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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

GREGORY BERNARD LACY,
Petitioner,
v.
J.A. LIZARRAGA, Warden,
Respondent.

Case No. 5:19-cv-00583-DDP (KES)

ORDER ACCEPTING FINDINGS AND
RECOMMENDATIONS OF UNITED
STATES MAGISTRATE JUDGE

Pursuant to 28 U.S.C. § 636, the Court has reviewed the Petition, the other records on file herein, and the Report and Recommendation of the United States Magistrate Judge. Further, the Court has engaged in a de novo review of those portions of the Report and Recommendation to which objections have been made. The Court accepts the findings and recommendations of the Magistrate Judge.

Respondent objects that, with respect to Counts 4, 5, and 6, Petitioner has not shown prejudice from the constitutional errors described in the Report and Recommendation. (See Dkt. 39 at 5, 14.) On collateral review, however, Respondent has the burden to show harmlessness. See Mays v. Clark, 807 F.3d 968, 980 (9th Cir. 2015). Furthermore, Respondent did not raise this issue before the Magistrate Judge or file any response to Petitioner’s supplemental memorandum, and thus has

1 waived the harmless error argument. See Greenhow v. Secretary of Health & Human
2 Services, 863 F.2d 633, 638-39 (9th Cir. 1988), overruled on other grounds by United
3 States v. Hardesty, 977 F.2d 1347, 1348 (9th Cir. 1992) (en banc) (“We do not believe
4 that the Magistrate Act was intended to give litigants an opportunity to run one
5 version of their case past the magistrate, then another past the district court.”);
6 (Rhodes v. Dittmann, 903 F.3d 646, 664 (7th Cir. 2018) (discussing government’s
7 waiver of harmless error issue).

8 “[R]elief is proper only if the federal court has ‘grave doubt about whether a
9 trial error of federal law had substantial and injurious effect or influence in
10 determining the jury's verdict.’” Davis v. Ayala, 576 U.S. 257, 267–68 (2015),
11 quoting O’Neal v. McAninch, 513 U.S. 432, 436 (1995) (internal quotation marks
12 omitted). For the reasons set forth by the Magistrate Judge, that standard has been
13 met with respect to all counts of conviction. Accordingly, the Petition is GRANTED.
14 This matter is REMANDED to the Superior Court of Riverside County for retrial on
15 Counts 1 through 6.

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17 IT IS SO ORDERED.

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20 DATED: October 26, 2021



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22 Dean D. Pregerson
23 UNITED STATES DISTRICT JUDGE
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