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**UNITED STATES DISTRICT COURT**

EASTERN DISTRICT OF CALIFORNIA

THEODORE FLOYD STANKEWITZ,

1:06-cv-0275-OWW-DLB (HC)

Petitioner,

v.

FINDINGS AND RECOMMENDATION  
REGARDING FIRST AMENDED PETITION

[Doc. 27]

DERRAL G. ADAMS,

Respondent.

\_\_\_\_\_  
Petitioner is a state prisoner proceeding pro se with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254.<sup>1</sup>

BACKGROUND

Following a jury trial in the Fresno County Superior Court, Petitioner was conviction of attempted murder (Cal. Penal Code §§ 187(a)/664),<sup>2</sup> assault with a firearm (§ 245(a)(2), first degree burglary (§§ 459, 460), unlawful possession of a firearm (§ 12021(a)(1)). It was also found true that he personally used a firearm and caused great bodily injury (§ 12022.5(a), 12022.53(b)-(d), 12022.7(a)). In addition, Petitioner admitted that he suffered a prior serious felony conviction within the meaning of California’s Three Strikes law. (§§ 667(b)-(i), 1170.12).

Petitioner was sentenced to a determinate term of 23 years plus a consecutive

\_\_\_\_\_  
<sup>1</sup> Respondent submits that the proper custodian is Derral G. Adams-the current Warden at Corcoran State Prison. Accordingly, pursuant to Rule 25(d) of the Federal Rules of Civil procedure, Warden Adams is substituted in place of Warden Scribner.

<sup>2</sup> All further statutory references are to the California Penal Code unless otherwise indicated.

1 indeterminate term of 25 years-to-life in state prison. (Lodged Doc. No. 5.)

2 Petitioner filed a timely notice of appeal. On May 18, 2005, the California Court of  
3 Appeal, Fifth Appellate District affirmed Petitioner's conviction. (Id.)

4 Petitioner filed a petition for review in the California Supreme Court, which was denied  
5 on August 10, 2005. (Lodged Doc. Nos. 6, 7.)

6 Petitioner filed the instant federal petition for writ of habeas corpus on March 13, 2006,  
7 and an amended petition on March 31, 2009. (Court Doc. 27.)

8 Respondent filed an answer to the amended petition on June 1, 2009, and Petitioner filed  
9 a traverse on July 1, 2009. (Court Docs. 33, 36.)

#### 10 STATEMENT OF FACTS

11 In June 2002 James Cogdell and Vicki Hubble lived together in a mobile  
12 home and a small trailer located on a parcel of property on Little Sandy Road (the  
property). One can see the trailer from the mobile home and vice-versa.

13 On the morning of June 20<sup>th</sup> Cogdell took some medication and went to  
14 sleep in the trailer. A few hours later, Hubbell was in the mobile home when she  
heard dogs barking and a man yelling. Cogdell was awakened by the noise.  
15 Cogdell opened the trailer door and Hubbell looked through a window to ascertain  
the source of the commotion. They saw [Petitioner], with whom they had been  
16 acquainted for the past five to eight years, standing beside a white Ford  
Thunderbird. Codefendant Jeffrey Marquez and another person were sitting  
17 inside the car. Cogdell recognized the Ford Thunderbird as one belonging to  
Marquez's wife, Donna McCain Marquez (McCain).

18 [Petitioner] approached the trailer, yelling that Cogdell owed him and that  
19 he was going to kill him. Cogdell told [Petitioner] to leave. [Petitioner] began to  
walk away. Cogdell closed the door, but quickly reopened it because [Petitioner]  
20 continued to yell.

21 Marquez got out of the car. He opened the trunk, removed an object and  
tossed it to [Petitioner]. [Petitioner] approached Cogdell, holding the object.  
22 Cogdell and Hubbell realized that [Petitioner] was carrying a gun. Cogdell  
described it as a sawed-off .22 caliber rifle. During her testimony Hubble  
23 described it as an older rifle with a brown stock. [Petitioner] pointed the rifle at  
Cogdell and said that "he was going to kill him." Cogdell replied, "Go ahead and  
24 kill me then."

25 Cogdell testified that [Petitioner] entered the trailer without his  
permission, yelling that Cogdell "owed him," and "he was going to take  
26 whatever." Cogdell told [Petitioner] that "[h]e ain't taking nothing." [Petitioner]  
repeatedly said that "he's crazy and that he'd kill me." [Petitioner] also said, "you  
27 know I can do it."

28 Cogdell grabbed the rifle's barrel and pulled it to his left. Cogdell and  
[Petitioner] began struggling. [Petitioner] discharged the rifle, sending a bullet

1 through a cabinet. They continued to struggle and about 30 seconds later  
2 [Petitioner] discharged the gun a second time, sending a bullet into Cogdell's  
lower left leg.

3 Hubbell testified that she heard [Petitioner] and Cogdell arguing.  
4 [Petitioner] insisted that he was going to enter the trailer. Cogdell was trying to  
push him outside. The two men began wrestling in the trailer's entry. Hubbell  
5 heard a gunshot and then she saw [Petitioner] on the floor, half in and half out of  
the trailer's entry. [Petitioner] still had the gun in his hands. He started to get on  
6 his feet. While he was on his knees he fired a second shot, causing Cogdell to fall  
backwards. [Petitioner] got to his feet. He yelled, "You are crazy for messing  
7 with me. You know I'll kill you. What are you doing? Are you crazy? You  
know I'm-you know I'll kill you. I'm going to kill you."

8 [Petitioner] walked back to the car, carrying the rifle. He handed the rifle  
to Marquez, who slid it in behind the driver's seat. The two men got into the car.  
9 Then [Petitioner] got out of the car, saying "he had to finish this, it was not done."  
Marquez got out of the car and said to [Petitioner], "Get in the car, let's go."  
10 They got back into the car and Marquez drove away.

11 Marquez testified that [Petitioner] got out of the car. Marquez said that he  
did not hear [Petitioner] yelling at anyone. After waiting for a few minutes,  
12 Marquez stepped out of the car, looked around and yelled to [Petitioner] that they  
needed to leave. [Petitioner] returned to the car. He did not have a gun in his  
13 hands and he was not running. Marquez denied hearing any gunshots and testified  
that he did not hand or toss a gun to [Petitioner]. Marquez was angry with  
14 [Petitioner] and yelled at him because he noticed two syringes in the car that he  
believed belonged to [Petitioner]. Marquez was afraid McCain would see the  
15 syringes. He was taking methadone to help him stop using illegal drugs because  
McCain had threatened to leave him if he used drugs again.

16 McCain testified she was in the back seat of the car and Marquez was  
driving that morning. [Petitioner] was in the front passenger seat. After stopping  
17 for gas and food, [Petitioner] directed Marquez to the compound. When they  
arrived, [Petitioner] got out of the car. McCain saw [Petitioner] standing near the  
18 travel trailer. Marquez got out of the car and yelled to [Petitioner], "Cousin, come  
on, let's go." [Petitioner] was facing the trailer. McCain could hear dogs barking  
19 and [Petitioner] yelling, but she did not know what he was saying. She did not  
hear any gunshots and [Petitioner's] hands were empty. She did not see any blood  
20 or scratches on [Petitioner's] body. After [Petitioner] got back into the car,  
Marquez yelled at him for being away so long. [Petitioner] apologized. Marquez  
21 retorted, "No, you're not sorry, you're just drunk."

22 They drove to a local park and reservoir. McCain and Marquez went to  
23 the restrooms while [Petitioner] remained in the car. When they returned, McCain  
saw [Petitioner] jump into the water. Soon thereafter, they left the park.

24 Meanwhile, Hubbell telephoned for emergency assistance. Cogdell was  
25 taken to the hospital and treated. The crime scene was processed. Shoe prints  
with a bear claw design were found on the ground outside the trailer's entrance.  
26 Cogdell's blood was found on the trailer's entry floor. A bullet exit hold was  
discovered in a drawer front.

27  
28 Abel Rival was working as a flagman on a road project in the general  
vicinity of the property. He told deputies that between noon and 1:00 p.m. he saw

1 a white Ford Thunderbird containing two men and one woman, all of who were  
2 Hispanic or American Indian. The driver had a pock-marked face and was  
wearing a red bandana.

3 At approximately 3:00 p.m., McCain’s car was stopped by sheriff’s  
4 deputies about three miles away from the park. A red bandana, two hypodermic  
5 needles, two bottles of methadone, empty beer cans, and a bottle containing nine  
pink pills were found in the car.

6 Deputy James Minenna asked [Petitioner] “where the gun was.”  
[Petitioner] replied, “Is that guy dead?” Deputy Minenna asked, Don’t you  
7 know?” [Petitioner] responded, “If I had a gun, that guy would be dead. If I carry  
a gun, that means someone is going to die. You should know me by now.”  
8 [Petitioner] repeated this statement at least three times. While [Petitioner] was  
being transported to the sheriff’s station, he threatened to assault the person “who  
9 told on him, who set him up.”

10 The soles of [Petitioner’s] shoes were consistent with the shoe prints  
outside the trailer. No blood was observed on [Petitioner’s] clothing and no  
11 evidence of gunshot residue was detected on [Petitioner] or Marquez.

12 Hubble testified that her brother-in-law found a .22 caliber shell casing on  
the ground near the travel trailer approximately 20 days after the shooting.

13 (Lodged Doc. No. 5, Opinion, at 3-6.)

## 14 DISCUSSION

### 15 A. Jurisdiction

16 Relief by way of a petition for writ of habeas corpus extends to a person in custody  
17 pursuant to the judgment of a state court if the custody is in violation of the Constitution or laws  
18 or treaties of the United States. 28 U.S.C. § 2254(a); 28 U.S.C. § 2241(c)(3); Williams v. Taylor,  
19 529 U.S. 362, 375, 120 S.Ct. 1495, 1504, n.7 (2000). Petitioner asserts that he suffered  
20 violations of his rights as guaranteed by the U.S. Constitution. The challenged conviction arises  
21 out of the Fresno County Superior Court, which is located within the jurisdiction of this Court.  
22 28 U.S.C. § 2254(a); 2241(d).

23 On April 24, 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act  
24 of 1996 (“AEDPA”), which applies to all petitions for writ of habeas corpus filed after its  
25 enactment. Lindh v. Murphy, 521 U.S. 320, 117 S.Ct. 2059, 2063 (1997); Jeffries v. Wood, 114  
26 F.3d 1484, 1499 (9th Cir. 1997), *cert. denied*, 522 U.S. 1008, 118 S.Ct. 586 (1997) (quoting  
27 Drinkard v. Johnson, 97 F.3d 751, 769 (5th Cir.1996), *cert. denied*, 520 U.S. 1107, 117 S.Ct.  
28

1 1114 (1997), *overruled on other grounds by Lindh v. Murphy*, 521 U.S. 320, 117 S.Ct. 2059  
2 (1997) (holding AEDPA only applicable to cases filed after statute's enactment). The instant  
3 petition was filed after the enactment of the AEDPA and is therefore governed by its provisions.

4 B. Standard of Review

5 Where a petitioner files his federal habeas petition after the effective date of the Anti-  
6 Terrorism and Effective Death Penalty Act (“AEDPA”), he can prevail only if he can show that  
7 the state court’s adjudication of his claim:

8 (1) resulted in a decision that was contrary to, or involved an unreasonable  
9 application of, clearly established Federal law, as determined by the Supreme  
10 Court of the United States; or

11 (2) resulted in a decision that was based on an unreasonable determination of the  
12 facts in light of the evidence presented in the State court proceeding.

13 28 U.S.C. § 2254(d). A state court decision is “contrary to” federal law if it “applies a rule that  
14 contradicts governing law set forth in [Supreme Court] cases” or “confronts a set of facts that are  
15 materially indistinguishable from” a Supreme Court case, yet reaches a different result.” Brown  
16 v. Payton, 544 U.S. 133, 141 (2005) citing Williams (Terry) v. Taylor, 529 U.S. 362, 405-06  
17 (2000). A state court decision will involve an “unreasonable application of” federal law only if it  
18 is “objectively unreasonable.” Id., quoting Williams, 529 U.S. at 409-10; Woodford v. Visciotti,  
19 537 U.S. 19, 24-25 (2002) (*per curiam*). “A federal habeas court may not issue the writ simply  
20 because that court concludes in its independent judgment that the relevant state-court decision  
21 applied clearly established federal law erroneously or incorrectly.” Lockyer, at 1175 (citations  
22 omitted). “Rather, that application must be objectively unreasonable.” Id. (citations omitted).

23 “Factual determinations by state courts are presumed correct absent clear and convincing  
24 evidence to the contrary, § 2254(e)(1), and a decision adjudicated on the merits in a state court  
25 and based on a factual determination will not be overturned on factual grounds unless objectively  
26 unreasonable in light of the evidence presented in the state court proceedings, § 2254(d)(2).”  
27 Miller-El v. Cockrell, 537 U.S. 322, 340 (2003). Both subsections (d)(2) and (e)(1) of § 2254  
28 apply to findings of historical or pure fact, not mixed questions of fact and law. See Lambert v.  
Blodgett, 393 F.3d 943, 976-77 (2004).

1 Courts further review the last reasoned state court opinion. See Ylst v. Nunnemaker, 501  
2 U.S. 979, 803 (1991). However, where the state court decided an issue on the merits but  
3 provided no reasoned decision, courts conduct “an independent review of the record . . . to  
4 determine whether the state court [was objectively unreasonable] in its application of controlling  
5 federal law.” Delgado v. Lewis, 223 F.3d 976, 982 (9th Cir. 2000). “[A]lthough we  
6 independently review the record, we still defer to the state court’s ultimate decisions.” Pirtle v.  
7 Morgan, 313 F.3d 1160, 1167 (9th Cir. 2002).

8 C. Instructional Error

9 Petitioner contends that the trial court erred when it responded to the jury’s question on  
10 the sequence by which they could consider the lesser included offenses.

11 1. *State Court Decision*

12 The last reasoned decision of the California Court of Appeal, Fifth Appellate District  
13 rejected Petitioner’s claim stating the following:

14 The jury was instructed on attempted voluntary manslaughter as a lesser  
15 included offense to the charged crime of attempted murder. The court included  
16 CALJIC Nos. 17.10 and 8.72 in the charge. CALJIC No. 17.10 informed the jury  
17 that it possessed discretion to choose the order in which it evaluated each charged  
18 offense and any lesser crimes and that it “may find it productive to consider and  
19 reach a tentative conclusion on all charges and lesser crimes before reaching any  
20 final verdict[s]. However, the court cannot accept a guilty verdict on a lesser  
21 crime unless you have unanimously found the defendant not guilty of the  
22 [charged] [greater] crime.” CALJIC No. 8.72 informed the jury that if it  
23 unanimously agrees that it has a reasonable doubt whether the crime is murder or  
24 manslaughter, it must give appellant the benefit of the doubt and find him guilty  
25 of manslaughter rather than murder.

26 During its deliberations, the jury sent out the following note: “We are  
27 confused about the instructions on page 66. Do we need to unanimously agree that  
28 we have reasonable doubt about murder before we can consider voluntary  
manslaughter?” After discussion with counsel, the court addressed the jury. First,  
it reread CALJIC No. 8.72, specifying that the instruction applied to attempted  
offenses. Next, it referred the jury to CALJIC No. 17.10 and reread the  
instruction's last paragraph, which is quoted above. The court made the following  
concluding remarks:

“So you either have to all agree it's attempted murder, and if you  
can't then you may consider attempted voluntary manslaughter. If  
you decide that it's attempted voluntary manslaughter I cannot  
accept a guilty [verdict] on attempted voluntary manslaughter  
unless you have all agreed he is not guilty of the attempted  
murder.” (Italics added.)

1 Appellant argues that the court's concluding summary was legally incorrect and  
2 contradicted CALJIC No. 17.10 because it improperly told the jurors that they  
3 must unanimously decide appellant did not commit attempted murder before  
4 considering whether the offense was voluntary manslaughter. We agree that the  
5 court's summary was incorrect, but find the error nonprejudicial.

6  
7 In *People v. Dennis* (1998) 17 Cal.4th 468 (*Dennis*), our high court explained the  
8 relevant legal principle:

9  
10 “We have held that a court may restrict a jury from returning a  
11 verdict on a lesser included offense before acquitting on a greater  
12 offense, but may not preclude it from considering lesser offenses  
13 during deliberations. [Citations.] Thus, a trial court should not tell  
14 the jury it must first unanimously acquit the defendant of the  
15 greater offense before deliberating on or even considering a lesser  
16 offense.” (*Dennis, supra*, 17 Cal.4th at p. 536.)

17  
18 *Dennis* relied on *People v. Kurtzman* (1988) 46 Cal.3d 322, which concluded that  
19 it is proper to instruct a jury that it “may not *return a verdict* on the lesser offense  
20 unless it has agreed beyond a reasonable doubt that defendant is not guilty of the  
21 greater crime charged, but it should not be interpreted to prohibit a jury from  
22 *considering* or *discussing* the lesser offenses before returning a verdict on the  
23 greater offense.” (*Id.* at p. 329.)

24  
25 Following and applying *Dennis* and *Kurtzman*, we agree with appellant that the  
26 challenged remark was incorrect because it told the jurors that if they could not  
27 agree on attempted murder *then* they could consider attempted voluntary  
28 manslaughter.

Yet, the error was harmless under any possible standard of review.<sup>3</sup> The evidence  
would not have justified an attempted manslaughter verdict and such a verdict  
would have been inconsistent with the defense theory asserted at trial. No credible  
evidence supported either species of voluntary manslaughter. The People  
presented evidence proving that appellant pointed a gun at Cogdell and threatened  
to kill him. When Cogdell attempted to defend himself, appellant fired the gun  
twice at close range, shooting Cogdell in the leg. The defense maintained that  
appellant was not armed and did not shoot Cogdell. Under neither version of  
events was Cogdell the initial attacker nor was appellant provoked. Moreover,  
appellant's defense was not consistent with attempted voluntary manslaughter.  
Defense counsel argued during closing that Cogdell and Hubbell were not credible  
witnesses; appellant did not have a gun, did not threaten to kill Cogdell and did  
not shoot him. Defense counsel did not argue in favor of an attempted voluntary  
manslaughter verdict. Finally, the jury was given CALJIC No. 8.50, which  
informed the jurors that when distinguishing between attempted murder and  
attempted manslaughter, the prosecution bears the burden of proving the existence  
of malice and the absence of heat of passion or provocation. Thus, when the jury  
found appellant guilty of attempted murder it necessarily concluded that the  
prosecutor had proved he acted with malice and did not act in the heat of passion  
or in response to legally adequate provocation. For all of these reasons, we  
conclude that it is not even remotely possible that the erroneous comment could

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<sup>3</sup> Appellant contends that the error must be assessed under the stringent *Chapman v. California* (1967) 386  
U.S. 18 standard, while the Attorney General cites the lenient *People v. Watson* (1956) 46 Cal.2d 818 standard.

1 have affected the verdict.

2 (Lodged Doc. No. 5, Opinion, at 10-12.)

3 2. *Applicable Law*

4 A challenge to a jury instruction solely as an error under state law does not state a claim  
5 cognizable in a federal habeas corpus action. See Estelle v. McGuire, 502 U.S. 62, 71-72 (1991).  
6 To obtain federal collateral relief for errors in the jury charge, a petitioner must show that the  
7 ailing instruction by itself so infected the entire trial that the resulting conviction violates due  
8 process. See id. at 72. Additionally, the instruction may not be judged in artificial isolation, but  
9 must be considered in the context of the instructions as a whole and the trial record. Id. The  
10 court must evaluate jury instructions in the context of the overall charge to the jury as a  
11 component of the entire trial process. See United States v. Frady, 456 U.S. 152, 169 (1982)  
12 (*citing Henderson v. Kibbe*, 431 U.S. 145, 154 (1977)). Furthermore, even if it is determined  
13 that the instruction violated the petitioner's right to due process, a petitioner can only obtain  
14 relief if the unconstitutional instruction had a substantial influence on the conviction and thereby  
15 resulted in actual prejudice under Brecht v. Abrahamson, 507 U.S. 619, 637, 113 S.Ct. 1710  
16 (1993) (whether the error had a substantial and injurious effect or influence in determining the  
17 jury's verdict.). See Hanna v. Riveland, 87 F.3d 1034, 1039 (9<sup>th</sup> Cir. 1996). The burden of  
18 demonstrating that an erroneous instruction was so prejudicial that it will support a collateral  
19 attack on the constitutional validity of a state court's judgment is even greater than the showing  
20 required to establish plain error on direct appeal." Id.

21 3. *Analysis*

22 Prior to deliberations, the trial court properly instructed the jury with CALJIC No. 17.10,  
23 stating:

24 If you are not satisfied beyond a reasonable doubt that the Defendants are  
25 guilty of the crimes charged, you may nevertheless convict them of any lesser  
26 crime, if you are convinced beyond a reasonable doubt that the Defendants are  
27 guilty of a lesser crime. The crime of attempted voluntary manslaughter is lesser  
28 to that of attempted murder as charge in Count One. Thus, you are to determine  
whether the Defendants are guilty or not guilty of the crimes charged or any lesser  
crimes. In doing so you have discretion to choose the order in which you evaluate  
each crime and consider the evidence pertaining to it. You may find it productive  
to consider and reach a tentative conclusion on all charges and lesser crimes

1 before reaching any final verdict. However, the Court did not accept a guilty  
2 verdict on a lesser crime unless you have unanimously found the Defendant not  
3 guilty on the charge crime or the greater crime.

4 (CT 270-271; RT 2051-2052.)

5 Notwithstanding the trial court's proper recitation of CALJIC No. 17.10, the Court  
6 violated the acquittal-first rule of Kurtzman by later instructing the jury that it must first  
7 unanimously acquit on the offense of murder before even considering the lesser offense of  
8 manslaughter. (Lodged Doc. No. 5, Opinion, at 11, citing People v. Dennis, 17 Cal.4th 468  
9 (1998); People v. Kurtzman, 46 Cal.3d 322 (1988). In any event, it is clear the error is subject to  
10 harmless error analysis under Brecht v. Abrahamson, 507 U.S. 619, and was harmless in this  
11 instance.

12 The apparent basis of Petitioner's claim is that he was guilty of voluntary manslaughter  
13 and not murder. However, as fully explained by the Court of Appeal, the evidence of Petitioner's  
14 guilt of the greater offense of murder was overwhelming, and there was not sufficient evidence to  
15 support an attempted manslaughter offense. The prosecution's theory of the case was that  
16 Petitioner pointed the gun at Cogdell and threatened to kill him. It was undisputed that the  
17 Cogdell was indeed shot in the leg by a rifle. Petitioner's cousin and co-defendant admitted that  
18 Petitioner had been drinking heavily that morning and directed him to drive to the victim's  
19 residence. (RT 1782, 1793-1794, 1786.) Both Cogdell and his girlfriend (Hubbell) testified that  
20 Petitioner approached the small travel trailer yelling that Cogdell owed him and he was going to  
21 kill him. (RT 417-419, 455, 778.) Petitioner's cousin and co-defendant, Marquez, retrieved a gun  
22 from the trunk of the vehicle and gave it to Petitioner. (RT 465, 778, 781.) Petitioner then  
23 entered the trailer and told Cogdell he was going to take whatever he desired. (RT 422.)  
24 Petitioner then pointed the gun at Cogdell stating "I'm going to kill you." (RT 484, 763, 766,  
25 909.) A struggle ensued as Cogdell attempted to take the gun from Petitioner causing the gun to  
26 discharge twice-the first bullet hitting the cabinet and the second hitting Cogdell's lower left leg.<sup>4</sup>

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27  
28 <sup>4</sup> The prosecution presented evidence that Petitioner had previously been convicted of first degree burglary,  
to support an inference of motive and intent on this occasion. (RT 1099-1101.)



1 the Local Rules of Practice for the United States District Court, Eastern District of California.  
2 Within thirty (30) days after being served with a copy, any party may file written objections with  
3 the court and serve a copy on all parties. Such a document should be captioned “Objections to  
4 Magistrate Judge’s Findings and Recommendation.” Replies to the objections shall be served  
5 and filed within ten (10) court days (plus three days if served by mail) after service of the  
6 objections. The Court will then review the Magistrate Judge’s ruling pursuant to 28 U.S.C. §  
7 636 (b)(1)(C). The parties are advised that failure to file objections within the specified time  
8 may waive the right to appeal the District Court’s order. Martinez v. Ylst, 951 F.2d 1153 (9th  
9 Cir. 1991).

10 IT IS SO ORDERED.

11 **Dated: August 31, 2009**

**/s/ Dennis L. Beck**  
UNITED STATES MAGISTRATE JUDGE