UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

DANTE JAMAHL ALEXANDER, Petitioner, v. A. HEDGPETH, Warden, Respondent.	CASE NO. 2:07-cv-00722-RAJ-JLW REPORT AND RECOMMENDATION

I. INTRODUCTION

Petitioner is currently incarcerated at the Kern Valley State Prison in Delano, California. He seeks relief under 28 U.S.C. § 2254 from his 2004 jury conviction in the Sacramento County Superior Court for first degree murder, attempted murder, second degree robbery, and attempted robbery, with special allegations of personal use and intentional discharge of a firearm causing great bodily injury. (*See* Docket 21, Lodged Document 4 at 2; Dkt. 15.) Petitioner is currently serving a sentence of life without the possibility of parole. (*See* Dkt. 21, LD 4 at 2-3.) Respondent has filed an answer to the petition, as well as relevant portions of the state court record. (*See* Dkts. 16, 21, and 23.) Although petitioner did not file a traverse in reply to respondent's answer, the briefing is nevertheless complete and this matter is ripe for review. The Court, having thoroughly reviewed the record and briefing of

the parties, recommends that the Court deny the amended petition and dismiss this action with prejudice.

II. FACTUAL AND PROCEDURAL HISTORY

Petitioner was convicted of murdering Cheryl Jones, and attempting to murder her husband, Victor Jones, after carrying out an armed robbery of the victims in the early morning hours of April 11, 2002. (*See* Dkt. 21, LD 4 at 2.) Petitioner's co-conspirators, Ladell Brown, Johtell Frank, and Sirrano Haywood, were also charged with these offenses. (*See id*.)

Victor and Cheryl first met petitioner and his co-conspirators at the Gold Rush Inn on April 9, 2002. (*See id*. at 3.) Over the next two days, Victor purchased crack cocaine from Brown on numerous occasions in exchange for money, as well as the use of the Jones' van. (*See id*.) On April 10, Brown informed Victor that his van had been stolen by someone. (*See id*. at 4.) Victor did not believe Brown's story about the theft and suggested that Brown return all the money Victor had paid him for cocaine. (*See id*. at 5.) Petitioner, Brown, and Victor discussed the problem until Brown eventually gave Victor a quarter ounce of cocaine and $20. (*See id*.)

Late that evening, petitioner came to the Jones' hotel room alone and asked Victor to go to the store and buy him some liquor. Victor told petitioner it would cost $10. Petitioner went back to his room, and then returned with $10 and his girlfriend, Johtell Frank. Frank offered to drive Victor to the store. (*See id*.) As the group left the hotel, Victor heard Brown's girlfriend, Jaynelle Frank, tell her sister, Johtell Frank, "Did you hear what was going to happen? That's messed up." (*Id*. at 6.) Petitioner then told Jaynelle to "go in the house." (*Id*.) At trial, Jaynelle Frank denied the statement attributed to her. (*Id*.)

Petitioner, Victor, Cheryl, and Johtell Frank left the hotel in Frank's car. Once they were on the road, Frank began answering phone calls on her cell phone while driving. (*See id*. at 6.) At one point, when Frank received a cell phone call, she told the caller, "After I finish with them, I'll deliver what you need." (*Id*.) Evidence later introduced by the prosecution at trial suggested that Frank had been speaking to Haywood while driving. Specifically, a number of calls were placed between Frank's Metro PCS cell phone and a particular SureWest cell phone, beginning at 10:52 p.m. on April 10, 2002, and ending at 2:42 a.m. on April 11, 2002. (*See id*. at 6-7.) The SureWest account for that phone was billed to Haywood's address, and Haywood's sister testified that she had obtained a SureWest phone for Haywood. (*See id*. at 7.)

Although Frank's passengers attempted to give her directions to the store, Frank kept turning the car in the opposite direction of their instructions. Victor had noticed that another vehicle was following them, and when that vehicle flashed its high beams, Frank accelerated and turned into a cul-de-sac. (*See id*. at 6-7.) The other vehicle followed them. (*See id*. at 7.) Once Frank had parked the car, she immediately got out. Petitioner then pointed a handgun at Victor and said, "Give me all your shit." (*Id*.) Victor handed petitioner everything he had – a wallet with bank cards and $12 in cash, a watch, keys to his car, and a packet of Tic Tacs. (*Id*.) Brown then walked up to the car, pointed a rifle at Victor, and directed Victor and Cheryl to get out of the car. (*See id*.)

Victor pushed Cheryl into the light in front of the car, and then stood back in the dark. (*Id*. at 7.) He told Brown, "Man, you don't have to do this . . . I'll go to the bank and get you money." *(Id*.) When Victor yelled, "You're going to kill us," petitioner shot him in the left

shoulder. (*Id*. at 8.) Victor made a dash for the door of one of the nearby houses and heard both guns fire at him, hitting him twice in the left arm. (*See id*. at 8.) Victor continued to run until his feet were shot out from under him, and he fell to the ground. He remembers hearing gunfire from multiple guns, and he watched Brown shoot Cheryl three or four times with his rifle as she was in the process of kneeling on the ground. Cheryl Jones died of a gunshot wound to the back inflicted by a .223 rifle. (*See id*.)

After Victor yelled and broke out windows in the door of a nearby house, a man's voice from inside the house announced that the police were on their way. (*See id*.) Brown attempted to shoot Victor with the handgun Victor had seen in the hands of petitioner. After the gun misfired twice, however, the co-conspirators fled. (*See id*.) Victor's lack of sleep and use of cocaine and alcohol prior to the offenses might have impaired his ability to observe and describe the events that morning. (*See id*.)

Petitioner was arrested later that afternoon. Sacramento County Sheriffs' Detectives Grant Stomsvik and Will Bayles informed petitioner that he was in custody and they wished to question him as part of their investigation regarding these offenses. (*See* Dkt. 21, 5 Clerk's Transcript on Appeal at 1201-02.) When Detective Stomsvik began to inform petitioner of his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966), petitioner interrupted him and asserted that he would not speak with the detectives until he had an attorney. (*See id*. at 1208.) The detective responded, "That's fine. What I can do is leave you a business card . . . [a]nd either you or your lawyer can contact me. Okay. If you want – if you change your mind and you want to tell me your side of the story, I'll be glad to hear it. Okay?" (*Id*.) He told petitioner they would be back with him soon, but they needed to interview a few other

witnesses. (*See id*. at 1209.)

While petitioner waited in an interview room, police performed a gunshot residue test and took a few photographs of petitioner. (*See id*. at 1215-1237.) Although petitioner repeatedly attempted to ask officers questions about the status of the case and what was happening to his girlfriend, they declined to answer most of his questions. (*See id*.) When petitioner asked Sergeant Hill if he could speed up the process by talking to the detectives about the case, Sergeant Hill told him "No. I can't say that. I don't know. I mean, you have that right, you don't have to – to talk to us." (*Id*. at 1234.) Finally, after petitioner persisted in asking questions, Sergeant Hill said,

> I – I would -- if I could legally, I could explain a lot of stuff to you, okay. You did something during your interview initially which prevents us from talking to you any further about the case. Okay. You asked for an attorney. Once you do that, we can no longer talk to you about the case. Okay? The only way around that is if you solicit (sic) and change your mind or whatever and I'm not in any kind of position to address that. Okay. That will be up to the other detectives and stuff. But since you asked for the attorney, I can't talk to you about the case, Dante.

(*Id*. at 1236-37.)

Petitioner responded that he would "rather have the detectives come back then. I'll talk to them. Well, if I talk to them, and you know what I mean, and all this stuff come back right, will I still go back – still go to jail?" (*Id*. at 1237.) Sergeant Hill said, "I can't tell you that. Um, you're under arrest now for the murder like they explained to you about. What's – what's happened if you talk to them, I don't know . . . And I can't ask them any questions about it. I'm trying to make that perfectly clear, you asked for an attorney and I am not in a

position to talk to you about the case." (*Id*.) Sergeant Hill then left the room to get petitioner a Pepsi to drink. As soon as he returned with the Pepsi, petitioner repeated his request to speak with the detectives. Petitioner explained, "I'm just trying to get this shit done possible – quick." (*Id*. at 1238.) Sergeant Hill then agreed to tell the detectives petitioner wanted to talk to them.

Approximately twenty-five minutes later, Detectives Stomsvik and Bayles returned to the interview room where petitioner was sitting. (*See id*. at 1238.) Petitioner told the detectives, "You can talk to me, man." (*Id*. at 1239.) Before questioning petitioner, Detective Stomsvik asked petitioner again, "You – you notified my boss that you want to talk to me now. Do you want to talk to me now?" Petitioner answered, "Yeah." (*Id*. at 1239-40.) Detective Stomsvik then read petitioner his *Miranda* rights. (*See id*. at 1240.) After being fully informed of his rights, petitioner again agreed to speak with the detectives about the case. (*See id*.)

The detectives then interviewed petitioner for several hours in a session that was video recorded. (*See id*. at 1240-1459.) During the interview, petitioner admitted that he had helped plan the robbery of Victor and Cheryl Jones. (*See id*. at 1422-1441.) He later asserted, however, that he had lied to the detectives throughout the interview because he did not trust them and "I'm going to jail anyway. . . ." (*Id.* at 1452; *see id*. at 1450-59.)

The district attorney charged petitioner, Brown, Frank, and Haywood with the crimes committed against Victor and Cheryl Jones. (*See id.*, LD 4 at 1.) Before trial, in September 2003, Haywood pled guilty to voluntary manslaughter and attempted murder, and admitted he was an armed principal in the shootings. (*See id*. at 1.) The remaining three codefendants

were tried in a single criminal proceeding before three separate juries. (*See id.*) Because Haywood had not yet been sentenced at the time of the trial, when the defense called him as a witness Haywood invoked the Fifth Amendment and refused to answer any questions regarding the offenses. (*See id*., 6 RT at 1281-84.)

In addition, petitioner moved during trial to exclude evidence of his interview with the detectives. (*Id*., 2 Reporter's Transcript on Appeal at 70-76.) The trial court found that "there is no question that Mr. Alexander clearly invoked" his right to counsel when the detectives first approached him regarding the offenses. (*Id*. at 81.) Contrary to petitioner's contention that the officers who spoke with petitioner and performed the drug residue test on him later "badgered" or coerced him into waiving this right, however, the trial court found that "the officers in fact bent over backwards to make it clear to Mr. Alexander that they could not talk to him about what he was being held for because he had invoked his right to have a lawyer present. Over and over again Mr. Alexander keeps trying to keep the conversation going by asking questions." (*Id*.) As a result, the trial court concluded that the portion of the detectives' interview which took place after petitioner had been fully advised of his *Miranda* rights would be admissible at trial. (*See id*. at 82-83.) Pursuant to the trial court's ruling, the prosecution played an edited version of the videotaped interview for petitioner's jury at trial. (*See id.*, 6 RT at 1242-50; s*ee id*., LD 4 at 9.)

The jury found petitioner guilty of first degree murder, attempted murder, second degree robbery, and attempted robbery, and found true all the special allegations and circumstances alleged in the amended information. (*See id*. at 2.) Specifically, the charges included allegations of personal use and intentional discharge of a firearm causing great

bodily injury. (*See id*.) The trial court sentenced petitioner to a determinate term of twenty-seven years, plus an indeterminate term of twenty-five-years-to-life without the possibility of parole. (*See id*. at 2-3; CT 13.)

Petitioner timely appealed his conviction and sentence to the California Court of Appeal, which affirmed the trial court's judgment on September 21, 2005. (*See id*. at 28.) The California Supreme Court summarily denied petitioner's petition for review on November 30, 2005. (*See* Dkt. 21, LD 5 and 6.) Petitioner did not seek habeas corpus relief in the state courts. Petitioner filed his first federal habeas petition on April 6, 2007, but subsequently retained new counsel to represent him. (*See* Dkts. 1, 4, 5, and 6.) He filed the instant amended petition and memorandum of points and authorities on February 18, 2008. (*See* Dkt. 15.)

III. FEDERAL CLAIMS FOR RELIEF

Petitioner presents the following claims for relief in his amended habeas petition:

1. Petitioner expressly invoked his right to counsel and his subsequent confession is inadmissible because police induced dialogue through coercive and deceptive methods.

2. The prosecutor violated petitioner's due process rights to compulsory process and to present a defense by entering into an illusory plea agreement with Sirrano Hayward that discouraged Haywood from testifying.

(*See id*. at 6 and 13.)

Respondent concedes that petitioner has exhausted his state court remedies as to both claims for relief, but contends that his claims are without merit. (*See* Dkt. 16 at 2.)

IV. STANDARD OF REVIEW

The Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA") governs this petition because it was filed after the enactment of AEDPA. *See Lindh v. Murphy*, 521 U.S. 320, 326-27 (1997). Because petitioner is in custody of the California Department of Corrections pursuant to a state court judgment, 28 U.S.C. § 2254 provides the exclusive vehicle for his habeas petition. *See White v. Lambert*, 370 F.3d 1002, 1009-10 (9th Cir. 2004) (providing that § 2254 is "the exclusive vehicle for a habeas petition by a state prisoner in custody pursuant to a state court judgment. . . ."). Under AEDPA, a habeas petition may not be granted with respect to any claim adjudicated on the merits in state court unless petitioner demonstrates that the highest state court decision rejecting his petition was either "contrary to, or involved an unreasonable application of, clearly established Federal law" as determined by the U.S. Supreme Court, or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1) and (2).

As a threshold matter, this Court must ascertain whether relevant federal law was "clearly established" at the time of the state court's decision. To make this determination, the Court may only consider the holdings, as opposed to dicta, of the U.S. Supreme Court. *See Williams v. Taylor*, 529 U.S. 362, 412 (2000). In this context, Ninth Circuit precedent remains persuasive but not binding authority. *See id.* at 412-13; *Clark v. Murphy*, 331 F.3d 1062, 1069 (9th Cir. 2003).

The Court must then determine whether the state court's decision was "contrary to, or involved an unreasonable application of, clearly established Federal law." *See Lockyer v. Andrade*, 538 U.S. 63, 71 (2003). "Under the 'contrary to' clause, a federal habeas court may

grant the writ if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the] Court has on a set of materially indistinguishable facts." *Williams*, 529 U.S. at 412-13. "Under the 'unreasonable application' clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from [the] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 413. At all times, a federal habeas court must keep in mind that it "may not issue the writ simply because [it] 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 [objectively] unreasonable." *Id.* at 411.

In each case, the petitioner has the burden of establishing that the state court decision was contrary to, or involved an unreasonable application of, clearly established federal law. *See* 28 U.S.C. § 2254; *Baylor v. Estelle*, 94 F.3d 1321, 1325 (9th Cir. 1996). To determine whether the petitioner has met this burden, a federal habeas court looks to the last reasoned state court decision because subsequent unexplained orders upholding that judgment are presumed to rest upon the same ground. *See Ylst v. Nunnemaker*, 501 U.S. 797, 803-04 (1991); *Medley v. Runnels*, 506 F.3d 857, 862 (9th Cir. 2007). Where, as in this case, the state courts have reviewed the claims and denied them without comment, the federal court conducts an independent review of the record "to determine whether the state court clearly erred in its application of controlling federal law." *Delgado v. Lewis*, 223 F.3d 976, 982 (9th Cir. 2000).

Finally, AEDPA requires federal courts to give considerable deference to state court decisions, and state courts' factual findings are presumed correct. *See* 28 U.S.C. § 2254(e)(1). Federal courts are also bound by a state's interpretation of its own laws. *See Murtishaw v. Woodford*, 255 F.3d 926, 964 (9th Cir. 2001) (citing *Powell v. Ducharme*, 998 F.2d 710, 713 (9th Cir. 1993)).

V. DISCUSSION

A. *Petitioner's* Miranda *Claim*

Petitioner argues that his right to due process of law and a fair jury trial under the Fifth, Sixth, and Fourteenth Amendments to the U.S. Constitution were violated by the trial court's admission of the incriminating statements petitioner made to police during his interrogation on April 11, 2002. (*See* Dkt. 15 at 6.) Petitioner asserts that he unambiguously invoked his right to counsel, and did not voluntarily waive this right when he reinitiated dialogue with police about the offenses "because police induced dialogue through coercive and deceptive methods." (*Id*.) Petitioner also cites *Miranda* to support the proposition that "[a]ny evidence that [petitioner] was threatened, tricked, or cajoled into a waiver will, of course, show that [petitioner] did not voluntarily waive his privilege." (*Id*. at 10.) *See Miranda*, 384 U.S. at 476. Specifically, petitioner argues that after he invoked his right to counsel, police officers "incorrectly told him they could not give him information about the case because he asked for an attorney . . . They also implied that an attorney could only be obtained by retaining one." (*Id*. at 10.)

Petitioner seems to be characterizing several of the statements Sergeant Hill made in response to petitioner's persistent questions about the case as being coercive or deceptive.

(*See id*.) For example, while petitioner was being photographed by police officers, he asked Sergeant Hill if "I just got to sit in jail till I talk to an attorney?" (*See* Dkt. 21, 5 CT at 1216.) Sergeant Hill responded, "You can attempt to bail – well, your bail is going to be zero until you go to court but yeah, you can just go ahead and try to get an attorney. We're not picking you at random but I'm – I can't go into the case of why we know what we do. Okay?" (*Id*.) Moments later, when petitioner asked why there was no lawyer present during his gunshot residue test, Sergeant Hill responded, " 'Cause we're not questioning you regarding what happened . . . if we were questioning you regarding the incidents which occurred you could have an attorney here. But right now you don't have an attorney retained so it would be kind of hard for us to question you regarding this – when you don't have an attorney, right?" (*Id*. at 1217-1218.) Finally, after petitioner had been sitting alone in the interrogation room for approximately forty minutes, petitioner asked, "So eventually I'm going to jail for murder?" (*Id*. at 1232.) Sergeant Hill responded, "Yes." (*Id*.) When petitioner asked if he would have to stay in jail "until I beat the case," Sergeant Hill explained,

> No. You'll have an opportunity to bail out. And again, I don't know what your bail's going to be or any of those circumstances right now. Right now it's going to be no bail because that's the way it is until you go to court. Once we go to court, uh, then your attorney can argue during the bail hearing that you should have some kind of a bail. So you'll get the opportunity to get out if you can bail. Okay.

(*Id*. at 1232-33.) Petitioner then resumed asking questions about the status of his girlfriend, and whether she was also going to jail after the detectives questioned her. (*Id*. at 1233-34.)

In *Edwards v. Arizona*, the U.S. Supreme Court set forth the bright line rule that once an accused has "expressed his desire to deal with the police only through counsel, [he] is not

subject to further interrogation by the authorities until counsel has been made available to him, *unless the accused himself initiates further communication, exchanges, or conversations with the police*." 451 U.S. 477, 484-85 (1981) (emphasis added). In determining whether the accused waived his Fifth Amendment right to have counsel present during interrogation, the government must show (1) that the accused initiated further discussions with the police, and (2) that "the purported waiver was knowing and intelligent and found to be so under the totality of the circumstances." *Oregon v. Bradshaw*, 462 U.S. 1039, 1045 (1983) (quoting *Edwards*, 451 U.S. at 486 n.9). *See also Smith v. Illinois*, 469 U.S. 91, 95 (1984).

To satisfy the first prong, the accused must initiate further communication, exchanges, or conversations with the police by speaking words or engaging in conduct that can "be fairly said to represent a desire on the part of the accused to open up a more generalized discussion relating directly or indirectly to the investigation." *Bradshaw*, 462 U.S. at 1045. To satisfy the second prong, the waiver of *Miranda* rights must be knowing, intelligent, and voluntary. *Miranda*, 384 U.S. at 479. A waiver is "knowing" and "intelligent" if an accused understands the advisements and consequences of giving up the right to an attorney, and "voluntary" if there is no "evidence that the accused was threatened, tricked, or cajoled into a waiver. . . ." *Id*. at 476 and 479. Thus, "[o]nce it is determined that a suspect's decision not to rely on his rights was uncoerced, that he at all times knew he could stand mute and request a lawyer, and that he was aware of the State's intention to use his statements to secure a conviction, the analysis is complete and the waiver is valid as a matter of law." *Moran v. Burbine*, 475 U.S. 412, 422-23 (1986).

Applying the relevant U.S. Supreme Court precedent discussed above, the California Court of Appeal rejected petitioner's claims. Specifically, the court reasoned as follows:

> On appeal, defendant argues that the trial court erred in failing to exclude the entire interview. He contends that after he initially invoked his right to counsel, the conduct of the sheriff's deputies, which included misinforming him of the consequences of asserting his rights, defeated the requirement that any post-invocation waiver of *Miranda* rights be knowing and intelligent. We conclude there was no error. . . .
>
> Viewing the ongoing conversation between defendant and the sheriff's deputies in its totality, it is clear that defendant repeatedly attempted to initiate a generalized discussion about the investigation, and said he would talk to the detectives before directly asking Sergeant Hill to tell the detectives he was willing to talk to them. (*San Nicholas*, *supra*, 34 Cal.4th at pp. 642-643.) Defendant doggedly sought information from Sergeant Hill about Johtell and how long he would have to wait for something to happen. And, as defendant demonstrates, Sergeant Hill doggedly refused to discuss the case with him.
>
> Turning to defendant's specific arguments . . . the fact that defendant interrupted Detective Stomsvik to invoke his right to counsel before Stomsvik gave the entire *Miranda* admonition is a difference without a distinction because it does not distinguish this case in any material way from prior decisions finding defendant's statements admissible. Defendant's conduct simply suggests that defendant understood his right to remain silent and not talk with the detectives without an attorney before Stomsvik recited the full admonition. . . .
>
> Nor do we find merit in the claim that Sergeant Hill misled defendant about his right to appointed counsel. Sergeant Hill correctly informed defendant that he was not entitled to have an attorney present during gunshot residue tests. An indigent criminal defendant is entitled to appointed counsel "at every stage of a criminal proceeding where substantial rights of a criminal accused may be affected." (*Mempa v. Rhay* (1967) 389 U.S. 128, 134 [19 L.ED.2d 336, 340.) Defendant does not contend the administration of a gunshot residue test was a proceeding that affected defendant's substantial rights. Sergeant Hill's other statements were also correct when read in

> context. No attorney would have been appointed for defendant until the district attorney filed a criminal complaint and defendant appeared in court for his arraignment. ([California Penal Code] § 987.) Sergeant Hill did not tell defendant he could have an attorney only if he retained one. Moreover, any possible confusion was remedied by Stomsvik when he read defendant the complete *Miranda* admonition when defendant agreed to talk.
>
> Defendant also complains that Hill misinformed defendant that he could not discuss anything about the case once defendant invoked his right to counsel. There is often a fine line between police answering a defendant's questions and police renewing interrogation. (See *People v. Boyer* (1989) 48 Cal.3d 247, 273-275, overruled on another ground in *People v. Stansbury* (1995) 9 Cal.4th 824, 830, fn. 1; see also *People v. Sims* (1993) 5 Cal.4th 405, 440-444.) In this legal context, Sergeant Hill acted prudently in declining to discuss the case with defendant.
>
> Three other factors are worthy of consideration in assessing the "totality of the circumstances" showing that defendant, not the sheriff's deputies, initiated further communication with the detectives. (*San Nicholas*, *supra*, 34 Cal.4th at pp. 642-643.) First, nearly two hours passed between the time defendant invoked his right to an attorney at 5:50 p.m. and the time the detectives returned, at his request, to talk to him at 7:27 p.m. This was ample time for defendant to evaluate his situation and to dispel the effects of what defendant characterizes on appeal as "misadvice of rights and deceptive or misleading statements." Second, as the transcript reveals, defendant's general antagonistic attitude and lack of cooperation with deputies during this period belies any claim his will was overborne. Third, defendant had to repeat his request to talk to the detectives twice before Sergeant Hill delivered his message. And Sergeant Hill said it would have to wait until the officers were done with what they were doing, further indicating the detectives were not endeavoring to overcome defendant's will. Based on the foregoing, we also conclude defendant made a knowing and intelligent waiver of his *Miranda* rights.

(Dkt. 21, LD 4 at 9 and 16-19.)

Here, the California Court of Appeal applied the appropriate federal standard in evaluating petitioner's claim, and reasonably concluded that petitioner's constitutional rights were not violated by the trial court's admission of the portion of the interrogation that took place after petitioner had been fully advised of his *Miranda* rights and nevertheless agreed to discuss the case with the detectives. Although petitioner clearly and unambiguously invoked his right to counsel when the detectives first approached him to discuss the case, petitioner subsequently "initiated further communication, exchanges, or conversations with police." *See Edwards*, 451 U.S. at 484-85. Specifically, petitioner's questioning of Sergeant Hill about the status of his case, as well as the status of his girlfriend, may have been "fairly said to represent a desire on the part of the accused to open up a more generalized discussion relating directly or indirectly to the investigation." *Bradshaw*, 462 U.S. at 1045. In any event, petitioner's multiple requests for Sergeant Hill to inform the detectives that he had changed his mind and wished to talk to them to "speed up" the process constituted an initiation of further communication or conversation with police relating to the investigation.

In addition, the record demonstrates that the California Court of Appeal's finding that under the totality of the circumstances, petitioner's waiver of his *Miranda* rights was voluntary, knowing, and intelligent, was not an unreasonable application of clearly established federal law. *See Bradshaw*, 462 U.S. at 1045. Contrary to petitioner's contentions, Sergeant Hill's statements to petitioner, viewed in context, did not induce dialogue by petitioner through coercive and deceptive methods. (*See* Dkt. 1 at 10.) On the contrary, Sergeant Hill repeatedly advised petitioner that he could not discuss the case because petitioner did not yet have an attorney present, and there is no evidence that petitioner

"was threatened, tricked, or cajoled" into waiving his right to counsel. *See Miranda*, 384 U.S. at 476. Furthermore, before detectives began to question petitioner about the case, they fully advised petitioner of his *Miranda* rights. (*See* Dkt. 21, 5 CT at 1240.) Petitioner then agreed to speak with the detectives about the case without any impropriety on the part of police. *(See id*.) As a result, petitioner's subsequent statements to the detective during the interrogation were the result of a voluntary and knowing waiver of his rights. *See Bradshaw*, 462 U.S. at 1046.

Accordingly, petitioner has failed to establish that the California Court of Appeal's denial of petitioner's claim was contrary to, or an unreasonable application of, clearly established federal law as determined by the U.S. Supreme Court. I therefore recommend that petitioner's request for habeas relief based upon this claim be denied.

B. *Petitioner's Prosecutorial Misconduct Claim*

Petitioner contends that "the prosecutor violated petitioner's due process rights to compulsory process and to present a defense by entering into an illusory plea agreement with Sirrano Haywood that discouraged Haywood from testifying" by improperly inducing him to invoke his Fifth Amendment privilege when he was called as a defense witness. (Dkt. 15 at 13.) Specifically, petitioner contends that the prosecutor committed misconduct when she failed to consummate Haywood's plea bargain so that he could be sentenced prior to petitioner's trial. (*See id*. at 13-15.) Petitioner argues that, if Haywood had been sentenced prior to petitioner's trial, Haywood might have testified in a manner incriminating himself and exonerating petitioner. (*See id*.) In addition, petitioner contends that the prosecutor committed misconduct when she conditioned Haywood's plea bargain upon Haywood

refraining from providing any information about his role in the offenses that was inconsistent with his prior statements to authorities. (*See id*.) Petitioner claims this misconduct caused Haywood to invoke the Fifth Amendment when called to testify as a defense witness, which "stripped the Petitioner of his Constitutional rights under the Sixth and Fourteenth Amendments to have a 'meaningful opportunity to present a defense'" under *Crane v. Kentucky*, 476 U.S. 683, 690 (1986). (*Id*. at 15.)

Petitioner's claim involves the interplay between a witness' Fifth Amendment privilege against self-incrimination, a defendant's Sixth Amendment right to present a defense and compel testimony, and the doctrine of prosecutorial misconduct. The Fifth Amendment privilege against self-incrimination applies to evidence which may directly support a criminal conviction, information which would furnish a link in the chain of evidence that could lead to a prosecution, and evidence which an individual reasonably believes could be used against him in a criminal prosecution. *Maness v. Meyers*, 419 U.S. 449, 461 (1975). Significantly, a convicted but unsentenced defendant retains his Fifth Amendment rights. *United States v. Paris*, 827 F.2d 395, 399 (9th Cir. 1987).

With respect to the Sixth Amendment, the U.S. Supreme Court has stated that "[t]he right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense . . . . This right is a fundamental element of due process of law." *Washington v. Texas*, 388 U.S. 14, 19 (1967). This right, however, is not absolute, and may bow to accommodate other legitimate interests in the criminal trial process in appropriate cases. *See Chambers v. Mississippi*, 410 U.S. 284, 295 (1973). More than the mere absence of testimony is necessary to establish a violation of the Sixth Amendment right

to compulsory process. *United States v. Valenzuela-Bernal*, 458 U.S. 858, 867 (1982). Furthermore, a criminal defendant's Sixth Amendment rights, including the right to compulsory process, do not necessarily include the right to compel a witness to waive the Fifth Amendment privilege against self-incrimination. *See Kastigar v. United States*, 406 U.S. 441, 444-45 (1972); *United States v. Vavages*, 151 F.3d 1185, 1191-92 (9th Cir. 1998); *United States v. Straub*, 538 F.3d 1147, 1166 (9th Cir. 2008) (no Fifth Amendment right for defendant to demand "use immunity" for a co-defendant; courts must be "extremely hesitant" to intrude on the Executive's discretion to decide whom to prosecute). Similarly, an accused is generally not entitled to compel a prosecutor to grant immunity to a potential defense witness to get the witness to testify. *See United States v. Paris*, 827 F.2d 395, 399 (9th Cir. 1987); *United States v. Trejo-Zambrano*, 582 F.2d 460, 464 (9th Cir. 1978).

In considering "prosecutorial misconduct," the U.S. Supreme Court has stated that prosecutors must "refrain from improper methods calculated to produce a wrongful conviction." *Berger v. United States*, 295 U.S. 78, 88 (1935). The Supreme Court has also held that the appropriate standard of review for prosecutorial misconduct is "the narrow one of due process," because a defendant's due process rights are violated when a prosecutor's misconduct renders a trial "fundamentally unfair." *Darden v. Wainwrigh*t, 477 U.S. 168, 181 (1986). *See also Greer v. Miller*, 483 U.S. 756, 765 (1987); *Donnelly v. DeChristoforo*, 416 U.S. 637, 642 (1974).

In *Webb v. Texas*, the U.S. Supreme Court held that if a trial court unduly interferes with a defense witness' choice whether to testify, the trial court's conduct may amount to a due process violation. 409 U.S. 95, 97-98 (1972) (defense witness influenced not to testify by

intimidating remarks of trial judge). Although the Supreme Court has not yet considered whether similar interference by a prosecutor would violate a defendant's due process rights, the Ninth Circuit has extended the rule of *Webb* to encompass the conduct of prosecutors as well. *See Earp v. Ornoski*, 431 F.3d 1158, 1167-68 (9th Cir. 2005) (prosecutor's intimidating threats to prevent witness from testifying may amount to misconduct; case remanded for evidentiary hearing); *United States v. Vavages*, 151 F.3d 1185, 1189-90 (9th Cir. 1998) (holding that a prosecutor's conduct is also governed by *Webb*, and asserting that "a defendant's constitutional rights are implicated only where the prosecutor or trial judge employs coercive or intimidating language or tactics that substantially interfere with a defense witness' decision whether to testify.").

Thus, in the absence of more specific guidance by the U.S. Supreme Court, the relevant inquiry for this Court is whether (1) the prosecutor committed misconduct which (2) rendered the trial so "fundamentally unfair" as to make the resulting conviction a denial of due process. *See Wainwright*, 477 U.S. at 181; *Jeffers v. Ricketts*, 832 F.2d 476, 479-80 (9th Cir. 1987) (where defendant has failed to provide evidence of prosecutorial misconduct, he has failed to show that he was denied a fair trial), *overruled on other grounds in Lewis v. Jeffers,* 497 U.S. 764 (1990). *See also Karis v. Calderon,* 283 F.3d 1117, 1128 (9th Cir. 2002) (claim of prosecutorial misconduct is analyzed under prejudice standard set forth in *Brecht v. Abrahamson*, 507 U.S. 619, 638 n. 9 (1993), regardless of type of harmless error review conducted by the state courts); *Woods v. Adams*, 631 F. Supp. 2d 1261, 1279 (C.D. Cal. 2009) (applying a two-part inquiry to prosecutorial misconduct claim, and finding that a prosecutor who refused to prevent a witness from invoking their Fifth Amendment privilege by

consummating the witness' plea bargain before trial so the witness could be called to testify by the defense did not commit prosecutorial misconduct rendering the trial "fundamentally unfair.").

At trial, counsel for petitioner and codefendant Frank argued to the trial court that the prosecutor's plea agreement with Haywood was "inherently coercive" because they "want[ed] to be able to call [Haywood] as a witness and not have him take the Fifth Amendment." (Dkt. 21, 2 RT at 130 and 134.) In response, the prosecutor acknowledged that Haywood's plea agreement "was based upon the information and evidence the People had against Mr. Haywood at the time the plea was entered. Should the people receive other evidence or information from Mr. Haywood that implicates him further in this crime, the plea would be withdrawn." (*Id*. at 132.) In other words, "[i]f Mr. Haywood wants to come in here and say he is the one that shot Victor and Cheryl Jones, which is not what we had at the time of the plea, the plea will be withdrawn." (*Id*. at 135.) She also noted, however, that Haywood "was interviewed numerous times by law enforcement in this case, all on videotape . . . [b]ut he never once said anything that would do anything except incriminate the three [codefendants]." (*Id*. at 130.) "He never made any type of admissions or confessions to anything except that he was the driver of the second car and that he was unaware and had not been told why they were going out or following the car that was in front of them, that he – his statement was he was simply called over [and] . . . [w]hen he got there, Mr. Brown said, 'Hey, I want a ride. Take me somewhere,' and they ended up going to where the shooting occurred." (*Id*.)

The trial court ultimately agreed with the prosecutor. When Haywood was later called as a defense witness at a hearing held outside the presence of the juries, he exercised his Fifth

Amendment privilege to remain silent. (*See id*., 6 RT at 1281-84.)

As a threshold matter, this Court notes that petitioner has failed to make any showing or proffer as to what Haywood would have said if he had not invoked the Fifth Amendment at trial. As discussed above, there is no indication in the record that Haywood would have made any self-incriminating statements, or that he would have made any statements that would have helped exculpate petitioner. On the contrary, if Haywood had testified consistent with his previous statements to law enforcement, his testimony would have been detrimental to petitioner's case. As the California Court of Appeal observed, in applying the relevant state court precedent to petitioner's claim, "there is nothing in this record to show that . . . the structure of the plea agreement was a substantial cause in Haywood's refusal to testify, or that Haywood could provide any evidence material to the defendant's defense." (*Id*., LD 4 at 20-26.) Without more, petitioner's speculation that Haywood's testimony would have benefited his case is insufficient to entitle him to habeas relief. *See Jones v. Gomez*, 66 F.3d 199, 204-05 (9th Cir. 1995) (conclusory allegations are insufficient to support a claim for habeas relief).

With respect to the first prong of this Court's analysis, there is no "clearly established Federal law" holding that the prosecutor's refusal to consummate Haywood's plea bargain before trial in this case constituted misconduct. *See Woods*, 631 F. Supp. 2d at 1279-80 (C.D. Cal. 2009) (acknowledging the absence of clearly established federal law on this precise issue). Similarly, there is no "clearly established Federal law" that holds that the prosecutor's refusal to grant Haywood immunity from prosecution so that he was unable to invoke his Fifth Amendment rights when called as a witness at trial constitutes misconduct. As

discussed above, federal courts that have considered this issue have found that "[t]he Sixth Amendment right of an accused to compulsory process to secure the attendance of a witness does not include the right to compel the witness to waive his Fifth Amendment privilege. Nor is an accused entitled to compel a prosecutor to grant immunity to a potential defense witness to get him to testify." *Paris*, 827 F.2d at 399. *See also Ricketts*, 832 F.2d at 479-80 (holding that where there is no evidence the prosecutor refused to grant immunity to a defense witness in order to distort the judicial fact-finding process, there was no prosecutorial misconduct); *Davis v. Straub*, 430 F.3d 281, 287-88 (6th Cir. 2005) (providing that state courts necessarily could not have acted contrary to clearly established Supreme Court precedent in this context, because the U.S. Supreme Court has not resolved the conflict between a witness' Fifth Amendment privilege and a defendant's right to present his defense.)

Furthermore, the fact that Haywood's plea bargain could have been revoked in the event that Haywood provided information or testimony that further implicated him in the offenses does not represent undue coercion, threat, or intimidation by the prosecutor. *See Woods*, 631 F. Supp. 2d at 1279 (providing that where a witness' plea agreement was conditioned upon that witness testifying truthfully, which would be "assumedly in conformity with prior statements [the witness] had made to police and authorities, as a result of which the prosecutor proffered the plea bargain in the first place, such a 'condition' does not represent undue coercion, threat, or intimidation."). In contrast to cases where the prosecutor directly coerced, threatened, or intimidated a witness into refusing to testify or invoking his Fifth Amendment privilege, petitioner does not allege that the prosecutor threatened Haywood with a perjury prosecution if he testified for the defense, or granted immunity to prosecution

witnesses while withholding immunity from Haywood. *See Williams v. Woodford*, 384 F.3d 567, 599 (9th Cir. 2004); *Ricketts*, 832 F.2d at 479-80. Haywood's plea agreement did not prohibit him from testifying as a defense witness at trial. (*See* Dkt. 21, 2 RT at 132-33.) As the prosecutor explained to the trial court, she had no objection to Haywood testifying for the defense, as long as the plea bargain could be revoked in the event that Haywood personally admitted shooting the victims. (*See id*. at 135.) Indeed, in the absence of such a condition, a defense witness may falsely attempt to "take the heat" for the offenses after receiving the benefit of his plea agreement.

Accordingly, petitioner has failed to show that the prosecutor's actions with respect to Haywood's plea agreement constituted misconduct. As discussed above, petitioner has also failed to make any showing or proffer to demonstrate that his trial was so "fundamentally unfair" as to make the resulting conviction a denial of due process. *See Wainwright*, 477 U.S. at 181; *Jeffers v. Ricketts*, 832 F.2d 476, 479-80 (9th Cir. 1987). The California Court of Appeal's denial of petitioner's prosecutorial misconduct claim was therefore not contrary to clearly established U.S. Supreme Court precedent. Petitioner's request for habeas relief based upon this claim should be denied.

VI. CERTIFICATE OF APPEALABILITY

The federal rules governing habeas cases brought by state prisoners have recently been amended to require a district court that denies a habeas petition to grant or deny a certificate of appealability in the ruling. *See* Rule 11(a), Rules Governing § 2254 Cases, 28 U.S.C. § 2254 (effective December 1, 2009).

A petitioner seeking post-conviction relief under § 2254 may appeal a district court's dismissal of his federal habeas petition only after obtaining a certificate of appealability from a district or circuit judge. A judge shall grant a certificate of appealability only where a petitioner has made "a substantial showing of the denial of a constitutional right." *See* 28 U.S.C. § 2253(c)(3). The certificate must indicate which issues satisfy this standard. *See id*. § 2253(c)(3). "Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: the petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 474 (2000).

For the reasons set out in the discussion of the merits, above, jurists of reason would not find the result debatable. Accordingly, I recommend that the Court decline to issue a certificate of appealability. Petitioner is advised that, if this Court denies a certificate of appealability, he may not appeal that denial in this Court. Rather, he may seek a certificate from the Ninth Circuit Court of Appeals under Rule 22 of the Federal Rules of Appellate Procedure.

VII. CONCLUSION

For all of these reasons, I recommend the Court find that the state courts' decisions denying petitioner's claims were not contrary to, or an unreasonable application of, clearly established federal law, or based on an unreasonable determination of facts. I further recommend that the Court decline to issue a certificate of appealability and enter an Order approving and adopting this Report and Recommendation, denying the amended petition (Dkt. 15), and directing that judgment be entered dismissing this action with prejudice.

This Report and Recommendation is submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(l). Within fourteen (14) days of being served with this Report and Recommendation, any party may file written objections with this Court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Report and Recommendation." Either party may then respond to the other party's objections within fourteen (14) days of being served a copy of such written objections. 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 (9th Cir. 1991). A proposed order accompanies this Report and Recommendation.

DATED this 7th day of May, 2010.

JOHN L. WEINBERG
United States Magistrate Judge