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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

OSCAR PABLO TORRES,  
Petitioner,  
v.  
SUZANNE PEERY, Warden,  
Respondent.

No. 1:17-cv-00169-LJO-JLT (HC)  
**FINDINGS AND RECOMMENDATION  
TO DISMISS CLAIMS FROM FIRST  
AMENDED PETITION**  
**[TWENTY-ONE DAY OBJECTION  
DEADLINE]**

Petitioner filed a habeas petition on February 2, 2017, challenging his 2013 conviction in Kings County Superior Court of attempted murder, assault with a deadly weapon, and active participation in a criminal street gang. The Court determined that the claims were unexhausted, and Petitioner was granted a stay of the proceedings in order to exhaust his state remedies. Recently, Petitioner advised the Court that exhaustion was complete and the Court lifted the stay. Petitioner filed a First Amended Petition on February 26, 2018. Upon review of the First Amended Petition, the Court finds that several of the grounds for relief fail to present a cognizable claim. The Court will recommend those grounds be **DISMISSED**.

**DISCUSSION**

A. Preliminary Review of Petition

Rule 4 of the Rules Governing Section 2254 Cases allows a district court to dismiss a petition if it “plainly appears from the petition and any attached exhibits that the petitioner is not

1 entitled to relief in the district court . . . .” Rule 4 of the Rules Governing Section 2254 Cases.

2 The Advisory Committee Notes to Rule 8 indicate that the court may dismiss a petition for writ of  
3 habeas corpus, either on its own motion under Rule 4, pursuant to the respondent’s motion to  
4 dismiss, or after an answer to the petition has been filed. *Herbst v. Cook*, 260 F.3d 1039 (9th  
5 Cir.2001).

6 **B. Failure to State a Claim**

7 Several grounds in the First Amended Petition fail to articulate a cognizable federal claim.  
8 In Ground One, Petitioner claims there was insufficient evidence to support his conviction. He  
9 fails to support this claim with any viable argument. He merely summarizes some evidence in the  
10 record. (Doc. 19 at 7.)

11 In Ground Four, he again claims the evidence was insufficient to support the conviction.  
12 He claims the evidence was patently insufficient to prove he stabbed the victim. However, he  
13 admits evidence existed from which a trier of fact could have determined that he committed the  
14 act. He acknowledges that key witness Sandra Lopez testified that he handed her a knife  
15 containing the victim’s blood. He then argues that it was at least 25 to 30 minutes after the  
16 assault had taken place that he had handed her the knife, and the knife could have changed hands  
17 any number of times in the interim. (Doc. 19 at 16.) This argument fails to state a prima facie  
18 claim on federal habeas review, because it is not within the federal court’s province to reweigh  
19 the evidence. The test for insufficiency of the evidence is: “[W]hether, after viewing the evidence  
20 in the light most favorable to the prosecution, any rational trier of fact could have found the  
21 essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307,  
22 319 (1979). On federal habeas review, the standard is doubly deferential. The federal court must  
23 presume the correctness of the state court’s factual findings. 28 U.S.C. § 2254(e)(1). To the  
24 extent that Petitioner argues that other evidence supported his claim that he was not the one who  
25 stabbed the victim, the Court must assume that the jury resolved these conflicting facts in favor of  
26 the prosecution. *Jackson*, 443 U.S. at 326. The reviewing court “must respect the province of the  
27 jury to determine the credibility of witnesses, resolve evidentiary conflicts, and draw reasonable  
28 inferences from proven facts by assuming that the jury resolved all conflicts in a manner that

1 supports the verdict.” Walters v. Maass, 45 F.3d 1355, 1358 (9th Cir. 1995).

2 For the same reason, Ground Eight fails to present a cognizable federal claim. Petitioner  
3 argues the evidence was insufficient to support the finding that he stabbed the victim. He points  
4 to evidence that no witness saw him stab the victim, that no witness saw anyone with a knife, that  
5 the video was dark and unclear, and that witnesses only saw him punch or kick the victim. He  
6 ignores the evidence that he handed witness Lopez a knife covered in the victim’s blood and that  
7 the victim suffered multiple knife wounds. As stated above, the Court assumes these evidentiary  
8 conflicts or discrepancies were resolved in favor of the prosecution. Jackson, 443 U.S. at 326.  
9 The reviewing court “must respect the province of the jury to determine the credibility of  
10 witnesses, resolve evidentiary conflicts, and draw reasonable inferences from proven facts by  
11 assuming that the jury resolved all conflicts in a manner that supports the verdict.” Walters, 45  
12 F.3d at 1358.

13 In Ground Nine, Petitioner alleges the prosecutor made several misstatements of material  
14 facts, thereby violating his right to a fair trial and due process. He contends that the prosecutor  
15 misstated the elements and evidence to prove guilt of assault by means of force likely to produce  
16 great bodily injury. Petitioner then recites the jury instruction on assault by means likely to  
17 produce great bodily injury. He then concludes his claim with a conclusory and unintelligible  
18 statement: “In contrast to her arguments regarding guilt of attempted murder and assault with a  
19 deadly weapon, charging guilt by means as a direct perpetrator.” (Doc. 19 at 31.) The Court  
20 cannot discern any claim for relief. Petitioner fails to support his argument with any specific  
21 facts. Moreover, he fails to establish how the alleged misstatements prejudiced him. Finally, he  
22 makes no argument as to how the state court rejection of his claim was contrary to or an  
23 unreasonable application of clearly established Supreme Court authority.

24 In Ground Eleven, Petitioner claims a violation of Brady v. Maryland, 373 U.S. 83 (1963),  
25 alleging the State failed to disclose evidence that was in the State’s possession. He alleges the  
26 prosecutor relied on video footage of the incident, and one video was darker than others. He  
27 claims that when trial counsel was replaced by another attorney, the new attorney had the videos  
28 translated to a different format which enabled him to adjust the contrast and lighting, thereby

1 enabling identification of another individual as the person who stabbed the victim. Petitioner fails  
2 to state a prima facie claim for relief because the State did in fact provide the videotape to the  
3 defense. There was no failure to disclose evidence. Moreover, the State utilized the videotape in  
4 its dark condition. Whether defense counsel was later able to adjust the footage is irrelevant to  
5 whether the State concealed any evidence.

6 Ground Thirteen likewise fails to present a cognizable federal claim. Petitioner claims  
7 that material and prejudicial testimonial evidence was introduced without an opportunity for  
8 cross-examination. He then recites the elements the prosecutor needed to prove in order to  
9 impose the gang sentencing enhancement. He concludes his argument by stating that Detective  
10 Kevin Smyres opined that the victim was a rival. (Doc. 19 at 42-43.) The Court cannot discern  
11 any claim for relief. No argument is presented, nor are any supporting facts.

12 Finally in Ground Fifteen, Petitioner claims the combined effect of multiple harmless  
13 errors rendered the defense far less persuasive than it otherwise would have been. Petitioner then  
14 notes several sources of information used by the testifying officers. However, he makes no claim  
15 of any kind of error. The claim should be dismissed.

#### 16 **RECOMMENDATION**

17 Accordingly, the Court RECOMMENDS that Grounds One, Four, Eight, Nine, Eleven,  
18 Thirteen, and Fifteen be DISMISSED from the petition for failure to state a claim.

19 This Findings and Recommendation is submitted to the United States District Court Judge  
20 assigned to this case, pursuant to the provisions of 28 U.S.C. section 636 (b)(1)(B) and Rule 304  
21 of the Local Rules of Practice for the United States District Court, Eastern District of California.  
22 Within twenty-one days after being served with a copy, Petitioner may file written objections  
23 with the Court. Such a document should be captioned "Objections to Magistrate Judge's Findings  
24 and Recommendation." The Court will then review the Magistrate Judge's ruling pursuant to 28

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U.S.C. § 636 (b)(1)(C). Failure to file objections within the specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9<sup>th</sup> Cir. 1991).

IT IS SO ORDERED.

Dated: March 1, 2018

/s/ Jennifer L. Thurston  
UNITED STATES MAGISTRATE JUDGE