible to collateral attack in the federal courts") (original emphasis).

Under narrow circumstances, however, the misapplication of state sentencing law may violate due process. See Richmond v. Lewis, 506 U.S. 40, 50 (1992). "[T]he federal, constitutional question is whether [the error] is so arbitrary or capricious as to constitute an independent due process" violation. Id. (internal quotation and citation omitted); see also Christian v. Rhode, 41 F.3d 461, 469 (9th Cir. 1994) ("Absent a showing of fundamental unfairness, a state court's misapplication of its own sentencing laws does not justify federal habeas relief.").

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Here, there was no sentencing error. Under California law, the sentencing court must calculate an indeterminate term separately from any determinate term and may not make the indeterminate term a "principal term." See People v. Neely, 176 Cal. App. 4th 787, 797-99, 97 Cal. Rptr. 3d 913 (2009). Thus, the sentencing approach suggested by Petitioner would have violated California law. See id. Therefore, Petitioner is not entitled to federal habeas relief on his sentencing claim. See 28 U.S.C. § 2254(a); Frantz v. Hazey, 533 F.3d 724, 736-37 (9th Cir. 2008) (en banc).

IV. Petitioner's Claims of Ineffective Assistance of Appellate Counsel Do Not Merit Federal Habeas Relief.

The standards of Strickland and its progeny govern claims of ineffective assistance of appellate counsel as well as claims of ineffective assistance of trial counsel. See Smith v. Robbins, 528 U.S. 259, 285-86 (2000); Bailey v. Newland, 263 F.3d 1022, 1028 (9th Cir. 2001), cert. denied, 535 U.S. 995 (2002); see also Daire v. Lattimore, 818 F.3d 454, 461 (9th Cir. 2016) (en banc) (clearly established Supreme Court law holds that Strickland applies to claim of ineffective assistance of counsel in noncapital sentencing proceedings). Appellate counsel has no constitutional obligation to raise all non-frivolous issues on appeal. See Pollard v. White, 119 F.3d 1430, 1435 (9th Cir. 1997); see also Moormann v. Ryan, 628 F.3d 1102, 1109 (9th Cir. 2010), cert. denied, 132 S. Ct. 346 (2011) (appellate counsel is not required to raise a meritless issue on appeal). "A hallmark of effective appellate counsel is the ability to weed out claims that have no likelihood of success, instead of

throwing in a kitchen sink full of arguments with the hope that some argument will persuade the court." See Pollard v. White, 119 F.3d at 1435.

Petitioner raised his claims of ineffective assistance of appellate counsel in his Superior Court habeas petition, which that court denied on the ground that Petitioner had failed to support his claims with non-conclusory factual allegations or documentary evidence (see Petition, Exhibits, ECF Dkt. No. 1, pp. 28-29; ECF Dkt. No. 17-6, p. 11; Respondent's Lodgment 7, ECF Dkt. No. 17-7). This decision of the Superior Court was the last reasoned state court decision regarding these claims. For the following reasons, this decision was not unreasonable.

Petitioner's claim that appellate counsel rendered ineffective assistance by allegedly failing to raise Petitioner's claims of trial counsel's ineffectiveness plainly fails. As discussed above, all of Petitioner's claims of trial counsel's ineffectiveness lack merit. Appellate counsel cannot be deemed ineffective for failing to raise unmeritorious claims. See Moormann v. Ryan, 628 F.3d at 1109 (where petitioner failed to show trial counsel's alleged ineffectiveness prejudiced petitioner, appellate counsel's failure to argue trial counsel's alleged ineffectiveness "was neither deficient representation nor prejudicial"); Featherstone v. Estelle, 948 F.2d 1497, 1507 (9th Cir. 1991) (where trial counsel's performance did not fall below the Strickland standard, "petitioner was not prejudiced by appellate counsel's decision not to raise issues that had no merit") (footnote omitted).

Petitioner's claim that appellate counsel failed to raise Petitioner's sentencing claim also necessarily lacks merit. For the reasons stated in section III above, Petitioner's sentencing claim is not even "colorable." Therefore, appellate counsel's failure to raise this claim was neither unreasonable nor prejudicial.

It follows that the Superior Court's rejection of Petitioner's claims of ineffective assistance of appellate counsel was not contrary to, or an objectively unreasonable application of, any clearly established Federal Law as determined by the United States Supreme Court. See 28 U.S.C. § 2254(d); Harrington v. Richter, 562 U.S. at 100-03. Petitioner is not entitled to federal habeas relief on these claims.

V. Petitioner Is Not Entitled to Federal Habeas Relief on His Faretta Claim.

A. Background

Under Faretta, a criminal defendant is constitutionally entitled to waive his or her Sixth Amendment right to counsel and to represent himself or herself at trial. Faretta, 422 U.S. at 820-21; see Moore v. Calderon, 108 F.3d 261, 264-65 (9th Cir.), cert. denied, 521 U.S. 1111 (1997) (Faretta rule clearly established by United States Supreme Court for purposes of 28 U.S.C. section 2254(d)). Under Ninth Circuit law, a Faretta request must be: (1) knowing and intelligent; (2) unequivocal; (3) timely; and (4) not asserted for purposes of delay. Hirschfield v. Payne, 420 F.3d 922, 926 (9th Cir. 2005);

United States v. Schaff, 948 F.2d 501, 503 (9th Cir. 1991).

At Petitioner's arraignment on April 21, 2011, the court appointed the public defender to represent Petitioner (C.T. 4). On April 29, 2011, the public defender declared a conflict and the court appointed a conflict panel attorney to represent Petitioner (C.T. 5). This attorney represented Petitioner at the preliminary hearing and during pretrial proceedings (C.T. 5-6, 11-14, 17, 22, 57-68). At a pretrial conference on Thursday, October 25, 2012, the court set a "readiness calendar date" of Friday, December 7, 2012, and a jury trial date of Monday, December 10, 2012 (C.T. 68).

On Friday, December 7, 2012, Petitioner's counsel advised the court that Petitioner had told counsel that morning that Petitioner wanted to "go pro per" (R.T. 1). Counsel also stated that Petitioner wanted to go over some "important information" with counsel at the jail rather than in court (R.T. 1). Counsel requested a continuance (R.T. 1). The court denied the request for a continuance, stating that the court had indicated in a chambers conference that the court intended to hear motions Monday morning and to start jury selection Monday afternoon (R.T. 1-2). Counsel then said Petitioner wanted to address the court (R.T. 2).

Petitioner told the court that his counsel was "a good lawyer" (R.T. 2). Petitioner nevertheless claimed he wanted to represent himself at trial (R.T. 2). The following then occurred:

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The Court: Okay. We're on for assignment calendar. You ready to start on Monday?

[Petitioner]: I mean, can I -- if I go pro per, can I look at my case? Can I study it for a minute?

The Court: What do you mean for a minute?

[Petitioner]: A couple of months?

The Court: No, sir. We've been -- just do a quick recitation here. Date of offense is April 20, 2011. The arraignment on the Information was April 21st of 2011. Public Defender was on the case for one or two appearances and conflicted off. And for the Conflict Panel, [Petitioner's counsel] has been on it since at least May of 2011.

Several continuances on the pre-preliminary hearing calendar. Went to preliminary hearing on August 31st of 2011 and held to answer. That's over a year ago. There's been, estimating, at least ten appearances since then. No prior request to go pro per.

So the request to go pro per on the date of assignment calendar, the Court finds that to be untimely . . . the defense ready to go next week?

[Petitioner's counsel]: Yes.

> [The Court]: So Court finds the request to go pro per is untimely and that is denied.
>
> [Petitioner]: Could you file a motion that -- saying that I wasn't ready for trial?
>
> The Court: Well, what you said and what [Petitioner's counsel] has said regarding what you wanted to talk about is on the record. There's certainly going to be time to talk to you before the trial starts on Monday and before witnesses are called on Wednesday.
>
> There will be time for you to have a discussion with [Petitioner's counsel] about -- I don't want you to tell me what you want to talk about because that's between you and [Petitioner's counsel], but there will certainly be time for discussion. Of course there's been, in the Court's opinion, time for discussion for the past year and a half as well.

R.T. 2-3).

Jury selection began on Monday, December 10, 2012 (R.T. 10).

Petitioner claims the trial court erred by denying his Faretta request. On direct review, the California Court of Appeal denied this claim on the merits, ruling that it was "clear that [Petitioner] was just trying to delay the inevitable (or perhaps build error into the case)" (see Respondent's Lodgment 5, ECF Dkt. No. 17-5, pp. 4-7;

People v. Andrews, 2014 WL 505716, at *2-3). The Court of Appeal stated:

> In this case, as quoted above, defendant himself described [Petitioner's counsel] as a "good lawyer," thus conceding that he had no quarrel with her performance to that point. . . . [T]here had been multiple hearings over a long period of time during which defendant, while represented by [Petitioner's counsel], sat mute and acquiescent. His professed desire for self-representation manifested itself only at the last minute before trial. Furthermore, defendant asked for two months of preparation time - a substantial additional delay and disruption to the court, counsel, the nine witnesses who testified, and the unquestionably substantial summoned jury pool. We presume that the trial court had these points in mind and substantial evidence supports its exercise of discretion. The conclusion that the request was prompted solely by a desire to put off the trial date is amply justified.
>
> . . . When a defendant who has sat quietly for well over a year suddenly stands up on the eve of a trial, which could result in a life sentence, and announces that he wishes to represent himself and have a "couple of months" to study his case, there is nothing arbitrary in the court's determination that the request is designed to create a delay and should be refused.

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(Respondent's Lodgment 5, ECF Dkt. No. 17-5, pp. 4-6; People v. Andrews, 2014 WL 505716, at *2-3) (footnote omitted).

Petitioner presented his Faretta claim to the California Supreme Court in his second habeas corpus petition filed in that court (see Respondent's Lodgment 12). As indicated above, the California Supreme Court denied that petition with citations (Respondent's Lodgment 13).

B. Standard of Review

Petitioner argues that, because the California Supreme Court assertedly rejected his Faretta claim on procedural grounds, the AEDPA standard of review does not apply (see Reply, ECF Dkt. No. 20, pp. 7, 11-15). See Pirtle v. Morgan, 313 F.3d 1160, 1167-68 (9th Cir. 2002), cert. denied, 539 U.S. 916 (2003) (AEDPA standard of review inapplicable where state supreme court denied claim on procedural grounds and there was no state court decision on the merits). Petitioner argues that review should be de novo, and that this Court should apply the Ninth Circuit's "jury empanelment" rule (a rule not endorsed by the United States Supreme Court) (see Reply, ECF Dkt. No. 20, pp. 11-15) (citing Burton v. Davis, 816 F.3d 1132 (9th Cir. 2016)).[5]

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[5] In cases unencumbered by the AEDPA standard of review, the Ninth Circuit applies the rule that "a motion to proceed pro se is timely if made before the jury is empaneled, unless it is shown to be a tactic to secure delay." Burton v. Davis 816 F.3d at 1142 (quoting Fritz v. Spaulding, 682 F.2d 782, 784 (9th Cir. 1982) (emphasis added)).

Here, the California Court of Appeal determined the merits of the Faretta issue. The California Supreme Court denied Petitioner's second habeas petition, which contained his Faretta claim, with citations to Waltreus, Duvall and Clark. The citation to Waltreus signified that the California Supreme Court would not consider on habeas corpus issues previously resolved on appeal. See Carter v. Giurbino, 385 F.3d 1194, 1198 (9th Cir. 2004), cert. denied, 543 U.S. 1190 (2005). A Waltreus denial is "neither a ruling of procedural default nor a ruling on the merits." Id. Where the California Supreme Court denies a habeas petition with a Waltreus citation, a federal habeas court must "look through" the California Supreme Court's denial to the last reasoned opinion, here the merits decision of the California Court of Appeal. See Ylst v. Nunnemaker, 501 U.S. 797, 805-06 (1991) ("Ylst"). "When a state court declines to review the merits of a petitioner's claim on the ground that it has done so already, it creates no bar to federal habeas review." Cone v. Bell, 556 U.S. 449, 466 (2009). Accordingly, the AEDPA standard of review is applicable in the present circumstance.

The California Supreme Court's citation to Duvall does not alter this conclusion. A citation to Duvall usually connotes a perceived failure to "state fully and with particularly the facts on which relief is sought." People v. Duvall, 9 Cal. 4th at 474; see Stancle v. Clay, 692 F.3d 948, 968 (9th Cir. 2012), cert. denied, 133 S. Ct. 1465 (2013); In re Reno, 55 Cal. 4th 428, 482, 146 Cal. Rptr. 3d 297, 283 P.3d 1181 (2012), cert. denied, 133 S. Ct. 2345 (2013). When the California Supreme Court deems a petition lacking in particularity, a federal habeas court examines the state petition independently to

determine whether the petitioner stated the claim "with as much particularity as is practicable." Barrera v. Attorney General of Calif., 473 Fed. App'x 748, 749 (9th Cir. 2012) (quoting Kim v. Villalobos, 799 F.2d 1317, 1320 (9th Cir. 1986). Petitioner copied much of the Faretta argument in his California Supreme Court habeas petition verbatim from the Faretta argument in his attorney-drafted opening brief in the California Court of Appeal, including a verbatim transcription of that portion of the Reporter's Transcript concerning Petitioner's Faretta request (see Respondent's Lodgments 3, 13). The Court of Appeal addressed the Faretta issue on the merits, evidently having no trouble discerning the particularized nature of the claim and the underlying facts. In these circumstances, this federal Court finds that Petitioner presented his Faretta argument to the California Supreme Court "with as much particularity as is practicable." See Kim v. Villalobos, 799 F.2d at 1320. Inclusion of the Duvall citation does not support a determination of procedural default or otherwise undermine the conclusion that the Waltreus citation renders applicable the AEDPA standard of review.

The citation to Clark at the pages referenced indicated that the petition was successive to Petitioner's first habeas petition to the California Supreme Court (which did not contain the Faretta claim). See Clark, 5 Cal. 4th at 767-69. This citation signified that Petitioner previously had the opportunity to assert that claim in a habeas petition but had failed to do so. Clark also states: "It has long been the rule that absent a change in the applicable law or the facts, the court will not consider repeated applications for habeas corpus presenting claims previously rejected." Clark, 5 Cal. 4th at

767 (citations omitted).

Even if Petitioner had raised his Faretta claim in his first California Supreme Court habeas petition, Petitioner still would have been subject to a Waltreus denial (as demonstrated by the California Supreme Court's citation of Waltreus in denying the second petition). The California Supreme Court's indication it would refuse to entertain a successive petition containing a claim already subject to a Waltreus denial does not diminish the significance of the Waltreus denial or render inapplicable the Ylst "look through" doctrine as to that denial.

In sum, the California Supreme Court's denial of Petitioner's second habeas petition is no bar to the application of the AEDPA standard of review to the reasoned decision of the California Court of Appeal. See Cone v. Bell, 556 U.S. at 466.

C. Under the AEDPA Standard of Review, Petitioner Is Not Entitled to Federal Habeas Relief on His Faretta Claim.

In Marshall v. Taylor, 395 F.3d 1058 (9th Cir.), cert. denied, 546 U.S. 860 (2005), the Ninth Circuit recognized that, although no United States Supreme Court case directly addressed the timing of a request for self-representation, Faretta itself incorporated a timing element. Id. at 1060. The Ninth Circuit read Faretta to "require a court to grant a Faretta request when the request occurs 'weeks before trial.'" Id. at 1061; see also Moore v. Calderon, 108 F.3d 261, 265 (9th Cir. 1997), abrogated on other grounds, Williams v. Taylor, 529

U.S. 362 (2000). (Faretta clearly established that a request to proceed pro se is timely if made "weeks before trial"). However, in Marshall v. Taylor, the Ninth Circuit also ruled that, "[b]ecause the Supreme Court has not clearly established when a Faretta request is untimely, other courts are free to do so as long as their standards comport with the Supreme Court's holding that a request 'weeks before trial' is timely." Marshall v. Taylor, 395 F.3d at 1061 (footnote omitted). The Marshall Court held that, because the petitioner's request for self-representation on the morning of trial "fell well inside the 'weeks before trial' standard for timeliness established by Faretta," the state court's finding of untimeliness "clearly comport[ed] with Supreme Court precedent." Id..

Here, Petitioner's claim fails because, inter alia, he did not make his Faretta request until the last court day before trial, which reasonably could be deemed untimely without violating the "weeks before trial" standard established by Faretta. See Burton v. Price, 816 F.3d 1132, 1141-42 & n.5 (9th Cir. 2016) (Faretta did not "clearly entitle" petitioner to relief where he made his Faretta request three court days before the jury was empaneled); Stenson v. Lambert, 504 F.3d 873, 884 (9th Cir. 2007), cert. denied, 555 U.S. 908 (2008) ("The Supreme Court has never held that Faretta's 'weeks before trial' standard requires courts to grant requests for self-representation coming on the eve of trial."); Turner v. Price, 2016 WL 1394282, at *8 (N.D. Cal. Apr. 8, 2016) (Faretta request made five days before trial untimely); Garcia v. Beard, 2015 WL 7960749, at *6 (C.D. Cal. Sept. 3, 2015), adopted, 2015 WL 8022982 (C.D. Cal. Dec. 4, 2015) (Faretta motion made the day before trial untimely).

Furthermore, the California Court of Appeal found as a matter of fact that Petitioner made his Faretta request for the sole purpose of delay. See Burton v. Davis, 816 F.3d at 1147 (determination of a petitioner's purpose in seeking self-representation is a question of fact); see also Williams v. Johnson, ___ F.3d ___, 2016 WL 3034705, at *4 (9th Cir. May 27, 2016) ("AEDPA requires us to defer to state court findings made for the first time by the appellate court. . . .") (citations omitted). Petitioner has produced no clear and convincing evidence to rebut the presumption of correctness accorded to this factual determination. See 28 U.S.C. § 2254(e)(1); Marshall v. Taylor, 395 F.3d at 1061-62 & n.19 (presuming correct factual finding by California Court of Appeal that petitioner's Faretta request was untimely). The California Court of Appeal was not unreasonable in concluding that the first-time, eve-of-trial self-representation request by a defendant who professed satisfaction with his counsel and requested a two-month continuance in a case over a year old betrayed the fact that the defendant's request was a tactic to secure delay.[6] See Hirschfield v. Payne, 420 F.3d 922, 926-27 (9th Cir. 2005) (denying Faretta motion based on purpose to delay not contrary to Faretta and not unreasonable, where petitioner sought self-representation the day before trial, had sought unsuccessfully to substitute counsel on four prior occasions and admitted that prior

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[6] Contrary to Petitioner's argument, the Court of Appeal's conclusion that Petitioner's Faretta request "was prompted solely by a decision to put off the trial date" was tantamount to a conclusion that the request "was a tactic to secure delay." This Court would reach the same factual conclusion on the present record under a "totality of the circumstances" de novo review. It is evident from all the circumstances that Petitioner's Faretta request was merely a tactic to secure delay.

requests to substitute counsel had been "close to trial").

For the foregoing reasons, the California Court of Appeal's rejection of Petitioner's Faretta claim was not contrary to, or an objectively unreasonable application of, any clearly established Federal Law as determined by the United States Supreme Court. Petitioner is not entitled to federal habeas relief on this claim. See 28 U.S.C. § 2254(d); Harrington v. Richter, 562 U.S. 86, 100-03 (2011).

RECOMMENDATION

For the foregoing reasons,[7] IT IS RECOMMENDED that the Court issue an Order: (1) accepting and adopting this Report and Recommendation; (2) denying Petitioner's "Request for Judicial Notice, etc." as moot; and (3) directing that Judgment be entered denying and dismissing the Petition with prejudice.

DATED: July 18, 2016.

/S/
CHARLES F. EICK
UNITED STATES MAGISTRATE JUDGE

[7] The Court has considered and rejected all of Petitioner's arguments. The Court has discussed Petitioner's principal arguments herein.

NOTICE

Reports and Recommendations are not appealable to the Court of Appeals, but may be subject to the right of any party to file objections as provided in the Local Rules Governing the Duties of Magistrate Judges and review by the District Judge whose initials appear in the docket number. No notice of appeal pursuant to the Federal Rules of Appellate Procedure should be filed until entry of the judgment of the District Court.

If the District Judge enters judgment adverse to Petitioner, the District Judge will, at the same time, issue or deny a certificate of appealability. Within twenty (20) days of the filing of this Report and Recommendation, the parties may file written arguments regarding whether a certificate of appealability should issue.