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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

Jo'Von Jordan

Petitioner,

No. 2:06:cv-01599-MDS

vs.

ORDER

A. Malfi, Warden, et al.

Respondents.

_____ /

Petitioner Jo'Von Jordan, a state prisoner, has filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254(a). Pending before the court are Jordan's petition for a writ of habeas corpus (Doc. 1), Jordan's supplemental memorandum of points and authority (Doc. 40), Respondent A. Malfi's answer (Doc. 41), and Jordan's response to Malfi's answer (Doc. 54). For the reasons discussed, Jordan's application is DENIED.

I

On March 5, 2003, Jordan was convicted by a Sacramento County Superior Court jury of two counts of murder (Cal. Penal Code § 187(a)); multiple murder circumstances (Cal. Penal Code § 190.2(a)(3)); and use of a firearm for each murder (Cal. Penal Code §§ 12022.5(a); 12022.53(b), (c), and (d)). Clerk's Transcript

1 (CT) at 363-65, 372-73. Jordan was sentenced to, and is currently serving, an
2 aggregate term of 90 years to life in prison. CT 10, 475-76.

3 A

4 Jordan filed a direct appeal of the judgment of conviction with the California
5 Court of Appeal, Third Appellate District. In its decision affirming the judgment,
6 the Court of Appeal summarized the relevant facts as follows:¹

7
8 [Jordan] and Timothy Traylor, who were so close they were like brothers,
9 were both associated with the Nogales Crips gang. [Jordan] was a member,
10 but Traylor never did become a member. On the afternoon of November 29,
11 2002, [Jordan] and Traylor walked to East Coast Fashion, a clothing store on
12 Marysville Boulevard. [Jordan] was wearing jeans and a white t-shirt. While
13 they were in the store, Hudson Augustus, who was known as “Artist,” came
14 into the store. Shortly thereafter, [Jordan’s] girlfriend Tanaria Barkins and
15 Tanaria’s mother Dana Laws came into the store.

16 Artist and his brother Gregory, also known as “Buckeye,” were part of the
17 Del Paso Heights Bloods, a rival gang to the Crips. [Jordan] and Traylor
18 made a purchase and were standing near the store’s exit when Artist began
19 addressing them in a disrespectful tone. Artist said he and his brother were
20 going to “whip” them. Traylor thought a fight was about to go down. He
21 told Artist they did not want any problems and to keep it cool.

22 Traylor walked out of the store onto the sidewalk and toward a nearby pizza
23 parlor. [Jordan] was right behind him, and Artist was already out on the
24 sidewalk. When they were in front of the pizza parlor, Buckeye pulled his
25 car up and jumped out. He ran up to Traylor and said something like, “what
26 you, fuck you, talking about you don’t want no problem.” Buckeye made a
27 fist. When Traylor saw Buckeye’s fist, he thought Buckeye was going to hit
28 him, so he dropped the bag of newly-purchased clothes he was carrying and
prepared to defend himself in a fist fight.

As soon as Traylor dropped the bag, gunshots went off. The shots were so
close to Traylor, he thought at first he had been hit. He saw Buckeye and
Artist fall to the ground. He never saw [Jordan] after the gunshots. Traylor
ran to the pizza parlor, but the door was locked. He yelled at them to call
911.

Willie Vains, who saw the shooting, came up and told Traylor to call 911.
Traylor used his mother’s cell phone to dial 911. He was disconnected, so he
called it again. He talked to the 911 operator and said there had been a

¹Since Jordan has not raised a challenge to their accuracy, the factual findings
of the Court of Appeal are presumed correct. See 28 U.S.C. § 2254(e)(1).

1 shooting.²

2 Traylor saw Barkins and Laws come out of the clothing store. They went
3 toward their car, where Laws's boyfriend, Alvin Williams, was waiting for
4 them. Laws asked Traylor if he wanted a ride. He got in the car and they
5 drove him home. While Traylor was in the car, the 911 operator called him
6 back. When Traylor got out of the car, he crossed the street to see his cousin,
7 Jibri Stepter. He told Stepter what had happened, and left the bag of clothes
8 with Stepter before going across the street to his own house.

9 Traylor's mother came home, and he told her what had happened. About 30
10 to 45 minutes after the shooting he called [Jordan]. Both Traylor and his
11 mother talked to [Jordan]. Traylor asked why [Jordan] had put him in such a
12 bad position. [Jordan] said he got tired of fighting. After talking to [Jordan],
13 Traylor's mother contacted the police, and Traylor went to the police station
14 to be questioned.

15 Five eyewitnesses (other than Traylor and [Jordan]) testified. Willie Vains
16 lived in the neighborhood and was a very close friend of the victims. As
17 Vains was crossing the street to the pizza parlor, he saw the victims and two
18 other men. One of the other men was Traylor, whom he described as a "tall
19 dark skinned" man. He knew Traylor from the neighborhood, and recognized
20 him because of his distinctive gold teeth. He was not friends with Traylor,
21 but he knew him. Vains was a Blood and Traylor was a Crip, so he would
22 not hang out with him. Vains testified the "shorter dude that was with Tim,
23 he had braids, he pulled a gun out and shot Artist first." Then he shot
24 Buckeye. The shooter ran away up Balsam. Traylor just stood there,
25 hysterical. Vains testified the shooter had about the same complexion as
26 Vains, or maybe a little lighter, and was wearing jeans and a white shirt.
27 Vains remembered that Traylor had a bag in his hands, and remembered
28 Traylor talking on the cell phone. Traylor stayed around five or six minutes,
then he left.

Denise Wesley was another eyewitness. She heard the gunshots and saw a
light-skinned person with a gun in his hand going north on Balsam.

James Crant, who was walking to a nearby car wash, heard the gunshots and
saw a man in tan pants, a white t-shirt and black head scarf "squeezing the
trigger away." The shooter was light-skinned, about 5 [sic] feet, seven or
eight inches tall and weighed around 160 or 170 pounds. After the shooting,
Grant saw the shooter walk around behind the pizza place down Balsam and
disappear. Grant assumed the shooter got in a car and left.

Kenneth Williams was at the nearby carwash with his girlfriend Yakima
Smith. Kenneth Williams talked to a police officer a few minutes after the
shooting. He told the officer he saw a thin, medium-complexioned black
male approximately five feet, eight inches tall wearing a white t-shirt and
black or blue pants holding a gun in his outstretched hand. He said he saw

²The tape of this call was played to the jury. Phone records confirmed two
calls to 911 were placed from Traylor's mother's cell phone within seconds of each
other.

1 the man with the gun run north on Balsam. At trial Kenneth Williams claimed
2 he had not seen any of this, and that his girlfriend, Smith, was the one who
3 saw it. He testified he told the officer he had seen everything because Smith
4 did not want to get involved.

5 Jess Green was a witness for the defense. He saw someone come around the
6 corner of the pizza parlor and start shooting. The shooter was six feet tall and
7 wearing a white shirt and dark pants. He was Black, and his skin color was
8 kind of dark, but not real dark. After the shooting, the person ran around the
9 pizza parlor to northbound Balsam with the gun in his hand.

10 Neither Alvin Williams nor his girlfriend, Dana Laws, saw the shooting take
11 place. Alvin Williams was parked across the street from East Coast Fashion,
12 and ducked down when he heard gunshots. Laws was inside East Coast
13 Fashion with her daughter Tanaria Barkins, [Jordan's] girlfriend. At trial all
14 three testified Traylor pushed his way into the car after the shooting. Traylor
15 had testified Laws asked him if he wanted a ride home. When the prosecutor
16 and his investigator told Williams they wanted to talk to him about the
17 shootings, he told them he wanted nothing to do with it because he had
18 people "bothering" him. While the prosecutor was talking to him Laws was
19 screaming "stick to your story" and "you didn't see anything."

20 Barkins testified Traylor pulled something from his waist band and gave it to
21 a boy who came to meet Traylor when they dropped him off. The person
22 who met Traylor, Jibri Stepter, testified Traylor left a bag of clothes with him,
23 but nothing else.

24 [Jordan] took the stand and testified he saw Traylor pull a gun out of his
25 pocket and start shooting. [Jordan] ran as soon as the first shot went off.
26 [Jordan] also produced as a witness Kenyatta Hudson, who testified he was
27 acquainted with both Traylor and [Jordan]. Hudson testified that about a
28 month after the shootings he had a telephone conversation with Traylor, and
Traylor told him it was too "hot" for him because of what had just happened.
However, Traylor did not tell Hudson he, rather than [Jordan], had done the
shooting.

Lodged Doc. 2 (Opinion) at 2-7.

B

On March 29, 2005, the California Court of Appeal for the Third Appellate
District affirmed Jordan's conviction on his direct appeal. Opinion at 2. Jordan's
petition for rehearing of his case was denied on April 15, 2005. Lodged Doc. 2
(Denial). On April 2, 2005, Jordan sought review in the California Supreme Court.
Doc. 1, appdx. 2. The California Supreme Court denied the petition on July 13,
2005. Doc. 1 at 3.

C

On July 19, 2006, Jordan filed an application for a writ of habeas corpus in

1 this court pursuant to 28 U.S.C. § 2254(a). Doc. 1. Malfi acknowledges that
2 Jordan has exhausted his grounds for relief. Doc. 41 at 3.

3 II

4 A

5 Jordan’s petition was filed after the enactment of the Antiterrorism and
6 Effective Death Penalty Act of 1996 (AEDPA). Under AEDPA, a federal court has
7 limited power to grant habeas corpus relief. AEDPA provides that:

8 An application for a writ of habeas corpus on behalf of a person
9 in custody pursuant to the judgment of a State court shall not be
10 granted with respect to any claim that was adjudicated on the
11 merits in State court proceedings unless the adjudication of the
12 claim --

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

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

19 28 U.S.C. § 2254(d). A state court decision may result in a decision that is
20 “contrary to” established federal law if it “applies a rule that contradicts the
21 governing law set forth in our cases” or “confronts a set of facts that are materially
22 indistinguishable from a decision of the Court and nevertheless arrives at a result
23 different from our precedent.” *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000).
24 “[C]learly established Federal law” is defined as “the governing legal principle or
25 principles set forth by the Supreme Court at the time the state court renders its
26 decision.” *Lockyer v. Andrade*, 538 U.S. 63, 71-72 (2003). The state court’s
27 decision may be “an unreasonable determination” if “the state court identifies the
28 correct governing legal principle” but applies the principle unreasonably to the
prisoner’s factual situation. *Williams*, 549 U.S. at 413.

When the state court does not explain its reasoning for denying a habeas
petition, the federal court “must conduct an independent review of the record to
determine whether the state court’s decision was objectively reasonable.” *Sass v.*

1 *Cal. Bd. of Prison Terms*, 461 F.3d 1123, 1127 (9th Cir. 2006). State court
2 decisions may only be subject to federal habeas relief if they are unreasonable, not
3 merely erroneous. *Early v. Packer*, 537 U.S. 3, 11 (2002).

4 B

5 Jordan's petition for habeas relief is subject to the AEDPA requirement that
6 the prior state court decisions refusing his petition are unreasonable, that is, contrary
7 to federal law, or an unreasonable determination of the facts. "In determining
8 whether a state court decision is contrary to federal law, we look to the state's last
9 reasoned decision," in this case, the opinion handed down by the California Court of
10 Appeal on Jordan's direct appeal. *Avila v. Galaza*, 297 F.3d 911, 918 (9th Cir.
11 2002); *see also Ylst v. Nunnemaker*, 501 U.S. 797, 803 (1991). The Court of
12 Appeal addressed each of Jordan's claims in a reasoned opinion, which the court
13 now reviews. *See* Opinion.

14 C

15 Jordan asserts that he is entitled to habeas corpus relief on six grounds. First,
16 he argues that the trial court's reading of CALJIC 2.28, a jury instruction on
17 evaluation of witnesses, unfairly penalized Jordan for his counsel's discovery
18 violation. Second, he argues that his trial counsel's stipulation not to report the oral
19 reading of jury instructions violated his due process rights and constituted
20 ineffective assistance of counsel. Third, he argues that his trial counsel rendered
21 ineffective assistance when he failed to object and move to strike the improperly
22 admitted opinion of a lay witness concerning Jordan's guilt. Fourth, he argues that
23 the trial court improperly excluded impeachment evidence directed against a key
24 prosecution witness. Fifth, Jordan argues that the trial court imposed consecutive
25 sentences rather than concurrent sentences for each of his convictions in violation of
26 his Sixth Amendment rights. Sixth and finally, he argues that the enhancement
27 imposed under § 12022.53 of the California Penal Code was not authorized by the
28 jury's findings, and therefore violates his Sixth and Fourteenth Amendment rights to

1 a jury trial. Doc. 1. The court addresses each of these claims in this Order.

2 III

3 A

4 Jordan argues that the trial court's reading of CALJIC 2.28 was an improper
5 discovery sanction that deprived him of due process. The trial court instructed the
6 jury under CALJIC 2.28 to sanction defense counsel's discovery violation.

7 Reporter's Transcript (RT) 730-31. Jordan's defense counsel had admittedly made
8 a late disclosure of his intention to call Kenyatta Hudson as a witness, on the basis
9 that he feared timely disclosure would endanger Hudson's life. RT 665. The trial
10 judge read CALJIC 2.28 as follows to the jury when Hudson was called as a
11 witness:

12 The prosecution and the defense are required to disclose to each other before
13 the trial the evidence that each intends to present at the trial so as to promote
14 the ascertainment of the truth, to save the court time and avoid any surprise
15 which may arise during the course of the trial. Concealment of evidence
16 and/or delay in the disclosure of the evidence may deny a party a sufficient
17 opportunity to subpoena necessary witnesses or produce evidence which may
18 exist to rebut the complying [sic] parties evidence. Disclosure of evidence
19 are [sic] required to be made at least 30 days in advance of trial. Any new
20 evidence discovered within 30 days of trial must be disclosed immediately.
21 In this case the defendant did either concealed [sic] or failed to timely
22 disclose evidence consisting of written summary of an interview of this
23 witness Kenyatta Hudson. Although the defendant [sic] failure to timely
24 disclose the evidence was without lawful justification, the Court has, under
25 the law, permitted the production of this evidence during the trial. The weight
26 and significance of any delay in disclosure is a matter for your consideration.
27 You should consider whether it [sic] untimely disclosed evidence pertains to a
28 fact of importance to something trivial or to the subject matter already
established by other credible evidence.

22 RT 783-84. The court then gave this instruction again on the conclusion of the case.
23 CT 339-40.

24 Jordan argues that the instruction violated his rights by ascribing the
25 discovery violation to Jordan personally, and inviting the jury to convict him on the
26 basis of the discovery violation rather than the alleged facts. Accordingly, Jordan
27 argues he was prejudiced. In its decision on direct appeal, the California Court of
28 Appeal noted that two of its recent cases had accepted arguments similar to Jordan's

1 regarding the jury instruction at issue. However, the Court of Appeal distinguished
2 the facts of *People v. Bell*, 12 Cal. Rptr. 3d 808 (Cal. Ct. App. 2004), and *People v.*
3 *Cabral*, 17 Cal. Rptr. 3d 456 (Cal. Ct. App. 2004), finding that the defendants in
4 those cases were prejudiced as a result of the jury instruction, but in Jordan’s case
5 “it is not reasonably probable [Jordan] would have achieved a more favorable result
6 had the court not given CALJIC No. 2.28.” Opinion at 10.

7 Federal law, as established by the Supreme Court at the time of Jordan’s
8 case, requires a finding that a trial error ““had substantial and injurious effect or
9 influence in determining the jury’s verdict”” before habeas relief can be granted.
10 *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993) (quoting *Kotteakos v. United*
11 *States*, 328 U.S. 750, 776 (1946)). Trial errors are defined as those that “occur[]
12 during the presentation of the case to the jury,” and “may therefore be quantitatively
13 assessed in the context of other evidence presented” to determine its effect on the
14 trial. *Arizona v. Fulminante*, 499 U.S. 279, 307-08 (1991). Such errors are treated
15 differently than “structural defects in the constitution of the trial mechanism,” which
16 infect the entire trial process and cannot be individually assessed. *Id.* at 309. The
17 alleged error here, a single jury instruction, is properly categorized as a trial error
18 rather than a structural defect, because it occurred during presentation of the case to
19 the jury and may be assessed in the context of the evidence presented.

20 The Court of Appeal denied Jordan’s direct appeal after reviewing this claim
21 for prejudice, finding that it was not “reasonably probable” that Jordan would have
22 a achieved “a more favorable result” absent the trial error. Opinion at 10. This
23 standard for harmless error is not contradictory to the federal standard for harmless
24 error, which requires a showing that the error “had substantial or injurious effect or
25 influence in determining the jury’s verdict.” *Kotteakos*, 328 U.S. at 776. Nor did
26 the state court’s decision on this point apply the facts of this case unreasonably.
27 Although Hudson’s testimony was exculpatory in that it indicated Traylor was the
28 shooter, rather than Jordan, it was contradicted by four other eye-witnesses who

1 identified the shooter as having light to medium skin and fleeing the scene
2 immediately after the shooting. The record indicates that Traylor has dark skin and
3 remained at the scene for several minutes after the shooting, calling 911 twice. In
4 light of this evidence, the state court was not unreasonable in ruling that it was not
5 reasonably probable that the faulty jury instruction changed the jury's verdict.
6 Because the error did not substantially influence the jury's verdict, Jordan is not
7 entitled to habeas relief on this ground.

8 B

9 Jordan's second argument is that his counsel's agreed stipulation that the oral
10 reading of jury instructions need not be reported in the record constituted ineffective
11 assistance of counsel. At the conclusion of the instructions conference, defense
12 counsel stipulated along with the prosecution that the court's oral reading of the jury
13 instructions it had submitted in written form to the jury need not be recorded as part
14 of the trial transcript. RT 1043-45. Consequently, the final record of the trial does
15 not include a transcript of this oral rendition. Jordan argues that, as a result, he has
16 been denied the opportunity to review those instructions for accuracy on appeal, and
17 that his attorney's failure to preserve the oral reading of the instructions for appeal
18 was ineffective assistance of counsel.

19 The California Court of Appeal ruled on this argument in conjunction with
20 Jordan's claim that trial counsel rendered ineffective assistance when he failed to
21 object and move to strike the improperly admitted opinion of a lay witness as to
22 Jordan's guilt. The California Court of Appeal ruled that Jordan could not prevail
23 on either claim of ineffective assistance of counsel because he had not shown that
24 the allegedly deficient performance resulted in prejudice. Opinion at 12. The court
25 concluded that even assuming Jordan's counsel's stipulation to forego transcription
26 of the oral jury instructions was deficient performance, there is no evidence that
27 Jordan was prejudiced. Absent affirmative evidence that the trial court made a
28 mistake in reading the jury instructions, the court declined to assume error. *Id.*

1 Similarly, as discussed in further detail below, the court declined to find ineffective
2 assistance of counsel because there could have been tactical explanations for the
3 failure to object. *Id.*

4 As the Supreme Court has indicated, “[t]he benchmark for judging any claim
5 of ineffectiveness must be whether counsel’s conduct so undermined the proper
6 functioning of the adversarial process that the trial cannot be relied on as having
7 produced a just result.” *Strickland v. Washington*, 466 U.S. 668, 686 (1984). To
8 prevail on a claim for ineffective assistance of counsel, a defendant must first show
9 his “counsel made errors so serious that counsel was not functioning as the
10 ‘counsel’ guaranteed the defendant by the Sixth Amendment” and then “that the
11 deficient performance prejudiced the defense.” *Id.* at 687. In cases such as this
12 where there is no more specific authority on whether counsel’s actions constituted
13 ineffective assistance of counsel, the court must recur to the *Strickland* standard.
14 *Knowles v. Mirzayance*, 2009 LEXIS 2329 at *23, No. 07-1315 (U.S. March 24,
15 2009).

16 Even if Jordan could successfully prove that his trial counsel’s stipulation not
17 to record the court’s oral rendition of the jury instructions was error, he could not
18 prevail on his claim without a showing that this error prejudiced his case. As the
19 Court of Appeal found, Jordan has presented no evidence of prejudice, only a vague
20 suggestion that something might have been found had the reading been recorded, an
21 error that presumably his counsel failed to catch during presentation of the jury
22 instructions themselves. The Court of Appeal’s rejection of this claim was not
23 unreasonable.

24 C

25 Jordan argues that he was denied effective assistance of counsel when his
26 trial counsel failed to object to Detective Husted’s direct examination testimony that
27 Traylor was a credible witness and not the shooter. Jordan’s counsel did object to
28 the government’s follow up question asking why Husted did not believe Traylor was

1 guilty.

2 In denying Jordan's appeal on this ground, the Court of Appeal wrote that:

3 mere failure to object to evidence rarely establishes counsel's incompetence
4 because it usually involves tactical decisions on counsel's part. It is possible
5 counsel did not object earlier because he did not wish to draw attention to
Husted's testimony or to appear antagonistic, or he may have simply felt
Husted's testimony on the matter was unimportant.

6 Opinion at 13.

7 In evaluating counsel's performance for the purposes of determining
8 ineffective assistance of counsel, the court must "determine whether, in light of all
9 the circumstances, the identified acts or omissions were outside the wide range of
10 professionally competent assistance." *Strickland*, 466 U.S. at 690. The court
11 should also note that "counsel is strongly presumed to have rendered adequate
12 assistance and made all significant decisions in the exercise of reasonable
13 professional judgment." *Id.*

14 Under this standard of review, the court cannot say that the Court of Appeal's
15 ruling was unreasonable. Established federal law gives broad deference to defense
16 counsel's tactical decision making and applies a presumption of adequate
17 assistance. Accordingly, this argument also fails.

18 D

19 Jordan argues that the trial court committed reversible error by preventing
20 him from impeaching Vains with Vains's prior felony conviction. During Vains's
21 cross-examination, Jordan's counsel asked him if he had previously been convicted
22 of any felonies. Before Vains could complete his answer, the government objected
23 and the trial judge sustained the objection. RT 175. When defense counsel
24 persisted in that line of questioning, he was rebuked by the trial judge. RT 176.
25 After Vains finished testifying, and outside the presence of the jury, the trial court
26 further admonished defense counsel for his "attempts to impeach the witness with a
27 felony conviction that [he knew] full well is inadmissible." RT 180. Jordan argues
28 that the trial court erroneously excluded the statement on the belief that

1 impeachment is impermissible unless approved in advance. He cites as support the
2 trial court's rebuking statement that "[he] didn't ask for permission to impeach the
3 witness with that conviction." RT 180.

4 The Court of Appeal rejected Jordan's characterization of the trial court's
5 ruling. It found that, although "[t]he record is silent as to why the trial court
6 believed the prior conviction was inadmissible," it could have been because the
7 conviction fell within one of the exceptions enumerated in California Evidence Code
8 § 788 (conviction has been pardoned, certificate of rehabilitation granted, or witness
9 has otherwise been relieved of penalties), or properly excluded pursuant to § 352 for
10 being more prejudicial than probative, unduly time consuming, confusing, or
11 creating a substantial danger of misleading the jury. Opinion at 14-16. The Court
12 of Appeal declined to assume that the prior conviction was omitted for an improper
13 reason in absence of evidence in the record indicating error. *Id.* at 16.

14 The right to cross-examine a witness is protected by the Sixth Amendment,
15 and denial of that right is reversible error, with no need to show prejudice. *Davis v.*
16 *Alaska*, 415 U.S. 308, 318 (1974). However, "[t]he right to present relevant
17 testimony is not without limitation." *Michigan v. Lucas*, 500 U.S. 145, 149 (1998)
18 (quoting *Rock v. Arkansas*, 483 U.S. 44, 55 (1987)). Trial judges have wide
19 latitude "to impose reasonable limits on cross-examination based on concerns about,
20 among other things, harassment, prejudice, confusion of the issues, the witness'
21 safety, or interrogation that is repetitive or only marginally relevant." *Delaware v.*
22 *Van Arsdall*, 475 U.S. 673, 679 (1986).

23 The Court of Appeal was not unreasonable in rejecting Jordan's argument
24 that the trial court excluded the evidence under the erroneous belief that Jordan
25 needed prior permission to impeach a witness. There is no evidence in the record to
26 support such a conclusion other than one clause of the trial court's rebuke to
27 Jordan's trial counsel, taken out of context. Given the wide latitude trial judges
28 have when ruling on the admissibility of cross-examination, the Court of Appeal was

1 also not unreasonable in concluding that the trial court’s ruling was not reversible
2 error.

3 E

4 Jordan claims that the trial court’s imposition of consecutive sentences rather
5 than concurrent sentences violated his Sixth Amendment rights, because it increased
6 the length of his sentence beyond the statutory maximum without a jury finding of
7 additional justifying facts. The California Penal Code requires the judgment of
8 conviction for two or more crimes to specify whether the terms of imprisonment for
9 the multiple convictions will run concurrently or consecutively. Cal. Pen. Code. §
10 669. If the court fails to specify, the terms of imprisonment will run concurrently.
11 *Id.* Under California law, Jordan asserts, the imposition of consecutive terms
12 requires the support of expressly identified aggravating facts. *See People v. Leung*,
13 7 Cal. Rptr. 2d 290, 303 (Cal. Ct. App. 1992) (“In choosing between consecutive
14 and concurrent terms, the court must decide whether the particular circumstances at
15 issue renders the collective group of offenses distinctively worse than the group of
16 offenses would be were that circumstance not present.”). Jordan alleges the trial
17 court violated the Sixth Amendment by relying on its own factfinding to impose the
18 consecutive sentences.

19 The Court of Appeal rejected Jordan’s claim that his consecutive sentences
20 represented an upward deviation from the sentencing norm in violation of the Sixth
21 Amendment, as found by the Supreme Court in *Blakely v. Washington*, 542 U.S.
22 296, 303-04 (2004) (holding that a trial court judge may not impose a sentence
23 above the statutory minimum, defined as “the maximum sentence a judge may
24 impose . . . without any additional findings”). The Court of Appeal reasoned that
25 “section 669 does not direct the court to impose concurrent or consecutive
26 sentences, nor does it require any particular finding before consecutive sentences
27 may be imposed.” Opinion at 27. It noted further,

28 [w]hile there is a statutory presumption in favor of the middle term as the

1 sentence for an offense, there is no comparable statutory presumption in favor
2 of concurrent rather than consecutive sentences for multiple offenses except
3 where consecutive sentencing is statutorily required. The trial court is
4 required to determine whether a sentence shall be consecutive or concurrent
5 but is not required to presume in favor of concurrent sentencing.

6 *People v. Reeder*, 200 Cal. Rptr. 479, 495 (Cal. Ct. App. 1984) (internal citation
7 omitted). Therefore, because there is no right to concurrent sentences, the statutory
8 maximum in any case is “an aggregate consecutive term. Thus, when the court
9 exercises its discretion to impose a consecutive sentence, the defendant has no right
10 to a jury determination of the facts the court deems relevant to that determination.”
11 Opinion at 28.

12 It is established federal law that “state courts are the ultimate expositors of
13 state law, and that we are bound by their constructions except in extreme
14 circumstances,” as when the state court interpretation is “an ‘obvious subterfuge to
15 evade consideration of a federal issue.’” *Mullaney v. Wilbur*, 421 U.S. 684, 691,
16 n.11 (1975) (quoting *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 129
17 (1945)) (internal citations omitted). The Court of Appeal’s interpretation of
18 California Penal Code § 669 is therefore entitled to federal deference absent any
19 evidence that the interpretation is meant to evade consideration of a federal issue.

20 The Court of Appeal acknowledged that trial judges are expected to provide
21 justification for imposing consecutive sentences over concurrent sentences, but
22 notes that neither the statute nor the rules of the court compel a specific result in any
23 delineated circumstances. Opinion at 27. In that respect, judicial discretion in
24 imposing consecutive or concurrent terms is distinguishable from decisions going
25 beyond the Federal Guidelines’ provisions subject to *United States v. Booker*, 543
26 U.S. 220 (2005). The Court of Appeal concluded that “[t]he *Blakely* line of cases
27 does not prohibit judicial fact-finding in the exercise of discretion to impose a
28 sentence within the statutory maximum range.” Opinion at 28. This conclusion is
not an unreasonable application of federal law, which, at the time of the Court of

1 Appeal’s opinion, had not yet applied the reasoning of *Blakely* and *Booker* to the
2 decision of concurrent or consecutive terms.

3 Jordan’s reference to *Oregon v. Ice*, in which the Supreme Court ultimately
4 addressed the issue, is unhelpful to his cause, since the Court concluded in that case
5 that “[t]he decision to impose sentences consecutively is not within the jury
6 function” covered under the *Blakely* line of cases, and that the Sixth Amendment’s
7 restriction on judge-found facts does not apply to imposition of concurrent or
8 consecutive sentences. 129 S.Ct. 711, 718 (2008). Because AEDPA requires
9 review of the state court decision on the basis of federal law established at the time
10 of that decision, *see Andrade*, 538 U.S. at 71, the court merely notes that the ruling
11 in *Ice* supports the conclusion that the Court of Appeal’s interpretation of federal
12 law was not an unreasonable application of that law.

13 F

14 Jordan’s final argument in support of his petition for habeas corpus is that he
15 was improperly sentenced for a firearms enhancement which was not actually found
16 by the jury. Established federal law holds that “any fact that increases the penalty
17 for a crime beyond the prescribed statutory maximum must be submitted to a jury,
18 and proved beyond a reasonable doubt.” *Apprendi v. New Jersey*, 530 U.S. 466,
19 490 (2000). Jordan was charged with a sentencing enhancement on the ground that
20 he used a firearm in the course of a felony in violation of California Penal Code §
21 12022.53(b), (c), and (d). Subsection (b) imposes a consecutive 10 year
22 enhancement for personally using a firearm in the commission of a felony,
23 subsection (c) imposes a consecutive 20 year term for personally and intentionally
24 discharging the firearm, and subsection (d) imposes a consecutive term of 25 years
25 to life for personally and intentionally discharging a firearm and proximately causing
26 great bodily injury to any person other than an accomplice.

27 As the Court of Appeal observed, “[t]he trial court instructed the jury
28 pursuant to the language of subdivision (d) of section 12022.53. However, for

1 reasons unknown the verdict form completed and signed by the jury foreperson and
2 to which the entire jury attested was limited to the language of subdivision (b).”
3 Opinion at 28-29. In acknowledging the trial court’s error in imposing the enhanced
4 sentence found in (d) despite the jury’s limited finding, the Court of Appeal declined
5 to reverse the sentence on the basis that the error was harmless. The Court of
6 Appeal interpreted *Apprendi*, and its progeny to allow for harmless error review, and
7 only require reversal when it could not be “shown beyond a reasonable doubt that
8 the error was harmless.” It further reasoned that, in finding Jordan guilty of the two
9 murders,

10 the jury must necessarily have found [that he] discharged the gun and killed
11 the victims. The jury clearly found [Jordan] caused the death of the victims
12 when it found [him] guilty of their murder. There was no evidence this was a
13 case in which [Jordan] beat the victims to death with the butt of the gun, or
caused their death in any way other than by discharging the bullets from the
gun into their bodies.

14 Opinion at 29-30. Jordan challenges the Court of Appeal’s ruling on the argument
15 that harmless error analysis does not apply in case such as this, where, he argues,
16 “the error is structural, and requires reversal per se.” Doc. 54 at 15.

17 Established federal law in effect at the time of the Court of Appeal’s decision
18 acknowledged that not all constitutional errors require automatic reversal; in fact, all
19 trial errors aside from structural defects are subject to harmless-error standards.
20 *Fulminante*, 499 U.S. at 306, 309 (the Court adopts the “general rule that a
21 constitutional error does not automatically require reversal of a conviction,” rather
22 “most constitutional errors can be harmless”); *see also United States v. Dominguez*
23 *Benitez*, 542 U.S. 74, 81 (2004) (“It is only for certain structural errors undermining
24 the fairness of a criminal proceeding as a whole that even preserved error requires
25 reversal without regard to the mistake’s effect on the proceeding.”). The error
26 alleged in this case is not clearly “structural,” in the way that total deprivation of
27 counsel, the right to self-representation, a biased judge, and a jury that excludes
28 members of the juror’s race are errors “affecting the framework within which the

1 trial proceeds.” *Fulminante*, 499 U.S. at 309-10.

2 In light of the highly deferential standard required by AEDPA, the state
3 court’s conclusion that the error was subject to harmless error review was not
4 unreasonable. In addition, the state court was not unreasonable in concluding that
5 the error was harmless. The jury must have concluded that Jordan shot the victims
6 in order to find him guilty of murder, therefore the corresponding enhancement is
7 appropriate.

8 CONCLUSION

9 Accordingly, it is hereby ORDERED that Jordan’s application for a writ of
10 habeas corpus is DENIED. The Clerk is directed to enter judgment and close the
11 case.

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13 DATED: April 9, 2009

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15 /s/ Milan D. Smith, Jr.

16 UNITED STATES CIRCUIT JUDGE

17 Sitting by Designation
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