

1 **A. Insufficiency of the Evidence Claims (Claims One, Two,**
2 **Seven, and Eight)**

3 Petitioner claims there was insufficient evidence to prove that
4 he was responsible for the shootings, thus undermining the sufficiency
5 of the evidence to support his attempted murder convictions.
6 Moreover, he argues that there was insufficient evidence to support
7 the personal use of a firearm and the great bodily injury
8 enhancements.

9 Viewing the evidence in the light most favorable to the
10 prosecution, we conclude that a reasonable jury could have found the
11 essential elements of the crime/enhancement beyond a reasonable doubt.
12 *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). Moreover, we conclude
13 that the state courts' rejection of these claims was neither contrary
14 to, nor involved an unreasonable application of, clearly established
15 federal law, as determined by the Supreme Court, nor was based on an
16 unreasonable determination of the facts in light of the evidence
17 presented. 28 U.S.C. § 2254(d). Accordingly, we conclude that
18 Petitioner is not entitled to habeas relief on Claims One, Two, Seven,
19 and Eight.

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21 **B. Improper Admission of Gang Evidence (Claim Three)**

22 Petitioner claims the trial court improperly admitted gang
23 evidence in his trial. We disagree. The evidence that was admitted
24 was relevant at least as to motive. In any event, habeas relief is
25 not available for mere error under state evidence law. To implicate
26 Petitioner's constitutional rights, the admission of the evidence must
27 have so fatally infected the proceedings as to render them
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1 fundamentally unfair. *Jammal v. Van de Kamp*, 926 F.2d 918, 919 (9th
2 Cir. 1991). Given the totality of the evidence at trial, the
3 admission of the gang evidence did not render Petitioner's trial
4 fundamentally unfair. The state courts' rejection of this claim
5 likewise is neither contrary to, nor involved an unreasonable
6 application of, clearly established federal law, as determined by the
7 Supreme Court, nor was based on an unreasonable determination of the
8 facts in light of the evidence presented. 28 U.S.C. § 2254(d).
9 Petitioner is not entitled to habeas relief on Claim Three.

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11 **C. Prosecutorial Misconduct (Claims Four, Five, and Six)**

12 Petitioner claims the prosecutor committed misconduct (1) during
13 closing argument, (2) in suggesting that defense counsel had coached a
14 witness,¹ and (3) by presenting false testimony. A federal habeas
15 court determines whether there was a violation of due process, not
16 whether any purported misconduct should be corrected under a court's
17 supervisory powers. *Darden v. Wainwright*, 477 U.S. 168, 181 (1986).
18 Our review is limited to determining whether the prosecutor's conduct
19 so infected the trial with unfairness as to make the resulting
20 conviction a denial of due process. *Donnelly v. DeChristoforo*, 416
21 U.S. 637, 643 (1974).

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¹It is unclear if Petitioner also meant to claim that his
24 counsel was ineffective for failing to seek an admonition of the
25 prosecutor from the court following what Petitioner characterized
26 as the prosecutor's purported suggestion that defense counsel had
27 coached a witness. No fair reading of the proceedings supports
28 such an inference. In any event, we conclude that counsel was
not unreasonable for failing to seek an admonition, and that
there is no reasonable probability that but for counsel's failure
the result would have been different. *See Strickland v.*
Washington, 466 U.S. 668, 688 (1984).

1 In this case, none of these instances of alleged prosecutorial
2 misconduct comes close to violating Petitioner's due process rights
3 for, among other reasons, those set forth by the State Court of
4 Appeal's decision and the Respondent's Answer. We thus conclude that
5 the state courts' denial of relief is neither contrary to, nor
6 involved an unreasonable application of, clearly established federal
7 law, as determined by the Supreme Court, nor was based on an
8 unreasonable determination of the facts in light of the evidence
9 presented. 28 U.S.C. § 2254(d).

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11 **D. Sentencing Error (Claim Nine)**

12 Petitioner claims the trial court erred by imposing an upper term
13 based on facts that were neither found by a jury nor admitted by him.
14 See *Cunningham v. California*, 549 U.S. 270, 274 (2007). However, the
15 state courts' determination that there was an adequate independent
16 basis for the upper term due to, among other things, the court's
17 finding that Petitioner had suffered numerous prior convictions was
18 neither contrary to, nor involved an unreasonable application of,
19 clearly established federal law, as determined by the Supreme Court,
20 nor was based on an unreasonable determination of the facts in light
21 of the evidence presented. 28 U.S.C. § 2254(d). Petitioner is not
22 entitled to habeas relief on Claim Nine.

1 **II. First Amended Petition**

2 Petitioner adds two claims in his First Amended Petition.

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4 **A. Newly Discovered Evidence/Actual Innocence (Claim One in**
5 **First Amended Petition)**

6 The state court held an evidentiary hearing during which the
7 witness who had purportedly recanted his trial testimony testified and
8 denied writing the text of the recantation but reaffirmed the truth of
9 his trial testimony. The state court judge found as a matter of fact
10 that Petitioner had failed to show the witness had lied at trial, and
11 that even if a new trial were ordered, it was not reasonably probable
12 that any different result would occur.

13 We find and conclude that the state courts' denial of this claim
14 is neither contrary to, nor involved an unreasonable application of,
15 clearly established federal law, as determined by the Supreme Court,
16 nor was based on an unreasonable determination of the facts in light
17 of the evidence presented. 28 U.S.C. § 2254(d).

18 We come to the same conclusion with respect to the state courts'
19 denial of Petitioner's subsequent attempt to present yet another
20 recantation by the same witness. The state court rejected the
21 purported second recantation as patently unbelievable, and held that
22 Petitioner had failed to show prejudice. On the record before the
23 state court, this conclusion was not contrary to, nor involved an
24 unreasonable application of, clearly established federal law, as
25 determined by the Supreme Court, nor was based on an unreasonable
26 determination of the facts in light of the evidence presented. 28
27 U.S.C. § 2254(d). As such, habeas relief remains unavailable
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1 regardless of the nature of any additional evidence Petitioner might
2 present at an evidentiary hearing before us to explore the witness's
3 current version of his testimony. *Cullen v. Pinholster*, 131 S. Ct.
4 1388, 1400 (2011).

5 In any event, "[t]o be credible, [a claim of actual innocence]
6 requires petitioner to support his allegations of constitutional error
7 with new reliable evidence - whether it be exculpatory scientific
8 evidence, trustworthy eyewitness accounts, or critical physical
9 evidence - that was not presented at trial. Because such evidence is
10 obviously unavailable in the vast majority of cases, claims of actual
11 innocence are rarely successful." *Schlup v. Delo*, 513 U.S. 298, 324
12 (1995). Petitioner "must show that it is more likely than not that no
13 reasonable juror would have convicted him in light of the new
14 evidence." *Id.* at 327.

15 Petitioner's purported new evidence consists of multiple
16 contradictory statements by the witness. His trial testimony
17 inculpated Petitioner at trial. His May, 2008 Declaration purported
18 to recant his trial testimony. At the state evidentiary hearing, the
19 witness said he had only signed a blank document to "help the
20 [Petitioner]." He denied any familiarity with the purported contents
21 of the first Declaration that purported to recant his trial testimony,
22 and denied any intent to assist Petitioner by recanting his trial
23 testimony. To the contrary, the witness reaffirmed his trial
24 testimony. Thereafter, Petitioner submitted another purported
25 Declaration by this witness in which he supposedly recants his
26 evidentiary hearing testimony. Based on the multiple conflicting
27 sworn statements made by the witness, we conclude that Petitioner has
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1 not satisfied the *Schlup* standard. Thus, the state courts' rejection
2 of this further attempt to use yet another purported recantation is
3 likewise neither contrary to, nor involved an unreasonable application
4 of, clearly established federal law, as determined by the Supreme
5 Court, nor was based on an unreasonable determination of the facts in
6 light of the evidence presented. 28 U.S.C. § 2254(d).

7 Petitioner is not entitled to relief on Claim One in his First
8 Amended Petition.

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10 **B. Ineffective Assistance of Counsel at Habeas Evidentiary**
11 **Hearing (Claim Two in First Amended Petition)**

12 This claim fails because Petitioner has no constitutional right
13 to assistance of counsel during state collateral proceedings.
14 *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987); *Bonin v. Vasquez*,
15 999 F.2d 425, 429 (9th Cir. 1993). Accordingly, Petitioner has failed
16 to show any grounds for habeas relief. The state courts' rejection of
17 this claim is neither contrary to, nor involved an unreasonable
18 application of, clearly established federal law, as determined by the
19 Supreme Court, nor was based on an unreasonable determination of the
20 facts in light of the evidence presented. 28 U.S.C. § 2254(d).

21 Petitioner is not entitled to relief on the Second Claim in his First
22 Amended Petition.

1 **III. Conclusion**

2 Based on the foregoing, as well as the reasons set forth in the
3 Respondent's Answer to the Petition and to the First Amended Petition,
4 both the Petition and the First Amended Petition are **DENIED**.
5 Moreover, we find and conclude that Petitioner has not made a
6 substantial showing of a violation of his constitutional rights.
7 Accordingly, a certificate of appealability is also **DENIED**.

8 IT IS SO ORDERED.

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10 DATED: 10/27/11

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13 George H. King
14 United States District Judge²
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28 ²United States District Judge for the Central District of
California sitting by designation.