UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

MIGUEL GARCIA, JR.,

Petitioner,

v

R.A. HOREL, Warden,

Respondent.

NO C-07-01105-VRW

ORDER

Petitioner Miguel Garcia, Jr, a state prisoner incarcerated at the Pelican Bay State Prison in Crescent City, CA, seeks a writ of habeas corpus under 28 USC § 2254. For the reasons set forth below, a writ is DENIED.

I

On July 12, 2005, after a jury trial in Fresno County superior court, petitioner was convicted of first degree murder and possession of a firearm by a person previously convicted of a violent felony. The jury found true the allegation that petitioner personally discharged a firearm causing great bodily

injury or death; in addition, petitioner admitted he had suffered a prior strike, served a prior prison term and committed the charged offenses while on parole. Petitioner was sentenced to a prison term of 75 years to life plus five years.

After the California Court of Appeal affirmed the conviction in its entirety, petitioner filed a petition for review in the California Supreme Court, which denied review. Petitioner's state habeas petition was also denied. Petitioner subsequently filed a petition for writ of habeas corpus in federal court.

II

In People v Garcia,[1] No F048408 (Fifth Appellate District, filed Nov 15, 2006), the California Court of Appeal thoroughly detailed the factual background of this case.[2] Opinion at 2-12. In brief, on the afternoon of October 3, 2003 petitioner "fatally shot Simon Herrera inside the garage of a residence owned by Joe Hernandez. [Petitioner] later transported Herrera from the crime scene inside a vehicle registered to Tamara Newman. Later that day, [petitioner] drove the car to an orchard and set it on fire with Herrera's body inside." Opinion at 2.

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[1] Because the opinion by the California Court of Appeal was unpublished, this court will refer to the lodged opinion ("Opinion") throughout this order. The full opinion was lodged by respondent as Lodged Document 4.

[2] The state court's determination of factual issues is presumed to be correct. 28 USC § 2254(e).

The evidence against petitioner at trial included testimony and pretrial statements given by Hernandez, Newman and Jose Mara, who were all percipient witnesses. Opinion at 2-12. Newman testified under a grant of immunity; she had previously been convicted of felony assault and during trial had felony charges pending against her based on an alleged knife assault on Jeffrey Teixerio. Opinion at 4. Hernandez, who had been friends with both petitioner and murder victim Herrera, was also facing felony charges at the time of trial. Opinion at 6. Jose Mora, who was also a friend of petitioner and Herrera, told Officer Richard Byrd that appellant had confessed to killing Herrera, and had shown him the body in the back of a car. Opinion at 10. Mora also stated that petitioner had filled a container with gas and that he followed petitioner to the orchard where the car with Herrera's body was burned. Opinion at 10. Both Hernandez and Mora testified that they had lied in earlier statements to police. Opinion at 9-10.

The evidence also included the testimony of Robert Zapien, a pre-trial cellmate of petitioner. Opinion at 11. Zapien testified that petitioner confessed to shooting a man inside a garage in Fresno, in the presence of a girl named Tamara. Zapien also testified that petitioner said he burned the car to "'get rid of the DNA.'" Opinion at 11. Zapien denied he was a prison informant, but admitted on cross-examination that he had previously provided information about a stabbing at San Quentin. Opinion at 11. Officer Byrd testified that to his knowledge, no one in law enforcement had offered Zapien any

consideration in exchange for his trial testimony; on re-direct, Zapien testified that he decided to come forward because petitioner "callously told him that he shot a child." Opinion at 12.

III

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), codified under 28 USC section 2254, provides "the exclusive vehicle for a habeas petition by a state prisoner in custody pursuant to a state court judgment, even when the [p]etitioner is not challenging his underlying state court conviction." White v Lambert, 370 F3d 1002, 1009-1010 (9th Cir 2004). Under AEDPA, this court may entertain a petition for habeas relief on behalf of a California state inmate "only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 USC section 2254(a).

The writ may not be granted unless the state court's adjudication of any claim on the merits: "(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 USC § 2254(d). Under this deferential standard, federal habeas relief will not be granted "simply because [this] court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also

be unreasonable." Williams v Taylor, 529 US 362, 411 (2000).

While circuit law may provide persuasive authority in determining whether the state court made an unreasonable application of Supreme Court precedent, the only definitive source of clearly established federal law under 28 USC section 2254(d) rests in the holdings (as opposed to the dicta) of the Supreme Court as of the time of the state court decision. Id at 412; Clark v Murphy, 331 F3d 1062, 1069 (9th Cir 2003).

When a federal court is presented with a state court decision that is unaccompanied by a rationale for its conclusions, the court has no basis other than the record "for knowing whether the state court correctly identified the governing legal principle or was extending the principle into a new context." Delgado v Lewis, 223 F3d 976, 982 (9th Cir 2000). In such situations, federal courts must conduct an independent review of the record to determine whether the state court decision is objectively unreasonable. Id While federal courts "'are not required to defer to a state court's decision when that court gives [them] nothing to defer to, [they] must still focus primarily on Supreme Court cases in deciding whether the state court's resolution of the case constituted an unreasonable application of clearly established federal law.'" Greene v Lambert, 288 F3d 1081, 1089 (9th Cir 2002) (quoting Fisher v Roe, 263 F3d 906, 914 (9th Cir 2001)). Furthermore, independent review of the record is not de novo review of the constitutional issue, but rather the only way a federal court can determine whether a silent state court decision is objectively unreasonable. Himes v Thompson, 336 F3d 848, 853 (9th Cir 2003).

However, if the state court did not reach the merits of a claim, federal review of the claim is de novo. Nulph v Cook, 333 F.3d 1052, 1057 (9th Cir 2003).

Even if a petitioner meets the requirements of section 2254(d), habeas relief is warranted only if the constitutional error at issue had a substantial and injurious effect or influence in determining the jury's verdict. Brecht v Abrahamson, 507 US 619, 638 (1993). Under this standard, petitioners "may obtain plenary review of their constitutional claims, but they are not entitled to habeas relief based on trial error unless they can establish that it resulted in 'actual prejudice.'" Brecht, 507 US at 637, citing United States v Lane, 474 US 438, 439 (1986).

IV

Petitioner seeks federal habeas relief based on three claims: (1) the trial court erroneously denied petitioner's request to present evidence of third-party culpability; (2) the trial court failed to give instructions regarding accomplices and; (3) petitioner's trial counsel was constitutionally ineffective.[3]

A

In his first claim for relief, petitioner argues that the trial court erred when it denied his request to present

[3] A fourth, unexhausted claim was withdrawn by petitioner.

evidence of third-party culpability. The California Court of Appeal addressed this claim in a lengthy reasoned opinion on direct appeal, which this court will summarize here. Opinion at 12-24.

Prior to commencement of trial, petitioner moved for "admission of evidence tending to prove that Hernandez shot Herrera and that Newman aided Hernandez." Opinion at 12. Petitioner based his motion, *inter alia,* on Hernandez's and Newman's arrests for assault after the charged crime occurred. Opinion at 12-13. The trial court denied petitioner's motion, ruling that the evidence could be used to impeach Hernandez, but was not relevant to show his culpability for the charged crime. Opinion at 14.

During a hearing outside of the presence of the jury during trial, the trial court found that evidence offered during trial was not direct or circumstantial evidence that Hernandez was the perpetrator. Opinion at 17. Finally, after the verdict, the trial court denied petitioner's motion for a new trial, which petitioner had argued was warranted based on the denial of his third-party culpability evidence and newly discovered evidence of an undated, handwritten note that was delivered to petitioner in jail. Opinion at 17-18.

In analyzing petitioner's claim on appeal, the California Court of Appeal first stated the applicable legal standard for analyzing evidence of third-party culpability.

> "To be admissible, the third-party evidence need not show substantial proof of a probability that the third person committed the act; it need only be capable of raising a reasonable doubt of defendant's guilt. At the same time, we do not require that any

> evidence, however remote, must be admitted to show a third party's possible culpability. Evidence of mere motive or opportunity to commit the crime in another person, without more, will not suffice to raise a reasonable doubt about a defendant's guilt: there must be direct or circumstantial evidence linking the third person to the actual perpetration of the crime. We emphasized that courts should simply treat third-party culpability evidence like any other evidence: if relevant it is admissible unless its probative value is substantially outweighed by the risk of undue delay, prejudice, or confusion. [Evid Code § 352]. A trial court's discretionary ruling under Evidence Code section 352 will not be disturbed on appeal absent an abuse of discretion."

Opinion at 19 (citing People v Lewis, 26 Cal 4th 334, 372-373 (2001) (internal citations and quotations omitted)).

The Court of Appeal then held that, under the above standard, the trial court had not erred when it denied petitioner's motion. The state court first addressed the relevance of Hernandez's and Newman's arrests for assault.

> Hernandez's subsequent crimes are remote and the offenses are not similar to the homicide. Hernandez's offenses occurred 11 months after Herrera's death. This lapse of time is significant. Also, there is no evidence indicating that Hernandez's subsequent crimes are in any way involved in or connected to the 2003 shooting. Reyna has no known connection to the homicide. Ybarra heard the shots on October 3 and saw a woman and a man, who was not Hernandez, dragging something into a car. However, there is no indication in the record that Hernandez's threat and assault on Ybarra was related to her status as a potential witness. Finally, Hernandez's assault on Reyna and his threats to Ybarra were not committed in a manner that is similar to the shooting. Herrera was surreptitiously killed inside the garage, away from public view. The shooting was similar to an execution. Herrera was seated in the chair and the three shots were fired into his body from point blank range. In sharp contrast, Hernandez threatened and assaulted Reyes and Ybarra in public or semi-public locations -- a liquor store, a street and Ybarra's front porch. He brandished a firearm and behaved in an aggressive and uncontrolled manner.
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> For all of these reasons, we conclude that exclusion of the facts of Hernandez's subsequent

> offenses to prove his culpability for Herrera's death was neither an abuse of discretion nor an infringement of appellant's constitutional due process or fair trial rights. (*Lewis, supra*, 26 Cal. 4th at pp. 373-74.) The fact that felony charges were pending against Hernandez was properly admitted to attack his credibility.
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> At no time below did appellant attempt to explain how Newman's 2004 assault charge could be relevant to prove her complicity in the homicide. Similarly, no explanation is offered on appeal. * * * Therefore, we summarily dismiss any possible claim that the court erred by excluding the facts of Newman's 2004 assault charge.

Opinion at 20-21.

Next, the state court addressed petitioner's objection to the trial court's "exclusion of unspecified evidence that allegedly was relevant to prove Hernandez was a drug dealer in Traver and that Herrera was a business competitor." Opinion at 21. According to petitioner, such evidence would have been relevant to show a motive for Hernandez to kill Herrera, i e elimination of a threat to control of the local drug business. Opinion at 21.

The state court first held that petitioner's argument failed because he did not make the offer of proof required under California law to the trial court. Opinion at 21-22 (citing People v Brady, 129 Cal App 4th 1314, 1332 (2005)). Petitioner's counsel did not specify during the pre-trial *in limine* hearing or during trial what evidence or testimony he sought to admit to support his theory that Hernandez was a drug dealer and Herrera was a competitor. Opinion at 22. The state court held that "[t]he absence of an adequate offer of proof also precludes a

finding of prejudice. Since appellant did not identify the evidence or testimony available to support his drug competition theory, he necessarily failed to show that he was prejudiced by the allegedly improper exclusion of this unspecified evidence. (*People v. Whitt, supra*, 51 Cal. 3d at pp. 648-649.)" Opinion at 22.

Although the state court found that petitioner's failure to make an offer of proof precluded relief on his claim of error, it also addressed his claim on the merits.

> We have carefully reviewed the record and do not find any significant evidence supporting the drug competitor theory, with the exception of a reference in the September 2004 police reports to marjuana plants found growing in buckets in the yard of the Terrace house. Yet, even assuming the plants support an inference that Hernandez was involved in an illegal drug business, they do not support an inference that he operated in the Traver area or that Herrera was a competitor. The preliminary hearing testimony referenced by appellant in his opening brief does not relate to drug sales or drug-related activity. Similarly, the messages left by Hernandez on Newman's phone, which are cited by appellant, do not reference drug sales or drug-related activity. The facts that Newman used drugs on October 2, that she drove Herrera to the Terrace house from the Traver area at Hernandez's request, and that Herrera was directed to wear a blindfold or to lie down on this drive do not support a reasonable inference that Hernandez was a drug dealer or that Herrera was a competitor. Although Newman testified that Hernandez, appellant and Herrera argued prior to the shooting, she did not remember the subject of their dispute. Hernandez's numerous lies to investigating officers and his directives to his wife and Newman to lie do not support an inference that Hernandez is a drug dealer because the matters about which he told them to lie did not concern drugs or drug-related activities. There is no evidence indicating that Herrera was a drug dealer. Hernandez testified that Herrera was a drug user, not a dealer.

Opinion at 22-23.

Finally, the state court addressed certain evidence defense counsel raised during trial and the "newly discovered

evidence" raised in petitioner's post-trial motion for a new trial.

> During trial, defense counsel indicated that Teixerio might be available to testify that Hernandez showed him where he buried or disposed of the gun used in the shooting. Defense counsel stated that he was going to interview Teixerio during the upcoming weekend and would then inform the prosecutor and the court of the substance of this interview. Although the court tentatively ruled that such evidence would not constitute direct or circumstantial evidence that Hernandez murdered Herrera, it approved this course of action. The record does not contain any record of further discussions concerning Teixerio's possible testimony and Teixerio was not called as a witness.
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> Although appellate counsel does not specifically cite the court's tentative ruling as erroneous, in an abundance of caution we note that the issue was not preserved for appeal. It is settled: "A tentative pretrial evidentiary ruling, made without fully knowing what the trial evidence would show, will not preserve the issue for appeal if the appellant could have, but did not, renew the objection or offer of proof and press for a final ruling in the changed context of the trial evidence itself." (*People v. Holloway* (2004) 33 Cal. 4th 96, 133.) Defense counsel did not renew his request to call Teixerio after the court's tentative ruling. Thus, any challenge to the court's tentative ruling was waived.
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> Appellant did not raise any appellate argument specifically premised on the undated note, possibly written by Hernandez, which was given to appellant while both men were incarcerated in the Fresno County jail. This note was translated into English by defense counsel's paralegal and was proffered as newly discovered evidence supporting the new trial motion. Having failed to develop an appellate argument supported by citation to the record and proper legal argument, we summarily dismiss any possible claim related to this note. (*People v. Williams*, *supra*, 16 Cal. 4th at p. 206.)
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> We briefly mention that the note implies that *Newman* shot Herrera. The author of the note does not admit any involvement in Herrera's death. Thus, even assuming [Hernandez] authored this note, it does not support the particular third party culpability theory advanced on appeal.

Opinion at 23-24.

Here, petitioner has not demonstrated that the state court's reasoned opinion is contrary to, or an unreasonable application of, clearly established United States Supreme Court law. Petitioner also fails to demonstrate that the state court's opinion relied on an unreasonable determination of the facts.

"While the Constitution [] prohibits the exclusion of defense evidence under rules that serve no legitimate purpose or that are disproportionate to the ends that they are asserted to promote, well-established rules of evidence permit trial judges to exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury." Holmes v South Carolina, 547 US 319, 326 (2006). With regards to rules regulating the admission of evidence proffered by criminal defendants of third-party liability for the charged crime, rules excluding such evidence pass constitutional muster if the proposed evidence is, *inter alia*, speculative or remote, does not tend to sufficiently connect the third party with the crime, or does not tend to prove or disprove a material fact. Id at 327.

In Holmes, the trial court had excluded evidence of third-party culpability because of strong evidence of the defendant's guilt. Id at 328. The Supreme Court held that such a rule, which focused on the prosecution's case and not the probative value of the proposed evidence, violated a criminal defendant's constitutional right to present a meaningful defense. Id at 328-330.

Petitioner's case is distinguishable. Neither the

applicable evidentiary rule in California (Opinion at 19, citing People v Lewis, 26 Cal 4th 334, 372-373) nor the state appellate court's analysis focus on the strength of the prosecution's case. Rather, the state court held that the proposed evidence was properly excluded because it was irrelevant, remote, not connected to the charged crimes and/or did not tend to show that someone else was responsible for the murder of Herrera. Opinion at 18-24. As such, the exclusion of the evidence comports with Holmes, where the Court stated that exclusion of third-party culpability evidence is constitutional if the proposed evidence is, *inter alia,* speculative or remote, does not tend to sufficiently connect the third party with the crime, or does not tend to prove or disprove a material fact. 547 US at 327.

Because petitioner has not shown that the state court's decision was an unreasonable application of clearly established federal law, his claim must fail. Moreover, petitioner has failed to show that the alleged constitutional error had a substantial and injurious effect or influence in determining the jury's verdict. Brecht, 507 US at 623. As the state courts found and as this court's review of the record confirms, the evidence proffered by defendant to show third-party culpability was speculative and irrelevant, and did not tend to show that someone else had murdered Herrera. Therefore, the state court's exclusion of the evidence was not prejudicial. Id

B

In his second claim for relief, petitioner maintains that the trial court erroneously failed to instruct the jury that

witnesses Newman and Hernandez were accomplices to the charged crimes. The California Court of Appeal addressed this claim in a reasoned opinion on direct appeal:

> The defense requested accomplice instructions * * * which were refused. In his unsuccessful new trial motion, appellant cited the refusal to give accomplice instructions as error.
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> Appellant contends sufficient evidence was presented at trial from which a reasonable juror could conclude Newman and Hernandez were accomplices and therefore the trial court erred in refusing cautionary instructions. [Footnote 8 omitted] We agree with appellant that cautionary instructions should have been given with respect to Newman because there is evidence from which reasonable jurors could have concluded that she aided and abetted the homicide.[4] Yet, the instructional error is harmless.
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> The absence of instruction on the law of accomplices is deemed prejudicial if it is reasonably probable that the defendant would have received a more favorable verdict if the appropriate instruction had been given. (*People v. Heishman* (1988) 45 Cal.3d 147, 163-164.) In this instance, it is not reasonably likely that if such instructions had been given, the jury would have viewed Newman's testimony differently or returned a more favorable verdict.
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> It was quite clear to the jury that Newman was not entitled to the same consideration of the evidence as a "'clean [person], free from infamy.'" (*People v. Guinan* (1998) 18 Cal.4th 558, 565.) During closing arguments the prosecutor acknowledged the numerous factors adversely affecting Newman's credibility. He referenced her grant of immunity from prosecution in the matter, her prior felony conviction, her pending felony charge and her obvious drug use and addiction as factors potentially damaging to her believability. The prosecutor even made the following important concession: "[I]n this case [if] you just had Tamara Newman, acquit him. If that's the only witness

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[4] The state court also held that "the record does not contain significant evidence, as opposed to speculation or argument, from which a reasonable jury could have concluded that Hernandez was an accomplice to the charged offense." Opinion at 26.

> you [had] was Tamara Newman about what happened [*sic*], acquit. * * *" The jury was instructed it could consider grants of immunity, prior felony convictions, past criminal conduct and prior inconsistent statements in assessing a witness's believability [citations omitted].
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> The absence of instruction on the requirement that an accomplice's testimony must be corroborated is harmless if there is corroborating evidence in the record. Corroborating evidence may be slight and "is sufficient if it tends to connect the defendant with the crime in such a way as to satisfy the jury that the accomplice is telling the truth." Corroborating evidence may be slight and "is sufficient if it tends to connect the defendant with the crime in such a way as to satisfy the jury that the accomplice is telling the truth." (*People v Fauber* (1992) 2 Cal.4th 792, 834.) Numerous witnesses corroborated Newman's testimony.
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> Accordingly, we find the instructional error to be nonprejudicial.

Opinion at 24-28.

Petitioner has not shown that the state court's reasoned opinion is contrary to, or an unreasonable application of, clearly established United States Supreme Court law. Petitioner also fails to demonstrate that the state court's opinion relied on an unreasonable determination of the facts. Finally, petitioner cannot show that any alleged error was prejudicial. Brecht, 507 US at 623.

Indeed, petitioner has not properly stated a federal constitutional claim. As the excerpt *supra* makes clear, petitioner is alleging that the trial court violated California state law when it did not instruct on accomplices. The United States Supreme Court has confirmed that a challenge to a jury instruction solely as an error under state law does not state a

claim cognizable in federal habeas corpus proceedings. Estelle v McGuire, 502 US 62, 71-72 (1991). Rather, to obtain federal collateral relief for instructional error, a petitioner must show that the ailing instruction or the lack of instruction by itself so infected the entire trial that the resulting conviction violates due process. Estelle, 502 US at 72; Cupp v. Naughten, 414 US 141, 147 (1973); see also Donnelly v DeChristoforo, 416 US 637, 643 (1974) ("'[I]t must be established not merely that the instruction is undesirable, erroneous or even "universally condemned," but that it violated some [constitutional right].'"). 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. See Estelle, 502 US at 72.

Here, petitioner cannot show that the trial court's alleged violation of state law states a federal constitutional claim. To the extent he is alleging that the instructional error is a violation of federal due process law, his claim must fail as he can cite to no relevant case or statutory law supporting such an argument. As the Ninth Circuit has stated, a petitioner "may not, . . . transform a state-law issue into a federal one merely by asserting a violation of due process." Langford v Day, 110 F3d 1380, 1389 (9th Cir 1996).

As the state court reasonably confirmed, there was no instructional error regarding Hernandez. Opinion at 26. And while the trial court erred in failing to give accomplice instructions regarding Newman, such error was harmless. Opinion at 25. The jury was instructed that it could use Newman's grant of immunity, prior inconsistent statements, prior felony

convictions and past criminal conduct in assessing her credibility. Opinion at 37. There was also extensive corroboration of her testimony; as such, the absence of the proposed instruction that an accomplice's testimony requires corroboration would have been redundant, and would not have convinced the jury to return a different verdict. Opinion at 27-28. Therefore, any instructional error does not rise to the level of a due process violation and petitioner's claim must be denied.

C

In his third claim, petitioner maintains that his trial counsel's stipulation to admission of and/or failure to request a limiting instruction regarding testimony that petitioner shot a child amounted to a violation of the Sixth Amendment. Petitioner also argues that the testimony was improperly admitted.

In order to prevail on a Sixth Amendment ineffectiveness of counsel claim, petitioner must establish two things. First, he must establish that counsel's performance was deficient, i e, that it fell below an "objective standard of reasonableness" under prevailing professional norms. Strickland v Washington, 466 US 668, 687-88 (1984). Second, he must establish that he was prejudiced by counsel's deficient performance, i e, that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id at 694.

Petitioner has the burden of showing that counsel's performance was deficient. Toomey v Bunnell, 898 F2d 741, 743 (9th Cir 1990). Similarly, he must "affirmatively prove prejudice." Strickland, 466 US at 693. Conclusory allegations that counsel was ineffective do not warrant relief. Jones v Gomez, 66 F3d 199, 205 (9th Cir 1995).

The California Court of Appeal addressed this claim in a reasoned opinion on direct appeal. First, the state court reviewed the factual background. Witness Zapien, who had met petitioner in prison, testified that petitioner had told him "he shot a man inside his brother's garage in Fresno." Opinion at 11. Zapien also testified that he approached authorities about petitioner's statement because petitioner told Zapien that he shot a child and talked about the incident "like he just . . . didn't care, you know." Opinion at 30. The trial court overruled petitioner's counsel's objection to the testimony, and also noted that petitioner's counsel had earlier stipulated to admission of the evidence on the record. Opinion at 28-30.

The California Court of Appeal then addressed petitioner's claim on the merits, focusing on the prejudice prong of the Strickland standard.

> The prejudice standard has not been satisfied. It is not reasonably probable that the jury would have returned a more favorable verdict if the challenged testimony had been excluded. First, no details were elicited about the uncharged shooting and the challenged statement was not used as propensity or bad character evidence []. The prosecutor's questions were related solely to the effect that appellant's statement had on Zapien, not on the details of the uncharged shooting. No evidence was admitted indicating that appellant actually shot a child or corroborating Zapien's claim that appellant told him that he had done so. During closing arguments, the

> prosecutor did not argue that appellant actually shot a child or urge the jury to convict appellant on the basis of his bad character. Additionally, the jury was given CALJIC No. 3.20, which directed the jurors to view the testimony of an in-custody informant "with caution and close scrutiny." Finally, Zapien is not the only person to whom appellant admitted shooting Herrera. Detective Byrd testified that Mora said appellant admitted to him that he killed Herrera. Mora said he was afraid appellant might also kill him because appellant killed Herrera, who was his friend. The jury was free to disbelieve Mora's recantation of some of his statement to Detective Byrd. Having considered the entirety of the record, we conclude that it is not reasonably likely that admission of the challenged testimony affected the verdict.

Opinion at 31-32.

Here, too, petitioner fails to demonstrate prejudice[5], and cannot show that the state court's reasoned opinion is contrary to, or an unreasonable application of, clearly established United States Supreme Court law. Petitioner also fails to demonstrate that the state court's opinion relied on an unreasonable determination of the facts. Petitioner cannot show that there is a reasonable probability that, but for his counsel's alleged failures, the result of his proceeding would have been different. See Strickland, 466 US at 693, 694.

As the state court discussed in detail, the jury was instructed to view Zapien's testimony with caution. The

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[5] A court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as the result of the alleged deficiencies. See Strickland, 466 US at 697; Williams v Calderon, 52 F3d 1465, 1470 & n3 (9th Cir 1995) (approving district court's refusal to consider whether counsel's conduct was deficient after determining that petitioner could not establish prejudice), cert denied, 516 US 1124 (1996).

statement in question was admitted solely for its impact on Zapien, not for its truth or as proof of any prior bad act on the part of petitioner. In addition, according to the trial testimony, Zapien was not the only person to whom petitioner admitted killing Herrera; as a result, especially in light of the significant additional evidence against petitioner, the jury did not have to rely solely upon Zapien's testimony to find petitioner guilty. Because petitioner cannot demonstrate prejudice, he is not entitled to federal habeas relief on his claim of ineffective assistance of trial counsel.

Petitioner also argues that Zapien's testimony was improperly admitted by the trial court. The California Court of Appeal addressed this claim in a reasoned opinion on direct appeal.

> Appellant also contends that Zapien's testimony concerning appellant's statement that he shot a child constitutes improper bad character or propensity evidence and that its admission infringed his federal constitutional due process right. In a related claim he argues defense counsel was ineffective because he did not request a limiting instruction on the use of bad character evidence []. These arguments fail because the challenged testimony was not admitted or used to prove appellant's bad character or propensity for violence.
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> The challenged testimony was admitted to provide an alternative explanation for Zapien's decision to inform on appellant. The defense sought to discredit Zapien by showing he was a prison snitch hoping for benefits in exchange for his testimony in this proceeding. On cross-examination, the defense elicited testimony that Zapien previously provided information to prison officials in respect to a 1999 stabbing incident. During redirect examination, the prosecutor elicited the challenged testimony to rehabilitate Zapien by providing an alternative motive for his decision to come forward. The prosecutor did not argue in closing that appellant actually shot a child or otherwise use this testimony in an improper manner. He did not argue that it demonstrated

> appellant's bad character or that he had a propensity for violence. *Michelson v. United States* (1948) 334 U.S. 469, which is relied upon by appellant, is distinguishable on this basis. (*Id.* at pp. 475-476.)
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> It is not reasonably probable that the jurors would misuse Zapien's testimony in the manner suggested by appellant. Consequently, we believe counsel's failure to request a limiting instruction may have been a reasonable tactical decision. * * * In any event, we do not believe the absence of a limiting instruction affected the verdict.

Opinion at 32-33.

Here, petitioner has not demonstrated that the state court's reasoned opinion is contrary to, or an unreasonable application of, clearly established United States Supreme Court law. Petitioner also fails to demonstrate that the state court's opinion relied on an unreasonable determination of the facts.

The due process inquiry in federal habeas review is whether the admission of evidence was arbitrary or so prejudicial that it rendered the trial fundamentally unfair.[6] See Walters v. Maass, 45 F3d 1355, 1357 (9th Cir 1995); Colley, 784 F2d at 990. Only if there are no permissible inferences that the jury may draw from the evidence can its admission violate due process. See Jammal v Van de Kamp, 926 F2d 918, 920 (9th Cir 1991).

Here, as the state court reasonably decided and as this court's review of the record confirms, there was no error in admission of the evidence because it was admitted for a permissible reason: its impact on Zapien. It was not admitted to demonstrate petitioner's generally violent character or his guilt

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[6] Petitioner's ineffective assistance of counsel claim has already been addressed by this court. Therefore, the remainder of this analysis addresses his evidentiary claim.

for the alleged crimes. Contrary to petitioner's assertion, it was probative as to the question why Zapien would come forward if he was not expecting preferential treatment as the result of his testimony. Opinion at 31-32. As such, admission of the testimony did not violate due process. Compare Michelson, 335 US 469, 475-476 (discussing general prohibition against prosecutor's reliance on defendant's evil character to establish guilt).

Furthermore, in order to obtain habeas relief on the basis of an evidentiary error, a petitioner must show that the error was one of constitutional dimension and that it was not harmless under Brecht. Here, for the reasons discussed in detail *supra*, petitioner cannot show that the trial court's alleged error had "'a substantial and injurious effect' on the verdict.'" Dillard v Roe, 244 F3d 758, 767 n7 (9th Cir 2001) (quoting Brecht, 507 US at 623). Because petitioner cannot demonstrate prejudice, his claim must be denied.

V

For the reasons set forth above, the petition for a writ of habeas corpus is DENIED.

The clerk shall enter judgment in favor of respondent and close the file.

IT IS SO ORDERED.

DATED: 11/6/2009

Vaughn R Walker
United States District Chief Judge