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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

ERNESTO ESPINOZA,  
Petitioner,  
v.  
RICK HILL,  
Respondent.

No. 2:11-cv-00461 AC

ORDER

Petitioner is a state prisoner proceeding through counsel on an amended application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 challenging his 2007 felony conviction for robbery. ECF No. 25. The parties have consented to the jurisdiction of the magistrate judge. ECF Nos. 7, 8. Respondent has filed an answer to the single claim remaining in this case. ECF No. 39. Petitioner has not filed a reply, and the time for doing so has long since expired.

For the reasons that follow, the petition will be denied on the merits without an evidentiary hearing.

I. Procedural and Factual Background

a. Procedural Background

Petitioner Ernesto Becerra Espinoza was convicted following a jury trial in the Superior Court for the County of Shasta of second degree robbery under California Penal Code § 211. Lodged Doc. 1. The jury found true the enhancement allegations that petitioner committed the

1 crime in association with a criminal street gang, and that petitioner had a firearm on his person or  
2 in the vehicle. Id.; Cal. Penal Code §§ 186.22 (b)(1), 12022 (a)(1). He was sentenced to an  
3 aggregate term of fourteen years in state prison: two years for robbery, ten years for the gang  
4 enhancement, and two years for the firearm enhancement. Lodged Doc. 1, 6.

5 Petitioner appealed his conviction to the California Court of Appeal for the Third  
6 Appellate District in case no. C056767, raising the following issues: (1) insufficiency of the  
7 evidence that the robbery was accomplished by force or fear; and (2) insufficiency of the  
8 evidence as related to the gang enhancement. Lodged Doc. 1, 1-2. On December 3, 2009, the  
9 appellate court affirmed his conviction and the sentence. Id.

10 Petitioner then filed a Petition for Review with the California Supreme Court in case no.  
11 S179410, claiming only that his second degree robbery conviction should be reversed for  
12 insufficient evidence that the taking was accomplished by force or fear. ECF No. 25. On  
13 February 18, 2010, the California Supreme Court denied the petition for review. Id.

14 Petitioner filed the instant mixed federal habeas petition on February 18, 2011 alleging his  
15 conviction should be reversed for: (1) insufficient evidence that the taking was accomplished by  
16 force or fear to support the robbery conviction; (2) insufficient evidence that the robbery was  
17 committed with the intent to promote, further, or assist criminal conduct by gang members; and  
18 (3) insufficient evidence supports the finding of the gang's primary activities. ECF No. 1.  
19 Respondent then sought dismissal of the petition since it contained two unexhausted grounds for  
20 relief. ECF No. 17. This Court granted respondent's motion to dismiss to the extent that the  
21 unexhausted grounds two and three were stricken from the petition without prejudice to refile.  
22 ECF No. 24. Petitioner was then directed to file a petition in the California Supreme Court and  
23 thereafter file an amended petition in this Court containing all exhausted claims within thirty days  
24 of the California Supreme Court's decision. Id.

25 Petitioner filed a state habeas petition in the California Supreme Court on December 19,  
26 2011 which was denied on April 18, 2012. ECF No. 25 at 52. Petitioner filed an amended §  
27 2254 petition in this court on May 16, 2012 which contained three claims for relief: a sufficiency  
28 challenge to the robbery conviction, as well as the two newly exhausted sufficiency challenges to

1 the gang enhancement. ECF No. 25. Respondent moved to dismiss, arguing that the newly  
2 exhausted claims were untimely filed because they did not relate back to any timely filed claim in  
3 the original habeas petition. ECF No. 30. Petitioner opposed the motion, which was heard before  
4 Magistrate Judge Gregory Hollows on October 18, 2012. ECF No. 34. The motion to dismiss  
5 was subsequently granted by order filed November 19, 2012, leaving a single claim: petitioner's  
6 original challenge to the sufficiency of the evidence supporting his robbery conviction. ECF No.  
7 35. Respondent was directed to file an answer to this claim, which he did on February 4, 2013.  
8 ECF Nos. 35, 39.

9 b. Factual Background

10 Petitioner was convicted of robbery for stealing a black shirt and a couple of pairs of  
11 Dickies jeans, by force or fear, from a Target store in Redding, California, on the morning of May  
12 19, 2005. Lodged Doc. 1. At the time of the robbery, Daniel Burrell ("Burrell"), Regina  
13 Anderson ("Anderson"), and Steve O'Neill ("O'Neill") were on duty at the Target store. R.T. 2  
14 at 367.<sup>1</sup> Burrell and Anderson both testified at petitioner's trial. Id. at 343, 450.

15 Burrell was an asset protection manager for Target.<sup>2</sup> R.T. 2 at 343-44. On May 19, 2005,  
16 he arrived at work at approximately 8:05 a.m. Id. at 345. Shortly after he arrived, three separate  
17 Target employees approached him to inform him that four Hispanic male individuals who "just  
18 didn't look right" had been waiting outside the store prior to its opening and had entered the store  
19 just as it opened. Id. at 345. One of these men was petitioner. Id. at 351.

20 After being approached by the three employees, Burrell went to the closed-circuit  
21 television ("CC-TV") room in the back of the store to observe the described individuals on the  
22 store's security cameras. R.T. 2 at 346-47. The security system included video feeds from  
23 various cameras inside and outside of the store, which enabled Burrell to monitor the men as they  
24 moved about the store. Id. On the video feed, he located the four men in the men's department

25 <sup>1</sup> "R.T." refers to the Reporter's Transcripts lodged by the respondent. The numeral following  
26 "R.T." refers to the specific volume number.

27 <sup>2</sup> An asset protection manager is the "security manager in charge of identifying and deterring  
28 theft activity, other safety activity in the store." R.T. 2 at 343. Burrell had held this position at  
Target for just about eighteen years at the time of his testimony, and had held the same position in  
another store for four years prior to his employment at Target. Id. at 343-44.

1 looking at merchandise near a T-shirt area. Id. at 347. Burrell became concerned that the men  
2 might try to steal something after they selected Dickies jeans, which are high-theft merchandise  
3 for Target stores in their district. Id. at 357. Burrell’s suspicions were further aroused after the  
4 group split up, with two individuals heading towards the front of the store and the other two—  
5 including petitioner—instead heading towards the garden center. Id. at 356-57. Burrell thought  
6 that the two who went towards the front of the store might go and wait in a car in the parking lot  
7 or near the store’s entrance, so he went towards the front of the store to “try to deter anybody  
8 from thinking about leaving the store with merchandise.” Id. at 358. Burrell was joined by  
9 Anderson at the front of the store. Id. at 357. Burrell observed that while petitioner and his  
10 friend (and subsequent co-defendant) Isaac Gonzalez (“Gonzalez”) were picking up merchandise,  
11 they appeared to be paying more attention to the activity in the store than to the merchandise,  
12 which further spurred Burrell’s suspicions. Id. at 358.

13 Burrell was concerned because he was the only security officer on duty, so if anything  
14 were to happen he did not like his odds. R.T. 2 at 359. Accordingly, he went back to the CC-TV  
15 room to pick up live surveillance of the men again. Id. at 357. On the video feed, he saw that the  
16 fourth individual had left the store and entered a white vehicle, had driven through the parking lot  
17 in a “somewhat circuitous route,” and then stopped in front of the garden center. Id. at 363. He  
18 also saw that petitioner and Gonzalez, who had gone towards the garden center, had re-entered  
19 the main store and met up with “one of the people that they had separated from earlier.” Id. at  
20 357. Then this third individual walked towards the front of the store, while petitioner and  
21 Gonzales walked back towards the men’s department, then towards the shoe department, and  
22 ultimately back towards the garden center. Id. at 361. While they were in the shoe department  
23 and headed towards the garden center, the third individual exited the building and entered the  
24 vehicle in front of the garden shop. Id. at 361-62.

25 Burrell then left the CC-TV room and headed towards the garden center, where he was  
26 again joined by Anderson as well as O’Neill. R.T. vol. 2, 366. Anderson and O’Neill were each  
27 standing next to a checkout stand at the front of the garden center. Id. at 367. The petitioner and  
28 Gonzalez then walked towards the front of the garden center. Id. at 368. Anderson testified that

1 as petitioner and Gonzales approached the checkout counter she said to them, “I’ll help you at this  
2 register.” Id. at 459. She stated that they then looked at each other, one of them (she could not  
3 remember who) smiled at the other, and then they both ran out the front doors of the store. Id.  
4 Anderson yelled “hey real loud and followed them out the door.” Id. Burrell, who was nearby,  
5 also ran out of the store to get his employees back in the store, to see whether the men got into the  
6 white vehicle, and to determine if he could recover any merchandise. Id. at 368. Burrell hopped  
7 over a railing to pursue the individuals at a fast walking pace and told the other employees not to  
8 pursue the men. Id. at 368-69, 448. Anderson stopped her pursuit when she reached the railing  
9 because employees were not supposed to pursue shoplifters any further than the railing. Id. at  
10 465.

11 Petitioner and Gonzalez were a good distance ahead of Burrell; about forty to sixty feet.  
12 R.T. 2 at 390, 396. The white vehicle then drove by Burrell while he was in pursuit and he did  
13 not try to stop it. Id. at 369. He testified that as the car was coming into the driveway, he was  
14 walking down the driveway and at that moment he decided to discontinue his pursuit of the two  
15 individuals because he saw they were headed towards the white vehicle and he would not be able  
16 to catch up with them before they reached the vehicle. Id. at 371. Burrell said that if the men had  
17 walked out of the store and he was able to catch up with them that he probably would have  
18 confronted them and tried to recover the merchandise, but if they had run and pushed past him he  
19 would not try to detain them. Id.

20 After Burrell turned around to walk back towards the store and tell the police details about  
21 the men’s vehicle, he heard a “pop-pop” so he started running because “the sound came from the  
22 vehicle and it sounded like a gun to me. And at that point I decided I best get back in.” R.T. 2 at  
23 371-73. He said that he was “a little bit concerned for [his] safety.” Id. at 372. However, Burrell  
24 also testified that he did not know if the two individuals were in the car at this point and that he  
25 had turned away from the vehicle before hearing the “pop-pop” sound. Id. He specifically stated  
26 that he had discontinued chasing the men and was headed back towards the store when he heard  
27 the “pop pop.” Id. at 416. The last he saw of the men, the two car doors were open and petitioner  
28 and Gonzalez were entering the vehicle. Id. To Burrell’s knowledge, there were no other

1 employees pursuing the men when the “pop pop” sound occurred. Id. at 448. Anderson testified  
2 that at some point she heard the “pop pop” sound, which caused her concern. At first she thought  
3 it was firecrackers, but Burrell said it could be a gun and she should call the police. Id. at 460.

4 Later on, after the car left and before the police arrived, Burrell went out to where the car  
5 had been located when he heard the “pop pop” sounds because “if that was a gun, if those were  
6 gunshots, we’ll see if there was any evidence of any gunfire left in that general vicinity.” R.T. 2  
7 at 374-75. He found two shell casings at the location where the car had been, which he pointed  
8 out to the police. Id. at 375. He was able to give a description of the vehicle as a white Toyota  
9 Camry and obtained the license plate number from the surveillance videos to provide for the  
10 police. Id.

11 Burrell testified that the fact that there were four individuals together caused him concern  
12 over his personal safety because he was the only security officer on duty that morning. R.T. 2 at  
13 359. He stated that he was also concerned because petitioner and Gonzales were both bigger than  
14 him. Id. at 359, 367. Redding Police Officer Rob Peterson testified that in 2005, petitioner was  
15 5’8” tall and approximately 180 lbs., Gonzalez was also 5’6” tall and 175 lbs., and the other two  
16 men were approximately 5’8” and 150 lbs., and 5’5” and approximately 170 lbs. R.T. 3 at 606.  
17 Burrell was approximately 5’8” or 5’9” and 160 to 180 lbs. Id. at 388. On cross-examination,  
18 Burrell testified that neither petitioner nor any of the individuals in question ever approached  
19 Burrell or any other Target employees or customers, never touched them in any way, and never  
20 spoke with them. Id. at 386-87.

21 Carolyn Martinez (“Martinez”), a Target customer, had parked outside the garden center  
22 that morning and heard the gunshots as she was exiting her car. R.T. 2 at 480-81. She testified  
23 that she immediately knew the sounds were gunshots and that as she heard them she  
24 simultaneously saw petitioner and another man “back pedaling” away from Target and towards  
25 the white car. Id. at 483-84. Because of the sounds she heard, she initially thought the man  
26 closest to her, who had clothes draped over his arm, had fired a gun from underneath the garments  
27 he was carrying. Id. at 483. She identified petitioner as standing next to the man she thought was  
28 the shooter because he had the clothes draped over his arm. Id. at 485. She testified that she

1 heard both the sounds of three gunshots and the sounds of the shell casings hitting the ground. Id.  
2 at 486. She was “petrified,” so she ran towards the entrance of the Target store in a big hurry and  
3 only saw the individuals for a couple of seconds. Id. at 486-87.

4 Redding Police Officer Bart Langley put out a “be on the lookout” (“BOLO”) for a white  
5 Camry with the license plate number supplied by Burrell and the car was spotted by California  
6 Highway Patrol around the Sacramento area. R.T. 2 at 470. Sacramento Police Officers Robert  
7 Hamm and Roger Dillon received a call about a vehicle involved in a robbery being pursued by  
8 California Highway Patrol in Sacramento. Id. at 506, 522. Both officers joined in the chase. Id.

9 The car eventually stopped in a Fry’s electronics store parking lot in Sacramento. R.T. 2  
10 at 509. When the car stopped, all four occupants jumped out and ran. Id. Officer Hamm chased  
11 and eventually caught Gonzalez. Id. at 509-10, 513. Officer Dillon looked in the car and on the  
12 floorboard near the pedals found a .22 caliber Ruger semi-automatic pistol, which he turned over  
13 to the crime scene investigator. Id. at 523. Sergeant Anthony Taylor was the first supervisor to  
14 arrive on scene at the vehicle and started giving directions to the other officers. Id. at 527.  
15 Sergeant Taylor discovered a pair of Dickies jeans and a handgun that had a magazine with  
16 rounds in it but no rounds in the chamber on the front passenger seat. Id. at 527-28. He also  
17 found a third gun wrapped in a blue bag lying on the floor that had one round in the chamber. Id.  
18 at 529. The blue bag also contained two other magazines and a silencer that could be attached to  
19 the barrel of the Ruger. Id. at 529-31.

20 Crime scene technician Michael Darling determined that the shell casings found by  
21 Burrell around the location in the Target parking lot where the white Camry had been waiting  
22 were .9 millimeter casings. R.T. 2 at 498. Criminalist Ronald Nies processed the .9 millimeter  
23 Ruger handgun found in the white Camry and compared the .9 millimeter shell casings found in  
24 the Target parking lot with test casings he fired from the .9 millimeter Ruger handgun. R.T. 3 at  
25 570. He found that the markings on the shell casings discovered at the scene matched the  
26 markings on the shell casings from test fired from the .9 millimeter Ruger handgun. Id. at 575-  
27 76. Barbara Philips, a latent print analyst, testified that she found no fingerprints whatsoever on  
28 the .9 millimeter Ruger handgun, the cartridges, or the Smith & Wesson magazine found with the

1 gun. Id. at 563.

2 II. Standards Governing Habeas Relief Under the AEDPA

3 28 U.S.C. § 2254, as amended by the Antiterrorism and Effective Death Penalty Act of  
4 1996 (“AEDPA”), provides in relevant part as follows:

5 (d) An application for a writ of habeas corpus on behalf of a person  
6 in custody pursuant to the judgment of a state court shall not be  
7 granted with respect to any claim that was adjudicated on the merits  
8 in State court proceedings unless the adjudication of the claim –

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

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

12 The statute applies whenever the state court has denied a federal claim on its merits,  
13 whether or not the state court explained its reasons. Harrington v. Richter, 131 S. Ct. 770, 785  
14 (2011). State court rejection of a federal claim will be presumed to have been on the merits  
15 absent any indication or state-law procedural principles to the contrary. Id. at 784-785 (citing  
16 Harris v. Reed, 489 U.S. 255, 265 (1989) (presumption of a merits determination when it is  
17 unclear whether a decision appearing to rest on federal grounds was decided on another basis)).  
18 “The presumption may be overcome when there is reason to think some other explanation for the  
19 state court’s decision is more likely.” Id. at 785.

20 The phrase “clearly established Federal law” in § 2254(d)(1) refers to the “governing legal  
21 principle or principles” previously articulated by the Supreme Court. Lockyer v. Andrade, 538  
22 U.S. 63, 71-72 (2003). Clearly established federal law also includes “the legal principles and  
23 standards flowing from precedent.” Bradley v. Duncan, 315 F.3d 1091, 1101 (9th Cir. 2002)  
24 (quoting Taylor v. Withrow, 288 F.3d 846, 852 (6th Cir. 2002)). Only Supreme Court precedent  
25 may constitute “clearly established Federal law,” but circuit law has persuasive value regarding  
26 what law is “clearly established” and what constitutes “unreasonable application” of that law.  
27 Duchaime v. Ducharme, 200 F.3d 597, 600 (9th Cir. 2000); Robinson v. Ignacio, 360 F.3d 1044,  
28 1057 (9th Cir. 2004).



1 A state court decision is “contrary to” clearly established federal law if the decision  
2 “contradicts the governing law set forth in [the Supreme Court’s] cases.” Williams v. Taylor, 529  
3 U.S. 362, 405 (2000). A state court decision “unreasonably applies” federal law “if the state  
4 court identifies the correct rule from [the Supreme Court’s] cases but unreasonably applies it to  
5 the facts of the particular state prisoner’s case.” Id. at 407-08. It is not enough that the state court  
6 was incorrect in the view of the federal habeas court; the state court decision must be objectively  
7 unreasonable. Wiggins v. Smith, 539 U.S. 510, 520-21 (2003).

8 Review under § 2254(d) is limited to the record that was before the state court. Cullen v.  
9 Pinholster, 131 S. Ct. 1388, 1398 (2011). The question at this stage is whether the state court  
10 reasonably applied clearly established federal law to the facts before it. Id. In other words, the  
11 focus of the § 2254(d) inquiry is “on what a state court knew and did.” Id. at 1399. Where the  
12 state court’s adjudication is set forth in a reasoned opinion, §2254(d)(1) review is confined to “the  
13 state court’s actual reasoning” and “actual analysis.” Frantz v. Hazey, 533 F.3d 724, 738 (9th  
14 Cir. 2008) (en banc). A different rule applies where the state court rejects claims summarily,  
15 without a reasoned opinion. In Richter, supra, the Supreme Court held that when a state court  
16 denies a claim on the merits but without a reasoned opinion, the federal habeas court must  
17 determine what arguments or theories may have supported the state court’s decision, and subject  
18 those arguments or theories to § 2254(d) scrutiny. Richter, 131 S. Ct. at 786.

### 19 III. Petitioner’s Claim for Relief

20 Petitioner alleges that the evidence presented at trial was insufficient to support his  
21 robbery conviction because no force or fear was used in the taking of the property.<sup>3</sup> ECF No. 25  
22 at 20. In this vein, petitioner raises two main arguments as grounds for federal habeas relief: (1)  
23 that prior to the use of any force or fear, no store employee had any intentions of trying to re-take

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25 <sup>3</sup> To the extent petitioner contends that the facts of his case are insufficient to constitute an Estes  
26 robbery under California law, this argument does not support federal habeas relief as it merely  
27 challenges a state court’s application of state law. See ECF No. 25 at 21-23 (citing People v.  
28 Estes, 147 Cal.App.3d 23 (1983); see also Langford v. Day, 110 F.3d 1380, 1389 (9th Cir. 1996)  
(stating that “alleged errors in the application of state law are not cognizable in federal habeas  
corpus.”); Waddington v. Sarausad, 555 U.S. 179, 192 n.5 (“ ‘it is not the province of a federal  
habeas court to reexamine state-court determinations on state-law questions’ ”).

1 the property from the petitioner or any of the other suspects; and (2) that the fleeing of petitioner  
2 and Gonzales, coupled with the presence of the two suspects in the car, did not demonstrate a  
3 willful creation of fear as an obstacle to the retaking of the property. ECF No. 25 at 23-24.

4 Petitioner contends in essence that the facts of the crime establish nothing more than petty theft.  
5 ECF No. 25 at 26.

6 This is the same claim that petitioner raised on direct appeal. The California Court of  
7 Appeal, the last state court to issue a reasoned decision addressing petitioner's claim, rejected the  
8 claim on the merits. Lodged Doc. 1, 13. Accordingly, this court reviews the California Court of  
9 Appeal decision to determine whether it was contrary to or an unreasonable application of clearly  
10 established federal law. See Ylst v. Nunnemaker, 501 U.S. 797 (1991); Ortiz v. Yates, 704 F.3d  
11 1026, 1034 (9th Cir. 2012). Because the state court denied relief in a reasoned opinion, review  
12 under § 2254(d) is confined to "the state court's actual reasoning" and "actual analysis." Frantz,  
13 533 F.3d at 738.

14 A. State Court Opinion

15 The state court ruled as follows:

16 Section 211 [of the California Penal Code] provides, "Robbery is  
17 the felonious taking of personal property in the possession of  
18 another, from his person or immediate presence, and against his  
19 will, accomplished by means of force or fear." In Gomez, supra, 43  
20 Cal.4th 249, our Supreme Court held: "A taking is not over at the  
21 moment of caption; it continues through asportation.... A robbery  
22 can be accomplished even if the property was peacefully or  
23 duplicitously acquired, if force or fear was used to carry it away."  
24 Our Supreme Court further held, "Mere theft becomes robbery if  
25 the perpetrator, having gained possession of the property without  
26 use of force or fear, resorts to force or fear while carrying away the  
27 loot." Put another way, "the use of force or fear to escape or  
28 otherwise retain even temporary possession of the property  
constitutes robbery."

Here, Anderson and Burrell followed defendant and his cohorts  
from the store. Burrell wanted to see if he could recover any of the  
merchandise. Although he would not have physically detained  
defendant and company, if he had been given the opportunity, he  
would have confronted them and tried to recover the merchandise.  
Burrell continued following them until they were getting into the  
car. He wanted to be able to give the police a full description of the  
vehicle, including its license plate number. Then he heard the  
gunshots. He thought they could have been shooting at him and  
decided not to pursue them any further.

1 Defendant contends that he and “his companion were merely trying  
2 to flee the store, reach the car, and make their escape; they did  
3 nothing to instill fear by sight or sound, such as turning to confront  
4 or shouting threats, to any employee who might be pursuing them.  
5 Similarly, the two men in the car did not get out as if to confront  
6 anyone, nor did they yell threats at [] Burrell or any other store  
7 employee.” While these statements may be true as far as they go,  
8 they entirely disregard the fact that Burrell and Anderson had  
9 followed the men, and defendant or one of his “companions” fired a  
10 gun in the direction of Burrell and Anderson. To suggest this is not  
11 a show of force or an attempt to instill fear in Burrell and his  
12 coworkers is ludicrous. The men fired the shots to prevent Burrell  
13 from continuing to follow them, either to reclaim the property or to  
14 better identify them. In either case, the purpose was to facilitate  
15 defendant’s getaway, his escape. The use of force to escape or  
16 carry away the loot elevated this offense to robbery. There was  
17 sufficient evidence of force or fear to support a robbery conviction.

18 Lodged Doc. No. 1 (internal citations omitted).

19 B. Clearly Established Federal Law

20 Due process requires that each essential element of a criminal offense be proven beyond a  
21 reasonable doubt. United States v. Winship, 397 U.S. 358, 364 (1970). In reviewing the  
22 sufficiency of evidence to support a conviction, the question is “whether, viewing the evidence in  
23 the light most favorable to the prosecution, *any* rational trier of fact could have found the essential  
24 elements of the crime beyond a reasonable doubt.” Jackson v. Virginia, 443 U.S. 307, 319  
25 (1974). If the evidence supports conflicting inferences, the reviewing court must presume “that  
26 the trier of fact resolved any such conflicts in favor of the prosecution,” and the court must “defer  
27 to that resolution.” Id. at 326

28 C. Analysis

The California Court of Appeal’s decision is not an unreasonable application of clearly  
established federal law.<sup>4</sup> The state court reasonably rejected petitioner’s first argument  
challenging the force or fear element, because petitioner was still in the process of carrying away  
the goods and had not yet reached a place of safety. The Court of Appeal’s conclusion that “[t]he  
men fired the shots to prevent Burrell from continuing to follow them, either to reclaim the

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<sup>4</sup> Although the California Court of Appeal did not expressly refer to Jackson, that fact does not  
affect the application of the AEDPA standard. Cf. Early v. Packer, 537 U.S. 3, 8 (2002) (per  
curiam) (holding that the state may comply with the AEDPA standard without even being aware  
of governing Supreme Court decisions, so long as ruling does not contradict them).

1 property or to better identify them” is amply supported by the record evidence. Viewing the  
2 evidence in the light most favorable to the prosecution, a rational juror could have found that the  
3 gun was fired to aid in petitioner’s getaway with the merchandise. Accordingly, the Court of  
4 Appeal’s rejection of this basis for petitioner’s claim is reasonable.

5 Petitioner’s second argument -- that his flight from the store coupled with the presence of  
6 his two cohorts in the car was not sufficient to create fear in the victims – is defeated by the  
7 testimony from two store employees that they subjectively experienced fear. R.T. 2 at 372, 460.  
8 There is also evidence that Burrell turned and ran after the “pop pop” sound and then saw  
9 Anderson crouched near the ground after the sounds occurred, from which a trier of fact could  
10 reasonably infer that the men were frightened by the gunfire. Id. There is no requirement that the  
11 perpetrator intend to cause fear in the victim. See Cal. Penal Code § 211. Therefore, the Court of  
12 Appeal reasonably rejected this basis for petitioner’s claim.

13 It simply cannot be said that no fairminded jurist could agree with the California Court of  
14 Appeal’s decision finding sufficient evidence to support the force or fear element of robbery. See  
15 Bobby v. Dixon, 132 S. Ct. 26, 27 (2011) (per curiam); Harrington v. Richter, 131 S. Ct. 770, 786  
16 (2011). Petitioner’s argument would be more convincing if he had merely run out of the store in  
17 a different direction than the getaway vehicle in which his cohorts and numerous weapons were  
18 later found. Had petitioner simply fled Target grounds without re-uniting with his fellow cohorts  
19 who were armed gang members, then the evidence would establish no more than a petty theft.  
20 However, those are not the facts this court is reviewing. After viewing the evidence in the light  
21 most favorable to the prosecution, a rational trier of fact could have found the essential elements  
22 of the crime of robbery beyond a reasonable doubt. Therefore, the Court of Appeal reasonably  
23 rejected petitioner’s claim for relief.

24 Because § 2254(d) bars relief on the one claim remaining in this case, the amended  
25 petition for writ of habeas corpus is denied.

#### 26 IV. Certificate of Appealability

27 Pursuant to Rule 11 of the Rules Governing Section 2254 Cases in the United States  
28 District Courts, “[t]he district court must issue or a deny a certificate of appealability when it

1 enters a final order adverse to the applicant.” Rule 11, 28 U.S.C. foll. § 2254. A certificate of  
2 appealability may issue under 28 U.S.C. § 2253 “only if the applicant has made a substantial  
3 showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). The court must either  
4 issue a certificate of appealability indicating which issues satisfy the required showing or must  
5 state the reasons why such a certificate should not issue. Fed. R. App. P. 22(b). For the reasons  
6 set forth herein, petitioner has not made a substantial showing of the denial of a constitutional  
7 right. Therefore, no certificate of appealability should issue.

8 Accordingly, IT IS HEREBY ORDERED that:

- 9 1. The amended petition for writ of habeas corpus (ECF No. 25) is denied; and
- 10 2. This court declines to issue a certificate of appealability.

11 DATED: August 7, 2014

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13 ALLISON CLAIRE  
14 UNITED STATES MAGISTRATE JUDGE  
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